

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship

1999

Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees

James J. Brudney

Fordham University School of Law, jbrudney@law.fordham.edu

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Labor and Employment Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 *Harv. J. on Legis.* 1 (1999)

Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/143

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ARTICLE

CONGRESSIONAL ACCOUNTABILITY AND DENIAL: SPEECH OR DEBATE CLAUSE AND CONFLICT OF INTEREST CHALLENGES TO UNIONIZATION OF CONGRESSIONAL EMPLOYEES

JAMES J. BRUDNEY*

In 1995, Congress passed the Congressional Accountability Act, which applied federal workplace and anti-discrimination laws to Congress. Under the terms of the Act, Congress can prevent legislative staff from unionizing if the presence of organized employees would raise constitutional problems or present a conflict of interest. In this Article, Professor Brudney argues that these constitutional conflicts and issues do not pose sufficient concern to outweigh the workplace rights of congressional staff. Rather, he maintains that Congress, should either fulfill its obligations under the Act and allow legislative staff to unionize, or else enact a statute and explain the need for such an exception.

The Congressional Accountability Act (“CAA”),¹ which extended the protections of eleven major workplace statutes to congressional employees,² was the first law passed in 1995 by the newly elected 104th Congress. Republicans hailed it as the master stroke of their freshly minted Contract with America.³ Sponsors from both parties lauded the long overdue restoration of the Framers’ intent that Congress should apply to itself the laws it

* Associate Professor of Law, The Ohio State University College of Law. B.A., Amherst College, 1971; M.A.B.A., Oxford University, 1973; J.D., Yale Law School, 1979. Victor Brudney, Ruth Colker, William Eskridge, Deborah Merritt, Stephen Ross, David Shapiro, and Peter Swire provided insightful comments and suggestions on earlier drafts of this Article. I thank Kathleen Lyon, Craig Byrnes, and the College of Law Library Research Staff for their excellent research assistance, and Michele Newton for her careful typing of the manuscript. The research and writing were supported by grants from the College of Law, for which I am also grateful.

¹ Pub. L. No. 104-1, 109 Stat. 3 (1995) (codified at 2 U.S.C. §§ 1301–1438 (Supp. II 1996)).

² See *id.* at §§ 201–220, 109 Stat. 7–22 (identifying 11 statutes and extending their rights and protections to congressional employees).

³ See David S. Cloud & Richard Sammon, *House Votes Overwhelmingly to End Exemptions*, CONG. Q., Jan. 7, 1995, at 16 (describing House approval of the bill on the first day of Congress as “a vivid symbol of the new era on Capitol Hill”); Robert Pear, *House Set to Make Members Subject to the Rights Laws*, N.Y. TIMES, Jan. 4, 1995, at A14 (reporting statements of Sen. Charles Grassley (R-Iowa) and Rep. Christopher Shays (R-Conn.)).

prescribes for the people.⁴ CAA supporters also anticipated that Congress would be more restrained in its future legislative efforts once it experienced the burdens of compliance, litigation, and liability that it had imposed for decades on businesses and other employers.⁵ Viewed as a rare triumph of bipartisanship, the bill received unanimous approval in the House⁶ and passed the Senate with a lone dissenting vote.⁷

Tucked away in the new law was little noticed language allowing for differential treatment of legislative aides regarding union representation. The CAA established an Office of Compliance (“OOC”) within the Legislative Branch to implement and enforce the rights provided pursuant to the eleven workplace statutes.⁸ One of these eleven laws, the Federal Labor Relations Act (“FLRA”),⁹ accords to Executive Branch employees the right to seek union representation and engage in collective bargaining. Yet before FLRA rights may be extended to individuals who work directly for members or congressional committees, the CAA provides that the OOC must promulgate, and Congress must approve, regulations determining whether conferral of such rights would give rise to constitutional or conflict of interest problems.¹⁰ If Congress does not act, its legislative employees remain unable to organize.

Nearly four years after the CAA became law, Congress has quietly but effectively thwarted the availability of collective bar-

⁴ See, e.g., 141 CONG. REC. S440–41 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley, quoting THE FEDERALIST No. 57 (James Madison) and observing that “[i]n November, the American people demanded that Congress be affected by the laws it passes”); *id.* at S700–01 (daily ed. Jan. 10, 1995) (statement of Sen. Joseph Lieberman (D-Conn.) quoting THE FEDERALIST No. 57 (James Madison)).

⁵ See, e.g., 141 CONG. REC. S441 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley); *id.* at H95 (daily ed. Jan. 4, 1995) (statement of Rep. Lee Hamilton (D-Ind.)); *id.* at H96 (daily ed. Jan. 4, 1995) (statement of Rep. Jay Dickey (R-Ark.)); *id.* at H263–64 (daily ed. Jan. 17, 1995) (statement of Rep. Bill Goodling (R-Pa.)).

⁶ The House first approved its own version of the CAA, H.R. 1, by a vote of 429 - 0. See 141 CONG. REC. H104 (daily ed. Jan. 4, 1995). It then approved the version passed by the Senate, S. 2, by a vote of 390–0. See *id.* at H286 (daily ed. Jan. 17, 1995).

⁷ The bill’s lone opponent, Senator Robert Byrd (D-W. Va.), stated his opposition on the floor. See 141 CONG. REC. S635–38 (daily ed. Jan. 9, 1995). The Senate version, S. 2, was ultimately approved by the House and signed by the President; it passed the Senate by a vote of 98–1. See *id.* at S767 (daily ed. Jan. 11, 1995).

⁸ Pub. L. No. 104-1, §§ 301–305, 109 Stat. 24–32 (1995) (codified at 2 U.S.C. §§ 1381–1385) (Supp. II 1996) (establishing, empowering, and authorizing funds for the Office of Compliance).

⁹ Pub. L. No. 95-454, §§ 701–35, 92 Stat. 1192 (1978) (codified at 5 U.S.C. § 7101–7135 (1994)). The FLRA provides rights and protections for federal employees analogous to those accorded to private employees under the National Labor Relations Act, with some modifications to account for the governmental context. See *infra* Part III.

¹⁰ See *infra* Part I.

gaining protections for its own personal and committee staff. The OOC issued regulations in 1996 concluding that access to union representation for legislative staff posed no special constitutional or conflict of interest problems.¹¹ The House Republican leadership, however, rejected this conclusion,¹² and there has been no Democratic effort to support or defend the OOC position. Neither the House nor the Senate has scheduled any legislative action to consider approving the OOC determination.

Lurking behind the controversy between Congress and the quasi-independent agency it created is a broad constitutional question: does the Speech or Debate Clause¹³ immunize members of Congress when they select, retain, or establish working conditions for their key legislative aides? If such immunity applies, congressional efforts to subject members to statutes assuring employees overtime pay and family or medical leave, as well as statutes prohibiting workplace discrimination based on age, disability, gender, or race, would also falter. The Supreme Court has recognized the importance of this question but has never resolved it.¹⁴ Lower courts and commentators are divided as to what shelter, if any, is provided by the Speech or Debate Clause when senators and representatives speak or act as employers.¹⁵

After setting out the background of the CAA, this Article uses that statute to examine in depth the Speech or Debate Clause protection accorded to members' personnel decisions affecting legislative staff. Because the Speech or Debate Clause issue received no attention from the OOC or Congress when each addressed the matter of unionization,¹⁶ the Article analyzes arguments both for and against a constitutional immunity. With respect to top legislative aides—a circle considerably smaller than those listed in the CAA—the immunity issue is a close one. The

¹¹ The OOC adopted final regulations and submitted them to Congress for approval on August 19, 1996. The regulations, along with OOC analysis and comment, appeared in the Congressional Record. See 141 CONG. REC. H10,019–30 (daily ed. Sept. 4, 1996).

¹² See Letter from Rep. Bill Thomas (R-Cal.), Chairman of Committee on House Oversight, to Glen Nager, Chairman of OOC Board of Directors (Sept. 19, 1996) (criticizing OOC determination on constitutional and conflict of interest issues, and returning regulations to OOC requesting further consideration) (on file with author).

¹³ The Speech or Debate Clause, U.S. CONST. art. 1, § 6, cl. 1, provides that "Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other place."

¹⁴ See *infra* Part I.

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part I for a discussion of the political realities and prudential concerns underlying this remarkable silence in the rulemaking record.

Supreme Court's jurisprudence on key aides or alter egos, along with the realities of the legislative process, point toward a plausible rationale for granting immunity as well as a possible standard to be applied. The Article concludes, however, that there should be no constitutional immunity for members of Congress when they engage in employment-related speech or conduct, even with respect to their key legislative advisors. By protecting only speech or conduct that is part of the actual legislative process, the Supreme Court's precedents since 1970 have created a somewhat arbitrary but ultimately defensible distinction between legislating and important predicates or accompaniments to legislating. A member's employment-related communications with a legislative alter ego fall on the unimmunized side of the line.

Having established that Congress may constitutionally authorize all its employees to unionize, as well as grant them other workplace rights enforceable against members, the Article explores whether unionization among key legislative staff raises any special conflict of interest issues. Apart from the traditional risk of conflict between public job responsibilities and private financial interests of organized government employees, there also is the possibility that a union may use its unique status as an exclusive bargaining representative to gain undue advantage as an interest group in the legislative arena. In addressing this potential policy-related conflict, congressional participants in the OOC rulemaking failed to acknowledge how their expressed concerns echo those raised in earlier decades by commentators advocating that public sector collective bargaining laws follow a different path from the private sector model. The prior legislative response—restricting the range of subjects on which government employers must bargain and the types of concerted economic pressure that government workers may apply—has enabled employees to engage in limited collective bargaining without distorting or subverting the policymaking process. The Article analyzes this special conflict of interest concern with the broader, historical vantage point in mind.

The constitutional and conflict of interest issues illustrate in different ways how Congress in the CAA was at once seeking to promote the principle of accountability while hoping to avoid some of its consequences. In addition to denying access to collective bargaining for its personal and committee staff, Congress since enacting the CAA has effectively denied the presence of a broader

Speech or Debate Clause question and has ignored the lessons of history regarding the advent of public sector unions. Consideration of these matters therefore carries larger implications for the constitutional protections available to congressional employees and also for the role of collective bargaining in the public sector. Further, resolution of the constitutional and conflict of interest issues may affect the employment status of top aides in the White House¹⁷ as well as the federal judiciary.¹⁸

I. THE CAA AND THE EXCEPTION FOR UNIONS

A. *Employee Protections Prior to the CAA*

For more than 100 years, Congress exempted itself from coverage when enacting laws that created rights enforceable against private and public employers. The Civil Service Act of 1883 restricted patronage in the Executive Branch, but not in Congress.¹⁹ Major workplace protection statutes enacted during the 1930s and 1960s similarly excluded congressional employees while covering private employers, local governments, and executive agencies.²⁰ In more recent times, outside observers as well as individ-

¹⁷ Congress recently passed the Presidential and Executive Office Accountability Act ("1996 Act"). Pub. L. No. 104-331, 110 Stat. 4053 (codified at 3 U.S.C. §§ 401-471 (Supp. II 1996)). The 1996 Act closely parallels the CAA in extending the protections of the same eleven federal workplace statutes to employees of the White House and the Executive Office of the President. The 1996 Act authorizes the Federal Labor Relations Authority to extend union representation rights to White House employees *unless* the Authority determines that exclusion from coverage is required because of "conflict of interest" or "constitutional" problems. Pub. L. No. 104-331, § 2, 110 Stat. 4065 (codified at 3 U.S.C. § 431 (Supp. II 1996)). The issue of the President's constitutional immunity from personal damages liability is addressed in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), discussed *infra* Part II.

¹⁸ The CAA directed the Judicial Conference of the United States to prepare and submit to Congress a report considering the possibility that Judicial Branch employees should be covered under the eleven federal workplace statutes now applied to congressional employees. Pub. L. No. 104-1, § 505, 109 Stat. 41-42 (1995) (codified at 2 U.S.C. § 1434 (Supp. II 1996)). The Judicial Conference Study resisted any extension of FLRA rights to Judicial Branch employees, relying expressly on the "constitutional and conflict of interest" language from the CAA. See JUDICIAL CONFERENCE OF THE UNITED STATES, STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 18-19 (1996). The issue of judges' common law immunity from personal damages liability is addressed in *Forrester v. White*, 484 U.S. 219 (1988), discussed *infra* Part II.

¹⁹ See Civil Service Act, ch. 27, §§ 2, 13, 14, 22 Stat. 403, 404, 407 (1883).

²⁰ For example, the Fair Labor Standards Act covered private employers when enacted in 1938; it was amended to apply to state and local governments and federal executive agencies in 1966, but not to employees of Congress. See 29 U.S.C. § 203(d), (e) (1994). Title VII of the 1964 Civil Rights Act initially covered private employers; it was amended to include state and local government employers and federal executive agen-

ual legislators have criticized Congress's unwillingness to submit to the laws it imposed on others.²¹

Congressional reluctance to extend existing laws as written reflected in part a concern that Executive Branch enforcement and judicial review raised serious separation of powers problems. Article I of the Constitution bestows upon each chamber the power to regulate and discipline its members,²² and upon each member privileges from outside arrest or questioning.²³ Scholarly commentators and members of Congress expressed concern that exposing the official conduct of legislators in dealing with their employees to investigation and prosecution by executive officials, and to compulsory process and ultimate judgment by federal courts, might amount to an unconstitutional impairment of Legislative Branch authority or independence.²⁴

cies in 1972. See 42 U.S.C. §§ 2000e(b), (f); 2000e-16 (1994). The Age Discrimination in Employment Act of 1967 originally applied to private employers; it was extended to state and local governments and the Executive Branch in 1974. See 29 U.S.C. §§ 630(b), 633a (1994).

²¹ See, e.g., THOMAS W. REED & BRADLEY T. CAMERON, ABOVE THE LAW: GOVERNING CONGRESS UNDER FEDERAL EMPLOYMENT LAWS 2-4, 8-9, 11-12, 17, 19-20 (1994) (quoting numerous members of the Senate and House expressing opposition to the double standard created by Congress); Editorial, *Make Congress Obey Itself*, N.Y. TIMES, Apr. 12, 1993, at A16; Daniel Rapoport, *The Imperial Congress: Living Above the Law*, NAT'L. J., June 2, 1979, at 911-15. In the early 1970s, members of Congress began questioning in relatively measured terms their failure to hold themselves accountable. See, e.g., REPORT OF THE JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS, THE CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS, S. Rep. No. 93-896, at 38-39, 53 (2d Sess. 1974) [hereinafter CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS.] This self-criticism had become more pointed and persistent by the early 1990s. See, e.g., 137 CONG. REC. S15,384 (daily ed. Oct. 29, 1991) (statement of Sen. John Seymour (R-Cal.)) (describing congressional immunity from civil rights laws as "a cancer of unaccountability"); 136 CONG. REC. S9369 (daily ed. July 10, 1990) (statement of Sen. Orrin Hatch (R-Utah)) (claiming as a "moral question" that the Senate should not be above the law); Representatives Bill Goodling & Harris Fawell (R-Ind.), *Congressional Coverage—The Time Has Come*, 44 LAB. L.J. 259, 259 (1993) (decrying "the hypocrisy of Congress exempting itself from the laws it applies to others"). See also 125 CONG. REC. 10,589, 10,591 (1979) (statement of Sen. John Glenn (D-Ohio)) (referring to Congress as "the last plantation").

²² U.S. Const. art. I, § 5, cl. 1, 2.

²³ *Id.* art. I, § 6, cl. 1.

²⁴ For recent examples of concern expressed by commentators, see, e.g., *Legislative Reorganization Act of 1994: Hearings Before the Subcommittee on Rules of the House of the Committee on Rules*, 103d Cong. 425, 440-41 (1994) [hereinafter *1994 House Committee Hearings*] (statement of Professor Harold H. Bruff); *Congressional Coverage Legislation: Applying Laws to Congress, Hearing Before the Senate Committee on Governmental Affairs*, 103d Cong. 27-78 (1994) [hereinafter *1994 Senate Committee Hearings*] (statement of Norman J. Ornstein). For similar reservations voiced recently by members of Congress, see, for example, *Application of Laws and Administration of the Hill: Hearings Before the Joint Committee on the Organization of Congress*, 103d Cong. 1 (1993) [hereinafter *1993 Joint Committee Hearings*] (statement of Rep. Hamilton, Joint Committee Chairman); *id.* at 16 (statement of Sen. Harry Reid (D-Nev.)). Members of Congress wrestled with these constitutional doubts in earlier years as well.

Burdened and perhaps fortified with such reservations, Congress in its initial efforts at self-regulation produced unenforceable or inadequate internal requirements, promulgated either through one-house rules or resolutions²⁵ or through statutory provisions applicable to one chamber's employees.²⁶

There are ample grounds to believe that entrusting congressional self-regulation directly to legislators, or to a process that includes significant participation by legislators, is unworkable. Given the realities of partisan politics, members inevitably will be tempted to depart from a neutral disciplinary approach. Further, regular member recourse to such disciplinary procedures would likely threaten even the modest comity among members that is needed to conduct the legislative process.²⁷ Yet, to the extent that such factors incline members to curtail or impair the use of disciplinary authority, congressional employees understandably will feel chilled in the exercise of their putative rights.²⁸ Indeed, employees' diffident assertion of those rights

See, e.g., 136 CONG. REC. S9362-63 (daily ed. July 10, 1990) (statement of Sen. Warren Rudman (R-N.H.)); *id.* at S9365-66 (statement of Sen. Wendell Ford (D-Ky.)).

The constitutional arguments also may have served as a smokescreen enabling members to avoid confronting their personal distaste at having their traditional absolute freedom and discretion challenged. *See generally* REED & CAMERON, *supra* note 21, at 87-90, 110-12 (setting forth examples of unfair, unsafe, or discriminatory working conditions allegedly implemented or accepted by congressional employers).

²⁵ *See, e.g.*, H.R. Res. 5, 94th Cong., 121 CONG. REC. 20, 22 (1975) (enacted) (House Rule prohibiting members from discriminating in employment because of race, color, religion, sex, or national origin; no provision for enforcement); H.R. Res. 558, 100th Cong., 134 CONG. REC. 27,840 (1988) (enacted) (prohibiting discrimination in House of Representatives employment; establishing Office of Fair Employment Practices to offer counseling and mediation and to adjudicate formal complaints; and providing for exclusive review of Office decisions by panel of House members and House employees); S. Res. 534, 94th Cong., 122 CONG. REC. 29,282 (1976) (enacted) (providing for equal employment opportunities in the Senate with no reference to enforcement).

²⁶ *See, e.g.*, Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, § 8, 103 Stat. 938, 944 (codified at 2 U.S.C. § 60k (1994)) (applying minimum wage but not overtime provisions of Fair Labor Standards Act to House employees, provision to be administered by Office of Fair Employment Practices based on H.R. Res. 558, *supra* note 25); Government Employee Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1088 (codified as amended at 2 U.S.C. §§ 1201 - 24 (1994)) (protecting Senate employees against discrimination on basis of race, color, religion, sex, national origin, age, disability; establishing Office of Senate Fair Employment Practices to enforce protections; providing for review of Office decisions by Senate Select Committee on Ethics and for further review upon petition before U.S. Court of Appeals for Federal Circuit).

²⁷ *Cf.* ROBERT S. GETZ, CONGRESSIONAL ETHICS: THE CONFLICT OF INTEREST ISSUE 84-113 (1966) (discussing similar concerns regarding congressional self-regulation in ethical matters).

²⁸ *See, e.g.*, 1993 Joint Committee Hearings, *supra* note 24, at 125 (statement of Nancy Kingsbury, U.S. General Accounting Office) (reporting that House employees filed a relatively small number of complaints between 1989 and 1993, and that the Office of Fair Employment Practices Director attributed the small number to high employee turnover and employees' concerns about their employing office becoming aware

prior to the CAA²⁹ may well reflect fear of being ignored or retaliated against due to a lack of confidence in the effectiveness or independence of member-controlled enforcement practices.³⁰

B. *Key Aspects of the CAA as Enacted*

The Republican Party made enactment of comprehensive congressional accountability legislation a prominent feature of its 1994 campaign effort to gain control of both houses of Congress.³¹ After sweeping into office, the new Republican majority arranged for a series of staff and member meetings to develop a consensus version of the legislation based on bills considered in the previous Congress.³² The CAA was introduced, debated, approved, and sent to the President within the first two weeks of the 104th Congress.³³ It made applicable to the Legislative Branch

of the complaint); REED & CAMERON, *supra* note 21, at 37–38 (reporting results of a survey commissioned in the early 1990s by the Joint Committee on Organization of Congress: up to 70% of Senate staff surveyed had reservations about contacting Senate Fair Employment Practices Office to make inquiry or file complaint).

²⁹ See 1993 Joint Committee Hearings, *supra* note 24, at 124 (noting that seven House employees filed formal complaints regarding employment discrimination between 1989 and 1993); CUMULATIVE REPORT OF THE OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES, JUNE 1, 1992 THROUGH SEPT. 30, 1994, at 14 (reporting that 28 employees filed formal complaints during the 28-month period). During the early 1990s, there were some 18,000 employees working for the House or Senate as personal staff, committee staff, leadership staff, or staff to Officers of the House or Senate. In addition, nearly 10,000 individuals were employed by Congress's support agencies, including the General Accounting Office, the Congressional Research Service, the Architect of the Capitol, and the Capitol Police. See NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS, 1993–94, 126–27 (1994).

³⁰ See 1994 House Committee Hearings, *supra* note 24, at 429 (statement of Harold H. Bruff); REED & CAMERON, *supra* note 21, at 37–38. See also Richard Morrin, *Female Aides on Hill: Still Outsiders in Man's World*, WASH. POST, Feb. 21, 1993, at A1 (reporting that 80% of female congressional employees would be reluctant to file sexual harassment complaints against members of Congress due to perceived ineffectiveness of current procedures or fear of retaliation).

³¹ See, e.g., Dan Harrie, *GOP's Georgia Bulldog Visits S.L. to Hound Demos, Hype the Election*, SALT LAKE TRIB., Oct. 27, 1994, at A1; Paul West, *Republicans Plot Coup in Congress*, BALTIMORE SUN, Aug. 28, 1994, at 1A; Joe Klein, *The House That Newt Will Build*, NEWSWEEK, Apr. 25, 1994, at 31.

³² See James T. O'Reilly, *Collision in the Congress: Congressional Accountability, Workplace Conflict, and the Separation of Powers*, 5 GEO. MASON L. REV. 1, 3–4 (1995); Richard Sammon, *No Instant End to Exemptions*, CONG. Q., Dec. 31, 1994, at 3594; Kenneth Pins, *Grassley Will Lead Task Force*, DES MOINES REG., Dec. 3, 1994, at 2.

³³ Congress convened on January 4, 1995, and sent the CAA to President Clinton on January 18; House Speaker Newt Gingrich (R-Ga.) described this as "the fastest that a new Congress has sent legislation to the White House since March 1933." Kenneth J. Cooper, *House Sends Congressional Compliance Bill to Clinton*, WASH. POST, Jan. 18, 1995, at A4 (reporting comments by Speaker Gingrich).

all major federal anti-discrimination laws³⁴ as well as federal laws establishing minimum workplace protections or standards.³⁵ As previously noted, CAA supporters appealed both to the basic principle that Congress should no longer be “above the law” and to the instrumental purpose that Congress by “feeling employers’ pain” would be less likely to augment the scope and burden of such laws in the future.³⁶

A central component of the new law was the creation of the OOC as an internal yet independent agency with investigative, adjudicatory, and rulemaking powers. The OOC’s five-person Board of Directors enjoys more meaningful autonomy than prior in-house congressional entities. Board members are appointed on a bipartisan basis for fixed five-year terms,³⁷ are accorded substantial resource support in the form of staff positions and a budget,³⁸ and are protected against arbitrary or partisan removal.³⁹ In addition to promulgating rules for implementation of the eleven statutes,⁴⁰ the OOC oversees a complaint procedure that provides for counseling, mediation, formal hearings and decisions by a hearing officer, and appeal to the Board of Directors.⁴¹ The CAA also provides for judicial review of Board decisions involving any of the eleven workplace statutes,⁴² and it allows covered employees complaining under nine of the statutes to opt

³⁴ See Pub. L. No. 104-1, § 102, 109 Stat. 5–6 (1995) (codified at 2 U.S.C. § 1302 (Supp. II 1996)) (applying Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1994); Rehabilitation Act of 1973, 29 U.S.C. § 701 (1994); veterans’ employment and reemployment provisions codified in scattered sections of 38 U.S.C.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); and Americans With Disabilities Act of 1990, 42 U.S.C. § 12,101 (1994)).

³⁵ See Pub. L. No. 104-1, § 102, 109 Stat. 5–6 (applying Federal Labor Relations Act of 1978, 5 U.S.C. § 7101 (1994); Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (1994); Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1994); Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 (1994); Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2101 (1994); and Family and Medical Leave Act of 1993, 29 U.S.C. § 2611 (1994)).

