**THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| BRADLEY F. PODLISKA,<br><br>Plaintiff,<br><br>v.<br><br>U.S. HOUSE OF REPRESENTATIVES SELECT COMMITTEE ON THE EVENTS SURROUNDING THE 2012 TERRORIST ATTACK IN BENGHAZI, *et al.*,<br><br>Defendants. | ) | Case No. 15-cv-2037 (RDM) |

**DEFENDANT U.S. HOUSE OF REPRESENTATIVES SELECT COMMITTEE ON THE EVENTS SURROUNDING THE 2012 TERRORIST ATTACK IN BENGHAZI'S MOTION TO DISMISS COUNTS I AND II OF THE FIRST AMENDED COMPLAINT**

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant United States House of Representatives Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi (ñSelect Committeeò or ñCommitteeò), by undersigned counsel,[1] hereby moves this Court to dismiss Counts I (discrimination) and II (retaliation) of the First Amended Complaint with prejudice because (1) the Court lacks subject matter jurisdiction over these claims, and (2) Plaintiff has failed to state claims upon which relief may be granted.[2]

The grounds for this motion are set forth in the accompanying memorandum of points and authorities. A proposed order is attached.

[1] The Select Committee is represented by the Office of House Employment Counsel (ñOHECò). Solely with respect to the Speech or Debate Clause, U.S. Const. art. I, § 6, cl.1, arguments asserted in support of this motion, the Committee also is represented by the House Office of General Counsel.

[2] Counts III and IV assert claims solely against Chairman Trey Gowdy and, therefore, are not addressed in this motion.

Respectfully submitted,

*Counsel for Defendant the Select Committee on Benghazi of the U.S. House of Representatives*

*Of Counsel solely with respect to the Constitutional Speech or Debate Arguments and the Fields affidavits*

By: /s/

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Dated: March 8, 2016

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**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendant United States House of Representatives Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi (ñSelect Committeeò or ñCommitteeò), by undersigned counsel, submits this Memorandum of Points and Authorities in support of its motion to dismiss Counts I and II of the First Amended Complaint.

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## I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Select Committee was established by a resolution of the House of Representatives in May 2014. Its purpose is to investigate matters related to the attacks on U.S. facilities in Benghazi, Libya and to issue a final report of its findings to the House. The ultimate authority to carry out these legislative activities rests with Rep. Trey Gowdy, the Committeeôs Chairman, and the eleven other Members of Congress who serve on the Committee.

Plaintiff Bradley Podliska (ñPlaintiffò or ñMr. Podliskaò) was hired in September 2014 as a non-supervisory Investigator for the Committeeôs Majority Staff. As alleged in the original Complaint and numerous press accounts, however, Plaintiff and his supervisors soon found themselves in dispute over a number of issues, including Plaintiffôs admitted refusal ñto go along withò the Committeeôs investigative focus starting in March 2015. *See, e.g.*, Compl. ¶¶ 26, 37, 38.[1] The Committeeôs management made several attempts to address these issues, but their efforts did not succeed. *E.g.*, *id.* ¶¶ 37, 38. Plaintiff eventually was called into a meeting on June 26, 2015 and given the choice of resigning or having his employment terminated. *Id.* ¶ 47.

Reading these and other allegations, one thing becomes abundantly clear. Plaintiff and his supervisors simply did not see eye to eye on the direction of the Committeeôs investigation or Plaintiffôs role in setting that direction. These same allegations, however, reveal why Plaintiff cannot prevail on his claims in Counts I and II of the First Amended Complaint (ñFACò) in which he alleges discrimination and retaliation, respectively, in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (ñUSERRAò), as incorporated by the Congressional Accountability Act of 1995 (ñCAAò).

[1] In evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), it ñis appropriate for the court to look beyond the amended complaint to the record, which includes the original complaint.ò *W. Assocs. Ltd. v. Market Square Assocs.*, 235 F.3d 629, 634 (D.C. Cir. 2001); *see also infra* Section III.B.1. The same principle applies when the Court is evaluating a motion to dismiss under Rule 12(b)(1). *Leaf v. Supreme Court of Wis.*, 979 F.2d 589, 595 (7th Cir. 1992).

As a threshold matter, Plaintiffôs CAA claims are barred by the Speech or Debate Clause of the U.S. Constitution. That clause provides Congressional committees with (1) immunity from suit for actions predicated on legislative activities, (2) protection from having their legislative activities used as evidence against them, and (3) a privilege against being compelled to disclose information about their legislative activities. As further explained below, Plaintiffôs allegations make it clear that his CAA claims necessarily will require an inquiry into the protected legislative activities of the Committee. Because that inquiry is forbidden by the Speech or Debate Clause, Counts I and II must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) and, alternatively, Rule 12(b)(6).

Plaintiffôs CAA claims also are subject to dismissal for two additional reasons. First, a USERRA plaintiff suing under the CAA must establish that military animus was the ***sole cause*** of the alleged adverse action. Plaintiff admits, however, that at least one of the motivating factors for the Committeeôs decision to end his employment was his refusal to ñgo along withò the Committeeôs investigative focus. Plaintiff therefore cannot establish that military animus was the sole cause of that decision. Second, with respect to the retaliation claim (Count II), Plaintiff alleges that he did not engage in the majority of his alleged USERRA-protected activities until ***after*** the Committeeôs separation decision had been made. Because Plaintiffôs post-separation-decision activities could not have been the cause of the Committeeôs separation decision, Count II should be dismissed to the extent that it is based on those activities.

## II. BACKGROUND

### A. Factual Background

The Committee. The Committee is vested with general investigative and oversight responsibilities relating to the September 11, 2012 attacks on U.S. facilities in Benghazi, Libya.

Those responsibilities include ñconduct[ing] a full and complete investigation and study and issu[ing] a final reportò regarding several discrete areas of inquiry, including but not limited to ñinternal and public executive branch communications about the attacks on United States facilities in Benghazi, Libya.ò H. Res. 567 (113th Cong.); H. Res. 5 (114th Cong.) (reauthorizing Committee); FAC ¶ 12; Aff. Philip G. Kiko (ñKiko Aff.ò) ¶ 4 (attached hereto as Ex. 1).[2]

Plaintiffôs Hiring by the Committee. Shortly after the Committee was formed, its Chairman, the Honorable Trey Gowdy, appointed Philip Kiko as the Committeeôs Staff Director. *See* FAC ¶ 13; Kiko Aff. ¶ 2. Mr. Kiko spent the summer following the Committeeôs formation finding staffers to fill key positions, with the ultimate hiring decision made by the Chairman. *See* FAC ¶ 15; Kiko Aff. ¶ 6. In June 2014, Plaintiff Bradley Podliska sent Mr. Kiko his resume. Kiko Aff. ¶ 6. Mr. Kiko was interested in the candidacy of Mr. Podliska, whose resume reflected that he had served in intelligence analyst positions for many years with a federal defense agency and the U.S. Air Force Reserve. *Id.* ¶ 7; *see also* FAC ¶¶ 9-10. Mr. Kiko made arrangements to interview Mr. Podliska when Mr. Podliska returned from his Air Force reserve duty in Germany. Kiko Aff. ¶ 6.

Plaintiffôs Job Responsibilities and Job Performance. In September 2014, Mr. Podliska began working for the Committee as an Investigator. FAC ¶¶ 15-16. Plaintiffôs assigned investigative job responsibilities included, among other things, assisting with witness interview

[2] Consistent with the D.C. Circuitôs guidance in *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 16-17 (D.C. Cir. 2006) (en banc), the Committee attaches to this memorandum affidavits from certain of Plaintiffôs superiors on the Committee, Staff Director and General Counsel Philip Kiko and Deputy Staff Director Christopher Donesa, that were previously filed with the Committeeôs motion to dismiss the original Complaint. As explained below, *see* Argument Section III.A., proceeding on Plaintiffôs claims against the Committee necessarily would require an inquiry into the protected legislative activities of the Committee. Because that inquiry is forbidden by the Speech or Debate Clause, Counts I and II must be dismissed under the standards articulated by the D.C. Circuit in *Fields* and its progeny.

preparation (such as drafting questions for witnesses and ensuring that relevant materials are submitted in advance), providing input on document requests to agencies to obtain information pertinent to the Committeeôs investigation, and reviewing documents to support the Committeeôs investigative focus. Kiko Aff. ¶ 8.

Eventually, Committee management began to have concerns about Plaintiffôs performance of his investigative duties and his professional judgment generally. *Id.* ¶ 9; Aff. Christopher A. Donesa (ñDonesa Aff.ò) ¶¶ 6-9 (attached hereto as Ex. 2). Plaintiffôs original Complaint, in particular, confirms that these concerns were well-founded, and reveals that Plaintiff substituted his own judgment for that of his superiors. For example,

- Plaintiffôs original Complaint repeatedly references ñPlaintiffôs investigation,ò ñhis investigations,ò and ñhis comprehensive, thorough, and objective investigation,ò as though he was authorized to conduct an investigation divorced from the directives of his superiors. Compl. ¶¶ 23, 26, 32; *see also id.* ¶ 38.

- Plaintiff admits that he was ñunwilling to go alongò with the Committeeôs purported investigative focus. *Id*. ¶ 26.

- Plaintiff admits that he was reprimanded for assigning work to interns that his superiors believed was improper. *Id*. ¶ 35; *see also* FAC ¶ 35.

- Plaintiff admits that he was reprimanded for failing to recognize potentially classified information and forwarding that information on an unclassified system, but dismisses those concerns by denigrating the Committeeôs Security Manager, who was tasked by Plaintiffôs superior to investigate the incident, as ñpoorly trainedò and ña novice.ò Compl. ¶¶ 41-43; FAC ¶¶ 39-41.

Plaintiffôs complaints further reveal that he repeatedly was counseled by his superiors for the deficiencies in his investigative work. For example, Plaintiff alleges that Mr. Kiko told him that his work product reflected a stark disconnect with the Committeeôs fact-based work and objectives, as directed by his superiors, by bluntly explaining: ñYou have no idea what weôre doing here.ò Compl. ¶ 24; FAC ¶ 24; *see also* Compl. ¶ 37. And, as noted above, Plaintiff admits that he was reprimanded for his unauthorized use of Committee interns (Compl. ¶¶ 35-37;

FAC ¶¶ 35-36), as well as his failure to protect sensitive information by placing it on an unclassified system. Compl. ¶ 41; FAC ¶ 39.[3]

In addition to his admission that he did not satisfy his superiors in his performance of his investigative duties, Plaintiff further admits that they doubted his judgment in other ways as well. For example, Plaintiff invited Majority-side Committee staff to attend a privately-sponsored event of which he was not the sponsor and that in no way related to any entity or issue within the Committeeôs investigative scope. *See* Compl. ¶ 27; FAC ¶ 26. Plaintiffôs attempt to influence other staff to attend a privately-sponsored reception that in no way related to their official duties, and to which they were not invited, was considered by his superiors to be improper and for that reason he was counseled by Mr. Kiko. *See* Kiko Aff. ¶ 9.[4]

The Circumstances of Plaintiffôs Departure from the Committee. In light of Plaintiffôs continual lapses of judgment, it was decided that Plaintiff no longer should remain on the Committee staff, and this recommendation was accepted by Chairman Gowdy. Kiko Aff. ¶ 13. This decision was a result of Plaintiffôs repeated lapses in judgment, including Plaintiffôs unwillingness to perform ï or inability to understand ï the Committeeôs investigation, his apparent inability to handle potentially classified information properly, and other professional deficiencies. *Id.* ¶¶ 9-13; *see also* Compl. ¶¶ 23, 26, 27, 35, 37, 38, 41. Plaintiff alleges that other employees engaged in similarly improper behavior but were not subjected to the same

[3] The Committee is specifically authorized to review such information in its investigation, *see* H. Res. 567 (113th Cong.), and Committee staffers were expected to handle ñsources and methodsò information appropriately. *See* Donesa Aff. ¶¶ 13-14. ñSources and methodsò represent ñthe heart of all intelligence operations.ò *Central Intelligence Agency v. Sims*, 471 U.S. 159, 167 (1985).

