

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OFFICE OF SENATOR MARK :

4 DAYTON, :

5 Appellant :

6 v. : No. 06-618

7 BRAD HANSON. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, April 24, 2007

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 1:00 p.m.

15 APPEARANCES:

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17 employment, Washington D.C.; on behalf of
18 Appellant.

19 RICHARD A. SALZMAN, ESQ., Washington, D.C.; on behalf of
20 Appellee.

21 THOMAS E. CABALLERO, ESQ., Assistant Senate Legal
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23 as amicus curiae, supporting Appellee.

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P R O C E E D I N G S

[1:00 p.m.]

JUSTICE STEVENS: We will hear argument in No. 06-618, the Office of Senator Mark Dayton against Brad Hanson.

ORAL ARGUMENT OF JEAN M. MANNING

ON BEHALF OF APPELLANT

MS. MANNING: Justice Stevens, and may it please the Court:

If I may, I would like to quickly frame the merits of the case and then turn to the jurisdictional issue. In United States versus Gravel, this Court recognized that Members of Congress have to delegate some of their legislative authority to employees and these employees are a second self to the Member. They are performing some of the legislative duties the Member himself would otherwise perform. Therefore, they are an integral part of the legislative process of the Member's office. For that reason, the Member must have absolute trust and confidence that these employees are in fact performing as his second self, and to do that the Member has to have complete discretion in selecting who these employees are and in managing them.

If a court oversees a Member's selection of these employees and his management of these employees,

1 then the court and not the Member is managing part of
2 his legislative process and that is a violation of the
3 Speech or Debate Clause, because a purpose of the
4 Clause is to ensure that the legislative process will be
5 performed independently. Now --

6 JUSTICE GINSBURG: Do you think -- do you
7 think that we owe any special measure of respect to the
8 Congress, that is most intimately concerned with the
9 Speech and Debate Clause, with their view that this is,
10 this legislation is compatible with that clause?

11 MS. MANNING: I do not, Justice Ginsburg.
12 This Court has never deferred to Congress with respect
13 to its interpretation and in fact has disagreed with
14 Congress, for example, in the Gravel case. But the
15 other reason is that the Congress of course is a
16 political body and because of that it will make
17 decisions that are politically expedient at times, which
18 means that over time their decisions can change, while
19 the Court is uniquely designed and intended to decide
20 cases on something other than what is politically
21 expedient. This is especially important when we are
22 dealing with the Constitution and interpreting the
23 Constitution.

24 JUSTICE GINSBURG: But what we are involved
25 with in this case is Congress subjecting itself to the

1 laws that govern all other employers.

2 MS. MANNING: It did, Justice Ginsburg,
3 subject itself, but it also in section 413 recognized
4 that there may be Speech or Debate Clause issues and
5 maybe not all of these cases can be adjudicated in a
6 court. Not that they can't be adjudicated, but maybe
7 not in a court. So while subjecting itself to the law --
8 and doing the best it could to do that -- it also cannot
9 trump the Constitution.

10 JUSTICE SCALIA: Which is what the statute
11 says, and so how could the statute possibly be
12 unconstitutional?

13 MS. MANNING: We are not --

14 JUSTICE SCALIA: I mean, the Constitution --
15 the statute has within itself a Speech or Debate Clause
16 exception. Now, I guess you can argue that a lower court
17 might not accurately provide the Speech or Debate Clause
18 protection that is due, but that -- that doesn't meet, it
19 seems to me, the -- the jurisdictional requirement that,
20 that the constitutionality of the statute be called into
21 question.

22 MS. MANNING: Well, Justice Scalia, we are
23 not arguing that the statute is unconstitutional.
24 Rather, it's an as-applied argument. What we are
25 arguing is that the issue that was before the circuit

1 court was whether the application of section 408 to this
2 particular case -- and of course 408 is what gives the
3 Court jurisdiction -- whether applying that to this case
4 violates the Constitution.

5 JUSTICE SCALIA: Well, that doesn't comply
6 with section 412, which says that an appeal may be taken
7 directly to the Supreme Court from "any interlocutory or
8 final judgment, decree, or order of a court upon the
9 constitutionality of any provision of the Act." Now,
10 an as-applied challenge is not a challenge to the
11 constitutionality of the provision.

12 MS. MANNING: Justice Scalia, in United
13 States versus Eichman, that statute issue there had
14 statutory direct appeal language that was exactly the
15 language of 412.

16 JUSTICE SOUTER: Isn't there a further
17 problem here, though, that the order of the district
18 court gave no explanation? We have no way of knowing
19 exactly why the court ruled the way it did, and for that
20 reason the appeal -- the review -- was that the original
21 appeal was taken properly to the court of appeals, so
22 that we are here not on appellate jurisdiction, but cert
23 jurisdiction, if at all.

24 MS. MANNING: I believe that you can take
25 appellate jurisdiction of this case because, as I was

1 saying, in United --

2 JUSTICE SOUTER: Well, there's no direct
3 appeal. We have appellate jurisdiction only if there's
4 a direct appeal and there's no direct appeal. This is
5 coming from the court of appeals.

6 MS. MANNING: Oh, section 412 provides
7 direct appeal from either court, unlike the Flag
8 Protection Act direct appeal language, which must be
9 from the district court. Section 412 doesn't limit it
10 to an appeal from the district court. It can be either
11 one.

12 JUSTICE SOUTER: What pages for the text of
13 412 set out on? You're going to have to help me here.

14 MS. MANNING: I'm sorry. With respect to --
15 it's at the jurisdictional statement at page 65a. And
16 the direct appellate language that was at issue in the
17 Flag Protection Act did limit the appeal to appeals from
18 the district court. But section 412 is different from
19 that. It doesn't limit --

20 JUSTICE ALITO: Well, why wasn't the ruling
21 of the district court a ruling upon the
22 constitutionality of the statute as applied? As I
23 understand it, you moved to dismiss the case on the
24 ground that an individual performing the duties that
25 Mr. Dayton performed cannot sue a Member of Congress for

1 employment discrimination and the district court denied
2 that. Why isn't that a ruling on the constitutionality
3 of the -- of the statute as applied?

4 MS. MANNING: Well, Justice Alito, the
5 argument we made was that, but to reach that decision
6 there were a couple of sub-arguments the court had to
7 reach. We had argued that, number one, is there a waiver
8 of sovereign immunity? If not, then is an employee who
9 meets the -- I'll call the duties test that we've set out
10 in our brief -- is that employee's claim jurisdictionally
11 barred from court review, and if so does Mr. Hanson meet
12 that duties test? Now, the court could have decided
13 Mr. Hanson doesn't meet the duties test, therefore we
14 never have to reach the constitutional issue, and
15 that would have been a decision upon his duties, not on
16 the Constitution.

17 JUSTICE ALITO: But was there a dispute about
18 the nature of his duties?

19 MS. MANNING: I'm sorry?

20 JUSTICE ALITO: Not how you characterize his
21 duties, but what his duties actually were. Was there a
22 dispute about that?

23 MS. MANNING: He did not dispute his duties.
24 What he disputed was -- what he said was that of the
25 duties we set forth in the affidavit -- and that was

1 Mr. Kimball's declaration, which is at the
2 jurisdictional statement at 66a -- he said that they
3 represent only 5 percent of his legislative duties over
4 the course of his employment. Well, of course, we're
5 not setting forth every jurisdictional duty he had over
6 the course of his employment. So he --

7 JUSTICE ALITO: So that made the court -- the
8 district court rule that somebody performing those duties
9 can constitutionally be tried -- bring suit, and it
10 doesn't -- and it doesn't violate the Speech or Debate
11 Clause? So I don't see how that's not a ruling on the
12 constitutionality of the statute as applied.