³⁶ See *supra* text accompanying notes 4–5; 141 CONG. REC. H94 (daily ed. Jan. 4, 1995) (statement of Rep. Shays); *id.* at H95 (statement of Rep. Hamilton); 141 CONG. REC. S447 (daily ed. Jan. 5, 1995) (statement of Sen. Glenn).

³⁷ See Pub. L. No. 104-1, § 301, 109 Stat. 24–25 (1995) (codified at 2 U.S.C. § 1381 (Supp. II 1996)).

³⁸ See *id.* at §§ 302, 305, 109 Stat. 26–28, 31–32 (1995) (codified at 2 U.S.C. §§ 1382, 1385 (Supp. II 1996)).

³⁹ See *id.* at § 301(f), 109 Stat. 25 (1995) (codified at 2 U.S.C. § 1381(f) (Supp. II 1996)).

⁴⁰ See *id.* at § 304, 109 Stat. 29–31 (1995) (codified at 2 U.S.C. § 1384 (Supp. II 1996)).

⁴¹ See *id.* at §§ 401–406, 109 Stat. 32–35 (1995) (codified at 2 U.S.C. §§ 1401–1406 (Supp. II 1996)).

⁴² See *id.* at § 407, 109 Stat. 35–37 (1995) (codified at 2 U.S.C. § 1407 (Supp. II 1996)) (providing for petitions to the U.S. Court of Appeals for the Federal Circuit).

out of Board procedures after mediation and file a civil action in federal district court.⁴³ Given the absence of Executive Branch involvement and the relatively limited nature of judicial review, a number of commentators have expressed guarded optimism that the general enforcement structure of the CAA does not present separation of powers difficulties.⁴⁴

A second important factor is the extent to which the CAA shields members themselves from litigation even while making Congress accountable as an institution. Employee complaints may be brought only against the employing office, not the member individually.⁴⁵ Accordingly, in a court or other formal proceeding the respondent employing office is likely to receive representation from counsel employed by the Senate or House rather than from a private attorney hired and compensated by the member.⁴⁶ In addition, Congress pays all monetary damages awarded as a result of misconduct by individual members.⁴⁷ The deci-

⁴³ See *id.* at §§ 404, 408, 109 Stat. 33, 37 (1995) (codified at 2 U.S.C. §§ 1404, 1408 (Supp. II 1996)). The district court option does not apply with respect to the Occupational Safety and Health Act ("OSHA") or the Federal Labor Relations Act ("FLRA"). Congressional employees alleging violations pursuant to these two statutes must rely on the OOC General Counsel to seek enforcement of Board decisions in the Federal Circuit. See *id.* at § 407(a)(1)(C), (D), 109 Stat. 35-36 (1995) (codified at 2 U.S.C. § 1407(a)(1)(C), (D) (Supp. II 1996)). This exclusive reliance on the General Counsel to pursue relief up to and including initiation of judicial enforcement corresponds to the enforcement mechanisms provided by Congress with regard to OSHA for the private sector and FLRA for the Executive Branch. See 141 CONG. REC. S442 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley).

⁴⁴ See, e.g., Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 157-59 (1995); O'Reilly, *supra* note 32, at 8; 1994 Senate Committee Hearings, *supra* note 24, at 242 (statement of Professor Nelson Lund). This Article analyzes the constitutionality of the CAA under the Speech or Debate Clause and also discusses constitutional concerns related to the presence of unions. It does not evaluate any general separation of powers concerns raised by the Act's basic approach of congressional self-policing.

⁴⁵ See Pub. L. No. 104-1, §§ 405(a), 408(b), 109 Stat. 33, 37 (1995) (codified at 2 U.S.C. §§ 1405(a), 1408(b) (Supp. II 1996)).

⁴⁶ Acting pursuant to the House Employees Position Classification Act, 2 U.S.C. §§ 294(d)(7), 300 (1994), the Committee on House Oversight established a new Office of House Employment Counsel in late 1995. The Office was authorized *inter alia* to represent House employing offices in actions brought under the CAA. See Letter from Rep. Bill Thomas, Chairman of Committee on House Oversight, to Robin H. Carle, Clerk of the House (Dec. 22, 1995) (on file with author); Dear Colleague Letter from Chairman Thomas and Ranking Minority Member Rep. Vic Fazio (D-Cal.) (Apr. 30, 1996) (on file with author). The Senate Chief Counsel for Employment performs a similar representational function for Senate employing offices. See 142 CONG. REC. H10,026 (daily ed. Sept. 4, 1996). It was established in 1993 at the direction of Senate leaders from both parties, and was formerly called the Office of Senate Legal Counsel, Employee/Management Relations. See 140 CONG. REC. S1391 (daily ed. Feb. 10, 1994).

⁴⁷ See Pub. L. No. 104-1, § 415, 109 Stat. 38 (1995) (codified at 2 U.S.C. § 1415 (Supp. II 1996)).

sion to immunize members from personal liability represented a departure from Congress's stance in prior legislation,⁴⁸ and it generated some internal dissent.⁴⁹ Supporters pointed in general terms to the Act's goal of compensating employees rather than punishing individual members of Congress;⁵⁰ they may also have feared that personal financial pressure would lead less well-off members to settle false or meritless claims.

A final significant CAA component is the special procedure adopted regarding employee access to union representation. The Act's basic approach directed the OOC to follow existing Executive Branch regulations for each of the eleven workplace statutes unless it determined that modification was needed to strengthen employee protections.⁵¹ In order to ensure prompt access to these protections, the CAA also specified as a general matter that a failure by Congress to approve the OOC's regulatory product would trigger statutory coverage based on "the most relevant substantive executive agency regulation."⁵² The notable exception to this approach involved employees' rights to join a union and engage in collective bargaining pursuant to the FLRA. The CAA at section 220(e) directed that anyone employed on a legislator's personal staff, on the staff of a congressional committee, or on the staff of House or Senate leadership, was to be excluded from exercising those rights if the OOC determined by

⁴⁸ See Government Employee Rights Act of 1991, Pub. L. No. 102-166, § 323, 105 Stat. 1071, 1098 (1991) (codified at 2 U.S.C. § 1222 (1994)) (requiring senators to reimburse federal treasury within sixty days for any damage payments made on their behalf). Congress quietly repealed this reimbursement requirement the following year as part of its annual Legislative Branch Appropriations Act. See Pub. L. No. 102-392, § 316(b), 106 Stat. 1703, 1724 (1992).

⁴⁹ See, e.g., S. 29, 103d Cong., § 2(a)(4) (1993) (bill introduced by Senator John McCain (R-Ariz.) requiring members to reimburse the federal government within sixty days for any damage payments made on their behalf); Richard Sammon & Phil Kuntz, *House Strongly Backs Bill to End Hill's Exemptions*, CONG. Q., Aug. 13, 1994, at 2313-14 (reporting that Rep. Goodling unsuccessfully sought to amend House bill to make members fully liable for punitive damages up to \$50,000).

⁵⁰ See, e.g., 140 CONG. REC. H7350 (daily ed. Aug. 10, 1994) (statement of Rep. Stephen Buyer (R-Ind.)); *id.* at H7335 (daily ed. Aug. 10, 1994) (statement of Rep. Fawell).

⁵¹ See, e.g., Pub. L. No. 104-1, § 202(d) (regarding Family and Medical Leave Act) (codified at 2 U.S.C. § 1312 (Supp. II 1996)); *id.* at § 204(c) (regarding Employee Polygraph Protection Act) (codified at 2 U.S.C. § 1314 (Supp. II 1996)); *id.* at § 205(c) (regarding Worker Adjustment and Retraining Notification Act) (codified at 2 U.S.C. § 1315 (Supp. II 1996)); *id.* at § 206(c) (regarding Veterans' Employment and Reemployment) (codified at 2 U.S.C. § 1316 (Supp. II 1996)); *id.* at § 210(e) (regarding public services and accommodations under Americans with Disabilities Act) (codified at 2 U.S.C. § 1331 (Supp. II 1996)); *id.* at § 215(d) (regarding Occupational Safety and Health Act) (codified at 2 U.S.C. § 1341 (Supp. II 1996)).

⁵² *Id.* at § 411, 109 Stat. 37 (1995) (codified at 2 U.S.C. § 1411 (Supp. II 1996)).

regulation that “such exclusion is required because of . . . a conflict of interest or . . . Congress’s constitutional responsibilities.”⁵³ Further, should Congress fail to approve the OOC rule regarding the constitutional and conflict of interest issues, the result would be not an extension of FLRA protections based on analogous Executive Branch rules but a denial of such protections for these legislative employees.⁵⁴

The language of section 220(e) neither states nor implies that the OOC should conclude constitutional or conflict of interest problems actually exist. Rather, the special rulemaking requirement was added “as an extra measure of precaution” in response to concerns about collective bargaining among legislative staff that apparently were voiced by a number of members during the enactment process.⁵⁵ Still, there can be no union representation rights for legislative staff until the OOC has completed its rulemaking effort and Congress has approved the results.

C. Disagreement Between the OOC and Congress

The OOC, through its five-person Board of Directors, conducted notice and comment rulemaking pursuant to section 220(e) between March and September 1996.⁵⁶ In response to the advance notice of proposed rulemaking,⁵⁷ and subsequent notice

⁵³ *Id.* at § 220(e)(1)(B), 109 Stat. 21 (1995) (codified at 2 U.S.C. § 1351 (Supp. II 1996)). In addition to identifying personal, committee, and leadership staff as candidates for categorical exclusion, § 220(e) also directed the OOC to apply the same “conflict of interest or . . . constitutional responsibilities” standard to other institutional employees involved in the legislative process, including employees of the Senate and House Legislative Counsel, the Senate and House Parliamentarians, the Senate and House Official Reporters of Debate, and the Congressional Budget Office. This Article focuses only on the rights and protections available to personal, committee, and leadership staff. The analysis and conclusions apply, however, to all other § 220(e) employees.

⁵⁴ *See id.* at § 411, 109 Stat. 37.

⁵⁵ S. REP. NO. 103-397, at 8 (1994); 141 CONG. REC. S444 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley); *see also id.* at S626 (daily ed. Jan. 9, 1995) (analysis by Sens. Lieberman and Grassley, suggesting that special rulemaking authority was to be cautiously applied).

⁵⁶ The CAA requires that substantive regulations be promulgated in accordance with the principles of the Administrative Procedure Act, 5 U.S.C. § 553 (1994), but adds that notices and adopted regulations are to be transmitted to the House and Senate leadership and published in the Congressional Record rather than the Federal Register. *See* Pub. L. No. 104-1, § 304(b), 109 Stat. 29 (1995) (codified at 2 U.S.C. § 1384(b) (Supp. II 1996)). The notice and comment rulemaking here covered both general regulations implementing the FLRA under section 220(d) and the special “conflict of interest or . . . constitutional responsibilities” regulation under section 220(e).

⁵⁷ *See* 142 CONG. REC. S1547-50 (daily ed. Mar. 6, 1996).

of proposed rulemaking,⁵⁸ the OOC received written comments from two key House committee chairmen, an additional House member, the Inspector General of the House, the Secretary of the Senate, and representatives of three labor organizations.⁵⁹ Each of the five congressional commenters contended that broad exclusions from FLRA coverage were warranted.⁶⁰ Each of the three labor organizations maintained that the OOC should create no categorical exclusions but rather adjudicate employee eligibility for FLRA protection on a case-by-case basis.⁶¹

The congressional commenters' most pertinent and detailed analysis came from Secretary of the Senate Kelly D. Johnston and Chairman of the Committee on House Oversight Representative Bill Thomas (R-Cal.). Focusing their constitutional attention on Congress's Article I status as sovereign lawmaker, they argued that legislative staff access to collective bargaining would chill uninhibited deliberations between members and their aides and would give unions undue influence over member decision-making.⁶² These constitutionally framed concerns blended into conflict of interest arguments that unions would create a unique

⁵⁸ See 142 CONG. REC. S5552-56 (daily ed. May 23, 1996).

⁵⁹ Following the notice of proposed rulemaking in May 1996, Rep. Thomas submitted lengthy comments and Rep. Goodling, Chairman of the House Committee on Economic and Educational Opportunities, submitted shorter comments jointly with Rep. Fawell who chairs the committee's Subcommittee on Employer-Employee Relations. Rep. George Radanovich (R-Cal.) also submitted comments at that time, as did House Inspector General John W. Lainhart IV. In addition, the Secretary of the Senate submitted lengthy comments at both the advance notice and notice stages. Finally, representatives from three labor organizations submitted comments at the advance notice stage; they were Jonathan P. Hiatt on behalf of the AFL-CIO, Alice L. Bodley on behalf of AFSCME Council 26, and Peter Winch on behalf of AFGE. Mr. Hiatt also submitted shorter comments at the notice stage (all on file with author).

⁶⁰ The Secretary of the Senate contended that the OOC should exclude from FLRA coverage all employees in each senator's personal office and all employees of Senate leadership and committee offices. See Comments submitted by Kelly D. Johnston, Apr. 11, 1996, at 12-15. Rep. Thomas maintained that the OOC should issue a rule excluding all House personal, committee, and leadership staff from FLRA coverage. See Comments submitted by Rep. Thomas, July 1, 1996, at 6, 13, 17-18. Reps. Goodling, Fawell, and Radanovich argued in more abbreviated fashion that the OOC should issue rules excluding categories of employees because to proceed by adjudication would result in "chaos and uncertainty" for congressional offices. Comments submitted by Reps. Goodling and Fawell, July 2, 1996, at 2; Comments submitted by Rep. Radanovich, July 2, 1996, at 2. The House Inspector General contended that his entire office should be excluded pursuant to the FLRA's existing statutory exemptions for "investigation or audit functions." 5 U.S.C. § 7211(b)(7). See Comments submitted by John W. Lainhart IV, July 1, 1996, at 1.

⁶¹ See Comments submitted by Jonathan P. Hiatt, Apr. 11, 1996, at 3, 6-7; Comments submitted by Alice L. Bodley, Apr. 5, 1996, at 3-4; Comments submitted by Peter Winch, Apr. 9, 1996, at 3.

⁶² See Comments by Kelly D. Johnston, *supra* note 60, at 13; Comments by Rep. Thomas, *supra* note 60, at 17-20.

risk of divided loyalty. A conflict would arise because—in contrast to other private associations—a union would have a statutory right to represent a member’s staff and to compel certain bargaining-related interactions with that member even if the union expressly opposed the member’s legislative policies. Given that unions often pursue broad legislative agendas, the argument continued, there was a distinct possibility that unions would organize the very staff they were attempting to influence on various legislative matters. Unions could then use their unique statutory position to affect a member’s legislative acts, by taking advantage of staff access to confidential legislative information or by exchanging key collective bargaining concessions for a member’s commitment on particular legislative issues.⁶³

The OOC Board in its final rule was not persuaded by these arguments and declined to make special rulemaking provisions for personal, committee, or leadership staff.⁶⁴ The Board found that the FLRA, itself “designed to meet the special requirements and needs of government,”⁶⁵ was amply protective of legislative prerogatives.⁶⁶ It further concluded that the CAA directive to adopt existing FLRA protections “to the greatest extent practicable”⁶⁷ militated against the wholesale exclusion of categories of employees.⁶⁸ The Board also determined that nothing about unions’ broad legislative agendas or their potential for exercising legislative influence qualified as a special constitutional or conflict of interest concern.⁶⁹

Significantly, none of the congressional commenters ever mentioned the Speech or Debate Clause when raising questions about the impact of FLRA coverage on Congress’s constitutional responsibilities. The OOC also did not refer to the Clause when examining and rejecting constitutional concerns during the rule-making process. The disagreement was framed solely in terms of

⁶³ See Comments by Kelly D. Johnston, *supra* note 60, at 13; Comments by Rep. Thomas, *supra* note 60, at 13–16.

⁶⁴ See 142 CONG. REC. H10,019–30 (daily ed. Sept. 4, 1996).

⁶⁵ 5 U.S.C. § 7101(b).

⁶⁶ See 142 CONG. REC. H10,021–22 (daily ed. Sept. 4, 1996).

⁶⁷ 2 U.S.C. § 1351(e)(1) (Supp. II 1996).

⁶⁸ See 142 CONG. REC. H10,023 (daily ed. Sept. 4, 1996).

⁶⁹ See *id.* at H10,022–25. Two of the five Board members dissented from the final rule. They urged that the Board devote further attention to the special status of the Legislative Branch in relation to union representation of congressional staff. The two dissenting Board members did not contend that constitutional or conflict of interest problems compelled certain exclusions; rather, they argued that these concerns had not been given sufficient attention, and that further hearings and factfinding proceedings were needed. See *id.* at H10,027–30.

a union's assertedly special institutional role in engendering conflicts of interest or divided loyalties that then would undermine Congress's sovereign lawmaking authority. That approach differs in important respects from the Speech or Debate Clause's more general concern of insulating individual members from being questioned in a forum outside of Congress.

The House Republican leadership was not satisfied with the OOC rulemaking determination. Rep. Bill Thomas advised the Board that the Committee would not report the regulation to the House for approval and suggested that the Board undertake additional "investigatory" rulemaking to include consultation or testimony from members in both parties and both chambers of Congress.⁷⁰ The OOC declined to accept a remand of its regulation, contending that while the Committee on Oversight could postpone or prevent a House vote to approve the regulation, the CAA did not authorize remands.⁷¹ Early in 1997, the House committee conducted a hearing at which committee members invoked their oversight authority under the Act to question the process and substance of OOC's rulemaking effort.⁷² Subsequently, eighteen legal academics and practicing attorneys, each of whom had served in Republican administrations or with Republican members of Congress, wrote a letter to House leaders criticizing as unjustified and heavy-handed the Committee's attempted remand of the OOC regulation.⁷³ Committee Republi-

⁷⁰ See Letter from Rep. Bill Thomas, Chairman of the Committee on House Oversight, to Glen Nager, Chairman of the OOC Board of Directors 3 (Sept. 19, 1996) (on file with author).

⁷¹ See Letter from Glen Nager, Chairman of the OOC Board of Directors to Rep. Bill Thomas, Chairman of the Committee on House Oversight 1-2 (Sept. 25, 1996) (on file with author).

⁷² See *Oversight Hearing: Office of Compliance: Hearing Before the Committee on House Oversight*, 105th Cong. 13 (statement of Chairman Thomas) (relying on Committee's oversight authority under CAA § 301(i)); *id.* at 15 (statement of Rep. Sam Gejdensen (D-Conn.)) (questioning OOC's failure to keep minutes or transcripts of Board meetings when deliberating about regulation); *id.* at 29 (statement of Rep. Vernon Ehlers (R-Mich.)) (criticizing Board's split decision rejecting the views of knowledgeable congressional commenters).

⁷³ See Letter from eighteen leading Republican lawyers (including Charles J. Cooper who served in the Justice Department during the Reagan administration, C. Boyden Gray who served in the White House during the Bush administration, and John C. Yoo who served under Chairman Hatch on the Senate Judiciary Committee) to Chairman Thomas at 1, 5-8 (May 27, 1997) (on file with author). The letter's authors sent copies to House Speaker Newt Gingrich, House Majority Leader Dick Armey (R-Tex.), House Minority Leader Richard Gephardt (D-Mo.), and other leaders in the House. See *id.* at 9.

cans responded with a letter to the OOC reiterating the suggestion that the Board reconsider its rule.⁷⁴

During this contretemps, Senator Charles Grassley (R-Iowa), co-author and floor manager of the CAA in the Senate, expressed publicly his fear that the section 220(e) rule would never be approved, adding that the consequent failure to implement the CAA fully would be "dishonest."⁷⁵ Twenty-one months later, the legislative stalemate persists, notwithstanding Senator Grassley's recently restated desire to resolve the matter.⁷⁶ If the House leadership response suggests hostility to the OOC regulatory determination, the Senate position more closely resembles indifference. Although Senator Grassley's statements have not been matched by a legislative initiative, his expressions of concern do stand in marked contrast to the absolute silence emanating from the Republican leadership as well as the entire Democratic contingent. Given the predictable pressure of other congressional business and the strained relations between key House members and the OOC, there is little reason to expect that either party will make FLRA coverage of legislative staff a priority in the near future.

D. *Practical Realities and a Concealed Constitutional Concern*

In considering the ongoing disagreement between Congress and its own internal agency, one might well ask what accounts for the intense and prolonged nature of the controversy. Applying the FLRA to legislative staff would provide rights to a very limited number of employees. Like its private sector counterpart, the National Labor Relations Act,⁷⁷ the FLRA exempts a range

⁷⁴ See Letter from Rep. Thomas, Rep. Robert Ney (R-Ohio), Rep. John Boehner (R-Ohio), Rep. Ehlert, Rep. Kay Granger (R-Tex.), and Rep. John Mica (R-Fla.) to OOC Board Chairman Glen Nager (June 11, 1997) (on file with author).

⁷⁵ See A.B. Stoddard, *Impact of Labor Law on the Hill is Minimal*, HILL, Mar. 19, 1997, at 25 (quoting Senator Grassley).

⁷⁶ See Charles Grassley with Jennifer Shaw Schmidt, *Practicing What We Preach: A Legislative History of Congressional Accountability*, 75 HARV. J. ON LEGIS. 33, 48 (1998) (calling Congress's refusal to approve the § 220 (e) rule "a disgrace to the principles supporting the CAA," and vowing to work toward a resolution). Other substantive regulations promulgated by the OOC have been approved by Congress. See, e.g., 142 CONG. REC. H3339-41 (daily ed. Apr. 15, 1996) (H.R. Res. 500 and S. Con. Res. 51 approving separate OOC regulations implementing coverage under Fair Labor Standards Act, WARN Act, Family and Medical Leave Act, and Employee Polygraph Protection Act).

⁷⁷ Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)).

of confidential, managerial, and supervisory workers.⁷⁸ Accordingly, the instant dispute probably affects only a small percentage of the fourteen thousand legislative staffers who work for Congress.⁷⁹ Moreover, even if some of these employees brought charges against their legislative employers, members of Congress are well-insulated from personal responsibility or financial risk.⁸⁰ Finally, unlike employees' obvious interest in being free from race or gender discrimination, or in making use of family or medical leave, it is far from clear how many legislative staff will seek union representation, assuming they are entitled to do so. The typical employee in a personal or committee office is strongly actuated by a desire to contribute to public policy development or to provide assistance to constituents.⁸¹ There are, of course, economic and quality of life aspects to the job as well, but staffers imbued with the mission of political service may less readily grasp the value of a collective voice in improving their terms and conditions of employment. While the short-term nature of employment need not be a barrier to union success,⁸² rapid legislative staff turnover—driven both by career ambitions and by the election returns—is also likely to dampen widespread continuing interest in unionization.⁸³ It therefore is not surprising

⁷⁸ See discussion *infra* Part III.

⁷⁹ See HAROLD W. STANLEY & RICHARD G. NIEMI, *VITAL STATISTICS ON AMERICAN POLITICS* 201 (5th ed. 1996) (identifying some 9200 House legislative staff and 5000 Senate legislative staff); ORNSTEIN ET AL., *supra* note 29 (identifying some 9600 House personal and committee staff and 5400 Senate personal and committee staff as of 1991; also noting 3000 other House and Senate employees plus some 10,000 support agency employees).

⁸⁰ See *supra* text accompanying notes 45–50 (discussing CAA provisions limiting members' personal exposure).

⁸¹ See EDWARD V. SCHNEIER & BERTRAM GROSS, *CONGRESS TODAY* 147 (1993) (observing that “[w]hat keeps the juices flowing [for congressional staff] is the sense of having an impact, of knowing that your idea is embodied in law”); Michael J. Malbin, *Delegation, Deliberation, and the New Role of Congressional Staff*, in *THE NEW CONGRESS* 134, 150 (Thomas E. Mann & Norman J. Ornstein eds., 1981) (discussing the exhilaration felt by staff at having even a vicarious effect on important events and policies).

⁸² Construction workers are one example of employees engaged in relatively short-term work who often seek unionization. See, e.g., David G. Savage & Stuart Silverstein, *High Court Extends Job Protections to Organizers*, L.A. TIMES, Nov. 29, 1995, at D1 (citing federal figures indicating that 19% of construction workers belonged to unions in 1994); Patrick Barry, *Congress's Deconstruction Theory*, WASH. MONTHLY, Jan. 1990, at 10, 16 (reporting that among top four hundred construction firms over half are union shops as opposed to open shops).