[4] The House Ethics Manual provides that invitations to such events only may be accepted when, *inter alia*, ñthe invitation came from the sponsor of the eventò and ñthe attendance of the Member or staff person is related to his or her official duties.ò Committee on Standards of Official Conduct, House Ethics Manual (2008 ed.), at 41-42 (providing guidance on House Rule 25, clause 5(a)(4)(A), which provides that attendance at such events may be permitted if ñappropriate to the performance of the official duties . . . of the . . . employee of the Houseò). The House Ethics Manual is available at: http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

employment action. *See* FAC ¶¶ 26, 44. As Mr. Kiko explains in his Affidavit, however, the recommendation to end Plaintiffôs service on the Committee was not the result of a single action, but the culmination of several missteps that reflected Plaintiffôs ñongoing poor judgment.ò Kiko Aff. ¶ 13.

On June 26, 2015, Plaintiff met with Messrs. Kiko and Donesa. He was informed of the Committeeôs decision and was given the option to resign. *Id*. ¶ 14; Donesa Aff. ¶ 18; *see also* FAC ¶ 45; Compl. ¶ 47. Plaintiff declined on June 26 to accept the offer to resign. Kiko Aff. ¶ 14; Donesa Aff. ¶ 18. On June 29, Plaintiff reported to work; because he was still negotiating the terms of his separation with the Committee, he was asked to leave. Donesa Aff. ¶ 19. On July 12, Plaintiff tendered his resignation letter to the Committee. Kiko Aff. ¶ 16; Donesa Aff. ¶ 20. Plaintiff was paid by the Committee through August 1, 2015. *See* Statement of Disbursements of the House: July 1, 2015 to September 30, 2015, part 3, at 2146, http://disbursements.house.gov/2015q3/2015q3_vol3.pdf.

**B. Procedural Background**

Before a Congressional employee may bring a claim against his or her Congressional employer under the CAA, the employee must first request counseling with the Office of Compliance (ñOOCò) and engage in mediation with his employing office. 2 U.S.C. §§ 1402, 1403, 1408(a). Plaintiff alleges that he requested counseling on August 5, 2015, that he requested mediation on September 10, 2015, and that the mediation period continued through October 13, 2015. FAC ¶¶ 51, 52, 53, 54.

On October 11, 2015, CNN aired an interview that Plaintiff had previously given to Jake Tapper (while Plaintiff was in the midst of supposed good-faith mediation with the Committee).[5]

[5] The Court may take judicial notice of Plaintiffôs public statements to the press when evaluating a motion to dismiss. *See Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013) (ñjudicial notice

*See State of the Union with Jake Tapper – "Ex Staffer: Benghazi Committee targeted Hillary Clinton"* (CNN television broadcast Oct. 11, 2015) (online at http://www.cnn.com/videos/politics/2015/10/11/bradley-podliska-benghazi-committee-investigation-hillary-clinton-dnt-sotu.cnn). Plaintiff told Mr. Tapper that there were ***two reasons*** for the termination of his employment. According to Plaintiff, one was his military service; the other was that he refused to follow the Committeeøs alleged directives to focus its investigation on Secretary Hillary Clinton.[6] Plaintiff was explicit: ***"I was fired for trying to conduct an objective, non-partisan, thorough investigation.***ò *Id.* (time mark 00:51 ï 00:58) (emphasis added).[7]

On November 23, 2015, Plaintiff filed the initial Complaint in this matter. *See* Compl. (ECF No. 1). In the Complaint, Plaintiff reiterated and elaborated on the statements he made in the Jake Tapper/CNN interview. Specifically, Plaintiff claimed that when he returned from his

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is properly taken of publicly available historical articlesò); *Washington Ass'n for Television & Children v. F.C.C.*, 712 F.2d 677, 683 n.12 (D.C. Cir. 1983) (ñspeech is in the public domain and is therefore a proper subject of judicial noticeò); *see also* Fed. R. Evid. 201(b)(2) (court may take judicial notice of fact that ñcan be accurately and readily determined from sources whose accuracy cannot reasonably be questionedò); Fed. R. Evid. 201(d) (court may take judicial notice ñat any stage of the proceedingò).

[6] The Committee denies Plaintifføs allegation that its investigation was improperly focused on Hillary Clinton. Moreover, the Committee had planned to (and did) conduct a public hearing with Secretary Clinton on October 22, 2015 ï just days after Plaintiff gave his interview to CNN. *See* Comm. Hearing 4 ï Former Secretary of State Hillary Clinton, 114th Cong. (Oct. 22, 2015), http://benghazi.house.gov/hearings/hearing-4. In light of this timing, it is reasonable to infer that Plaintiff and his counsel went to the press with this salacious allegation knowing that such an allegation would be of significant national interest and would, thus, permit him to secure his ñfifteen minutes of fame.ò

[7] In addition to the October 11 Jake Tapper/CNN interview, Plaintiff apparently also provided a draft of his Complaint ï which contained this allegation ï to the press at the same time. *See, e.g.*, FAC ¶ 60 n. 6 (citing Ari Melber, *Ex-Benghazi Investigator Alleges Rep. Gowdy Violated Federal Law*, NBC News, Oct. 12, 2015 (ñA draft of a lawsuit to be filed by Podliska claimed he was fired in part because he refused to go along with the anti-Clinton effort . . . .ò), http://www.nbcnews.com/news/us-news/ex-benghazi-investigator-alleges-rep-gowdy-violated-federal-law-n443166). The Court may consider press articles cited in Plaintifføs FAC without converting this motion into a Rule 56 motion. *See Nichols v. Vilsack*, No. 13-01502 (RDM), 2015 WL 9581799, at *2 (D.D.C. Dec. 30, 2015); *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011). Plaintiff was supposedly mediating in good faith with the Committee (mediation ended on October 13, FAC ¶ 54) when he spoke to Jake Tapper and provided his draft Complaint to the press (on or before October 11). Unlike the press, the first time the Committee saw the Complaint was over a month later, after it had been filed in this Court.

March 2015 military leave, the Committeeôs investigation ñchanged significantly to focus on Secretary of State Hillary Clinton and the State Departmentò and that Plaintiff ñwas unwilling to go along with the hyper-focus on the State Department and Secretary Clinton.ò Compl. ¶¶ 25-26. The initial Complaint further alleged that Plaintiff did not agree with this supposed change in focus and that Committee management was critical of and ñattempted to curtailò the manner in which he was conducting the investigation. *Id.* ¶¶ 26, 38. The initial Complaint further alleged that ñ***it was clear to Plaintiff that he was being singled out*** because of his military service ***and because he was unwilling to go along with the hyper-focus on the State Department and Secretary Clinton.***" *Id.* ¶ 26 (emphasis added). These allegations were expressly incorporated into Counts I and II. *Id.* ¶¶ 70, 78.

In addition, one of Plaintiffôs counsel prepared and published on his law officeôs website a list of ñFrequently Asked Questionsò relating to this lawsuit. There, Plaintiffôs counsel further highlights this aspect of Plaintiffôs claim, stating: ñBradley Podliska is a former investigator of the U.S. House Benghazi Committee ***who was fired in June 2015*** for serving in the military as a U.S. Air Force reservist ***and for refusing to unduly focus on the State Department in the investigation he conducted as a Committee staffer***.ò[8]

On February 5, 2016, the Committee filed its first motion to dismiss (ECF No. 22), explaining that Plaintiffôs Complaint allegations and press statements precluded him from asserting USERRA claims under the CAA because mixed motive claims are not permitted and military animus must be the ñsoleò factor for the adverse employment actions. ECF No. 22 at

[8] Washington Lawyersô Comm., *Frequently Asked Questions: Civil rights lawsuit against the U.S. House Benghazi Committee and its Chairman Rep. Trey Gowdy (SC)* (Nov. 23, 2015) (emphasis added), http://www.washlaw.org/news-a-media/455-frequently-asked-questions-civil-rights-lawsuit-against-the-u-s-house-benghazi-committee-and-its-chairman-rep-trey-gowdy-sc (last visited March 3, 2016). A copy is attached hereto as Exhibit 3.

22-35. In other words, the Committeeôs February 5, 2016 motion demonstrated that Plaintiffôs decision to incite press interest in his case ï by unequivocally asserting publicly and in his Complaint that he was fired in part because he allegedly would not focus his investigation on Secretary Clinton ï precluded him from asserting a viable USERRA claim.

On February 20, 2016, Plaintiff filed the FAC, which removes (but does not recant) the factual allegations relating to the dual motives for Plaintiffôs termination ï i.e., that he was terminated because of his military service ***and*** because of his refusal to go along with the Committeeôs alleged focus on Secretary Clinton. Through what can fairly be described as a cosmetic disguise, the FAC asserts a new legal conclusion ï that military animus was ñ***the sole or*** motivating factorò for Plaintiffôs termination and the other adverse actions alleged in Counts I and II. FAC ¶¶ 71, 81 (emphasis added).

On February 26, 2016, the Court denied the Committeeôs initial motion to dismiss as moot in light of Plaintiff having filed the FAC. *See* Minute Orders (ECF No. 33).

## III. ARGUMENT

### A. The Speech or Debate Clause Requires Dismissal of Plaintiff's Discrimination and Retaliation Claims (Counts I and II).

Counts I (discrimination) and II (retaliation) should be dismissed with prejudice because ñthe challenged . . . personnel decision was taken because of plaintiffôs performance of conduct protected by the Speech or Debate Clause.ò *Fields*, 459 F.3d at 16. In explaining why this is so, we proceed as follows. We first provide an overview of the relevant constitutional framework, both generally (subpart 1) and in the context of legislative branch employment actions (subpart 2). We then explain why, in light of *Fields*, the Speech or Debate Clause requires dismissal of Plaintiffôs claim that he was discharged and retaliated against in violation of the CAA (subparts 3 and 4).

**1. A Brief Overview of the Speech or Debate Clause.**

a. History and Purpose of the Clause. The Speech or Debate privilege is rooted in the epic struggle for parliamentary independence in 16th- and 17th-century England. *See United States v. Johnson*, 383 U.S. 169, 178 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (ñAs Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. . . . In 1689, the Bill of Rights declared in unequivocal language: ó[T]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.ôò). As a result of the English experience, ñ[f]reedom of speech and action in the legislature was taken as a matter of courseò by the Founders, and reflected in the Speech or Debate Clause of our Constitution. *Tenney*, 341 U.S. at 372.

The purpose of the Clause

> is to insure that the legislative function the Constitution allocates to Congress may be performed independently.
>
> . . . .
>
> [T]he ñcentral roleò of the Clause is to ñprevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary. . . .ò

*Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975) (quoting *Gravel v. United States*, 408 U.S. 606, 617 (1972)). ñIn the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.ò *Johnson*, 383 U.S. at 178.

