

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	JEAN M. MANNING, ESQ.	
4	On behalf of the Appellant	3
5	ORAL ARGUMENT OF	
6	RICHARD A. SALZMAN, ESQ.	
7	On behalf of Appellee	31
8	ORAL ARGUMENT OF	
9	THOMAS E. CABALLERO, ESQ.,	
10	On behalf of the United States Senate,	
11	as amicus curiae, supporting Appellee	46
12	REBUTTAL ARGUMENT OF	
13	JEAN M. MANNING, ESQ.	
14	On behalf of the Appellant	55
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 vs. 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 the 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 or 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 I mean, the statute has within itself a Speech or Debate
16 Clause exception. Now, I guess you can argue that a
17 lower court might not accurately provide the Speech or
18 Debate Clause protection that is due, but that, that
19 doesn't meet, it seems to me, the, the jurisdictional
20 requirement that, that the constitutionality of the
21 statute be called into 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 of order of court upon the
9 constitutionality of any provision of the Act." Now,
10 and as-applied challenge is not a challenge to the
11 constitutionality of the provision.

12 MS. MANNING: Justice Scalia, in the United
13 States versus Eichman, that statute at 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 are 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 --

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 to reach that decision there
6 were a couple of sub-arguments the court had to reach.
7 We had argued that, number one, is there a waiver of
8 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 that Mr. Hanson doesn't meet the duties test, therefore
14 we never have to reach the constitutional issue, and
15 that would have been a decision on his duties, not on
16 the Constitution.

17 JUSTICE ALITO: 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: But didn't the district
8 court rule that somebody performing those duties can
9 constitutionally be tried -- bring suit, and it doesn't,
10 and it doesn't violate the Speech or Debate Clause? So
11 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 --

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 unconstitutional and a
6 possibility it could not.

7 JUSTICE BREYER: I see.

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 embracing
11 a decision by a court that a particular use of this
12 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?

12 MS. MANNING: Yes, United States versus
13 Eichman is cited at the Appellant's reply brief at page
14 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 is 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: Counsel argued both, but this
2 Court did not deal with both. This Court actually took
3 direct appeal just on the as-applied argument. Counsel
4 argued the statute was unconstitutional and the second
5 argument was --

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

8 MS. MANNING: What the Court held was --

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

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

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

17 MS. MANNING: Well, the --

18 JUSTICE KENNEDY: Absent some declaratory
19 judgment provision.

20 JUSTICE STEVENS: We simply didn't rule hold
21 was a right to burn flags in some cases and not others.

22 MS. MANNING: Well, there were questions
23 that the parties raised. One was, is the statute
24 unconstitutional altogether. And the Court didn't even
25 touch that. Instead the second argument they raised was

1 well, is it constitutional -- unconstitutional, rather,
2 as applied on these facts? And that is what the Court
3 took the case on, that was what allowed direct
4 jurisdiction.

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

9 MS. MANNING: I'm sorry, Justice Scalia, I
10 don't remember what the lower court held in that case --

11 JUSTICE SCALIA: I mean, but that can mean
12 -- you can always dispose of a, of a facial challenge by
13 just saying we don't have to reach the facial question;
14 we can decide it on an as applied question. But in
15 order to get here in the first place, it has to be a
16 challenge to the constitutionality of a provision of the
17 Act.

18 JUSTICE KENNEDY: And in we recite that the
19 district court held the Act unconstitutional as applied
20 to appellees and dismissed the charges.

21 MS. MANNING: Right. Unconstitutional as
22 applied so it was an as applied argument. And now when
23 the Court wants a statute to mean that it's only an
24 unconstitutional interpretation as opposed to a
25 constitutional interpretation, the Court -- I'm sorry,

1 Congress makes that distinction. So for example in 28
2 U.S.C. Section 1257, which was a direct appeals statute,
3 and has since been repealed, in that statute Congress
4 did say that there is direct appeal when the statute is
5 found to be constitutional, or when the statute is found
6 to be unconstitutional. But it used -- Congress, that
7 is, used the vague language, more vague and general
8 language in Section 412, which is just upon the
9 constitutionality. In any event --

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

15 MS. MANNING: Not that I recall in the
16 Eichman case. Not that I recall.

17 JUSTICE SOUTER:

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

23 Moving to my Speech or Debate Clause
24 argument, with respect to Speech or Debate Clause, this
25 Court has held that all acts that are within the

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

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

20 MS. MANNING: Justice Breyer, he did
21 significantly more than that. First --

22 JUSTICE BREYER: I have the whole list here.
23 What here suggests, he ever -- he doesn't even write a
24 statement for the floor. There is nothing here that
25 suggests one word of anything he did ever went to a

1 committee meeting, to a floor of the Senate, anything.

2 MS. MANNING: Oh, Justice --

3 JUSTICE BREYER: What?

4 MS. MANNING: Justice Breyer --

5 JUSTICE BREYER: What are the words?

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

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

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

23 MS. MANNING: Justice Breyer actually he did
24 both of those. He for example, when talking to the
25 constituents realized that there was a problem with

1 respect to ambulance reimbursement for health care. He
2 went to the Senator and said we've got a problem here in
3 the State, and the constituents have identified it. He
4 then said to the Senator, I think you should draft
5 legislation on this and I think you should have a
6 committee hearing on this. Both of which the Senator
7 did. Mr. Hanson drafted that legislation. He --

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

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

11 JUSTICE BREYER: Where does it say that?

12 MS. MANNING: That is in the Kimball
13 declaration which is jurisdictional statements at page
14 66a. And he also prepared the witnesses for the
15 hearings. Justice -- I'm sorry, Senator Dayton had the
16 hearing on the health care issue, and Mr. Hanson
17 identified the witnesses for that, prepared them, wrote
18 the questions for the hearing and --

19 JUSTICE SCALIA: Well, he didn't do
20 exclusively that stuff anyway. We can certainly all
21 agree on that. And why isn't it sufficient that when
22 any of those issues are, his activities in any of those
23 capacities are sought to be introduced into evidence,
24 anyone tries to contradict them, then you can bring in
25 your Speech or Debate Clause objection?

1 MS. MANNING: Because it is --

2 JUSTICE SCALIA: Why is the whole suit
3 precluded?

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

15 So the termination itself is part of the
16 functioning of the legislative process which is the test
17 for a legislative act. And therefore this case is
18 predicated on a legislative act. That is, the
19 termination. And in Doe V. McMillan this Court stated
20 that a case that is predicated on a legislative cannot
21 be adjudicated.

22 JUSTICE STEVENS: I'm puzzled. Firing
23 somebody is a legislative act?

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

25 JUSTICE STEVENS: Firing someone is a

1 legislative act?

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

11 JUSTICE GINSBURG: That's part of -- how many
12 second selves would there be?

13 (Laughter.)

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

15 JUSTICE GINSBURG: On the Senator's staff?

16 MS. MANNING: I'm sorry. I still didn't
17 hear.

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

21 JUSTICE SCALIA: Maybe he was the 23rd self.

22 (Laughter.)

23 JUSTICE SCALIA: I think you have to figure
24 out when he was hired.

25 MS. MANNING: Well, in Gravel, in United

1 States vs. Gravel, this Court stated not only do you
2 have second selves, but you must -- members must
3 delegate and redelegate and redelegate authority. That
4 implies there are a lot of second selves. It's not one
5 person. So there can be --

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

16 Now suppose that we did as the court, lower
17 court wanted to do, say let's just see if that becomes
18 relevant. Because it's possible, given his other tasks
19 that those two incidents, one on November 15th and the
20 other, whenever help he gave to the drafting, had
21 nothing to do with his being fired and nobody claims
22 that. So what they said is let's wait and see if that
23 becomes relevant. Now what's wrong with that solution?

24 MS. MANNING: What's wrong with that
25 solution is that when a member, as I was explaining in

1 response to Justice Stevens' questions, when a member
2 has a second self who is in the legislative process and
3 the member says you know, I'm pulling him out of the
4 process because he doesn't perform well, he -- I don't
5 think he is my second self, that termination for
6 whatever reason is part of the process because the
7 member has changed the process.

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

12 MS. MANNING: The -- it is a whole employee.
13 When he is removed from the process for whatever reason,
14 he is gone from the process so that is part of the
15 functioning of the process. If I may give an example,
16 let's say that the Senator is at Union Station and he is
17 buying a gift for someone and he hears someone making
18 very derogatory statements to the cashier, and he turns
19 around and lo and behold, this is his legislative
20 director. And he says I can't have this person as my
21 second self; I don't talk to individuals that way; this
22 has nothing to do with my legislative process but this
23 is a second self and he is not my second self and I pull
24 him out of the process.

25 That has affected his legislative process.

1 He now has a hole in this sphere, this legislative
2 sphere. The person is gone. That is a part of his
3 legislative process. He didn't matter, why he is gone.
4 He is gone.

5 JUSTICE KENNEDY: Isn't that a -- can you
6 give me examples of cases where that Act applies?

7 MS. MANNING: I'm sorry?

8 JUSTICE KENNEDY: Can you give me instances
9 in which employees of an the office of a Senator are
10 covered by these obligations and cannot invoke the
11 Speech or Debate Clause? What's the classic example
12 where you can't invoke the Speech or Debate Clause?

13 MS. MANNING: Where you cannot invoke the
14 Speech or Debate Clause.

15 JUSTICE KENNEDY: Yeah.

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

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

20 MS. MANNING: If I may answer the second
21 question first, approximately 75 percent of the people
22 who are covered by this Act, the employees who are
23 covered by this Act are not employed by members of
24 Congress or committees. Now those employees for the
25 most part -- and not all of them, because some of those

1 employees do work on the floor, but for the most part --

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

4 MS. MANNING: And those employees --

5 JUSTICE KENNEDY: And so it seems to me
6 you're giving no effect to that. You say there is a
7 hole in the process the minute the furniture mover is
8 gone?

9 MS. MANNING: No, Justice Kennedy, those
10 employees -- first of all some of those employees can
11 sue. For example the Court has said that writing news
12 releases or newsletters to constituents, this is in the
13 Brewster case, are not, that is not a legislative act.
14 So if we have an employee in a member's office like the
15 deputy press secretary who does those kind of things,
16 that person is not performing legislative acts. But in
17 addition to that these employees still have a -- a
18 forum; their forum is the Office of Compliance, which is
19 unique to the Congressional Accountability Act. And the
20 Office of Compliance has cases heard before retired
21 judges; the employees get the same remedies as they
22 would in court. It is the same procedure except that it
23 is an expedited procedure and it is a confidential
24 procedure.

25 So these employees are, it's not that they

1 can't sue; it's that they cannot sue in Federal court.

2 JUSTICE ALITO: If this statute --

3 JUSTICE SOUTER: Wouldn't they get into --

4 no, you.

