IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRADLEY F. PODLISKA, Plaintiff, v. U.S. HOUSE OF REPRESENTATIVES SELECT COMMITTEE ON THE EVENTS SURROUNDING THE 2012 TERRORIST ATTACK IN BENGHAZI, and HAROLD WATSON "TREY" GOWDY III, in his individual capacity, Defendants.	)	Civil Action No. 15-2037-RDM

PLAINTIFF'S CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED COMPLAINT

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INTRODUCTION

Plaintiff Bradley F. Podliska ("Plaintiff") submits this Opposition to Defendants' Motions to Dismiss. As described herein, Plaintiff has pleaded strong, plausible claims that Defendant the Select Committee on Benghazi ("Committee") discriminated and retaliated against him due to his military service in violation of the Congressional Accountability Act's ("CAA") provisions on the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), including by terminating him in June 2015 shortly after he returned from serving in the Air Force. Similarly, he has pleaded strong claims that show Defendant Rep. Trey Gowdy ("Gowdy"), the Committee's Chairman, defamed him and violated his federal due process rights by falsely asserting in the national media that Plaintiff mishandled classified information. As Gowdy and the Committee staff knew, Plaintiff never mishandled such information. But Plaintiff has been forced to pay a serious price for Gowdy's false and damaging comments. Contrary to Defendants' assertions, none of Plaintiff's claims are barred by the Speech or Debate Clause or any other immunities or defenses raised in the Defendants' Motions.

PROCEDURAL BACKGROUND

On November 23, 2015, Plaintiff filed his Original Complaint. Dkt. No. 1. On February 5, 2016, Defendants moved to dismiss. Dkt. Nos. 22, 23. On February 20, 2016, Plaintiff filed his First Amended Complaint ("FAC"). Dkt. No. 26. On February 26, 2016, this Court denied Defendants' Motions to Dismiss the Original Complaint as moot in light of the FAC. February 26, 2016 Minute Orders. On February 23, 2016, Gowdy filed a Motion to Dismiss Counts III and IV of the FAC. Dkt. No. 29 ("GM"). On March 8, 2016, the Committee filed a Motion to Dismiss Counts I and II of the FAC. Dkt. No. 39 ("CM").

FACTUAL BACKGROUND

For nearly two decades, Plaintiff has worked on intelligence and national security issues for the Armed Forces and the federal government. FAC ¶¶ 9-10. From 1997 to 2014, Plaintiff was a federal employee at a federal defense agency where he worked on security and foreign policy. *Id.* ¶ 10. From 1999 to the present, he also has served as an Intelligence Officer in the Air Force Reserve, and currently holds the rank of Major, along with the security clearances required for that position. FAC ¶ 9. In his capacity as an Intelligence Officer, Plaintiff has been required by the Air Force Reserves to perform annual training, as well as duties as an Individual Mobilization Augmentee. *Id.* Before serving the federal government and the military on intelligence and national security issues, Plaintiff received a master's degree in National Security Studies and a Ph.D in Political Science with a focus on International Relations. *Id.* ¶ 10.

In 2014, the House of Representatives established a Select Committee to investigate and study the September 11, 2012, terrorist attack on the U.S House Special Mission Compound and U.S. government annex in Benghazi, Libya. FAC ¶¶ 11-12. On September 2, 2014, Plaintiff began working as a Committee investigator and was tasked with investigating "the Intelligence Community and the Obama Administration's response to the Benghazi attack, among other things." *Id.* ¶ 16. Plaintiff was hired by Philip Kiko, the Committee's staff director, and Chirstopher Donesa, the Committee's deputy staff director, who were responsible for making the Committee's personnel decisions with Chairman Gowdy. *Id.* ¶¶ 13-15.

On March 2, 2015, Plaintiff sent an e-mail to inform Kiko, Donesa, and the Committee's Chief Counsel Dana Chipman that "to satisfy his commitment as a reservist, he was obligated to serve 39 days with the Air Force as an IMA, and that his first duty assignment during his time with the Benghazi Committee would be two weeks beginning on March 14, 2015." *Id.* ¶ 18.

Before Plaintiff sent the e-mail informing his supervisors he would be taking military leave from the Committee, Plaintiff had not been "disciplined nor placed on a performance improvement plan for any work performance deficiency," and just days earlier on "February 25, 2015, Kiko praised Plaintiff's performance in an e-mail, stating Plaintiff was doing 'great work.'" *Id.* ¶ 17.

The Committee's response to Plaintiff's e-mail about his military service was anything but supportive, and consisted of a single word – "wow" – e-mail from Kiko. *Id.* ¶ 19.

Plaintiff performed his annual military training from March 14 to March 27, 2015, but when he returned from his military duty Plaintiff "immediately" "began to encounter problems" with the Committee's leadership. *Id.* ¶¶ 20-21. The "moment" Plaintiff returned from military duty, his supervisors significantly changed their "attitude and demeanor" towards him. "Kiko no longer acted cordially towards Plaintiff and offered him little, if any work opportunities"; Chipman "noticeably started to distance himself from" Plaintiff; and Kiko, Donesa, and Chipman all "began to criticize Plaintiff's work after Plaintiff informed them that he was required to perform military service." *Id.* ¶¶ 21-23. Kiko acted in an aggressive and unprofessional manner, telling Plaintiff: "'You have no idea what we're doing here. You have no clue what's going on.'" *Id.* ¶ 24. This dramatic change in the treatment of Plaintiff, which occurred immediately after he told them about and then performed military duty, led Plaintiff to believe "he was being singled out because of his military service." *Id.* ¶ 25.

After his military service in March 2015, the Committee's leadership started to create a fabricated record to terminate Plaintiff and cover up the real reason why it wanted to terminate Plaintiff – discrimination and retaliation based on his military service. *Id.* ¶¶ 26-27, 29-30, 31, 33-44. The first incident occurred in mid-April 2015, when Kiko reprimanded Plaintiff for sending other Committee staff an invitation to attend a Congressional "Rack of Pork" reception that is

widely attended by Congressional staff. Committee staff routinely sent such social invitations without reprimand. *Id.* ¶ 26. At the same time Plaintiff was reprimanded for sending this e-mail, the Committee's leadership was aware of and condoned "far more questionable activities" by other staff, like weekly "alcohol-infused drinking sessions in the Majority Staff's office during the workday" where staff used "custom-made wine glasses" to poke fun at Rep. Elijah Cummings; and a "gun buyer's club" where staffers "spent hours at a time during work hours, meeting in the conference room to design custom-made, monogrammed, silver-plated, 'Tiffany-style' Glock 9 millimeter semi-automatic pistols." *Id.* ¶ 27.

In May 2015, Plaintiff again was "called to Germany by the U.S. Air Force Reserve to perform military service," and thus took military leave from May 4 to May 27, 2015. *Id.* ¶ 28. During this second period of military leave, the Committee's leadership began to vocalize animus towards Plaintiff's military service and disdain for his decision to take military leave. *Id.* For example, during Plaintiff's military leave in May 2015, Chief Counsel Chipman told one staffer: "'I question whether Brad [Plaintiff] really needs to go to Germany,' where Plaintiff was serving" in the Air Force Reserve, and also "had questioned the validity of Plaintiff's military obligations on a previous occasion." *Id.* ¶¶ 29-30. Also during Plaintiff's May 2015 military leave, Kiko "grew upset" over seeing Facebook pictures of Plaintiff while he was on military leave in Germany that led Kiko to *erroneously* conclude Plaintiff "was abusing his military leave." After seeing the pictures, Kiko told his executive assistant: "'[Brad] needs to take annual leave for [being in Germany] and he doesn't have enough [annual] leave. [Brad] misrepresented going to Europe on military orders; he is there on vacation.'" *Id.* ¶ 31. As Plaintiff was not working at the time he took the pictures of himself, he had not abused his military leave. *Id.*

Consistent with this hostility towards Plaintiff's military service, upon his return to the

Committee his supervisors retaliated against him. *Id.* ¶¶ 33-34. Immediately after Plaintiff returned from serving in Germany in May 2015, "Kiko and Donesa refused to give Plaintiff any work and would not talk to him, not even to exchange pleasantries in passing as both routinely did with other members of the Majority Staff." *Id.* As pretext for discrimination and retaliation, Kiko and Donesa accused Plaintiff of assigning Committee interns an unauthorized project, though "that work and the use of interns had been approved by Kiko and Donesa." *Id.* ¶¶ 35-36.

As further pretext for discrimination and retaliation, the Committee's Security Manager John Tolar accused Plaintiff "of a security violation for allegedly putting classified material onto an unclassified system." *Id.* ¶ 39. Contrary to this allegation, "Plaintiff had used only publicly available sources to write the document that Tolar believed to contain classified material, and to give rise to the alleged security allegation." *Id.* Tolar later admitted the information Plaintiff put in the document "was not classified." *Id.* ¶ 42. Although three other staffers—none of which had performed military service—were accused of committing and being involved in the same security violation as Plaintiff, Plaintiff was the only staffer "to be reprimanded . . . or subjected to any adverse employment action." *Id.* ¶¶ 43-44.

Less than a month after Plaintiff returned from military leave, on June 26, 2015 Kiko and Donesa threatened to terminate Plaintiff within 30 days if he did not resign. In response, Plaintiff told Kiko and Donesa he believed the Committee was threatening to terminate him "because of Plaintiff's military service in violation of USERRA";; and Plaintiff hired an attorney. *Id.* ¶¶ 45-46. Plaintiff's attorney immediately contacted the Committee's leadership to enforce Plaintiff's rights, and in response on June 29, 2015 Kiko and Donesa terminated Plaintiff. *Id.* ¶¶ 46-49.

On two occasions before and after his termination—June 9 and June 29, 2015—Plaintiff met with the Committee's Finance and Personnel Administrator, who reviewed his personnel file

and "confirmed that there were no negative personnel documents" in the file. *Id.* ¶¶ 37, 50.

From August to October 2015, Plaintiff exhausted his administrative remedies by engaging in counseling and mediation with the Office of Compliance. *Id.* ¶¶ 51-54. The mediation period began on September 10, 2015, and ended on October 13, 2015. *Id.* ¶ 54.

Between October 10 and October 12, 2015, during the mediation process and without any notice to Plaintiff, the Committee, Gowdy, and their agents made numerous written and oral statements to the national media about the content of the mediation and Plaintiff's termination to retaliate against him for exercising his CAA/USERRA rights, harm his reputation, and prevent him from obtaining future employment. *Id.* ¶¶ 57-63. A number of the statements were false and/or defamatory, particularly the repeated allegation that he "mishandled classified information," *id.* ¶¶ 58-61—a charge the Committee's Security Manager had previously admitted was false. *Id.* ¶ 42.

By falsely stating that Plaintiff was terminated for mishandling classified information, Gowdy suggested that Plaintiff had committed a "serious crime that has ended the careers of many in national security related positions, and one that can subject an individual to criminal penalties, including imprisonment." *Id. ¶* 64. Gowdy made these false and damaging statements even though he admitted to Fox News on October 12, 2015, that "he did not know if Plaintiff had been 'terminated' or 'resigned.'" *Id.* ¶ 65. Gowdy knew that his statement that Plaintiff mishandled classified information was false, or he made the statement recklessly. *Id.* ¶ 66.

Due to Gowdy's false and damaging statements, in conjunction with terminating Plaintiff, Plaintiff's reputation and ability to obtain employment in his business, trade, and profession have been significantly harmed. Despite Plaintiff's substantial experience in intelligence and national security and his stellar qualifications, he has not been able to return to his prior job at a defense agency or secure other permanent positions in his chosen field. And Plaintiff has undertaken

substantial efforts to secure permanent employment. Prior to filing the FAC, Plaintiff applied for 12 full-time positions, but had not yet been hired. *Id.* ¶ 96.

In Counts 1 and 2 of the FAC, Plaintiff asserts the Committee violated USERRA's anti-discrimination and anti-retaliation provisions, 38 U.S.C. § 4311(a)-(b), which are incorporated into the CAA via 2 U.S.C. § 1316(a)(1)(A). FAC ¶¶ 68-85. Counts 1 identifies a number of discriminatory adverse actions the Committee took due to Plaintiff's military service, including terminating Plaintiff and taking away the "terms, conditions, status and privileges of employment," and alleges "Plaintiff's military service, membership, and obligations were the sole or motivating factor in these adverse employment actions." *Id.* ¶¶ 70-71. Count 2 identifies adverse actions the Committee took in retaliation for Plaintiff exercising his right to take military leave in March and May 2015 and for complaining about his USERRA rights being violated, including taking way Plaintiff's work in early June 2015 and terminating him in late June 2015. *Id.* ¶¶ 33-34, 79-81.

In Count 3, Plaintiff asserts Gowdy violated District of Columbia defamation law by knowingly making the false statement that he mishandled classified information. *Id.* ¶¶ 87-90. In Count 4, Plaintiff asserts Gowdy's defamatory statements, in conjunction with his termination, violated Plaintiff's due process rights under the reputation-plus and stigma-plus theories. *Id.* ¶¶ 92-100.

<u>LEGAL STANDARD</u>

The Court should hold that the ordinary standards of Rule 12(b)(6) apply to the Speech or Debate Clause arguments raised by both Defendants. The Committee is wrong that Rule 12(b)(1) governs its motion to dismiss based on the Speech or Debate Clause, as the underlying actions that form the basis of Plaintiff's CAA/USERRA discrimination and retaliation claims are not legislative acts. Accordingly, the motion must be construed and decided based on the Rule 12(b)(6) standard. *Howard v. Office of the Chief Admin. Officer of the U.S. House of*

Representatives, 720 F.3d 939, 949 (D.C. Cir. 2013) (explaining that whether a motion to dismiss on Speech or Debate Clause grounds is a Rule 12(b)(1) or a Rule 12(b)(6) motion depends on whether the act the plaintiff challenges a "legislative act.").

In *Howard* and an earlier en banc decision, the D.C. Circuit held that when an employee challenges her "termination" as a violation of a federal anti-discrimination law incorporated into the CAA, the termination itself is not considered a "legislative act[]," and Rule 12(b)(6) governs a motion to dismiss based on Speech or Debate Clause grounds. 720 F.3d at 949-50 (holding "alleged demotion and termination" based on racial animus "are not legislative acts"); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 5, 13 (D.C. Cir. 2006) (en banc) (plurality) (demotion, termination based on race and gender are not legislative acts); *accord Floyd v. Lee*, 968 F. Supp. 2d 308, 321 (D.D.C. 2013) (claim based on "denial of the accommodation" in violation of CAA and "alleged comments" are not "legislative acts protected by Speech or Debate Clause").

As in *Howard* and *Fields*, Plaintiff challenges adverse employment personnel decisions, including termination and retaliation, that he alleges were made based on discriminatory animus regarding his military duty or status and his exercising and enforcing his rights. FAC ¶¶ 68-85. As the termination and retaliation due to discriminatory animus were not "legislative acts," Rule 12(b)(6) governs the Committee's attempt to dismiss his claims on Speech or Debate Clause grounds. *Howard*, 720 F.3d at 949-50; *Fields*, 459 F.3d at 5, 13. Moreover, that a plaintiff "may face difficulties in proving her case without delving into protected legislative activities," "is not a basis for dismissal . . . under Rule 12(b)(6)." *Howard*, 720 F.3d at 950. Instead, like any other Rule 12(b)(6) motion, the Court applies the ordinary standard "'assess[ing] the feasibility of the complaint," and may "not weigh the evidence that might be offered to support it.'" *Id.* (quoting *Global Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 155 (2d Cir. 2006) ("[t]he purpose

of Rule 12(b)(6) is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits").

Unlike the Committee, Gowdy does not assert whether Rule 12(b)(1) or 12(b)(6) governs his Speech or Debate Clause arguments. GM at 44-45. But they too are governed by Rule 12(b)(6), not Rule 12(b)(1), as the acts of Gowdy that Plaintiff challenges are not legislative acts. *Howard*, 720 F.3d at 949-50. In his defamation claim, Plaintiff challenges Gowdy's statements, which were made exclusively through news releases and interviews with reporters; and his due process claim challenges the same statements in conjunction with his termination. FAC ¶¶ 86-91, 92-100. None of these acts are legislative acts. As noted above, terminating Plaintiff is not a legislative act. *Howard*, 720 F.3d at 949-50. The Supreme Court has made clear the types of statements Gowdy made through press releases and interviews with reporters are "political," not "legislative" acts and do not receive Speech or Debate Clause protection. *United States v. Brewster*, 408 U.S. 501, 512 (1972) ("news releases, and speeches delivered outside the Congress" are "political in nature rather than legislative"); *Hutchinson v. Proxmire*, 443 U.S. 111, 130-33 (1979) ("press releases" "newsletters," and "speeches delivered outside the Congress" are not legislative acts and receive no protection). Likewise, *Hutchinson* held "libelous remarks in the followup telephone calls . . . in the television and radio interviews are not protected" by the Speech or Debate Clause, which means Gowdy's interviews are not legislative acts here. 433 U.S. at 121 n.10 (affirming Seventh Circuit decision on lack of protection for calls and statements made to television and radio).

Defendants' remaining arguments are also governed by Rule 12(b)(6), under which "the question for the court is whether the *factual allegations* 'state a claim to relief that is plausible on its face,'" after "accept[ing] the factual allegations of the complaint as true[.]" *McGary v. Hessler-Radelet*, No. 13-1267 (RDM), 2016 U.S. Dist. LEXIS 22963, at *9-10 (D.D.C. Feb. 25, 2016)

(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, a defendant may "prevail on a 12(b)(6) motion only by demonstrating that the facts, as alleged in the complaint, do not warrant relief as a matter of law," and may "rely only on the factual allegations contained in the complaint" or incorporated by reference. *Id.* at *9, 13 (citation omitted).