Because ñthe guarantees of th[e Speech or Debate] Clause are vitally important to our system of government,ò they ñare entitled to be treated by the courts with the sensitivity that such important values require.ò *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Accordingly, the Supreme Court has, ñ[w]ithout exception, . . . read the Speech or Debate Clause broadly to

effectuate its purposes.ò *Eastland*, 421 U.S. at 501; *see also Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Gravel*, 408 U.S. at 624; *Johnson*, 383 U.S. at 179; *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

This broad reading has included extending the three protections of the Clause, discussed below in subpart 1.c., beyond the criminal context where it originated to the private civil context because a ñprivate civil action . . . creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks.ò *Eastland*, 421 U.S. at 503; *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) (ñThe Speech or Debate Clause applies in civil cases as well as criminal prosecutions. . . . The Clause states, after all, that Members shall not be called to account óin any other Placeôï not just a criminal court.ò).

In similar fashion, the Supreme Court held in *Gravel* that the protections of the Clause apply ñnot only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.ò 408 U.S. at 618; *see also id*. at 616 (in applying Speech or Debate Clause, ña Member and his aide are to be treated as oneò (quotation marks omitted). This is so because ñit is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants.ò *Id*. at 616; *see also Eastland*, 421 U.S. at 507 (ñWe draw no distinction between the Members and the Chief Counsel.ò).

In this case, Messrs. Kiko and Donesa were functioning, for *Gravel* purposes, as aides to the Committee and, therefore, are entitled to assert the privilege on the Committeeôs behalf. *Fields*, 459 F.3d at 16 (acknowledging that aides are entitled to assert Speech or Debate Clause

privilege in context of CAA cases); *see also* Kiko Aff. ¶ 3 (confirming that Chairman Gowdy has authorized Mr. Kiko to assert the privilege on behalf of the Committee); Donesa Aff. ¶ 3 (same).

b. Scope of the Clause. The three protections afforded by the Speech or Debate Clause, discussed in the next subsection, apply to all activities ñwithin the ólegislative sphere,ôò *McMillan*, 412 U.S. at 312 (quoting *Gravel*, 408 U.S. at 624-25), which includes all activities that are

> ñan integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.ò

*Eastland*, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625).

The courts have broadly construed the concept of ñlegislative activityò to include much more than words spoken in debate. The ñcases have plainly not taken a literalistic approach in applying the privilege. . . . Committee reports, resolutions, and the act of voting are equally covered.ò *Gravel*, 408 U.S. at 617. Similarly, committee investigations and hearings have been held to be activities within the legislative sphere, *Eastland*, 421 U.S. 491, as has the general collecting of information in furtherance of legislative responsibilities because ñó[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.ôò *Id*. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)).[9]

[9] Protected information-gathering can be informal as well as formal. *See, e.g.*, *Brown & Williamson*, 62 F.3d 408 (documents delivered to committee by private citizen, at citizenôs own initiative, protected); *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (en banc) (ñ[A]cquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the [Speech or Debate] privilege so that congressmen are able to discharge their constitutional duties properly.ò); *Tavoulareas v. Piro*, 527 F. Supp. 676, 680 (D.D.C. 1981) (ñ[A]cquisition of

Not surprisingly, the courts also have made clear that protected ñlegislative activitiesò encompass preparatory activities that are a normal, routine, and common sense part of any hearing, speech, meeting, information-gathering effort, or other legislative activity. *See, e.g.*, *Gravel*, 408 U.S. at 628-29 (describing scope of appropriate protective order relating to matters privileged under the Speech or Debate Clause as including acts ñperformed by the [Member], or by his aides in the course of their employment, in preparation for the subcommittee hearingò and ñconcerning communications between the [Member] and his aides during the term of their employment and related to . . . any other legislative act of the [Member])ò; *Johnson*, 383 U.S. at 173-76 (describing communications related to Memberôs speech and concluding that their admission at trial resulted in ñconstitutional infirmity infecting th[e] prosecutionò); *MINPECO, S.A. v. Conticommodity Serv., Inc.*, 844 F.2d 856, 861 (D.C. Cir. 1988) (recognizing that preparation of statement in subcommittee report is part of the legislative process).

c. Protections Afforded by the Clause. In practice, the Speech or Debate privilege comprises three broad protections: (i) an immunity from lawsuits or prosecutions for all ñactions within the ólegislative sphere,ôò *McMillan*, 412 U.S. at 312 (citation omitted);[10] (ii) a non-evidentiary use privilege which bars a prosecutor in a criminal case ï and a party in a civil suit ï from advancing their cases or claims against Legislative Branch officials by ñ[r]evealing information as to a legislative act,ò *United States v. Helstoski*, 442 U.S. 477, 490 (1979); *see also Johnson*, 383 U.S. at 173; and (iii) a non-disclosure privilege, *see Gravel*, 408 U.S. at 615-16; *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 655-56, 660-62 (D.C. Cir. 2007);

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information by congressional staff, whether formally or informally, is an activity within the protective ambit of the speech or debate clause.ò).

[10] This immunity extends to both criminal prosecutions and civil suits. *See Helstoski*, 442 U.S. 477 (criminal prosecution); *United States v. Brewster*, 408 U.S. 501 (1972) (same); *Johnson*, 383 U.S. 169 (same); *Eastland*, 421 U.S. 491 (civil suit); *McMillan*, 412 U.S. 306 (same); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (same).

*Brown & Williamson*, 62 F.3d 408. The non-disclosure privilege operates to protect Legislative Branch officials from being compelled to testify as to privileged matters and from being compelled to produce privileged documents. *Gravel*, 408 U.S. at 615-16; *Helstoski*, 442 U.S. at 484-86; *Rayburn House Office Bldg.*, 497 F.3d at 660.[11]

The Supreme Court draws no distinctions among these three protections. Rather, it has stated unequivocally that when the Speech or Debate Clause applies, its protections are ñabsolute.ò *Eastland*, 421 U.S. at 501, 503, 507, 509-10, 509 n.16; *Gravel*, 408 U.S. at 623 n.14.

**2. In the Employment Context, the Speech or Debate Clause Bars Challenges to Legislative Branch Employment Decisions Taken Because of the Plaintiff's Performance or Non-Performance of Legislative Activities.**

The D.C. Circuit first addressed the application of the Speech or Debate Clause in the context of legislative branch employment actions in two cases decided before the 1995 enactment of the CAA ï *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984), and *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986).

The plaintiff in *Walker* was the general manager of the House restaurant system and alleged that she had been fired because she was a woman. The Congressional defendants ï a House Subcommittee Chairman and the Subcommitteeôs Staff Director ï moved to dismiss on the ground that they were immune from suit under the Speech or Debate Clause. The Court rejected that argument because the restaurant manager had no ñómeaningful input into . . . legislative decisionmaking,ôò 733 F.2d at 930 (quoting *Davis v. Passman*, 544 F.2d 865, 880-81 n.25 (5th Cir. 1977), *rev'd on other grounds*, 571 F.2d 793 (5th Cir. 1978) (en banc), *rev'd*,

[11] *See also, e.g.*, *Dennis v. Sparks*, 449 U.S. 24, 30 (1980) (testimony); *Miller v. Transam. Press, Inc.*, 709 F.2d 524, 528-29 (9th Cir. 1983) (same); *Brown & Williamson*, 62 F.3d at 420 (documents); *MINPECO*, 844 F.2d at 859-61 (same); *Pentagen Techs. Int'l, Ltd. v. Comm. on Appropriations of U.S. House of Representatives*, 20 F. Supp. 2d 41, 43-44 (D.D.C. 1998) (same), *aff'd*, 194 F.3d 174 (D.C. Cir. 1999) (per curiam); *United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246, 248-49 (D.D.C. 1981) (same).

442 U.S. 228 (1979)), and her duties were not ñóintimately cognateôto the legislative process,ò 733 F.2d at 931 (quoting *Davis*, 544 F.2d at 879 (citation omitted)).

The plaintiff in *Browning*, on the other hand, was an official House reporter whose job duties entailed ñthe verbatim stenotype transcription of committee and subcommittee hearings.ò 789 F.2d at 924. The *Browning* plaintiff alleged that she had been fired because she was African-American. As in *Walker*, the Congressional defendants in *Browning* ï the Speaker of the House, the Clerk, an Assistant to the Clerk, and the Director of the Office of Official Reporters ï moved to dismiss on the ground that they were immune from suit under the Speech or Debate Clause. This time the Court agreed:

> The touchstone to determining whether the Speech or Debate Clause immunity attaches is whether the activities at issue were ñan integral part of the deliberative and communicative processes [of Congress],ò *Gravel*, 408 U.S. at 625, such that the activity is legislative in character. Personnel decisions are an integral part of the legislative process to the same extent that the affected employeeôs duties are an integral part of the legislative process. Thus, if the employeeôs duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the ñdischarge of their functions,ò personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny.
> . . . .
> [W]e hold that the standard for determining Speech or Debate Clause immunity is best expressed as whether the employeeôs duties were *directly related to the due functioning of the legislative process*. There can be little doubt that Browningôs duties as an Official Reporter were directly related to the legislative process.

*Id*. at 928-29 (emphasis in original; citation omitted).

When Congress enacted the CAA in 1995, it made clear that it was not waiving, even if it could waive (an uncertain proposition, *see Helstoski*, 442 U.S. at 490, 492), the protections afforded under the Speech or Debate Clause. *See* 2 U.S.C. § 1413 (ñThe authorization to bring judicial proceedings under [the CAA] shall not constitute a waiver . . . of the privileges of any

Senator or Member of the House of Representatives under [the Speech or Debate Clause] . . . .ò). And when the D.C. Circuit next considered the issue of how the Speech or Debate Clause applies in the employment context, it agreed. *Fields*, 459 F.3d at 8 (CAA did not waive Speech or Debate privilege); *see also Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 31 n.5 (D.D.C. 2001) (same). *Fields*, however, did reconsider *Browning* and, in the process, reconfigured the manner in which the Clause applies to legislative-branch employment decisions.[12]

The en banc *Fields* court considered two consolidated appeals ï one by a House Member office and one by a Senate Member office ï each of which contended that the district court had erred in denying its motion to dismiss CAA claims asserted against it by a discharged staffer who arguably performed duties that satisfied the *Browning* test. The case produced four opinions. The principal opinion, a plurality, was authored by Judge Randolph and joined by Judges Ginsburg, Henderson, and Tatel. 459 F.3d at 4.[13] All eight judges agreed that the *Browning* duties test was ñoverinclusiveò and that ñan employeeôs duties are too crude a proxy for protected activity.ò *Id*. at 11; *see also id*. at 17, 18, 21. And all agreed that, notwithstanding, the Speech or Debate Clause still plays an important role in legislative-branch employment cases. *Id*. at 14, 17, 18, 30.

The plurality articulated two ***independent*** bases upon which the Speech or Debate Clause applies in the employment context. First, in rejecting the argument that employment decisions

[12] The Supreme Court has not reached this issue. In *Davis*, a pre-CAA case, a former deputy administrative assistant to a Member of Congress alleged that her discharge was based on her gender in violation of the Fifth Amendment. *See* 442 U.S. at 230-31. While the Court recognized that the decision was ñtaken in the course of [the Memberôs] official conduct,ò *id*. at 246, it did not reach the question of whether the Memberôs decision to discharge the employee was Speech or Debate protected, *id.* at 249.