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

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

22 And so for example in Eastland versus
23 Servicemen's Fund this Court stated that a committee of
24 the Senate is covered by the Speech or Debate Clause.
25 And in Tenney although that was a State case, the Court

1 did apply the Speech or Debate Clause jurisprudence.
2 The Court there said that a committee of the State is
3 covered by the Speech or Debate Clause and the case
4 would be dismissed.

5 And then in Doe vs. McMillan, in that case
6 there was a consultant to Congress and he was sued.
7 There was functionaries of Congress that did not work
8 for a member, did not work for a committee and the Court
9 held in that case that if those, if the consultant and
10 the functionaries were performing duties that were
11 within this legislative sphere, the Speech or Debate
12 Clause clause applies and the case was dismissed.

13 JUSTICE ALITO: In what sense would the
14 member be called to answer under those circumstances, if
15 the member isn't a defendant and has no financial
16 liability and is able to invoke the clause as an
17 evidentiary privilege? In what sense would the Speech
18 or Debate Clause be applicable?

19 MS. MANNING: In the scenario where the
20 Congress is the defendant?

21 JUSTICE ALITO: Yes.

22 MS. MANNING: Well, what we are arguing is
23 that the termination itself, the termination itself is a
24 legislative act because the termination itself is part
25 of the due functioning of the legislative process. And

1 in Doe V. McMillan the Court stated that when a case is
2 predicated on a legislative act, court jurisdiction is
3 barred. Now also in answer to your question it doesn't
4 matter who the defendant is. The member, let's say
5 Congress was --

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

16 MS. MANNING: No Justice Ginsburg, there has
17 been no waiver --

18 JUSTICE SOUTER: I'm Justice Souter.

19 MS. MANNING: I'm sorry. Justice Souter,
20 sorry. Justice Souter --

21 JUSTICE SOUTER: You're very flattering.

22 (Laughter.)

23 MS. MANNING: Sorry. Justice Souter, sorry,
24 Justice Souter.

25 There has been no waiver for the Senate as a

1 defendant. Section 1408 of the CAA which of course
2 gives the Court jurisdiction --

3 JUSTICE SOUTER: Yes, but I was just going
4 to say if this case continues we've got to accept the
5 proposition that the Office of Senator Mark Dayton is
6 still a, some kind of an entity that has got to be
7 accorded reality by the judiciary, right.

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

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

22 MS. MANNING: I agree with that, Justice
23 Souter. There is no defendant that exists any more.
24 The only defendant in the CAA, and the language is very
25 express, is the employing office and the employing

1 office is defined in Section 1301(9) as, for purposes of
2 this case, "the personal office of a member of
3 Congress." And there is no member of Congress --

4 JUSTICE SOUTER: Yes, but at this point
5 that's silly. There's no Senator. There's no office in
6 any sense.

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

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

22 JUSTICE SCALIA: There's never an office. I
23 mean, I think the office is just a fictional construct
24 anyway. So what you say now has nothing to do with
25 whether, whether this current Senator has, has departed

1 from the scene. Even if he were still on the scene,
2 there still wouldn't be any such thing as that office.
3 It's just a fiction, and it would always be a suit
4 against Congress, and so you say none of these suits can
5 ever be brought.

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

8 JUSTICE SCALIA: Why isn't it a waiver of
9 sovereign immunity when you set up a suit that envisions
10 a suit which will be paid off by the Senate? Why isn't
11 that a waiver of sovereign immunity?

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

14 JUSTICE SOUTER: Is it unequivocal?

15 MS. MANNING: It is unequivocal --

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

19 MS. MANNING: Well, first, I disagree with
20 the premise in that I don't think it is a fiction that
21 this office never existed. The office, the personal
22 office of a member of Congress -- members of Congress
23 didn't work out in the hallway before the CAA was
24 passed. There was always a personal office of a member
25 of Congress. So in that sense it is not a fiction.

1 I would like to reserve the balance of my
2 time.

3 JUSTICE SCALIA: A physical, a physical
4 office, yes. I mean, they didn't work in the hallway.
5 But their staff salary was not paid out of their, quote,
6 "office." It was paid out of the Senate.

7 MS. MANNING: Well, actually the structure
8 doesn't support that. The Senate, within the Senate,
9 each member does pay the salary, sets the salary. We
10 can have legislative directors and do have legislative
11 directors in two different offices, different salaries,
12 different numbers of paid days, different number of
13 annual leave days.

14 JUSTICE SCALIA: Setting it is quite
15 different from paying it.

16 MS. MANNING: It is paid for --

17 JUSTICE SCALIA : The Senator sets it and
18 the Senate pays it.

19 MS. MANNING: Justice Scalia, actually the
20 Senate is given an appropriation and all of his salaries
21 must be paid from the appropriation.

22 JUSTICE SCALIA: Right. The Senate puts a
23 limit on how much money it will spend for a particular
24 Senator. That's all that amounts to. It doesn't hand
25 him the money. It's still the Senate's money, isn't it?

1 And what the Senate says is each office will have so
2 much of a call upon our fund and no more.

3 MS. MANNING: It is the appropriated fund
4 for the Senator and the Senator is the one who pays the
5 fund.

6 If I may, I'd like to reserve the rest of my
7 time.

8 JUSTICE STEVENS: Mr. Salzman.

9 ORAL ARGUMENT OF RICHARD A. SALZMAN

10 ON BEHALF OF APPELLEE

11 MR. SALZMAN: Justice Stevens and may it
12 please the Court:

13 The motion to dismiss in this case raised a
14 single issue, the issue of absolute immunity; more
15 specifically, whether the employing office created by
16 Congress as the defendant in these kinds of cases can be
17 sued by a member of a Senator or a House of
18 Representatives staff. The Dayton office argues that a
19 Senator's personnel decisions are always a legislative
20 act that are always absolutely immunized by the Speech
21 or Debate Clause. That argument is untenable and it was
22 rejected by every one of the eight judges of the D.C.
23 Circuit en banc.

24 This case doesn't involve any administrative
25 acts. Mr. Hanson didn't work on Capitol Hill. He was

1 in the Minnesota office. His, the nature of his claim
2 is that he was a valued employee until he became ill and
3 disclosed his illness and need for surgery, at which
4 point he was fired. Senator Dayton's office first says
5 that they were not even aware, that Senator Dayton was
6 unaware of the need for surgery at the time he made the
7 decision to fire Mr. Hanson, and then says that the
8 reason for the firing was Mr. Hanson's work on a classic
9 constituent service.

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

21 JUSTICE SCALIA: The other side's contention
22 is that the firing is itself a legislative act and so
23 when you challenge the firing you are challenging the
24 legislative act. What do you say to that?

25 MR. SALZMAN: We say that's absolutely wrong

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

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

23 But none of that involves legislative
24 activity as this Court has described it under the speech
25 or debate act. So our contention is that the only issue

1 in this case is absolute immunity and there is no
2 absolute immunity in this case. This case does not
3 involve a legislative act, as Judge Randolph below and
4 all of the judges below recognized.

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

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

21 JUSTICE STEVENS: But maybe the Senator
22 might argue that this is all privileged: It's the
23 reason I fired him, but I can't go into it because I
24 don't want to invade my own privilege not to discuss
25 matters that are covered by the immunity.

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

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

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

20 JUSTICE KENNEDY: What if it required him to
21 say how he allocated his resources, that he allocate his
22 resources 10 percent to foreign affairs issues, 50
23 percent to health care issues? Would that involve is --
24 is that a Speech or Debate Clause problem?

25 MR. SALZMAN: I don't believe that it would,

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

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

19 We don't believe that in the, in the run of
20 these cases, that will be difficult for the district
21 courts to handle.

22 JUSTICE STEVENS: That doesn't quite capture
23 the problem that I'm having. It's not that the
24 plaintiff can't inquire. Usually they can't. But my
25 thought is that the defendant cannot put in his own

1 defense without waiving the privilege that would
2 otherwise be applicable. So he's sort of in a dilemma.
3 Either I give up my constitutional right not to talk
4 about this stuff or I've got to waive that right in
5 order to give a full explanation of why I discharged the
6 plaintiff.

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

17 JUSTICE STEVENS: Or he just wrote a lousy
18 memo. In order to demonstrate it's lousy, I've got to
19 talk about legislative matters.

20 MR. SALZMAN: If that is truly the situation
21 and if a district court assessing, once all of the
22 information is presented to the district court, that
23 requiring the Senator in that circumstance to discuss
24 really his legislative goals, we think that maybe that
25 evidence would not be permitted. Now, the, this court

1 has recognized --

2 JUSTICE STEVENS: Even if the Senator did
3 not have a defense?

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

21 JUSTICE SOUTER: Yes, but what if the
22 Senator doesn't want to put it in? I mean, what if he
23 does not want to waive the privilege? Is his only
24 choice in effect to sit moot and lose the case?

25 MR. SALZMAN: Well, if he chooses to sit

1 moot and if the evidence --

2 JUSTICE SOUTER: "Mute" I guess I should
3 have said.

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

5 JUSTICE SOUTER: Yes.

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

9 JUSTICE SOUTER: Well, why don't, why
10 doesn't that -- why doesn't being placed in that dilemma
11 in effect implicate the clause, and why can't he invoke
12 the clause as a basis for dismissal?

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

23 JUSTICE SOUTER: Well, yes, so far as the
24 member's immediate financial concern, they took care of
25 it. But I'm not sure about the careful way. They in

1 effect said, you know, if this gets into Speech or
2 Debate Clause issues they prevail. And that kind of
3 just leaves us with no solution for the problem that
4 Justice Stevens raised and that I'm concerning with,
5 unless there's, there's going to be an automatic
6 dismissal when the member says, look, I cannot respond
7 to this without getting into, into acts within the
8 legislative process which are privileged.

9 Unless you want to recognize that as kind of
10 an absolute defense upon its invocation, I don't see how
11 we get out of the problem.

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

23 It may be that in some rare circumstances
24 the Senator in order to fully defend himself feels the
25 need to actually testify about real legislative acts,

1 such as votes on something or his conduct in a committee
2 proceeding. But his assessment of an employee's
3 performance, just as Judge White's assessment in the
4 Forrester case of Miss Forrester's performance, is not
5 legislative activity. It may be activity that is
6 important to the legislative process. It may provide
7 for a sound legislative arena, just as in the judicial
8 sphere. But when this Court found unanimous,
9 unanimously that when Judge White was assessing the
10 performance of Miss Forrester in the judicial context
11 and deciding, I don't think she did a good job on
12 delegated judicial functions, that's not a judicial act.
13 And we would say the same with respect to a legislative
14 act, so --

15 JUSTICE GINSBURG: That would go for a
16 stenographer in a committee hearing?

17 MR. SALZMAN: Yes, Your Honor, and I believe
18 that's the Browning case, that the D.C. Circuit
19 originally had found would be considered a legislative
20 act. And we do believe that, yes, the assessment by
21 the, whoever supervised Miss Browning that her
22 performance was inadequate is not itself a legislative
23 activity. Miss Browning's performance obviously was
24 involved, was closely tied to the legislative process
25 because she was a stenographer at hearings. If the

1 committee, if the committee decided in a committee
2 proceeding and took a vote that they were not going to
3 use stenographers any more and Miss Browning had brought
4 a challenge with respect to that, alleging that it was
5 focused personally on her and racially motivated, then
6 we think a legislative immunity might apply as it did in
7 the Bogan case.