ARGUMENT

A. The Court Should Reject the Committee's Speech or Debate Clause Arguments

1. In This Circuit, a Discrimination Claim Cannot Be Dismissed at the Pleading Stage Simply Because an Employee Asserts a Congressional Employer's Alleged Reason for Taking Adverse Action Was Not the Actual Reason

The Committee's Speech or Debate Clause argument misrepresents controlling D.C. Circuit authority on how the clause applies at the motion to dismiss stage in CAA suits, where, as here, a plaintiff claims a defendant's asserted reason for taking a challenged action is not the actual reason. The Committee repeatedly urges this Court to adopt Judge Kavanaugh's dissenting position that was rejected by the majority opinion in *Howard*, the most recent case to apply the Speech or Debate Clause to the CAA, but it stealthily fails to cite or discuss the fact that Judge Kavanaugh's position was already rejected by the majority. If this Court follows the majority in *Howard*—as it must—it should hold the affidavits proffered by the Committee here do not end this case at the pleading stage, but instead give Plaintiff an opportunity to take discovery with reasonable limits and prove the Committee took adverse action due to his military service.

The main place of agreement between Plaintiff and the Committee appears to be that *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), is no longer the law in this Circuit for applying the Speech or Debate Clause to employment cases. In *Browning*, the D.C. Circuit held that to determine whether a Congressional employee's lawsuit raises Speech or Debate Clause issues, a court should focus on "whether the employee's duties were directly related to the due functioning of the legislative process." *Id.* at 928-29. As the Committee admits,

this is no longer good law, because in *Fields* all four opinions of the *en banc* Court agreed the duties test in *Browning* was "'overinclusive'" and "an employee's duties are too crude a proxy for protected activity.'" CM at 16 (quoting *Fields*, 459 F.3d at 11). Moreover, the *Fields* plurality cautioned that a focus on the plaintiff's duties would be "inconsistent with the Court's practice of being 'careful not to extend the scope of the protection further than its purposes require.'" 459 F.3d at 11 (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)).

As the plurality explained, "[t]he Speech or Debate Clause operates as a jurisdictional bar when the actions upon which [a plaintiff] sought to predicate liability were 'legislative acts,'" and instead of focusing on an employee's duties the Court should "examine the pleadings" to "determine on what actions a plaintiff sought to predicate liability." *Id.* at 13. For example, as the plurality illustrated, a complaint did not "predicate liability on protected conduct" when it alleges the congressional office "discriminated against [the plaintiff] because of her race and gender and retaliated against her when she objected to discriminatory treatment of her co-worker[.]" *Id.* In other words, taking adverse action against an employee due to a protected status – such as race or military status – is not a legislative act that gives rise to Speech or Debate Clause protection. *See id.* As noted above, in *Howard*, the D.C. Circuit reaffirmed this principle. 720 F.3d at 949-50 ("alleged demotion and termination" based on racial animus "are not legislative acts").

Plaintiff's CAA claims are USERRA claims that challenge the adverse actions taken against him due to his military service and/or status. As in *Fields* and *Howard*, the specific personnel decisions that give rise to liability here – *e.g.*, refusing to give Plaintiff work in early June 2015 and terminating him in late June 2015 – are not legislative acts. *Id.* at 949-50; *Fields*, 459 F.3d at 5, 13. Also, contrary to the Committee's assertion, CM at 20, Plaintiff's acknowledgment in the FAC that his performance was criticized – as alleged pretext – does not

convert personnel decisions Plaintiff is actually challenging into legislative acts. In *Fields*, as here, the plaintiff claimed her office retaliated against her based on illicit animus, including "falsely accusing her of poor performance" and "initiat[ing] a bad faith and bogus investigation of plaintiff's conduct as an employee[.]" 459 F.3d at 5. But acknowledging that criticism did not stop the D.C. Circuit from holding that the adverse acts she challenged were not "legislative acts" or from holding that the Speech or Debate Clause did not bar her from litigating her bias claims. *Id.* at 5, 13, 17. The same was true in *Howard*, which held an alleged discriminatory termination was not a legislative act when the plaintiff acknowledged that her employer claimed she was "terminated for insubordination." 720 F.3d at 944, 949-50.

Even if the workplace discrimination a plaintiff challenges is held not to be a legislative act, the Speech or Debate Clause may still offer congressional defendant an "evidentiary privilege," which "includes a testimonial privilege" so that a "Member may not be made to answer questions – in a deposition, on the witness stand, and so forth – regarding legislative activities." *Fields*, 459 F.3d at 14 (citations and internal quotations omitted). In discrimination cases, this evidentiary privilege may come into play if the employer asserts the personnel action was taken not for discriminatory reasons, but for reasons "motivated by the employee's participation in the legislative process." *Id.* at 14-15. As *Fields* observed, the potential for there to be inquiry into the "motivation" behind "legislative acts" arises principally in discrimination suits that "are subject to the framework established by" *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "under which a plaintiff proves a prima facie case of discrimination, which the employer rebuts by producing evidence that its conduct was nondiscriminatory, which the plaintiff then seeks to demonstrate is pretextual." *Fields*, 459 F.3d at 14-15.

But, as the Court noted, *McDonnell Douglas* is only used in discrimination suits where

"direct evidence of discrimination" is "absent." *Id.*; *accord Wheeler v. Georgetown Univ. Hosp.*, 812 F.3d 1109, 1113 (D.C. Cir. 2016) ("Where the plaintiff lacks direct evidence of discrimination, racial discrimination claims under Title VII are subject to the familiar burden-shifting framework of *McDonnell Douglas Corp.*"). And later, *Fields* made clear the concerns it raised and the rules it established would not necessarily apply to "a case in which the plaintiff uses evidence unrelated to legislative actions – such as direct evidence of discrimination," and in such a case direct evidence could be used "to demonstrate that the defendant's legislative explanation is pretext" without inquiring into a defendant's motives for legislative activities. 459 F.3d at 16.

Focusing on discrimination suits where *McDonnell Douglas* would apply, *Fields* stated the Speech or Debate Clause could limit the prosecution of a discrimination suit where a congressional defendant presents "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 plaintiff's performance of conduct protected by the Speech or Debate Clause." *Id.* at 16. And, again, relying on the *McDonnell Douglas* framework, the Court explained that if a district court decides that "the asserted activity is in fact protected by the Speech or Debate Clause," the action *might* need to be "dismissed" because "the failure to rebut a defendant's evidence with 'evidence . . . that the[] proffered justifications were mere pretext' normally is fatal to a plaintiff's discrimination allegations." *Id.* (quoting *Smith v. District of Columbia*, 430 F.3d 450, 455-56 (D.C. Cir. 2005) (applying *McDonnell Douglas* framework)).

At the same time, however, *Fields* made clear that such an affidavit would not be the death knell for many discrimination cases brought against congressional defendants:

> If the lawsuit does not inquire into legislative motives or question conduct part of or integral to the legislative process, or if the district court determines that the asserted activity is not in fact part of or integral to the legislative process, then the case can go forward. *Cf. Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360-

> 61 (D.C. Cir. 1990) (noting, in a different context, that where inquiry into a matter was forbidden "even for the purpose of showing it to be pretextual," the claim need not be dismissed because "it may turn out that the potentially mischievous aspects. . . are not contested . . . or are subject to entirely neutral methods of proof" and "[o]nce evidence is offered, the district court will be in a position to control the case").

Fields, 459 F.3d at 16. Indeed, in *Minker*, which *Fields* relied upon, the D.C. Circuit held that in a case where the Constitution may limit inquiry into a defendant's actions, a case need not be dismissed outright. Rather than dismiss it, it is more appropriate for a court to decide at summary judgment, "[o]nce evidence [is] offered" and discovery has been taken, whether it can be tried in a way that "protect[s] against any impermissible entanglements." *Minker*, 894 F.2d at 1360-61.

In *Howard*, the D.C. Circuit clarified – over Judge Kavanaugh's dissent – the impact a so-called *Fields* affidavit has on a motion to dismiss when a plaintiff alleges the employer's stated reason for taking adverse action against him was not the actual reason, such as when a defendant asserts the plaintiff poorly performed his legislative duties. As Judge Kavanaugh noted in his dissent, *Howard* "require[d] [the D.C. Circuit] to resolve" "[a] question left open in *Fields*" of "whether the plaintiff could nonetheless dispute whether the defendant's stated reason was the actual basis for the defendant's decision or was just a pretext for discrimination." 720 F.3d at 955 (Kavanaugh, J., dissenting). Judge Kavanaugh "believe[d]" in such a case "(unlike the majority opinion) that the case must come to an end" at the motion to dismiss stage. *Id.*

On the other hand, in *Howard* the majority held *Fields* does *not* authorize a court to dismiss a CAA action due to the Speech or Debate Clause if there is any possibility the plaintiff could prove his discrimination claim without "contest[ing] her employer's conduct of protected legislative activities and [] prov[ing] her allegations of pretext using evidence that does not implicate protected legislative activities." 720 F.3d at 949. As the *Howard* majority explained,

> Importantly, nothing in the *Fields* plurality opinion prevents an employee who is pursuing an action under the CAA from having "a fair opportunity to show that [the employer's]

> stated reason [for the disputed adverse action] was in fact pretext." *McDonnell Douglas*, 411 U.S. at 804. Given the strictures of the Speech or Debate Clause, a "fair opportunity" means that the complaining party may pursue her claim to the fullest, so long as she can prove her case "without inquiring into legislative acts or the motivation for legislative acts." *Fields*, 459 F.3d at 17 (quotations and citation omitted).
>
> > If the lawsuit does not inquire into legislative motives or question conduct part of or integral to the legislative process, or if the district court determines that the asserted activity is not in fact part of or integral to the legislative process, then the case can go forward. *Id.* at 16.

Howard, 720 F.3d at 948-49. Applying these principles, *Howard* rejected the defendant's "suggest[ion] that an employee should be precluded from seeking to prove pretext once an individual who is eligible to invoke the Speech or Debate Clause has submitted an affidavit that offers a nondiscriminatory explanation for the contested employment action." *Id.* at 949. It also clarified that a *Fields* affidavit does not bar a plaintiff from litigating his or her claims:

> Nothing in *Fields* or in any decision issued by the Supreme Court supports this view of the Speech or Debate Clause. Indeed, the only reasonable reading of the applicable precedent indicates that a plaintiff-employee may pursue her claims even after her employer has filed a *Fields* affidavit, provided that she does not contest her employer's conduct of protected legislative activities and that she prove her allegations of pretext using evidence that does not implicate protected legislative matters.

Id. In holding the plaintiff could prove her demotion, termination, and retaliation claims without inquiring into protected legislative matters, *Howard* observed that "an investigation into activities in proximity to the legislative process does not necessarily require a probe into protected legislative activity." *Id.* at 952 (citing *Brewster*, 408 U.S. at 528). Similarly, *Howard* emphasized that the Supreme Court has held the Speech or Debate Clause "'does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but [are] not a part of the legislative process itself.'" *Id.* at 949 (quoting *Brewster*, 408 U.S. at 528).

After *Howard*, it is now clear a plaintiff may take discovery and prove discrimination claims against a congressional office even if he seeks to prove the defendant's asserted reasons for

taking adverse action were not the actual reasons, and even when the defendant has presented a *Fields* affidavit identifying legislative acts the plaintiff allegedly poorly performed.

Although the Committee fails to mention the dissenting opinion in *Howard*, it nevertheless asks this Court to apply the rule Judge Kavanaugh proposed in his dissent in *Howard*.

First, the Committee asserts "the original Complaint makes plain, Plaintiff's 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 superiors' directives," and "[f]or this reason, Plaintiff's action is barred by the Speech or Debate Clause under *Fields*, 459 F.3d at 10-11, 13." CM at 20. This argument contravenes *Howard*, as it assumes the mere fact that Plaintiff acknowledges these reprimands (which may or may not relate to legislative acts) occurred means he has no right "[to] prove [his] allegations of pretext using evidence that does not implicate protected legislative matters." *Howard*, 720 F.3d at 949.

Although the FAC mentions several incidents where Plaintiff was reprimanded or criticized by his supervisors in June 2015, it makes clear Plaintiff does not believe these were the *actual reasons* why the Committee took adverse actions against him. Instead, as the FAC states, the animus towards Plaintiff's military service and his exercise of his rights was the "sole or motivating factor" for its adverse action against him.[1] Moreover, as described below, Plaintiff *can* prove animus against his military service and/or his exercise of his rights was a motivating factor or but-for cause why he was subjected to adverse action *without* inquiring into legislative acts.

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[1]*See, e.g.*, FAC ¶¶ 26, 35, 39 (reprimands that occurred were "pretext" for discrimination); *Id.* ¶¶ 71-72 ("Plaintiff's military service, membership, and obligations were the sole or motivating factor in these adverse employment actions taken against Plaintiff by Defendant in violation of 38 U.S.C. § 4311(a), and that Defendants' "explanations or excuses" "are a pretext" for discrimination); *id.* ¶ 81 ("[t]he actions that Plaintiff took to enforce and exercise his rights under USERRA . . . were the sole or motivating factor in the Benghazi Committee's decision to terminate and/or constructively discharge Plaintiff").

Second, the Committee asserts that the affidavits of Kiko and Donesa "make plain that the Committee's personnel decision was made precisely for the reasons articulated in *Fields*, and, as such, the case against the Committee should be dismissed." CM at 20. In support of this argument, it summarizes how the affidavits describe Plaintiff's investigative job responsibilities and four alleged reasons for his "separation from the Committee" for "'his fail[ure] to exercise appropriate judgment consistent with the mission of the Select Committee.'" *Id.* at 21 (quoting Donesa Aff. ¶ 16). To complete its argument, the Committee asserts that it has offered a legitimate non-discriminatory reason for the challenged personnel actions and as the Speech or Debate Clause "precludes Plaintiff from compelling the disclosure of documents or testimony to challenge the Committee's stated legislative reasons for that personnel action," "he will not be able to 'carry [his] burden of persuasion' of "'demonstrat[ing] that the proffered reason was not the true reason for the employment decision.'" *Id.* at 22 (quoting *Fields*, 459 F.3d at 15).

This is the same exact argument Judge Kavanaugh made in his dissent – but was rejected by the majority – in *Howard*. Essentially, the Committee is arguing a *Fields* affidavit is an absolute shield that requires dismissal of *every case* where a congressional office offers an affidavit alleging non-discriminatory reasons for a personnel action that are related to legislative acts. Without *Howard*, this position might have been plausible. But *Howard* expressly rejected the "suggest[ion] that an employee should be precluded from seeking to prove pretext once an individual who is eligible to invoke the Speech or Debate Clause has submitted an affidavit that offers a nondiscriminatory explanation for the contested employment action." 720 F.3d at 949.

2. Plaintiff Can Prove His Claims With Strong Direct Evidence of Bias by the Decisionmakers, As Well as Other Compelling Circumstantial Evidence, Which Avoids the Speech or Debate Clause Issued Raised in *Fields*

After *Howard*, the Committee cannot use affidavits as an absolute shield at the pleading stage. Instead, a plaintiff must have "a fair opportunity to show that [the employer's] stated reason

[for the disputed adverse action] was in fact pretext," "so long as she can prove her case 'without inquiring into legislative acts or the motivation for legislative acts.'" *Id.* at 948-49 (quoting *McDonnell Douglas*, 411 U.S. at 804, and *Fields*, 459 F.3d at 17). Therefore, at this stage the appropriate question is whether Plaintiff can possibly prove his CAA claims against the Committee without inquiring into legislative acts or the motivation for them. *Id.* Because the Committee inappropriately presumes that Judge Kavanaugh's dissent is the governing standard, it completely fails to address whether Plaintiff can prove his claims without inquiring into legislative acts. Instead, the Committee self-servingly asserts that Plaintiff will seek broad discovery about the four allegedly non-discriminatory reasons it provides for terminating him.

Consistent with *Howard* and *Fields*, Plaintiff will be able to prove the Committee took adverse action against him in violation of the CAA due to his military service and/or status, and Plaintiff can do so without inquiring into any legislative acts that Kiko's and Donesa's affidavits describe. In particular, Plaintiff will present strong evidence of discrimination—including direct evidence of animus by the decisionmakers—that will permit a jury to find unlawful bias was the *actual reason* why the Committee took adverse action against him and that the Committee would not have taken that action in the absence of such bias. And the jury could make this finding even if Plaintiff does not contest *all* of the acts – legislative or otherwise – that Kiko and Donesa identify as reasons for terminating Plaintiff. Moreover, as described below, some of the acts the Committee relies upon for terminating Plaintiff are not legislative acts, and thus cannot receive Speech or Debate Clause protection. *Fields*, 459 F.3d at 12. *See infra* at 24-25.

"Although many issues regarding the Speech or Debate privilege will undoubtedly arise over the course of discovery, the fact that discovery may become complicated is not cause for dismissing the entire case." *Floyd*, 968 F. Supp. 2d at 323-34 (citing *In re Sealed Case*, 494 F.3d

139, 148-154 (D.C. Cir. 2007)); *accord Howard*, 720 F.3d at 950 (stating the fact that a plaintiff "may face difficulties in proving her case without delving into protected legislative activities," "is not a basis for dismissal of a case under Rule 12(b)(6)").