⁸³ See Malbin, *supra* note 81, at 149–50 (describing personal and committee staffs being dominated by individuals who view their jobs in Congress as stepping stones to other positions); Gareth G. Cook, *Carnage on the Hill*, U.S. NEWS & WORLD REP., Nov. 28, 1994, at 26 (reporting that more than two thousand Democratic employees on Capitol Hill will be terminated as result of 1994 congressional elections); Cindy Loose,

that a recent survey of congressional staffers revealed little enthusiasm for joining a union.⁸⁴

Yet even with the odds distinctly in their favor, members may be wary of the reputational damage that unions appear able to inflict. Labor organizations generally have more resources and greater sophistication than does an individual employee who alleges member misconduct. Union presentations critical of a member's former or current employment practices may be taken up by the media or by an opposition candidate.⁸⁵ A union engaged in collective bargaining also has broad rights to request documents or information within a member's control.⁸⁶ Either acceding to or defying such requests may exacerbate adverse effects on the member's reputation.

Assuming some wariness about unions exists, it is relatively easy for members of Congress to indulge their fears. In political terms, there appears to be little cost involved in opposing staff access to unions. By contrast, had House leaders blocked extension of Title VII or the Family and Medical Leave Act to legislative staff less than two years after enacting the CAA, one would hardly anticipate the same lack of partisan debate within Congress or the same absence of participation from interest groups and the public at large.⁸⁷

Anxiety on the Hill: GOP Victory Brings on the Pink-Slip Blues, WASH. POST, Nov. 20, 1994, at A1 (describing bewilderment, depression, and fear among thousands of congressional employees who expect to be unemployed or already are because of the 1994 elections).

⁸⁴ See Stoddard, *supra* note 75, at 25 (reporting that only nine of eighty legislative staff responding to a survey conducted by THE HILL in early 1997 stated they would be interested in joining a staff union).

⁸⁵ In recent years, organized labor has shown its willingness to target individual members over particular issues of public policy. See, e.g., Kent Jenkins, Jr., *Labor's Love Lost By Moran, Not Hoyer*, WASH. POST, Dec. 22, 1993, at B1; *Saving Lawmaker on Labor Hit List*, N.Y. TIMES, Mar. 15, 1994, at A18.

⁸⁶ See generally *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (holding that an employer's refusal to disclose information relevant to its claim of economic inability to pay increased wages supports a finding of a failure to bargain in good faith); *U.S. Dept. of Health and Human Servs. v. FLRA*, 833 F.2d 1129 (4th Cir. 1987) (holding that a federal employer's obligation to furnish information requested by a union extends to information needed for administering and policing the contract as well as for contract negotiation).

⁸⁷ See generally PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 22-25 (1990) (claiming that Congress today is far less willing to rely on labor-management negotiations as a mechanism for ordering employment relations and redistributing economic resources); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1568-72, 1596 (1996) (contrasting the decline in popular and legal support for collective bargaining with a renewed faith in individual rights statutes).

In light of Congress's resistance to unionization, one might have expected a constitutional defense predicated on the Speech or Debate Clause. Surprisingly, however, that Clause was never raised during the rulemaking process. Congressional commenters did assert a different type of Article I concern stemming from union representation in the employment relationship.⁸⁸ Yet, the Supreme Court has stated quite clearly that the Speech or Debate Clause is *the* appropriate source for determining whether members of Congress merit constitutional protection against employment-related challenges to their activities. In *Davis v. Passman*,⁸⁹ the Court was confronted with the decision of Representative Otto Passman (D-La.) to discharge his female deputy administrative assistant on the express grounds that he needed a man for the job. The Court held that petitioner Davis could bring a Fifth Amendment cause of action against the Congressman, concluding that "judicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause of the Constitution."⁹⁰ Thus, the Court views the Framers as having fully addressed their constitutional concerns about members' official conduct toward Legislative Branch employees through the inclusion of the Speech or Debate Clause; it finds no justification for expanding immunity based on more general Article I or separation of powers concerns.⁹¹

By the same token, the applicability of Speech or Debate Clause immunity to a member's employment relationship with legislative aides such as those listed in section 220(e)—an issue left unresolved by the Court in *Passman*⁹²—cannot be confined to

⁸⁸ See *supra* text in paragraph preceding note 70 (discussing the argument that union-inspired divided loyalties would undermine congressional sovereignty).

⁸⁹ 442 U.S. 228, 230 (1979).

⁹⁰ *Id.* at 235 n.11. The Court explained that "[s]ince the Speech or Debate Clause speaks so directly to the separation-of-powers concerns raised by" a member of Congress charged with unconstitutional sex discrimination against his legislative aide, if the member is not shielded by the Clause, there are no other separation of powers barriers to the cause of action. "[W]e apply the principle that 'legislators ought . . . generally to be bound by [the law] as are ordinary persons.'" *Id.* at 235 n.11, 246 (quoting *Gravel v. United States*, 408 U.S. 606, 615 (1972)).

⁹¹ See *United States v. Stanley*, 483 U.S. 669, 685 (1987) (reasoning that Framers, by creating Speech or Debate Clause immunity, meant to limit constitutional protection for members' legislative activity to the terms of that Clause); *Passman*, 442 U.S. at 249–51 (Burger, C.J., dissenting) (objecting to the Court's unwillingness to hold respondent member of Congress immune on general separation of powers grounds).

⁹² The Court in *Passman* expressly declined to decide whether Rep. Passman's conduct in discharging his deputy administrative assistant was shielded by the Speech or Debate Clause because the en banc Court of Appeals had not decided it. See 442 U.S. at 236 n.11. In that regard, the briefs indicate that the parties did not agree on whether petitioner Davis was a key policymaking aide or a low-level assistant, and the transcript

challenges brought pursuant to just one of the eleven employee protection laws included in the CAA. Whether a member is accused of discriminating against a staffer based on age, medical condition, or support for a union, the member's constitutional defense rests on the Speech or Debate Clause. Similarly, whether a member refuses to share information requested by a union during the collective bargaining process or by an individual employee prior to the hearing on her complaint, the Speech or Debate Clause will determine if that refusal is constitutionally justified.⁹³

Upon reflection, it is understandable why both members of Congress in requesting an FLRA exemption and the OOC in considering their request might wish to avoid the broader Speech or Debate Clause implications. The CAA received near-unanimous approval from Congress, and most members have a sincere interest in subjecting themselves to the rule of law. Even if some do secretly hope the CAA fails, they would have no desire to appear hypocritical to the American public; their interest would be in framing constitutional objections in the narrowest terms. The OOC, too, is in a delicate position as it seeks to cultivate professional respect and establish enough independence to earn the confidence of Congress's employees. Having been directed to respond to constitutional concerns that affect coverage under one law, the OOC would hardly be inclined to reach out and discuss possible constitutional concerns involving ten others. Instead, it has in essence embraced the passive virtue of ignoring larger constitutional concerns that were not raised.

In short, the question of Speech or Debate Clause applicability that was left unanswered by the Supreme Court in *Passman* remained unasked by congressional commenters and the OOC. I now proceed to consider that question.

of oral argument discloses that this area of uncertainty was troubling to some of the Justices. See Brief for Petitioner at 58–60 (arguing that petitioner was a low-level office worker, and Court need not reach the issue of speech or debate protection for high-level policymaking aides); Brief for Respondent at 3, 28–29 (arguing that petitioner was deputy administrative assistant, a role in which she was closely involved in the legislative process); Transcript of Oral Argument at 2, 12–13 (reflecting concern from Justices Blackmun and Rehnquist as to whether it should matter in constitutional terms if respondent is a secretary or a policymaking aide), reprinted in 107 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 415–17; 436, 461–62; 554, 564–65 (Philip B. Kurland & Gerhard Casper eds., 1980) [hereinafter LANDMARK BRIEFS AND ARGUMENTS].

⁹³ In each instance, of course, the member may have statutory defenses to the charges of discrimination or unlawful refusal to provide information.

II. THE CAA AND SPEECH OR DEBATE CLAUSE IMMUNITY

In analyzing the relationship between the CAA and the Speech or Debate Clause, it is important to identify with some precision the subset of employees whose rights are at issue. The CAA covers a broad array of Legislative Branch workers, including thousands employed by congressional support agencies.⁹⁴ The possible extension of Speech or Debate Clause immunity affects only the status of legislative aides employed directly by the House or Senate—roughly the universe referred to in section 220(e). Moreover, the universe of legislative staff embraced by section 220(e) includes employees who perform routine constituent casework, open and sort mail, or answer telephones, in addition to those who serve as committee counsel, legislative investigators, or personal office chiefs of staff. For employees whose job functions are primarily ministerial and in no way integral to the legislative process, it is difficult to argue that Speech or Debate Clause immunity should apply.⁹⁵ There are, however, many employees whose job responsibilities give them significant input into legislative decisionmaking: examples include a senator's legislative aide who advises her on policy matters outside of her committee jurisdictions,⁹⁶ or a House committee chairman's assistant counsel who provides guidance on particular portions of the committee's legislative agenda.⁹⁷ These employ-

⁹⁴ See Pub. L. No. 104-1, § 101(3), 109 Stat. 3, 4 (1995) (codified at 2 U.S.C. § 1301(3) (Supp. II 1996)) (defining covered employees to include employees of the Capitol Police, Office of the Architect of the Capitol, and the Congressional Budget Office, as well as employees of the House and Senate); ORNSTEIN ET AL., *supra* note 29, at 126–27 (identifying those three support agencies as employing over 3500 individuals).

⁹⁵ See *infra* Part IIA, setting forth a standard for what qualifies as protected activity under the Speech or Debate Clause. It is doubtful that the Supreme Court in *Passman* would have recognized a cause of action against members on behalf of legislative employees if the Court had believed that the Speech or Debate Clause precluded all such actions. See also *supra* note 92 (discussing the Justices' interest in a member's immunity status on employment decisions affecting key legislative aides); LANDMARK BRIEFS AND ARGUMENTS, *supra* note 92, at 560–62 (indicating concerns from Justices Powell and Burger that discharge of key policy staff in White House or Congress presents special constitutional immunity issue).

⁹⁶ For instance, a senator may wish to be a “player” on proposed legislation involving telecommunications or the environment even though she is not a member of the Commerce Committee or the Environment Committee. A legislative aide on her personal office staff would be responsible for monitoring developments in those areas and helping the senator position herself to offer bills or amendments, or to participate in key legislative negotiations.

⁹⁷ Some legislative staff with policy-related responsibilities may be excluded from joining unions under the FLRA because they qualify as confidential, supervisory, or managerial employees under that Act. See *infra* text accompanying notes 241–246.

ees are the focus of my analysis; for them, the issue of Speech or Debate Clause immunity deserves close attention.

A. *Speech or Debate Clause Origins and Scope*

The provision in Article I of the Constitution that “Senators and Representatives shall . . . be privileged . . . for any Speech or Debate in either House”⁹⁸ stems from more than 200 years of developments in England and its colonies. Parliament asserted a privilege of free speech and debate as early as 1512, in response to a private criminal complaint brought against a member of the House of Commons.⁹⁹ The legislature established that a member of Parliament (“MP”) could not be indicted in a lower court for actions taken in Parliament, which was itself the highest court.¹⁰⁰ Over time, as Parliament exercised increasing legislative initiative that included criticisms of Crown policies and conduct, the privilege came to be invoked primarily to protect MPs against punitive measures taken by the executive.¹⁰¹ In this context, the privilege was transformed from a simple request for free speech that was part of the traditional speaker’s petition presented to the King or Queen at the commencement of Parliament to a strong

Employees such as an individual member’s legislative aide or a committee’s assistant counsel, however, do not automatically or even obviously qualify as exempt under any of those three statutory exemptions. See *infra* text accompanying notes 249–251.

⁹⁸ U.S. CONST. art. I, § 6, cl. 1.

⁹⁹ In *Strode’s Case*, 4 Henry VIII c. 8 (1512), MP Strode was prosecuted, fined, and imprisoned by a local court because he had voted in favor of a bill regulating working conditions in tin mines. Strode petitioned Parliament, which enacted a law annulling the judgment and declaring void any future proceedings against MPs arising from parliamentary matters.

¹⁰⁰ For thoughtful discussion on the origins and evolution of the privilege, see Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1120–44 (1973); Craig M. Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?*, 57 N. CAR. L. REV. 197, 199–214 (1979).

¹⁰¹ English monarchs, including Elizabeth I, Charles I, and James II, prosecuted and imprisoned MPs for critical words spoken in parliamentary debate and for republication of parliamentary committee reports alleging misconduct by the Crown. Parliament responded by protesting against unwarranted Crown interference and by passing statutes that voided particular judgments against its members. In addition, following the execution of Charles I, Parliament in 1667 declared that the special statute enacted for Strode’s case was a general law affirming parliamentary rights and privileges against the Crown. See ERSKINE MAY’S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 77–80 (Sir Charles Gordon ed., 20th ed., 1983) [hereinafter MAY’S TREATISE]; Reinstein & Silverglate, *supra* note 100, at 1123–33; Bradley, *supra* note 100, at 201–08.

statement of principle that became part of the 1689 English Bill of Rights.¹⁰²

In the century leading up to the American Revolution, colonial assemblies also asserted parliamentary privileges against their royal governors.¹⁰³ Freedom of speech generally was included among the privileges presented in a speaker's petition, and occasionally was invoked as a right during a conflict between assembly and governor.¹⁰⁴ While ample evidence exists that legislators in England and the colonies exploited other parliamentary privileges,¹⁰⁵ the privilege of free speech and debate appears not to have generated any real controversy in this country during the period preceding the Constitutional Convention.¹⁰⁶ The freedom of speech language from the English Bill of Rights was incorpo-

¹⁰² The Bill of Rights provides "[t]hat the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." 1 W. & M. sess. 2, c. 2 (1689) (quoted in MAY'S TREATISE, *supra* note 101, at 81). Other privileges claimed by Parliament during this time period include freedom from arrest or molestation, freedom of access to the Crown, freedom to determine the qualifications of its members, freedom to control the publication of debates and proceedings, and that a favorable construction should be placed on House of Commons proceedings. See MAY'S TREATISE, *supra* note 101, at 73, 83, 97-101, 119-21; CARL WITTKÉ, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 21-23 (1921).

¹⁰³ See MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 79-82 (1943); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 863 (1st ed. 1833).

¹⁰⁴ CLARKE, *supra* note 103, at 61-92 (describing the earliest uses of the speaker's petition in Jamaica (1677), Maryland (1682), Virginia (1684), New York (1691), South Carolina (1702), New Jersey (1703), Pennsylvania (1707), Georgia (1755), Nova Scotia (1759) and North Carolina (1760); and reporting that such petitions generally demanded freedom from arrest, freedom from molestation, freedom of speech, access to the governor, and that a favorable construction be put on actions of the house); *id.* at 93-97 (observing that freedom of speech was seldom cited by legislators as the basis of a dispute, but identifying "a few occasions" on which a colonial assembly invoked the right of free speech in its conflict with the governor).

¹⁰⁵ For example, MPs stretched the privilege of freedom from arrest to include not only members themselves but also their servants, families, and estates, regardless of what crimes might be involved; MPs also sold "protections" to outsiders giving them freedom from arrest for common law violations. See WITTKÉ, *supra* note 102, at 41-43; Reinstein & Silverglate, *supra* note 100, at 1137 n.128; Bradley, *supra* note 100, at 210. Legislative abuse of the privileges from arrest and molestation was widely reported in the colonies as well. See CLARKE, *supra* note 103, at 98, 108-17, 130. The record of legislative abuses received attention from the American public and also from the Framers of the Constitution. See *Powell v. McCormack*, 395 U.S. 486, 527-31 (1969) (describing the American public's reaction to Wilkes case in early 1780s in which the House of Commons expelled an MP who exposed corruption in Parliament, and explaining how Wilkes was viewed as a popular hero for standing up to parliamentary overreaching). See generally THE FEDERALIST No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) (expressing concern that "[T]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex").

¹⁰⁶ See CLARKE, *supra* note 103, at 93-97; Reinstein & Silverglate, *supra* note 100, at 1136-39.

rated in closely comparable form in the Articles of Confederation¹⁰⁷ and also in a number of early state constitutions.¹⁰⁸

At the Convention, the Speech or Debate Clause was included as part of Article I without opposition and with little substantive discussion.¹⁰⁹ Unlike other English parliamentary privileges that the Framers chose to preserve in more limited terms or to omit altogether,¹¹⁰ the privilege for speech or debate remained intact. Charles Pinckney at one point proposed that each House should be the judge of its own privileges, and James Madison at another point suggested that the scope of the privilege should be specified; the Convention declined to adopt either proposal.¹¹¹

One of the Framers, James Wilson, offered an early and succinct justification for the insertion of the Speech or Debate Clause in Article I:

¹⁰⁷ Article V of the Articles of Confederation provided that "Freedom of speech or debate in Congress shall not be impeded or questioned in any court or place out of Congress . . ." ARTICLES OF CONFEDERATION art. v.

¹⁰⁸ See, e.g., MD. DECL. OF RIGHTS art. x (1776); MASS. CONST. part I, art. xxi (1780); N.H. CONST. part 1, art. xxx (1784); S.C. CONST. art. vii (1776); N.J. CONST. art. xxii (1776). See generally, *Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951).

¹⁰⁹ The Committee of Detail produced various draft versions of the Constitution between July 26 and August 6, 1787. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 129-92 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION]. A draft in the handwriting of Committee member James Wilson included language that closely resembles the final Speech or Debate Clause. See *id.* at 166. This language was presented to and accepted by the Convention. See *id.* at 180, 254. See generally ELLIOTT'S DEBATES, BOOK II, VOL. V at 406 (2d ed. 1836) (1941); Reinstein & Silverglate, *supra* note 100, at 1136. The ratification debates reveal even less substantive consideration. See, e.g., ELLIOTT'S DEBATES, *supra*, Book I, Vol. II at 52-54 (Mass.), 325, 329 (N.Y.); Book I, Vol. III at 368-75 (Va.). At the Convention there is at least a record of proposed changes. See *infra* note 111.

¹¹⁰ See *Powell v. McCormack*, 395 U.S. at 532-41 (concluding that the Framers in Article I limited legislative privilege to determine qualifications of members of Congress); STORY, *supra* note 103, at §§ 856-59, at 325-27 (observing that the Framers in Article I limited legislative privilege to be free from arrest); Reinstein & Silverglate, *supra* note 100, at 1132-38 (reporting that the Framers in Article I rejected the legislative privilege to control the publication of debates and proceedings).

¹¹¹ Pinckney unsuccessfully proposed that "[E]ach House should be the Judge of the privileges of its own members." RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 502. Madison opposed this approach, adverting to the risk of giving too much discretion to each House. See *id.* at 503; 3 THE PAPERS OF JAMES MADISON 1493 (Langley ed., 1841). Madison himself advocated to the Convention that the Constitution could "make provision for ascertaining by law, the privileges of each House." 3 THE PAPERS OF JAMES MADISON at 1493-94 (emphasis in original); RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 503 (emphasis in original). This suggestion too was not accepted. See JANE BUTZNER, CONSTITUTIONAL CHAFF: REJECTED SUGGESTIONS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 47 (1941). Subsequently, Madison adopted a more open-ended view, concluding that "[when applying the] privilege to emerging cases, difficulties and differences of opinion may arise [hence] the reason and necessity of the privilege must be the guide." Letter from James Madison to Phillip Doddridge (June 6, 1832), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 221 (1865).

In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.¹¹²

Two centuries later, the rationale for conferring absolute and total immunity upon senators and representatives reflects two distinct dimensions of the policy concern set forth by Wilson. From a substantive perspective, absolute immunity protects against possible distortion in the exercise or expression of legislative judgment. By ensuring that members need not answer for their performance except to the voters at election time, the Clause encourages legislators to fulfill their Article I responsibilities in a manner that is at once deliberative and robust. From an accompanying time management perspective, absolute immunity guards against the risk that members will be distracted from their legislative duties. It does so by minimizing the predictably diverting impact of litigation or interrogation upon members' finite energies and resources.¹¹³ This rationale of protecting against distorted judgment and diverted energies applies to Speech or Debate Clause claims asserted in private civil actions as well as in criminal prosecutions brought by the executive.¹¹⁴

¹¹² 1 JAMES WILSON, WORKS OF JAMES WILSON 421 (Robert G. McCloskey ed., 1967). The justification was offered as part of a series of lectures on the Constitution that Wilson presented in 1791 and 1792. *See id.* at 59.

¹¹³ *See* United States v. Brewster, 408 U.S. 501, 507 (1972) (invoking need to insure independent legislative judgment); Powell v. McCormack, 395 U.S. at 505 (invoking need to avoid distraction from performance of legislative tasks); *Cf.* Clinton v. Jones, 117 S. Ct. 1636, 1643–44 (1997) (justifying President's constitutional immunity from damages for official actions in similar terms); Forrester v. White, 484 U.S. 219, 223 (1988) (justifying judges' common law immunity from damages in similar terms).

¹¹⁴ It is true that the privilege of free speech and debate blossomed in England and the colonies in response to legislative perceptions of an overreaching executive. *See supra* text accompanying notes 98–106 (discussing English and colonial experience). The Supreme Court has acknowledged on more than one occasion the historic role played by executive intimidation. *See* United States v. Helstoski, 442 U.S. 477, 491 (1979) (noting that the Clause's purpose was "to preserve the constitutional structure of separate, coequal, and independent branches of government" in light of the English and colonial experience of executive power); United States v. Johnson, 383 U.S. 169, 182 (1966) (interpreting fear of indictment by the executive as motivating the parliamentary struggle for privilege). The Court, however, with good reason has never adopted a two-tier approach to the Speech or Debate Clause. The language of the Clause itself makes no distinction between civil actions pursued by private individuals and criminal prosecutions brought by the executive. An early and celebrated state court decision appears to embody the contemporary understanding that the legislative privilege applied equally in civil and criminal proceedings. *See* Coffin v. Coffin, 4 Mass. 1, 27 (1808) (concluding that analogous privilege in the Massachusetts Constitution was meant to "enabl[e] representatives to execute the functions of their office without fear of prosecutions, civil

Although the language of the Clause refers only to "Speech or Debate in either House," the Supreme Court has made clear that the immunity extends to many types of legislative conduct undertaken by members of Congress. Thus, the protections of the Clause encompass speeches made on the House floor¹¹⁵ but also votes cast on bills,¹¹⁶ participation in committee hearings and proceedings,¹¹⁷ circulation of information to other members of Congress,¹¹⁸ and issuance of investigatory subpoenas.¹¹⁹ At the same time, the Court has held that the Clause does not apply to all official responsibilities assumed by members. Important congressional functions have been deemed unprotected, notably dissemination of legislative materials to the public¹²⁰ and communication with administrative agencies on behalf of constituents.¹²¹

In determining how far the Clause extends to matters beyond speech or debate in either House, the Court's test is whether the matters in question are "an integral part of the deliberative and communicative process by which members participate" in their constitutionally prescribed lawmaking activity.¹²² This test is not a model of clarity. Reference to "an integral part" signifies that the challenged conduct must be more than merely "related to" the lawmaking process if it is to merit such extraordinary pro-

or criminal."). *Coffin* involved a civil action for slander; the Massachusetts court's conclusion was quoted and relied on by the Supreme Court in *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1880). Moreover, while the Clause reflects a desire to avoid intrusion by the executive in a system of separation of powers, it serves the additional purpose of protecting legislative independence by screening out all lawsuits that would interfere with the legislative process. See *United States v. Gillock*, 445 U.S. 360, 369 (1980) (discussing two underlying rationales for Speech or Debate Clause immunity: avoiding intrusion by the executive or judiciary into the affairs of a coequal branch and protecting legislative independence); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) (interpreting the Clause as ensuring the independence of the Legislative Branch).

¹¹⁵ See *Johnson*, 383 U.S. at 176-77 (1966).

¹¹⁶ See *Kilbourn*, 103 U.S. at 204.

¹¹⁷ See *Gravel v. United States*, 408 U.S. 606, 628-29 (1972); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967).

¹¹⁸ See *Doe v. McMillan*, 412 U.S. 306, 311-13 (1973).

¹¹⁹ See *Eastland*, 421 U.S. at 503-05.

¹²⁰ See *Hutchinson v. Proxmire*, 443 U.S. 111, 123-33 (1979) (clause does not protect communication through press releases or constituent newsletters); *Doe*, 412 U.S. at 313-15 (clause does not protect distribution to the public of otherwise protected legislative materials).

¹²¹ See *United States v. Brewster*, 408 U.S. 501, 512 (1972) (clause does not protect a legislator's efforts to intervene with administrative agencies on behalf of constituents); *Johnson*, 383 U.S. at 172 (same); Sam J. Ervin Jr., *The "Gravel" and "Brewster" Cases: An Assault on Congressional Independence*, 59 U. VA. L. REV. 175 (1973) (criticizing Court's decisions limiting congressional immunity).