8 But absent that, it's our belief that an
9 assessment of an employee's performance, even if the
10 employee is performing duties that are related to the
11 legislative process, is not itself a legislative act.

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

19 MR. SALZMAN: Justice Breyer, I think that
20 that is one of the rare circumstances where the, the
21 Senator's assessment of the performance is very tied up
22 with a legislative act.

23 JUSTICE BREYER: Well, all he'd have to say
24 is it's relevant to my decision to fire the person.
25 Now, surely a jury or whoever -- it's probably a jury

1 matter, I guess, on this -- is entitled to take that
2 into account. If it's something the jury is entitled to
3 take into account, you are questioning what that Senator
4 did in the speech or debate and you are questioning it
5 in another place, namely, a court.

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

20 That's not this case. This case deals with
21 threshold immunity issues, where the Senator's office is
22 saying that any personnel decision that it engages in is
23 by definition a legislative act if it relates to anybody
24 who works in their office. And Congress clearly was not
25 of that view. It defined every employee of the Senate,

1 including those who worked in a Senator's office, to be
2 a covered employee and all covered employees under
3 Section 408 have the right to go to court.

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

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

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

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

17 If there are no further questions --

18 JUSTICE KENNEDY: I have one question. The
19 Appellants here were the ones that appealed to the court
20 of appeals? Did they appeal from the district court?

21 MR. SALZMAN: Yes.

22 JUSTICE KENNEDY: But under 1291, the United
23 States Court of Appeals does not have jurisdiction where
24 direct review may be had in the Supreme Court. So it
25 seems to me that their position contradicts their own

1 basis for jurisdiction here. Do you agree with that?

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

12 JUSTICE KENNEDY: Well, but my point is that
13 the Appellants are telling us that this is appealable
14 here directly, but if that's so they shouldn't have gone
15 to court of appeals, they shouldn't have gone to the
16 court of appeals; they're untimely when they come here.

17 MR. SALZMAN: That is our understanding of
18 the way it generally works. We believe that the GYRA
19 statute, which was the predecessor to the Congressional
20 Accountability Act, may have permitted appeals directly
21 from the court of appeals to this court. So there
22 appears to be some ambiguity. When we first responded
23 with respect to the appeal, we did argue that if Senator
24 Dayton's office wanted to appeal directly they needed to
25 do that two years ago when the district court had ruled.

1 Upon further research, we were not sure that that was
2 correct, Your Honor.

3 JUSTICE STEVENS: Thank you, Mr. Salzman.

4 Mr. Caballero.

5 ORAL ARGUMENT OF THOMAS E. CABALLERO

6 ON BEHALF OF THE UNITED STATES SENATE

7 AS AMICUS CURIAE, SUPPORTING APPELLEE

8 MR. CABALLERO: Justice Stevens and may it
9 please the Court:

10 We agree that there is no jurisdiction in
11 this Court under Section 412. But I first would like to
12 correct one of the answers regarding cases under this
13 Congressional Accountability Act.

14 Two cases have been finally adjudicated by
15 the district courts. One was two cases against offices
16 of members or committees where an employee worked for a
17 member. One of those involved a finding that it was
18 outside the limitations in the statute. The other case
19 was a summary judgment finding of an employee who was a
20 legislative employee of the Committee on Ways and Means
21 and the Court found that the dismissal there was on an
22 allowable ground under the statute and there was no
23 violation of the employee's rights.

24 JUSTICE SOUTER: And there's no jurisdiction
25 under 412 because?

1 MR. CABALLERO: Because, as we said in our
2 brief, the decision of the court of appeals was a
3 decision on the scope of the Speech or Debate Clause as
4 that clause is preserved in Section 413 of the act and
5 therefore there would be no appeal under Section 412.

6 If the court does go to the merits in this
7 matter, I think it's important to effectuate Congress'
8 intent in enacting the statute along with its concerns
9 with the Speech or Debate Clause. The Speech or Debate
10 Clause provides senators and representatives with a
11 constitutional privilege that is critical to securing
12 the independence of the legislative branch in our system
13 of government.

14 Certainly, Congress is the institution that
15 has the greatest interest in and is most sensitive to
16 maintaining a robust speech or debate privilege under
17 this Court's precedence. In enacting the Congressional
18 Accountability Act, however, Congress concluded that it
19 could provide its own employees with the same employment
20 law protections that it had already provided Executive
21 Branch employees and private sector employees, including
22 the critical right of action for victims of illegal
23 discrimination to bring suit in the Federal court; and
24 that a suit under the Act would not infringe upon the
25 Speech or Debate Clause.

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

8 JUSTICE BREYER: Can we go back a step. I
9 just -- you said this is appealable and your reason for
10 it being appealable was because the statute itself --
11 you said it was not appealable and the reason not is
12 because the statute itself said that this has to be
13 applied consistent with the Speech or Debate Clause?

14 MR. CABALLERO: Correct.

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

19 MR. CABALLERO: Well, that is an application
20 of Section 412, the preservation of Speech or Debate
21 Clause in the statute.

22 JUSTICE BREYER: No, no, no, I'm not asking
23 about the argument you are making. I want to ask about
24 an argument you aren't making, that the reason -- I'll
25 ask about the one you are making in a second. The

1 reason I want to know about -- I want to know about the
2 other possible reason for not being appealed, namely
3 that this is as applied and not on its face. They don't
4 strike down any provision. What's your view about that
5 one?

6 MR. CABALLERO: Our view is that that is
7 correct, Your Honor.

8 JUSTICE BREYER: That is correct. And what
9 you do about this case, what is it, Eichman?

10 MR. CABALLERO: The Eichman case they cited.

11 JUSTICE KENNEDY: In Eichman, I was able to
12 get out the district court and the last part of the
13 district court, the last line of the district court, it
14 says the law under which these three -- let me begin
15 again -- the law under which these three defendants have
16 been prosecuted is unconstitutional, which seems to me
17 to contradict what Appellant's counsel told us about
18 what happened in the district court.

19 MR. CABALLERO: I think that's correct.

20 JUSTICE SCALIA: It wouldn't matter anyway,
21 because our prior decisions that do not explicitly refer
22 to jurisdictional questions are not authority on
23 jurisdiction.

24 MR. CABALLERO: That's correct.

25 JUSTICE SCALIA: We have that firm rule:

1 When we take a case and don't get into the
2 jurisdictional question, it is not precedent for the
3 fact -- -

4 MR. CABALLERO: For a finding of
5 jurisdiction later, that's correct.

6 I would say --

7 JUSTICE BREYER: So then a holding of a
8 district court in your opinion, the holdings say,
9 imaginary, is that no one who actually works in an
10 office of a Senator and who ever worked on any matter
11 having to do with legislation falls within this Act
12 because that would violate the speech and debate clause.
13 That would be quite major in its implication. But
14 you're saying there is no appeal on that because it's as
15 applied.

16 MR. CABALLERO: Right. Based on the court
17 of appeals decision, I would say the two arguments as
18 applied in the preservation of Section 413 aren't wholly
19 separate.

20 JUSTICE BREYER: Does that mean if I go to
21 your argument -- I mean, the problem with your argument
22 it seems to me is that that leaves no room for this
23 appellate provision at law, because the only reason that
24 anything is likely to be unconstitutional in this area,
25 at least 99 percent of it, would be Speech or Debate

1 Clause violation. So in that interpretation of the
2 statute there is no direct appeal, or hardly ever.

3 MR. CABALLERO: Well, there was a lot of
4 discussion in the legislative history about the
5 separation of powers generally.

6 JUSTICE ALITO: We were told that 75 percent
7 of the employees who were covered by the Act do not work
8 for an individual member. So how could, how could a
9 provision to be facially unconstitutional under the
10 Speech or Debate Clause?

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

13 JUSTICE ALITO: What could it possibly be?
14 And if it couldn't possibly be then what did Congress
15 have in mind when it provided it for an interlocutory
16 appeal from a ruling on the constitutionality of the
17 statute.

18 MR. CABALLERO: Again, there was major
19 debate in the Congress over whether or not the provision
20 of judicial hearing of suits over congressional
21 employment decisions, separate from the Speech or Debate
22 Clause, just a separation of powers concern of having
23 the judiciary oversee the workings of Congress, and
24 there was a concern about that separation of powers
25 issue, which would be a facial issue. Can you hear any

1 suits by employees of Congress who are employed in a
2 separate branch?

3 And that was where this provision has life,
4 and is meant to protect the ability for a litigant to
5 bring it before this Court immediately; it would be a
6 facial challenge.

7 JUSTICE SCALIA: Yes. That, that may make
8 sense. I, I wondered why -- why they would provide for
9 an appeal on constitutionality if they had in mind the
10 Speech or Debate Clause stuff, when the legislation
11 itself says that nothing herein shall be deemed a
12 violation of speech.

13 MR. CABALLERO: Right. It preserves a
14 member's -- exactly. It preserves a member's speech or
15 debate.

16 JUSTICE SCALIA: Yeah.

17 MR. CABALLERO: And when Congress did
18 provide these rights under the statute, it was very
19 important for the Congress under the previous regime
20 affecting the Senate, employees had employment
21 protections and they had administrative processes that
22 they could go to. But they lacked a judicial right.
23 And Congress made a specific decision that providing
24 that right of action was an important employment law
25 protection employees needed.

1 And again it relied on this Court's
2 decisions both under the Speech or Debate Clause as to
3 the scope of the clause and under Forrester where this
4 Court held that a judge's employment decision as to an
5 employee who did judicial duties was not a judicial act,
6 did -- achieve absolute immunity. It was a -- it was an
7 administrative act, an employment act.

8 And similarly here what is brought before
9 the courts is an employment act. Again this case is
10 before the Court on a motion to dismiss. There has been
11 no discovery. There has been no litigation over the
12 claims involved. There is just a question presented
13 does the Speech or Debate Clause bar the jurisdiction of
14 Federal courts when a legislative, an employee with any
15 legislative duties brings a suit under the Act? And I
16 think the question, the answer to that question has to
17 be no.

18 Indeed in the case here, you could have
19 litigation over whether the Senator knew of the alleged
20 disability. That's one of the disputes that's been laid
21 out in the pleadings, whether that was the basis for
22 the, for the decision to terminate the employee.