Even if all the incidents the Committee identifies as the reasons for taking adverse action against Plaintiff are legislative acts—which they are not—Plaintiff can still win this action without disputing that those incidents occurred, as he can proffer strong direct evidence of discrimination, as well as other compelling circumstantial evidence, to show the Committee did not actually take adverse action against him due to the incidents identified in the two affidavits.

In the FAC, Plaintiff identifies compelling, direct evidence of discrimination by his supervisors, who took adverse action against him immediately after he returned in late-May 2015 from military leave that his supervisors questioned and were angered by. *See* FAC ¶¶ 28-31.

For example, Plaintiff alleges that while he was serving in the military in May 2015, Staff Director Kiko saw "Facebook pictures of [Plaintiff]" that were "taken when Plaintiff was not working during his military service in Germany." *Id.* ¶ 31. Kiko "(erroneously) believed that Plaintiff was abusing his military leave," "grew upset over seeing them," and told his executive assistant: "'[Brad] needs to take annual leave for [being in Germany] and he doesn't have enough [annual] leave. [Brad] misrepresented going to Europe on military orders; he is there on vacation.'" *Id.* This statement was a clear expression of hostility and animus about Plaintiff's military service and status. During the same time period that Kiko made this statement criticizing Plaintiff's military service, the Committee's Chief Counsel, Chipman, openly, expressly, and repeatedly "questioned the validity of Plaintiff's military obligations," including telling another staffer: "'I question whether Brad [Plaintiff] really needs to go to Germany,' where Plaintiff was serving out

the remainder of his annual military duties." *Id.* ¶¶ 29-30.[2]

The very next time Plaintiff returned to work at the Committee, both Kiko and Donesa immediately took away his work and, within several weeks, terminated him. *Id.* ¶¶ 28, 32-33, 45, 49 (stating Plaintiff's leave ended on May 27, 2015; "[t]hroughout the month of June 2015, Kiko and Donesa refused to give Plaintiff any work and would not talk to him, not even to exchange pleasantries in passing as both routinely did with other members of the Majority Staff"; he was told on June 26, 2015 "he would be terminated" if he did "not agree to tender his resignation"; and on June 29, 2015 he "was terminated").

Taking away Plaintiff's work was itself actionable, as it "den[ied] Plaintiff the . . . terms, conditions *status, and privileges of employment* shared by other employees." *Id.* ¶ 70. *See* 38 U.S.C. § 4311(a) (emphasis added) (stating a service member "shall not be denied . . . any benefit of employment by an employer on the basis of that membership . . . performance of service . . . or obligation" in the "uniformed service"); *id.* § 4303(2) (defining "benefit of employment" as "the terms, conditions, or privileges of employment, including any advantage, profit, *privilege, gain, status*, account or interest" in the workplace, as well as "the opportunity to select work hours or location of employment") (emphasis added). *See Crews v. City of Mt. Vernon*, 567 F.3d 860, 869 (7th Cir. 2009) (actionable adverse employment action under USERRA includes "material loss of . . . responsibilities"); *cf. Serricchio v. Wachovia Sec. LLC*, 658 F.3d 169, 183 (2d Cir. 2011) (rejecting contention that titular demotion is necessary to find alteration in "status" within meaning of USERRA; "the plain language of USERRA makes clear that status must be assessed with regard to factors beyond mere title or 'rank'" including 'responsibility'") (quoting 20 C.F.R. § 1002.194). And, of course, the Committee's termination of Plaintiff due to his performance of military service

[2]These negative comments over Plaintiff's service were consistent with Kiko's skeptical, shocking one word response, "wow," that occurred shortly before he took military leave in March 2015. FAC ¶¶ 18-19.

is actionable, as it "denied" Plaintiff "retention in employment" and all of the attendant "benefit[s] of employment." 38 U.S.C. § 4311(a).

Such strong evidence of bias—where decisionmakers openly questioned why Plaintiff engaged in military service, expressed hostility towards his use of military leave, and then immediately took adverse action by taking away his work and terminating him shortly thereafter—constitutes *direct evidence of discrimination*. *Eichaker v. Village of Vicksburg*, 627 F. App'x 527, 632 (6th Cir. 2015) ("An employer's concern that an employee is taking too much time off for military service is direct evidence of anti-military animus. So too is a supervisor's statement that he does not want an employee volunteering for extra military duty when needed at work.") (citing *Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511, 518 (6th Cir. 2009) (per curiam), and *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 755 (6th Cir. 2012)).[3]

Furthermore, in addition to strong direct evidence of the Committee's bias against Plaintiff's military service and the exercise of his rights, Plaintiff may also introduce compelling circumstantial evidence about non-legislative acts that would help to establish that the Committee's reasons for taking adverse action against Plaintiff are pretextual. While obtaining some of this evidence may lead to "an investigation into activities in proximity to the legislative process," it does not "necessarily require a probe into protected legislative activity." *Howard*, 720 F.3d at 952 (citing *Brewster*, 408 U.S. at 528). For example:

- Plaintiff could offer testimony and documents to show that other staffers who openly engaged in "far more questionable activities" during the same period were not reprimanded or terminated—such as several staffers who "organized a gun buyer's club" where they "spent hours at a time during work hours, meeting in the conference room to design custom-made" firearms, and who organized day-time drinking parties in the office where they used

[3] *See also Shelton v. Fiskar Brands, Inc.*, No. 3:12-cv-1836-ST, 2015 U.S. Dist. LEXIS 38038, at *9-12 (D. Or. Feb. 10, 2015) (plaintiff proffered "direct evidence" of animus where supervisor's statements "express[ed] his opposition to [plaintiff] fulfilling his military obligations," such as "We're too busy this time of year. I don't want you to go on it," and military leave "is a burden to you and [] your employer," as did the supervisor's "agitat[ion]" with plaintiff's duty).

"custom-made wine glasses that were engraved with the words 'glacial pace,' poking fun" at the Committee's ranking member. FAC ¶ 27. A jury would be entitled to doubt that the Committee would allow such outrageous breaches of protocol without taking any disciplinary action, but at the same time took adverse action against Plaintiff, including terminating him, for the reasons stated in the Kiko and Donesa affidavits.

- Plaintiff could offer the testimony of three other Committee staffers who could testify (1) they were accused of the same security violation as Plaintiff, (2) they were not disciplined or terminated for doing so, and (3) they were "not members of the National Guard or Reserves and did not perform any military service." *Id.* ¶ 44.

- Plaintiff could offer testimony that his supervisors' demeanor changed dramatically after he began taking military leave, with Kiko "prais[ing] Plaintiff's performance in an email," "on February 25, 2015," "stating Plaintiff was doing 'great work,'" *id.* ¶ 17, but then responded "wow" to Plaintiff's informing him that he was taking military leave, *id.* ¶¶ 18-19, and after Plaintiff returned from military leave "Kiko no longer acted cordially towards Plaintiff and offered him little, if any work opportunities." FAC ¶¶ 22; *see Howard*, 720 F.3d at 943, 951-53 (holding plaintiff could pursue discrimination claim where she alleged she "receive[d] high performance ratings throughout her tenure").

- Plaintiff could offer his testimony and that of the Committee's personnel administrator that "[o]n June 9, 2015," she "confirmed that there were no disciplinary records, negative personnel reports, counseling, or other security entries in [Plaintiff's] [personnel] file," and "On June 29, 2015 . . . confirmed that there were no negative personnel documents in his personnel file." FAC ¶¶ 37, 50; *see Howard*, 720 F.3d at 943, 951-53.

- Plaintiff could offer the testimony of other Committee staffers that they routinely sent e-mails inviting other staffers to social events on Capitol Hill, including events outside of the Committee's focus, and no adverse action was taken against them. FAC ¶¶ 26-27.

All of this circumstantial evidence will help Plaintiff prove his CAA claims, even though not essential for him to prevail on his claims, in light of the strong direct evidence of bias identified in the FAC. But, critically, none of this circumstantial evidence will require a "probe" into specific legislative acts or the motivation for them. *Howard*, 720 F.3d at 952.

Because of the strong direct evidence Plaintiff has already identified, as well as the further direct evidence he will likely obtain through discovery, his claims do not trigger the same Speech or Debate concerns that often arise in cases that rely exclusively on circumstantial evidence to prove unlawful discrimination. *Fields*, 459 F.3d at 14-17. As noted above, the concerns that *Fields*

expressed were focused on discrimination cases that relied upon the *McDonnell Douglas* burden shifting framework used to prove discrimination without direct evidence. *Id.* at 14-15. But *Fields* explicitly identified a situation where the Speech or Debate Clause would not be implicated in the same way as a case that relies on *McDonnell Douglas*: where a plaintiff uses "direct evidence of discrimination." *Id.* at 14-17. As Plaintiff has *already* proffered direct evidence of discrimination that a jury could rely upon to find bias motivated the Committee's adverse actions, *Fields* bolsters the conclusion that Plaintiff should be allowed to take discovery and prove his claims at trial.

3. The Committee's Affidavits Should Not Be Considered as They Fail to Meet the Standard Established in *Fields* and They Even Contradict Each Other

Even if the Committee's affidavits could be relied on to dismiss this case at the pleading stage—which they cannot, *Howard*, 720 F.3d at 948-49—there is a major problem with the affidavits that preclude them from being considered at this stage: the affidavits fail to specifically identify what acts, if any, that allegedly led to the adverse actions are legislative acts. In *Fields*, the Court stated that an affidavit "must indicate into what 'legislative activity' or into what matter integral to the due functioning of the legislative process the plaintiff's suit necessarily will inquire," including by "recounting facts sufficient to show that the challenged personnel decision was taken because of the plaintiff's performance of conduct protected by the Speech or Debate Clause." 459 F.3d at 16. The Kiko and Donesa affidavits describe several incidents that allegedly caused them to conclude that Plaintiff "failed to exercise appropriate judgment consistent with the mission of the Select Committee," and should thus be terminated. Kiko Aff. ¶ 16. Yet nowhere do these affidavits identify or indicate which of the acts or incidents are "legislative activity" or are "integral" to the "due functioning of the legislative process." *Fields*, 459 F.3d at 16. For example, they do not identify whether (or how) sending an e-mail about a social event is a legislative act or, for that matter, how allegedly committing a security infraction is a legislative act.

4. The Acts Describe in the Affidavits Are Not Legislative Acts

While Plaintiff can prove his claims even if he does not dispute the incidents identified in the Committee's affidavits, *supra* at 18-23, a number of the incidents did not even involve legislative acts and, thus, deserve no Speech or Debate Clause protection. *Fields*, 459 F.3d at 12.

For example, it cannot possibly be considered a legislative act when Plaintiff sent an e-mail to other Committee staffers inviting them to a social event on Capitol Hill that, *in the words of the Committee's staff director*, "did not relate in any way to the Select Committee's jurisdiction or investigation." Donesa Aff. ¶ 8. Inviting staffers to a social event unrelated to the Committee's jurisdiction does not even come close to the serious types of "legislative activity" that federal courts have held are protected by the Speech or Debate Clause, such as "'conduct at committee hearings, preparation of committee reports, authorization of committee publications . . . and issuance of subpoenas concerning a subject on which legislation could be had." *Howard*, 720 F.3d at 946 (quoting *McSurely v. McClellan*, 553 F.2d 1277, 1284-85 (D.C. Cir. 1976)). To hold that sending such a social invite is a legislative act would transgress the "'finite limits'" the Supreme Court has placed on the Speech or Debate Clause in "refusing to stretch its protective umbrella 'beyond the legislative sphere' to conduct not 'essential to legislating.'" *McSurely*, 553 F.2d at 1285 (quoting *Doe v. McMillan*, 412 U.S. 306, 317 (1973), and *Gravel v. United States*, 408 U.S. 606, 621, 624-25 (1972)). Indeed, a staffer sending a social invitation is far less legislative in nature than a member of Congress making a speech outside of Congress, interviewing with a reporter, or disseminating documents to federal agencies, all of which are *not* protected legislative acts. *Hutchinson*, 433 U.S. at 121 n.10, 130-33; *Brewster*, 408 U.S. at 512.

Furthermore, the words that Plaintiff wrote when he allegedly mishandled classified information do not come close to constituting a legislative act. With respect to this incident, the Committee alleges Plaintiff sent an e-mail to other staffers that used words that "contained

information" that allegedly "relat[ed] to intelligence 'sources and methods.'" Donesa Aff. ¶ 13. While the Committee asserts Plaintiff put "classified information" in an unclassified e-mail system by including that specific information in an e-mail, *id.* ¶ 13-14 & n.1, Plaintiff asserts the specific information he included in the e-mail was exclusively from "publicly available sources from the Internet," FAC ¶ 39, a fact the Committee's security manager was forced to concede. *Id.* ¶ 42.

Based on the parties' positions, it is clear the dispute has nothing to do with the legislative process, but rather whether Plaintiff's sending public information from the Internet in an e-mail to other staffers is improper. At the most extreme, Plaintiff's use of specific words in an e-mail may be "related to" the legislative act of preparing for a hearing, but it was certainly not an "integral part of" the legislative process. *Fields*, 459 F.3d at 10. Indeed, courts have made clear the Speech or Debate Clause "'does not prohibit inquiry into illegal conduct simply because it has *some nexus* to legislative functions,' or because it is merely 'related to,' as opposed to 'part of,' the 'due functioning' of the 'legislative process.'" *Id.* at 10 (quoting *Brewster*, 408 U.S. at 514, 528).

5. <u>Plaintiff's Claims Against Gowdy Are Not Barred by the Speech or Debate Clause</u>

Gowdy enjoys no Speech or Debate Clause immunity for making statements in the national media *on a Sunday outside of Congress*. The Supreme Court has made clear the Speech or Debate Clause offers a Congressman no protection when he engages in libel outside of Congress, as Gowdy did here. As the D.C. Circuit explained:

> The privilege only bars civil suits when the action complained of falls within the legislative sphere. For example, although a congressman cannot be sued for defamatory statements made on the House floor, *he has no claim to immunity for a libel action based on his subsequent republication of those statements outside Congress*; those later expressions are no part of the "legislative process."

Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 416 (D.C. Cir. 1995) (quoting *Hutchison*, 443 U.S. at 127-28, and citing *Gravel*, 408 U.S. at 622-27). As noted above, the

Supreme Court has held libelous remarks in news releases, speeches delivered outside Congress, and interviews with reporters via telephone, television and radio are not protected by the Speech or Debate Clause. *Hutchinson*, 433 U.S. at 121, 130-33; *Brewster*, 408 U.S. at 512.

Furthermore, Plaintiff's specific words that caused the Committee to assert that he had mishandled classified information do not constitute a legislative act. *Supra* at 24-25. Thus, Plaintiff can prove he did not mishandle classified information without implicating Gowdy's Speech or Debate Clause rights. *Fields*, 459 F.3d at 12.

Moreover, even if Plaintiff's specific words could constitute a legislative act, he could still demonstrate to the jury that he did not mishandle classified information without inquiring into the details of the e-mail. For example, he could present testimony that (1) the Committee's security manager admitted he did not mishandle classified information, (2) three other accused staffers suffered no consequences, and (3) the Committee took no action to report the alleged security incident to the relevant authorities. Presenting such extrinsic evidence to undermine the allegation that Plaintiff mishandled classified information is no different than demonstrating that an employer's reasons for terminating him were pretextual without inquiring into the specifics of the legislative act—a procedure approved by the D.C. Circuit. *See Howard*, 720 F.3d at 948-49.

Although Gowdy claims the Speech or Debate Clause shields him because he may choose to defend himself by asserting that Plaintiff *did* mishandle classified information, GM at 44-45, he curiously relies upon Judge Kavanaugh's *dissent* in *Howard* and the two cases Judge Kavanaugh cited to *unsuccessfully* argue that "the case must come to an end" once a member of Congress has presented a *Fields* affidavit that makes an assertion about the plaintiff (here, that Plaintiff was, in fact, terminated for mishandling classified information). But there is no meaningful difference between how Gowdy would defend himself against Counts 3 and 4 from how the Committee would

defend itself against Counts 1 and 2 under a procedure that *Howard* held was consistent with the Speech or Debate Clause. 720 F.3d at 948-49. Accordingly, this Court should follow the *majority opinion* in *Howard*, and reject Gowdy's argument.[4]

B. Plaintiff Has Pleaded Meritorious CAA/USERRA Claims Against the Committee

1. The Legal Standard Does Not Bar Plaintiff's CAA/USERRA Claims

The Court should reject the Committee's arguments concerning the legal standard that governs Plaintiff's CAA/USERRA claims. As described below, the "motivating factor" standard applies to Plaintiff's CAA/USERRA claims. And even if the Court adopts a but-for causation standard, as Gowdy contends, Plaintiff's allegations in the FAC satisfy that standard.

a. USERRA's History and Canons of Construction

Since 1940, a series of federal laws has protected servicemembers so that they can serve our country, return to their civilian jobs after serving, and remain free of discrimination based on military status and service. *Lapine v. Town of Wellesley*, 304 F.3d 90, 97-98 (1st Cir. 2002) (describing history of USERRA and predecessor statutes); H.R. Rep. No. 103-65, at 18 (1993) ("House Report").[5] Enacted in 1994, USERRA is the latest in this line of statutes, succeeding its immediate predecessor, the Vietnam Era Veterans' Readjustment Assistance Rights Act of 1974,[6]

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[4] Furthermore, to the extent that Gowdy is asserting that the counts should be dismissed against him because he has presented a *Fields* affidavit, that argument should be rejected because Gowdy has not proffered a *Fields* affidavit in support of his Speech or Debate Clause immunity. The Kiko and Donesa affidavits submitted by the Committee state that they are submitted to "invoke the Speech or Debate Clause on behalf of the Select Committee in this action," Dkt. No. 39-2; 39-3, but do not purport to invoke the immunity of Gowdy individually. And Gowdy has proffered no affidavit whatsoever to invoke his own Speech or Debate Clause immunity as part of his Motion to Dismiss. In addition, as noted above, *Howard* clarified that a *Fields* affidavit does not require a complaint to be dismissed at the pleading stage.