¹²² *Gravel*, 408 U.S. at 625.

tection.¹²³ At the same time, the privilege may extend to conduct other than participation in floor or committee proceedings so long as constitutional immunity is necessary “to prevent *indirect* impairment of [legislative] deliberations.”¹²⁴

Lower courts have struggled with the Supreme Court standard. Tensions have surfaced between and within circuits as to when—if at all—legislators’ personnel decisions should be accorded absolute immunity.¹²⁵ Two judges who adopted divergent positions on this question have since become Supreme Court Justices.¹²⁶ Legal commentators similarly are not resolved as to whether absolute immunity should ever extend to a member of Congress’s employment-related conduct.¹²⁷

¹²³ *Brewster*, 408 U.S. at 513–14.

¹²⁴ *Gravel*, 408 U.S. at 625 (quoting *United States v. Doe*, 455 F.2d at 760) (emphasis added).

¹²⁵ Compare *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986) (dismissing on Speech or Debate Clause grounds official reporter’s race discrimination action against Clerk of House and Speaker of House) and *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir. 1984) (relying on *Gravel* test to confer absolute legislative immunity on President of the Puerto Rico House of Representatives in a discrimination action brought by an unsuccessful applicant for a position as a House press officer) and *Hudson v. Burke*, 617 F. Supp. 1501 (N.D. Ill. 1985) (accordng absolute legislative immunity to city council committee chairman for his decision to terminate committee investigators) with *Davis v. Passman*, 544 F.2d 865, 877–81 (1973), *rev’d on other grounds* 442 U.S. 228 (1979) (holding that Speech or Debate Clause never extends to member decisions to dismiss staff) and *Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989) (holding that city council member is not entitled to absolute immunity for her decision to terminate her legislative aide). *Browning* and *Passman* represent a direct conflict on the Speech or Debate Clause issue. *Agromayor*, *Hudson*, and *Gross* involved parallel claims of common law immunity asserted by state and local legislators with respect to civil rights actions brought under 42 U.S.C. § 1983 (1994). The First Circuit in *Agromayor* applied *Gravel*’s “integral part of the [lawmaking] processes” test to decide in favor of legislative immunity. 738 F.2d at 59. The D.C. Circuit in *Gross* found its own circuit’s analysis in *Browning* less persuasive than the Supreme Court’s more recent decision in *Forrester v. White*, 484 U.S. 219 (1988) (holding that a state judge’s personnel decision was not entitled to judicial immunity at common law), but declined to consider whether special constitutional considerations applicable to members of Congress should support the approach taken in *Browning*. 876 F.2d at 172; *see also United States v. Rostenkowski*, 59 F.3d 1291, 1302–03 (D.C. Cir. 1995) (recognizing that *Browning* remains controlling law within D.C. Circuit, and declining to reexamine the *Browning* approach notwithstanding Supreme Court’s subsequent decision in *Forrester*).

¹²⁶ Justice Breyer, then a member of the First Circuit, participated in the unanimous panel decision granting legislative immunity in *Agromayor*. Justice Ginsburg, then a member of the D.C. Circuit, joined the unanimous panel decision refusing to grant legislative immunity in *Gross*.

¹²⁷ Compare Bruff, *supra* note 44, at 137 (contending that Speech or Debate Clause should shield some congressional employment decisions based on an employee’s proximity to legislative functions, and that *Browning* was correctly decided) and Richard D. Batchelder, Jr., Note, *Chastain v. Sundquist: A Narrow Reading of the Doctrine of Legislative Immunity*, 75 CORNELL L. REV. 384, 405–09 (1990) (arguing that Congress should act to ensure a broader scope of absolute legislative immunity) with 1993 *Joint Committee Hearings*, *supra* note 24, at 251–55, 260–264 (statement of Professor

B. *The CAA Does Not Constitute a Relinquishment of the Privilege*

Before exploring the arguments for and against extending Speech or Debate Clause immunity to certain employment-related activity by members of Congress, it is worth considering whether enactment of the CAA has effectively averted any need to resolve the constitutional issue. The CAA's application of eleven workplace protection laws to Congress as an employer might be viewed as a waiver of whatever constitutional protection is conferred by the Speech or Debate Clause with respect to matters affected by the eleven laws. Alternatively, the CAA's insulation of members from personal liability or monetary exposure might be seen as according protections comparable if not equivalent to those the speech or debate privilege would provide.

First, with respect to the possibility of a waiver, the Supreme Court has declined to decide whether Congress has the power to cede the speech or debate privilege of individual members.¹²⁸ Several Justices have suggested that Congress does have such power when legislating employment standards for its own staff,¹²⁹ and more than one commentator has contended that the privilege belongs to the institution as a whole rather than to individual legislators.¹³⁰

Notwithstanding these arguments, a number of factors combine to counsel strongly against permitting a congressional majority to waive the privilege for all members. The structure of Article I indicates that the first clause in Section Six was meant

Nelson Lund) (contending that employment decisions are never part of the legislative process and that *Browning* was wrongly decided) and Sharon A. Rudnick, Comment, *Speech or Debate Clause Immunity For Congressional Hiring Practices: Its Necessity and Its Implications*, 28 UCLA L. REV. 217, 248-51 (1980) (arguing that Speech or Debate Clause immunity should be denied to all employment-related decisions).

¹²⁸ See *United States v. Helstoski*, 442 U.S. 477, 493 (1979) (holding that even if Congress could constitutionally waive Speech or Debate Clause protection for individual members, it did not do so in explicit and unequivocal terms in enacting federal bribery statute); *United States v. Brewster*, 408 U.S. 501, 529 n.18 (1972) (refusing to decide waiver issue).

¹²⁹ See *Davis v. Passman*, 442 U.S. 228, 250 (1979) (Burger, C.J., joined by Powell and Rehnquist, JJ., dissenting on other grounds).

¹³⁰ See Bradley, *supra* note 100, at 223-25 (relying primarily on the history of the privilege in England to argue for legitimacy of waiver by Congress); Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 434-36 (1994) (relying on the Clause's purpose of protecting the integrity of the legislative process to argue that privilege should be waivable by Congress). *But see* Reinstein & Silverglate, *supra* note 100, at 1166-71 (arguing that privilege is individual and only individual members may waive it).

to confer rights on individual members. While Section Five provides for “each House” to have certain specified powers and privileges relating to institutional governance, Section Six is addressed to “Senators and Representatives” as individual actors.¹³¹ Justice Story stressed this distinction in his 1833 Commentaries on the Constitution,¹³² and the earliest case to address the matter also viewed the privilege as belonging to each individual member.¹³³

A contrary stance would in effect authorize Congress, rather than the Court, to determine the scope of the constitutional privilege. The proposition that Congress as an institution should be the judge of its own privileges is, however, one that the Framers themselves considered and rejected at the Convention.¹³⁴ That proposition also assigns to Congress the role of giving ultimate meaning to constitutional provisions that define its own institutional prerogatives, a role normally reserved to the courts.¹³⁵ Further, allowing Congress to waive the privilege of its members would enable a legislative majority to suppress dissent simply by criminalizing conduct otherwise thought of as legislative. While Article I authorizes Congress to inflict its own forms of disci-

¹³¹ The powers and privileges vested in each House under Article I, Section Five, include the powers to judge the elections and qualifications of its members, to compel attendance of absent members to help make a quorum, to determine internal rules of operation, to discipline its members, and to maintain and publish a journal of its proceedings. The rights and privileges accorded to individual members under Article I, Section Six, include the right to compensation and the privileges from arrest and for speech or debate. In addition, section 6 establishes limitations on holding other federal offices that apply to members individually.

¹³² STORY, *supra* note 103, at § 847 (“The sixth section of the first article contains an enumeration of the rights, privileges, and disabilities of the members of each house in their personal and individual characters, as contradistinguished from the rights, privileges, and disabilities of the body, of which they are members.”)

¹³³ See *Coffin v. Coffin*, 4 Mass. 1, 27 (1808) (“[T]he privilege secured by it is not so much the privilege of the House, as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house or by an act of the legislature.”). The U.S. Supreme Court has accorded particular respect to the *Coffin* case because of its proximity to the founding, see *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880), and has cited with approval the discussion quoted above. See *Helstoski* 442 U.S. at 493.

¹³⁴ See *supra* text accompanying note 111.

¹³⁵ See *United States v. Munoz-Flores*, 495 U.S. 385, 390–93 (1990) (rejecting argument that Congress should decide scope and application of Origination Clause in Article I, Section Seven); *Powell v. McCormack*, 395 U.S. 486, 547–49 (1969) (rejecting argument that Congress should decide scope and application of its power to exclude duly elected members under Article I, Sections Two and Five).

pline upon members it deems recalcitrant, that is a far cry from exposing members to prosecution and punishment from the two other branches for floor statements criticizing a treaty or supporting an unpopular cause. Even if such a repressive legislative scenario may be unlikely to occur in practice,¹³⁶ the conclusion that each member controls her own privilege precludes it from happening at all. Finally, assuming *arguendo* that a waiver were constitutionally permissible, the Court has made clear that “such waiver could be shown only by an explicit and unequivocal expression.”¹³⁷ The CAA never mentions the Speech or Debate Clause in text, and its legislative history contains only a few inconclusive references. This record hardly qualifies as a waiver.¹³⁸

¹³⁶ Unlikely does not mean inconceivable. Federal law makes it a felony to “willfully communicate[] . . . to any person not entitled to receive it” information related to the national defense which the communicating individual “has reason to believe could be used to the injury of the United States or to the advantage of a foreign nation.” 18 U.S.C. § 793(d) (1994). *Cf.* *Abrams v. United States*, 250 U.S. 616 (1919) and *Frohwerk v. United States*, 249 U.S. 204 (1919) (upholding convictions for publication of leaflets or newspapers under related provisions originally enacted as part of 1917 Espionage Act). If Congress were to enact a statute prohibiting members from communicating classified national security information, one might imagine a member’s televised floor speech disclosing such information—perhaps out of a sincere belief that the residents of a certain city or state should know they are a prime target for nuclear attack by a foreign country—and the member then being subjected to criminal prosecution by the Executive Branch.

¹³⁷ *Helstoski*, 442 U.S. at 493.

¹³⁸ If a member of Congress could waive his own constitutional privilege by voting in favor of a specific statute, the CAA might be a particularly attractive candidate because only one member of Congress voted against it. *See supra* notes 6–7. Still, new members enter Congress every two years, and they presumably would have to vote to waive as well. While practical concerns about biennial waiver votes could be overcome (e.g., the waiver could be included as part of House and Senate Rules to be approved at the start of each session), the risk of a majority suppressing dissent is probably increased given new members’ likely reluctance to break with colleagues over what is framed as essentially a housekeeping matter.

None of this is meant to suggest that Congress lacks the power to waive any non-constitutional immunity it may possess with respect to violations committed within the scope of official legislative duties. This Article does not address the question of whether members of Congress are entitled to federal common law immunity for the discharge of official responsibilities beyond what is conferred by the Speech or Debate Clause. *Compare* *Chastain v. Sundquist*, 833 F.2d 311, 314–28 (D.C. Cir. 1987) (holding that members are not entitled to the same federal common law immunity that has been extended to state legislators, judges, and high executive officials) *with id.* at 328–35 (Mikva, J., dissenting) (arguing that members should have such immunity for non-core legislative activities). Even if members are entitled to a federal common law privilege similar to that enjoyed by other high-ranking government officials, such non-constitutional immunities may be supplanted by federal legislation. *See generally* Batchelder, *supra* note 127, at 407–09 (arguing that Congress should act to override the holding in *Chastain*). The CAA could qualify as such a legislative supplanting if the test is less “explicit and unequivocal” than for waiver of Speech or Debate Clause protection.

Second, with respect to the possibility that the CAA provides protection to members comparable to what they enjoy under the Speech or Debate Clause, it should be emphasized that the latter immunity entails absolute protection from all forms of judicially controlled inquiry.¹³⁹ The CAA has immunized members from personal liability,¹⁴⁰ and protection against monetary exposure surely reduces the risks of distortion and distraction at which the Clause is aimed. The CAA does not eliminate such risks, however, because complaints challenging individual member conduct may still proceed.

The mere existence and processing of a complaint brought by a member's legislative aide can become the focus of potentially debilitating public or political attention. While the Act does provide for confidentiality in the complaint procedure, it also allows for discretionary and even mandatory disclosure in a number of circumstances.¹⁴¹ Especially at election time, such disclosures can be used by the media or political opponents to inflict possibly irreparable discredit upon a member even if the employee's complaint ultimately fails.¹⁴²

Other CAA provisions that structure the litigation process may also expose members to heightened public awareness and political vulnerability. For instance, the Act exempts from liability employment decisions affecting legislative staff that are based

¹³⁹ A legislator asserting Speech or Debate Clause immunity must file a motion to dismiss in order to extinguish the judicial proceeding, but—assuming the Clause applies—that is the member's only responsibility. *See Powell*, 395 U.S. at 505 n.25.

¹⁴⁰ *See supra* Part I.B.

¹⁴¹ While all counseling and mediation are strictly confidential, proceedings before the Board and its hearing officers may be made public for judicial review purposes, they may be disclosed to congressional ethics committees after consultation with the complaining employee or individual, and they may be disclosed as a general matter at the Board's discretion. Further, a decision by a hearing officer (if not appealed to the Board) or the Board must be made public if the decision favors the employee or if it is a Board decision reversing a hearing officer determination that had favored the employee. *See* Pub. L. No. 104-1, § 416, 109 Stat. 38-39 (1995) (codified at 2 U.S.C. § 1416 (Supp. II 1996)).

¹⁴² For example, section 416(f) of the Act requires public disclosure of a Board decision discussing an employee's complaint if that decision reversed a hearing officer's judgment favoring the employee. *See* 2 U.S.C. § 1416(f) (Supp. II 1996). Even strong supporters of the CAA have expressed misgivings about the election-related damage that can be caused by unsuccessful legal suits. *See, e.g.*, 141 CONG. REC. S476 (daily ed. Jan. 5, 1995) (statement of Sen. William Roth (R-Del.)); 1993 *Joint Committee Hearings, supra* note 24, at 30 (statement of Sen. Don Nickles (R-Okla.)); *id.* at 101 (statement of Sen. Richard Lugar (R-Ind.)); 124 CONG. REC. 35,545-46 (1978) (statement of Sen. Glenn). *See generally* *Nixon v. Fitzgerald*, 457 U.S. 731, 762-63 (1982) (Burger, C.J., concurring) (observing that members must be "totally free from judicial scrutiny" for their legislative acts, and stressing that "[u]ltimate vindication on the merits does not repair the damage" of lawsuits held to be without merit).

on political incompatibility with the employing office.¹⁴³ Yet, assuming *arguendo* the complaining individual alleges that political incompatibility is a pretext for age, race, or disability-based animus, the resulting Board or judicial inquiry will likely delve into internal office operations.¹⁴⁴ The member who wishes to defend her personnel decision on political compatibility grounds will find her energies diverted and perhaps her legislative judgment impaired as well.

Further, the CAA provisions shielding members from personal litigation exposure¹⁴⁵ raise the prospect of a Hobson's choice. Because respondents are employing offices as opposed to individual legislators, and damage awards are to be paid through the OOC's Treasury account, members may discover that their principled assertions of blamelessness do not prevent the OOC from finding a violation or agreeing to a settlement that brings them unfavorable publicity. Members who wish to exert more direct influence on these outcomes may choose to participate in Board proceedings or to intervene at the judicial review stage.¹⁴⁶ Such initiatives, however, will in turn heighten the member's personal and political visibility in the litigation process. For all of these reasons, the threat to a legislator's independence of judgment and allocation of energies that results from employment-related proceedings remains substantial despite the CAA's insulating effect.¹⁴⁷

¹⁴³ See Pub. L. No. 104-1, § 502, 109 Stat. 39-40 (1995) (codified at 2 U.S.C. § 1432 (Supp. II 1996)).

¹⁴⁴ The political compatibility exemption applies to nine of the eleven workplace statutes included in the CAA, but not to the Federal Labor Relations Act. For further discussion of this exemption, see *infra* Part II.D.3.

¹⁴⁵ See *supra* text accompanying notes 45-50.

¹⁴⁶ See Pub. L. No. 104-1, § 407(a)(2), 109 Stat. 36 (1995) (codified at 2 U.S.C. § 1407(a)(2) (Supp. II 1996)) (authorizing intervention as of right in the court of appeals and contemplating that members may participate before the Board). See generally O'Reilly, *supra* note 32, at 29 (suggesting that members' "enlightened self-interest" is likely to stimulate intervention).

¹⁴⁷ It is difficult to assess the magnitude of this threat. The obvious dearth of employment-related actions brought against members in the past is not relevant because of the legal and practical barriers that until recently existed to discourage such actions. See *supra* text accompanying notes 19-30. Citizen actions alleging unlawful professional conduct by members of Congress have been perceived as problematic at least since the 1970s. See Richard E. Cohen, *When Congress Goes to Court*, NAT'L J., Feb. 12, 1977, at 254 (discussing renewed interest on Capitol Hill in creating a special office to represent members of Congress named as defendants in civil lawsuits, and reporting at least a dozen such cases filed each year). While precise figures on such actions are not readily available, there is no reason to believe the number of actions brought is likely to decline. Cf. Clinton v. Jones, 117 S. Ct. 1636, 1658 (1997) (Breyer, J., concurring) (suggesting that in an increasingly litigious society, a sitting President may become a target for civil damages actions).

C. *Arguments Favoring Speech or Debate Clause Coverage for Certain Employment-Related Matters*

The case for extending Speech or Debate Clause immunity into the employment-related domain has not been sufficiently developed by courts or commentators. Accordingly, I adopt here the somewhat unconventional approach of first presenting a position that I will ultimately reject in order to demonstrate why it deserves to be taken seriously. The following two scenarios provide useful reference points for formulating the strongest arguments in favor of extending absolute immunity to members in their employment dealings with key legislative aides. In the first, an assistant counsel employed by the Senate Labor and Human Resources Committee seeks to organize those professional committee staff who are not subject to the relevant statutory exemptions.¹⁴⁸ The committee chairman, an implacable foe of unions from a right-to-work state, learns of the employee's effort and fires him. Alternatively, the assistant counsel does not attempt to organize employees, but is a middle-aged man. The chairman replaces him with a comparably aged woman, based on the chairman's stated desire for more diversity in committee policymaking positions. In both of these examples, there is a strong argument that the chairman's conduct merits protection under the Speech or Debate Clause.

The justification for extending Speech or Debate Clause immunity to certain employment-related matters begins with the fact that members of Congress are the only federal officials other than the President who are directly accountable to voters. Senators and representatives are elected as representatives of the people, presumably based on their articulation of and support for various legislative policies or proposals.¹⁴⁹ They will be judged

¹⁴⁸ The FLRA provides, for example, that managers, supervisors, and confidential employees are not to be included in a bargaining unit. 5 U.S.C. § 7112(b) (1994). These exemptions and other specific aspects of FLRA application are discussed *infra* Part III.

¹⁴⁹ This policy-related bond exists between members of Congress and those they represent regardless of whether one views representative theory from the perspective of the legislator as an agent for those who elected her or as a trustee for the broader public good. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547-58 (1988) (discussing republican theories of politics). See generally ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) (discussing interest group or pluralist theories of politics). Although the practical realities of congressional politics are far more complicated than political theory can describe, recent studies suggest that voters' policy-related preferences play a substantial role in shaping congressional election outcomes. See, e.g., Suzanna De Boef & James A. Stimson, *The Dynamic Structure of Congressional Elections*, 57 J. POLITICS 630, 646 (1995) (concluding that change in

and perhaps rejected because of public perceptions as to their relative success in advancing these policies or proposals through the legislative process.¹⁵⁰ Given the institutional, political, and societal complexities that are part of the process, members cannot devise and implement legislative policy without considerable assistance from an inner circle of aides and advisors.¹⁵¹

In this setting, the goals of representative government require that each member of Congress be given broad control with respect to an inner circle of legislative staff. A senator or representative ought to have some individuals to whom she can talk without ever being held accountable by them for the things she says or the way she deals with them in verbal terms.¹⁵² By exerting absolute—even arbitrary—direction over these indispensable aides, a member can more effectively advance her own legislative priorities. Conversely, her agenda may flounder because key aides can challenge and delay—or subvert—her decisions to reward what she deems initiative or to punish what she regards as disloyalty. If this occurs, her ability to deliver on her legislative proposals, and voters' ability to assess her legislative performance, will become clouded by her need to explain and justify her conduct as an employer.¹⁵³

citizen preferences on public policy affects the turnover rate among House members and also causes members to adapt their voting patterns at the margins); Alan I. Abramowitz, *Explaining Senate Election Outcomes*, 82 AM. POL. SCI. REV. 385, 386–87, 392 (1988) (concluding that voters' ideological preferences influence their voting decisions in Senate elections); George Rabinowitz & Stuart E. MacDonald, *A Directional Theory of Issue Voting*, 83 AM. POL. SCI. REV. 93, 110 (1989) (contending that when a majority supports a particular policy position, the candidate who aggressively favors that policy is likely to have the advantage over a centrist opponent).

¹⁵⁰ See, e.g., De Boef & Stimson, *supra* note 149, at 646; Abramowitz, *supra* note 149, at 387; Rabinowitz & MacDonald, *supra* note 149, at 115.

¹⁵¹ For discussions of the substantial policy-related role played by congressional staff, see, e.g., BARBARA SINCLAIR, *LEGISLATORS, LEADERS, AND LAWMAKING 72–73* (1995); C. LAWRENCE EVANS, *LEADERSHIP IN COMMITTEE 27–33* (1991); CHARLES R. WISE, *THE DYNAMICS OF LEGISLATION 35–37* (1991); GLENN R. PARKER, *CHARACTERISTICS OF CONGRESS 146* (1989).

¹⁵² This lack of accountability does not extend to physical restraint or harm inflicted on a close aide or advisor. Elected officials should have an unchallenged zone in which to articulate and develop policies and ideas. Subjecting aides to involuntary servitude or assault, however, bears at best an attenuated relationship to this goal, and is incompatible with general norms of criminal conduct in our society.

¹⁵³ The argument here is that a member's inability to promote a legislative agenda in the manner the member would have chosen (i.e., through key aides) curtails opportunities to accomplish what the voters elected the member to do and impedes the electorate's capacity to hold the member fairly accountable based on her actions as a legislator. This is not to suggest that a member's arbitrary or discriminatory conduct as an employer should be off limits to voters. The media and the political opposition are still capable of discovering and publicizing personnel actions involving key aides that are assertedly violative of individual rights, and such developments may lead voters to turn

The Supreme Court has recognized the compelling nature of promoting effective and accountable representative government. In a series of cases pertaining to elected state executive officials and their top policymaking aides,¹⁵⁴ the Court has held that the general practice of patronage dismissal and hiring unconstitutionally restricts First Amendment rights of political belief and association. In each instance, however, the Court has reserved a limited number of policymaking positions as to which the need for political loyalty and responsiveness justifies infringing upon individual employee rights.¹⁵⁵ An elected sheriff or governor may exercise this degree of control over top aides, including those “who help [the governor] write speeches, explain his views to the press, or communicate with the legislature.”¹⁵⁶ He is allowed to do so because “representative government [should] not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate.”¹⁵⁷ While the obstruction in traditional patronage settings stems from partisan or ideological factors, a governor’s need for absolute discretion regarding his selection of high-level aides should not be limited by reference to such factors.¹⁵⁸ As

on an otherwise popular senator or representative. See Foster Church, *Packwood’s Future Divides Voters*, PORTLAND OREGONIAN, Dec. 16, 1992, at A1 (reporting that in light of allegations of sexual misconduct by Senator Robert Packwood (R-Or.) that were disclosed in the *Washington Post*, one-third of those who voted for Packwood on November 3, 1992, would now vote against him); *Protest Urges Barring of Packwood*, PORTLAND OREGONIAN, Jan. 5, 1993, at B1 (reporting that the National Organization of Women demonstrated at Packwood’s Senate office in Washington urging that he not be sworn in for his new term, and that five petitions filed with the Senate by Oregon residents also urged that Packwood not be seated). Still, the voters’ assessment of a member’s conduct as an employer would be separable from their assessment of how that member functions as a legislator utilizing the essential instruments she selected for herself.

¹⁵⁴ See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

¹⁵⁵ See *Elrod*, 427 U.S. at 367–68 (recognizing exception for patronage dismissals in policymaking positions); *Branti*, 445 U.S. at 518 (preserving patronage dismissal exception for certain high-level assistants); *Rutan*, 497 U.S. at 74 (applying same exception to patronage decisions affecting promotion, transfer, recall, and hiring).

¹⁵⁶ *Branti*, 445 U.S. at 518.

¹⁵⁷ *Elrod*, 427 U.S. at 367 (Brennan, J., plurality).

¹⁵⁸ In *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), the Court extended the *Elrod-Branti-Rutan* line of authority to prohibit adverse employment actions taken by rival factions of the same political party even if the factional differences are non-ideological. Because “politics . . . has the undeniable potential to be an ideological activity,” the court concluded that even employment practices that only potentially threaten political association are highly suspect. *Id.* at 1552–53. By the same token, even non-ideological employment decisions affecting an inner circle of aides may be protected precisely because they implement the political preferences of a directly accountable elected official.