13 MS. MANNING: No, Justice Alito, the court
14 didn't rule that. The court just gave us a minute
15 order, and there's a possibility that it ruled that, but
16 there is a possibility that it just said it doesn't
17 matter what test you're telling me, counsel, because
18 this particular employee doesn't meet your test to begin
19 with. So I'm saying, the court could have said, I'm
20 saying he doesn't meet the duties test --

21 JUSTICE BREYER: Don't you agree with
22 Justice Scalia -- Justice Alito? Don't you agree with
23 Justice Alito? I thought he's saying it's a ruling on
24 constitutionality.

25 MS. MANNING: It is a -- not the district

1 court ruling. Not the district court. The appellate
2 court, yes. I'm sorry, Justice Breyer. The appellate
3 court, yes; the district court, no, because the district
4 court was merely a minute order. And it's a possibility
5 that it could have been on constitutionality and a
6 possibility it could not.

7 JUSTICE BREYER: I see. So, when you --

8 JUSTICE SCALIA: My problem is, it's
9 extraordinary. We have very few direct appeal cases any
10 more and I -- I am loathe to read section 412 as
11 embracing a decision by a court that a particular use of
12 this statute was unconstitutional. You say it was, the
13 statute was unconstitutional as applied. That's sloppy
14 language. It really means that this application of the
15 statute or the use of the statute for this purpose was
16 unconstitutional.

17 I think that's something different from
18 saying that it was an order of the court upon the
19 constitutionality of any provision. Which provision of
20 this Act has been held to be unconstitutional?

21 MS. MANNING: Section 408 as applied to this
22 case is unconstitutional.

23 JUSTICE SCALIA: Which -- but it hasn't been
24 held to be unconstitutional. It's perfectly
25 constitutional. You're just saying it can't be used in

1 this particular case.

2 MS. MANNING: Well, when Congress --

3 JUSTICE SCALIA: I mean, read the language.

4 It says "The constitutionality of any provision of this
5 Act," not "the constitutionality of the application of
6 any provision of this act."

7 MS. MANNING: Yes, and in United States
8 versus Eichman, Justice Scalia, the very same language
9 was at issue.

10 JUSTICE KENNEDY: What is that citation? I
11 was looking for that. Is that cited in your brief? I'm
12 just --

13 MS. MANNING: Yes, United States versus
14 Eichman is cited at the reply brief at page 1.

15 JUSTICE KENNEDY: Thank you.

16 MS. MANNING: And the statutory section is
17 18 U.S.C. section 700(d), and the direct appeal language
18 was exactly the same, "upon the constitutionality of a
19 provision of this act." And this Court accepted direct
20 appeal when the issue was whether the application of the
21 Flag Protection Act was unconstitutional. In any event,
22 even if this Court were not to take jurisdiction --

23 JUSTICE STEVENS: But in the flag case the
24 whole statute was either valid or not. There weren't
25 different applications, were there?

1 MS. MANNING: The counsel argued both, but
2 this Court did not deal with both. This Court actually
3 took direct appeal just on the as-applied argument.
4 Counsel argued the statute was unconstitutional and the
5 second argument was an as-applied --

6 JUSTICE KENNEDY: You mean we held that the
7 statute was constitutional on its face?

8 MS. MANNING: What the Court held was -- it
9 didn't --

10 JUSTICE KENNEDY: I'll look at Eichman, but
11 it's not my recollection of the case, that the whole,
12 the essence of the duty imposed by, under the statute
13 was held void.

14 MS. MANNING: It was the application in that
15 particular situation.

16 JUSTICE KENNEDY: Well, but there's always
17 an application or there's no case.

18 MS. MANNING: Well, the --

19 JUSTICE KENNEDY: Absent some declaratory
20 judgment proceeding.

21 JUSTICE STEVENS: We certainly didn't hold
22 that it was alright to burn flags in some cases and not
23 others.

24 MS. MANNING: Well, there were two questions
25 that the parties raised. One was, is the statute

1 unconstitutional altogether? And the Court didn't even
2 touch that. Instead the second argument they raised was
3 well, is it constitutional -- unconstitutional, rather,
4 as applied on these facts? And that is what the Court
5 took the case on, that was what allowed direct
6 jurisdiction.

7 JUSTICE SCALIA: What -- what had the lower
8 court held? It isn't a question of what we held; it's a
9 question of what the lower court had held. Had the
10 lower court held that it was unconstitutional?

11 MS. MANNING: I'm sorry, Justice Scalia, I
12 don't remember what the lower court held in that case,
13 but --

14 JUSTICE SCALIA: I mean, but that's what
15 counts, not our opinion. You can always dispose of a --
16 of a facial challenge by just saying we don't have to
17 reach the facial question; we can decide it on an
18 as-applied question. But in order to get here in the
19 first place, it has to be a challenge to the
20 constitutionality of a provision of the Act.

21 JUSTICE KENNEDY: And in *Eichman*, we recite
22 that the district court held the Act unconstitutional as
23 applied to appellees and dismissed the charges.

24 MS. MANNING: Right. Unconstitutional as
25 applied so it was an as applied argument. And now when

1 the Court wants a statute to mean that it's only an
2 unconstitutional interpretation as opposed to a
3 constitutional interpretation, the Court -- I'm sorry,
4 Congress makes that distinction. So for example in 28
5 U.S.C. section 1257 -- which was a direct appeals
6 statute, and has since been repealed -- in that statute
7 Congress did say that there is direct appeal when the
8 statute is found to be constitutional, or when the
9 statute is found to be unconstitutional. But it used --
10 Congress, that is -- used the vague language, more vague
11 and general language in section 412, which is just upon
12 the constitutionality. In any event --

13 JUSTICE SOUTER: I realize, before you leave
14 that I realize that on a jurisdictional issue like that
15 we have an obligation to raise it ourselves. But I'm --
16 I'm -- I'm curious, was -- was jurisdiction contested in
17 that case?

18 MS. MANNING: Not that I recall in the
19 Eichman case. Not that I recall.

20 JUSTICE SOUTER: Yes.

21 MS. MANNING: Okay. In any case, this Court
22 should accept the petition, take this case on a petition
23 for writ because the decision of the court of appeals
24 was upon a question of Federal law that is an important
25 question.

1 Moving to my Speech or Debate Clause
2 argument, with respect to Speech or Debate Clause, this
3 Court has held that all acts that are within the
4 legitimate legislative sphere are protected by Speech or
5 Debate Clause immunity. And the Court has defined what
6 is inside that sphere as anything that is part of the
7 due functioning of the legislative process. And when an
8 employee is an alter ego, that is, a second self of a
9 Member, that employee by definition is actually
10 performing part of the Member's job. He is performing
11 legislative acts so he is in this sphere. He is doing
12 something that is part of the due functioning of the
13 legislative process. He is in that sphere.

14 JUSTICE BREYER: What does he do? I mean I
15 looked at what he does in 74, 75, 76a. He seems to
16 spend a lot of time moving furniture. He lists that
17 twice. He runs the office. And he represents, he is
18 out in the local office somewhere and he talks to
19 constituents. I mean, he doesn't even appear in the
20 Senate office except very rarely in which case he is
21 doing casework. So I guess if he is included in that, I
22 mean so is a full-time furniture mover.

23 MS. MANNING: Justice Breyer, he did
24 significantly more than that. First --

25 JUSTICE BREYER: I have the whole list here.

1 What here suggests he ever -- he doesn't even write a
2 statement for the floor. There is nothing here that
3 suggests one word of anything he did ever went to a
4 committee meeting, to a floor of the Senate, anything.

5 MS. MANNING: Oh, Justice --

6 JUSTICE BREYER: What?

7 MS. MANNING: Justice Breyer --

8 JUSTICE BREYER: What are the words?

9 MS. MANNING: Actually in the Kimball
10 declaration, which is at jurisdictional statement 66a,
11 and the self-evaluation of Mr. Hanson which is attached
12 thereto as a jurisdictional statement at 78a, and this
13 is his self evaluation and Mr. Kimball, his supervisor
14 at the time telling what he had done, he being
15 Mr. Hanson.