[5] USERRA's purposes are "(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service"; "(2) to minimize the disruption to the lives of persons performing service in the uniformed services . . . by providing for the[ir] prompt reemployment" after completing "such service"; and "(3) to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a).

[6] 38 U.S.C. §§ 4301-4307 (Supp. V 1994), *superseded by* USERRA, Pub. L. 103-353, sec. 2(a), 38 U.S.C.

also known as the Veterans' Reemployment Rights Act ("VRRA or VRRA Act"). 20 C.F.R. § 1002.2; *accord Vahey v. Gen. Motors Co.*, 985 F. Supp. 2d 51, 57 (D.D.C. 2013). Congress enacted USERRA "to replace the VRR Act in order to 'clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions.'" *Gummo v. Village of Depew, N.Y.*, 75 F.3d 98, 105 (2d Cir. 1996) (quoting House Report at 18).

A bedrock principle of liberal interpretation has governed the interpretation of USERRA and its predecessor statutes since the 1940s. On numerous occasions, the Supreme Court has held the federal reemployment rights law must be broadly construed in favor of servicemembers.[7] Congress expressly stated this liberal canon would apply to interpreting USERRA. House Report at 19 (rule of liberal construction "remains in full force and effect"); *accord* S. Rep. No. 103-158, at 40 (1993) ("Senate Report"). Any ambiguity in the language of USERRA that Congress incorporated into the CAA must be construed liberally in light of *Fishgold* and its progeny.

Another canon Congress incorporated into USERRA is that decisions under USERRA's predecessors remain in effect so long as consistent with USERRA. *Rivera-Melendez v. Pfizer Pharm., LLC*, 730 F.3d 49, 54 (1st Cir. 2013); *Vahey*, 985 F. Supp. 2d at 57; 20 C.F.R. § 1002.2.

b. <u>A Motivating Factor Standard Applies to USERRA Claims, and Congress Directly Referenced That Standard in Enacting the CAA</u>

As the Committee admits, USERRA does not require a showing that a discriminatory or retaliatory reason be the sole motive for a challenged employment action to establish a violation

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§§ 4301-4333, 108 Stat. 3149-69 (1994). Formerly codified as 38 U.S.C. §§ 2301-2307, VRRA sections were renumbered 4301-4307 in 1992. Pub. L. No. 102-568, title V, § 506(b), 106 Stat. 4340 (1992).

[7] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (construing USERRA's antecedent legislation and holding "[t]his legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977) (reaffirming that this "guiding principle" of liberal construction "govern[s] all subsequent interpretations of the re-employment rights of veterans."); *see also, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980).

of § 4311. Under USERRA's express language, an employee need only show his or her status or activity protected by USERRA was "a motivating factor" in an adverse action. 38 U.S.C. § 4311(c)(1)-(2); *see Vahey*, 985 F. Supp. 2d at 71 ("under USERRA, 'discrimination in employment occurs when a person's military service is *a* motivating factor' in an adverse employment action, and it is not required 'that military service be the *sole* motivating factor'") (quoting *Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1369 (Fed. Cir. 2009)). If the employee makes this showing, an employer will be liable unless the employer proves as an affirmative defense that the same action would have been taken in the absence of the USERRA-protected activity or status. 38 U.S.C. § 4311(c)(1)-(2); 20 C.F.R. §§ 1002.22, 1002.23(b).

This burden of proof framework is modeled on the framework the Supreme Court approved for National Labor Relations Act discrimination cases in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). *See* House Report at 24; Senate Report at 45. Under that framework, a plaintiff bears the burden of proving, by a preponderance of the evidence, that an employee's protected activity "was a substantial or motivating factor" in an adverse action. *Transp. Mgmt.*, 462 U.S. at 401. Such a showing establishes a violation unless the employer proves as an affirmative defense it would have taken the same action "regardless of [its] forbidden motivation." *Id*. As discussed below, Congress intended this burden of proof scheme to apply not just to USERRA discrimination cases, but also to claims under the VRRA. *Infra* at 36-39.

When Congress enacted the CAA in 1995, it directly referenced USERRA's motivating factor standard. In CAA § 206, Congress stated: "It shall be unlawful for an employing office to—(A) discriminate, within the meaning of subsections (a) and (b) of section 4311 of title 38, against an eligible employee." Pub. L. No. 104-1, § 206. At that time, § 4311(b) of title 38 expressly stated the "motivating factor" standard applied to § 4311 claims. 38 U.S.C. 4311(b) (1995).

c. <u>Congress Did Not Implicitly Repeal the Motivating Factor Standard that Applies to CAA/USERRA Claims by Subsequently Reordering § 4311(b) and (c) of USERRA or by Amending an Unrelated Provision in the CAA</u>

The Committee argues that Congress intended to apply USERRA's prohibitions of discrimination and retaliation based on military status or service to Congressional employers under the CAA, but not USERRA's motivating factor standard that governs such claims. Instead, it suggests Congress impliedly repealed the motivating factor standard and replaced it with a "sole" factor standard when Congress amended USERRA in 1996 by moving the "motivating factor" standard from § 4311(b) to § 4311(c) and by correcting an unrelated CAA cross-reference to USERRA in 2010. CM at 33-34. Thus, the Committee claims Congress removed the motivating factor standard from the CAA and thereby diminished the rights of servicemembers who work for Congress and gave them USERRA rights that are inferior to the USERRA rights of all other servicemembers employed in the private sector and in federal, state, or local governments.

Plaintiff is surprised by this argument, not only as it tries to take away the rights of Congressional staff who honorably serve in the military, but also as it contradicts the clear text of the law, it has never been adopted by any court, and it requires this Court to apply the highly disfavored canon of repeal by implication. *United States Ass'n of Reptile Keepers v. Jewell*, 103 F. Supp. 3d 133, 153, 155 (D.D.C. 2015) (stating repeal or amendment "by implication" is not "favored under the law," and "'implied amendments are no more favored than implied repeals'") (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007)).

As the text and history of the CAA and USERRA plainly show, the CAA gives congressional employees *all* the same substantive protections and rights that servicemembers and veterans ordinarily have under USERRA. In fact, to ensure that there would *never be any doubt* about this question, Congress included a unique, express provision in the CAA that states a

servicemember or veteran who works for Congress "may also utilize any provision of chapter 43 of title 38 [USERRA] that are applicable to that employee," 2 U.S.C. § 1361(d)(2), unlike employees who invoke other laws incorporated into the CAA. Of course, if a servicemember who works for Congress may "utilize any provisions of [USERRA]," it means such an employee may invoke § 4311(c) and its motivating factor standard since § 4311(c) is a provision of USERRA. *Id.*

First, when Congress enacted the CAA in 1995, it plainly intended to apply the "motivating factor" standard to USERRA claims brought under the CAA. As noted above, CAA § 206 makes it unlawful for a congressional employer to "(A) discriminate, within the meaning of subsections (a) and (b) of section 4311 of title 38," Pub. L. No. 104-1, § 206, and in 1995 § 4311(b) expressly stated the motivating factor standard applies to § 4311 claims. 38 U.S.C. 4311(b) (1995). Congress never amended the relevant text of CAA § 206(a)(1)(A) that bars Congress from discriminating against employees based on military status or service. 2 U.S.C. § 1316(a)(1)(A) (2016).

Second, in CAA § 225, Congress made a strong and clear statement that a servicemember who works for Congress may invoke *all* USERRA provisions that apply to him or her, not just the specific provisions of USERRA that are referenced in § 206. *See* Pub. L. No. 104-1, § 225(d)(2). Congress has never amended CAA § 225(d)(1)-(2). *See* 2 U.S.C. § 1361(d)(1)-(2). § 225(d) states:

> (1) IN GENERAL.—Except as provided in paragraph (2), no person may commence an administrative or judicial proceeding to seek a remedy for the rights and protections afforded by this Act except as provided in this Act.
>
> (2) VETERANS.—A covered employee under section 206 may also utilize any provisions of chapter 43 of title 38, [] [USERRA], that are applicable to that employee.

Id. In § 225(d)(1), Congress generally limited the "rights and protections" that their employees could seek under the CAA to the rights and protections "afforded by" the CAA, "[e]xcept as provided in paragraph (2)." Thus, Paragraph (2), which applies to "[a] covered employee under section 206"—*i.e.*, to congressional employees who perform military service—provides the only

exception to the general rule that the CAA limits the rights of congressional employees under the laws the CAA incorporates to the rights the CAA provides. Unlike all other congressional employees, employees who perform military service "may also utilize any provisions of chapter 43 of title 38, [] that are applicable to that employee." 2 U.S.C. § 1361(d)(2). As "chapter 43 of title 38" is USERRA, § 225(d)(2)'s only possible meaning is that servicemembers may invoke *any* provision of USERRA that applies to him, including § 4311(c) and its motivating factor standard.

Of course, there is no dispute that § 4311(c) is a USERRA provision that applies to Plaintiff, as he alleges his employer discriminated and retaliated against him due to his military service and enforcing his USERRA rights in violation of § 4311. Thus, under CAA § 225(d) Plaintiff can use § 4311(c) and its motivating factor standard to litigate his CAA/USERRA claims.

To interpret the CAA as not incorporating § 4311's motivating factor standard because CAA §206 does not use the term "motivating factor" or cross-reference § 4311(c) would render superfluous or inoperative CAA § 225(d)(2)'s exception that allows servicemembers to invoke *any* USERRA provision. "The interpretive canon in favor of giving all language in a statute meaning, thus, counsels against" the Committee's position. *Validata Chem. Servs. v. U.S. Dept. of Energy*, No. 13-1882 (RDM), 2016 U.S. Dist. LEXIS 31481, at *33 (D.D.C. Mar. 11, 2016).[8]

Third, in CAA § 225(f)(1), both as enacted and in its present form, Congress stated "the definitions and exemptions in the laws made applicable by [the CAA] shall apply under [the CAA]," unless they are "inconsistent with the definition and exemptions provided in this Act." Pub. L. No. 104-1, § 225(f)(1); 2 U.S.C. 1361(f)(1). The motivating factor standard, which has

[8] *See id* (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) ("'[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'") (quoting *Mackey v. Lanier Collection Agency & Serv., Inc*., 486 U.S. 825, 837 (1988)); *Fishgold*, 328 U.S. at 285 (instructing courts to "construe the separate provisions of the [veterans' reemployment] Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits").

always been expressly in 38 U.S.C. § 4311, should be viewed as a definition of what it means for an employer "to have engaged in actions prohibited" by the discrimination and retaliation provisions of § 4311(a) and (b). As the CAA does not describe what standard applies to claims brought under Section 206, USERRA's own definition of what types of acts are considered to be discrimination and retaliation under § 4311(a)-(b) is not inconsistent with any CAA definitions and, thus, must be applied to USERRA claims brought under the CAA. 2 U.S.C. § 1361(f)(1).

Fourth, the CAA requires courts to apply the Department of Labor's ("DOL") USERRA regulations to Plaintiff's claim in the absence of a final regulation issued by the Office of Compliance on the issue, 2 U.S.C. § 1411, and here DOL's USERRA regulations expressly state the motivating factor standard applies to USERRA claims. 20 C.F.R. §§ 1002.22 and 1002.23.

Under CAA § 206, the regulations that apply to CAA/USERRA claims "shall be the same as substantive regulations provided by the Secretary of Labor to implement the statutory provisions referred to in subsection (a)," *i.e.*, USERRA's provisions, unless "for good cause shown" the Office of Compliance's Board decides a departure from DOL's regulations "would be more effective for the implementation of the rights and protections under this section." 2 U.S.C. § 1316(c)(2). Although in 2008 the Office of Compliance issued a proposed regulation for CAA/USERRA claims that did not include the DOL's regulations on the motivating factor standard, the House never approved them, and they therefore never became final or effective.[9]

Where, as here, the Board's proposed regulations never became effective, the CAA states

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[9] 154 CONG. REC. S3188-S3203 (daily ed. Apr. 21, 2008) (stating "veterans' employment regulations" were not "already in force" and "awaits Congressional approval"); 2 U.S.C. § 1384(c)-(d) (CAA procedures for congressional approval of proposed substantive regulations and issuance of approved regulations). The Committee states in the notice of proposed rulemaking, "the OOC explained the CAA apparently contained a typographical error insofar as it did not incorporate certain remedies from USERRA," and in so stating cites a footnote 1. CM at 33-34. But the Congressional Record on the notice of proposed rulemaking contains no such footnote or discussion of such a typo. 154 CONG. REC. S3188-S3203.

a court "shall apply, to the extent necessary and appropriate, the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding," 2 U.S.C. § 1411, which here is DOL's regulations recognizing the motivating factor standard. 20 C.F.R. §§ 1002.22, 1002.23. Thus, the motivating factor standard governs here.[10]

Finally, the Court should reject the Committee's bold assertion that Congress intended to remove the motivating factor standard from the CAA because in 1996 it amended USERRA to transfer the motivating factor standard from § 4311(b) to § 4311(c) and because in 2010 Congress amended the CAA's USERRA provision to address the fact that, at that time, CAA § 206 was erroneously cross-referencing the wrong subsection of USERRA on the remedies available under USERRA. CM at 33-34. In neither the text of these amendments nor their legislative history did Congress expressly state it was intending to eliminate the motivating factor standard from the CAA's USERRA provision.[11] Thus, the only way such amendments can remove the motivating factor from the CAA is by satisfying the onerous test for a repeal by implication or implied amendment. *Jewell*, 103 F. Supp. 3d 133, 153, 155.

The Committee cannot satisfy that test and has not tried to do so. The standard for an "amendment by implication" and "implied repeals" is a "high one" and is "conceptually identical":

> A new statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that

[10] Even if approved, the Board's proposed regulations that delete the DOL's motivating factor regulations would be void, as such a departure is not "more effective for the implementation of the rights and protections" under the CAA/USERRA, and instead is a substantive difference. 2 U.S.C. § 1316(c)(2). Rather than being more effective for the implementation of CAA/USERRA rights, removing the motivating-factor standard would unnecessarily complicate adjudication of those rights. Such an interpretation also would conflict with 2 U.S.C. § 1361(d)(2), which expressly states a servicemember can invoke any provision of USERRA that is applicable to him, such as 38 U.S.C. § 4311(c). *Id.* Thus, it is no surprise that the House never approved the proposed regulations.

[11] It would be very odd for Congress to apply a less demanding standard to itself, given that in enacting USERRA Congress stated: "[i]t is the sense of Congress that the Federal government should be a model employer in carrying out the provisions of [USERRA]." 38 U.S.C. § 4301(b); *see id.* § 4303(4)(A)(iii), (6).

> cannot be reconciled. An amendment or repeal is to be implied only if necessary to make the (later enacted law) work, and even then only to the minimum extent necessary. Accordingly, when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

Id. at 155 (internal quotations and citations omitted). Obviously, there is no "positive repugnancy" between (A) the 1996 USERRA amendment that merely switched § 4311(b) and (c) of USERRA, or the 2010 CAA amendment that corrected an obvious, erroneous cross-reference on USERRA's remedies, and (B) the 1995 original enactment of the CAA that adopted the motivating factor standard. These amendments are totally capable of "capable of coexistence" with the CAA's original enactment. *Id.* Nor is there anything inconsistent or repugnant about applying the same motivating factor standard to ordinary USERRA claims and USERRA claims brought under the CAA, and there is nothing inconsistent with the CAA referencing the correct section of USERRA that states USERRA's remedies and allowing CAA claims to apply the same motivating factor standard as USERRA.[12] Moreover, there are sound reasons why Congress may have felt it unnecessary to modify CAA § 206 to cross-reference § 4311(c) after Congress moved the

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[12] The one case the Committee cites to support this argument is highly inapposite. In *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), the Supreme Court held that a 1991 amendment to that codified a specific burden-shifting framework into Title VII could not be construed to hold that the Age Discrimination in Employment Act has a similar burden-shifting framework as Title VII, when Congress amended both laws at the same time in one of the most deliberate and significant amendments to our federal employment laws, but chose not to codify the same burden-shifting framework into the ADEA. *Id.* at 173-75. In contrast, here the 1996 reordering of § 4311(b) and (c) was not done at the same time as any amendments to the CAA. Pub. L. No. 104-275, § 311 (1995). And the 2010 amendment to the CAA to fix an erroneous cross-reference to USERRA was a "technical amendment" in an enormous omnibus bill that dedicated several lines to this fix, Pub. L. No. 111-275, 703 (2010), unlike the 1991 amendments to Title VII and the ADEA that focused largely on burden shifting standards under federal civil rights laws. In fact, one of the first substantive provisions of the 1991 Act focused on the "Burden of Proof in Disparate Impact Cases." Pub. L. No. 102-166, § 105 (1991). Nor did the subject of the 2010 amendment – the remedies available under USERRA for the purposes of a CAA claim – have anything to do with the motivating factor standard that the CAA incorporated from USERRA in 1995. In contrast, in *Gross* the burden-shifting issue was changed in the 1991 Act under Title VII without making a comparable change to burdens under the ADEA.

motivating factor standard from § 4311(b) to (c) in 1996.[13] But whether Congress had these thoughts in mind, it is *the Committee's burden* to show Congress clearly expressed its intent to eliminate the motivating factor standard from the CAA or satisfy the implicit repeal or amendment standard. *Jewell*, 103 F. Supp. 3d at 155-56 (citing *Howard v. Pritzker*, 775 F.3d 430, 437 (D.C. Cir. 2015).

d. <u>Even If the CAA Does Not Incorporate USERRA § 4311(c), the Motivating Factor Standard Still Applies to USERRA Claims Brought Under the CAA</u>

Even if CAA § 206 does not incorporate USERRA § 4311(c) and its express language on the motivating factor standard, the motivating factor standard would still govern Plaintiff's claims. The motivating factor standard was the standard for discrimination and retaliation claims under the VRRA. House Report at 24; Senate Report at 45; Joint Explanatory Statement on H.R. 995; 140 Cong. Rec. H9136 (daily ed. Sept. 13, 1994), *reprinted in* 1994 U.S.C.C.A.N. 2493, 2515); 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery). Congress continued and codified the motivating factor standard in enacting § 4311.[14] House Report at 24; Senate Report at 45; Joint Explanatory Statement on H.R. 995; 140 Cong. Rec. H9136. Congress's purpose in replacing the VRRA's anti-discrimination provision was to clarify and strengthen anti-

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[13] Congress could have believed that after 1996 a CAA § 206 reference to § 4311(b) was appropriate as it focused on the *conduct* that CAA § 206 prohibits—retaliation—as opposed to the standard to evaluate that conduct. It also could have believed CAA § 225(d)'s catch-all provision that allows a servicemember to assert any USERRA provision that is applicable to him would incorporate § 4311(c) and the motivating factor standard, like other provisions of USERRA that are not expressly referenced in § CAA 206.