Professor Alexander Bickel observed in an analogous context when advocating the President's need for arbitrary authority over the tenure of his key assistants, "[h]is whim should rule, because it is desirable to enlarge as much as possible his personal political responsibility, and this demands a special kind of loyalty and responsiveness of his immediate subordinates."¹⁵⁹

The Court has laid the foundation for according this same type of protection or authority to members of Congress. In *Gravel v. United States*,¹⁶⁰ the Court acknowledged that staff play an essential role in enabling members to fulfill the legislative tasks for which they were elected.¹⁶¹ The extension of the speech or debate privilege to cover activities of key staff may well exceed what was contemplated by the Framers.¹⁶² Nonetheless, the expansion is responsive to a modern legislative process in which certain staff regularly draft statutory language, advocate policy positions, and negotiate legislative compromises on behalf of their members.¹⁶³ As the Court in *Gravel* observed, "the day-to-day work of such aides is so critical to the [m]embers' performance that they must be treated as the latter's alter egos; and if they are not so recognized, the central role of the Speech or Debate Clause . . . will inevitably be diminished and frustrated."¹⁶⁴ For a number of employees who serve on a member's personal, committee, or leadership staff, job performance regularly requires meaningful discretionary input into the lawmaking process. Because these employees are substantially and continuously identified with their principal's legislative activities, a member's

¹⁵⁹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 186 (1962).

¹⁶⁰ 408 U.S. 606 (1972).

¹⁶¹ *See id.* at 613–22.

¹⁶² Some Justices have wondered aloud about the Court's evolutionary approach to interpreting the Speech or Debate Clause. During oral argument in *Davis v. Passman*, 442 U.S. 228 (1979), which took place nearly seven years after *Gravel* was decided, the following exchange occurred between one of the Justices and counsel for respondent:

QUESTION: I know it's water over the dam, but it has always worried me.

Just frankly, when the Speech or Debate Clause was adopted, how many people do you think our founding fathers intended that to apply to, numerically?

MR. GEAR: Numerically, at that time the legislators did not have the immense staffs that they have today.

QUESTION: They didn't have any staff, did they?

MR. GEAR: I would assume that is correct. They rode on a horse to Congress.

But the Constitution does develop—

QUESTION: From that day up until now there has been quite a lot of water—

LANDMARK BRIEFS AND ARGUMENTS, *supra* note 92, at 572.

¹⁶³ *See, e.g.*, PARKER, *supra* note 151, at 146; EVANS, *supra* note 151, at 27–28; Malbin, *supra* note 81, at 154–60.

¹⁶⁴ *Gravel*, 408 U.S. at 616–17.

determinations regarding the selection and retention of aides become an integral component of the member's participation in the legislative process.¹⁶⁵

The fact that senators and representatives consistently delegate decisionmaking authority to their top aides as part of the law-making enterprise may also justify extending broader employment-related immunity to members of Congress than to judges. The Supreme Court in *Forrester v. White*¹⁶⁶ considered whether a state judge should have absolute immunity from a damages action brought under 42 U.S.C. § 1983 for his decision to demote and dismiss a court probation officer. The Court held that a judge should not enjoy such absolute immunity under federal common law because the employment decision was administrative rather than judicial in nature.¹⁶⁷ At the same time, the Court in *Forrester* observed that judges have very little freedom to delegate the performance of judicial acts to their subordinates, and consequently judicial independence will not be unduly threatened if these subordinates are permitted to challenge demotion or termination decisions.¹⁶⁸ By contrast, legislative deliberations may suffer significant, albeit "indirect[,] impairment"¹⁶⁹ from such a challenge, because it could trigger wide-ranging inquiry into a member's judgment regarding the optimal preferred means of promoting the member's legislative agenda. Indeed, if the se-

¹⁶⁵ Consistent with this line of analysis, an employee's occasional or infrequent exercise of substantial legislative judgment should not trigger absolute immunity regarding decisions affecting that employee's job status. If employment-related litigation implicates such a discrete event, the legislative privilege may apply to limit discovery or otherwise restrict the outside inquiry. For discussion of how to decide whether an employee's exercise of legislative authority is an "occasional" or a "regular" component of his job, see *infra* text accompanying notes 172–175. The standard articulated here refers to delegated decisionmaking authority involving the exercise of discretion and judgment. Cf. *Agromayor v. Colberg*, 738 F.2d 55, 60 (1st Cir. 1984). By contrast, the D.C. Circuit in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), concluded that the decision to terminate an official House reporter was protected by the Speech or Debate Clause because the reporter's duties "were directly related to the due functioning of the legislative process." *Id.* at 929 (emphasis omitted). This approach is too formal and mechanical: personnel decisions for employees whose ministerial performance is a "cog in the legislative machine" do not warrant a constitutional immunity that is based on respect for political accountability.

¹⁶⁶ 484 U.S. 219 (1988).

¹⁶⁷ See *id.* at 229–30.

¹⁶⁸ See *id.* at 230. Specifically, the Court stated that "to the extent that a judge is less free than most Executive Branch officials to delegate decisionmaking authority to subordinates, there may be somewhat less reason to cloak judges with absolute immunity from such suits than there would be to protect such other officials." *Id.* Members of Congress also are considerably more free than judges to delegate decisionmaking authority, and in fact do so on a regular basis.

¹⁶⁹ *Gravel*, 408 U.S. at 625.

lection or retention of key aides becomes the object of protracted litigation, members are likely to shift their attention and energies to other portions of their agenda, with a resultant loss of legislative opportunities.¹⁷⁰

A return to the hypothetical scenarios set forth at the start of this section may help illustrate the latter point. In the first scenario, the Senate Labor and Human Resources Committee chairman terminates his union-organizing committee counsel, replacing him with a qualified attorney who has been working for a militantly anti-union coalition. The decision may result from the chairman's desire to restore aggressive thinking among top staff in the hope of generating new anti-union legislative proposals. Alternatively, the decision may best be understood as a clear statement that the chairman speaks with one voice regarding the role of unions in society, thereby removing any uncertainty among his colleagues on the committee or in the Senate at large. Either purpose—to strengthen an internal policy priority or to solidify an ideological reputation with other senators—reflects conduct designed to promote a legislative agenda, conduct that arguably qualifies as core privileged activity. Under the second scenario, in which the committee chairman replaces his male counsel with a female, there may be a related but distinct legislative motivation at work. The chairman's selection of a woman may be due to a desire to diversify the committee's heavily male professional staff and thereby promote a cross-section of perspectives among his top legislative advisors. In this regard, a member's personnel judgments regarding key legislative aides may represent a decision to reaffirm or to depart from prior policy positions.

The chairman may, of course, hope to further other objectives that are not integrally related to the legislative process.¹⁷¹ In

¹⁷⁰ See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 109–10, 176–78 (1984) (discussing how legislative opportunities are lost when key players shift their attention to other problems that have greater chances for success); James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 26 (1994) (discussing how Congress abandons legislative efforts, sometimes in short order, if it becomes counterproductive to invest more time in the matter).

¹⁷¹ For example, a chairman might aim to demonstrate for interest groups and other constituents his deep opposition to unions or his support for women. This effort to inform members of the public is an important official function, but it would not be one essential to the deliberative legislative process, at least according to the Supreme Court. See *Doe v. McMillan*, 412 U.S. 306, 314–315 (1973); *Gravel v. United States*, 408 U.S. 606, 625 (1972); *United States v. Brewster*, 408 U.S. 501, 528 (1972). Other goals might be to express personal discomfort or dislike toward unions and to satisfy a per-

practical terms, the decision at issue here is likely to reflect a subtle combination of legislative and non-legislative purposes or motives. Allowing the dismissed committee counsel to file an action under the CAA would produce efforts to identify the primary or determining motivation in order to assess whether that primary motivation was impermissibly discriminatory under the FLRA or Title VII. Such efforts ultimately would challenge the chairman to explain or to justify these legislative judgments in court. Even assuming that the chairman prevails in this action, his legislative effort to generate new anti-union legislation or to include issues of concern to women is likely to flounder while the litigation process has both a chilling effect on his new aide's performance and a diverting impact on the chairman's own time and energies. Such a temporary setback might well be fatal in the context of an always-crowded legislative calendar.

There will doubtless be linedrawing problems concerning which aides are so substantially and continuously identified with a member's legislative activity that decisions addressing their job status or tenure should receive absolute immunity.¹⁷² These problems, though, do not differ in kind from the problems of proof facing a governor who seeks to establish that certain policymaking aides may be dismissed based on their political beliefs or affiliations.¹⁷³ Indeed, the competitive and professionalized nature of congressional employment means that patterns of delegated authority will be at least broadly analogous between one member's personal office and another's, or from one committee staff to another.¹⁷⁴ Accordingly, it should not be unduly difficult or time-consuming to decide which staff positions are dominated

sonal desire for increased female companionship. These goals too would be non-legislative in nature.

¹⁷² See *supra* note 165, discussing aides with occasional alter ego status.

¹⁷³ See *Elrod v. Burns*, 427 U.S. 347, 367–68 (1976) (stating that “[n]o clear line can be drawn between policymaking and nonpolicymaking positions,” and that the “political loyalty [justification is a matter of proof [by the government employer], or at least argument, directed at particular kinds of jobs” (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 574 (7th Cir. 1972)); *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (reiterating that “it is not always easy to determine whether a position is one in which political affiliation is a [constitutionally] legitimate factor to be considered”).

¹⁷⁴ See generally Malbin, *supra* note 81, at 136–60 (discussing allocations of job responsibility within personal staff, committee staff, and leadership staff); REPORT OF THE SECRETARY OF THE SENATE FROM OCT. 1, 1996 TO MAR. 31, 1997, D19–D23 (listing job titles and semiannual salaries for various job classifications within Senate majority and minority leadership staff); *id.* at D25 to D126 (same for senators' personal staffs); *id.* at D129 to D152 (same for Senate committee staffs).

by responsibilities and activities that implicate the decisions of the member as a legislator.¹⁷⁵

D. *The Speech or Debate Clause Should Never Apply in the Employment Setting*

Despite the force of the arguments presented above, Speech or Debate Clause immunity should not be extended to any employment-related activities, including those that involve the hiring or retention of a member's closest legislative advisors. Ultimately, claims made in favor of applying the constitutional privilege are unpersuasive.

The uncompromising language of the Speech or Debate Clause posits total immunity for members outside the chamber if their legislative activities cause injury or offense. Even if the constitutional rights of others are being abridged, the Court has relied on the need to preserve legislative independence as expressly precluding any judicial effort to vindicate those rights.¹⁷⁶ Moreover, unlike other privileged actors whose speech-related activity can inflict serious harm on individuals, members of Congress are vested with an absolute and unqualified privilege that is not subject to balancing tests based on their alleged bad faith or malicious intent.¹⁷⁷ It is the very nature of this Speech or Debate Clause protection—absolute and not susceptible to any balancing of competing interests¹⁷⁸—that gives rise to concern. The Constitution was conceived as a series of checks and balances,

¹⁷⁵ For example, one can distinguish between personal office staff, who act on a member's behalf in the legislative process by drafting and negotiating floor amendments, and employees who perform liaison work with a member's home district or engage in casework-related services for constituents. This is an area in which the OOC could play a constructive role, either by promulgating a rule for offices to apply or by developing a series of advisory opinions in response to individual office requests for clarification and assistance. Of course, the OOC plays no such role now because review of the CAA's constitutionality has not confronted the Speech or Debate Clause issue.

¹⁷⁶ See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509–10 (1975) (finding that the Clause provides absolute immunity against judicial interference with legitimate legislative activity even if judicial intervention would vindicate First Amendment rights); *Doe v. McMillan*, 412 U.S. 306, 312–13 (1973) (holding that members of Congress and their aides are immune from liability for legislative actions even though their conduct, if performed in another context, would be unconstitutional or otherwise violative of criminal or civil statutes).

¹⁷⁷ Cf., e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (allowing public officials to recover damages from the press if defamatory falsehood was published with actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (allowing private individuals to recover damages for false publication on lesser fault-based standard).

¹⁷⁸ See *Eastland*, 421 U.S. at 509 & n.16.

and no provision should be understood or applied in isolation from all others.¹⁷⁹ When the absolute protection of the Clause is integrated into the larger constitutional scheme, a persuasive argument can be made that the Clause should not cover the employment area at all. Both the Supreme Court's decisions applying the privilege and the Clause's underlying rationale are best understood from this perspective.

1. Supreme Court Ambivalence Regarding Coverage

In its first decision construing the Speech or Debate Clause, the Court in *Kilbourn v. Thompson*¹⁸⁰ expressed some discomfort over the potential sweep of the legislative privilege. While *Kilbourn* held that members were protected for legislative acts other than mere speech,¹⁸¹ the Court recognized a possibility that even speech might lose its absolute privilege if it amounted to an "utter perversion of [legislative] powers to a criminal purpose."¹⁸² The Court subsequently narrowed this possibility, though in doing so it reaffirmed a willingness to articulate potential limits on the seemingly unqualified freedom of legislative conduct.¹⁸³

Moreover, in a series of decisions beginning with *Kilbourn*, the Court repeatedly has determined that legislative employees may be held liable for conduct undertaken at members' direction to implement members' privileged legislative acts. Thus, the House Doorkeeper, Clerk, and Sergeant at Arms were held accountable for carrying out a privileged resolution to exclude Representative

¹⁷⁹ See generally *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (observing that "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (cautioning against "judicial definitions of the power of any of [the] branches [of government] based on isolated clauses or even single Articles torn from context").

¹⁸⁰ 103 U.S. 168 (1880).

¹⁸¹ See *id.* at 200–04. The case involved an alleged false imprisonment carried out by the House Sergeant at Arms after petitioner had failed to comply with a subpoena voted by House committee members. The Court held that the House members were absolutely privileged for their votes. See *id.*

¹⁸² *Id.* at 205. The Court cited the Long Parliament's role in ordering the execution of Charles I, and the French Assembly's similar exercise of the function of overseeing capital punishment. See *id.*

¹⁸³ See *United States v. Johnson*, 383 U.S. 169, 184–85 (1966) (stating that the claim of an unworthy or even a criminal purpose cannot interfere with absolute privilege); accord *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). The Court in *Johnson* expressly left open the possibility that a narrowly drawn criminal statute, enacted by Congress pursuant to its authority to regulate member conduct, might justify inquiry into the motives behind legislative speech. See *Johnson*, 383 U.S. at 185.

Adam Clayton Powell (D-N.Y.);¹⁸⁴ a Senate committee counsel was held answerable for information-gathering activity that was part of a privileged committee hearing;¹⁸⁵ and the Public Printer and Superintendent of Documents were held accountable for printing at Congress's direction more than the usual number of copies of a privileged House committee report.¹⁸⁶ The Court has explained these determinations by distinguishing between the privileged performance of a legislative act and the unlawful implementation of that act as it affects the rights of others.¹⁸⁷

But an illegal implementation rationale begs the key question of whether the essentially ministerial actions of these employees should be seen as part of the legislative process. If the act of implementation is the natural extension of a legislative vote, and it is necessary to give effect to that vote, one could reasonably infer that protection should attach to the agents of Congress whose duty it is to perform the act. The Court's unwillingness to accept that conclusion reflects an abiding concern over the potential for conflict between protecting legislative independence and preserving legal redress for persons victimized by the exercise of that independence.¹⁸⁸

The tension between these two constitutional imperatives—legislative independence and judicial review—is a useful way to approach the Court's post-1970 decisions restricting the scope of immunity for conduct that appears closely related to the legislative process. In several cases the Court has held that efforts by members or aides to republish a legislative speech or report, or otherwise to disseminate information about activities occurring within the Congress, do not qualify for speech or debate immunity.¹⁸⁹ Similarly, the Court has concluded that efforts by com-

¹⁸⁴ See *Powell v. McCormack*, 395 U.S. 486, 504–06 (1969); see also *Kilbourn*, 103 U.S. at 204 (holding Sergeant at Arms accountable for false imprisonment for executing a House-approved arrest warrant).

¹⁸⁵ See *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

¹⁸⁶ See *Doe v. McMillan*, 412 U.S. 306, 320–24 (1973).

¹⁸⁷ See *Gravel v. United States*, 408 U.S. 606, 620 (1972) (“None of these . . . cases adopted the simple proposition that immunity was unavailable to congressional or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection.”).

¹⁸⁸ See *id.* at 621 (recognizing that in *Kilbourn*, *Powell*, and *Dombrowski*, “protecting the rights of others may have to some extent frustrated a planned or completed legislative act”).

¹⁸⁹ See *Hutchinson v. Proxmire*, 443 U.S. 111, 115–16, 127–33 (1979) (refusing to extend privilege to a senator's allegedly defamatory press release reprinting a speech that appeared in the Congressional Record); *Doe*, 412 U.S. at 313–18 (refusing to extend privilege to committee staff for publicly disseminating copies of a committee re-

mittee staff to acquire information through informal processes and sources (i.e., without relying on subpoena authority) as part of an investigation or hearing are not protected by the privilege.¹⁹⁰ Informing the public and gathering information are important, arguably critical, elements of an effective lawmaking operation.¹⁹¹ The Court, however, has opted for a more canonical and restrictive approach to Congress's constitutionally prescribed functions.¹⁹² In order to qualify for immunity as an "integral part" of the legislative enterprise, the challenged speech or conduct must be an actual component in the formal processes of investigating, formulating, advocating, and voting that culminate in approval or rejection of a proposed law.¹⁹³ All other official activities undertaken by members and their staffs are subject to judicial review.

Consistent with this approach, employment-related decisions should be unprotected. Admittedly, a legislator's dealings with personal or committee staff are internal to the Congress, in contrast to her dealings with constituents, Executive Branch agencies, and the public at large. Yet, the same distinction applies between what is a constitutive part of the decisionmaking process and what is a valuable or even essential precondition for sound legislative decisionmaking. In establishing terms and conditions of employment for top aides, a member decides what is necessary to enable her to participate as an effective legislator, but that decision is not itself a form of legislative participation.¹⁹⁴

Before concluding that prior Supreme Court decisions debar use of the privilege in the employment setting, it is worth pondering whether the Court ought to reconsider its conception of the legislative process. The Court's vision of how laws come to be enacted can surely be criticized as both incomplete and unrealis-

port that allegedly invaded privacy interests); *Gravel*, 408 U.S. at 622–26 (refusing to extend privilege to efforts by a senator and staff to arrange for private republication of documents introduced and made public at a committee hearing).

¹⁹⁰ See *Gravel*, 408 U.S. at 627–29.

¹⁹¹ See Reinstein & Silverglate, *supra* note 100, at 1148–55; Ervin, *supra* note 121, at 184–88.

¹⁹² In this regard, the Court earlier had stated in dicta that the Speech or Debate Clause would not apply to members' contacts with administrative agencies or executive officials regarding the administration of federal statutes. See *United States v. Johnson*, 383 U.S. 169, 172 (1966).

¹⁹³ *Gravel*, 408 U.S. at 625.

¹⁹⁴ Cf. *Forrester v. White*, 484 U.S. 219, 229 (1988) (analyzing scope of immunity with respect to judicial decisionmaking and concluding that dismissal of a judge's probation officer, while perhaps "crucial to the efficient operation" of the court, is not an adjudicative function).

tic.¹⁹⁵ Legislators regularly use staff to gather information on controversial or sensitive subjects so that they can identify the magnitude of a problem and decide whether it is susceptible to a legislative solution. Hearings and subpoena authority are important means to this end, but preliminary and less formal methods of information gathering are often needed as well if Congress is to develop and maintain an adequate knowledge base. Similarly, members and their staffs frequently contact executive agencies as part of an effort to assess the burdens of compliance with a given statute or the extent of noncompliance with that law. While the contacts may be triggered by constituent requests or protests, the resulting assessment may well produce an amendment to the existing legislative scheme. Finally, disseminating information to the public can be a central part of members' attempts to generate broad support on a pending legislative matter. In an era when public opinion survey results help set the priorities for Congress's legislative agenda, members may seek to influence scheduling determinations through aggressive efforts to elevate public awareness of their issues.

Each of these activities—gathering information, contacting agencies, and publicizing positions—is part of the business of legislating. At the same time, each also has other purposes such as providing service to constituents, exerting control over agency performance, or increasing name recognition among potential voters. The Court was at best oversimplifying when it referred to such activities in categorical terms as “political in nature rather than legislative.”¹⁹⁶

Still, unless the Court imposes well-defined limits on the term “legislative process,” the Speech or Debate Clause privilege could cover almost everything members do in their quest for legislative success. Neither the language of the Clause nor its under-

¹⁹⁵ For criticism from members of Congress, see, for example, CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS, *supra* note 21, at 45–48. See also 134 CONG. REC. H3188–93 (daily ed. May 12, 1988) (criticizing D.C. Circuit decision in *Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987), discussed at *supra* note 138). For criticisms by commentators, see, for example, *Hearings on Constitutional Immunity of Members of Congress Before the Joint Committee on Congressional Operations*, 93d Cong. 54–58 (1973) (statement of former Supreme Court Justice Arthur J. Goldberg); Reinstein & Silverglate, *supra* note 100, at 1148–63. Congress in 1974 failed to enact a proposed statute providing a broader non-constitutional definition of legislative activity. Failure was attributable in part to members' general fear of voter backlash and in part to the particular circumstances of Congress seeking to broaden legislative privilege at a time when it was battling with President Nixon over the scope of executive privilege. See Batchelder, *supra* note 127, at 407–10.

¹⁹⁶ *United States v. Brewster*, 408 U.S. 501, 512 (1972).

lying purpose suggests that members are meant to enjoy such breadth of absolute protection from the rule of law. By characterizing the legislative process as basically inward-looking, the Court has fudged reality in order to accommodate competing rights and interests in our legal system. Members of Congress possess considerable authority under Article I, and they have on occasion shown themselves capable of abusing that authority.¹⁹⁷ When a legislator's abuse is tantamount to criminal misconduct, a broad refusal to allow prosecution may undermine the public's right to honest representation as well as their interest in the fair administration of criminal justice.¹⁹⁸ When a member's mistreatment harms the civil rights of private individuals, those adversely affected cannot seek vindication through the prosecutorial powers of the executive. If the judiciary is unable to protect these individuals as a matter of principle, they may well be vulnerable to the authority of the Legislative Branch.¹⁹⁹ Thus, even

¹⁹⁷ The Court in *United States v. Rumely*, 345 U.S. 41, 44 (1953), recognized that the Bill of Rights imposes restraints on congressional investigations. In *Watkins v. United States*, 354 U.S. 178, 215 (1957), the Court invalidated on Fifth Amendment due process grounds a conviction for refusing to answer questions propounded as part of an investigation undertaken by the House Committee on UnAmerican Activities (HUAC). Notwithstanding these decisions, Congress in the 15 years following World War II authorized wide-ranging inquiry into the lives and affairs of private citizens, which led to numerous convictions for refusal to answer questions or produce documents requested by HUAC and other congressional committees asserting national security interests. See, e.g., *Wilkinson v. United States*, 365 U.S. 890 (1961); *United States v. Fleischman*, 339 U.S. 991 (1950); *United States v. Yellin*, 287 F.2d 242 (7th Cir. 1961); *Liveright v. United States*, 280 F.2d 708 (D.C. Cir. 1960); *Braden v. United States*, 272 F.2d 653 (5th Cir. 1960); *Bart v. United States*, 203 F.2d 45 (D.C. Cir. 1952); see also *United States Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1264-68 (D.C. Cir. 1973) (holding that subpoena for bank records authorized by a Senate committee chairman violated the First Amendment rights of a non-profit corporation), *rev'd on other grounds*, 421 U.S. 491 (1975).

¹⁹⁸ See *Brewster*, 408 U.S. at 524-25 (discussing right to honest representation); cf. *United States v. Nixon*, 418 U.S. 683, 707-13 (1974) (discussing due process demands in criminal law context).

¹⁹⁹ Congressional committees possess powers of investigation and inquiry that can inflict enormous burdens and penalties on private individuals. See *Watkins*, 354 U.S. at 187 (holding that Congress lacks general authority to expose private activities and associations of individuals without a legitimate legislative purpose); *Hentoff v. Ichord*, 318 F. Supp. 1175, 1181-83 (D.D.C. 1970) (enjoining publication, except through Congressional Record, of a report by House Committee on Internal Security, on grounds that it amounted to little more than an effort to blacklist individuals whose views differed from those of committee members); Amy Keller, *Groups Join Together to Fight Senate Subpoenas*, ROLL CALL, Sept. 4, 1997, at 26 (describing recent efforts by diverse groups—including the Christian Coalition, the National Right to Life Committee, the International Brotherhood of Teamsters, and the Association of Trial Lawyers—to resist allegedly unconstitutional subpoena requests from the Senate Governmental Affairs Committee investigating campaign finance abuses). See generally George F. Kennan, *Persecution Left and Right*, in MCCARTHYISM 87-97 (Thomas C. Reeves ed., 3d ed. 1989); Ellen W. Schrecker, *The Two Stages of McCarthyism*, in MCCARTHYISM at 98-101.

if there are objections to particular aspects of its linedrawing, the Court's underlying ambivalence reflects a sensible determination that lines must be drawn to balance the importance of legislative independence against the need to protect the rights of other constitutional actors.