[13] Judge Tatel also wrote a concurring opinion, *id*. at 18; Judge Rogers wrote an opinion that concurred with much of the pluralityôs reasoning and in the judgment, *id*. at 17; and Judge Brown wrote an opinion, joined by Judges Sentelle and Griffith, that concurred in the judgment, *id*. at 21.

never can be protected legislative acts as such, the plurality necessarily concluded that some employment decisions may, in and of themselves, be legislative acts that are immune from suit under the immunity component of the Clause. *Id*. at 10 (ñsome personnel decisions would not qualifyò as protected legislative acts). Acknowledging that these were ñperplexing questions,ò *id*. at 9, the plurality declined to say definitively when employment decisions are protected legislative acts in and of themselves, beyond concluding that the employment decisions in the two cases then before the Court were not. *Id*. at 13.

Second, the plurality held that, even ñ[w]hen the [immunity component of the] Clause does not preclude suit altogether,ò the non-disclosure component of the Clause ñstill óprotect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts.ôò 459 F.3d at 14 (quoting *Brewster*, 408 U.S. at 508). This non-disclosure component, as the plurality explained, would lead in ñmany casesò to the dismissal of CAA claims. 459 F.3d at 15; *see also id*. at 20 (Tatel, J., concurring) (agreeing that Clauseôs non-disclosure aspect could ñpreclude[] litigationò of some CAA claims); *id*. at 17-18 (Rogers, J., concurring) (same). And from there, the plurality went on to articulate an analytical framework by which district courts are to assess whether such dismissal is required.

> [W]hat happens when the [employment] action was motivated by the employeeôs participation in the legislative process?
>
> Suppose a plaintiff sues a Memberôs personal office claiming her discharge violated the [CAA]. Suppose further that she is able to make out a prima facie case of discrimination of one form or another. If the employing office produces evidence ï by affidavit, for example ï that the personnel decision was made because of the plaintiffôs poor performance of conduct that is an integral part of ñthe due functioning of the [legislative] process,ò then for the plaintiff to carry her burden of persuasion, she must ñdemonstrate that the proffered reason was not the true reason for the employment decision.ò In many cases, the plaintiff would be unable to do so without ñdraw[ing] in questionò the legislative

> activities and the motivations for those activities asserted by the affiant ï matters into which the Speech or Debate Clause prohibits judicial inquiry.
> . . . .
> In employment discrimination cases under the [CAA], then, as in other employment discrimination cases, the defendant will provide evidence of a legitimate nondiscriminatory reason for the discharge. To invoke the Speech or Debate Clause, the employing office should include with this evidence an affidavit from an individual eligible to invoke the Speech or Debate Clause recounting facts sufficient to show that the challenged personnel decision was taken because of the plaintiffôs performance of conduct protected by the Speech or Debate Clause. . . . The affidavit must indicate into what ñlegislative activityò or into what matter integral to the due functioning of the legislative process the plaintiffôs suit necessarily will inquire.
>
> With that submission, the district court must then determine whether the asserted activity is in fact protected by the Speech or Debate Clause. ***If it is, the action most likely must be dismissed*** . . . .

*Id*. at 15-16 (emphasis added; citations omitted).

The D.C. Circuit reaffirmed the *Fields* framework several years later in *Howard v. Office of the Chief Administrative Officer*, including the significance of the submission of a ñ*Fields* affidavitò by the Congressional employer. 720 F.3d 939, 948 (D.C. Cir. 2013). The Circuit reasoned that, under the facts presented, the *Howard* plaintiff (who performed a budget function for the Houseôs Chief Administrative Officer) could pursue her claims, despite limitations imposed by the Clause, but only ñprovided that she does not contest her employerôs conduct of protected legislative activities and that she prove her allegations of pretext using evidence that does not implicate protected legislative matters.ò *Id.* at 949. The Circuit was influenced by the fact that the reasons proffered for the relevant employment actions only tangentially implicated the Clause. *Id.* at 942.

**3. Because the Committee's Decision to End Plaintiff's Employment Was a Legislative Act, It Is Immune from Challenge Under the Speech or Debate Clause.**

Counts I and II both challenge the circumstances of Plaintiffôs separation from the Committee ï Count I alleges that Plaintiff was unlawfully discriminated against on the basis of his military service, while Count II alleges that Plaintiff was unlawfully retaliated against for raising a complaint of discrimination on the basis of his military service. Because Plaintiffôs separation from the Committee is the actual employment action that is challenged in both counts, we consider them together here inasmuch as the governing *Fields* analysis is the same.

Where, as here, a defendant files a Rule 12(b)(1) motion to dismiss, ñ[i]t is to be presumed that [the] cause lies outside [the federal courtsô] limited jurisdiction.ôò *Ragsdale v. Holder*, 668 F. Supp. 2d 7, 14 (D.D.C. 2009) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The plaintiff then ñóbears the burden of establishing the factual predicates of jurisdiction by a preponderance of the evidence.ôò *Kaur v. Chertoff*, 489 F. Supp. 2d 52, 59 (D.D.C. 2007) (quoting *Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006)). While this Court must accept as true the factual allegations in the First Amended Complaint, ñthe factual allegations in [a] complaint will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim.ò *Leiterman v. Johnson*, 60 F. Supp. 3d 166, 174-75 (D.D.C. 2014) (quotation marks and citation omitted). In resolving a 12(b)(1) motion, the court ñmay [also] consider materials outside the pleadingsò to determine whether it has jurisdiction over the underlying claims. *See, e.g.*, *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005); *Ragsdale*, 668 F. Supp. 2d at 14; *P & V Enters. v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 2d 134, 139 (D.D.C. 2006).

As discussed above, the D.C. Circuit has recognized that where a personnel decision is, itself, a legislative act, any action based on that decision is barred. *Fields*, 459 F.3d at 10-11; *Howard*, 720 F.3d at 947. ñTo determine on what actions a plaintiff sought to predicate liability, we examine the pleadings.ò *Fields*, 459 F.3d at 13. Here, as the original Complaint makes plain, Plaintiffôs performance of legislative duties, including his alleged independent investigative focus, delegation of certain investigative duties to intern staff, and handling of sensitive information gathered in the course of his legislative duties, was inconsistent with his superiorsô directives. *See* Compl. ¶¶ 23, 24, 26, 35, 37, 38.[14] For this reason, Plaintiffôs action is barred by the Speech or Debate Clause under *Fields*, 459 F.3d at 10-11, 13. *Cf. Scott v. Office of Alexander*, 522 F. Supp. 2d 262, 269 (D.D.C. 2007) (sexual harassment claim of Scheduler in Memberôs personal office ñin no way requires inquiry into óhow the [Congressman] spoke, how he debated, how he voted, or anything he did in chamber or committeeôò (quoting *Fields*, 459 F.3d at 13)); *see also Floyd v. Jackson Lee*, 968 F. Supp. 2d 308, 323 (D.D.C. 2013) (plaintiff ñcrafted her complaint to . . . center only on the assignment and delegation of political tasksò).

[14] Plaintiffôs statements to the press, including press statements incorporated by reference into his First Amended Complaint, are consistent with the allegations in his original Complaint and confirm that he seeks to predicate liability on (protected) legislative activity. *See, e.g.*, Press Release, Washington Lawyersô Committee for Civil Rights and Urban Affairs, *Former Benghazi Committee Investigator . . . .* (Nov. 23, 2015), http://www.washlaw.org/news-a-media/454-former-benghazi-committee-investigator-files-federal-civil-rights-lawsuit-against-benghazi-committee-andchairman-trey-gowdy (last visited Mar. 3, 2016) (stating that Mr. Podliska was ñterminatedò because of his alleged ñefforts to conduct an objective, non-partisan investigation of the Benghazi attackò) (copy attached at Ex. 4); Jim Geraghty, *An Ex-Benghazi Committee Staffer Says Exactly What Hillary Needed (UPDATED)*, Natôl Review Online, *The Corner* (Oct. 12, 2015), http://www.nationalreview.com/corner/425412/ex-benghazi-committee-staffer-says-exactly-what-hillary-needed-updated-jim-geraghty (last visited Mar. 3, 2016) (ñPodliska . . . is now preparing to file a lawsuit . . . alleging that he lost his job in part because he resisted pressure to focus his investigative efforts solely on the State Department and Clintonôs role surrounding the Benghazi attack.ò) (cited at FAC ¶¶ 59, 62). As explained above, *see supra* notes 5 and 7, the Court may take judicial notice and/or otherwise consider these press statements and articles.

**4. Alternatively, the Non-Evidentiary Use and Non-Disclosure Aspects of the Speech or Debate Clause Privilege Require the Dismissal of Counts I and II.**

In the alternative, even assuming this Court has jurisdiction over Plaintiffôs claims against the Committee, those claims must be dismissed pursuant to the non-evidentiary use and non-disclosure components of the Speech or Debate Clause. As explained above, the *Fields* plurality opinion explained that in cases where the Clause does not bar an employment action altogether, the non-disclosure component may require dismissal of such action if the Congressional defendant produces evidence, in the form of an affidavit, that ñthe challenged personnel decision was taken because of plaintiffôs performance of conduct protected by the Speech or Debate Clause.ò *Fields*, 459 F.3d at 16. Here, the affidavits of Messrs. Kiko and Donesa make plain that the Committeeôs personnel decision was made precisely for the reasons articulated in *Fields* and, as such, the case against the Committee should be dismissed.

First, the Kiko Affidavit explains that, as a Committee Investigator, Plaintiff had job responsibilities that were legislative in nature. In particular, he was responsible for ñadvising Select Committee Members and staff supervisors on investigative matters,ò ñreviewing documents to support the investigative focus of the Select Committee,ò ñdrafting questions for [Select Committee] witnesses,ò ñ[d]rafting and reviewing investigative memoranda,ò and ñimplementing investigative plans as assigned by supervisors and developing reports and memoranda relating to the same.ò Kiko Aff. ¶ 8. As a matter of law, these activities were an integral part of the legislative process since they were in direct support of the legislative responsibilities of the Committee. *See Eastland*, 421 U.S. at 504 (gathering of information in furtherance of legislative responsibilities Speech or Debate protected); *supra* note 9 (collecting lower court decisions holding that this activity protected).

Second, under *Fields*, Plaintiff cannot contest that he was asked to resign because of his performance of these constitutionally protected activities (and indeed Plaintiff has previously admitted as much). As Mr. Donesa has explained, ñIn short, among other ongoing concerns about Mr. Podliskaôs judgment, we became concerned that he was utilizing Select Committee resources to pursue issues outside of the tasks assigned to him by staff management, and further that he was not fully bringing to bear his intelligence community expertise on relevant matters that were a more appropriate focus of the Select Committeeôs work.ò Donesa Aff. ¶ 9. Eventually, Mr. Donesa was forced to explain to Plaintiff that the reason for his separation from the Committee was his ñfail[ure] to exercise appropriate judgment consistent with the mission of the Select Committee,ò as evidenced by ñ(1) engaging in work that was inconsistent with the Select Committeeôs workplan, and repeatedly attempting to task interns with such work; (2) failing to meet the Select Committeeôs expectations in light of his intelligence agency experience; (3) the security infraction incident [involving the mishandling of sources and methods information]; and (4) exhibiting lack of judgment in inviting Select Committee staff to a particular outside event.ò *Id.* ¶ 16.

In short, in *Fields* terms, the Committee has ñprovide[d] evidence of a legitimate nondiscriminatory reasonò for its personnel action. Because the Speech or Debate Clause precludes Plaintiff from compelling the disclosure of documents or testimony to challenge the Committeeôs stated legislative reasons for that personnel action, and because the Clause likewise precludes Plaintiff from using any such documents or testimony against the Committee, he will not be able ñto carry [his] burden of persuasionò of ñdemonstrat[ing] that the proffered reason was not the true reason for the employment decision.ò *Fields*, 459 F.3d at 15 (quotation marks omitted).