[14]Section 4311 became effective upon USERRA's enactment, October 13, 1994, replacing the VRRA's anti-discrimination provision. Pub. L. No. 103-353, § 8(b) (1994). The 1996 amendments to § 4311 were retroactively effective as of USERRA's enactment date. Pub. Law No. 104-275, § 313(a), 110 Stat. 3322, 3336 (1996). The amendments were enacted to correct and clarify, not change, the protections and burdens of proof for discrimination and retaliation claims under § 4311. *See id.*, Title III, Subtitle B—*Technical Amendments Relating to the Uniformed Services Employment and Reemployment Rights Act of 1994*, § 311, 110 Stat. 3322, 3333-34 (1996) (emphasis added); S. Rep. No. 104-371, at 16 (1996) (explaining that the "technical and clarifying amendments" to USERRA "[c]larify that the burden of proof provision specified in section 4311 applies to both anti-reprisal and anti-discrimination situations").

discrimination and retaliation protections and reaffirm the motivating factor standard, not weaken those protections or create a new burden of proof standard. *See* Pub. L. 103-353, § 2(a) (1994); House Report at 18, 23-24; Senate Report at 33, 45. If Congress had not expressly incorporated the motivating factor standard in USERRA, that standard would have continued to apply to servicemembers' discrimination and retaliation claims, consistent with congressional intent.

e. <u>A Sole-Factor Standard Has Never Applied to USERRA or the VRRA and Should Not Be Construed to Apply to the CAA's USERRA Provisions</u>

In arguing that a sole cause standard applied under the VRRA, CM at 34-35, the Committee erroneously elevates to controlling precedent dicta in *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981). *Monroe* did not hold servicemembers bear a sole cause burden of proof in discrimination cases under the VRRA. Rather, it held the VRRA's antidiscrimination provision did not require an employer to provide *preferential treatment* to reservists by allowing them to make up time missed due to reserve obligations when such a benefit was not available to other employees. Whether the VRRA imposed such a requirement on employers was the only issue before the Court,[15] and burdens of proof were not at issue or mentioned. The Court's remark, quoted by the Committee, that legislative history "indicates" that the VRRA was enacted to protect reservists "against discriminations like demotion and discharge, motivated solely by reserve status," *id.* at 559, was not a holding on the burden of proof applicable to VRRA discrimination cases.

Moreover, *after Monroe*, Congress made clear the motivating factor standard governed analysis of VRRA discrimination claims and explicitly rejected any intimation in *Monroe* of a sole motivation requirement. In sponsoring an amendment that Congress enacted in 1986 to expand the protection of the VRRA's antidiscrimination section, Pub. L. No. 99-576, § 331 (1986),

[15] *Id.* at 551 ("We granted certiorari to consider the petitioner's contention that an employer has a statutory duty to make work-scheduling accommodations for reservist-employees not made for other employees, whenever such accommodations reasonably can be accomplished.").

Congressman G.V. Montgomery, Chair of the House Veterans' Affairs Committee, stated the same burden of proof scheme as that described in *Transportation Management* applied in determining violations of the VRRA's antidiscrimination section, and that such approach was consistent with Congressional intent in enacting the anti-discrimination section. 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery). Montgomery said *Monroe's* "implication" that a violation that "occurs only when the Reserve obligation is the sole motive in the adverse action taken by the employer" was "totally inconsistent" with the analysis in *Transportation Management. Id.* As Montgomery sponsored the amendment, his remarks "are an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982).

In enacting § 4311 of USERRA, not only did Congress reject any sole motivation requirement for § 4311 discrimination cases, but it also repudiated the notion arising from *Monroe's* dicta that a sole cause standard ever applied to VRRA discrimination cases. The House and Senate Reports explained the burden of proof analysis described in § 4311 was the same standard required for VRRA cases, and thus § 4311 was "a reaffirmation of the original intent of Congress" in enacting the VRRA's discrimination section. House Report at 24; Senate Report at 45. A joint explanation of USERRA prepared by the Senate and House Committees on Veterans' Affairs noted that rather than being new, the standard and burden of proof set forth in § 4311 "are a codification of existing law." Joint Explanatory Statement on H.R. 995, 140 Cong. Rec. H9136 (daily ed. Sept. 13, 1994), *reprinted in* 1994 U.S.C.C.A.N. 2493, 2515.[16] In confirming the continuity and consistency between the burden of proof analysis required for discrimination cases

[16] *Accord* 140 Cong. Rec. S13634 (Sept. 28, 1994) (statement of Sen. Rockefeller) ("I note, as the [Senate] committee report did (page 45), that the portion of new section 4311 which would codify the burden and standard of proof in discrimination cases is merely a reaffirmation of the original intent of Congress when present section 2021(b)(3) was enacted in 1968. The restatement of the standard and burden of proof in the compromise agreement is, therefore, meant to be applicable to all discrimination cases based on the VRR law regardless of when the claim first arose.").

under the VRRA and USERRA, Congress rejected any reliance on *Monroe* as establishing a sole cause burden for plaintiffs under either statute. House Report at 24 (rejecting decisions relying on "dicta" from *Monroe* that a violation of the VRRA's discrimination section can occur only if a servicemember's military obligation is the sole factor). Thus, any suggestion that *Monroe* requires this Court to apply a sole factor standard to USERRA § 4311 is highly misguided.

Furthermore, contrary to the Committee's assertion, *University of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), and *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), cannot be construed to impose on Plaintiff a but-for burden in a USERRA case simply because § 4311(b) contains the phrase "because of." Neither *Nassar* nor *Gross* concerned USERRA or the CAA's incorporation of USERRA—*Gross* was decided under the ADEA, and *Nassar* under Title VII.

Any linguistic similarity between § 4311(a) and (b) of USERRA and the Title VII and ADEA provisions at issue in *Gross* and *Nassar* does not warrant rote application of those decisions to Plaintiff's claims. *See Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 393 (2008) (cautioning "[w]hile there may be areas of common definition," one "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination"). Many factors militate against applying *Gross* and *Nassar* to Plaintiff's claims, including USERRA's express incorporation of the motivating factor standard, Congress's stated intent that the motivating factor standard applies to discrimination claims under the VRRA (which contained no express evidentiary standard) and USERRA, the canon of liberally construing USERRA to benefit servicemembers, USERRA's anti-discrimination purpose,[17] the CAA's authorization for Plaintiff to apply any provision of USERRA, and the CAA's application of DOL's USERRA regulations.

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[17] *Cook v. 84 Lumber Co.*, No. 82-878, 1983 WL 2088, at *3 (N.D. Ohio Nov. 21, 1983) ("To require a showing that military service was the sole basis for a discharge would be contrary to both the Act's purposes and the policy that it be liberally construed for the benefit of" servicemembers).

Critically, both before and after the 1986 VRRA amendment, and since USERRA was enacted in 1994, the two laws have contained the phrase "because of" that the Committee says *must* be construed to mandate a sole cause test. *Monroe*, 452 U.S. at 557; Pub. L. No. 99-576, § 331 (1986). But as Plaintiff just showed, in 1986 and 1994 Congress rejected the notion that "because of" in the VRRA or in USERRA § 4311 allows a sole factor test to be applied and instead mandates a motivating factor test. The other factors identified above show 4311(b)'s "because of" language should be construed differently than similar language in Title VII and the ADEA.

f. <u>Even a But-for Causation Standard Does Not Mean Sole Cause, as There Can Still Be More than One But-for Cause of a Single Result</u>

As the motivating factor standard in USERRA § 4311(c) applies to Plaintiff's CAA/ USERRA claims, he need not meet a stricter standard of showing but-for causation. Yet, the Committee erroneously argues Plaintiff has the burden to show but-for causation, and that such a showing requires him to prove that unlawful motive was the sole cause of the challenged actions.

But even if a but-for burden applied—which it does not—Plaintiff would not be required to prove discriminatory or retaliatory motive was the sole cause of the challenged actions. After the Supreme Court decided *Gross* in 2009, the D.C. Circuit held but-for cause does not mean a plaintiff must prove discrimination was the sole cause. *See Ponce v. Billington*, 679 F.3d 840, 846 (D.C. Cir. 2012) ("[W]e never said—nor could we . . .—that a plaintiff in a *but-for* case must show that an adverse employment action occurred solely because of a protected characteristic."). And after *Gross* and *Nassar* circuits across the nation have agreed with the D.C. Circuit that "[t]he requirement of but-for causation . . . does not mean that the protected activity must have been the only cause of the adverse action. Rather it means that the adverse action would not have happened without the activity." *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 828 n.1 (7th Cir. 2014) (citing

Nassar, 133 S. Ct. at 2525).[18] Indeed, neither *Gross* nor *Nassar* held but-for cause means sole cause, and after these two cases courts in this Circuit have continued to hold "but for causation does not mean" that the discrimination "must be the *only* cause of the employer's action—merely that the adverse action would not have occurred absent" the discrimination.[19]

Finally, after both *Gross* and *Nassar*, the Supreme Court clarified in *Burrage v. United States*, 134 S. Ct. 881 (2014), that but-for causation requires showing that a particular reason "was the straw that broke the camel's back"—a test that is inconsistent with a sole cause rule. *Id.* at 888. *Burrage* explained under the "traditional understanding" of but-for causation at issue in *Nassar*, to qualify as a but-for cause, an antecedent need not be the exclusive cause of a result and may combine with other factors to produce the result. *Id*. So long as the other factors alone would not have produced the result, the antecedent would qualify as but-for cause of the result. *Id.* In other words, an antecedent would so qualify if "it was the straw that broke the camel's back." *Id.* Further, in quoting *Gross* and *Nassar*, *Burrage* replaced "the" with "a" in references to "the but-for cause," clarifying that but-for causation does not require a showing that a forbidden motive was ***the*** sole cause of a challenged employment action. *Id.* at 888-89. Unsurprisingly, the D.C. Circuit followed *Burrage* in explaining that just because "there could be a multiplicity of possible 'but for' causes does not mean that" one of those causes "fails to qualify as a 'but for' cause." *In re de Henriquez*, No. 15-3054, 2015 U.S. App. LEXIS 18024, at *3 (D.C. Cir. Oct. 16, 2015). Notably, none of the cases the Committee cites considered *Burrage*, which clarified the but-for causation standard.

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[18] *Accord Leal v. McHugh*, 731 F.3d 405, 415 (5th Cir. 2013) ("the district court misread *Gross*, since 'but-for cause' does not mean 'sole cause.'"); *Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 & n.5 (2d Cir. 2013); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 315-16 (6th Cir. 2012) (en banc); *Jones v. Oklahoma City Pub. Sch.*, 617 F.3d 1273, 1278 (10th Cir. 2010).

[19] *Farzam v. Shell*, No. 12-35 (RMC), 2015 U.S. Dist. LEXIS 166033, at *11-12 (D.D.C. Dec. 11, 2015); *accord Guerrero v. Vilsack*, No. 14-2107, 2015 WL 5729229, at *9 (D.D.C. Sept. 30, 2015)

g. Plaintiff's FAC Satisfies the Relevant Legal Standards, Regardless of Whether Statements Made Outside of the FAC Are Considered

The Committee does not dispute that Plaintiff can satisfy the motivating factor standard. If the Court holds the motivating factor standard applies, the motion to dismiss should be denied.

Even under a but-for analysis, there is no reason to dismiss Plaintiff's CAA/USERRA claims based on his public statements in October 2015 that he believed he was fired for two reasons: (1) his military service and protected activity and (2) his refusal to unduly focus his investigatory work on Secretary Clinton. As discussed above, it is possible for there to be more than one but-for cause of an adverse employment action. Indeed, the Committee does not contend Plaintiff told the media he would have been fired in the absence of the anti-military discrimination he suffered. And his FAC repeatedly alleges discriminatory and retaliatory actions were taken "because of" or "due to" his military service, making clear he believes these actions would not have been taken in the absence of anti-military discrimination or retaliation. FAC ¶¶ 25, 45, 80.

Under the but-for causation standard, Plaintiff has a right to take discovery and prove at trial that anti-military animus was ***a*** *but-for* cause of the adverse actions, *i.e.*, that anti-military animus "broke the camel's back." *Burrage*, 134 S. Ct. at 888. It would be proper for the Committee's lawyers to ask Plaintiff what he meant when he told the media he believed he was fired for two reasons—but it would be inappropriate for this Court to dismiss Plaintiff's claims that plausibly state a claim of anti-military discrimination. As described above, Plaintiff has strong direct and circumstantial evidence of anti-military bias, both of which he may rely upon to prove that anti-military discrimination was a but-for cause of the adverse actions. *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

2. Plaintiff's Retaliation Claim Against the Committee Should Not Be Dismissed

a. Plaintiff's CAA/USERRA Retaliation Claim is Plausible, as it Alleges Adverse Action Was Taken Because He Took Military Leave

As the Committee concedes, Plaintiff's retaliation claim is plausible and cannot be dismissed because he "allege[s] that he engaged in a third protected activity when he 'exercis[ed] his right to take military leave in March and May 2015." CM at 38 n.25 (quoting FAC ¶ 81 and citing FAC ¶¶ 20, 29). Indeed, retaliation against a servicemember who has "exercised a right" under USERRA violates of 38 U.S.C. § 4311(b), and there is no dispute that taking military leave is a right a servicemember may exercise under USERRA.

b. The Retaliation Claim May Also Rely on Later Acts to Enforce His Rights

Although the Committee agrees that Plaintiff pleaded a valid retaliation claim based on exercising his right to take military leave, it argues he cannot also base his retaliation claim on the USERRA complaint he lodged when he was told he would be fired in a month if he did not resign or his hiring a lawyer to enforce his USERRA rights. Contrary to this argument, Plaintiff's June 26, 2015 complaint and his hiring an attorney to enforce his USERRA rights are protected activities giving rise to a plausible retaliation claim. Indeed, he alleges the Committee *expedited* his firing by nearly 30 days in terminating him days after he complained about his USERRA rights being violated and his attorney contacted the Committee to try to resolve the dispute. FAC ¶¶ 45-49.

Unlike cases the Committee points to where an employee lost summary judgment when an employer implemented an earlier, irrevocable decision to terminate an employee (or moved up the termination date somewhat), *see, e.g.*, *Connell v. Bank of Boston*, 924 F.2d 1169, 1180 (1st Cir. 1991), and *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (cited by CM at 43), at the motion to dismiss stage Plaintiff is not required to plead a prima facie case, *Major v. Plumbers Local Union No. 5*, 370 F. Supp. 2d 118, 128 (D.D.C. 2005); *Swierkiewicz v. Sorema N. A.*, 534

U.S. 506, 512 (2002), and there is no suggestion that the June 26 ultimatum meant the Committee had actually decided to terminate him. Indeed, discovery may reveal the ultimatum was merely a threat and no final termination decision was made. The Committee also claims Plaintiff must prove it knew he hired an attorney to enforce his statutory rights to count as protected activities his hiring a lawyer and having the lawyer contact the Committee. CM at 44. But given the context of the Committee's imposing an ultimatum on June 26, followed by Plaintiff's immediate invocation of USERRA to protest the ultimatum, and his attorney's June 28 email referencing "the current situation," FAC at ¶¶ 45-48, the allegations adequately allege (or raise an inference) that the Committee would have understood the attorney's email related to Plaintiff's complaint that the Committee was violating his USERRA rights.[20]

C. The Court Should Deny Gowdy's Motion to Dismiss Plaintiff's Due Process Claim

As Gowdy acknowledges, "'[a] claim for deprivation of a liberty interest without due process based on allegedly defamatory statements of government officials . . . may proceed on one of two theories: a 'reputation-plus' claim or a 'stigma or disability' claim,'" *McGinnis v. District of Columbia*, 65 F. Supp. 3d 203, 213 (D.D.C. 2014) (quoting *Fonville v District of Columbia*, 38 F. Supp. 3d 1, 11 (D.D.C. 2014)), even when asserted by an at-will employee. GM at 12-13. In *McGinnis*, this Court recently summarized the two theories in the following manner:

> The reputation-plus theory is implicated when the government makes a charge against [the employee] that might seriously damage his standing and associations in the community, and does so in connection with a termination or other change in employment status. . . . The stigma theory relates to situations where a government action foreclosed [the employee's] freedom to take advantage of other employment opportunities.