Congressional employees, of course, are also vulnerable to misuse of authority by members of the Legislative Branch. If anything, they would seem less able to assert their rights than members of the public at large.²⁰⁰ Further, there are additional policy and practical reasons why the legislative privilege is peculiarly inapt with respect to employment-related matters.

2. Considerations of Policy and Practice

The rationale supporting speech or debate immunity, as discussed earlier,²⁰¹ is that senators and representatives can more capably fulfill their Article I legislative responsibilities if their judgments are neither distorted nor their energies diverted by the risk that they will be questioned outside of Congress for their legislative activities. This rationale is best understood as focused on the distinctive position of persons affected by the lawmaking enterprise, namely the public. Members of Congress are uniquely responsible to the public in their special capacity as legislators. The Speech or Debate Clause recognizes a risk of excessive reaction from that public: organized groups or individual constituents may be disappointed or offended by what senators and representatives have said or done as legislators. The Clause guards against the possibility that the groups or individuals frustrated by legislative performance will seek to vent their frustrations in court rather than the voting booth.

Individuals employed by a member or committee office are not similarly situated. A member's responsibility to them is not specially defined under Article I of the Constitution. Moreover, their frustrations are not materially different from the frustrations expressed by the employees of any other employer.²⁰² A dismissed legislative committee aide who seeks vindication in

²⁰⁰ See *supra* text accompanying notes 28–30 (discussing employees' fear of asserting their rights); *supra* text accompanying notes 82–84 (discussing employees' lack of interest in asserting certain rights).

²⁰¹ See *supra* text accompanying notes 112–114.

²⁰² Cf. *Forrester v. White*, 792 F.2d 647, 667 (7th Cir. 1986) (Posner, J., dissenting), *rev'd on other grounds*, 484 U.S. 219 (1988) (observing that a judge sued for employment discrimination is comparably situated to other public or private employers).

court is challenging the committee chairman's conduct as an administrator rather than the chairman's performance as a legislator.²⁰³

To be sure, the chairman may well contend that a judicial challenge to his personnel judgment will end up diminishing his legislative capacities as well, and that if allowed such challenges will proliferate for ideological or partisan reasons. The concern that senators and representatives will have their energies diverted by litigation is not, standing alone, of constitutional importance. Members of Congress may be sued for anything from child support to default on a car loan without making the consequent diversion of their energies worthy of Article I attention.²⁰⁴ Moreover, it is far from clear why individuals or groups ideologically opposed to a member's legislative positions would prefer to advance their opposition through litigation rather than through other means. Members of Congress may be weakened or toppled for their official non-legislative activities through concerted criticism from interest groups or political opponents, or through the persistent attention of the media.²⁰⁵ While litigation does add the potential for discovering new inculpatory information, it can be a two-edged sword. Discovery provides senators and representatives with an opportunity to question and perhaps intimidate their

²⁰³ See 1993 Joint Committee Hearings, *supra* note 24, at 255 (statement of Nelson Lund); 1994 House Committee Hearings, *supra* note 24, at 443 (statement of Harold Bruff). An aide may on occasion be motivated to bring such a challenge out of disappointment or anger over his inability to influence the member's legislative performance. The survival and success of such a legal claim, however, will require a focus on the distinct issue of the member's performance as an employer. The aide's success in inflicting political damage will be a function of whether his frustrations are embraced by interest groups or partisan opponents, or publicized by the media. Litigation is not necessary, and may not even be helpful, to achieve such ends. See *infra* text accompanying note 205.

²⁰⁴ Cf. *Clinton v. Jones*, 117 S. Ct. 1636, 1650 (1997) (concluding that burdens on the President's time and energy from litigation unconnected to official performance do not require federal courts to stay private actions against the President while in office).

²⁰⁵ Recent examples include the demise of Senator Bob Packwood's legislative career following media disclosure of his alleged sexual misconduct, see *supra* note 153, and also the serious damage done to both Speaker Newt Gingrich following his \$4.5 million book advance and Senator Carol Mosley-Braun (D-Ill.) as a result of several controversial actions she had taken. See, e.g., Janet Hook, *Hard Fight Led to a Hard Fall*, L.A. TIMES, Sept. 9, 1995, at A1 (detailing events leading to Sen. Packwood's resignation nearly three years after the Washington Post first published allegations against him); Katherine Q. Seelye, *House Speaker Says Democrats Are Trying to Destroy Him*, N.Y. TIMES, Jan. 20, 1995, at A24 (reporting on intensity of political criticism aimed at Speaker Gingrich); John Kass, *Mosley-Braun Loses Power Base—Senator Hurt By Controversy*, CHI. TRIB., June 22, 1997, at 1 (reporting that Sen. Mosley-Braun's high negative ratings are closely tied to character issues stemming from official non-legislative conduct).

accusers. Further, access to a neutral forum offers the chance to reshape the public's perception of the alleged misconduct, if not to obtain total vindication. In short, the congressional employment relationship is not within the zone of interest contemplated under the basic policy rationale that justifies speech or debate immunity.

At the same time, personal or committee aides are especially susceptible to mistreatment if members of Congress are accorded immunity in their employment relationships. When outside individuals or groups complain about official congressional conduct, the existence of a public record will likely provide an accessible and adequate basis for resolving legal claims.²⁰⁶ Such claims often challenge institutional action taken by a house or committee, in which case injunctive or declaratory relief may be secured against the institution rather than individual members.²⁰⁷ By contrast, when current or former legislative aides complain about the actions of their employers, they are alleging wrongful speech or conduct by an individual member in charge of a personal or committee staff. In many instances, it is likely that such speech or conduct was observed only by the legislator and the prospective plaintiffs. If the privilege applies, the affected employees would have no other means by which to challenge or even question the legislator's actions in an effort to vindicate their rights. Such a result is especially troubling if the asserted violation implicates the constitutional rights of these individuals.²⁰⁸

²⁰⁶ See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 115–17 (1979) (relying on press release); *Watkins v. United States*, 354 U.S. 178, 209–14 (1957) (relying on transcript of committee hearing).

²⁰⁷ See, e.g., *Watkins*, 354 U.S. at 216 (reversing criminal conviction); *Bergman v. Senate Special Comm. on Aging*, 389 F. Supp. 1127 (S.D.N.Y. 1975) (enjoining in part compliance with committee subpoena); *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970) (enjoining republication of committee report).

²⁰⁸ Examples would be discriminatory job actions taken on the basis of an employee's race, gender, or protected associational rights. Under the *Elrod-Rutan* line of authority, see *supra* text accompanying notes 154–155, the government official asserting absolute control over conditions of employment must prove a compelling interest in having a particular job depend on loyalty and responsiveness, and that this was the official's true motive (e.g., not masking animus toward protected expression or association). Under the Speech and Debate Clause, however, the only inquiry would be whether the job position itself was integral to the legislative process; if so, the issue of unconstitutional motive would never be reached.

3. Pro-Immunity Contentions Addressed

The argument favoring constitutional immunity with respect to certain staff relied on the important interest in promoting effective and accountable representative government. Members of Congress have a strong interest in the fulfillment of their role as accountable representatives, and they—like elected executive officials²⁰⁹—should be accorded broad discretion when deciding on the selection or retention of key aides. One can agree, however, that there is a vital interest in granting legislators such broad discretion without relying on the Speech or Debate Clause at all.

Protection for dealing with subordinates who function as alter egos—a protection established by the *Elrod* line of cases—is not itself a constitutional right or immunity. Rather, it is a public policy interest in being surrounded with politically or ideologically compatible key aides that is compelling enough to outweigh the First Amendment rights of the affected individual employees.²¹⁰ Members of Congress can assert a comparably compelling interest in the exercise of broad employment-related discretion regarding key legislative advisors so as to advance or defend their individual legislative priorities. Moreover, Congress collectively is able to establish such discretion for its individual members, though it is not required to do so under the Speech or Debate Clause or any other provision of Article I. If members' employment-related discretion is not a function of Speech or Debate Clause immunity, it does not assume the absolute and unqualified status that would be accorded such immunity. One consequence is that Congress can more readily waive its strong interest in promoting loyalty and political compatibility from top aides by enacting a statute that in its view recognizes an even

²⁰⁹ See *supra* text accompanying notes 154–159.

²¹⁰ See *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990) (referring to the “government’s interest in securing employees who will loyally implement its policies”); *Branti v. Finkel*, 445 U.S. 507, 517 (1980) (referring to the “State’s vital interest in maintaining governmental effectiveness and efficiency”); *Elrod v. Burns*, 427 U.S. 347, 367 (1976) (referring to “the need for political loyalty of employees . . . to the end that representative government not be undercut.”). This type of balancing approach may also allow the compelling interest in promoting effective and accountable representative government to outweigh employees’ rights to equal protection under the Fifth Amendment. Cf. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (holding that a state university’s use of race in its admissions process can survive strict scrutiny); *Califano v. Webster*, 430 U.S. 313 (1977) (holding that the federal social security retirement benefits statute according higher payments to women than to similarly situated men served a compelling governmental interest).

stronger public policy consideration—namely, assuring that Congress adheres to the same rule of law it prescribes for the nation as a whole.²¹¹

The text of the CAA indicates that Congress recognized the special importance to members of politically compatible employees in a legislative setting. Yet in creating an exemption from liability for personnel judgments that rely on political compatibility with the employing office,²¹² the CAA is unlikely to be the last word on this matter. By allowing members to invoke political compatibility with respect to *all* employees on their personal and committee staff, the exemption appears substantially overinclusive. The teaching of *Elrod* and its progeny is that, outside of a limited number of policymaking positions, the government's interest in political loyalty of employees is not sufficient to outweigh those employees' constitutional rights. For reasons already explained, the limited circle in the congressional setting is far smaller than a member's entire personal or committee staff.²¹³ The CAA approach is also strangely underinclusive in that the political compatibility exemption does not apply to the FLRA. While the omission probably results from an inadvertent oversight in the CAA drafting process,²¹⁴ the statute as written apparently would not allow a member to terminate a committee counsel on the basis that the counsel's efforts to organize a union are incompatible with the member's legislative agenda. Still, Congress remains able to address both the overinclusive and underinclusive features of the exemption without appealing to speech or debate immunity. An appropriately crafted CAA amendment

²¹¹ Another consequence is that a member seeking to establish a compelling interest in the exercise of employment-related discretion must satisfy a more rigorous burden of proof than would be required under the Speech or Debate Clause. *See supra* note 208.

²¹² *See supra* text accompanying notes 143–144 (discussing Pub. L. No. 104-1, § 502, 109 Stat. 39–40 (1995) (codified at 2 U.S.C. § 1432 (Supp. II 1996)), which established a political compatibility exemption for employment-related decisions affecting personal staff, committee staff, and leadership staff under nine of the eleven workplace statutes included in the CAA).

²¹³ *See supra* text accompanying notes 94–97.

²¹⁴ The House and Senate bills most seriously considered in the 103d Congress differed with respect to FLRA coverage. The House version, H.R. 4822, extended FLRA protection and included the political compatibility exemption. *See* H.R. REP. NO. 103-650, pt. 2, at 2–3, 9, 26–27 (1994). The Senate version, S. 1824, did not include the FLRA at all. *See* S. REP. NO. 103-297, at 22–23 (1994). FLRA coverage was included in the CAA, but the political compatibility exemption language was not picked up. The fact that FLRA enforcement is addressed separately from enforcement of the other nine statutes for unrelated reasons, *see supra* note 43, may explain the failure to mention political compatibility. Given that Congress had special reservations about extending FLRA coverage to its legislative staff at all, it seems highly unlikely that Congress would knowingly have deprived itself of this exemption.

would entitle members of Congress to the same employment-related discretion that elected executive officials enjoy under applicable Supreme Court precedent.

4. Presidential Parallels

A final factor that warrants discussion is the Supreme Court's recognition of constitutional immunity for the President. In *Nixon v. Fitzgerald*,²¹⁵ respondent alleged that top federal officials including President Nixon had terminated his employment in violation of his statutory and constitutional rights.²¹⁶ The Court rejected this claim and in the process distinguished the President from governors, cabinet officers, and other Executive Branch officials by holding that a president has absolute immunity from damages liability extending to all acts within the "outer perimeter" of his duties of office.²¹⁷ Emphasizing the President's singular position in the constitutional scheme, the Court reasoned that the special dangers of judicial intrusion on the authority and functions of the Executive Branch warranted foreclosing private damage actions seeking to vindicate individual rights.²¹⁸

The President's unique status of being elected by the nation as a whole and responsible for the actions of the entire Executive Branch distinguishes him from the 535 members of Congress.²¹⁹ Still, senators and representatives, like the President, are directly accountable to the national electorate. Collectively, their mandate is to serve or at least consider the interests of the nation as a whole, and they are responsible for the actions of an entire political branch of the government. One could argue, therefore, that members of Congress should be viewed as special constitutional actors analogous to the President.

In light of the Court's holding in *Nixon v. Fitzgerald*, a failure to immunize *any* employment-related decisions by members of Congress would yield a curious result. The text of the Constitution is explicit in conferring upon senators and representatives

²¹⁵ 457 U.S. 731 (1982).

²¹⁶ See *id.* at 733–35, 740. Specifically, Fitzgerald alleged that he had been fired in retaliation for his congressional testimony about military cost overruns. See *id.* at 785–88 (White, J., dissenting) (detailing the causes of action).

²¹⁷ *Id.* at 750, 755–57.

²¹⁸ See *id.* at 749–54. The Court reaffirmed this conclusion in *Clinton v. Jones*, 117 S. Ct. 1636 (1997), while declining to extend such absolute constitutional immunity to conduct engaged in by the President before assuming office.

²¹⁹ See *Clinton v. Jones*, 117 S. Ct. at 1653 (Breyer, J., concurring).

absolute immunity from the judicial process, and is silent regarding the availability of such immunity for the President. The historical record suggests that this silence was not inadvertent; there are indications of an understanding that the President was not to enjoy privileges beyond those available to any other citizen.²²⁰ The Court in *Fitzgerald* reasoned that the absence of a specific textual basis did not foreclose subsequent recognition of constitutional immunity based on general separation of powers considerations.²²¹ It need hardly follow from *Fitzgerald*, however, that textual silence authorizes a far broader scope of immunity for the President than is available for members of Congress who were accorded express privileges in Article I.

The conclusion that the Framers in effect sanctioned less demanding protection by being explicit than they did by their silence is possible but unlikely in view of contemporaneous references and the express language used. Yet, that would appear to be the current state of the law if speech or debate immunity is deemed inapplicable to the employment area. The President can discriminate against any Executive Branch employee for whatever vindictive or invidious reason and remain personally immune based on respect for the separation of powers. By contrast, senators and representatives are denied parallel structural protection even with regard to their closest advisors or aides because the Speech or Debate Clause accords narrower immunity.²²² There is a certain irony in determining that the Constitution gives members of Congress no protection at all in employment-related matters after conferring so much protection upon the President. At a minimum, it results in a strangely uneven ap-

²²⁰ See, e.g., *An American Citizen* [Tench Coxe] I, INDEP. GAZETTEER (Philadelphia), Sept. 26, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 20, 24 (Bernard Bailyn ed., 1993) (observing that under proposed Constitution “[The President’s] person is not so much protected as that of a member of the house of representatives; for he may be proceeded against like any other man in the ordinary course of law.”); 10 ANNALS OF CONG. 71 (1800) (statement of Sen. Charles Pinckney of South Carolina) (contrasting privileges extended to members of Congress under Constitution with the absence of such privileges for all others including the President); *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.) (observing “that the President of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted.”).

²²¹ See *Fitzgerald*, 457 U.S. at 750 n.31, 753–54.

²²² See *United States v. Stanley*, 483 U.S. 669, 685 (1987) (stating that the Framers addressed their full range of legislative immunity concerns in Speech or Debate Clause, and speculating that “had they believed further protection was necessary they would have expanded that immunity provision.”).

proach to constitutional immunity for heads of the two politically accountable branches.

This is not to say that the existence of unequal constitutional consequences cannot be explained and indeed justified. Accepting *arguendo* that the Court's approach to the President provides a suitable analogy, a number of factors help account for the Court's divergent constitutional treatment of the two political branches. First, presidential immunity under *Nixon v. Fitzgerald* applies only with respect to private damages actions. The chief executive has long been held subject to the judicial process in other circumstances.²²³ The Court in *Clinton v. Jones* reaffirmed that a sitting President may be required to answer questions or provide other information in the course of judicial proceedings.²²⁴ Speech or Debate Clause immunity, on the other hand, affords more comprehensive protection. By preempting compulsory interrogation "in any other place,"²²⁵ the Clause ensures that members need not be subject to judicial process of any kind. Given a level of protection that may impair or preclude the administration of civil and criminal proceedings, including those involving third parties, the domain of protected legislative conduct merits a different and more circumscribed approach.

Further, Congress has the power to confer upon its members the same protection that the Court in *Nixon* granted to the President. The CAA has done just that, according senators and representatives in the employment setting an equivalent immunity from personal liability for monetary damages. Congress was able to accomplish this politically risky result by subsuming it in a statute creating new rights for Legislative Branch employees, including the right to monetary relief against the institution. The

²²³ See *United States v. Nixon*, 418 U.S. 683, 707–13 (1974) (holding that President must submit tapes to court as part of criminal trial proceedings); *United States v. Burr*, 25 Fed. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692) and 25 Fed. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14, 694) (holding that a subpoena can be directed at the President); cf. Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1705–09 (1997) (contending that despite the Supreme Court's recent decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), exempting the President from suit under the Administrative Procedure Act, the President should be subject to suits concerning his official conduct). See generally Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 739, 809–13 (1992) (discussing lower court approaches to suits against the President in the years since Watergate).

²²⁴ See *Clinton v. Jones*, 117 S. Ct. 1636, 1649–51 (1997) (observing that Presidents have often responded to court orders, and that case management techniques can avoid any undue interference with Executive Branch functions).

²²⁵ U.S. CONST. art. I, § 6, cl. 1.

fact that Presidents already had such personal immunity may have helped make the issue of damages liability more amenable to this type of statutory response, thereby averting the need for a constitutionally based approach.²²⁶

The express protection provided by the Speech or Debate Clause also means that once the privilege applies there can be no statutory supplanting of absolute immunity for members of Congress.²²⁷ The Court in *Nixon v. Fitzgerald* apparently refrained from going this far. Instead, the Court stated that it was dealing only with implied causes of action for damages, and it reserved the question of whether Congress by statute could create an explicit damages action against the President.²²⁸ Thus, assuming that Congress were to enact such a statute for the employment setting,²²⁹ the Court would have to decide whether immunity from personal monetary liability for actions at the “outer perimeter of [a President’s] official responsibility”²³⁰ should continue to apply. The Court’s analysis would presumably balance the dangers of intrusion upon Executive Branch functions against the interests served in allowing actions to enforce the civil rights laws enacted by Congress.²³¹ Regardless of the outcome, this type of balancing approach would not be available under the Speech or Debate Clause if that clause is held to cover particular employment decisions by members of Congress. Once again the absolute nature of the legislative privilege may help justify a more circumspect approach to the scope of protected activity.

²²⁶ Congress also has the power to grant the President immunity from personal liability. Cf. Soldiers and Sailors Civil Relief Act of 1940 (codified as amended at 50 U.S.C. App. §§ 501–525 (1994)) (providing for a stay of civil claims by or against military personnel during the course of active duty). Whereas Congress controls its own fate in this regard, the President would have to depend on a co-equal political branch, creating a more uneasy state of affairs.

²²⁷ See *supra* text accompanying notes 131–136.

²²⁸ See *Fitzgerald*, 457 U.S. at 748–49 & n.27; *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (intimating that an explicit statement from Congress might permissibly create a damages action against the President). *But cf.* *Nixon v. Fitzgerald*, 457 U.S. at 792 (White J., dissenting) (questioning whether the majority’s separation of powers analysis permits a different result if Congress creates such a statutory cause of action). The Court in *Clinton v. Jones*, 117 S. Ct. 1636 (1997), reaffirmed the President’s absolute immunity from damages for official conduct without advertent to the matter of implied versus explicit causes of action.

²²⁹ The Presidential and Executive Office Accountability Act, *supra* note 17, does not qualify as such a statute. It creates damages liability for “employing offices,” but the definition of an “employing office” fails to include the President. See Pub. L. No. 104-331, § 2, 110 Stat. 4053, 4054–56 (codified at 3 U.S.C. §§ 401, 402, 411 (Supp. II 1996)).

²³⁰ *Fitzgerald*, 457 U.S. at 756.

²³¹ See *id.* at 754.

Each of these distinctions supports dealing with members of Congress under the Speech or Debate Clause differently from the way the Court dealt with the President in *Nixon v. Fitzgerald*. Even in separation of powers terms, the President's unique status in the constitutional scheme merits special recognition when compared with the Legislative Branch. The President's role as Commander-in-Chief²³² and his ultimate responsibility to see that the laws are faithfully executed²³³ impose greater obligations and pressures than those shared among 535 members of Congress. The danger that a lawsuit for damages—or the prospect of such a suit—will inhibit the President's performance is thus of larger consequence to the country than the hazards associated with litigation against an individual member of Congress or a group of members. Admittedly, the Court's language in *Nixon v. Fitzgerald* is very strong, and one may fairly question or criticize the apparent reach of its holding.²³⁴ Yet, however expansively the Court's separation of powers analysis is applied to the President, there is good reason not to apply the same analysis to members of Congress. In any event, the contours of that analysis cannot be developed because of the Court's anomalous judgment that the Speech or Debate Clause forecloses any more general immunity based on separation of powers concerns.²³⁵

In the end, no sound basis exists for extending Speech or Debate Clause protections to members of Congress for any employment-related matters. The Speech or Debate Clause rationale of removing pressures that would distort *legislative* decisionmaking is appropriately a response to the potential litigation directed at members by other *legislative* players, such as voters, interest groups, or the Executive Branch. That rationale lacks equivalent constitutional resonance when applied to litigation generated as part of the employer-employee relationship. While

²³² See U.S. CONST. art. II, § 2, cl. 1.

²³³ See U.S. CONST. art. II, § 3, cl. 1.

²³⁴ See *supra* text accompanying note 228 (identifying disagreement as to whether Congress can create statutory cause of action for damages against President after *Fitzgerald*); Thomas M. Cunningham, Comment, *Nixon v. Fitzgerald: A Justifiable Separation of Powers Argument for Absolute Presidential Civil Damages Immunity?*, 68 IOWA L. REV. 557, 577–80 (1983) (arguing that the Court failed to justify why the President's need for absolute immunity should automatically outweigh individuals' right to judicial review of their constitutional claims); Aviva A. Orenstein, Note, *Presidential Immunity From Civil Liability: Nixon v. Fitzgerald*, 68 CORNELL L. REV. 236, 255 (1983) (arguing that the Court went too far, and that the President should be held liable for monetary damages when he knowingly violates an individual's constitutional rights).

²³⁵ See *supra* text accompanying notes 90–91.

there is a vital interest in granting legislators broad discretion in employment-related dealings with their inner circle of advisors, that interest can and should be met without relying on the Speech or Debate Clause at all. Such an approach enables a reviewing court to balance the competing rights of affected employees in a manner consistent with the larger constitutional design. Finally, the President's different constitutional immunity status under *Fitzgerald* does not raise serious problems of unequal treatment between the two branches.

III. THE CAA, UNIONS, AND CONFLICTS OF INTEREST

Apart from concern about Congress's constitutional responsibilities, the CAA also provides in section 220(e) that legislative aides should be denied access to union representation as a class if such a denial is necessary because of "a conflict of interest or appearance of a conflict of interest."²³⁶ The conflict of interest issue may be analyzed from a traditional economic standpoint or in a special legislative and policy-oriented context.²³⁷

²³⁶ Pub. L. No. 104-1, § 220(e)(1)(B), 109 Stat. 21 (1995) (codified at 2 U.S.C. § 1351(e)(1)(B) (Supp. II 1996)).