If these Counts were allowed to proceed, Plaintiff presumably would seek discovery in the following ways:

- by interrogating Committee Members and/or staff on the scope, nature, and quality of his investigative work, in support of his pretext claims (*see* FAC ¶ 70);
- by interrogating Committee staff about the nature of the investigative tasks he, and others, assigned to interns, in support of his allegation that the assignments he directed were not improper (*see id.* ¶¶ 35-36, 72; *see also* FAC ¶¶ 35-36);
- by interrogating Committee staff about the precise information disclosed by him in June 2015, in support of his allegations that he had not improperly placed sensitive information on an unclassified network (*see* Compl. ¶ 41; FAC ¶ 39);
- by interrogating Committee staff about the propriety of attending sponsored events that do not relate to official duties, and soliciting others to attend such events, an inquiry that necessarily would involve the Committeeôs interpretation of House Rule 25 (*see* Compl. ¶ 27; FAC ¶ 26; *supra* note 4); and
- by obtaining documentary evidence regarding the above.

This result is precisely what the courts have held the Clause prohibits. *Eastland*, 421 U.S. at 503, 508-09 (ñThe wisdom of congressional approach or methodology is not open to judicial veto.ò); *see also Brewster*, 408 U.S. at 525 (ñIt is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.ò); *McMillan*, 412 U.S. at 339 (1973) (Rehnquist, J., concurring) (ñA supposed privilege against being held judicially accountable for an act is of virtually no use to the claimant of the privilege if it may only be sustained after elaborate judicial inquiry into the circumstances under which the act was performed.ò); *McSurely*, 521 F.2d at 1035 (ñRather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator.ò); *Fields*, 459 F.3d at 21 (Tatel, J., concurring) (ñ[D]istrict courts should focus on determining whether the cases may proceed

without undue judicial ónquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.ôö (quoting *Brewster*, 408 U.S. at 525)); *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1351 (D.C. Cir. 1975) (Congressôs ñexecution of internal rulesò is ñlegislativeò).

Because such probing into core legislative matters is precluded by the Speech or Debate Clause, Counts I and II must be dismissed.

**B. Counts I and II Should Be Dismissed Because Plaintiff's Factual Allegations and Public Statements Confirm that Military Animus Was Not the Sole Cause of the Alleged USERRA Violations.**

As explained below, USERRA, as incorporated by the CAA, requires that military animus be the ñsoleò cause of the adverse actions alleged. However, Plaintiffôs factual allegations in the initial Complaint and various public statements in the press assert that Plaintiff refused to ñgo along withò his employerôs alleged directives regarding the focus of its investigation and, further, that this was a motivating cause for the Committeeôs termination of his employment and the other adverse actions alleged. Accordingly, Plaintiff cannot establish that military animus was the ñsoleò cause of these adverse actions. Plaintiff, therefore, fails to state a claim for a USERRA violation, and Counts I and II must be dismissed.

**1. Plaintiff May Not Avoid Dismissal Through a 'Cosmetic Disguise' of His Factual Allegations in His Amended Pleading.**

To be sure, the FAC no longer contains factual references to the alleged improper focus of the Committeeôs investigation, or to the fact that Plaintiff stated that he refused to ñgo alongò with that investigation, or that Plaintiff has unequivocally stated that this was one of the reasons he was fired. The FAC also does not allege any ***factual allegations*** to contradict these previous factual assertions. Rather, the FAC simply omits those factual allegations. However, an amended pleading does not wipe the slate clean of the prior factual allegations. Indeed, it is well

established that a plaintiff may not avoid dismissal of his lawsuit by filing an amended complaint that contains ñmerely a cosmetic disguiseò of the factual infirmities that doomed his initial pleadings. *W. Assocs. Ltd.*, 235 F.3d at 634 (looking at allegations in initial complaint on a Rule 12(b)(6) motion and decidedly rejecting the plaintiffôs assertion that ñthe court must focus on [the] amended complaintò); *see also Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 170 n.15 (D.D.C. 2013) (ñCourt may consider the original Complaint and Plaintiffs' other filings, including sworn statements, in evaluating the Amended Complaint . . . . [O]n a Rule 12(b)(6) motion it is appropriate for the court to look beyond the amended complaint to the record, which includes the original complaint ***and compare the complaints***ò) (citations and quotations omitted) (emphasis added), *aff'd*, 796 F.3d 1 (D.C. Cir. 2015).[15]

The ***only*** substantive change in the FAC that is relevant to this argument is Plaintiffôs addition of the word ñsoleò to the legal conclusion that his military status was a factor in the Committeeôs actions. FAC ¶¶ 71, 81. As discussed below, this allegation is a ***legal*** conclusion that the Court need not consider presumptively true when evaluating a motion to dismiss. In the unlikely event, however, that Plaintiff intends to argue that the addition of the word ñsoleò into the FAC is a new ***factual*** allegation that should supersede his prior factual allegations and press statements, such a factual change is completely impermissible. ñA plaintiff . . . may not plead facts in their amended complaint that contradict those in their original complaint.ò *Hourani*, 943 F. Supp. 2d at 171. Furthermore, as the Court in *Hourani* noted, were a plaintiff to make such a

[15] *Accord Fasugbe v. Willms*, No. 2:10ï 2320 WBS KJN, 2011 WL 2119128, at *5 (E.D. Cal. May 26, 2011) (noting that ñthe court need not ignore the prior allegations in determining the *plausibility* of the current pleadingsò and that while ñplaintiffs may alter their allegations in an amended complaint . . . the court may properly consider the plausibility of the FAC in light of the prior allegationsò) (emphasis in original); *Cole v. Sunnyvale*, No. Cï 08ï 05017ï RMW, 2010 WL 532428, at *4-5 (N.D. Cal. Feb. 9, 2010) (considering facts alleged in ñprior iterations of the pleadingò to determine whether Third Amended Complaint ñplausibly suggests an entitlement to reliefò).

blatant ***factual*** contradiction between an initial complaint and an amended complaint, Rule 11 might very well be implicated. 943 F. Supp. 2d at 171-72; *see also* 796 F.3d at 17-18.

Indeed, when a ñplaintiff blatantly changes his statement of the facts in order to respond to the defendant['s] motion to dismiss ... [and] directly contradicts the facts set forth in his original complaint, a court is authorized to accept the facts described in the original complaint as true.ò *Colliton v. Cravath, Swaine & Moore LLP*, No. 08 CIV 0400 (NRB), 2008 WL 4386764, at *1 (S.D.N.Y. Sept. 24, 2008), *aff'd sub nom.* 356 F. Appôx 535 (2d Cir. 2009) (alterations in original) (citations and quotations omitted). In *Colliton*, for example, the plaintiff alleged in his initial complaint that he was employed by the defendant as an attorney. *Id.* at *6. The defendant pointed out that the plaintiffôs admitted status as an attorney barred him from recovering under controlling law. Plaintiff then filed an amended complaint in which he ñchanged his story, claiming instead that Cravath employed him primarily as a óspecialist,ô and that he ówas never, at any time during the Employment Period, an associate, a senior attorney or counsel.ôò *Id.* at *13 (quoting am. compl.). The court chastised plaintiff for this conduct, which it found was a ñtransparent attempt by plaintiff to amend his pleading in order to avoid a dispositive defense.ò *Id.* at *6.

In evaluating whether the FAC states a claim for a violation of USERRA under the CAA, the Court must assess whether the Plaintiff has plausibly pled sufficient factual allegations to state a viable cause of action. *Ey v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 967 F. Supp. 2d 337, 341 (D.D.C. 2013). In doing so, the Court ñneed not accept as true either a legal conclusion couched as a factual allegation or an inference drawn by the plaintiff if such inference is unsupported by the facts set out in the complaint.ò *Patel v.*

*Bureau of Prisons*, No. 09-200 (RDM), 2015 WL 4999906, at *2 (D.D.C. Aug. 21, 2015) (citations and quotations omitted).

In the FAC, Plaintiff alleges the legal conclusion that military animus was the ñsole or motivating factor.ò The addition of the word ñsoleò is just a ñlabel[] and conclusion[]ò to which the Court need not defer. *Ey*, 967 F. Supp. 2d at 341 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Moreover, the word ñsoleò is wholly inconsistent with ï and directly contradicted by ï the factual allegations in the initial Complaint and Plaintiffôs press statements.[16] When, as here, the legal conclusions are unsupported by ï or, even worse, contradicted by ï the factual allegations in the record, the pleading fails to state a claim. *W. Assocs. Ltd.*, 235 F.3d at 633 (on a motion to dismiss, court ñis not bound by the complaintôs legal conclusions,ò and ñ[c]omparing the amended complaint with the original complaint further demonstrates that . . . [the amended complaintôs legal conclusions] . . . are merely a cosmetic disguiseò).

In short, despite the ñcosmetic disguiseò of removing certain factual allegations from his pleadings, Plaintiffôs previously pled (and publicly-stated) factual allegations remain subject to judicial consideration. And those statements ï which have not been recanted or contradicted ï make clear that Plaintiff has alleged that his termination and the other adverse actions alleged were motivated, in part, by his refusal to conduct his work consistent with the Committeeôs investigatory focus. Therefore, as further explained below, Plaintiff is unable to state a claim

[16] As noted above, the Court may take judicial notice of Plaintiffôs statement to Jake Tapper at CNN on October 11, 2015 which is in the public domain. *See supra* note 5. Should the Court decide, however, that it cannot consider Plaintiffôs public statements without converting this motion into one for summary judgment under Rule 56, the Committee requests that the Court convert this motion into one for summary judgment on this limited issue. *See Patel*, 2015 WL 4999906, at *2. Such a motion would be proper at this time because there is no reasonable basis for Plaintiff to assert that he needs discovery under Rule 56(d) regarding ***his*** publicly available statements to Jake Tapper.

under USERRA, as incorporated by the CAA, because his allegations absolutely preclude him from establishing that military animus was the ñsoleò factor for the adverse actions alleged.

**2. USERRA – as Incorporated by the CAA – Requires Plaintiff to Show that Military Status or Service Was the But-For Cause of the Adverse Employment Actions Alleged.**[17]

Section 4311 of USERRA states:

> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
>
> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. . . . .
>
> (c) An employer shall be considered to have engaged in actions prohibitedð
>
> > (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
> >
> > (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

38 U.S.C. § 4311(a)-(c).

[17] With the exception of subsection 5, the remainder of Section III.B is nearly identical to Section III.B of the Committeeôs February 5, 2016 motion to dismiss (ECF No. 22).

In sum, subsection (a) of section 4311 prohibits discrimination in employment based on military status or service; subsection (b) prohibits retaliation because an individual has exercised his rights under USERRA; and subsection (c) provides the liability standard by which courts are to determine whether subsections (a) and/or (b) have been violated.

In a ***typical*** USERRA case, a plaintiff may establish that he has been discriminated or retaliated against by meeting the liability standard in subsection (c) ï i.e., by demonstrating that his military service or exercise of rights was ***a motivating factor*** in the employerôs termination decision. *See, e.g.*, *Staub v. Proctor Hosp.*, 562 U.S. 411, 416-17 (2011). This is not, however, the standard for establishing USERRA discrimination or retaliation under the CAA, ***because the CAA does not incorporate the motivating factor standard in subsection (c) of section 4311 of USERRA*****.** Rather, the CAA incorporates only select portions of USERRA.