23 These are all the types of issues that play
24 out in district courts. District courts receive
25 evidence. They make these judgments; they see the

1 specific context and they make specific rulings. To try
2 to decide in the abstract how you would apply an
3 employment law case with the Speech or Debate Clause in
4 an evidentiary sense is very difficult. And that's why
5 a more full record would be necessary. But to decide
6 the question on appeal, I think the Court can easily
7 decide if these cases go forward.

8 One last point I would like to make is to
9 address the issue of the existence of the office. It's
10 not a mere creation of the Act. Senators have personal
11 offices. Those offices incur liabilities or
12 obligations. They buy paper; they make contracts and
13 the like. When a Senator leaves office, the employing
14 office still has to pay the bills that were incurred
15 when the Senator was in office. And the Senate allows
16 employing offices under the approval of the former
17 member to submit the vouchers and receive payment. The
18 employing office has life afterwards.

19 Similarly here, if it incurs an employment
20 liability it has life sufficient to litigate whether or
21 not that liability exists and a judgment will be paid
22 under Government funds under the Act.

23 JUSTICE SOUTER: But it will -- the money is
24 simply Senate money.

25 MR. CABALLERO: Yes. The money is an

1 appropriation of Senate -- and under the fund, the money
2 is an appropriation for the specific fund under the Act
3 for paying judgements in these cases.

4 JUSTICE SOUTER: But none of those funds
5 are, as I understand it, are somehow subtracted from or
6 contributed by the funds of individual senatorial
7 offices while a Senator is in office. I am assuming
8 that those, that there is a separate appropriation for
9 the payment of -- of any such judgment, is that correct?

10 MR. CABALLERO: Under the Act there is.
11 Congress decided to not have any personal liability for
12 a member to shield them from that, and also not to
13 require the member's office in cases such as illegal
14 discrimination cases, to pay the awards or judgments.

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

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

20 I thank the Court.

21 JUSTICE STEVENS: Ms. Manning, you have
22 about a minute left.

23 REBUTTAL ARGUMENT BY JEAN M. MANNING,

24 ON BEHALF OF APPELLANT

25 MS. MANNING: There are four instances in

1 which the Court has found that jurisdiction is barred in
2 Speech or Debate Clause cases. The first is when the
3 case is predicated on a legislative act. The second is
4 when the case cannot, that is cannot be adjudicated
5 without questioning a legislative act or the motive for
6 the act. And the third is when the member will be made
7 to answer in terms of his defense for a legislative act.

8 This goes to the question that Justice
9 Stevens asked. In Gravel the Court made it clear that
10 if the member is made to answer in his defense for a
11 legislative act, that violates the Speech or Debate
12 Clause. Under the, these types of cases the member
13 does, would have to come forward and explain a
14 legislative act: that is, why did I terminate this
15 employee?

16 That is the explanation, because the
17 termination itself is a legislative act, he is being
18 questioned about a legislative act.

19 JUSTICE KENNEDY: Right. I have one -- one
20 question. Could the Senate direct you to pay this
21 judgment?

22 MS. MANNING: Direct me -- I'm sorry. Me
23 personally?

24 JUSTICE KENNEDY: Direct your office to --
25 to do that.

1 MS. MANNING: To pay the judgment?

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

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

12 JUSTICE KENNEDY: Could it, if it chose?

13 MS. MANNING: Well, I believe that it cannot
14 because the defendant in this case is the employing
15 office.

16 JUSTICE KENNEDY: All right.

17 MS. MANNING: So for that reason the Senate
18 has never, doesn't even know the cases exist. Doesn't
19 know that we are negotiating settlement. Doesn't review
20 settlement agreements. Is not involved in strategy. In
21 fact the CAA in Section 403 states that the, that the
22 mediation and then the counseling in the case is
23 strictly confidential. The Senate cannot even know that
24 they are happening. Only the employing office can know.
25 In no sense has the Senate been the defendant. If the

1 Senate has been defendant --

2 JUSTICE STEVENS: Ms. Manning --

3 MS. MANNING: Where this they been for
4 twelve years? They have not been in these cases for
5 twelve years.

6 JUSTICE STEVENS: Thank you, Ms. Manning.
7 The case is submitted.

8 MS. MANNING: Thank you.

9 (Whereupon, at 2:02 p.m., the case in the
10 above-titled matter was submitted.)

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A	39:16 40:14,17 40:22 41:12,14 41:20 42:11,22 43:8,10,14,16 43:23 44:5,8 44:15 45:20 46:13 47:4,18 47:24 50:11 51:7 53:5,7,7,9 53:15 54:10,22 55:2,10,19 56:3,5,6,7,11 56:14,17,18	agreements 57:20 aide 37:10,12 Alito 7:20 8:4,17 8:20 9:7,13,22 9:23 24:2,5 25:13,21 38:14 51:6,13 alleged 53:19 alleging 42:4 allocate 35:21 allocated 35:21 36:5 allow 27:18 allowable 46:22 allowed 13:3 allowing 35:3 allows 54:15 alter 15:5 altogether 12:24 ambiguity 45:7 45:22 ambulance 17:1 32:19 amicus 1:23 2:11 46:7 amount 32:18 amounts 30:24 annual 30:13 answer 22:20 25:14 26:3 53:16 56:7,10 answers 46:12 anybody 43:23 anymore 18:9 anyway 17:20 28:24 49:20 appeal 6:6,14,20 6:21 7:3,4,4,7 7:8,10,17 10:9 11:17,20 12:3 14:4 44:20 45:23,24 47:5 50:14 51:2,16 52:9 54:6 appealable 45:13 48:9,10	48:11,18 appealed 44:19 49:2 appeals 6:21 7:5 7:17 14:2,20 44:20,23 45:15 45:16,20,21 47:2 50:17 appear 15:16 APPEARAN... 1:15 appears 45:22 Appellant 1:5 1:18 2:4,14 3:7 55:24 Appellants 44:19 45:13 Appellant's 11:13 49:17 appellate 6:22 6:25 7:3,16 10:1,2 50:23 Appellee 1:20 1:23 2:7,11 31:10 46:7 appellees 13:20 applicable 25:18 37:2 application 6:1 10:14 11:5,20 12:13,16 48:19 applications 11:25 applied 7:22 8:3 9:12 10:13,21 13:2,14,19,22 13:22 48:13 49:3 50:15,18 applies 22:6 25:12 apply 25:1 42:6 43:19 54:2 applying 6:3 appropriated 31:3 appropriation 30:20,21 55:1	55:2,8 approval 54:16 approximately 22:21 April 1:10 area 50:24 arena 41:7 arguably 34:9 argue 5:16 34:22 45:23 argued 8:7 12:1 12:4 argues 31:18 arguing 5:23,25 25:22 argument 1:13 2:2,5,8,12 3:3 3:6 5:24 8:5 12:3,5,25 13:22 14:24 22:18 31:9,21 40:13 46:5 48:23,24 50:21 50:21 55:23 arguments 50:17 asked 56:9 asking 32:11 48:22 assessing 37:21 41:9 assessment 41:2 41:3,20 42:9 42:21 assigned 37:10 37:13 assignment 37:14 Assistant 1:21 assuming 55:7 as-applied 5:24 6:10 12:3 48:17 attached 16:8 attaches 24:16 attempted 36:9 authority 3:14
----------	---	---	--	--

<p>20:3 49:22 automatic 40:5 awards 55:14 aware 32:5</p> <hr/> <p style="text-align: center;">B</p> <p>back 48:8 bad 33:22 badge 24:16 balance 30:1 banc 31:23 bar 53:13 barred 8:11 26:3 56:1 based 33:11 50:16 basis 28:13 29:17 34:19 39:12 45:1 53:21 behalf 1:17,19 2:4,7,10,14 3:7 31:10 46:6 55:24 behavior 39:22 behold 21:19 belief 42:8 believe 6:24 35:25 36:19 38:13 41:17,20 43:7 44:14 45:18 57:13 best 5:8 16:21 better 19:10 beyond 48:6 bigoted 36:11 bill 20:11 bills 54:14 bit 21:10 body 4:16 Bogan 33:7,14 42:7 bound 39:15 Brad 1:7 3:5 branch 47:12,21 52:2 Brewster 23:13</p>	<p>33:6 38:4 Breyer 9:21 10:2,7 15:11 15:20,22 16:3 16:4,5,17,23 17:8,11 20:6 21:8 32:11 42:12,19,23 43:6 48:8,15 48:22 49:8 50:7,20 brief 8:10 11:11 11:13 47:2 bring 9:9 17:24 42:18 47:23 52:5 brings 53:15 brought 29:5 42:3 53:8 Browning 41:18 41:21 42:3 Browning's 41:23 budgetary 33:11 burn 12:21 buy 54:12 buying 21:17</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 CAA 27:1,24 29:23 57:21 Caballero 1:21 2:9 40:12 46:4 46:5,8 47:1 48:14,19 49:6 49:10,19,24 50:4,16 51:3 51:11,18 52:13 52:17 54:25 55:10,17 call 8:9 31:2 called 5:21 25:14 capacities 17:23 Capitol 31:25 capture 36:22</p>	<p>care 17:1,16 35:23 39:24 careful 39:20,25 case 3:11 4:14 4:25 6:2,3,25 7:23 10:22 11:1,23 12:10 12:16 13:3,10 14:14,16,18,19 15:17 18:17,20 21:9 23:13 24:11,18,20,25 25:3,5,9,12 26:1 27:4 28:2 28:9,11,11,12 28:12,16,20,21 31:13,24 32:10 33:7,18 34:1,2 34:2 35:6,7 36:9 38:14,24 39:7,16 41:4 41:18 42:7,18 43:19,20,20 44:11,11,12,14 45:10 46:18 49:9,10 50:1 53:9,18 54:3 56:3,4 57:5,14 57:22 58:7,9 cases 4:20 5:5 10:9 12:21 22:6 23:20 31:16 35:10 36:20 37:8 44:4,7,15 46:12,14,15 54:7 55:3,13 55:14 56:2,12 57:10,18 58:4 casework 15:18 case-by-case 34:18 cashier 21:18 ceased 28:8 cert 6:22 certainly 17:20 34:12 36:9</p>	<p>38:19 40:13 47:14 challenge 6:10 6:10 13:12,16 32:23 42:4 48:17 52:6 challenging 32:23 change 4:18 changed 21:7 characterize 8:20 charge 34:6 charges 13:20 Chief 1:16 chill 35:9 choice 38:24 choose 38:16 chooses 38:25 39:6 chose 57:12 circuit 5:25 31:23 38:13 41:18 circumstance 33:14 36:13 37:23 38:15 39:18 43:14,18 circumstances 25:14 36:16 39:14 40:23 42:20 citation 11:10 cited 11:11,13 49:10 claim 8:10 32:1 claims 20:21 53:12 classic 22:11 32:8 33:15,21 clause 4:3,4,9,10 5:4,16,18 9:10 14:23,24 15:2 17:25 22:11,12 22:14 24:13,24 25:1,3,12,12 25:16,18 28:16</p>	<p>31:21 34:10,13 34:15 35:19,24 39:11,12 40:2 47:3,4,9,10,25 48:3,4,13,21 50:12 51:1,10 51:22 52:10 53:2,3,13 54:3 56:2,12 clear 34:16 40:19 48:3 56:9 clearly 33:9 36:12 43:15,24 closely 41:24 closest 44:10,10 come 27:17 35:16 45:16 56:13 comes 57:8 coming 7:5 committee 16:1 16:19,20 17:6 20:14 24:23 25:2,8 41:1,16 42:1,1,1 43:10 46:20 committees 22:24 46:16 companion 44:11 compatible 4:10 compel 35:13 complete 3:22 completely 22:18 Compliance 23:18,20 comply 6:5 concern 39:24 51:22,24 concerned 4:8 concerning 40:4 concerns 47:8 concluded 47:18 condition 29:13 conduct 33:2</p>
---	---	--	--	---