²³⁷ It is possible to assert as a constitutional matter that allowing collective bargaining at all among legislative aides would compromise or undermine Congress's non-delegable power to enact laws and otherwise to exercise its sovereign legislative authority under Article I. See *supra* text accompanying note 62 (discussing comments submitted to the OOC by the Secretary of the Senate and the Chairman of the Committee on House Oversight). For several reasons, I have chosen not to engage this constitutional argument here. First, it is unlikely that an Article I challenge to the presence of unions among legislative staff may be brought outside the Speech or Debate Clause. See *supra* text accompanying notes 88-91. Second, assuming *arguendo* that such a challenge may be brought, the claim that collective bargaining among public employees with policymaking responsibilities would *per se* violate notions of sovereignty or illegal delegation has been persuasively rebutted by others. See, e.g., Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 735-36 (1983) (rejecting sovereignty and illegal delegation arguments against public employee strikes); Harry T. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 359-61 (1972) (rejecting sovereignty arguments against public sector collective bargaining); WILLEM B. VOSLOO, *COLLECTIVE BARGAINING IN THE UNITED STATES CIVIL SERVICE* 17-20, 24-26 (1966) (rejecting sovereignty and illegal delegation arguments against public employee unions). Finally, the claim that a union presence in congressional offices might compromise the ability of personal staff or committee staff to fulfill their policymaking responsibilities is better understood as a non-constitutional conflict of interest concern. See discussion *infra* Part III.B.

A. Traditional Conflicts of Interest

Because the CAA does not define “conflict of interest,” the phrase may be interpreted in accordance with its ordinary or common usage.²³⁸ Standard dictionary definitions and various federal statutes refer to the conflict between performance of official responsibilities and advancement of private or personal economic interests.²³⁹ Similarly, under general House and Senate ethics rules, the term conflict of interest “is limited in meaning; it denotes a situation in which an official’s conduct of his office conflicts with his private economic affairs.”²⁴⁰ As applied to the issue of unionization, the concern is that a conflict will arise between organized employees’ official job responsibilities and the union’s promotion of their private financial interests. This could occur, for instance, when employees who share responsibility for personnel-related matters, or who have access to personnel-related information, also stand to benefit individually if the union prevails in various negotiating positions.

The FLRA squarely addresses the potential for such traditional conflicts through its treatment of certain types of employees. Confidential employees, those who work closely and share relevant information with an individual who “formulates or effectuates management policies in the field of labor-management relations,”²⁴¹ may not belong to a union at all.²⁴² Supervisors—employees who regularly use their independent judgment to reward, discipline, or otherwise participate in personnel matters²⁴³—

²³⁸ See, e.g., *Smith v. United States*, 508 U.S. 223, 228 (1993).

²³⁹ See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 477 (1981) (defining conflict of interest as “a conflict between the private interests and the official responsibilities of a person in a position of trust (such as a government official)”); BLACK’S LAW DICTIONARY 299 (6th ed. 1990) (defining conflict of interest as “refer[ing] to a clash between public interest and the private pecuniary interest of the [public official] concerned”). See generally Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 Nw. U. L. REV. 57, 63–70 (1992) (providing overview of federal conflict of interest regulation). The OOC invoked both dictionary definitions and Senate and House ethics rules to support its conclusion that a special conflict of interest provision was unnecessary in this setting. See 142 CONG. REC. H10,023 (daily ed. Sept. 4, 1996).

²⁴⁰ COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, 102D CONG., 2D SESS., ETHICS MANUAL FOR MEMBERS, OFFICERS, AND EMPLOYEES OF THE UNITED STATES HOUSE OF REPRESENTATIVES 87 (1992); accord STANDING RULES OF THE SENATE, S. DOC. NO. 104-8, Rule XXXVII (2) (1995) (prohibiting “outside business or professional activity or employment for compensation which is inconsistent with or in conflict with the conscientious performance of official duties.”).

²⁴¹ 5 U.S.C. § 7103(a)(13) (1994).

²⁴² See *id.* at § 7112(b)(2).

²⁴³ See *id.* at § 7103(a)(10).

may not belong to a bargaining unit that includes any non-supervisory employees.²⁴⁴ Management officials, defined as individuals with policymaking duties or responsibilities,²⁴⁵ are likewise excluded from units that include non-managerial employees.²⁴⁶ In addition to the exclusions for confidential, supervisory, and management employees, the statute prohibits any other employee from participating in the management or representation of a union if such activity “would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.”²⁴⁷ Finally, employees engaged in administering any law that involves labor-management relations may not be represented by a union that also represents individuals covered by such a law.²⁴⁸

The Federal Labor Relations Authority (“Authority”) has applied these classifications to Executive Branch employees on a case-by-case basis, focusing on the nature of the work performed in each instance. The Authority has declined to exclude entire categories of employees based on their job classifications or titles.²⁴⁹ For that reason, the Authority has refused to treat attorneys automatically either as confidential employees²⁵⁰ or as mana-

²⁴⁴ *See id.* at § 7112(b)(1); *see also id.* at § 7135(a)(2) (authorizing bargaining units of supervisors in limited circumstances).

²⁴⁵ *See id.* at § 7103(a)(11).

²⁴⁶ *See id.* at § 7112(b)(1); *see also id.* at § 7135(a)(2) (authorizing bargaining units of management officials in limited circumstances).

²⁴⁷ *Id.* at § 7120(e).

²⁴⁸ *See id.* at § 7112(c)(1). Nor can these employees be represented by a union affiliated directly or indirectly with a different union that represents individuals to whom the identified labor-management relations law applies. *See id.* at § 7112(c)(2).

²⁴⁹ *Compare, e.g.,* Defense Logistics Agency Defense Distribution Region, W. Stockton, California, and American Fed’n of Gov’t Employees AFL-CIO Local 916, DA-CA-50226, 1996 WL 560245 (F.L.R.A. June 28, 1996) (holding that a secretary to the chief of support division was a confidential employee because she attended staff meetings and because labor-management conversations were held in front of her) *with* Department of Veterans Affairs Med. Ctr. Denver, Colorado and American Fed. of Gov’t Employees, AFL-CIO Local 2241, DE-CA-50140, 1996 WL 665512 (F.L.R.A. Sept. 27, 1996) (holding that a secretary to the chief of chaplain service was not a confidential employee despite the chief’s labor-related supervisory role, because she did not have a confidential relationship with him); *see also* Department of the Navy, Naval Underwater Sys. Ctr., Newport, R.I., and Federal Union of Scientists and Eng’r, Nat’l Ass’n of Gov’t Employees, Local RI-144, 9 F.L.R.A. 30 (1982) (holding that some engineers were supervisors while others were not, depending on whether they exercised independent judgment in personnel matters).

²⁵⁰ *Compare, e.g.,* U.S. Department of Labor, Office of Solicitor, Arlington Field Office and American Fed’n of Gov’t Employees, Local 12, 37 F.L.R.A. 1371, 1383 (1990) (holding attorneys confidential employees because they represented management in internal labor relations matters) *with* U.S. Dept. of the Treasury, Office of the Chief Counsel, Internal Revenue Serv., Nat’l Office and Nat’l Treasury Employees Union, 41 F.L.R.A. 402 (1991) (holding an attorney not a confidential employee because he had no labor-related functions).

gerial officials.²⁵¹

It is probable that in the congressional context, a number of high-level personal and committee aides would be excluded from coverage as confidential, supervisory, or managerial employees. It is also possible that certain committee staffs may be restricted as to their choice of unions if their committee's authorization, appropriation, or oversight responsibilities over public or private sector labor-management laws are deemed functionally equivalent to "administering [a law] relating to labor-management relations."²⁵² These applications, however, constitute limited exceptions to the FLRA's general purpose of permitting and even approving unionization among federal workers.²⁵³ Congress in the CAA chose to extend FLRA protections to Legislative Branch employees, and it directed the OOC to follow "to the greatest extent practicable" the provisions and purposes of the FLRA when contemplating possible conflict of interest concerns involving personal or committee aides.²⁵⁴ Given this legislative commitment, and the case-by-case approach to traditional conflicts of interest adopted for the Executive Branch, there is ample reason to conclude that categorical or systemic exclusion of personal and committee staff is not warranted unless legislative employment presents special problems.²⁵⁵

²⁵¹ See, e.g., U.S. Dept. of Energy Headquarters Washington DC, and Nat'l Treasury Employees Union, 40 F.L.R.A. 264, 269-73 (1991) (holding that certain attorneys in the office of general counsel were management officials because they established or effectively influenced courses of action for the agency, but also that other attorneys in the same office were not management officials because they simply provided advice or applied technical expertise in specific legal areas). See generally *Arlington Field Office*, supra note 250, at 1381 (concluding that "Congress intended attorneys, like other professionals, to have the same right to be represented by a union that Congress conveyed to other federal employees," and that "[m]embership in a labor organization is in itself not incompatible with the obligations of fidelity owed to [a government] employer by its [attorney] employees.").

²⁵² 5 U.S.C. § 7112(c) (1994). Such committees might include Senate Governmental Affairs, Senate Labor and Human Resources, House Education and the Workforce, and House Government Reform and Oversight.

²⁵³ See 5 U.S.C. § 7101(a)(1) (1994) (concluding that statutory protection for employees' rights to organize and to bargain collectively "(A) safeguards the public interest, (B) contributes to the effective conduct of public business, and (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment . . .").

²⁵⁴ Pub. L. No. 104-1, § 220(e)(1), 109 Stat. 21 (1995) (codified at 2 U.S.C. § 1351(e)(1) (Supp. II 1996)).

²⁵⁵ Campaign contributions from unions representing legislative staff may be viewed as giving rise to a traditional conflict of interest, analogous to the conflict generated by campaign contributions from any interest group that has a policy agenda. For example, a union's contribution to a representative's re-election effort could in theory become a *quid pro quo* for acceding to the union's collective bargaining requests on behalf of the legislator's employees. This *quid pro quo*, however, would hardly be a function of the

B. Legislative or Policy-Related Conflicts of Interest

1. Dual Access and Divided Loyalties

In addition to the traditional conflict between public duties and private interests, unions may be viewed as posing a risk that derives from their status as exclusive bargaining representatives. Simply stated, the concern is that a union may take advantage of the special access it has gained through collective bargaining to enhance unfairly its role as an interest group in the legislative process. To be sure, all interest groups rely on their economic resources or their numerical strength in seeking to maximize influence over issues of legislative policy. Unions compete in this conventional manner, but they also are able to participate on a second level. Unlike other outside groups or individuals with whom a member of Congress may refuse to meet, the union that represents a member's employees has a statutory right to interact with that representative or senator as their employer.²⁵⁶ Moreover, the legislator's duty to bargain in good faith²⁵⁷ means that the union is entitled to more than a mere *pro forma* encounter.

union's presence. Interest groups regularly hope that their financial support for a legislator will be followed by the legislator's official support for their policy priorities. Such direct exchanges may be relatively rare; far more frequent is the scenario in which a private contributor (an individual or interest group) receives privileged access to the legislator following the contribution. See Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 826-28 (1985). Cf. Jill Abramson, *Money Buys a Lot More Than Access*, N.Y. TIMES, Nov. 9, 1997, § 4, at 4. (reporting on the distinction between buying access to Executive Branch officials and purchasing specific policy favors, and on the difficulty of proving that the latter transactions have occurred in practice). Because unions representing congressional employees are already entitled to privileged access by virtue of their status as exclusive bargaining representative, campaign contributions may be less important to them in instrumental terms.

Alternatively, insofar as campaign contributions are viewed as enhancing the special status already accorded to these unions, that status is addressed as part of the discussion in *infra* Part III.B.

²⁵⁶ I assume that for present purposes the representative or senator is deemed the employer of her personal office staff and—if she is committee chairman—of her committee staff as well. She may choose to designate a management official (e.g., the administrative aide in her personal office or the staff director in her committee office) to coordinate negotiations with the union. Still, any collective bargaining agreement that emerges will affect the day-to-day operations of her employees; accordingly, it seems likely that she will participate in at least some aspects of the bargaining process.

²⁵⁷ See 5 U.S.C. § 7102(2) (1994) (granting federal employees the right to engage in collective bargaining through their chosen representatives); *id.* at § 7103(a)(12) (defining "collective bargaining" as the mutual obligation of union and federal employer "to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting [the] employees.").

There will be a series of meetings and discussions between labor and management at which the legislator must present her positions, give supporting reasons, supply relevant information, and respond to proposals or arguments offered by the union.²⁵⁸ These dealings between legislator and union will be protracted in length, they will be at times intense in nature, and they will be conducted in private, outside the regular channels of interest group participation.

When selected as the exclusive bargaining representative, a union will thus have a special kind of continuous access, a forum in which to develop a richer and more complex relationship with the member of Congress and key staff. Because unions, and the organized labor movement, have broad legislative agendas that extend beyond conventional workplace issues,²⁵⁹ they may seek to take advantage of their unique position in numerous ways. A union may informally glean information about the issues or bills that comprise a member's legislative agenda—both as to areas of possible compromise and intensity of personal commitment.²⁶⁰ Such information may assist the union in formulating legislative strategies. On a more direct level, the union may lobby a committee aide regarding a specific legislative issue when that aide's status as a member of the bargaining unit makes him more sus-

²⁵⁸ See generally *NLRB v. Katz*, 369 U.S. 736 (1962) (holding that, as part of the duty to bargain in good faith, an employer may not institute unilateral changes in terms or conditions of employment until it has first bargained to impasse with the union); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (holding that, as part of the duty to bargain in good faith, an employer that claims it cannot afford to pay higher wages must comply with the union's request to provide substantiating information).

²⁵⁹ A review of recent semi-annual lobbying reports filed by various labor organizations reveals lobbying activity on issues affecting immigration, health care, defense, taxation, transportation, nuclear waste, campaign finance reform, food labeling, environmental concerns, criminal law enforcement, and international trade. See, e.g., Lobbying Reports of American Fed'n of State, County, and Mun. Employees; International Bhd. of Teamsters; Service Employees Int'l Union (all for period January 1–June 30, 1997) (on file with author). Each of these labor organizations has been active or may be expected to become active in efforts to unionize Legislative Branch employees. See, e.g., Juliet Eilperin, *Architect Workers Vote "Yes" on Joining Union*, ROLL CALL, Aug. 4, 1997, at 26 (describing AFSCME's success in organizing 622 employees of the Architect of the Capitol's workforce); John Mercurio, *Fraternal Order of Police Beats Out Teamsters in Capitol Union Election*, ROLL CALL, June 16, 1997, at 1, 28 (describing how more than 700 employees of the Capitol Police Force selected the Fraternal Order of Police to represent them, despite vigorous efforts by Teamsters).

²⁶⁰ Informal means of access could include learning about invitations received by the legislator and about which ones are accepted, noticing areas in which constituent correspondence is heaviest and how the legislator responds, and becoming aware of who is in regular or frequent communication with the legislator. See Comments submitted by Kelly D. Johnston, *supra* note 60, at 13.

ceptible to being influenced on the policy matter.²⁶¹ Employees who belong to a union that opposes many of the legislator's policy positions may feel pressured to place their union's interests above the interests of constituents, or they may decide on their own to pursue their legislator's positions less energetically or resourcefully.²⁶² There is even the possibility that a union will signal its preparedness to exchange collective bargaining concessions for a member of Congress's commitment to support or oppose a particular legislative measure.²⁶³ If the legislator balks at following the union's lead on a pending bill or amendment, the union has a special ability to inflict damage from its position as prospective or current exclusive bargaining representative. Organizing materials officially disseminated to encourage employee membership may include harsh criticisms of a legislative employer's current or past practices. Such criticisms would likely be recirculated—if not embellished—by local media, an electoral opponent, or the opposition political party. A recognized union that has not yet secured a collective bargaining agreement might file a series of unfair labor practice charges against the legislator. If appropriately timed—say September of an election year—these too could become grist for partisan political mills.

2. The Risk Overstated

It is true that a union representing congressional employees is empowered to operate at a second level that distinguishes it from other constituents or interest groups competing in the legislative arena. For several reasons, however, neither the union's special position as a dual participant nor the concerns about consequent dilution of loyalty among legislative employees supports a wholesale prohibition of personal and committee staffs from participating in collective bargaining activities.

At the outset, it is easy to exaggerate the special nature of divided loyalty problems involving unionized employees. Legislative aides are not prohibited as a general matter from belonging to ideologically oriented interest groups.²⁶⁴ Committee and per-

²⁶¹ See Comments submitted by Rep. Thomas, *supra* note 60, at 15.

²⁶² See Comments submitted by Kelly D. Johnston, *supra* note 60, at 13.

²⁶³ See *id.*

²⁶⁴ Indeed, prohibitions on freedom of association for governmental employees would raise serious First Amendment concerns. See, e.g., *Smith v. Arkansas State Highway*

sonal staff may become members or supporters of politically active associations such as the National Right to Life Committee, the Wilderness Society, or the American Farm Bureau. Such participation raises the potential for conflict between a key employee's policy preferences—as promoted by the outside group—and the positions or priorities of that employee's legislative employer. But the mere potential for such conflict does not justify barring union membership for legislative aides any more than it would justify barring membership in these other legislatively active groups.

Moreover, personal staff and committee aides are especially unlikely to be diverted from the obligation of fidelity to their legislative principal. In contrast to the vast majority of Executive Branch employees, these are political appointees recruited and hired to work for particular legislators or committees. Loyalty and congruence of ideological perspective are prime selection criteria for individuals whose major responsibility is to promote the legislative values and policies of a certain member or committee chairman.²⁶⁵ Once hired, these legislative aides are also closely monitored in their performance of policy-related functions. Members of Congress may be expected to react swiftly to official conduct by an aide that is at odds with the member's stated goals or policy objectives.²⁶⁶

To the extent that employees do act in a subversive or disloyal manner by elevating the union's interest above their legislator's, alternative remedies are available that are less restrictive than blanket exclusions from statutory coverage. The Supreme Court

Employees, 441 U.S. 463, 464–65 (1979); *Boddie v. City of Columbus, Mississippi*, 989 F.2d 745, 748 (5th Cir. 1993).

²⁶⁵ See HARRISON W. FOX, JR. & SUSAN WEBB HAMMOND, *CONGRESSIONAL STAFFS* 148, 153 (1977) (arguing that staff are hired for loyalty, expertise, and judgment and that most staff reflect or even reinforce the legislator's views and values); SCHNEIER & GROSS, *supra* note 81, at 147 (contending that staff's apparent autonomy is largely a function of their ability to anticipate and serve member preferences); David E. Price, *Professionals and Entrepreneurs: Staff Orientations and Policy Making on Three Senate Committees*, 30 J. POL. 316, 320–25 (1971) (presenting an example of an aggressively pro-consumer committee staff that reflected the chairman's desire to be known as a strong consumer advocate).

²⁶⁶ See SINCLAIR, *supra* note 151, at 73 (discussing how congressional leaders receive feedback on staff behavior from various sources, and this feedback system assures that staff will perform as faithful agents). Brudney, *supra* note 170, at 50 (discussing political incentives to engage in close monitoring, including the intensifying effect of publicity or media exposure). The presence of a union able to file a grievance on behalf of the aide may reduce or delay the speed with which disciplinary action is implemented. In the end, however, an employee who violates neutral employment standards or personnel rules is likely to be disciplined even in a unionized setting. See *infra* text accompanying note 267.

recently reaffirmed that employees protected by labor-management relations laws remain subject to discipline or discharge for violating non-discriminatory work rules or employment standards.²⁶⁷ Thus, rules prohibiting the misuse of confidential information, or requiring that job duties be discharged solely in the interest of the legislator, could be enforced against overly zealous union supporters—provided that the enforcement is not a pretext for anti-union animus and that the same enforcement occurs with respect to overly zealous employees who promote other ideological causes.

While the union retains its special ability to inflict political harm based on its official status as exclusive representative, that power will be tempered by practical realities. If a senator is generally supportive of organized labor's positions in the legislative arena, the union will probably be cautious if not reluctant in its critiques of that senator's actions as an employer.²⁶⁸ On the other hand, if a senator is regularly hostile to organized labor's agenda, then even sharply worded criticism from a union will cause little or no political damage—it may even be welcomed as further evidence of ideological consistency. In short, because organized labor and its political opponents will tend to view a legislator's policy positions as more significant than his management practices, union reaction to the legislator's conduct as an employer is unlikely to affect his performance on legislative matters.

A final perspective is that policy-related conflicts of interest are in certain respects endemic to politically accountable government. Legislators are elected at least in part because voters perceive that they share various communities of interest with some or all of the legislator's constituents.²⁶⁹ A member who supports

²⁶⁷ See *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 457 (1996).

²⁶⁸ Reluctance should not be equated with silence. A union's duty of fair representation requires that it avoid arbitrary, discriminatory, or bad faith conduct toward members of the bargaining unit. See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Accordingly, unions in appropriate circumstances are likely to file and pursue grievances alleging misconduct even against senators friendly to organized labor's policy positions. Still, the duty of fair representation allows unions to operate with considerable discretion in determining how to process grievances and to formulate a collective bargaining strategy. See *Vaca*, 386 U.S. at 191–95; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337–38 (1953).

²⁶⁹ See GETZ, *supra* note 27, at 81 (arguing that a legislator's role as broker and his membership in communities of interest justify a different approach to conflicts); FINAL REPORT AND RECOMMENDATIONS OF HOUSE BIPARTISAN TASK FORCE ON ETHICS, 135 CONG. REC. H9253, 9259 (daily ed. Nov. 21, 1989, Part II) [hereinafter BIPARTISAN TASK FORCE] (maintaining that some merger of economic interests between members of

and promotes organized labor's legislative priorities after meeting with a union is comparable in this respect to a member who promotes oil or farm interests after private meetings with oil industry or farm lobbyists.²⁷⁰ If the union has used its exclusive representative status as a means to conduct lobbying for its legislative positions, mandatory disclosure of these lobbying contacts provides a further means of monitoring potential conflicts of interest.²⁷¹ The very nature of the representative function suggests that legislative staff—like legislators—will at times support bills or provisions that inure publicly to the benefit of groups with which those staff identify or to which they belong. That congruence of commitment cannot alone be enough to serve as a disqualifying conflict of interest.

3. The Risk Addressed

To conclude that a concern is overstated in practical terms is not to say that the concern is illusory or trivial. Collective bargaining by government employers raises special issues that do not arise in the private sector. Government's frequent separation of operating authority from funding responsibility allows for and may even encourage negotiated agreements that are unconstrained by current budgets.²⁷² Further, as already referred to, unions may achieve public policy objectives through bilateral negotiations while other groups struggle with less success in the multilateral political process.²⁷³ Congress, however, has not been insensitive to these and other distinguishing features of unionization among government employees. When it enacted the FLRA in 1978,²⁷⁴

Congress and their constituents is the nature of representative government).

²⁷⁰ Cf. GETZ, *supra* note 27, at 58 (paraphrasing an Oklahoma senator who said that if he could not vote for the things that Oklahoma residents depend on, he would establish a conflict of interest that would eliminate him from Congress).

²⁷¹ See Pub. L. No. 104-65, § 5(b)(2), 109 Stat. 691, 697-98 (1995) (codified at 2 U.S.C. § 1604(b)(2) (Supp. II 1996)) (requiring semiannual reports on lobbying activities that include lists of specific issues lobbied); see also HOUSE BIPARTISAN TASK FORCE, *supra* note 269, at H9259 (recommending disclosure plus the discipline of the electoral process as appropriate safeguards).

²⁷² See generally DONALD WOLLETT ET AL., *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 3 (4th ed. 1993); Edwards, *supra* note 237, at 362.

²⁷³ See *supra* text accompanying notes 256-258; Edwards, *supra* note 237, at 363; Harry H. Wellington & Ralph K. Winter, Jr., *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 807-08 (1970).

²⁷⁴ The FLRA was included as Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 701-704, 92 Stat. 1111, 1191-1218 (codified at 5 U.S.C. §§ 7101-7135 (1994)). Prior to 1978, federal employees had certain rights to organize and engage in collective bargaining pursuant to a series of Executive Orders. See, e.g., Exec. Order No. 10,988, 3 C.F.R. 521 (1962) (Pres. Kennedy); Exec. Order No. 11,491, 3

Congress responded to concerns about collective bargaining among Executive Branch employees principally by codifying two sets of limits on the power of federal employee unions.

First, the FLRA substantially restricts the subjects on which unions may negotiate when compared with the scope of bargaining in private sector labor relations. Employee rates of pay and fringe benefits are already fixed pursuant to various federal statutory provisions.²⁷⁵ The FLRA leaves those wage and benefit arrangements off limits to collective bargaining.²⁷⁶ Further, federal agencies under the FLRA are expressly given a wide range of substantive management rights. These include the right to hire, remove, or reduce pay consistent with other laws;²⁷⁷ the right to determine the agency's mission and the organization necessary to further that mission;²⁷⁸ the right to establish budget and number of employees, thereby controlling the nature and extent of reductions in workforce;²⁷⁹ and the right to determine whether agency work will be contracted out.²⁸⁰ Even with respect to agency officials' procedural implementation of these broad management rights—such as making arrangements for adversely affected employees—the FLRA permits, but does *not* require, negotiation with the union.²⁸¹ Thus, although federal employers must bargain in good faith over “conditions of employment,” the definition of these conditions excludes many economic issues and policy-related judgments that are bargainable in the private sector.²⁸² For legislative employers, the exclusion of policy-related

No. 10,988, 3 C.F.R. 521 (1962) (Pres. Kennedy); Exec. Order No. 11,491, 3 C.F.R. 861 (1969) (Pres. Nixon); Exec. Order No. 11,838, 3 C.F.R. 957 (1975) (Pres. Ford).