16 Some of the things Mr. Hanson did was he did
17 talk to constituents, but remember of course the Member
18 is in D.C.; he is supposed to be representing people in
19 the State. The very people who have contact with --

20 JUSTICE BREYER: I agree with that one. I
21 just said he doesn't do anything that gets to the floor
22 of the Senate, that gets to a committee report, that
23 gets to a committee hearing. Now what in there -- and
24 you said it was not contested, so I guess the best
25 source if it's not contested is his affidavit.

1 MS. MANNING: Justice Breyer actually he did
2 both of those. He for example, when talking to the
3 constituents realized that there was a problem with
4 respect to ambulance reimbursement for health care. He
5 went to the Senator and said we've got a problem here in
6 the State, and the constituents have identified it. He
7 then said to the Senator, I think you should draft
8 legislation on this and I think you should have a
9 committee hearing on this. Both of which the Senator
10 did. Mr. Hanson drafted that legislation. He --

11 JUSTICE BREYER: Oh. Where does it say
12 that? He drafted legislation that was then introduced?

13 MS. MANNING: Yes, he did. He drafted --

14 JUSTICE BREYER: Where does it say that?

15 MS. MANNING: That is in the Kimball
16 declaration which is in jurisdictional statement at page
17 66a. And he also prepared the witnesses for the hearing.
18 Justice -- I'm sorry, Senator Dayton had the hearing on
19 the healthcare issue, and Mr. Hanson identified the
20 witnesses for that, prepared them, wrote the questions
21 for the hearing and --

22 JUSTICE SCALIA: Well, he didn't do
23 exclusively that stuff anyway. We can certainly all
24 agree on that. And why isn't it sufficient that when
25 any of those issues are -- his activities in any of those

1 capacities are sought to be introduced into evidence,
2 anyone tries to contradict them, then you can bring in
3 your Speech or Debate Clause objection?

4 MS. MANNING: Because it is --

5 JUSTICE SCALIA: Why is the whole suit
6 precluded?

7 MS. MANNING: The whole suit is precluded
8 because when you have as we do an employee who is in
9 this legislative sphere, that the Court has identified,
10 he is in that sphere because he is performing
11 legislative acts. So a Member who decides, you know, I
12 don't want him in my legislative duties anymore, my
13 sphere, I'm pulling him out. Taking him out, when the
14 Member takes him out of that process, he has done
15 something -- he being the Member -- that is also part of
16 the functioning of his legislative process, which is the
17 test.

18 So the termination itself is part of the
19 functioning of the legislative process which is the test
20 for a legislative act. And therefore this case is
21 predicated on a legislative act. That is, the
22 termination. And in *Doe v. McMillan* this Court stated
23 that a case that is predicated on a legislative act
24 cannot be adjudicated -- or a court has its jurisdiction
25 --

1 JUSTICE STEVENS: I'm a little puzzled.
2 Firing somebody is a legislative act?

3 MS. MANNING: I'm sorry, Justice Stevens?

4 JUSTICE STEVENS: Firing someone is a
5 legislative act?

6 MS. MANNING: Firing not anyone is a
7 legislative act, but firing your second self is a
8 legislative act. And the reason for that is that you
9 are doing something that is part of your legislative
10 process. You created a hole in your legislative
11 process; you have taken out an employee who is your
12 second self. This is your second self. And you've
13 decided, you know, I think my legislative process is
14 going to work better with him gone. And that's part of
15 --

16 JUSTICE GINSBURG: On a Senator's staff, how
17 many second selves would there be?

18 (Laughter.)

19 MS. MANNING: I'm sorry, Justice Ginsburg?

20 JUSTICE GINSBURG: On the Senator's staff?

21 MS. MANNING: I'm sorry. I still didn't
22 hear.

23 JUSTICE GINSBURG: How many second selves?
24 Of -- what universe are you covering? Who is not a
25 second self, who works in a Senator's office?

1 JUSTICE SCALIA: Maybe he was the 23rd self.
2 (Laughter.)

3 JUSTICE SCALIA: I think you have to figure
4 out when he was hired.

5 MS. MANNING: Well, in Gravel, in United
6 States versus Gravel, this Court stated not only do you
7 have second selves, but you must -- Members must
8 delegate and redelegate and redelegate authority. That
9 implies there are a lot of second selves. It's not one
10 person. So there can be many --

11 JUSTICE BREYER: What's wrong with this? I
12 found what you're talking about here. It says in
13 paragraph 13, contrary to what he says in his own
14 evaluation, that Senator Dayton's staff, including
15 Mr. Hanson -- that's a little uncertain, what they mean
16 by that -- introduced a bill and drafted it. Okay? And
17 then on paragraph 14 they say on November 15th, 2001,
18 Mr. Hanson -- just as you said -- planned a Senate
19 Government Affairs Committee meeting, selected hearing
20 witnesses and prepared questions.

21 Now suppose that we did as the court, lower
22 court wanted to do, say let's just see if that becomes
23 relevant. Because it's possible, given his other tasks
24 that those two incidents, one on November 15th and the
25 other, whatever help he gave to the drafting, have

1 nothing to do with his being fired and nobody claims
2 that. So what they said is let's wait and see if that
3 becomes relevant. Now what's wrong with that solution?

4 MS. MANNING: What's wrong with that
5 solution is that when a Member -- as I was explaining in
6 response to Justice Stevens' questions -- when a Member
7 has a second self who is in the legislative process and
8 the Member says you know, I'm pulling him out of the
9 process because he doesn't perform well, he -- I don't
10 think he is my second self, that termination for
11 whatever reason is part of the process because the
12 Member has changed the process.

13 JUSTICE BREYER: All right. Let's make an
14 absurd case out of it which I'm trying to do a little
15 bit to get you to focus on it. Let's suppose he got
16 fired because he didn't move the furniture properly.

17 MS. MANNING: The -- it is a whole employee.
18 When he is removed from the process for whatever reason,
19 he is gone from the process so that is part of the
20 functioning of the process. If I may give an example,
21 let's say that the Senator is at Union Station and he is
22 buying a gift for someone and he hears someone making
23 very derogatory statements to the cashier, and he turns
24 around and lo and behold, this is his legislative
25 director. And he says I can't have this person as my

1 second self; I don't talk to individuals that way; this
2 has nothing to do with my legislative process but this
3 is a second self and he is not my second self and I pull
4 him out of the process.

5 That has affected his legislative process.
6 He now has a hole in this sphere, this legislative
7 sphere. The person is gone. That is a part of his
8 legislative process. It doesn't matter why he is gone.
9 He is gone.

10 JUSTICE KENNEDY: Can you give me examples of
11 cases where that Act applies?

12 MS. MANNING: I'm sorry?

13 JUSTICE KENNEDY: Can you give me instances
14 in which employees of an office and the Senator are
15 covered by these obligations and cannot invoke the
16 Speech and Debate Clause? What's the classic example
17 where you can't invoke the Speech and Debate Clause?

18 MS. MANNING: Where you cannot invoke the
19 Speech or Debate Clause.

20 JUSTICE KENNEDY: Yes.

21 MS. MANNING: Was that the question, or can?

22 JUSTICE KENNEDY: Yes. Because it seems to
23 me that your argument just completely eviscerates the
24 intent of the Congress in passing this Act.

25 MS. MANNING: If I may answer the second

1 question first, approximately 75 percent of the people
2 who are covered by this Act, the employees who are
3 covered by this Act are not employed by Members of
4 Congress or committees. Now those employees for the
5 most part -- and not all of them, because some of those
6 employees do work on the floor, but for the most part --

7 JUSTICE KENNEDY: Well, except the Act
8 itself has a provision for office of Senators.

9 MS. MANNING: And those employees --

10 JUSTICE KENNEDY: And so it seems to me
11 you're giving no effect at all to that. You say there is
12 a hole in the process the minute the furniture mover is
13 gone?