[20] *Mitchell v. Baldrige*, 759 F.2d 80 (D.C. Cir. 1985), involved claims dismissed *during trial*, not the pleading stage, did not involve counsel contacting an employer, and only required proof *at trial* of employer knowledge of protected activity. *Id.* at 86. But the FAC alleges the Committee knew of Plaintiff's protected activities occurring on or after June 26. *Johnson v. Portfolio Recovery Assocs., LLC*, 682 F. Supp. 2d 560 (E.D. Va. 2009), is inapposite, as the employee did not complain about a violation of a specific law before the employee's lawyer contacted the employer about potential claims. *Id.* at 580.

McGinnis, 65 F. Supp. 3d at 213 (citations and internal quotations omitted).

Contrary to Gowdy's arguments, *see* GM at 19-40, Plaintiff has more than sufficiently pleaded a plausible due process claim based on the reputation plus or stigma plus theories.

1. A Potential CAA Retaliation Claim Does Not Bar a Due Process Claim

Gowdy argues that Plaintiff's due process claim based on the statements Gowdy made in October 2015 should be dismissed because those statements could also give rise to a CAA retaliation claim against the Committee and, thus, Plaintiff is trying to "circumvent" the exclusive remedial scheme "Congress already has provided to him." GM at 13-14. He asserts that CAA "Section 1317, like Title VII's anti-retaliation provision" protects former employees against post-termination "retaliatory conduct" such as "false, misleading or pejorative statements made to the press and others about a former employee's job performance," *id.* at 15-16, and thus Plaintiff's ability to pursue a CAA retaliation claim against the Committee for Gowdy's October 2015 statements bars his due process claim. *Id.* at 17-18. Gowdy also asserts the Court should construe the due process claim as a CAA retaliation claim and dismiss it on "two independent, dispositive grounds"—the Committee is the proper defendant for a CAA claim and Plaintiff did not exhaust his legal remedies by seeking counseling about Gowdy's statements. *Id.* at 16-17.

Gowdy's arguments are misguided. Plaintiff does not dispute Gowdy's October 2015 statements constitute *some* of the facts that could support *both* a due process claim and a CAA retaliation claim. But Gowdy overlooks that Plaintiff's due process claim is not simply a CAA retaliation claim restyled as a constitutional claim, and the basic facts Plaintiff must prove to prevail on his due process claim are not actionable under the CAA. In this Circuit, there is no basis to hold the potential for Plaintiff to bring a CAA retaliation claim that relies *in part* on Gowdy's October 2015 statements bars a due process claim that also relies *in part* on the same statements.

In *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405 (D.C. Cir. 1985), the D.C. Circuit explained that "federal employees may not bring suit under the Constitution for employment discrimination that is actionable" under a federal law, and affirmed a district court's dismissal of "constitutional claims that *simply restated claims* of racial, ethnic or other discrimination cognizable under Title VII, or claims of retaliation for the invocation of Title VII rights." *Id.* at 1415 (emphasis added). At the same time, however, the D.C. Circuit held that some of the plaintiffs' First Amendment claims were not precluded by Title VII because the facts underlying those claims would not necessarily be actionable under Title VII. *Id.* at 1415-16. Thus, for example, the plaintiffs' claim that the Library of Congress (their employer) had punished them "for their constitutionally protected criticisms of Library policies" was not barred by Title VII because they fell "outside the scope of Title VII." *Id.* at 1415. In drawing this distinction, the D.C. Circuit concluded that "Congress did not intend for Title VII to displace" "constitutional claims for which Title VII could not provide a remedy." *Id.* at 1416.

In *Butler v. West*, No. 94-2182 (TFH), 1997 U.S. Dist. LEXIS 1858, at *6-7 (D.D.C. Feb. 14, 1997), the Court applied *Boorstin* to hold a plaintiff's First Amendment claim was "outside the scope of Title VII and therefore is not barred by the exclusivity rules." As *Butler* explained, "[t]he key issue is whether an additional [constitutional] claim is 'outside the scope of Title VII.'" *Id.* at *7 (quoting *Ethnic Employees*, 751 F.2d at 1415). The Court held the First Amendment claim was outside the scope of Title VII, because the constitutional "claim does not rest on allegations of discriminatory animus, but on an alleged suppression of speech, expression, and association," and because "Plaintiff will have to prove separate elements and establish different facts to maintain her First Amendment claim than she will her Title VII ones." *Id.* at *7-8.[21]

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[21] In a later opinion in *Butler*, the district court dismissed the plaintiff's First Amendment claim as it concluded the claim could have been exhausted before a federal agency that had authority to hear the First

Here, Plaintiff has not "simply restated" a CAA retaliation claim as a constitutional claim or pleaded a due process claim that is clearly actionable under the CAA. *Ethnic Employees*, 751 F.2d at 1415. Instead, he has asserted a due process claim that involves significantly different elements than the potential CAA retaliation claim he could choose to file, but is not necessarily actionable under the CAA. And to prove these two claims, Plaintiff would need to prove quite different facts. Thus, the potential for Plaintiff to bring a CAA retaliation claim does not bar Plaintiff's due process claim. *See id.*; *Butler*, 1997 U.S. Dist. LEXIS 1858, at *6-7.

To prevail on his due process claim, he must prove that his employment status changed (*e.g.*, he was terminated) and Gowdy made defamatory statements about him that damaged his reputation and/or stigmatized him in a way that foreclosed permanent employment in his chosen field. *McGinnis*, 65 F. Supp. 3d at 213. But these elements do not require Plaintiff to prove he engaged in any sort of protected activity or that Gowdy's statements were made in retaliation against Plaintiff's protected activity. *See id.* On the other hand, to prevail on a potential CAA retaliation claim, Plaintiff must prove he engaged in protected activities *and* his employer made disparaging comments about him in retaliation against his activities that are protected by the CAA. 2 U.S.C. 1317(a). And to prevail, Plaintiff need not prove that he was terminated. *See id.* (only mandating a plaintiff oppose practices that are unlawful under the CAA, not that plaintiff was terminated); GM at 15-16 (collecting cases where retaliation occurred without a termination)

As the elements of the Due Process and CAA retaliation claims are so different, proving

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Amendment claim and the federal agency did, in fact, consider the merits of Plaintiff's First Amendment claims. *See Butler v. West*, 1997 U.S. Dist. LEXIS 18721 (D.D.C. Nov. 12, 1997). But the D.C. Circuit reversed the conclusion that the plaintiff should have exhausted his First Amendment claim, as well as the dismissal of the constitutional claim, and remanded for further proceedings. It also suggested that if there is a question about whether the plaintiff should exhaust a claim under a federal statute the Court could "stay the case, or hold it in abeyance, for a reasonable period of time" for the federal agency to make an initial determination in the first place. *Butler v. West*, 164 F.3d 634, 643 (D.C. Cir. 1999).

them will turn on significantly different facts. Most significantly, Plaintiff's Due Process claim will merely require him to show that Gowdy made defamatory statements about him, while a potential CAA claim would require Plaintiff to show that Gowdy's statements *were motivated by protected activity that Plaintiff engaged in* before those statements. By dismissing Plaintiff's Due Process claim as a restyled CAA retaliation claim, this Court would be improperly forcing Plaintiff to prove facts and elements that he would never otherwise be required to prove in this proceeding.

Furthermore, by enacting the CAA and its retaliation provision, Congress clearly did not intend to regulate or make actionable all, or even most, derogatory statements Congressional offices or members make about their former employees, including most statements of retaliation against employees. *See Ethnic Employees*, 751 F.2d at 1415-16. In CAA Section 1317, Congress made clear that retaliation against Congressional employees is *actionable* under CAA § 1317 *only if* the action was taken against "any covered employee because the covered employee has opposed any practice made unlawful *under this chapter*, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter." 2 U.S.C. 1317(a). Of course, the only practices that are unlawful under the CAA are violations of 11 federal civil rights and employment laws that Congress incorporated into the CAA, and the only proceedings that can be pursued under the CAA relate to violations of the same 11 statutes. *See* 2 U.S.C. 1302(a)(1)-(12) (identifying eleven federal statutes that "shall apply, as prescribed by this chapter, to the legislative branch"). As a result, any derogatory statement made about a Congressional employee that is not made in retaliation for the employee opposing violations of these 11 statutes receives *no protection* under the CAA.[22] Thus,

[22] For example, if an employee complained that a Congressional office was violating the Hatch Act, and the Congressional employer disparaged the employee in retaliation for speaking out about the Hatch Act violation, the CAA's retaliation provision would not apply to the derogatory statements.

it is clear Congress did not intend to displace due process claims that require different elements and facts than CAA retaliation claims. *See Ethnic Employees*, 751 F.2d at 1415-16.

Because the CAA is not the exclusive scheme for Plaintiff to challenge Gowdy's derogatory statements, there is no basis for construing Plaintiff's due process claim as a CAA retaliation claim that must be dismissed for failure to exhaust under the CAA or for naming the wrong employer, as Gowdy contends. GM at 16-17.

2. <u>Plaintiff Has Sufficiently Pleaded a Plausible Reputation-Plus Claim</u>

a. <u>Plaintiff Sufficiently Alleges Gowdy Falsely Accused Him of an Act That Would be Perceived as a Serious Crime or That Could Give Rise to One</u>

Gowdy argues that to plead a reputation-plus claim Plaintiff must allege more than defamation related to Plaintiff's job performance—that he must allege defamation that "'call[s] into serious question those personal characteristics that are central or enduring in nature,' such as 'accusations of dishonesty, the commission of a serious felony, manifest racism, serious mental illness, or lack of intellectual ability.'" GM at 21 (quoting *Fonville*, 38 F. Supp. 3d at 14 (quoting *Alexis v. District of Columbia*, 44 F. Supp. 2d 331, 339 (D.D.C. 1999))).

Plaintiff does not dispute this is the reputation-plus standard. But as Plaintiff's Complaint alleges, Gowdy's defamatory statements went far beyond mere job performance and extended to accusations of serious criminal conduct that could result in a felony prosecution or conviction. FAC ¶¶ 59-62, 63 & n.10. When Gowdy spoke to the national press, instead of explaining what the Committee actually accused Plaintiff of doing—sending an e-mail to other Committee staffers containing information the Committee thought was sensitive—he declared without qualification, that Plaintiff was terminated because he "mishandled classified information." *Id.* ¶ 60.

A reasonable person hearing Gowdy's statement could easily believe the act Plaintiff was accused of committing was a serious federal crime. It has become common parlance in the national

media to equate mishandling of classified information with committing a serious federal crime (or, at least, an act that could give rise to such a crime). Indeed, over the past couple of years this same phrase "mishandling classified information" has been used to describe the federal crime to which General David Petraeus pleaded guilty and the conduct of former Secretary of State Hillary Clinton that the Federal Bureau of Investigation is investigating as a potential federal crime.[23] In fact, former Attorney General Michael Mukasey repeatedly used the phrase "mishandling classified information" as a shorthand to describe crimes for which he believes Secretary Clinton should be prosecuted.[24] Moreover, Gowdy made clear to the media that the alleged security incident was serious enough to terminate a staffer who spent decades working on national security issues, and Gowdy made no effort to downplay the incident as a minor infraction. Gowdy's statements had exactly the effect he intended, or knew would occur, to permanently smear Plaintiff's reputation.

In light of this popular understanding that equates "mishandling classified information" with committing a serious federal crime, by repeatedly making the unqualified statement that

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[23]*See, e.g.*, John R. Schindler, *Hillary Has an NSA Problem*, the Observer (Mar. 18, 2016), http://observer.com/2016/03/hillary-has-an-nsa-problem/ (discussing whether the Federal Bureau of Investigation will "recommend[] prosecution of [Secretary Clinton] or members of her inner circle for mishandling classified information—which is something the politically unconnected routinely do face prosecution for"); Tara McKelvey, *Could Hillary face the same fate as David Petraeus*, BBC.com, http://www.bbc.com/news/world-us-canada-35722882 (Mar. 15, 2016) ("Petraeus pleaded guilty last year to . . . mishandling classified information" and stating that "[r]evealing classified information is a crime"); Stephen Dinan, *Trey Gowdy puts limits on Democrats' access to Benghazi probe*, Washington Times (Mar. 16, 2016), http://www.washingtontimes.com/news/2016/mar/16/trey-gowdy-limits-democrats-access-to-benghazi-pro/?page=all (stating that "both the FBI and the State Department inspector general are reviewing whether classified information was mishandled" by Clinton).

[24]Michael B. Mukasey, *Clinton's Emails: A Criminal Charge is Justified*, Wall Street Journal (Jan. 21, 2016), http://www.wsj.com/articles/clintons-emails-a-criminal-charge-is-justified-1453419158 ("[t]he FBI's criminal investigation of messages on the server initially related solely to Mrs. Clinton's possibly unlawful mishandling of classified information," and now "it is nearly impossible to draw any conclusion other than that she knew enough to support a conviction at the least for mishandling classified information"); *see also* Ed Morrisey, *Former AG: It's time to charge Hillary*, HotAir.com (Jan. 23, 2016) ("According to former Attorney General Mukasey, it's time for Loretta Lynch and the Department of Justice to do their jobs and charge Hillary Clinton with mishandling classified information").

Plaintiff "mishandled classified information," Gowdy "indicat[ed] that [Plaintiff] was terminated . . . for criminal conduct . . . as distinct from performance," the former of which "affect[s] a plaintiff's liberty interest." *Fonville*, 38 F. Supp. 3d at 14-15 (citing *Mazaleski v. Treusdell*, 562 F.2d 701, 714 (D.C. Cir. 1977)). Such a statement is far more damaging to an employee's professional reputation than a statement that an employee engaged in "'unacceptable' behavior during a single incident in which he lost his temper and exercised poor judgment." *Id.* In the latter case, there is no suggestion or implication that the employee committed a serious crime.

Gowdy suggests that because he made a general statement about Plaintiff mishandling classified information it would be unreasonable for the public to believe a federal crime may have been committed. GM at 22-23. But Gowdy cites no cases where a statement that a federal employee mishandled classified information was deemed to be so general that a reasonable person could not believe it was a crime. Nor does he offer any authority to support his suggestion that the failure of the speaker to identify specific facts that satisfy all the elements of a criminal law precludes a reputation-plus claim. *See id.* at 22-23 & n.19. If this were the law, Gowdy could *falsely* state that "after drinking heavily in the Committee office on Wednesday afternoon, Staffer A shot staffer B"; but by omitting details on Shooter A's intent or whether he acted in self-defense, the alleged shooter could not bring a reputation-plus claim. Such an assertion is absurd and would give federal employers license to make highly damaging, general statements about their former employees that destroy their reputations and stigmatize them.[25]

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[25]Gowdy suggests Plaintiff's claim cannot rely on statements of Committee staffers, as Plaintiff must allege Gowdy was "personally involved in the illegal conduct," *Debrew v. Atwood*, 792 F.3d 118, 131 (D.C. Cir. 2015) (cited by GM at 22-23 n.18). But the FAC plainly alleges Gowdy *was* personally involved in *all* the illegal conduct, including a one-on-one interview with NBC where he said Plaintiff "mishandled classified information" and a release containing the same statement. FAC ¶¶ 58-60. Thus, Plaintiff alleges Gowdy was "personally involved in the alleged constitutional violations," such that he can be held personally liable under *Bivens* without the need to rely on a respondeat superior theory. *Id.*

b. <u>Gowdy's Defamatory Statements Did Accompany Plaintiff's Termination</u>

Gowdy argues his defamatory statements did not accompany Plaintiff's termination, because Plaintiff resigned or was constructively discharged (*i.e.*, not terminated), and because he made the statements several months after Plaintiff resigned and/or was terminated. GM at 24-28.

Gowdy is wrong on both points. Plaintiff's FAC specifically alleges he was terminated in late June 2015. FAC ¶ 49 ("On June 29, 2015, Plaintiff was summoned to Kiko's office. Kiko and Donesa were both present. Plaintiff was terminated and ordered to leave the Majority Staff office immediately."). These factual allegations must be accepted as true at the pleading stage. *McGinnis*, 65 F. Supp. 3d at 216. Thus, there is no basis for Gowdy's claim that Plaintiff was never terminated. Furthermore, while Gowdy points to a resignation letter Plaintiff allegedly sent to Gowdy in July 2015, Gowdy offers no legal authority to suggest there is any legal impact of an employee's resignation that occurs *after* he was terminated.

Moreover, as this Court recently explained, a constructive discharge – which Plaintiff alleges as an alternative to his termination allegation, FAC ¶¶ 70, 79-82, 93-95 – can be "as stigmatizing as an actual, 'official' termination"; the D.C. Circuit has never held that a constructive discharge or a forced resignation cannot give rise to a reputation-plus claim; and "the only circuit court to have squarely addressed the issue held that an involuntary termination *would* count as an adverse action" if the plaintiff can prove a constructive discharge occurred. *Jefferson v. Harris*, No. 14-1247 (JEB), 2016 U.S. Dist. LEXIS 35685, at *28-30 (D.D.C. Mar. 21, 2016) (following *Hill v. Borough of Kutztown*, 455 F.3d 225, 233 n.10 (3d Cir. 2006)). Likewise, an involuntary resignation can give rise to a reputation-plus claim. *Id.* at *31-32.