²⁷⁵ See, e.g., 5 U.S.C. §§ 5101–5392 (1994) (establishing job classification and pay comparability system for federal employees); *id.* at §§ 6301–6327 (establishing system for annual leave, sick leave, and other paid leave); *id.* at §§ 8307–8479 (establishing federal employees' retirement system).

²⁷⁶ See 5 U.S.C. § 7103(14) (defining “conditions of employment” on which parties must bargain collectively so as to exclude policies, practices, and matters provided for by federal statute); *id.* at § 7117(a)(2) (excluding from domain of collective bargaining any agency rule or regulation unless the Authority determines that there is no compelling need for the rule or regulation).

²⁷⁷ See *id.* at § 7106(a)(2)(A).

²⁷⁸ See *id.* at § 7106(a)(1).

²⁷⁹ See *id.*

²⁸⁰ See *id.* at § 7106(a)(2)(B).

²⁸¹ See *id.* at § 7106(b)(2), (3).

²⁸² See, e.g., 29 U.S.C. § 158(d) (1994) (requiring private parties to bargain collectively on wages and other economic terms of employment); *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203 (1964) (requiring private employer to bargain about decision to contract out work); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–82 (1981) (requiring private employer to bargain over effects on employees from decision to close part of a business).

judgments seems to remove categorically from the bargaining table a member's legislative positions and priorities.²⁸³

Second, the FLRA significantly curtails federal employees' ability to use concerted economic pressure as part of the collective bargaining process. The Act makes it unlawful for a union to participate in or condone a strike or work slowdown, or to engage in labor-related picketing that interferes with a federal agency's operations.²⁸⁴ Unions that engage in such unlawful conduct may be decertified.²⁸⁵ Individual employees who participate in a strike or assert the right to strike are barred from federal employment;²⁸⁶ they also may be prosecuted for criminal misconduct.²⁸⁷ This strong stance against group action by employees minimizes unions' capacity to impede the policymaking functions of the federal government. In the Legislative Branch context, it further reduces unions' ability to disrupt Congress's lawmaking activities.

In enacting these two sets of restraints on the power of unions in federal employment, Congress deliberately departed from private sector models as part of its stated goal "to meet the special requirements and needs of the government."²⁸⁸ The express reservation of broad management rights originated in the 1960s when a series of executive orders for the first time authorized collective bargaining by federal employees.²⁸⁹ The prohibition on federal employee strikes dates from an even earlier period.²⁹⁰

²⁸³ The CAA in effect makes each committee or member office into a federal employer for FLRA purposes. See *supra* text accompanying note 45. Under the FLRA, management retains the unilateral authority "to determine the mission, budget, organization, number of employees, and internal security practices of the agency." 5 U.S.C. § 7106(a)(1). Management's retained right to determine its own mission and organization seems directly applicable to matters of legislative policy and strategy. See *United States Customs Serv. v. FLRA*, 854 F.2d 1414, 1418–19 (D.C. Cir. 1988) (holding that a Customs Service decision on timing for implementation of its program to streamline inspection of vessels is part of management's reserved right to determine means by which the agency's mission will be conducted); see also *American Fed'n of Gov't Employees v. FLRA*, 802 F.2d 1159, 1162 (9th Cir. 1986) (holding that a naval weapon station's policy of expeditious suspension of driving privileges is an internal security practice free from bargaining under § 7106(a)(1)).

²⁸⁴ See 5 U.S.C. § 7116(b)(7).

²⁸⁵ See *id.* at § 7120(f).

²⁸⁶ See *id.* at § 7311.

²⁸⁷ See 18 U.S.C. § 1918 (1994) (making violations of 5 U.S.C. § 7311 a felony); *id.* at § 2 (making it unlawful to aid or abet the violation of a federal statute).

²⁸⁸ 5 U.S.C. § 7101(b).

²⁸⁹ See, e.g., Exec. Order No. 10,988, §§ 6(b), 7, 3 C.F.R. 521, 524–25 (1962); Exec. Order No. 11,491, § 12, 3 C.F.R. 861, 869–70 (1969); Exec. Order No. 11,636, § 8, 3 C.F.R. 634, 641–42 (1971).

²⁹⁰ See Meltzer & Sunstein, *supra* note 237, at 773–75 (describing initial 1946 anti-strike provision and its amplification between 1947 and 1955).

During congressional consideration of the FLRA, serious efforts were made to expand the scope of bargaining so that it would resemble more closely the private sector model.²⁹¹ Some members of Congress also expressed support for binding arbitration, and testimony from federal union leaders advocated legalization of strikes.²⁹² The final version of the statute, enacted in 1978, reaffirmed both the restricted domain for collective bargaining and the strong anti-strike policy.²⁹³

The CAA appears to embrace the judgments made by this earlier Congress when it states that implementing regulations should be as consistent as practicable with the FLRA approach.²⁹⁴ Congress in 1995 could thus be seen as signaling its recognition that collective bargaining can be accommodated to the special realities of the legislative process. Yet, the more recent record of expressed reservations by certain members of Congress and passive resistance by others belies such a conclusion. Instead, congressional opposition may be better understood as reflecting an inability or unwillingness to accept conclusions already reached about the legitimacy of public sector unions.

²⁹¹ See H.R. 13, 95th Cong. § 7103(11), (13) (1978), reprinted in SUBCOMM. ON POSTAL PERSONNEL AND MODERNIZATION OF THE COMM. ON POST OFFICE AND CIVIL SERV., 96TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978, at 121, 127–28 [hereinafter LEG. HIST.] (defining “conditions of employment” to include pay practices, disciplinary procedures, and reduction in force practices, and defining “collective bargaining” to include good faith negotiations over these matters); H.R. 1589, 95th Cong. § 3(m), (p) (1978), reprinted in LEG. HIST. 183, 189–90 (similarly expanding the subjects amenable to collective bargaining); H.R. 9094, 95th Cong. § 7103(14), (16) (1978), reprinted in LEG. HIST. 235, 243–44 (same). See S. Rep. No. 95-1403, at 12 (1978), reprinted in LEG. HIST. 682 (reporting that Title VII on labor-management relations does not go as far as H.R. 9094 in expanding the scope of bargaining); 124 CONG. REC. H9637–38 (daily ed. Sept. 13, 1978), reprinted in LEG. HIST. 932 (statement of Rep. Bill Clay (D-Mo.)) (observing that explicit management rights clause was included in Title VII despite arguments by him and others that courts should protect such rights under a case-by-case approach as they do in the private sector).

²⁹² See, e.g., H.R. 9094, 95th Cong. § 7119 (1978), reprinted in LEG. HIST., *supra* note 291, at 285–87 (authorizing parties to agree to binding arbitration procedure, and authorizing Federal Services Impasse Panel to “take whatever action is necessary” in resolving disputes); *Improved Labor-Management Relations in the Federal Service: Hearings on H.R. 13 and H.R. 1589 Before the Subcomm. on Civil Serv. of the House Comm. on Post Office and Civil Serv.* 14–15 (95th Cong. 1977) (statement of Kenneth Meiklejohn, AFL-CIO) (supporting provisions that require final and binding arbitration, while expressing interest in having the right to strike); *id.* at 140–41 (statement of John Leyden, PATCO) (stating willingness to accept binding arbitration “although we would like the right to strike”).

²⁹³ See generally Christine Godsil Cooper & Sharon Bauer, *Federal Sector Labor Relations Reform*, 56 CHI.-KENT L. REV. 509, 526–27 (1980); Meltzer & Sunstein, *supra* note 237, at 777.

²⁹⁴ Pub. L. No. 104-1, § 220(e)(1), 109 Stat. 3, 20–22 (1995) (codified at 2 U.S.C. § 1351(e)(1) (Supp. II 1996)).

4. History Revisited

For the first half of this century, union activity among government employees lacked both the statutory protections and the numerical successes achieved by private sector workers. With respect to the federal government, presidents from Theodore Roosevelt and Taft to Franklin Roosevelt and Eisenhower voiced grave reservations about allowing unions to seek improved working conditions on behalf of Executive Branch employees.²⁹⁵ Much of the opposition reflected a fear that federal employees and their unions would disrupt or undermine Executive Branch personnel management that was assertedly neutral, rule-based, and sensitive to political and fiscal realities.²⁹⁶ More broadly, scholarly concern about allowing collective bargaining in government focused in part on formal constitutional claims that the government's sovereign authority must not be shared with or delegated to unions.²⁹⁷ Commentators also suggested that in practical

²⁹⁵ See, e.g., MURRAY B. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 6-7 (1976) (describing Theodore Roosevelt's view that lobbying or electoral activity by the postal workers' union undermined the executive's authority to manage the government, and his 1902 Executive Order prohibiting federal employees, individually or in associations, from attempting to influence legislation except through their agency or department directors); *id.* at 7 (describing President Taft's 1909 Executive Order extending the earlier order to bar federal employees from responding to any congressional request except as authorized by the head of their department); EUGENE C. HAGBURG & MARVIN J. LEVINE, LABOR RELATIONS: AN INTEGRATED PERSPECTIVE 166 (1978) (quoting from President Franklin Roosevelt's 1937 letter to the National Federation of Federal Employees, in which he warned that "the process of collective bargaining, as usually understood, cannot be transplanted into the public service" principally because "[t]he very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations"); WILSON R. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 26 (1961) (quoting from President Eisenhower's 1960 message vetoing a federal employee pay raise bill, in which he remarked "That public servants might be so unmindful of the national good" as to have sought to make Congress accede to their demands "is, to say the least, shocking.").

²⁹⁶ Congress in 1912 had passed the Lloyd-LaFollette Act, nullifying the Taft and Theodore Roosevelt executive orders by establishing federal employees' right to petition Congress regarding working conditions and other matters. See Pub. L. No. 62-336, 37 Stat. 539, 555 (1912). Over the ensuing fifty years, however, little progress was made in establishing meaningful collective bargaining protections for federal employees. The 1937 statement from Franklin Roosevelt—a recognized supporter of organized labor in the private sector—was viewed as a key official pronouncement against extending collective bargaining to the federal government. Numerous bills proposing protections were introduced in Congress between 1949 and 1961; all were opposed by the Executive Branch as unnecessary if not unduly restrictive, and none of the bills passed. For general discussion of developments in this area, see NESBITT, *supra* note 295, at 8-19; HAGBURG & LEVINE, *supra* note 295, at 166-67; HART, *supra* note 295, at 19-26, 33-37.

²⁹⁷ See Edwards, *supra* note 237, at 359; Harry H. Wellington & Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1108-09 (1969); Meltzer & Sunstein, *supra* note 237, at 735-36. These claims have been ad-

terms, unions representing government workers might amass excessive power because market forces are less effective at restraining union demands in the public sector, especially when voters perceive the government services at issue to be essential to their welfare.²⁹⁸

By the 1960s, however, there was widespread support for the idea that public employees should have the opportunity to seek union representation and engage in collective bargaining. As two leading commentators observed, government workers—like their private sector counterparts—were experiencing a depersonalized and bureaucratic workplace that “has encouraged [them] to look to collective action for a sense of control over their employment destiny.”²⁹⁹ The peaceful democratic mechanisms for securing and maintaining union representation were perceived as compatible with our larger political system.³⁰⁰ Moreover, the voters and taxpayers who consume and fund government services tend to identify with the asserted economic interests of public employers. Accordingly, proponents maintained that for government workers seeking to improve their conditions of employment, access to union representation was justified in order to offset their relatively isolated status in the budgetary process.³⁰¹

Over the past four decades, state and local governments as well as the federal government have developed extensive legal frameworks allowing public employees to form, join, and sup-

9 (1969); Meltzer & Sunstein, *supra* note 237, at 735–36. These claims have been addressed. *See supra* note 237.

²⁹⁸ *See* Wellington & Winter, *supra* note 297, at 1119–25; Wellington & Winter, *supra* note 273, at 806–08, 817–22; Meltzer & Sunstein, *supra* note 237, at 738–41; Edwards, *supra* note 237, at 362.

²⁹⁹ Wellington & Winter, *supra* note 297, at 1115.

³⁰⁰ *See* Wellington & Winter, *supra* note 273, at 810 (contending that while public employee strikes pose a threat to the “normal American political process,” establishment of collective bargaining through traditional mandatory recognition procedure does not).

³⁰¹ *See, e.g.,* Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 *YALE L.J.* 1156, 1159–60, 1165–68 (1974); Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 *U. CIN. L. REV.* 669, 675 (1975). There was considerable debate among commentators as to whether public sector unions would exercise disproportionate power in budgetmaking and other government processes if granted traditional collective bargaining related powers. *See, e.g.,* R. Theodore Clark, Jr., *Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 *U. CIN. L. REV.* 680, 683 (1975) (rejecting Summers’s contention that the political process operates to the general disadvantage of organized public employees); John F. Burton, Jr. & Charles Krider, *The Role and Consequences of Strikes by Public Employees*, 79 *YALE L.J.* 418, 424–28 (1970) (criticizing Wellington and Winter’s thesis that economic constraints on unions do not meaningfully exist in the public sector).

port labor organizations.³⁰² Public employee membership in unions has grown at a steady rate even as private sector union strength has declined.³⁰³ At the present time, nearly 45% of state and local government workers are covered by a collective bargaining agreement while some 40% of federal sector employees are represented by labor organizations.³⁰⁴

In the context of the section 220(e) rulemaking proceeding, neither the OOC nor the congressional commenters who expressed their reservations relied on or referred to this sweep of historical events.³⁰⁵ While the rulemaking record might not be expected to include such historical perspective, it is fair to assume that Congress was aware of the dynamic developments legitimating union representation in public employment. Congress in the CAA made the deliberate choice to be bound by the same set of labor-management rules that apply to the Executive Branch under the FLRA. This choice reflects at least tacit recognition that the limits imposed on unions by existing federal law—restricting the scope of collective bargaining and prohibiting group economic pressures—were sufficient to protect the business of government in the Legislative Branch just as they have been in the Executive Branch.

The only remaining question is whether unionization of congressional employees who are responsible for helping to shape legislative policy raises novel concerns not anticipated in the Executive Branch setting. The answer to that question is no. Many if not most federal departments or agencies have legislative affairs offices, with employees whose activities are in key respects comparable to those of a House or Senate legislative aide

³⁰² The authorization for federal employees came through a series of executive orders and then the FLRA. See *supra* note 289 and accompanying text. Since 1960, collective bargaining statutes have been enacted by more than twenty states and scores of local governments. See GORDON E. JACKSON, LABOR AND EMPLOYMENT LAW DESK BOOK, Part VI (2d ed. 1993 & 1997 Supp.) (discussing labor relations laws for all fifty states).

³⁰³ See U.S. DEPT. OF LABOR, HANDBOOK OF LABOR STATISTICS 201, 403, tbls. 100, 162 (1980) (indicating that in 1962 approximately 13% of individuals employed by federal, state, and local governments were union members); UNION MEMBERSHIP AND EARNINGS DATA BOOK 10, tbl. 1 (BNA 1995) (reporting that between 1973 and 1995, the percentage of public sector wage and salary workers who are union members, increased from 23.0% to 37.7% while the percentage of private sector wage and salary workers belonging to unions declined from 24.2% to 10.3%).

³⁰⁴ See UNION MEMBERSHIP AND EARNINGS DATA BOOK, *supra* note 303, at 12, tbl. 3.

³⁰⁵ One labor union commenter that supported broad FLRA coverage did invoke the historical events whereby federal employees were granted rights to petition Congress and to organize and bargain collectively. See Letter from Peter Winch, National Organizer, AFGE, to Glen Nager, Chairman of the OOC Board of Directors 1-2 (Apr. 9, 1996) (on file with author).

or committee counsel. These Executive Branch employees must directly or indirectly advise their agency head on whether proposed legislation merits agency support. In order best to render such advice, they must interact with and respond to private interest groups. They also may be called upon to help draft proposed statutory amendments, committee testimony, or other legislative history. Notwithstanding their obvious legislative policy responsibilities, the FLRA does not exclude this group of employees from access to union representation.³⁰⁶

Similarly, the fact that congressional employees are political rather than career appointees does not present special problems with respect to collective bargaining status. Federal agencies regularly are authorized to fill positions of a policymaking nature with so-called "Schedule C" appointees hired outside the career or competitive civil service.³⁰⁷ These Schedule C appointees are not excluded from coverage under the FLRA.³⁰⁸

Finally, the risk that unions will distort the policymaking process through their dual access³⁰⁹ is no more serious than the similar risk associated with unions that represent Executive Branch employees. If anything, the chances of distortion would seem to be less in the congressional setting. Certain issues that Executive Branch employees may characterize as affecting conditions of employment will also have a substantial public dimension. Examples include the development of merit pay standards for teachers in Department of Defense schools, or the requirement of internal monitoring procedures for FBI agents. Employee unions in this setting might attempt to pressure their agency to determine the policy issue in their favor as part of the collec-

³⁰⁶ They may, of course, be excluded on an individual basis as managerial, supervisory, or confidential employees.

³⁰⁷ See 5 C.F.R. § 213.3301 (1994) (providing in pertinent part that "agencies may make appointments under this section to positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials. Positions filled under this authority are excepted from the competitive service and constitute Schedule C . . .").

³⁰⁸ See U.S. Dep't of Housing and Urban Dev. Headquarters and American Fed'n of Gov't Employees, Local 476, 41 F.L.R.A. 1226, 1236-37 (1991) (observing that Schedule C employees are not expressly excluded from FLRA coverage, and that even if an employee has the "close and confidential working relationship" referred to in the applicable regulation [5 C.F.R. § 213.3301], this does not compel a conclusion that the employee is "confidential" as defined in the FLRA). Schedule C employees may, however, have a sufficiently distinct community of interest to require that they not belong to the same bargaining unit as career appointees. See *id.* at 1238-39. Of course, in a congressional office, where everyone is a political appointee, the latter distinction may not be terribly important.

³⁰⁹ See *supra* text accompanying notes 256-263.

tive bargaining process. By contrast, congressional employees do not offer these types of services to a broader group of consumers. Accordingly, their unions at most will try and use their own conditions of employment as leverage to influence resolution of unrelated policy issues that do implicate public interests. That type of indirect distortion is less likely to be effective, both because the leverage itself is weak and because the injection of unrelated policy matters into bargaining is prohibited.³¹⁰

C. *Experience in Other Countries*

Although Congress is just now confronting the question of whether—and to what extent—to allow collective bargaining within its walls, it is far from the first national legislature to address the matter. A number of other industrialized nations have authorized parliamentary employees—including professional staff who work for members or committees—to form or participate in unions. There are, of course, differences in legal culture and socioeconomic conditions between those countries and the United States. Still, the existence of collective bargaining relationships among professional employees in the Legislative Branch has been deemed acceptable in societies not substantially dissimilar from our own.

In England, unions have a statutory right of access to House of Commons employees under a 1978 law.³¹¹ Legislative staff employed by the House of Commons belong to unions and benefit from collectively bargained agreements or dispute resolution procedures that apply directly to the legislature.³¹² In Australia, parliamentary employees have the right to unionize under a 1988

³¹⁰ See *supra* text accompanying note 283.

³¹¹ House of Commons (Administration) Act, 1978, ch. 36, § 5(5), sched. 1 (Eng.); see also 5 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS §§ 376–377, Gr. Brit. (R. Blanpain ed., 1997) [hereinafter INTERNATIONAL ENCYCLOPAEDIA] (describing legislation that establishes a general right to unionization for employees in Britain, including private employees of members of Parliament).

³¹² See Letter from Dr. C.C. Pond, President, House of Commons Trade Union Side, to Jennifer Larraguibel, Foreign and International Law Librarian, The Ohio State University College of Law 1 (Nov. 5, 1996) (describing how both House of Commons staff and personal staff employed by members belong to unions) (on file with author); Letter from Dr. C.C. Pond to Jennifer Larraguibel (Nov. 5, 1997) (amplifying the state of affairs described in earlier letter) (on file with author); House of Commons Whitley Committee Constitution (1994) (setting forth negotiated agreement between House of Commons management and coalition of eleven trade unions) (on file with author); House of Commons Dispute Procedure Agreement (1994) (setting forth agreed procedure for resolving work-related disputes) (on file with author).

law.³¹³ Many staff employed by members of Parliament, either to handle constituent business or to assist in management of legislative matters, are represented by a union.³¹⁴ In Canada, some legislative staff are expressly excluded from collective bargaining protection under a 1986 law, though other parliamentary employees are permitted to join unions and have chosen to do so.³¹⁵ While in each of these instances professional staff belong to unions of parliamentary employees, legislative employees in other countries may be members of broader interprofessional trade unions.³¹⁶ In short, not every country accords parliamentary employees the right to organize and engage in collective bargaining, but there is ample evidence that legislative staff are represented by unions—including staff who serve the policy-related needs of their parliamentary principal or of the institution as a whole.

CONCLUSION

Congress's decision to extend labor relations protections to its own legislative aides deserves to be implemented. The argument for exclusion of key committee and personal staff on constitutional grounds presents a close question, one that is not limited to the availability of statutory protection for unionization. In the final analysis, however, the immunity of the Speech or Debate Clause should not be extended to the realm of employment-related conduct by members of Congress. The conflict of interest

³¹³ Industrial Relations Act, 1988, ch. 86 (Austl.), Part VIB, § 170.

³¹⁴ See Letter from Graeme Thomson, Officer for Community and Public Sector Union, to Jennifer Larraguibel (Oct. 24, 1996) (explaining how electorate officers, employed by individual members of Parliament and senators, especially those belonging to Australian Labor Party, are unionized) (on file with author); Electorate Officers Agreement, 1995–96 (collectively bargained agreement governing terms and conditions of employment for electorate officers) (on file with author).

³¹⁵ See Parliamentary Employment and Staff Relations Act, ch. 41, § 4(2) (1986) (Can.) (specifying that provisions establishing collective bargaining rights and implementation procedures do not apply to leadership staff or to “the staff of any other individual Member of Parliament”); E-Mail Letter from Lloyd Fucile, Public Service Alliance of Canada, to Kim Clarke, Reference Librarian, The Ohio State University College of Law (Oct. 22, 1997) (explaining that some professional committee staff are unionized) (on file with author).

³¹⁶ See Letter from Xavier Roques, Director of Personnel Bureau, Assemblée Nationale, to Jennifer Larraguibel (Nov. 20, 1996) (explaining that staff members employed by individual deputies are guaranteed the exercise of trade union rights, and that some of them probably belong to inter-professional trade unions given the absence of a union dedicated to parliamentary employees) (French original and English translation on file with author); see also 5 INTERNATIONAL ENCYCLOPAEDIA, *supra* note 311, at §§ 308–11, 314–17, (Fr.) (describing legislation that establishes general right to unionize).

arguments favoring exclusion also are unpersuasive. Concerns about special union access and divided employee loyalties are not materially different than those expressed with regard to federal employees in the Executive Branch or indeed public employees in state and local government. The FLRA's accommodation of those concerns—through specific exemptions based on job functions, restrictions imposed on the scope of bargaining, and limitations on the use of group pressure—represents a fully adequate response for the Legislative Branch setting.

In considering its next move, Congress must decide whether to proceed with its previously announced intention to apply the FLRA. Congress could follow the English approach and provide access to union representation for legislative staff. It also could follow the example of Canada and decide explicitly to exclude certain legislative aides from coverage under the labor relations laws. In the CAA Congress chose neither option, instead enacting an inconclusive provision that assigns key policymaking choices to an administrative agency while subtly reserving to itself the power to reject the agency's conclusions.³¹⁷ Although the strategy of delegating tough policy judgments to an agency has been deemed characteristic of Congress's legislative approach in other areas,³¹⁸ its application in the instant setting is peculiarly ironic. The Congressional Accountability Act drew high praise not for its quite modest practical impact but rather for its considerable symbolic implications. Yet, Congress has effectively hidden the fact that with respect to unions and collective bargaining it remains beyond the reach of the laws it has imposed on all other employers.

It is time for Congress to make a choice. By applying the same workplace protection laws to itself that are experienced elsewhere in government or society at large, Congress keeps faith with the public and develops a first-hand appreciation for the costs and benefits associated with such regulation. Alternatively, by expressly exempting certain parts of its operation from statutory coverage, Congress can explain to that same public why special arrangements are appropriate or necessary from a policy

³¹⁷ See *supra* text accompanying notes 51–55.

³¹⁸ See generally MICHAEL HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 154 (1981) (arguing that Congress regularly deals with conflictual demands from outside groups by enacting ambiguous statutes delegating policy responsibility to agencies).

standpoint. In either instance, Congress would be opting for accountability rather than denial.