14 MANNING: No, Justice Kennedy, those
15 employees -- first of all some of those employees can
16 sue. For example the Court has said that writing news
17 releases or newsletters to constituents, this is in the
18 Brewster case, are not covered -- that is not a
19 legislative act. So if we have an employee in a Member's
20 office like the deputy press secretary who does those
21 kinds of things, that person is not performing
22 legislative acts. But in addition to that these
23 employees still have a -- a forum; their forum is the
24 Office of Compliance, which is unique to the
25 Congressional Accountability Act. And the Office of

1 Compliance has cases heard before retired judges; the
2 employees get the same remedies as they would in court.
3 It is the same procedure except that it is an expedited
4 procedure and it is a confidential procedure.

5 So these employees are, it's not that they
6 can't sue; it's that they cannot sue in Federal court.

7 JUSTICE ALITO: If this statute --

8 JUSTICE SOUTER: Wouldn't they get into --
9 no, please.

10 JUSTICE ALITO: If this statute was set up
11 so that the defendant here was the Senate, as opposed to
12 the office of a Senator, would you still say that this
13 suit couldn't go forward?

14 MS. MANNING: With respect to the abatement
15 issue, I would -- this is with respect to the abatement
16 issue -- I would say that the case would not be abated,
17 because the defendant would still exist. But with
18 respect to the Speech or Debate Clause issue I would say
19 it could not still go forward, and the reason for that
20 is the immunity is, as this Court stated in Gravel, is
21 not like a badge that attaches to different people and
22 different entities. It's an expression of a policy,
23 which means that whenever a case is going to infringe
24 into this legislative sphere, irrespective of who the
25 defendant is, then the case cannot be adjudicated in

1 a Federal court.

2 And so for example, in Eastland versus
3 Servicemen's Fund, this Court stated that a committee of
4 the Senate is covered by the Speech or Debate Clause.
5 And in Tenney, although that was a State case, the Court
6 did apply the Speech or Debate Clause jurisprudence.
7 The Court there said that a committee of a State is
8 covered by the Speech or Debate Clause and the case
9 would be dismissed.

10 And then in Doe versus McMillan, in that case
11 there was a consultant to Congress and he was sued.
12 There were functionaries of Congress that did not work
13 for a Member, did not work for a committee and the Court
14 held in that case that if those -- if the consultant and
15 the functionaries were performing duties that were
16 within this legislative sphere, the Speech or Debate
17 Clause applies and the case was dismissed.

18 JUSTICE ALITO: In what sense would the
19 Member be called to answer under those circumstances, if
20 the Member isn't a defendant and has no financial
21 liability and is able to invoke the clause as an
22 evidentiary privilege? In what sense would the Speech
23 or Debate Clause be applicable?

24 MS. MANNING: In the scenario where the
25 Congress is the defendant?

1 JUSTICE ALITO: Yes.

2 MS. MANNING: Well, what we are arguing is
3 that the termination itself, the termination itself is a
4 legislative act because the termination itself is part
5 of the due functioning of the legislative process. And
6 in Doe V. McMillan the Court stated that when a case is
7 predicated on a legislative act, court jurisdiction is
8 barred. Now, also in answer to your question, it doesn't
9 matter who the defendant is. The Member -- let's say
10 Congress was --

11 JUSTICE SOUTER: Well why doesn't it matter
12 who the defendant is? Because I don't, this so-called
13 office of Senator Mark Dayton is a construct that I
14 understand, and there is no immunity problem there. But
15 if -- if that office is gone now and getting to your
16 hypothesis, if the, if -- if the true party is the
17 Senate of the United States, has there been any
18 unequivocal waiver of immunity with respect to the
19 entire Senate or the Senate of the United States as an
20 institution?

21 MS. MANNING: No Justice Ginsburg, there has
22 been no waiver --

23 JUSTICE SOUTER: I'm Justice Souter.

24 MS. MANNING: I'm sorry. Justice Souter,
25 sorry. Justice Souter --

1 JUSTICE SOUTER: You're very flattering.

2 (Laughter.)

3 MS. MANNING: Sorry. Justice Souter, sorry,
4 Justice Souter.

5 There has been no waiver for the Senate as a
6 defendant. Section 1408 of the CAA which of course
7 gives the Court jurisdiction --

8 JUSTICE SOUTER: Okay. No , but I was going
9 to say so that if this case continues we've got to accept
10 the proposition that the office of Senator Mark Dayton is
11 still a, some kind of an entity that has got to be
12 accorded reality by the judiciary, right.

13 MS. MANNING: That is correct, because --

14 JUSTICE STEVENS: And how do we do it? I
15 mean, you've said -- I don't want to go too far with a
16 metaphor, but you spoke a moment ago of there being sort
17 of a, what did you say, a hole or a space in the
18 legislative sphere when somebody is fired. I mean, the
19 sphere at the moment is totally empty. The Senator's
20 gone. Everybody knows that this -- this office of
21 Senator Mark Dayton is a totally fictional construct.
22 And in reality, as you point out, the money is going to
23 come out of the Senate or some Senate fund. If we allow
24 this to go forward, we've got to face the reality that
25 it's the Senate which is the defendant and there hasn't

1 been a waiver of immunity.

2 MS. MANNING: I agree with that, Justice
3 Souter. There is no defendant that exists any more.
4 The only defendant in the CAA, and the language is very
5 express, is the employing office and the employing
6 office is defined in section 1301(9) as, for purposes of
7 this case, "the personal office of a Member of
8 Congress." And there is no Member of Congress --

9 JUSTICE SOUTER: Yes, but at this point
10 that's silly. There's no Senator. There's no office in
11 any sense.

12 MS. MANNING: I agree with you that there is
13 no defendant any more. This defendant has ceased to
14 exist and this case has abated. There is no successor
15 and when there is no successor there are not two
16 adversarial parties in the case. There's no case or
17 controversy, case is moot, and the case should be
18 dismissed on that basis alone.

19 Why -- the Court does not even have to reach
20 the jurisdictional issue with respect to the Speech or
21 Debate Clause because this case became moot in January
22 when the function of the office, which was solely to
23 support Senator Dayton -- when there was no Senator
24 Dayton there was no office of Senator Dayton. There is
25 no defendant that is extant in this case and therefore

1 the case --

2 JUSTICE SCALIA: There's never an office. I
3 mean, I think the office is just a fictional construct
4 anyway. So what you say now has nothing to do with
5 whether -- whether this current Senator has -- has
6 departed from the scene. Even if he were still on the
7 scene, there still wouldn't be any such thing as that
8 office. It's just a fiction, and it would always be a
9 suit against Congress, and so you say none of these suits
10 can ever be brought.

11 MS. MANNING: Justice Scalia, it is not just
12 a fiction. The office --

13 JUSTICE SCALIA: Why isn't it a waiver of
14 sovereign immunity when you set up a system that
15 envisions a suit which will be paid off by the Senate?
16 Why isn't that a waiver of sovereign immunity?

17 MS. MANNING: It is, Justice Scalia, a
18 waiver of sovereign immunity that has a condition on it.

19 JUSTICE SOUTER: Is it unequivocal?

20 MS. MANNING: It is unequivocal --

21 JUSTICE SOUTER: I mean, when it's done on
22 the basis of this fiction, is that what we should accept
23 as an unequivocal waiver?

24 MS. MANNING: Well, first, I disagree with
25 the premise in that I don't think it is a fiction that

1 this office never existed. The office -- a personal
2 office of a Member of Congress -- Members of Congress
3 didn't work out in the hallway before the CAA was
4 passed. There was always a personal office of a Member
5 of Congress. So in that sense it is not a fiction.

6 And I would like to reserve the rest of my --

7 JUSTICE SCALIA: A physical, a physical
8 office, yes. I mean, they didn't work in the hallway.
9 But their staff's salary was not paid out of their,
10 quote, "office." It was paid out of the Senate.