Specifically, the relevant section of the CAA provides:

> It shall be unlawful for an employing office to ï (A) discriminate, within the meaning of ***subsections (a) and (b) of section 4311*** of Title 38, against an eligible employee. . . .

2 U.S.C. § 1316(a)(1) (emphasis added). Subsection (c) of section 4311 is not incorporated into the CAA. Without subsection (c), there is no expressly mandated liability standard for USERRA claims under the CAA.[18] Indeed, in 2008, the Office of Compliance ï the agency Congress established to enforce the CAA ï submitted proposed rules to the Congress interpreting USERRA that specifically advised Congress on this point by stating:

[18] As noted in the Committeeôs initial motion to dismiss (*see* ECF No. 22 at 26 n.18), Plaintiffôs pleadings reveal a number of instances where he has assumed, erroneously, that USERRA has been incorporated wholesale into the CAA. For example, Plaintiff states that he did not pay the filing fee required of most plaintiffs, asserting that ñ[t]his action is exempt from any filing fees pursuant to USERRA, 38 U.S.C. § 4323(h)(1).ò Compl. ¶1; FAC ¶ 1. However, the CAA does not incorporate section 4323(h)(1) of USERRA. *See* 2 U.S.C. § 1316(b). (The Committee takes no position as to whether the Court should *sua sponte* order Plaintiff to pay the civil filing fees.) Similarly, Plaintiff appears to allege that the Committee was required to ñpost[] . . . USERRA workplace notices.ò Compl. ¶¶ 76, 85, FAC ¶¶ 75, 84. The USERRA notice-posting requirements, 38 U.S.C. § 4334(a)-(b), are not incorporated into the CAA. *See* 2 U.S.C. § 1316.

> Congress applied section 4311 to the legislative branch in order to provide discrimination and retaliation protections, respectively to eligible and covered employees. ***Interestingly, although Congress adopted these protections, it did not adopt the legal standard by which to establish a violation of this section of the regulations.***

Office of Compliance: Notice of Proposed Rulemaking, *New Proposed Regulations Implementing Certain Substantive Employment Rights and Protections for Veterans, As Required by 2 U.S.C. 1316, Congressional Accountability Act of 1995, as amended* (ñNotice of Proposed Rulemakingò), 154 CONG. REC. S3188-03 (daily ed. April 21, 2008) (emphasis added).[19]

Accordingly, in the regulations that the OOC proposed for the Legislative Branch, the OOC expressly did not incorporate provisions from the Department of Laborôs USERRA regulations that it concluded were inapplicable to Congressional employing offices. These include:

- Sec. 1002.22 (Who has the burden of proving discrimination or retaliation in violation of USERRA?);
- Sec. 1002.23 (What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?).

Office of Compliance: Index to Notice of Proposed Rulemaking, http://www.compliance.gov/sites/default/files/rulemaking/041608_numbering_index.pdf (stating that 20 C.F.R. §§ 1002.22, 1002.23 were deleted from the OOC regulations).

Without an express liability standard under the CAA, the Court must analyze the specific statutory language in subsections (a) and (b) of section 4311 to determine the appropriate standard. To that end, the Supreme Courtôs decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), provides controlling guidance because it interpreted nearly identical

[19] *See* 2 U.S.C. § 1381 (establishing the Office of Compliance) and 2 U.S.C. §§ 1316(c), 1384(a), (b)(1) (requiring the Office of Compliance to adopt substantive USERRA regulations and propose such regulations to Congress by providing them for publication in the Congressional Record). The quoted language and text of the proposed regulations is available on the OOCôs website at http://www.compliance.gov/sites/ default/files/rulemaking/041608_userra_preamble.pdf.

language in the Age Discrimination in Employment Act (ñADEAò). At issue in *Gross* was the ADEAôs private sector discrimination prohibition, which makes it unlawful to take an adverse employment action ñbecause ofò an individualôs age. The Court concluded that the term ñbecause ofò sets forth a ñbut-forò causation standard. *Id.* at 176-77. It also concluded that such ñbecause ofò language precludes a ñmixed motiveò theory of liability and, further, mandates that the plaintiff retain the burden of persuasion at all times in such cases. *Id.* at 177-78.

The Supreme Court confirmed and amplified this analysis four years later in *University of Texas Southwestern Medical Center v. Nassar*, __ U.S. __, 133 S. Ct. 2517 (2013). In *Nassar*, the Court found that Title VIIôs anti-retaliation provision, ñlike the statute at issue in *Gross*, makes it unlawful for an employer to take adverse employment action against an employee ôbecauseôof certain criteria.ò *Id.* at 2528. The Court concluded that this language required but-for causation. *Id.* at 2534. Of note, the dissenting justices in *Nassar* ï who would have adopted a motivating factor standard ï explained the practical ramifications of the Courtôs conclusion, lamenting that the ñbut forò standard the Court adopted means that ña Title VII plaintiff alleging retaliation *cannot* establish liability if her firing was prompted by both legitimate and illegitimate factors.ò *Id.* at 2546 (Ginsburg, J., dissenting) (emphasis in original).

Section 4311(b) of USERRA uses the same ñbecause ofò terminology that was analyzed in *Gross* and *Nassar.* Section 4311(a) of USERRA uses the similar phrase ñon the basis of.ò[20] Because the CAA does not incorporate the motivating factor language of subsection (c) of section 4311, the ñbecause ofò and ñon the basis ofò terms of subsections (a) and (b) of USERRA

[20] ñOn the basis ofò is a variant of ñbased on,ò which the Court in *Gross* explained has the same meaning as the phrase ñbecause ofò and establishes ñbut-forò causation. *Gross*, 557 U.S. at 176. *See also Burrage v. United States*, __ U.S. __, 134 S. Ct. 881, 889 (2014) (referencing *Gross* and stating: ñOur insistence on but-for causality has not been restricted to statutes using the term ôbecause of.ô. . . [I]n common talk, the phrase ôbased onô indicates a but-for causal relationship . . . .ò) (citations and quotations omitted).

are clear and controlling. USERRA claims under the CAA must therefore be analyzed under the but-for standard as articulated in *Gross* and *Nassar*.

**3. The History of Congress's Amendments to USERRA and the CAA Confirms that the But-For Standard Applies Under the CAA.**

Prior to USERRA's enactment in 1994, courts interpreting the predecessor statute (the Veterans' Reemployment Rights Act ("VRRA")) applied a "sole cause" standard to claims of military status discrimination. Under VRRA, an employee could not state a claim unless he demonstrated that his military status was the sole cause of the adverse employment action. *See Monroe v. Standard Oil, Co.*, 452 U.S. 549 (1981); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). When Congress adopted USERRA in 1994, it "replace[d] the 'sole motivation' test with a more lenient standard that requires only that the employee's military status was 'a motivating factor' in the employer's action." *Id.* at 898 (citing *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1012-13 (Fed. Cir. 2001)).

Furthermore, as enacted in 1994, USERRA provided that ***discrimination*** claims were to be proven by the motivating factor standard, ***but not retaliation*** claims. *See* Pub. L. No. 103-353, § 2, 108 Stat. 3149, 3153 (1994) (amending 38 U.S.C. § 4311 to apply motivating factor language to discrimination, not retaliation). When the CAA was enacted a few months later in January 1995, it incorporated only the discrimination provision of section 4311 and its motivating factor liability standard. *See* Pub. L. No. 104-1, § 206(a)(1)(a), 109 Stat. 3, 12 (1995). Were the law today what it was back in 1995, the motivating factor standard would apply to USERRA ***discrimination*** claims under the CAA. And, because the USERRA-specific retaliation provision was not initially incorporated in the CAA, at that time, a plaintiff bringing a CAA retaliation claim based on USERRA would need to utilize the CAA's general anti-reprisal provision at 2 U.S.C. § 1317.

However, Congress amended both USERRA and the CAA a number of times in the intervening two decades since 1995. For instance, in 1996, Congress amended USERRA to make both discrimination and retaliation claims subject to the motivating factor standard. In doing so, Congress reordered the provisions of section 4311 of USERRA ï placing the motivating factor liability standard where it now resides ï in section 4311(c). *See* amendment to 38 U.S.C. § 4311 made by Pub. L. No. 104-275, §311(3), 110 Stat. 3322, 3334 (1996) (amending and reordering 38 U.S.C. § 4311); *see also* S. Rep. 104-371, at 28 (1996) (legislative history explaining that the intent of the 1996 amendments was ñto specify . . . that the standards and burdens of proof . . . would apply to both discrimination and retaliation claimsò).

Congress did not, however, alter the CAAôs cross-reference numbering to coincide with the 1996 amendments to USERRA. Accordingly, the CAA no longer incorporated the motivating factor standard from USERRA because the 1996 amendments moved that standard to subsection (c) of section 4311 ï and, as noted above, subsection (c) was not incorporated into the CAA. But, through the 1996 USERRA amendments, Congress added a new avenue by which a CAA plaintiff could bring a USERRA retaliation claim ï subsection (b), which is the avenue Plaintiff utilizes here. *See* FAC ¶ ¶ 78-79.

Congressôs non-incorporation of subsection (c) into the CAA cannot be dismissed as a mere drafting oversight. As noted above, in 2008, pursuant to statutory command, the OOC provided the Speaker of the House and the President pro tempore of the Senate with its Notice of Proposed Rulemaking regarding substantive USERRA regulations under the CAA. This Notice was then published in the Congressional Record. And, as explained above, the OOC expressly pointed out in the Notice that the CAA does not incorporate the motivating factor liability standard under subsection 4311(c). Additionally, just one page earlier in the same Notice, the

OOC explained that the CAA apparently contained a typographical error insofar as it did not incorporate certain remedies from USERRA. Notice of Proposed Rulemaking at 2 n.1. Congress presumably took heed of the OOCôs comments and, in 2010, amended the CAA to address the latter issue (remedies), but left unchanged the non-incorporation of subsection 4311(c) and its ñmotivating factorò liability standard. Pub. L. No. 111-275, § 703, 124 Stat. 2864, 2888 (2010).

Had Congress believed the non-incorporation of subsection (c) was an inadvertent drafting error, or had Congress wished to reestablish the ñmotivating factorò standard under the CAA (whether for USERRA discrimination claims, USERRA retaliation claims, or both), it could have done so at the same time it amended the CAA to alter the USERRA remedies provision. But, it did not. The fact that Congress was expressly made aware of these two issues from the OOCôs Notice of Proposed Rulemaking, and chose to amend the statute to address only one of them, is evidence that Congress acted intentionally. *See, e.g.*, *Gross*, 557 U.S. at 174-75 (ñWe cannot ignore Congressôdecision to amend Title VIIôs relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.ò). Accordingly, as a result of various amendments to USERRA and the CAA, it is unambiguous that USERRA discrimination and retaliation claims under the CAA are analyzed under the but-for liability standard.[21]

[21] As noted above, Plaintiff did not bring Count II pursuant to the CAAôs general anti-reprisal provision codified at 2 U.S.C. § 1317. *See* FAC. ¶¶ 77-85 (referencing only 2 U.S.C. § 1316 and 38 U.S.C. § 4311(b) ï not 2 U.S.C. § 1317). However, the result would be the same for purposes of the liability standard, because section 1317 of the CAA also requires but-for causation. *Anyaso v. U.S. Capitol Police*, 39 F. Supp. 3d 34, 44-45 (D.D.C. 2014), *reconsideration denied*, 305 F.R.D. 1 (D.D.C. 2014).