Plaintiff's allegations more than satisfy the standards for constructive discharge or involuntary resignation, either of which can be proven by showing the resignation was obtained

by coercing or misrepresenting information to the employee. *See id.* at *30-32.[26]

Furthermore, there is no bright-line rule that the defamation must occur immediately after the termination to give rise to a reputation-plus claim. As Gowdy admits, the D.C. Circuit has not established a ceiling on the amount of time that may transpire between the termination and the defamation to give rise to a reputation-plus claim, but most circuits have applied the so-called "roughly contemporaneous" standard. GM at 25-26. Under that "roughly contemporaneous" standard, the "publication of defamatory statements need not be strictly contemporaneous with a termination to occur in the course of the termination of employment." *Renaud v. Wyo. Dep't of Family Servs*., 203 F.3d 723, 727 (10th Cir. 2000) (cited by GM at 25-26 n.22). And in applying this test, what really matters is "the nature and timing of an allegedly defamatory statement" to determine whether the statements were made "incident to the termination." *Id.* (citations and internal quotations omitted). Thus, if the defamatory statements are directly connected to the termination by stating the "reason for his termination," the amount of time between the termination and the statements is less consequential. *See id.*

Therefore, when a defamatory statement identifies the reason for terminating an employee, as Gowdy did here, a gap of months between a termination and the defamation *does not* bar a reputation-plus claim. In such a case "a jury could conclude the statements were made in the course of [an employee's] termination." *Coleman v. Burns*, No. 2:10-cv-1186-TC, 2015 U.S. Dist. LEXIS

[26]Plaintiff alleges he was told he had to resign or he would be fired in 30 days, and that he had no choice other than termination or resignation; and his resignation (to the extent he resigned) was the product of his employer misrepresenting information to him, as he was told the Committee was terminating him for mishandling classified information, even though the Committee's security manager previously conceded he had not mishandled classified information. *See* FAC ¶¶ 42-45; *Jefferson*, 2016 U.S. Dist. LEXIS 35685, at *31-35 (denying motion to dismiss reputation-plus claim where plaintiff alleged the employer made allegations against the employee, alleged the employer told him he had to resign or be terminated, and "alleged that the government knew or should have known the reasons underlying his termination were unsubstantiated," and citing *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987)).

111100, at *18-19 (D. Utah Aug. 20, 2015) (applying roughly contemporaneous standard under *Renaud*, 203 F.3d at 727, and holding a two-month gap can give rise to a liberty interest claim).

Rather than drawing a bright-line rule that defamation must occur within a certain period after a termination, what ought to matter, when evaluating a reputation-plus claim, is that the employer offers a defamatory statement as the official reason for the termination *the first time* the employer publicly discloses why the employee was fired. As *Peter B. v. C.I.A.*, 620 F.2d 58 (D.D.C. 2009), explained, when an employer publicly discloses a stigmatizing reason for a termination, "although the defamation has occurred after the status change, it is nonetheless accompanying the status change if it is being offered as the official reason for the status change." *Id.* at 72 (citing *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1113 (D.C. Cir. 1985)).

Indeed, in this case there was no public disclosure of Plaintiff's termination until around October 2015, when Gowdy first went to the national media and unequivocally stated that the official reason Plaintiff was fired was he "mishandled classified information." FAC ¶¶ 57-60. As reputation-plus claims focus on how the defamatory statements harm an employee's liberty interest in his professional reputation, *McGinnis*, 65 F. Supp. 3d at 213, it should make no difference whether Gowdy's statements came days or even several months after Plaintiff's termination, as the first time the public learned of Plaintiff's termination, Gowdy went out of his way to destroy Plaintiff's reputation and standing in the community by suggesting he committed a federal crime.

While Gowdy points to the D.C. Circuit's statement that "the conceptual basis for reputation-plus claims . . . presumably rests on the fact that official criticism will carry much more weight if the person criticized is at the same time demoted or fired," *O'Donnell v. Barry*, 148 F.3d 1126, 1140 (D.C. Cir. 1998), *O'Donnell* did not purport to adopt a requirement that reputation-plus claims may only be brought where the termination and defamation occurred at the "same

time." *Id.* Moreover, this case illustrates how when a defamatory statement about the reason for a termination is particularly harsh and broadcast nationally – here a Congressman making false statements to the national media about Plaintiff mishandling classified information – a gap of weeks or months does nothing to diminish the weight of the criticism.

Finally, while Gowdy asserts two out-of-circuit district court cases held defamation cannot accompany a termination when it responds to an employee's own public statement, GM at 27, the remarks in those opinions about employees first speaking with the media are, at best, dicta, and do not stand for the proposition that a plaintiff's decision to speak with the media absolutely bars a due process claim.[27] In any event, those cases should not be followed. To accept the argument that Plaintiff cannot bring a due process claim solely because he spoke to the media about his termination before or around the same time that Gowdy spoke to the media would require Plaintiff to surrender his First Amendment rights—including the right to speak publicly about misconduct by a congressional committee—in order to preserve his due process right to not have his reputation destroyed without adequate process. But it is well accepted that a party should not be forced "to choose to give up one constitutional right in order to ensure that another is protected." *Garcia v. State*, 429 S.W.3d 604, 614 (2014) (collecting federal court cases). "Such a Hobson's choice is actually no choice at all." *Smith v. Grams*, 565 F.3d 1037, 1046 (7th Cir. 2009).

3. <u>Plaintiff Has Sufficiently Alleged a Plausible Stigma-Plus Claim</u>

Contrary to Gowdy's claim, Plaintiff's stigma-plus claim does not rely solely upon

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[27] In *Ogburn v. Elrod*, No. 87 C 4492, 1989 U.S. Dist. LEXIS 2644 (D. Ill. Mar. 10, 1989), the Court denied the due process claim because the statements came nearly six months after the plaintiff's termination, but noted parenthetically that the statements were made after the plaintiff made his own statements. *Id.* at *6-7. Likewise, in *LaForgia v. Davis*, No. 01 Civ. 7599, 2004 U.S. Dist. LEXIS 25143 (S.D.N.Y. Dec. 14, 2004), the Court rejected the claim based on the court's view that the statements had to be exactly "concurrent with plaintiff's termination" and the comments to the media "were after" the termination, before observing that the remarks were made in response to the employee's interview. *Id.* at 25-26.

Gowdy's defamatory statements that were intended to stigmatize Plaintiff. GM at 28. In his Complaint, Plaintiff alleges he was terminated by the Committee, and that allegation is expressly incorporated into his due process claim. *See* FAC ¶ 92 (incorporating all prior paragraphs into Plaintiff's due process claim for reputation-plus and stigma-plus); FAC ¶ 99 (relying on the "same allegation described above" in specifically describing Plaintiff's stigma-plus claim).[28]

Furthermore, there is no basis to dismiss a stigma-plus claim at the pleading stage based on a defendant's speculation that the plaintiff's difficulty obtaining future employment "might easily be explained in other ways." *Taylor v. Resolution Trust Co.*, 56 F.3d 1497, 1506-07 (D.C. Cir. 1995) (cited by GM at 29). *Taylor* did not involve a motion to dismiss, but instead a preliminary injunction that was decided against the plaintiff because he failed to carry his "burden of persuasion" in proving the merits of his stigma-plus claim where *all* the plaintiff offered was "as a simple assertion that he has been unable to find employment in his chosen field." *Id.* at 1507. As the plaintiff offered so little evidence to support a preliminary injunction motion, it was no surprise that the Court observed that plaintiff's difficulty finding work "might easily be explained in other ways in light of his record" at his prior job. *Id.* But by making this observation in denying a preliminary injunction, *Taylor* did not suggest an employer's alternative explanations could trump a plaintiff's well-pleaded allegations on a motion to dismiss.

Likewise, Gowdy's reference to *Mosrie v. Barry*, 718 F.2d 1151, 1161 (D.C. Cir. 1983), is highly misleading. In *Mosrie*, the D.C. Circuit merely held "[t]he reaction of others to unfavorable publicity about [him]" could not give rise to a stigma-plus claim *where the plaintiff had not alleged that he had been terminated from government employment.* 718 F.2d at 11262. Thus, *Mosrie* has

[28] For the same reasons stated above with respect to Plaintiff's reputation-plus claim, the Court should reject Gowdy's repeated argument that the amount of time between Plaintiff's termination and Gowdy's statements bars the stigma-plus claim. The cases cited by the parties with respect to this issue apply the same standards for reputation-plus and stigma-plus claims. *See supra* at 53-55.

no applicability to this case where *Plaintiff alleges he was terminated*. Moreover, the only decision Gowdy cites where a court applied the "unfavorable publicity" language from *Mosrie* is *Doe v. Rogers*, No. 12-01229 (TFH), 2015 U.S. Dist. LEXIS 138225 (D.D.C. June 17, 2015), where the plaintiff *did not allege* he was terminated. *Id.* at *106-07. In fact, in the same passage where *Doe* referenced *Morsie's* publicity language, *Doe* noted the plaintiff had not alleged "government action that changed [his] status," such as termination. *Id.*

Furthermore, the Court should reject Gowdy's argument that Plaintiff's stigma-plus claim must fail because he allegedly spoke to the media before or around the same time as Gowdy. The cases Gowdy cites for this proposition are inapposite and show why Gowdy's aggressive, defamatory statements *do give rise to a stigma-plus claim*. In *Walsh v. Suffolk Cnty. Police Dep't*, No. 06-cv-2237, 2008 U.S. Dist. LEXIS 36465 (E.D.N.Y. May 5, 2008), the case upon which Gowdy principally relies, the Court denied a plaintiff's stigma-plus claim on summary judgment because *the defendant never spoke to the media about the plaintiff*, and thus any public airing of stigmatizing allegations was entirely the responsibility of the plaintiff. *Id.* at *36-37 ("although highly criticized in the article, [the employer] refused to comment on plaintiff's situation"). In fact, it summarized the rejection of the stigma-plus claim by stating "it is uncontroverted that defendants never disclosed the stigmatizing statements to any third party." *Id.* at *3; *see also id.* at *33.[29]

In contrast to the employer in *Walsh* who never publicly disclosed stigmatizing information, Gowdy released written statements and conducted interviews with the national media where he directly targeted Plaintiff and stated that he was terminated for mishandling classified

[29] In the appeal in *Walsh* the plaintiff did not raise the issue of the statements to the media. Thus, the Second Circuit did not address them and reached the uncontroversial conclusion that the communication the plaintiff challenged (reports in the employer's files) could not give rise to a stigma-plus claim as they were never made public. *Walsh v. Suffolk County Police Dep't*, 341 F. App'x 674, 675 (2d Cir. 2009).

information. FAC ¶¶ 56-60.

Further, while Gowdy suggests that Plaintiff acknowledged in media interviews that he was insubordinate, Plaintiff's due process claim is not based on Gowdy's assertion that Plaintiff was insubordinate. Instead, the claim is based on Gowdy's false statement that Plaintiff mishandled classified information—a charge Plaintiff vigorously denied and identified as a trumped up, pretextual charge to cover up the Committee's discrimination. FAC ¶¶ 58, 64, 66, 96, 100; Dkt. No. 29-1, 2. If Gowdy had not told the media that Plaintiff had actually mishandled classified information, the stories would have merely presented the security incident as a false, pretextual reason for firing Plaintiff that was contrary to what actually happened. But telling the media that Plaintiff *did* mishandle classified information transformed the story from a non-stigmatizing one into a highly stigmatizing one that millions of people heard. FAC ¶¶ 57-60 & nn. 4-7.

Next, Gowdy argues that Plaintiff has not adequately alleged broad preclusion from future employment due to his termination and Gowdy's stigmatizing statements. GM at 31-35.

Contrary to Gowdy's suggestion, Plaintiff is not merely claiming stigma based on his termination, *id.* at 32, but based on his termination *and* Gowdy's defamatory statements that seriously impaired future employment opportunities in Plaintiff's chosen field in which his ability to be trusted with classified information is critical. In fact, Plaintiff specifically alleges:

> Gowdy widely published and publicized the false and defamatory statements about Plaintiff, including the statement that he mishandled classified information, with the purpose and knowledge that making such false statements would cause future employers in the federal government and the private sector to ascribe to Plaintiff a stigma or disability that he cannot be trusted with classified, sensitive, or confidential information, and that would make it exceedingly more difficult for Plaintiff to obtain future employment in the fields in which he has considerable education and experience. [T]he stigma that [] Gowdy intentionally imposed upon Plaintiff with the goal of impugning his personal and professional reputation has imposed a major roadblock to Plaintiff's obtaining full-time employment in the short run and, most likely, in the long run.

FAC ¶ 100. As *McGinnis* held, "[a]t the motion to dismiss stage, allegations that a termination 'denigrated the plaintiff's professional competence and impugned his personal reputation in such a fashion as to effectively put a significant roadblock in his ability to obtain other employment,' are sufficient." 65 F. Supp. 3d at 215 (quoting *Holman v. Williams*, 436 F. Supp. 2d 68, 80 (D.D.C. 2006)). That is precisely what Plaintiff alleges in Paragraph 100 of the FAC, as well Paragraph 96, where he explains he applied to return to his prior employer of 17 years and 12 other positions in the Air Force, but has not been hired for any of those positions.

Contrary to Gowdy's suggestion, GM at 33, it is not necessary for Plaintiff to allege his employment applications were formally rejected. In *McGinnis*, while the Court stated "she must allege that she has applied for and been rejected from other positions in her field," 65 F. Supp. 3d at 215, it held the plaintiff's "allegations *[we]re sufficient* to state a claim" where she "assert[ed] that she has 'applied for numerous positions in law enforcement, but *has not been hired* by any law enforcement agency." *Id.* (quoting amended complaint). Thus, it is sufficient that Plaintiff has alleged he applied to "return to his prior employer" for whom he worked "for more than 17 years" but has not been hired, and he "has applied for twelve other full-time positions in the Air Force, but has not yet been hired for any of those positions." FAC ¶¶ 96.[30]

Furthermore, that Gowdy points to other cases where plaintiffs offered more specific allegations about how they had not been hired in jobs in their field, GM at 34 & n.31, does not mean Plaintiff's specific factual allegations – accepted as true – do not state a plausible stigma-plus claim. Contrary to Gowdy's suggestion that Plaintiff has not alleged a change in his status, *id.* at 34 & n.32, Plaintiff *does* allege a change of his status due to his termination. FAC ¶¶ 92, 99.

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[30] To the extent the Court concludes Plaintiff must identify a larger number of permanent positions he applied for, and/or specify whether those positions were in his chosen field, the Court should grant Plaintiff leave to identify additional facts that have occurred *after* the filing of the FAC.

Nor is Gowdy correct that a plaintiff's ability to obtain a single temporary position constitutes an absolute bar to a plaintiff's stigma-plus claim. GM at 33. The only case law he cites shows the opposite is true. In *Alexis v. District of Columbia*, 44 F. Supp. 2d 332 (D.D.C. 1999), the Court *denied* the employer's summary judgment motion with respect to plaintiffs who had a single temporary position, but granted the motion with respect to plaintiffs who had multiple temporary positions. *Id.* at 342. In *Payne v. District of Columbia*, 4 F. Supp. 3d 80 (D.D.C. 2013), the Court recognized the same distinction from *Alexis* between employees who had *multiple* temporary positions and those who did not, and thus granted an employer's summary judgment motion where a plaintiff secured multiple temporary positions in "his chosen profession." *Id.* at 92-93.[31] Just as the plaintiffs in *Alexis* who survived summary judgment, the FAC only identifies a single temporary job with the Air Force since he was terminated in June 2015. FAC ¶ 9. Thus, there is no basis to bar his claim based on a single temporary position.[32]

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[31] Gowdy's invocation of *McGinnis* is also highly misleading and inapposite. GM at 33. There, the Court stated that a plaintiff "cannot have obtained a similar job after her termination," but the only case it cited for that proposition was *O'Donnell*, 148 F.3d at 1142, where the plaintiff obtained another permanent position as the "Chief of Police of Brunswick, Maryland." *Id.* at 1132, 1142.

[32] Nor is there any basis to Gowdy's assertion that there is no "temporal nexus between his inability to secure his reemployment and Chairman Gowdy's statements" because Plaintiff does not state exactly when he applied to work for the federal defense agency where he previously worked. GM at 35. Based on the context of Plaintiff's allegations regarding his attempt to return to the defense agency and how he has been "unable to secure future employment there due to the damage to his reputation as a result of Chairman Gowdy's false and defamatory statements in conjunction with Plaintiff's termination," it is implicit, and can be inferred, that Plaintiff applied *after* Gowdy's October 2015 statements. As this Court noted, "[o]n a motion to dismiss for failure to state a claim, the Court . . . must grant Plaintiffs the benefit of all inferences that can be derived from the facts alleged." *Clayton v. District of Columbia*, 117 F. Supp. 3d 68, 73 (D.D.C. 2015). Nor is the temporal proximity standard for a Title VII retaliation claim relevant to Plaintiff's claim, as that standard focuses on inferring proximity between an employee's protected activity and the employer's retaliation. *Id.* at 77-78. In contrast, here Plaintiff alleges that *Gowdy, his former employer*, prevented Plaintiff from obtaining *future employment*.