41:1 confidence 3:20 confidential 23:23 57:23 Congress 3:13 4:8,12,14,15 4:25 7:25 11:2 14:1,3,6 22:19 22:24 25:6,7 25:20 26:5 28:3,3 29:4,22 29:22,25 31:16 39:19,19 43:17 43:24 47:7,14 47:18 48:1 51:14,19,23 52:1,17,19,23 55:11 congressional 23:19 34:14 44:15 45:19 46:13 47:17 51:20 considered 41:19 43:8,13 consistent 48:13 constituent 32:9 33:21 constituents 15:16 16:14,25 17:3 23:12 Constitution 4:22,23 5:9,14 6:4 8:16 constitutional 8:14 10:25 12:7 13:1,25 14:5 37:3 47:11 constitutionali... 5:20 6:9,11 7:22 8:2 9:12 9:24 10:19 11:4,5,18 13:16 14:9 51:16 52:9 constitutionally	9:9 construct 26:8 27:16 28:23 consultant 25:6 25:9 contact 16:16 45:9 contend 33:22 contends 32:14 contention 32:21 33:25 contested 14:13 16:21,22 context 34:19 40:18 41:10 54:1 continues 27:4 contracts 54:12 contradict 17:24 49:17 contradicts 44:25 contrary 20:8 contributed 55:6 control 57:9 controversy 28:12 correct 27:8 46:2,12 48:14 49:7,8,19,24 50:5 55:9 counsel 1:16,22 9:17 12:1,3 49:17 57:4 counseling 57:22 couple 8:6 course 4:15 6:2 9:4,4,6 16:14 27:1 57:8 court 1:1,13 3:9 3:12,24 4:1,12 4:19 5:6,7,17 6:1,3,7,8,18,19 6:21 7:5,7,9,10 7:18,21 8:1,6	8:11,12 9:8,13 9:14,19 10:1,1 10:2,3,3,4,11 10:18 11:19,22 12:2,2,8,24 13:2,6,7,8,10 13:19,23,25 14:18,20,25 15:2 18:6,19 20:1,16,17 23:11,22 24:1 24:15,21,23,25 25:2,8 26:1,2 27:2 28:14 31:12 33:2,6 33:13,24 35:3 35:5,12,15 36:15,15,17 37:21,22,25 38:5,6,12 41:8 43:5,9,14 44:3 44:5,8,16,19 44:20,23,24 45:6,15,16,21 45:21,25 46:9 46:11,21 47:2 47:6,23 48:3 49:12,13,13,18 50:8,16 52:5 53:4,10 54:6 55:20 56:1,9 courts 34:17 36:21 46:15 53:9,14,24,24 Court's 40:15 47:17 48:1 53:1 covered 22:10 22:22,23 24:24 25:3 34:25 44:2,2 51:7 covering 19:19 created 19:6 31:15 39:19 creation 54:10 critical 47:11,22 cross-examina...	38:17 curiae 1:23 2:11 46:7 curious 14:13 current 28:25 <hr/> D <hr/> D 3:1 date 37:15 days 30:12,13 Dayton 1:4 3:4 7:25 17:15 26:8 27:5,16 28:18,19,19 31:18 32:5 33:20 Dayton's 20:9 32:4,15 45:24 deal 12:2 34:18 dealing 4:22 deals 43:20 debate 4:3,9 5:4 5:15,18 9:10 14:23,24 15:2 17:25 22:11,12 22:14 24:13,24 25:1,3,11,18 28:16 31:21 33:25 34:9,13 34:15 35:19,24 40:2 42:16 43:4 47:3,9,9 47:16,25 48:3 48:5,13,20 50:12,25 51:10 51:19,21 52:10 52:15 53:2,13 54:3 56:2,11 decide 4:19 13:14 35:16 38:10 54:2,5,7 decided 8:12 19:9 42:1 55:11 decides 18:8 deciding 41:11 decision 8:5,15	10:11 14:20 32:7 33:8 36:7 38:14 40:13,16 40:17 42:24 43:22 47:2,3 50:17 52:23 53:4,22 decisions 4:17 4:18 31:19 35:11 49:21 51:21 53:2 declaration 9:1 16:7 17:13 declaratory 12:18 decree 6:8 deemed 52:11 defend 40:24 defendant 24:6 24:12,20 25:15 25:20 26:4,7 27:1,20,23,24 28:8,8,20 31:16 36:25 38:10 39:8,20 57:14,25 58:1 defendants 49:15 defense 34:6 37:1 38:3 40:10 56:7,10 deferred 4:12 defined 15:2 28:1 43:25 definition 15:6 43:23 delegate 3:13 20:3 delegated 41:12 demonstrate 37:18 denied 8:1 departed 28:25 deputy 23:15 derogatory 21:18 described 33:24
---	---	---	--	---

35:13 designed 4:19 determination 48:2 determinations 33:12 difference 40:19 43:9 different 7:18 10:17 11:25 24:16,17 30:11 30:11,12,12,15 40:21 57:5 difficult 36:20 54:4 dilemma 37:2,9 39:10 direct 6:14 7:2,4 7:4,7,8,16 10:9 11:17,19 12:3 13:3 14:2,4 44:24 51:2 56:20,22,24 57:7 directly 6:7 45:14,20,24 director 21:20 directors 30:10 30:11 disability 53:20 disagree 29:19 39:17 disagreed 4:13 discharged 37:5 disclosed 32:3 discovery 44:13 53:11 discretion 3:22 discrimination 8:1 39:22 47:23 55:14 discuss 34:24 37:23 discussion 51:4 dismiss 7:23 31:13 53:10 dismissal 39:12	40:6 42:14 46:21 dismissed 13:20 25:4,12 28:13 dispose 13:12 dispute 8:17,22 8:23 disputed 8:24 disputes 53:20 dissatisfied 37:11 dissent 34:5 distinction 14:1 distinguished 33:14 district 6:17 7:9 7:10,18,21 8:1 9:7,25 10:1,3,3 13:19 34:17 35:3,5,15 36:15,20 37:21 37:22 43:14 44:5,8,20 45:5 45:5,25 46:15 49:12,13,13,18 50:8 53:24,24 Doe 18:19 25:5 26:1 doing 5:8 15:8 15:18 19:5 draft 17:4 36:14 36:15 drafted 17:7,9 17:10 20:11 drafting 20:20 due 5:18 15:4,9 25:25 37:15 duties 3:16 7:24 8:9,12,13,15 8:18,21,21,23 8:25 9:3,8 18:9 25:10 32:13 34:11 42:10 53:5,15 duty 9:5 12:11 40:20 D.C 1:9,17,19	1:22 16:15 31:22 41:18 <hr/> E E 1:21 2:1,9 3:1 3:1 46:5 easily 54:6 Eastland 24:22 effect 23:6 38:24 39:11 40:1 effectuate 47:7 ego 15:5 Eichman 6:13 11:8,13 12:9 14:16 49:9,10 49:11 eight 31:22 either 7:7,10 11:24 33:11 35:6 37:3 48:5 embracing 10:10 employed 22:23 52:1 employee 8:8 9:18 15:5,6 18:5 19:7 21:12 23:14 32:2 33:7 42:10 43:25 44:2 46:16,19 46:20 53:5,14 53:22 56:15 employees 3:14 3:15,20,23,25 3:25 22:9,22 22:24 23:1,4 23:10,10,17,21 23:25 40:20 44:2 47:19,21 47:21 51:7 52:1,20,25 employee's 8:10 41:2 42:9 43:7 43:12 46:23 employers 5:1 employing	27:25,25 31:15 54:13,16,18 57:14,24 employment 1:17 8:1 9:4,6 47:19 51:21 52:20,24 53:4 53:7,9 54:3,19 empty 27:14 en 31:23 enacting 47:8,17 engages 43:22 ensure 4:4 entire 26:14 entirely 45:2 entirety 38:19 entities 24:17 entitled 43:1,2 entity 27:6 envisions 29:9 errors 37:16 especially 4:21 ESQ 1:16,19,21 2:3,6,9,13 essence 12:11 45:10 evaluation 16:8 16:10 20:9 event 11:21 14:9 Everybody 27:15 evidence 17:23 32:16 34:18 35:3,6,16 36:9 37:25 39:1,15 39:15 53:25 evidentiary 25:17 34:16,20 40:18 54:4 eviscerates 22:18 exactly 6:14,19 11:18 32:10 52:14 example 4:14 14:1 16:24 21:15 22:11	23:11 24:22 33:7 36:6,8,13 examples 22:6 exception 5:16 excise 35:5 exclusively 17:20 Executive 47:20 exercise 35:9 exist 24:12 28:9 57:18 existed 29:21 existence 54:9 exists 27:23 54:21 expedient 4:17 4:21 expedited 23:23 explain 38:10 45:6 56:13 explaining 20:25 explanation 6:18 37:5,9 38:16,18 39:8 43:15 56:16 explicitly 49:21 express 27:25 expression 24:17 extant 28:20 extended 48:6 extraordinary 10:9 <hr/> F face 12:7 27:19 48:17 49:3 faces 39:21 facial 13:12,13 51:25 52:6 facially 51:9,12 fact 3:20 4:13 32:16 33:3 50:3 57:21 facts 13:2 falls 50:11
--	--	--	---	---