11 MS. MANNING: Well, actually the structure of
12 the Senate doesn't support that. The Senate, within the
13 Senate, each Member does pay the salary, sets the salary.
14 We can have legislative directors and do have legislative
15 directors in two different offices, different salaries,
16 different number of paid sick days, different number of
17 annual leave days.

18 JUSTICE SCALIA: Setting it is quite
19 different from paying it.

20 MS. MANNING: It is paid for --

21 JUSTICE SCALIA: The Senator sets it and the
22 Senate pays it.

23 MS. MANNING: Justice Scalia, actually the
24 Senator is given an appropriation and all of his salaries
25 must be paid from the appropriation.

1 JUSTICE SCALIA: Right. The Senate puts a
2 limit on how much money it will spend for a particular
3 Senator. That's all that amounts to. It doesn't hand
4 him the money. It's still the Senate's money, isn't it?
5 And what the Senate says is each office will have so
6 much of a call upon our funds and no more.

7 MS. MANNING: It is the appropriated fund
8 for the Senator and the Senator is the one who pays the
9 fund.

10 If I may, I'd like to reserve the rest of my
11 time.

12 JUSTICE STEVENS: Mr. Salzman.

13 ORAL ARGUMENT OF RICHARD A. SALZMAN

14 ON BEHALF OF APPELLEE

15 MR. SALZMAN: Justice Stevens, and may it
16 please the Court:

17 The motion to dismiss in this case raised a
18 single issue, the issue of absolute immunity; more
19 specifically, whether the employing office created by
20 Congress as the defendant in these kinds of cases can be
21 sued by a Member of a Senator or House of Representatives
22 staff. The Dayton office argues that a Senator's
23 personnel decisions are always a legislative act that are
24 always absolutely immunized by the Speech
25 or Debate Clause. That argument is untenable and it was

1 rejected by every one of the eight judges of the D.C.
2 Circuit en banc.

3 This case doesn't involve any legislative
4 acts. Mr. Hanson didn't work on Capitol Hill. He was
5 in the Minnesota office. His -- the nature of his claim
6 is that he was a valued employee until he became ill and
7 disclosed his illness and need for surgery, at which
8 point he was fired. Senator Dayton's office first says
9 that they were not even aware, that Senator Dayton was
10 unaware of the need for surgery at the time he made the
11 decision to fire Mr. Hanson, and then says that the
12 reason for the firing was Mr. Hanson's work on a classic
13 constituent service.

14 This case presents exactly the hypothetical
15 that Justice Breyer was asking about. Although
16 Mr. Hanson had a very small, he says 5 percent of his
17 duties, that were in some way related to the legislative
18 process, no one contends, not Mr. Kimball, not Senator
19 Dayton's office, that that had anything to do with the
20 reason for his firing. In fact, the only evidence in
21 the record, in this record so far, is that on that small
22 amount of work that Mr. Hanson did with respect to
23 ambulance legislation, he did a, quote unquote, "great
24 job."

25 JUSTICE SCALIA: The other side's contention

1 is that the firing is itself a legislative act and so
2 when you challenge the firing you are challenging the
3 legislative act. What do you say to that?

4 MR. SALZMAN: We say that's absolutely wrong
5 Justice Scalia, that is absolutely wrong. The reason is
6 that this Court has said that conduct that is related to
7 the legislative process, that may in fact be important
8 to the legislative process, is not itself a part of the
9 legislative process. That is the fundamental holding of
10 Brewster. And this Court has found that some actions
11 that affect an employee, for example in the Bogan case,
12 where a decision that resulted in the termination of a
13 person was clearly legislative in nature because it was
14 made in a legislative proceeding, it was voted upon by
15 the legislators, and it was based upon either budgetary
16 or policy determinations.

17 That is a legislative act. But this Court
18 in Bogan specifically distinguished that circumstance
19 from a classic personnel action firing such as happened
20 to Mr. Hanson here. There was no legislative act
21 involved in Mr. Hanson's firing. He was just fired.
22 The reason for the firing is at issue in this case. A
23 jury can sort out issues like whether or not Senator
24 Dayton had notice of the need for surgery, whether or
25 not Mr. Hanson's performance of classic constituent

1 services was bad or good, as we contend.

2 But none of that involves legislative
3 activity as this Court has described it under the
4 speech-or-debate act. So our contention is that the only
5 issue in this case is absolute immunity and there is no
6 absolute immunity in this case. This case does not
7 involve a legislative act, as Judge Randolph below and
8 all of the judges below recognized.

9 JUSTICE STEVENS: What if his dissent -- or
10 defense, rather, to the charge is that he was very
11 inefficient in giving me help in legislative hearings
12 and so forth, like work of that kind which might be
13 arguably a legislative act, and that Speech or Debate
14 Clause forbids inquiry into the quality of his
15 performing those duties?

16 MR. SALZMAN: Justice Stevens, certainly the
17 Speech or Debate Clause does incorporate -- I'm sorry.
18 The Congressional Accountability Act does incorporate
19 the Speech or Debate Clause with respect to the
20 evidentiary privilege and that is clear from section
21 413. In that instance, district courts will have to
22 deal with the proffered evidence on a case-by-case
23 basis. Obviously, the context matters with respect to
24 any evidentiary privilege.

25 JUSTICE STEVENS: But maybe the Senator

1 might argue that this is all privileged: It's the
2 reason I fired him, but I can't go into it because I
3 don't want to invade my own privilege not to discuss
4 matters that are covered by the immunity.

5 MR. SALZMAN: Well, Justice Stevens, again
6 if the reason for the firing would shed light if the
7 district court would show that the allowing the evidence
8 that is proffered in would so intrude upon a real
9 legislative act, then the district court can excise that
10 evidence from the case. It either can be taken out, as
11 in the Helstoski case.

12 JUSTICE KENNEDY: What's the test for
13 intruding? If it would chill his exercise of the
14 function in future cases, or if it requires him to talk
15 about his legislative decisions, or what?

16 MR. SALZMAN: I think, as this Court has
17 described it, Justice Kennedy, if it would compel the
18 Senator to testify about his motives for legislation or
19 for a legislative act, then a district court could
20 decide that that evidence would not come in. The firing
21 itself, however, is not a legislative act and the
22 motivation behind the firing is not precluded by the
23 Speech or Debate Clause.

24 JUSTICE KENNEDY: What if it required him to
25 say how he allocated his resources, that he allocated his

1 resources 10 percent to foreign affairs issues, 50
2 percent to health care issues? Would that involve this
3 -- is that a Speech or Debate Clause problem?

4 MR. SALZMAN: I don't believe that it would
5 be, Justice Kennedy. I don't think that that would
6 intrude so much on his goals with respect to a
7 particular piece of legislation or with respect to a
8 general legislative agenda. I'm not sure I would see
9 that his testifying about how he has allocated money in
10 the office, for example, would be anything other than
11 testimony about an administrative decision.

12 If he were -- for example, if a plaintiff
13 certainly attempted to introduce evidence in a case
14 about a speech that the Senator gave on the floor of the
15 Senate in which he is accused of making maybe a bigoted
16 or a sexist remark, section 413 would clearly preclude
17 that. And there may be circumstances, for example, where
18 if a plaintiff wanted to introduce a draft of the speech
19 or a draft of legislation, that a court, district court,
20 could in those circumstances say that that intrudes so
21 much on a true legislative act that the court could
22 preclude that testimony from going in.

23 We don't believe that in the -- in the run of
24 these cases, that will be difficult for the district
25 courts to handle.

1 JUSTICE STEVENS: That doesn't quite capture
2 the problem that I'm having. It's not that the
3 plaintiff can't inquire. Usually they can't. But my
4 thought is that the defendant cannot put in his own
5 defense without waiving the privilege that would
6 otherwise be applicable. So he's sort of in a dilemma.
7 Either I give up my constitutional right not to talk
8 about this stuff or I've got to waive that right in
9 order to give a full explanation of why I discharged the
10 plaintiff.