**4. But-For Causation Means that the Unlawful Motive Must Be the Sole Cause of the Adverse Employment Action.**

As explained above, in *Nassar*, the Supreme Court discussed but-for liability. By precluding mixed-motive cases under Title VIIôs anti-retaliation provision, the Court emphasized that it expected its ruling would reduce the number of retaliation claims under Title VII. 133 S. Ct. at 2531-32. Although the Court did not explicitly state whether but-for causation requires that the unlawful motive be the ñsole causeò for the adverse action, the dissenting justices correctly understood that would be the impact of the majorityôs ruling. *Nassar*, 133 S. Ct. at 2546 (Ginsburg, J., dissenting).

Since *Nassar* was decided, the D.C. Circuit does not appear to have addressed the question of whether but-for causation requires the unlawful factor to be the sole cause of the alleged adverse action.[22] And, although the district courts in this Circuit are not uniform in their analysis of this question, a number have held ï either explicitly or implicitly ï that the but-for liability standard is, in effect, a ñsole causeò standard. *See, e.g.*, *Gonda v. Donahoe*, 79 F. Supp. 3d 284, 303 (D.D.C. 2015) (ñ[u]nder a óbut-forô burden of proof,ò the existence of an undisputed legitimate reason for the adverse action ñmake[s] it impossible for a jury to conclude that retaliatory animus was the only cause forò the adverse action); *Rattigan v. Holder*,

[22] In fact, the only reported D.C. Circuit opinion to mention *Nassar* is a concurring opinion, and it does not address this specific point. *Kaufman v. Perez*, 745 F.3d 521, 531 (D.C. Cir. 2014) (Srinivasan, J., concurring). Prior to *Nassar*, different panels of the D.C. Circuit reached different opinions on this question. For instance, in *Porter v. Natsios*, 414 F.3d 13 (D.C. Cir. 2005), a panel of the D.C. Circuit that included now-Chief Justice Roberts strongly intimated that sole cause and but-for causation were two sides of the same coin, stating: ñthe mixed motive framework . . . allows an employee to establish a Title VII violation . . . without proving that an impermissible consideration ***was the sole or but-for motive*** for the employment action . . . .ò *Id.* at 19 (emphasis added). Indeed, the Court in *Natsios* held that the appropriate jury instruction in a non-mixed-motive case was a sole cause standard. The Court opined that had the plaintiff ñwanted to establish liability under the higher evidentiary burden of a single motive theory, he could have requested an instruction asking the jury to find that an impermissible consideration was the ***sole motive***, rather than óa motivating factorô . . .ò *Id.* at 20 (emphasis added). *But see Ponce v. Billington*, 679 F.3d 840, 846 (D.C. Cir. 2012) (panel ñhereby banish[es] the word ósoleô from our Title VII lexiconò). In light of *Nassar*, these decisions are of limited guidance on this issue.

982 F. Supp. 2d 69, 82 (D.D.C. 2013) (ñPrior to *Nassar* . . . it might have been possible for a jury to find liability for decisions based on a mixture of legitimate and illegitimate considerations because this mixture would show that retaliatory animus was a motivating factor. . . . Now, such an approach is prohibited.ò), *aff'd*, 780 F.3d 413 (D.C. Cir. 2015).[23]

Finally, and perhaps most importantly, the Supreme Courtôs decision in *Monroe v. Standard Oil, Co.*, 452 U.S. 549 (1981), establishes that the ñbecause ofò language means ñsole cause.ò In that case, the Court interpreted language from VRRA (the predecessor statute to USERRA mentioned earlier), which states: ñAny person who holds a position . . . shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed forces.ò 452 U.S. at 552, n.5 (quoting what was then 38 U.S.C. § 2021(b)(3)). Interpreting this language, the Court held: ñThe legislative history thus indicates that § 2021(b)(3) was enacted for the significant ***but limited*** purpose of protecting the employee-reservist against discriminations like discharge and demotion, ***motivated solely by reserve status***.ò *Id.* at 559 (emphasis added).

The district courts in this Circuit have confirmed that *Monroe* implied a sole cause standard under the VRRA. *Vahey v. Gen. Motors Co.*, 985 F. Supp. 2d 51, 58 (D.D.C. 2013) (*Monroe "*suggested[] that military service be the sole motivating factor for the adverse

[23] *See also Paulk v. Architect of the Capitol*, 79 F. Supp. 3d 82, 92 (D.D.C. 2015) (CAA case noting that unlawful motive ñcould have been a motivating factor, but not the sole cause of [plaintiffôs] non-selectionò), *aff'd in part*, No. 15-5036, 2015 WL 5231062 (D.C. Cir. July 1, 2015), *and dismissed sub nom.* No. 15-5036, 2015 WL 6153697 (D.C. Cir. Oct. 7, 2015); *Butler v. White*, 67 F. Supp. 3d 59, 78 (D.D.C. 2014) (applying *Nassar* and concluding that, to succeed under a but-for theory, plaintiff ñmust also rule out all other possible explanations of the retaliatory conductò); *Morales v. Gotbaum*, 42 F. Supp. 3d 175, 199-200 (D.D.C. 2014) (citing *Nassar* and concluding that retaliation claim failed because adverse actions were not ñsolely the product of retaliation,ò particularly when the ñplaintiff admits that factors other than retaliation could explain his supervisorsô decisionsò); *Anyaso*, 39 F. Supp. 3d at 45 (CAA case concluding that ñthe presence of a clear non-retaliatory justification for the [adverse action] . . . would make it impossible for a reasonable jury to conclude that the but-for cause of [the adverse action] . . . was his protected activitiesò).

employment actionò) (citations omitted). Moreover, other courts interpreting *Monroe* specifically found that, when an employer had legitimate reasons for an adverse action under VRRA in addition to military animus, the employee could not state a claim. For example, in *Sawyer v. Swift & Co.*, 836 F.2d 1257 (10th Cir. 1988), the court held:

> In the instant case . . . it is clear that even if Sawyerôs reserve status played some role in his termination, there were sufficient other, non-pretextual, reasons irrelevant to his military status. . . . We cannot conclude as a matter of law that Sawyer was terminated solely because of attending Naval Reserve training. . . . . Rather, we conclude that Sawyer was terminated for valid reasons of absenteeism and tardiness, having little, if anything, to do with his Reserve obligations.

*Id.* at 1262. Of course, Congress reversed this ñsole causeò standard in 1994 when it added the motivating factor language to USERRA. However, because that motivating factor language is not incorporated into the CAA, the Supreme Courtôs interpretation in *Monroe* of the nearly identical language that ***was incorporated*** into the CAA controls.[24] Therefore, under the CAA, a plaintiff must establish that military animus was the sole cause for the adverse actions alleged.

**5. Plaintiff's Mixed Motive Allegations Foreclose Liability under the Sole Cause Standard.**

In his October 11 interview with Jake Tapper, and in the factual allegations of the initial Complaint, Plaintiff chose to blanket the world with his claim that he was fired because he refused to go along with what he asserted was the improper focus of the Committeeôs investigation on Secretary Clinton. Presumably, this was a calculated decision Plaintiff made to increase the likelihood he would receive his ñfifteen minutes of fame.ò However, that decision also established a record ï a record that this Court can and should take notice of ï that now makes it impossible for Plaintiff to proceed with his USERRA claims.

[24] The VRRA provision at issue in *Monroe* prohibited discrimination ñbecause ofò military obligations. *Monroe*, 452 U.S. at 552, n.5. The successor USERRA provision applicable to Count I ï section 4311(a) ï prohibits discrimination ñon the basis ofò military status. As noted, the Supreme Court has determined that these terms have the same meaning. *Gross*, 557 U.S. at 176; *Burrage*, 134 S. Ct. at 889.

Simply put, Plaintiffôs pleadings and public statements allege that the adverse actions at issue were caused by military animus (Count I) and retaliation for exercising rights under USERRA (Count II), ***and because Plaintiff refused to comply with the Committee's alleged directives regarding the focus of its investigation***. Plaintiff is thus foreclosed from asserting that military animus and/or his exercise of his rights under USERRA were the sole, but-for cause of those adverse actions. Accordingly, Plaintiff cannot state claims under USERRA, as incorporated by the CAA, and Counts I and II must be dismissed with prejudice.

### C. Count II Must Be Dismissed to the Extent It Is Based on Alleged Protected Activities Occurring *After* the Committee Informed Plaintiff of Its Decision to End His Employment.

As further explained below, Count II of the FAC (the retaliation claim) should also be partially dismissed to the extent that two of the three alleged protected activities on which it is based ï (1) Plaintiffôs expression of USERRA-related concerns to the Committee and (2) his subsequent hiring of an attorney ï occurred ***after*** the Committee informed Plaintiff of its decision to end his employment.[25] Accordingly, these alleged protected activities could not have been the cause of the termination decision.

#### 1. Plaintiff Did Not Express USERRA-Related Concerns or Hire an Attorney Until *After* the Committee Informed Him of Its Separation Decision.

A plaintiff can make out a prima facie case of retaliation under the CAA by establishing ñ(1) that he engaged in a statutorily protected activity; (2) that he suffered a materially adverse action by his employer; and (3) that his protected activity was a but-for cause of the adverse

[25] Plaintiff amended his initial Compliant to allege that he engaged in a third protected activity when he ñexercis[ed] his right to take military leaveò in March and May 2015. FAC ¶ 81; *see also id.* ¶¶ 20, 29. Because that activity is alleged to have occurred before the Committee informed Plaintiff of its separation decision on June 26, 2015, the Committee does not argue that this allegation is insufficient to state a plausible retaliation claim for purposes of its argument in Section III.C. The Committee nonetheless moves to dismiss the remainder of Plaintiffôs retaliation claim for the reasons stated herein. *See, e.g.*, *King v. Holder*, 950 F. Supp. 2d 164, 171-73 (D.D.C. 2013) (dismissing retaliation claim to the extent it was based on one of several alleged protected activities that was deemed legally insufficient).

action by the employer.ò *Anyaso*, 39 F. Supp. 3d at 44 (alterations and citations omitted).[26] To survive a motion to dismiss, the plaintiffôs ñcomplaint must ócontain sufficient factual matter, accepted as true,ôto plausibly establish those three elements.ò *Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Employees of Library of Cong., Inc. v. Billington*, 737 F.3d 767, 772 (D.C. Cir. 2013) (Title VII retaliation case) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). It is possible, however, ñfor a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible.ò *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1116 (D.C. Cir. 2000).

Count II must be partially dismissed for this very reason. That claim appears to be based on a single alleged retaliatory act: the ñCommitteeôs decision to terminate and/or constructively discharge Plaintiff in late June 2015.ò FAC ¶ 81; *see generally id.* ¶¶ 45-50 (allegations concerning ñPlaintiffôs USERRA Protected Activityò) and ¶¶ 78-85 (specific allegations in support of Count II). Plaintiff admits, however, that the Committee first communicated its decision to separate him from employment in a meeting held on ***June 26, 2015***. According to Plaintiff, it was during this June 26, 2015 meeting that Mr. Kiko, the Staff Director for the Committeeôs Majority Staff, informed Plaintiff that ñif he did not agree to tender his resignation within 30 days, he would be terminated.ò *Id.* ¶ 45.