far 27:10 32:17 39:23	former 54:16	generally 45:18 51:5	guess 5:16 15:18 16:21 39:2 43:1	holding 33:5 50:7
Federal 14:21 24:1,21 47:23 53:14	Forrester 40:16 41:4,10 53:3	getting 26:10 40:7 43:12	GYRA 45:18	holdings 50:8
feels 40:24	Forrester's 41:4	gift 21:17	<hr/> H <hr/>	hole 19:6 22:1 23:7 27:12
fiction 29:3,7,17 29:20,25	forth 8:25 9:5 34:8	Ginsburg 4:6,11 4:24 5:2 19:11 19:14,15,18 26:16 41:15 44:4,6,7,9	hallway 29:23 30:4	Honor 38:4 41:17 46:2 49:7
fictional 27:16 28:23	forum 23:18,18	give 21:15 22:6 22:8 37:3,5 43:12	hand 30:24	House 31:17 42:16 48:5
Fields 44:11	forward 24:8,14 27:19 38:6 39:7,16 43:19 45:10 54:7 56:13	given 20:18 30:20 48:16	handle 36:21	hypothesis 26:11
figure 19:23	found 14:5,5 20:7 33:6 41:8 41:19 46:21 56:1	gives 6:2 27:2	Hanson 1:7 3:5 8:11,13 16:8 16:12,13 17:7 17:16 20:10,13 31:25 32:7,12 32:18 33:16 45:8	hypothetical 32:10
final 6:8	four 55:25	giving 23:6 34:7	Hanson's 32:8 33:17,21	<hr/> I <hr/>
finally 46:14	frame 3:10	go 24:8,14 27:10 27:19 34:23 38:6 39:16 41:15 43:19 44:3 45:10 47:6 48:8 50:20 52:22 54:7	happened 33:15 49:18	identified 17:3 17:17 18:6
financial 25:15 39:21,24	full 37:5 54:5	goals 36:2 37:24	happening 57:24	ill 32:2
finding 39:22 45:8 46:17,19 50:4	fully 40:24	goes 39:7 43:10 56:8	health 17:1,16 35:23	illegal 47:22 55:13
fire 32:7 42:24	full-time 15:19	going 7:13 19:10 24:18 27:3,17 36:18 40:5 42:2	hear 3:3 19:17 51:25	illness 32:3
fired 20:21 21:11 27:13 32:4 33:17 34:23	function 28:17 35:10	good 33:22 41:11	heard 23:20	imaginary 50:9
firing 18:22,25 19:2,3 32:8,16 32:22,23 33:15 33:17,18 35:2 35:16,18	functionaries 25:7,10	gotten 44:11	hearing 16:20 17:6,16,18 20:14 41:16 51:20	immediate 39:24
firm 49:25	functioning 15:4 15:9 18:13,16 21:15 25:25	govern 5:1	hearings 17:15 34:7 41:25	immediately 52:5
first 13:15 15:21 22:21 23:10 29:19 32:4 45:22 46:11 56:2	fund 24:23 27:18 31:2,3,5 55:1,2 57:8	government 20:14 47:13 54:22	hears 21:17	immunity 8:8 15:2 24:15 26:9,13 27:21 29:9,11,13 31:14 34:1,2 34:25 42:6 43:21 53:6
flag 7:7,17 11:21 11:23	fundamental 33:5	Gravel 3:12 4:14 19:25 20:1 24:15 43:9 56:9	held 10:20,24 12:6,8,12 13:6 13:6,7,8,10,19 14:25 25:9 51:12 53:4	immunized 31:20
flags 12:21	funds 54:22 55:4 55:6	great 32:19	help 7:13 20:20 34:7	implicate 39:11
flattering 26:21	fundraising 15:13 15:19 21:11 23:7	greatest 47:15	Helstoski 35:7	implication 50:13
floor 15:24 16:1 16:18 23:1 36:10 43:17 48:5	furniture 15:13 44:17 46:1	ground 7:24 46:22	Hill 31:25	implies 20:4
focus 21:10	future 35:10		history 51:4	important 4:21 14:21 33:3 41:6 47:7 52:19,24
focused 42:5	<hr/> G <hr/>		hold 12:20	imposed 12:11
forbids 34:10	G 3:1			inadequate 41:22
foreign 35:22	general 14:7 36:4			

incidents 20:19	interpreting	judge 34:3 39:13	10:23 11:3,8	12:15,18 13:18
included 15:18	4:22	41:3,9 43:18	11:10,15,23	22:5,8,15,17
including 20:9	intimately 4:8	judgements	12:6,9,15,18	23:2,5,9 35:8
44:1 47:21	introduce 36:9	55:3	12:20 13:5,9	35:13,20 36:1
incorporate	36:14	judges 23:21	13:11,18 14:10	44:18,22 45:2
34:13,14	introduced 17:9	31:22 34:4	14:17 15:11,20	45:12 49:11
incur 54:11	17:23 20:11	judge's 53:4	15:22 16:2,3,4	56:19,24 57:2
incurred 54:14	intrude 35:4	judgment 6:8	16:5,17,23	57:12,16
incurs 54:19	36:2 38:8	12:19 44:8	17:8,11,15,19	Kimball 16:6,10
independence	intrudes 36:16	46:19 54:21	18:2,22,24,25	17:12 32:14
47:12 48:7	intruding 35:9	55:9 56:21	19:11,14,15,18	Kimball's 9:1
independently	invade 34:24	57:1	19:21,23 20:6	kind 23:15 27:6
4:5	invocation	judgments	21:1,8 22:5,8	34:8 40:2,9
indictment 38:6	40:10	53:25 55:14	22:15,17 23:2	kinds 31:16
38:7	invoke 22:10,12	judicial 40:15	23:5,9 24:2,3,5	knew 53:19
individual 7:24	22:13 25:16	40:17 41:7,10	25:13,21 26:6	know 18:8 19:9
42:15 51:8	39:11	41:12,12 51:20	26:16,18,18,19	21:3 40:1 49:1
55:6	involve 31:24	52:22 53:5,5	26:20,21,23,24	49:1 57:4,11
individuals	34:3 35:23	judiciary 27:7	27:3,9,22 28:4	57:18,19,23,24
21:21	involved 4:24	51:23	28:22 29:6,8	knowing 6:18
individual's	33:17 41:24	jurisdiction 6:3	29:12,14,16	knows 27:15
42:15	46:17 53:12	6:22,23,25 7:3	30:3,14,17,19	
inefficient 34:7	57:20	11:22 13:4	30:22 31:8,11	L
information	involvement	14:13 26:2	32:11,21 33:1	lacked 52:22
37:22	57:9	27:2 44:23	34:5,12,21	laid 53:20
infringe 24:18	involves 33:23	45:1 46:10,24	35:1,8,13,20	language 6:14
47:24	irrespective	49:23 50:5	36:1,22 37:7	6:15 7:8,16
initially 45:3	24:19	53:13 56:1	37:17 38:2,14	10:14 11:3,8
inquire 36:24	issue 3:12 5:25	jurisdictional	38:21 39:2,5,9	11:17 14:7,8
inquiry 34:10	6:13 7:16 8:14	3:11 5:19 7:15	39:23 40:4,12	27:24
inside 15:3	11:9,20 14:11	9:2,5 14:11	41:15 42:12,19	late 37:16
instance 34:17	17:16 24:10,11	16:7,9 17:13	42:23 43:6	Laughter 19:13
instances 22:8	24:13 28:15	28:15 49:22	44:4,6,7,9,18	19:22 26:22
55:25	31:14,14 33:18	50:2	44:22 45:2,12	law 5:7 14:21
institution 26:15	33:25 51:25,25	jurisdictionally	46:3,8,24 48:8	47:20 49:14,15
47:14	54:9	8:10	48:15,22 49:8	50:23 52:24
integral 3:18	issues 5:4 17:22	jurisprudence	49:11,20,25	54:3
intended 4:19	33:19 35:22,23	25:1	50:7,20 51:6	laws 5:1
intent 22:19	40:2 43:21	jury 33:19 42:25	51:13 52:7,16	leave 14:10
47:8	53:23	42:25 43:2	54:23 55:4,15	30:13
interest 47:15	J	Justice 3:3,8 4:6	55:21 56:8,19	leaves 40:3
55:18	January 28:16	4:11,24 5:2,10	56:24 57:2,12	50:22 54:13
interlocutory	JEAN 1:16 2:3	5:14,22 6:5,12	57:16 58:2,6	left 55:22
6:7 51:15	2:13 3:6 55:23	6:16 7:2,12,20		Legal 1:21
interpretation	job 15:7 32:20	8:4,17,20 9:7	K	legislation 4:10
4:13 13:24,25	41:11	9:13,21,22,22	Kennedy 11:10	17:5,7,9 32:19
51:1		9:23 10:2,7,8	11:15 12:6,9	35:14 36:3,15

37:11 50:11 52:10 legislative 3:14 3:16,18 4:2,4 9:3 15:1,4,8,10 18:6,8,9,13,16 18:17,18,20,23 19:1,3,4,5,6,9 21:2,19,22,25 22:1,3 23:13 23:16 24:19 25:11,24,25 26:2 27:13 30:10,10 31:19 32:13,22,24 33:3,4,5,9,10 33:13,16,23 34:3,7,9 35:5 35:11,15,17 36:4,17 37:10 37:19,24 38:9 38:11 39:16 40:8,14,18,21 40:22,25 41:5 41:6,7,13,19 41:22,24 42:6 42:11,11,22 43:8,10,13,16 43:23 45:9 46:20 47:12 48:7 51:4 53:14,15 56:3 56:5,7,11,14 56:17,18 legislator 42:13 legislators 33:11 legitimate 15:1 let's 20:17,22 21:8,10,16 26:4 liabilities 54:11 liability 25:16 39:21 54:20,21 55:11 57:3 life 52:3 54:18 54:20 55:19 light 35:2	limit 7:9,17 30:23 limitations 46:18 line 49:13 list 15:22 lists 15:13 litigant 52:4 litigate 54:20 litigation 53:11 53:19 little 20:10 21:9 45:9 lo 21:19 loathe 10:10 local 15:15 look 12:9 40:6 looked 15:12 looking 11:11 lose 38:24 lot 15:13 20:4 51:3 lousy 37:17,18 lower 5:17 13:5 13:7,8,10 20:16 <hr/> M <hr/> M 1:16 2:3,13 3:6 55:23 maintaining 47:16 major 50:13 51:18 making 21:17 36:11 48:2,23 48:24,25 management 3:25 managing 3:23 4:1 Manning 1:16 2:3,13 3:6,8 4:11 5:2,13,22 6:12,24 7:6,14 8:4,19,23 9:13 9:25 10:21	11:2,7,12,16 12:1,8,13,17 12:22 13:9,21 14:15,18 15:20 16:2,4,6,23 17:10,12 18:1 18:4,24 19:2 19:14,16,25 20:24 21:12 22:7,13,16,20 23:4,9 24:9 25:19,22 26:16 26:19,23 27:8 27:22 28:7 29:6,12,15,19 30:7,16,19 31:3 55:21,23 55:25 56:22 57:1,7,13,17 58:2,3,6,8 Mark 1:3 3:4 26:8 27:5,16 matter 1:12 9:17 22:3 26:4,6 43:1 47:7 49:20 50:10 58:10 matters 34:19 34:25 37:19 McDade 38:14 McMillan 18:19 25:5 26:1 mean 5:14,15 11:3 12:6 13:11,11,23 15:11,16,19 20:10 27:10 28:23 29:16 30:4 38:22 42:13,13 50:20 50:21 means 4:18 10:14 24:18 46:20 meant 52:4 measure 4:7 mediation 57:22	meet 5:19 8:11 8:13 9:18,20 meeting 16:1 20:14 meets 8:9 member 3:15,16 3:19,21 4:1 7:25 15:6 16:14 18:8,11 18:12 20:25 21:1,3,7 25:8 25:14,15 26:4 28:2,3 29:22 29:24 30:9 31:17 39:20,21 40:6 46:17 51:8 54:17 55:12 56:6,10 56:12 members 3:13 20:2 22:23 29:22 46:16 member's 3:18 3:24 15:7 23:14 39:24 52:14,14 55:13 memo 37:13,18 mere 54:10 merely 10:4 merits 3:11 44:5 44:8 47:6 metaphor 27:11 mind 51:15 52:9 Minnesota 32:1 minute 9:14 10:4 23:7 45:4 45:6 55:22 moment 27:11 27:14 money 27:17 30:23,25,25 36:5 54:23,24 54:25 55:1 moot 28:12,16 38:24 39:1 motion 31:13 53:10	motivated 42:5 motivation 35:18 motive 56:5 motives 35:14 move 21:11 moved 7:23 mover 15:19 23:7 moving 14:23 15:13 Mute 39:2,4 <hr/> N <hr/> N 2:1,1 3:1 named 55:18 nature 8:18 32:1 33:9 necessary 48:6 54:5 need 32:3,6 33:20 40:25 57:4 needed 45:24 52:25 needs 38:11 negotiating 57:19 never 4:12 8:14 28:22 29:21 37:15 57:18 news 23:11 newsletters 23:12 notice 33:20 November 20:12,19 number 8:7 30:12 numbers 30:12 <hr/> O <hr/> O 2:1 3:1 objection 17:25 obligation 14:12 obligations 22:10 54:12 obviously 34:19
--	--	--	---	---