11 MR. SALZMAN: Understood, Justice Stevens.
12 I think that in most cases that will not present a
13 dilemma. Even if the Senator's explanation is, I
14 assigned a real legislative aide to research a piece of
15 legislation and I was dissatisfied for whatever reason,
16 suppose the reason is that the aide simply didn't turn
17 in the memo that that he was assigned to do. The
18 Senator testifying about, I gave an assignment to this
19 person, the due date was September 1st, I never got it
20 or he was late or it was riddled with errors --

21 JUSTICE STEVENS: No, it's not just that he
22 wrote a lousy memo. In order to demonstrate it's lousy,
23 I've got to talk about legislative matters.

24 MR. SALZMAN: If that is truly the situation
25 and if a district court assessing, once all of the

1 information is presented to the district court, that
2 requiring the Senator in that circumstance to discuss
3 really his legislative goals, we think that maybe that
4 evidence would not be permitted. Now, the -- this Court
5 has recognized --

6 JUSTICE STEVENS: That would mean the Senator
7 did not have a defense.

8 MR. SALZMAN: Well, in Brewster, Your Honor,
9 this Court recognized that there may be situations where
10 the court permits an indictment to go forward, in which
11 the indictment itself and the proof that the prosecutor
12 will be presenting does not so intrude on the
13 legislative process that it would be precluded but that
14 the defendant may decide that in order to explain the
15 accusation he needs to rely on legislative acts. And
16 the court recognized that that may be the situation that
17 the Senator is in. I believe the Third Circuit in a
18 decision written by Justice Alito, the McDade case,
19 talks about that circumstance, where the Senator at that
20 point can choose to put in his explanation and be
21 subject to cross-examination simply with respect to that
22 explanation, but that the prosecution is not precluded
23 in its entirety. And certainly that's what we are
24 talking about here.

25 JUSTICE SOUTER: Yes, but what if the

1 Senator doesn't want to put it in? I mean, what if he
2 does not want to waive the privilege? Is his only
3 choice in effect to sit moot and lose the case?

4 MR. SALZMAN: Well, if he chooses to sit
5 moot and if the evidence --

6 JUSTICE SOUTER: "Mute" I guess I should
7 have said.

8 MR. SALZMAN: Mute, I'm sorry.

9 JUSTICE SOUTER: Yes.

10 MR. SALZMAN: If he chooses to stay silent,
11 then perhaps the case just goes forward without an
12 explanation. The defendant --

13 JUSTICE SOUTER: Well, why doesn't -- why,
14 I mean, why doesn't being placed in that dilemma in
15 effect implicate the clause, and why can't he invoke the
16 clause as a basis for dismissal?

17 MR. SALZMAN: Well, Judge Randolph below
18 thought that there may be circumstances where the
19 evidence is so -- all of the evidence is so bound up in a
20 legislative act that the case might not go forward. We
21 respectfully disagree with that. We think that that
22 will rarely be the circumstance. But this is the system
23 that Congress set up and Congress created the system in
24 a -- in a careful way. The defendant is not the Member.
25 The Member faces no financial liability whatsoever from

1 a finding of discrimination or unlawful behavior.

2 JUSTICE SOUTER: Well, yes, so far as the
3 Member's immediate financial concern, they took care of
4 it. But I'm not sure about the careful way. They in
5 effect said, you know, if this gets into Speech and
6 Debate Clause issues they prevail. And that kind of
7 just leaves us with no solution for the problem that
8 Justice Stevens raised and that I'm concerned with,
9 unless there's -- there's going to be an automatic
10 dismissal when the Member says, look, I cannot respond
11 to this without getting into -- into acts within the
12 legislative process which are privileged.

13 Unless we are going to recognize that as kind
14 of an absolute defense upon its invocation, I don't see
15 how we get out of the problem.

16 MR. SALZMAN: Well, Justice Souter, our
17 argument is that the decision itself is certainly not a
18 legislative act, and in most -- and that is in accordance
19 with this Court's view of the judicial privilege in
20 Forrester that the decision itself is not a judicial act.
21 The reasons behind the decision in the legislative
22 context could be shielded by the evidentiary privilege,
23 but we think there's a clear difference between the
24 employees performing a duty that is related to the
25 legislative process being different than a legislative

1 act itself.

2 It may be that in some rare circumstances
3 the Senator in order to fully defend himself feels the
4 need to actually testify about real legislative acts,
5 like his vote on something, or his conduct in a committee
6 proceeding. But his assessment of an employee's
7 performance, just as Judge White's assessment in the
8 Forrester case of Miss Forrester's performance, is not
9 legislative activity. It may be activity that is
10 important to the legislative process. It may provide
11 for a sound legislative arena, just as in the judicial
12 sphere. But when this Court found unanimous,
13 unanimously that when Judge White was assessing the
14 performance of Miss Forrester in the judicial context
15 and deciding, I don't think she did a good job on
16 delegated judicial functions, that's not a judicial act.
17 And we would say the same with respect to a legislative
18 act, so --

19 JUSTICE GINSBURG: That would go for the
20 stenographer in a committee hearing?

21 MR. SALZMAN: Yes, Your Honor, and I believe
22 that's the Browning case, that the D.C. Circuit
23 originally had found would be considered a legislative
24 act. And we do believe that, yes, the assessment by
25 the, whoever supervised Miss Browning that her

1 performance was inadequate is not itself a legislative
2 activity. Miss Browning's performance obviously was
3 involved, was closely tied to the legislative process
4 because she was a stenographer at hearings. If the
5 committee -- if the committee decided in a committee
6 proceeding and took a vote that they were not going to
7 use stenographers any more and Miss Browning had brought
8 a challenge with respect to that, alleging that it was
9 focused personally on her and racially motivated, then
10 we think a legislative immunity might apply as it did in
11 the Bogan case.

12 But absent that, it's our belief that an
13 assessment of an employee's performance, even if the
14 employee is performing duties that are related to the
15 legislative process, is not itself a legislative act.

16 JUSTICE BREYER: Well, it could or couldn't
17 be. I mean, if the legislator, the Senator,
18 says, I think relevant to my dismissal of this
19 individual is the individual's performance that revealed
20 itself in a speech or debate that I gave in the House,
21 and if that's relevant, then why isn't that the end of
22 the case, they can't bring it?

23 MR. SALZMAN: Justice Breyer, I think that
24 that is one of the rare circumstances where the -- the
25 Senator's assessment of the performance is very tied up

1 with a legislative act.

2 JUSTICE BREYER: Well, all he'd have to say
3 is it's relevant to my decision to fire the person.
4 Now, surely a jury or whoever -- it's probably a jury
5 matter, I guess, on this -- is entitled to take that
6 into account. If it's something the jury is entitled to
7 take into account, you are questioning what that Senator
8 did in the speech or debate and you are questioning it
9 in another place, namely, a court.

10 MR. SALZMAN: You are, Justice Breyer. The
11 employee's performance, we believe, of the speech
12 writing would not be considered a legislative act. This
13 Court said in Gravel that there is a difference between
14 a legislative act -- what goes on in a committee
15 proceeding and preparation for that proceeding, and the
16 employee's performance getting the Senator ready to give
17 his speech would not itself be considered a legislative
18 act. But in that circumstance the district court might
19 say that because the Senator's explanation is so clearly
20 tied to a real legislative act, a speech that he
21 actually gave on the floor of the Congress, perhaps that
22 might be a circumstance where Judge Randolph's view that
23 that case could not go forward might apply.

24 That's not this case. This case deals with
25 threshold immunity issues, where the Senator's office is

1 saying that any personnel decision that it engages in is
2 by definition a legislative act if it relates to anybody
3 who works in their office. And Congress clearly was not
4 of that view. It defined every employee of the Senate,
5 including those who worked in a Senator's office, to be
6 a covered employee and all covered employees under
7 section 408 have the right to go to court.