The date and time of this June 26, 2015 meeting is critical to assessing Plaintiffôs retaliation claim for two reasons. First, courts examining similar allegations have made it clear that, when an employer offers an employee the choice between resigning or being terminated, it

[26] Because the CAA does not incorporate USERRAôs ñmotivating factorò provision, *see supra* Section III.B, most reported USERRA cases are of only limited value to analyzing Count II. The Committee thus relies primarily on non-mixed-motive cases brought under the CAA, Title VII, and similar anti-discrimination statutes. However, the Committeeôs analysis here does not depend on the distinction between motivating-factor causation and but-for causation.

is that act which constitutes the adverse employment action for purposes of anti-discrimination statutes. *See, e.g.*, *DuBerry v. District of Columbia*, 582 F. Supp. 2d 27, 36 n.7 (D.D.C. 2008); *Johnson v. Maddox*, 230 F. Supp. 2d 1, 10 (D.D.C. 2002), *aff'd sub nom. Johnson v. Williams*, 117 F. Appôx 769 (D.C. Cir. 2004). Second, courts have clarified that an employerôs decision to separate an employee becomes actionable ***when the employer makes and/or communicates the decision to the plaintiff*** ï because that is when the discrimination or retaliation occurs ï not when the plaintiffôs employment actually comes to an end. *See, e.g.*, *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (concluding that, where a professor was denied tenure before his employment actually ended, the ñalleged discrimination occurred ï and the filing limitations periods therefore commenced ï at the time the tenure decision ***was made and communicated to***ò the plaintiff) (emphasis added); *Bradshaw v. Office of Architect of Capitol*, 856 F. Supp. 2d 126, 137 (D.D.C. 2012) (relying on *Ricks* in a CAA case and citing, *inter alia*, *Belt v. U.S. Dep't of Labor*, 163 F. Appôx 382, 387 (6th Cir. 2006) (ñA plaintiffôs cause of action accrues when he receives notice of termination, not when his employment actually ceases.ò), and *Flaherty v. Metromail Corp.*, 235 F.3d 133, 137 (2d Cir. 2000) (ñIt has long been settled that a claim of employment discrimination accrues for statute of limitation purposes on the date the employee learns of the employerôs discriminatory conduct.ò)).

Applying these principles here, the operative date and time of Plaintiffôs alleged termination/constructive discharge occurred on June 26, 2015 when, as Plaintiff admits, the Committee informed Plaintiff of its decision to separate him from employment. This fact is fatal to Count II to the extent the claim is based on protected activities that are alleged to have occurred after this date and time. More specifically, according to the FAC, Plaintiff engaged in the following two post-separation-decision activities:

1. Plaintiff ñexercis[ed] his right . . . to express his concern to the Committee that it was violating his rights under USERRA.ò FAC ¶ 81. Plaintiff clearly alleges that this activity occurred during the June 26, 2015 meeting, but ***after*** the Committee informed Plaintiff of its separation decision. *Id.* ¶¶ 45, 81.

2. Plaintiff ñexercise[ed] his right . . . to hire an attorney to enforce and exercise his statutory rights under USERRA.ò *Id.* ¶ 81. Plaintiff clearly alleges that this activity occurred ***after*** the June 26, 2015 meeting. *Id.* ¶¶ 46, 47, 80.

Plaintiffôs own timeline thus establishes that he did not engage in the alleged protected activities of expressing USERRA-related concerns and hiring an attorney until ***after*** the Committeeôs separation decision was made and communicated to him. To the extent Plaintiffôs retaliation claim is based on these post-separation-decision activities, the claim must be dismissed with prejudice because it is logically impossible for Plaintiff to establish that these activities caused the Committeeôs termination decision. *See Anyaso*, 39 F. Supp. 3d at 44 (ñA majority of the alleged adverse actions pre-date [plaintiffôs] protected activity and therefore cannot form the basis of a retaliation claim.ò); *Ramseur v. Perez*, 962 F. Supp. 2d 21, 28-29 (D.D.C. 2013) (dismissing retaliation claim where the employerôs alleged retaliatory actions predated the plaintiffôs protected activity because this chronology made it ñfactually impossible for plaintiff to prove causation as to this retaliation claimò); *Riggiladez v. Harvey*, 510 F. Supp. 2d 106, 110-11 (D.D.C. 2007) (dismissing retaliation claims where ñdefendant initiated plaintiffôs termination with the Notice of Proposed Removalò before plaintiff filed her EEO complaint and inquiry form); *Welzel v. Bernstein*, 436 F. Supp. 2d 110, 128 (D.D.C. 2006) (holding that plaintiff cannot ñmake out a prima facie case of retaliation when the employer was preparing to terminate her before she filed her chargeò); *Carter v. Greenspan*, 304 F. Supp. 2d 13, 30 (D.D.C. 2004) (ñBecause [plaintiffôs] supervisorsô dissatisfaction with his performance and their intentions to terminate him predated his protected activity, his retaliatory discharge claim is illogical and must be dismissed.ò); *Trawick v. Hantman*, 151 F. Supp. 2d 54, 63 (D.D.C.

2001), *aff'd*, No. 01-5309, 2002 WL 449777 (D.C. Cir. Feb. 21, 2002) (where termination process was initiated before plaintiff first engaged in protected activity, no reasonable juror could conclude that the termination had been caused by such protected activity).

**2. That Plaintiff's Separation from Employment Became Effective After He Engaged in the Alleged Post-Separation-Decision Activities Does Not Cure the Defects of His Retaliation Claim.**

The FAC alleges that, after Plaintiff engaged in the post-separation-decision activities of expressing USERRA-related concerns and hiring an attorney, his attorney contacted the Committee on June 28, 2015. FAC ¶¶ 45, 46, 47. Plaintiff further alleges that, on June 29, 2015, he ñwas terminated and ordered to leave the Majority Staff office immediately.ò *Id.* ¶ 49. These additional allegations, however, do nothing to cure the defects of Plaintiffôs retaliation claim because nothing materially adverse happened to Plaintiff after the June 26, 2015 meeting.

As an initial matter, the allegation that Plaintiffôs employment was terminated on June 29, 2015 is misleading to say the least. In fact ï and consistent with the Committeeôs initial offer to Plaintiff during the June 26, 2015 meeting to resign or be terminated ï Plaintiff remained on the Committeeôs payroll through August 1, 2015. *See* Statement of Disbursements of the House, July 1, 2015 to September 30, 2015, pt. 3, at 2146 (reflecting service dates ending on ñ08/01/15ò), http://disbursements.house.gov/ 2015q3/2015q3_vol3.pdf.[27] Moreover, Plaintiff did, in fact, tender his resignation on July 12, 2015. Kiko Aff. ¶ 16 and Ex. A (Plaintiffôs resignation letter).[28] For these reasons, Plaintiff has not alleged (and cannot establish) that he

[27] These public records are subject to judicial notice without converting this motion into a motion for summary judgment. *See Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004); *Detroit Int'l Bridge Co. v. Gov't of Canada*, No. CV 10-476 (RMC), 2015 WL 5726601, at *7 (D.D.C. Sept. 30, 2015); *see also* 2 U.S.C. § 4108(a) (requiring House to create and publish Statements of Disbursements).

[28] Plaintiff initially did not allege that he resigned his employment. After the Committee brought this fact to the Courtôs attention in its first motion to dismiss, *see* ECF No. 22 at 7, 40 n. 28, Plaintiff amended his pleading to allege constructive discharge. *Compare* Compl. ¶ 81 (alleging that ñthe Committee ***terminated*** Plaintiffò) (emphasis added), *with* FAC ¶ 80 (altering this language to allege that Plaintiff was

suffered any material harm as a result of his expressing USERRA-related concerns or hiring an attorney. At most, Plaintiffôs allegations show only that, notwithstanding his post-separation-decision activities, the Committee proceeded to carry out its previously stated plan to end Plaintiffôs employment within 30 days of the June 26, 2015 meeting.

This point is fatal to Count II to the extent the claim is based on Plaintiffôs alleged post-separation-decision activities. As the Supreme Court has explained, ñ[e]mployers need not suspend previously planned . . . [personnel actions] upon discovering that . . . [an employee has engaged in protected activity], and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.ò *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (relying on this principle in case where the alleged adverse employment action occurred after plaintiff filed a lawsuit); *see also Connell v. Bank of Bos.*, 924 F.2d 1169, 1180 (1st Cir. 1991) (where an employer gave an employee one discharge date, but then peremptorily discharged the employee two weeks prior to the original date after she hired an attorney, the peremptory discharge was not a separate and new adverse employment action); *Kennedy v. Gray*, 83 F. Supp. 3d 385, 391 (D.D.C. 2015) (concluding that a ñplaintiffôs subsequent requests of a defendant to reverse its [alleged] discriminatory decision does not create a new instance of discriminationò when the defendant declines the request), *reconsideration denied sub nom. Kennedy v. District of Columbia*, No. 13-CV-01384 (CRC), 2015 WL 7274027 (D.D.C. Nov. 16, 2015); *Riggiladez*, 510 F. Supp. 2d at 110 (ñYet, an adverse employment action following soon after the employeeôs engagement in the protected activity

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ñterminated ***and/or constructively discharged***ò) (emphasis added). Because Plaintiffôs resignation letter is central to his constructive discharge claim and the letterôs authenticity cannot be challenged, the Court may consider this letter without converting this motion into a motion for summary judgment. *See Spechler v. Tobin*, 591 F. Supp. 2d 1350, 1354 (S.D. Fla. 2008), *aff'd*, 327 F. Appôx 870 (11th Cir. 2009).

cannot establish causation if the employer contemplated the adverse action *before* the employeeôs protected activity.ò) (emphasis in original).

Plaintiffôs alleged protected activity of hiring an attorney suffers from an additional defect. To establish that this is an actionable protected activity, Plaintiff must show that the Committee knew he hired an attorney for the purpose of enforcing statutory rights. *See Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985). This is a burden that Plaintiff cannot meet. The FAC expressly alleges that Plaintiffôs attorney contacted the Committee by email on June 28, 2015 and stated the following:

> ñI have been retained by Mr. Podliska to amicably resolve the current situation. Before anyone on either side takes any affirmative steps and the matter escalates, Iôd like to discuss the situation and get a better sense of the Benghazi Committeeôs perspective. I am sure you would agree that such a course of action is the most prudent way to proceed for all concerned.ò

*Id.* ¶ 47 (quoting email of Plaintiffôs attorney). There is simply nothing about this email that could possibly have put the Committee on notice that Plaintiffôs vague concerns about ñthe current situationò had anything to do with his military status, his military commitments, or any other matter related to USERRA. Accordingly, Plaintiffôs allegations regarding his attorneyôs contact with the Committee are ñtoo vagueò for the Court to rely upon to indicate that, as a result of his attorneyôs email, ñDefendant was placed on notice that Plaintiff intended to pursue . . . [USERRA] claims.ò *Johnson v. Portfolio Recovery Assocs., LLC*, 682 F. Supp. 2d 560, 580 (E.D. Va. 2009) (emphasis added).

For all of these reasons, Plaintiff cannot establish the causation element of a prima facie case of retaliation with respect to his allegations that, after he was informed of the Committeeôs decision to end his employment, Plaintiff (1) expressed USERRA-related concerns and/or (2)

hired an attorney. Count II of the FAC should, therefore, be partially dismissed with prejudice to the extent that it is based on those alleged activities.

## IV. CONCLUSION

In light of the arguments advanced above, the Committee respectfully requests that the Court dismiss Counts I and II of the First Amended Complaint with prejudice.

Respectfully submitted,

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