<p>41:23 October 44:12 office 1:3 3:4,19 15:14,15,17 19:20 22:9 23:3,14,18,20 24:7 26:8,10 27:5,15,25 28:1,2,5,17,19 28:22,23 29:2 29:7,21,21,22 29:24 30:4,6 31:1,15,18 32:1,4,15 36:6 43:21,24 44:1 45:24 50:10 54:9,13,14,15 54:18 55:7,13 56:24 57:15,24 offices 30:11 46:15 54:11,11 54:16 55:7 Oh 7:6 16:2 17:8 Okay 14:18 20:11 55:15 once 37:21 ones 44:19 opinion 50:8 opposed 13:24 24:6 oral 1:12 2:2,5,8 3:6 31:9 46:5 order 6:8,17 9:15 10:4,18 13:15 37:5,18 38:10 40:24 45:4,5,6 original 6:20 originally 41:19 outside 46:18 48:4 oversee 51:23 oversees 3:24 owe 4:7</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1</p>	<p>page 2:2 7:15 11:13 17:13 pages 7:12 paid 29:10 30:5 30:6,12,16,21 54:21 paper 54:12 paragraph 20:8 20:12 part 3:18 4:1 15:3,7,9 18:12 18:15 19:5,11 21:6,14 22:2 22:25 23:1 25:24 33:4 49:12 particular 6:2 9:18 10:11 11:1 12:14 30:23 36:3 parties 12:23 28:11 party 26:11 55:16,17,18,19 passed 29:24 passing 22:19 pay 30:9 54:14 55:14 56:20 57:1,7 paying 30:15 55:3 payment 54:17 55:9 pays 30:18 31:4 people 16:15,16 22:21 24:16 percent 9:3 22:21 32:12 35:22,23 50:25 51:6 perfectly 10:24 perform 3:17 21:4 performance 33:21 41:3,4 41:10,22,23 42:9,15,21</p>	<p>43:7,12 performed 4:5 7:25 performing 3:16 3:21 7:24 9:8 15:7,7 18:7 23:16 25:10 34:11 40:20 42:10 permits 38:6 permitted 37:25 45:20 person 20:5 21:20 22:2 23:16 33:9 37:15 42:24 personal 28:2 29:21,24 54:10 55:11 personally 42:5 56:23 personnel 31:19 33:15 43:22 petition 14:19 14:19 physical 30:3,3 piece 36:3 37:10 place 13:15 43:5 placed 39:10 plaintiff 36:8,14 36:24 37:6 planned 20:13 play 53:23 pleadings 53:21 please 3:9 31:12 46:9 point 27:17 28:4 32:4 38:16 45:12 54:8 55:16 policy 24:17 33:12 political 4:16 politically 4:17 4:20 position 44:25 possibility 9:15</p>	<p>9:16 10:4,6 possible 20:18 49:2 possibly 5:11 51:13,14 powers 51:5,22 51:24 precedence 47:17 precedent 48:2 50:2 preclude 36:12 36:18 precluded 18:3 18:4 35:18 38:9,18 predecessor 45:19 predicated 18:18,20 26:2 56:3 premise 29:20 preparation 43:11 prepared 17:14 17:17 20:15 present 37:8 presented 37:22 53:12 presenting 38:8 presents 32:10 preservation 48:20 50:18 preserve 48:7 preserved 47:4 preserves 52:13 52:14 press 23:15 prevail 40:2 previous 52:19 prior 49:21 private 47:21 privilege 25:17 34:16,20,24 37:1 38:23 40:16,19 47:11 47:16</p>	<p>privileged 34:22 40:8 probably 42:25 problem 6:17 10:8 16:25 17:2 26:9 35:24 36:23 40:3,11 50:21 procedure 23:22 23:23,24 proceeding 33:10 41:2 42:2 43:11,11 process 3:18 4:2 4:4 15:4,10 18:11,13,16 19:6,7,9 21:2,4 21:6,7,13,14 21:15,22,24,25 22:3 23:7 25:25 32:14 33:3,4,5 38:9 40:8,21 41:6 41:24 42:11 45:9 48:7 processes 52:21 proffered 34:18 35:4 proof 38:7 properly 6:21 21:11 proposition 27:5 prosecuted 49:16 prosecution 38:18 prosecutor 38:7 protect 52:4 protected 15:1 protection 5:18 7:8,17 11:21 52:25 protections 47:20 52:21 protects 48:4 provide 5:17 41:6 47:19</p>
---	---	--	---	---

<p>52:8,18 provided 47:20 51:15 provides 7:6 47:10 providing 52:23 provision 6:9,11 10:19,19 11:4 11:6,19 12:19 13:16 23:3 49:4 50:23 51:9,11,19 52:3 pull 21:23 pulling 18:10 21:3 purpose 4:3 10:15 purposes 28:1 put 36:25 38:16 38:22 puts 30:22 puzzled 18:22 p.m 1:14 3:2 58:9</p> <hr/> <p style="text-align: center;">Q</p> <p>quality 34:10 question 5:21 13:6,7,13,14 14:21,22 22:16 22:21 26:3 44:18 50:2 53:12,16,16 54:6 56:8,20 questioned 56:18 questioning 43:3,4 56:5 questions 12:22 17:18 20:15 21:1 44:17 49:22 quickly 3:10 quite 30:14 36:22 50:13 quote 30:5 32:19</p>	<hr/> <p style="text-align: center;">R</p> <p>R 3:1 racially 42:5 raise 14:12 raised 12:23,25 31:13 40:4 Randolph 34:3 39:13 Randolph's 43:18 rare 40:23 42:20 rarely 15:17 39:18 reach 8:5,6,14 13:13 28:14 read 10:10 11:3 ready 43:12 real 35:4 37:10 40:25 43:16 55:15 reality 27:7,17 27:19 realize 14:10,11 realized 16:25 really 10:14 37:24 reason 3:19 4:15 6:20 19:4 21:6 21:13 24:14 32:8,16 33:1 33:18 34:23 35:2 37:11,12 48:9,11,15,16 48:18,24 49:1 49:2 50:23 57:17 reasoning 45:7 reasons 40:17 REBUTTAL 2:12 55:23 recall 14:15,16 receive 53:24 54:17 recite 13:18 recognize 40:9 recognized 3:13 5:3 34:4 38:1,5</p>	<p>38:12 recollection 12:10 record 32:17,17 54:5 redelegate 20:3 20:3 refer 49:21 reflection 45:4 regarding 46:12 regime 52:19 reimbursement 17:1 rejected 31:22 related 32:13 33:2 40:20 42:10 relates 43:23 releases 23:12 relevant 20:18 20:23 42:14,17 42:24 relied 48:1 53:1 rely 38:11 remark 36:12 remedies 23:21 remember 13:10 16:14 removed 21:13 repealed 14:3 reply 11:13 report 16:19 represent 9:3 representatives 31:18 47:10 representing 16:15 57:6 represents 15:14 require 55:13 required 35:20 requirement 5:20 requires 35:10 requiring 37:23 research 37:10 46:1</p>	<p>reserve 30:1 31:6 resources 35:21 35:22 respect 4:7,12 7:14 14:24 17:1 24:9,10 24:13 26:13 28:15 32:18 34:15,19 36:2 36:3 38:17 41:13 42:4 45:23 respectfully 39:17 respond 40:6 responded 45:22 response 21:1 rest 31:6 resulted 33:8 retired 23:20 revealed 42:15 review 6:20 8:11 44:24 57:19 RICHARD 1:19 2:6 31:9 riddled 37:16 right 12:21 13:21 21:8 27:7 30:22 37:3,4 44:3 47:22 50:16 52:13,22,24 56:19 57:16 rights 46:23 52:18 robust 47:16 48:4 room 50:22 rule 9:8,14 12:20 49:25 ruled 6:19 9:15 45:25 ruling 7:20,21 8:2 9:11,23 10:1 51:16</p>	<p>rulings 54:1 run 36:19 runs 15:14</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 salaries 30:11 30:20 salary 30:5,9,9 Salzman 1:19 2:6 31:8,9,11 32:25 34:12 35:1,12,25 37:7,20 38:4 38:25 39:4,6 39:13 41:17 42:19 43:6 44:6,9,21 45:2 45:17 46:3 saying 7:1 9:19 9:20,23 10:18 10:25 13:13 43:22 50:14 says 5:11 6:6 11:4 20:7,8 21:3,20 31:1 32:4,7,12 40:6 42:14 49:14 52:11 Scalia 5:10,14 5:22 6:5,12 9:22 10:8,23 11:3,8 13:5,9 13:11 17:19 18:2 19:21,23 28:22 29:6,8 29:12 30:3,14 30:17,19,22 32:21 33:1 49:20,25 52:7 52:16 scenario 25:19 scene 29:1,1 scheduled 44:12 scope 47:3 53:3 second 3:15,21 12:4,25 15:5</p>
---	---	--	--	---