8 JUSTICE GINSBURG: Have any cases gone
9 through a district court on the merits under this Act?

10 MR. SALZMAN: I'm sorry, Justice Ginsburg?

11 JUSTICE GINSBURG: Have any cases under this
12 Act gone to a district court to judgment on the merits?

13 MR. SALZMAN: No, Justice Ginsburg. The
14 closest -- my understanding is the closest that we have
15 gotten is the companion case in this case, the Fields
16 case, is scheduled for trial in October and it is my
17 understanding that they have gone through some discovery
18 in that case. I don't believe that there have been any,
19 any cases under the Congressional Accountability Act in
20 court, that have made it past that.

21 If there are no further questions --

22 JUSTICE KENNEDY: I have one question. The
23 Appellants here were the ones that appealed to the court
24 of appeals? They appealed from the district court?

25 MR. SALZMAN: Yes.

1 JUSTICE KENNEDY: But under 1291, the United
2 States court of appeals does not have jurisdiction where
3 direct review may be had in the Supreme Court. So it
4 seems to me that their position contradicts their own
5 basis for jurisdiction here. Do you agree with that?

6 MR. SALZMAN: Not entirely, Justice Kennedy.
7 We do -- we had thought that initially and then upon
8 reflection it seemed to us that because the minute order
9 of the district -- because the order of the district
10 court was a minute order that did not explain its
11 reasoning, perhaps there was some ambiguity about
12 whether he was simply finding that Mr. Hanson had so
13 little contact with the legislative process that, that
14 the case should go forward or whether he was in essence
15 --

16 JUSTICE KENNEDY: Well, but my point is that
17 the Appellants are telling us that this is appealable
18 here directly, but if that's so they shouldn't have gone
19 to the court of appeals, and if they shouldn't have gone
20 to the court of appeals, they're untimely when they come
21 here.

22 MR. SALZMAN: That is our understanding of
23 the way it generally works. We believe that the GERA
24 statute, which was the predecessor to the Congressional
25 Accountability Act, may have permitted appeals directly

1 from the court of appeals to this court. So there
2 appeared to be some ambiguity. When we first responded
3 with respect to the appeal, we did argue that if Senator
4 Dayton's office wanted to appeal directly they needed to
5 do that two years ago when the district court had ruled.
6 Upon further research, we were not sure that that was
7 correct, Your Honor.

8 JUSTICE STEVENS: Thank you, Mr. Salzman.
9 Mr. Caballero.

10 ORAL ARGUMENT OF THOMAS E. CABALLERO
11 ON BEHALF OF THE UNITED STATES SENATE
12 AS AMICUS CURIAE, SUPPORTING APPELLEE

13 MR. CABALLERO: Justice Stevens, and may it
14 please the Court:

15 We agree that there is no jurisdiction in
16 this Court under section 412. But I first would like to
17 correct one of the answers regarding cases under this
18 Congressional Accountability Act.

19 Two cases have been finally adjudicated by
20 the district courts. One was this -- two cases against
21 offices of Members or committees where an employee worked
22 for a Member. One of those involved a finding that it
23 was outside the limitations provided in the statute. The
24 other case was a summary judgment finding of an employee
25 who was a legislative employee of the Committee on Ways

1 and Means and the court found that the dismissal there
2 was on an allowable ground under the statute and there
3 was no violation of the employee's rights.

4 JUSTICE SOUTER: And there's no jurisdiction
5 under 412 because?

6 MR. CABALLERO: Because, as we said in our
7 brief, the decision of the court of appeals was a
8 decision on the scope of the Speech or Debate Clause as
9 that clause is preserved in section 413 of the act and
10 therefore there would be no appeal under section 412.

11 If the court does go to the merits in this
12 matter, I think it's important to effectuate Congress's
13 intent in enacting the statute along with its concerns
14 with the Speech or Debate Clause. The Speech or Debate
15 Clause provides Senators and Representatives with a
16 constitutional privilege that is critical to securing
17 the independence of the legislative branch in our system
18 of government.

19 Certainly, Congress is the institution that
20 has the greatest interest in and is most sensitive to
21 maintaining a robust speech or debate privilege under
22 this Court's precedents. In enacting the Congressional
23 Accountability Act, however, Congress concluded that it
24 could provide its own employees with the same employment
25 law protections that it had already provided executive

1 branch employees and private sector employees, including
2 the critical right of action for victims of illegal
3 discrimination to bring suit in the Federal court; and
4 that a suit under the Act would not infringe upon the
5 Speech or Debate Clause.

6 Congress relied on this Court's own
7 precedents in making that determination. Under the
8 Speech or Debate Clause, this Court has made clear that
9 the clause is robust, protects activities outside of
10 just speech and debate on the floor of either House, but
11 that it shouldn't be extended beyond what is necessary
12 to preserve the independence of the legislative process.

13 JUSTICE BREYER: Can you -- can we go back a
14 step? I just -- you said this is appealable and your
15 reason for it being appealable was because the statute
16 itself --
17 you said it was not appealable and the reason not is
18 because the statute itself said that this has to be
19 applied consistent with the Speech or Debate Clause?

20 MR. CABALLERO: Correct.

21 JUSTICE BREYER: That's your reason. So I
22 take it, what about the reason that's been given, that
23 this is an as-applied challenge instead of on its face?
24 What about that as a reason for it not being appealable?

25 MR. CABALLERO: Well, that is an application

1 of section 413, the preservation of Speech or Debate
2 Clause in the statute.

3 JUSTICE BREYER: No, no, no, I'm not asking
4 about the argument you are making. I want to ask about
5 an argument you're not making, that the reason -- I'll
6 ask about the one you are making in a second. The
7 reason I want to know about -- I want to know about the
8 other possible reason for not being appealed, namely
9 that this is as applied and not on its face. They don't
10 strike down any provision. What's your view about that
11 one?

12 MR. CABALLERO: Our view is that that is
13 correct, Your Honor.

14 JUSTICE BREYER: That is correct. And what
15 you do about this case, Eichman -- was it Eichman?

16 MR. CABALLERO: The Eichman case cited.

17 JUSTICE BREYER: Yes.

18 JUSTICE KENNEDY: In Eichman, I've been able
19 to get out the district court and the last part of the
20 district court, the last line of the district court, it
21 says: "The law under which these three districts --
22 these three" -- let me begin again. "The law under which
23 these three defendants have been prosecuted is
24 unconstitutional," which seems to me
25 to contradict what Appellant's counsel told us about

1 what happened in the district court.

2 MR. CABALLERO: I think that's correct. It
3 was --

4 JUSTICE SCALIA: It wouldn't matter anyway,
5 because our prior decisions that do not explicitly refer
6 to jurisdictional questions are not authority on
7 jurisdiction.

8 MR. CABALLERO: That's correct.

9 JUSTICE SCALIA: We have -- that's a firm
10 rule. When we take a case and don't get into the
11 jurisdictional question, it is not precedent for the
12 fact --

13 MR. CABALLERO: For a finding of
14 jurisdiction later, that's correct.

15 I would say --

16 JUSTICE BREYER: So then a holding of a
17 district court in your opinion, the holdings say,
18 imaginary, is that no one who actually works in an
19 office of a Senator and who ever worked on any matter
20 having to do with legislation falls within this Act
21 because that would violate the Speech and Debate Clause.
22 That would be quite major in its implication. But
23 you're saying there is no appeal on that because it's as
24 applied.

25 MR. CABALLERO: Right. Based on the court

1 of appeals decision, I would say the two arguments as
2 applied in the preservation of section 413 aren't wholly
3 separate.

4 JUSTICE BREYER: I mean, if I go to your
5 argument -- I mean, the problem with your argument it
6 seems to me is that that leaves no room for this
7 appellate provision at all, because the only reason that
8 anything is likely to be unconstitutional in this area,
9 at least 99 percent of it, would be Speech or Debate
10 Clause violation. So in that interpretation of the
11 statute there is no direct appeal, or hardly ever.