<p>19:3,8,8,12,18 19:20 20:2,4 21:2,5,21,23 21:23 22:20 48:25 56:3 secretary 23:15 section 5:3 6:1,6 7:6,9,18 10:10 10:21 11:16,17 14:2,8 27:1 28:1 34:16 36:12 44:3 46:11 47:4,5 48:20 50:18 57:21 sector 47:21 securing 47:11 see 9:11 10:7 20:17,22 36:4 40:10 53:25 selected 20:14 selecting 3:22 selection 3:24 self 3:15,21 15:5 16:8,10 19:3,8 19:8,20,21 21:2,5,21,23 21:23 selves 19:12,18 20:2,4 Senate 1:16,21 1:22 2:10 15:17 16:1,19 20:13 24:6,24 26:12,14,25 27:18,18,20 29:10 30:6,8,8 30:18,20,22 31:1 36:11 43:25 46:6 52:20 54:15,24 55:1,16 56:20 57:6,9,17,23 57:25 58:1 Senate's 30:25 Senator 1:3 3:4 17:2,4,6,15</p>	<p>20:9 21:16 22:9 24:7 26:8 26:14 27:5,15 28:5,18,18,19 28:25 30:17,24 31:4,4,17 32:4 32:5,14 33:19 34:21 35:14 36:10 37:14,23 38:2,13,15,22 40:24 42:13 43:3,12 45:23 50:10 53:19 54:13,15 55:7 senatorial 55:6 senators 23:3 47:10 54:10 Senator's 19:15 19:20 27:14 31:19 37:9 42:21 43:15,21 44:1 sense 25:13,17 28:6 29:25 52:8 54:4 57:25 sensitive 47:15 separate 50:19 51:21 52:2 55:8 separation 51:5 51:22,24 September 37:15 service 32:9 Servicemen's 24:23 services 33:22 set 7:13 8:9,25 24:5 29:9 39:19 sets 30:9,17 setting 9:5 30:14 settlement 57:19 57:20 sexist 36:12 shed 35:2</p>	<p>shield 55:12 shielded 40:18 show 35:3 sides 57:5 side's 32:21 significantly 15:21 silent 39:6 silly 28:5 similarly 53:8 54:19 simply 12:20 37:12 38:17 45:8 54:24 single 31:14 sit 38:24,25 situation 12:14 37:20 38:12 situations 38:5 sloppy 10:13 small 32:12,17 solely 28:17 solution 20:23 20:25 40:3 somebody 9:8 18:23 27:13 sorry 7:14 8:19 10:2 13:9,25 17:15 18:24 19:14,16 22:7 26:19,20,23,23 34:13 39:4 44:6 56:22 sort 27:11 33:19 37:2 sought 17:23 sound 41:7 source 16:22 Souter 6:16 7:2 7:12 14:10,17 24:3 26:6,18 26:18,19,20,21 26:23,24 27:3 27:23 28:4 29:14,16 38:21 39:2,5,9,23 40:12 46:24</p>	<p>54:23 55:4,15 sovereign 8:8 29:9,11,13 so-called 26:7 space 27:12 special 4:7 specific 52:23 54:1,1 55:2 specifically 31:15 33:14 speech 4:3,9 5:4 5:15,17 9:10 14:23,24 15:1 17:25 22:11,12 22:14 24:13,24 25:1,3,11,17 28:15 31:20 33:24 34:9,13 34:15 35:19,24 36:10,14 40:1 42:16 43:4,7 43:13,16 47:3 47:9,9,16,25 48:3,5,13,20 50:12,25 51:10 51:21 52:10,12 52:14 53:2,13 54:3 56:2,11 spend 15:13 30:23 sphere 15:1,3,8 15:10 18:6,7 18:10 22:1,2 24:19 25:11 27:13,14 41:8 spoke 27:11 staff 19:15 20:9 30:5 31:18 State 16:16 17:3 24:25 25:2 stated 18:19 20:1 24:15,23 26:1 statement 7:15 9:2 15:24 16:7 16:9 statements</p>	<p>17:13 21:18 states 1:1,13,22 2:10 3:12 6:13 11:7,12 20:1 26:12,14 44:23 46:6 57:21 Station 21:16 statute 5:10,11 5:15,21,23 6:13 7:22 8:3 9:12 10:12,13 10:15,15 11:24 12:4,7,11,23 13:23 14:2,3,4 14:5 24:2,5 45:19 46:18,22 47:8 48:10,12 48:21 51:2,17 52:18 statutory 6:14 11:16 stay 39:6 stenographer 41:16,25 stenographers 42:3 step 48:8 Stevens 3:3,8 11:23 12:20 18:22,24,25 21:1 27:9 31:8 31:11 34:5,12 34:21 35:1 36:22 37:7,17 38:2 40:4 46:3 46:8 55:21 56:9 58:2,6 strategy 57:20 strictly 57:23 strike 49:4 structure 30:7 stuff 17:20 37:4 52:10 subject 5:3 38:17 subjecting 4:25 5:7</p>
---	---	--	---	--

<p>submit 54:17 submitted 58:7 58:10 subtracted 55:5 sub-arguments 8:6 successor 28:9 28:10 sue 7:25 23:11 24:1,1 sued 25:6 31:17 sufficient 17:21 54:20 suggests 15:23 15:25 suit 9:9 18:2,4 24:8 29:3,9,10 47:23,24 53:15 suits 29:4 51:20 52:1 summary 46:19 supervised 41:21 supervisor 16:10 support 28:18 30:8 supporting 1:23 2:11 46:7 suppose 20:16 21:10 37:12 57:2 supposed 16:15 Supreme 1:1,13 6:7 44:24 sure 36:4 39:25 46:1 surely 42:25 surgery 32:3,6 33:20 system 39:18,19 47:12</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 6:24 11:22 14:19 43:1,3</p>	<p>48:16 50:1 taken 6:6,21 19:7 35:6 takes 18:11 talk 16:14 21:21 35:10 37:3,19 talking 16:24 20:7 38:20 talks 15:15 38:15 tasks 20:18 telling 9:17 16:11 45:13 Tenney 24:25 terminate 53:22 56:14 termination 18:15,19 21:5 25:23,23,24 33:8 56:17 terms 56:7 test 8:9,12,13 9:17,18 18:14 18:16 35:8 testify 35:14 40:25 testifying 36:5 37:14 testimony 36:7 36:18 text 7:12 thank 11:15 46:3 55:20 58:6,8 thereto 16:9 thing 29:2 things 16:13 23:15 think 4:6,7 10:17 17:4,5 19:9,23 21:5 28:23 29:20 35:12 36:1 37:8,24 39:17 40:19 41:11 42:6,14,19 47:7 49:19</p>	<p>51:11 53:16 54:6 third 38:13 56:6 THOMAS 1:21 2:9 46:5 thought 9:23 36:25 39:14 45:3 57:3 three 49:14,15 threshold 43:21 tied 41:24 42:21 43:16 time 4:18 15:13 16:11 30:2 31:7 32:6 times 4:17 told 49:17 51:6 totally 27:14,16 touch 12:25 Treasury 57:8 trial 44:12 tried 9:9 tries 17:24 true 26:11 36:17 truly 37:20 trump 5:9 trust 3:20 try 54:1 trying 21:9 Tuesday 1:10 turn 3:11 37:12 turns 21:18 twelve 58:4,5 twice 15:14 two 20:19 28:10 30:11 45:25 46:14,15 50:17 types 53:23 56:12</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unanimous 41:8 unanimously 41:9 unaware 32:6 uncertain 20:10 unconstitutio...</p>	<p>5:12,23 10:5 10:12,13,16,20 10:22,24 11:21 12:4,24 13:1,8 13:19,21,24 14:6 49:16 50:24 51:9,12 understand 7:23 26:9 55:5 understanding 44:10,13 45:17 Understood 37:7 unequivocal 26:13 29:14,15 29:18 Union 21:16 unique 23:19 uniquely 4:19 United 1:1,13,22 2:10 3:12 6:12 7:1 11:7,12 19:25 26:12,14 44:22 46:6 universe 19:19 unlawful 39:22 unquote 32:19 untenable 31:21 untimely 45:16 use 10:11,15 42:3 Usually 36:24 U.S.C 11:17 14:2</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:6 18:19 26:1 vague 14:7,7 valid 11:24 valued 32:2 versus 6:13 11:8 11:12 24:22 victims 47:22 view 4:9 40:15 43:18,25 49:4 49:6 violate 9:10</p>	<p>50:12 violates 6:4 56:11 violation 4:2 46:23 51:1 52:12 vote 42:2 voted 33:10 votes 41:1 vouchers 54:17 vs 3:12 20:1 25:5</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 20:22 waive 37:4 38:23 waiver 8:7 26:13 26:17,25 27:21 29:8,11,13,18 waiving 37:1 want 18:9 27:10 34:24 38:22,23 40:9 48:23 49:1,1 wanted 20:17 36:14 45:24 wants 13:23 Washington 1:9 1:17,19,22 wasn't 7:20 51:12 way 6:18,19 21:21 32:13 39:20,25 45:18 Ways 46:20 went 15:25 17:2 weren't 11:24 we're 9:4 we've 8:9 17:2 27:4,19 whatsoever 39:21 White 41:9 White's 41:3 wholly 50:18 witnesses 17:14</p>
--	--	---	--	---

<p>17:17 20:15 wondered 52:8 word 15:25 words 16:5 34:8 work 19:10 23:1 25:7,8 29:23 30:4 31:25 32:8,18 51:7 worked 44:1 46:16 50:10 workings 51:23 works 19:20 43:24 45:18 50:9 world 55:15 wouldn't 24:3 29:2 49:20 writ 14:20 write 15:23 writing 23:11 43:8 written 38:14 wrong 20:6,23 20:24 32:25 33:1 wrote 17:17 37:17</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,8</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yeah 22:15 52:16 years 45:25 57:10 58:4,5</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>06-618 1:6 3:4</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 11:14 1st 37:15 1:00 1:14 3:2 10 35:22 12 57:10 1257 14:2 1291 44:22</p>	<p>13 20:8 1301(9) 28:1 14 20:12 1408 27:1 15th 20:12,19 18 11:17</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2:02 58:9 2001 20:12 2007 1:10 23rd 19:21 24 1:10 28 14:1</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 31 2:7</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>403 57:21 408 6:1,2 10:21 44:3 412 6:6,15 7:6,9 7:13,18 10:10 14:8 46:11,25 47:5 48:20 413 5:3 34:17 36:12 47:4 50:18 46 2:11</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 9:3 32:12 50 35:22 55 2:14</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>65a 7:15 66a 9:2 16:7 17:14</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>700(d) 11:17 74 15:12 75 15:12 22:21 51:6 76a 15:12</p>	<p>78a 16:9</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>99 50:25</p>		
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