12 MR. CABALLERO: Well, there was a lot of
13 discussion in the legislative history about the
14 separation of powers generally.

15 JUSTICE ALITO: We were told that 75 percent
16 of the employees who were covered by the Act do not work
17 for an individual Member. So how could the -- how could
18 a provision be held to be facially unconstitutional under
19 the Speech or Debate Clause?

20 MR. CABALLERO: Well, I think the provision
21 wasn't held facially unconstitutional.

22 JUSTICE ALITO: Well, how could it possibly
23 be? And if it couldn't possibly be then what did
24 Congress have in mind when it provided it for an
25 interlocutory appeal from a ruling on the

1 constitutional of the statute?

2 MR. CABALLERO: Again, there was major
3 debate in the Congress over whether or not the provision
4 of judicial hearing of suits over congressional
5 employment decisions, separate from the Speech or Debate
6 Clause, just a separation of powers concern of having
7 the judiciary oversee the internal workings of Congress,
8 and there was a concern about that separation of powers
9 issue, which would be a facial issue. Can you hear any
10 suits by employees of Congress who are employed in a
11 separate branch?

12 And that was where this provision has life,
13 and is meant to protect the ability for a litigant to
14 bring it before this Court immediately; it would be a
15 facial challenge.

16 JUSTICE SCALIA: Yes. That -- that may make
17 sense. I -- I wondered why -- why they would provide for
18 an appeal on constitutionality if they had in mind Speech
19 or Debate Clause stuff, when the legislation itself says
20 that nothing herein shall be deemed a violation of
21 speech.

22 MR. CABALLERO: Right. It preserves a
23 Member's -- exactly. It preserves a Member's speech or
24 debate.

25 JUSTICE SCALIA: Yes.

1 MR. CABALLERO: And when Congress did
2 provide these rights under the statute, it was very
3 important for the Congress under the previous regime
4 affecting the Senate, employees had employment
5 protections and they had administrative processes they
6 could go to. But they lacked a judicial right.
7 And Congress made a specific decision that providing
8 that right of action was an important employment law
9 protection employees needed.

10 And again it relied on this Court's
11 decisions both under the Speech or Debate Clause as to
12 the scope of the clause and under Forrester where this
13 Court held that a judge's employment decision as to an
14 employee who did judicial duties was not a judicial act,
15 did achieve absolute immunity. It was a -- it was an
16 administrative act, an employment act.

17 And similarly here what is brought before
18 the courts is an employment act. Again this case is
19 before the Court on a motion to dismiss. There has been
20 no discovery. There has been no litigation over the
21 claims involved. There is just a question presented:
22 Does the Speech or Debate Clause bar the jurisdiction of
23 Federal courts when a legislative, an employee with any
24 legislative duties brings a suit under the Act? And I
25 think the question -- the answer to that question has to

1 be no.

2 Indeed in the case here, you could have
3 litigation over whether the Senator knew of the alleged
4 disability. That's one of the disputes that's been laid
5 out in the pleadings, whether that was the basis for
6 the -- for the decision to terminate the employee.

7 These are all the types of issues that play
8 out in district courts. District courts receive
9 evidence. They make these judgments; they see the
10 specific context and they make specific rulings. To try
11 to decide in the abstract how you would apply an
12 employment law case with the Speech or Debate Clause in
13 an evidentiary sense is very difficult. And that's why
14 a more full record would be necessary. But to decide
15 the question here on appeal, I think the Court can easily
16 decide if these cases go forward.

17 One last point I would like to make is to
18 address the issue of the existence of the office. It's
19 not a mere creation of the Act. Senators have personal
20 offices. Those offices incur liabilities or
21 obligations. They buy paper; they make contracts and
22 the like. When a Senator leaves office, the employing
23 office still has to pay the bills that were incurred
24 when the Senator was in office. And the Senate allows
25 employing offices under the approval of the former

1 Member to submit the vouchers and receive payment. The
2 employing office has life afterwards.

3 Similarly here, if it incurs an employment
4 liability it has life sufficient to litigate whether or
5 not that liability exists and a judgment will be paid
6 under Government funds under the Act.

7 JUSTICE SOUTER: But it will -- the money is
8 simply Senate money.

9 MR. CABALLERO: Yes. The money is an
10 appropriation of Senate -- and under the fund, the money
11 is an appropriation of the specific fund under the Act
12 for paying judgments in these cases.

13 JUSTICE SOUTER: But none of those funds
14 are, as I understand it, are somehow subtracted from or
15 contributed by the funds of individual senatorial
16 offices while a Senator is in office. I am assuming
17 that those, that there is a separate appropriation for
18 the payment of -- of any such judgment, is that correct?

19 MR. CABALLERO: Under the Act there is.
20 Congress decided to not have any personal liability for
21 a Member to shield them from that, and also not to
22 require the Member's office in cases such as illegal
23 discrimination cases, to pay the awards or judgments.

24 JUSTICE SOUTER: Okay. In the real world
25 then at this point isn't the Senate the -- the party?

1 MR. CABALLERO: Perhaps it's a party in
2 interest, but I would say again that the named party is
3 not a party without any life except under the Act.

4 I thank the Court.

5 JUSTICE STEVENS: Ms. Manning, you have
6 about a minute left.

7 REBUTTAL ARGUMENT BY JEAN M. MANNING,

8 ON BEHALF OF APPELLANT

9 MS. MANNING: There are four instances in
10 which the Court has found that jurisdiction is barred in
11 Speech or Debate Clause cases. The first is when the
12 case is predicated on a legislative act. The second is
13 when the case cannot, that is cannot be adjudicated
14 without questioning a legislative act or the motive for
15 the act. And the third is when the Member will be made
16 to answer in terms of his defense for a legislative act.

17 This goes to the question that Justice
18 Stevens asked. In Gravel the Court made it clear that
19 if the Member is made to answer in his defense for a
20 legislative act, that violates the Speech or Debate
21 Clause. Under the -- these types of cases the Member
22 does, would have to come forward and explain a
23 legislative act; that is, why did I terminate this
24 employee?

25 That is the explanation, because the

1 termination itself is a legislative act, he is being
2 questioned about a legislative act.

3 JUSTICE KENNEDY: Right. I have one -- one
4 question. Could the Senate direct you to pay this
5 judgment?

6 MS. MANNING: Direct me -- I'm sorry. Me
7 personally?

8 JUSTICE KENNEDY: Direct your office to --
9 to do that.

10 MS. MANNING: To pay the judgment?

11 JUSTICE KENNEDY: Because it -- suppose they
12 thought there was liability and if you say yes, then I
13 need to know why you and counsel who just addressed this
14 are on different sides of the case, if you're both
15 representing the Senate.

16 MS. MANNING: They cannot direct us to pay.
17 It of course comes out of the Treasury fund and the
18 Senate has had absolutely no control or involvement at
19 all for 12 years in any of these cases. They do not
20 know --

21 JUSTICE KENNEDY: Could it, if it chose?

22 MS. MANNING: Well, I believe that it cannot
23 because the defendant in this case is the employing
24 office.

25 JUSTICE KENNEDY: All right.

1 MS. MANNING: So for that reason the Senate
2 has never, doesn't even know the cases exist. Doesn't
3 know that we are negotiating a settlement. Doesn't
4 review settlement agreements. Is not involved in
5 strategy. In fact the CAA in section 403 states that
6 the -- that the mediation and then the counseling in the
7 case is strictly confidential. The Senate cannot even
8 know that they are happening. Only the employing office
9 can know. In no sense has the Senate been the defendant.
10 If the Senate has been defendant --

11 JUSTICE STEVENS: Thank you --

12 MS. MANNING: Where have they been for
13 12 years? They have not been involved in these cases for
14 12 years.

15 JUSTICE STEVENS: Thank you, Ms. Manning.
16 The case is submitted.

17 MS. MANNING: Thank you.

18 (Whereupon, at 2:02 p.m., the case in the
19 above-entitled matter was submitted.)

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