4. **Plaintiff Was Not Required to Request a Name-Clearing Hearing**

Gowdy also asks the Court to dismiss the due process claim because Plaintiff did not formally request a name-clearing hearing before Gowdy terminated and defamed him. GM at 35-38. Contrary to Gowdy's view, there is not an open question in this Circuit over whether a plaintiff must formally request a name-clearing hearing. The D.C. Circuit has held that *the employer* has an "obligation to offer" a name-clearing hearing to the employee before defaming him, even in a case where the employee has not requested one. *Lyons v. Barrett*, 851 F.2d 406, 410 (D.C. Cir. 1988).[33] Thus, where a complaint merely does not "state[] or impl[y]" that the "plaintiffs did not receive [name-clearing] hearings, the court cannot say that the complaint fails to state a due process claim[.]" *M.K. v. Tenet*, 99 F. Supp. 2d 12, 28 (D.D.C. 2000).

Here, as Gowdy was obligated to provide Plaintiff a name-clearing hearing before terminating and defaming him, and as Plaintiff's FAC does not state or imply he received such a hearing, the Court cannot dismiss his due process claim. And even if there was a rule that required a plaintiff to at least implicitly notify an employer that he wants a name-clearing hearing—which there is not[34]—this Court may infer that Plaintiff implicitly sought a name-clearing hearing via his efforts to inform the Committee about the truth of the alleged security incident, his attorney's attempt to resolve the dispute with the Committee in late June 2015, and Plaintiff's efforts to

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[33] Other Circuits agree with the D.C. Circuit. *See, e.g.*, *Eames v. Logan*, 762 F.2d 83, 86 (10th Cir. 1985) ("Plaintiff's failure to earlier request a name-clearing hearing does not defeat his claim. He may still be entitled to a hearing if he can prove at trial that his liberty interest was indeed violated."); *cf. Hill v. Borough of Kutztown*, 455 F.3d 225, n. 19 (3rd Cir. 2006) ("[W]e have not held that [a plaintiff is] required to" "request[] any sort of name-clearing hearing").

[34] While *O'Donnell* stated there is "no need for a plaintiff to make [a] request explicitly" for a "nameclearing hearing," "so long as it is reasonably clear that what the plaintiff complains of includes the lack of a hearing," 148 F.3d at 1140 n.4, Gowdy appears to acknowledge that courts understand *O'Donnell* to merely be saying a plaintiff's *complaint* need not expressly request a name-clearing hearing to assert a due process claim. GM at 36 n.34; *Winskowski v. City of Stephen*, 442 F.3d 1107, 1111 (8th Cir. 2006). In other words, *O'Donnell* did not hold an employee must implicitly request a name-clearing hearing before he is defamed.

mediate the dispute. FAC ¶¶ 39-42, 45-47, 51-55; *Ersek v. Township of Springfield*, 102 F.3d 79, 84 n.8 (3d Cir. 1996) (communication by attorney to employer on employee wanting to respond to claims could be construed as a request for a hearing).

5. Plaintiff Did Not Receive All the Process he Deserved

Gowdy also argues Plaintiff received all the process that he was due, as the Committee's security manager investigated the alleged security violation and Plaintiff had an opportunity to speak with the security manager about the alleged violation. GM at 38-40. But (*assuming arguendo* that the investigation was not pretext for bias), the fact that the Committee's security manager conducted an informal investigation – without an independent investigator or adjudicator – does not mean Plaintiff received adequate process. In *Jefferson*, where the Department of Labor had its independent Office of the Inspector General conduct an investigation of an employee's alleged misconduct, the Court rejected the suggestion that such process was adequate. "The fact that some process was afforded" to an employee during the initial part of the OIG's investigation "does not obviate the need for additional process further down the line." *Jefferson*, 2016 U.S. Dist. LEXIS 35685, at *39. Likewise, in *Doe*, the D.C. Circuit held it was necessary to provide something "approximating a 'hearing'" between the time an employer "completed its investigation and decide to terminate [the plaintiff]." 753 F.2d at 1112 n.3.

Here, as in *Doe*, Plaintiff was not afforded any process between the completion of the Committee's informal investigation and its decision to terminate Plaintiff. *Id.*; FAC ¶¶ 39-49. And here, to an even greater extent than in *Jefferson*, it was necessary for there to be a more formal process than the informal, initial investigation the Committee's security manager undertook—particularly since, as the FAC alleges, the security manager was "poorly trained" and "completely disregarded the most basic security management procedures." *Id.* ¶ 41.

In any event, although the Committee's security manager conceded that Plaintiff had *not* mishandled classified information, the Committee's staff director decided to overrule or disregard that finding and terminated Plaintiff over the security incident without any further process. *Id.* ¶¶ 42-46. If the Committee was going to change its view of the security incident and *terminate* Plaintiff on that ground, Plaintiff was entitled to some process during the period in which the staff director reversed the decision. But Plaintiff received none, and was never even informed of the reason why the Committee reversed its initial conclusion that there was no wrongdoing. In fact, when Plaintiff's attorney reached out to the Committee to better understand the Committee's position, the Committee expedited Plaintiff's termination by nearly a month and refused to provide Plaintiff any opportunity to challenge the security allegations. *Id.* ¶¶ 46-49.[35]

Finally, the Court should reject Gowdy's assertion that Plaintiff received all the process he was due because he sought counseling and mediation before the Office of Compliance on his CAA claims against the Committee (or because he could possibly file a new CAA retaliation claim with the Office of Compliance). GM at 40. The D.C. Circuit has rejected the same argument under similar circumstances. In *Lyons*, the D.C. Circuit held a district court "was correct in holding that the EEO proceeding that [the plaintiff] had as a result of his complaint of racial discrimination did not constitute a name-clearing hearing," as that proceeding "did not address allegations he made against [his employer], and did not afford him a direct opportunity to answer the defamatory charges raised against him." 851 F.2d at 410. The same is true here, as the Office of Compliance

[35] Furthermore, where a plaintiff contends the "legal conclusions" the employer reached were "incorrect," "it would seem obvious that additional protections were required – viz, an opportunity to clear his name." *Jefferson*, 2016 U.S. Dist. LEXIS 35685, at *39-40. Here, Plaintiff vigorously disputes the Committee's legal conclusion that writing an e-mail that solely contains widely available public information constitutes mishandling classified information. Thus, it is "obvious" that greater process was needed so that Plaintiff could clear his name and show the Committee's leadership that there was no such mishandling.

serves the same prophylactic purpose as federal EEO offices that investigate and conciliate discrimination charges, and in this case the Office of Compliance did not offer Plaintiff any opportunity to address or confront his employer over the security incident.[36]

6. Gowdy Can Be Sued for Violating Plaintiff's Due Process Rights

The Court should reject Gowdy's arguments about why he cannot be sued in an individual capacity for the due process violations. GM at 40-41. First, Gowdy argues he cannot be sued in an individual capacity because Plaintiff requests "[a]n order requiring Chairman Gowdy to provide [him] an opportunity to clear his name," FAC at 27, ¶ p, and it is the employer/agency's obligation to conduct a name-clearing hearing, but Gowdy was not his employer. GM at 40-41. But Plaintiff alleges Gowdy, as the Committee's Chairman, was his employer. FAC ¶¶ 6, 15. And unlike the defendants in *Moore v. Agency for Int'l Dev*., 80 F.3d 546, 548 (D.C. Cir. 1996), "neither" of whom "could have ordered such a [name-clearing] hearing," as they did not employ the plaintiff, Gowdy is the Chairman who employed Plaintiff and who had the authority to make all personnel decisions for the Committee. FAC ¶ 13. Furthermore, in making this argument, Gowdy confuses who has the authority to order a name-clearing hearing before a lawsuit, *Moore*, 80 F.3d at 548, with whom the Court may order to hold such a hearing, and he offers no authority to suggest the Court cannot order the head of an agency to hold such a hearing.[37]

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[36] The fact that the purpose of the CAA's counseling and mediation process is to resolve the dispute between an employee and a Congressional office does not mean that process gives an employee *any* opportunity to "confront his accusers about the 'security violation,'" as Gowdy alleges. GM at 39. Nowhere in the CAA or its regulations are employees given a right during counseling or mediation to confront or question their accusers. In the end, after Plaintiff was initially told the Committee concluded that he had not mishandled classified information, he received no process before Gowdy told the national media that Plaintiff was terminated because he mishandled classified information. Furthermore, requiring Plaintiff to pursue a CAA § 1317 retaliation action – that requires him to prove significantly different facts and elements than his due process claim, *see supra* at 46-47 – in lieu of a due process claim would not guarantee that Plaintiff would ever receive an actual hearing over the subject of Gowdy's defamatory statements.

[37] Gowdy argues that in seeking equitable or injunctive relief, Plaintiff must sue him in his official capacity, and such relief may only be granted "against federal officials in their *official* capacity." GM at 41. To the

Second, contrary to Gowdy's argument that a permanent injunction barring Gowdy from defaming Plaintiff would constitute an illicit prior restraint, the D.C. Circuit has held "under certain circumstances, declaratory and injunctive relief may be obtained against defamatory statements by government officials." *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987) (citation and internal quotations omitted). If this Court determines such an injunction is impermissible, it still could require Gowdy to issue a retraction. *Id.* In fact, here a retraction may be a more effective remedy than an injunction barring Gowdy from repeating the statements.

Finally, Gowdy argues there is not a damages remedy against him under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as the Supreme Court has not recognized it, *Bivens* is not an automatic remedy, and special factors caution against such a remedy here—namely that this case involves federal employment and a federal scheme, the CAA, that reflects a judgment about the type and amount of relief to be provided. GM at 41-42.

Bivens "established that the victims of a constitutional violation by a federal agent have a

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contrary, for Plaintiff to obtain equitable or injunctive relief on his due process claim, it is necessary to sue Gowdy in his individual, not his official, capacity. In several months, the Committee will formally dissolve (30 days after a final report is issued), and neither Gowdy nor anyone else will be a chair or member of the Committee. H. Res. 567, § 6 ("The Select Committee shall cease to exist 30 days after filing the final report."); Select Committee on Benghazi, Select Committee Announces Scheduled Testimony of Additional Witnesses (Feb. 25, 2016), https://benghazi.house.gov/news/press-releases/select-committee-announces-scheduled-testimony-of-additional-witnesses-0 (stating Committee plans to issue its final report "before summer" of 2016). As a result, if, at the conclusion of this litigation, the Court enters an order granting equitable or injunctive relief on Plaintiff's due process claim, it is unlikely that Gowdy will have any authority to act in an official capacity for the Committee. Thus, it is more appropriate here for the Court to grant equitable an injunctive relief against Gowdy personally by requiring him as an individual to retract the defamatory statements or never repeat them again. (In fact, suing Gowdy in his official capacity could render moot his claim for injunctive relief when there is no longer a Committee chair). If Plaintiff must sue Gowdy in his official capacity, the Court should construe Plaintiff's many references to "Chairman Gowdy," FAC ¶¶ 93-100, as asserting his claims for injunctive relief against Gowdy in his official capacity. Alternatively, Plaintiff requests that the Court grant leave to Plaintiff to amend his complaint to clarify that he sues Gowdy in his official capacity for injunctive relief purposes. Amendments that modify a defendant's capacity are freely granted and relate back to the complaint's original filing. *Jones v. Quintana*, 665 F. Supp. 2d 1, 3 (D.D.C. 2009); *Francis v. Woody*, No. 3:09cv235, 2009 U.S. Dist. LEXIS 66460, at *22-24 (E.D. Va. July 31, 2009) (following *Hill v. Shelander*, 924 F.2d 1370 (7th Cir. 1991)); *cf. Griffith v. Lanier*, 521 F.3d 398, 399-400 (D.C. Cir. 2008) (Rule 15 freely allows amendment to alter defendant's capacity).

right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14, 18 (1980). "[N]either the Supreme Court nor the D.C. Circuit has affirmatively recognized a *Bivens* remedy for 'reputational harm[.]"*Liff v. Office of the Inspector Gen. for the United States Dep't of Labor*, 2016 U.S. Dist. LEXIS 2181, at *36-37 (D.D.C. Jan. 6, 2016). But other circuits have held that a *Bivens* remedy applies to procedural due process violations. *Arar v. Ashcroft*, 585 F.3d 559, 597 (2d Cir. 2009) ("A deprivation of procedural due process rights can give rise to a *Bivens* claim[.]").

While Gowdy asserts that recognizing a *Bivens* remedy here would be extraordinary, he overlooks the fact that Plaintiff seeks to enforce the same amendment (Fifth) against the same category of defendants (a member of Congress) for which the Supreme Court recognized a *Bivens* remedy in *Davis v. Passman*, 442 U.S. 228 (1979), which applied *Bivens* to an employee who sued a Congressman under the Fifth Amendment's Due Process Clause. *Id.* at 242. As the D.C. Circuit held, to decide if it is a "new context" to recognize a *Bivens* remedy, courts look at whether a claim involves a "constitutional amendment outside the three amendments previously approved" or "a new category of defendants." *Meshal v. Higgenbotham*, 804 F.3d 417, 423-24 (D.C. Cir. 2015).

Although enforcing the same amendment against the same category of defendants does not guarantee the recognition of a *Bivens* remedy, *see id.*, the statements the Supreme Court made about the need for a *Bivens* remedy in *Davis* are directly applicable to the instant case that similarly involves an employee who was terminated and stigmatized by a Congressman. Like Plaintiff here, *Davis* observed that the plaintiff "claims that her rights under the [Fifth] Amendment have been violated, and that she has no effective means other than the judiciary to vindicate these rights," "'damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty,'" and "[r]elief in damages would be judicially manageable." *Davis*, 442 U.S. at 243-45.

Moreover, *Davis* held any concerns about suing a Congressman for "actions taken in the course of his official conduct" were "coextensive with the protections afforded by the Speech or Debate Clause." *Id.* at 246. Thus, if a Congressman's "actions are not shielded by the [Speech or Debate] Clause, we apply the same principle that 'legislators ought . . . generally to be bound by [the law] as are ordinary persons.'" *Id.* (quoting *Gravel*, 408 U.S. at 615).

Furthermore, no "special factors" caution against recognizing a *Bivens* remedy here. *See* GM at 42. Unlike the Civil Service Reform Act ("CSRA"), in which "Congress deliberately included Library of Congress employees in the 'civil service' governed by the CSRA" but "deliberately . . . chose to limit the beneficiaries of the CSRA's remedial protections in large part to non-probationary employees in the executive branch," *Davis v. Billington*, 681 F.3d 377, 384 (D.C. Cir. 2012), Congress did not include employees who work directly for members of Congress in the CSRA's governance. Thus, the CSRA does not bar a *Bivens* remedy for such workers. *See id.*[38] Furthermore, the CAA does not constitute a "'comprehensive system to administer public rights,'" that could limit a *Bivens* remedy. *Id.* at 382 (quoting *Spagnola v. Mathis*, 859 F.2d 223, 228 (1988)). Rather than providing a "statutory scheme that at least technically accommodates [employees'] constitutional challenges," like the SCRA does, *Spagnola*, 859 F.2d at 229, the CAA does not allow any congressional employees to assert constitutional challenges and exclusively limits the types of claims that can be asserted to 11 federal civil rights and employment laws. *See* 2 U.S.C. § 1302(a)(1)-(12). Thus, for *all* workers covered by the CAA, the CAA woefully fails to be a comprehensive scheme, regardless of what types of remedies it offers them. *Compare Davis*,

[38]As the cases Gowdy cites demonstrate, the "special factor" of federal employment only applies in situations where the CSRA governs. *See* GM at 42 (citing *Zimbelman v. Savage*, 228 F.3d 367, 371 (4th Cir. 2000) ("Federal employment is a "special factor" because federal personnel matters are governed by the CSRA"). Because here the CSRA does not govern the relevant employees – those who work for members of Congress – the so-called special factor of federal employment has no application.

681 F.3d at 381-82, 387-88 (noting in *Spagnola* there was little doubt the CSRA brought First Amendment claims into its ambit).[39]

7. <u>Gowdy Is Not Entitled to Qualified Immunity on Plaintiff's Due Process Claim</u>

Contrary to Gowdy's assertion, he is not entitled to qualified immunity on the due process claim. Plaintiff does not dispute the qualified immunity standard—that he must show Gowdy's "conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Dukore v. District of Columbia*, 799 F.3d 1137, 1144 (D.C. Cir. 2015). And to decide whether the rights are "clearly established" the Court looks at cases from the Supreme Court and the D.C. Circuit, and "if neither provides an answer," other appellate courts. *Fenwick v. Pudimott*, 778 F.3d 133, 139 (D.C. Cir. 2015) (citations omitted).

Gowdy frames the "particularized right at issue" as "a former at-will employee's claimed entitlement to a name-clearing hearing from the head of his former employer, before the latter may respond publicly to the employee's press statements about the reasons for his termination." GM at 44. While a right should be framed in a "particularized sense so that the contours of the right are clear," *Dukore*, 799 F.3d at 1144, Gowdy's "formulation" of the right here is "too particularized" as he "phrase[s] the 'right allegedly violated' in such detail and in terms so closely paralleling what allegedly happened here." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1158 (9th Cir. 2000); *accord Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualiz1'fied immunity unless the very action in question has previously been held unlawful."); *Lash v. Lemke*, 786 F.3d 1, 5 (D.C. Cir. 2015).

[39] Should the court doubt whether *Bivens* applies, it may defer the issue until after it decides "the threshold question of whether a due-process violation has transpired." *Liff*, 2016 U.S. Dist. LEXIS 2181, at *36-37.

Here, the more appropriate formulation of the right is whether there was a clearly established right to not have a public employer terminate and defame the employee by making statements that suggest he committed a serious crime without first affording him adequate process. For example, in *Haiyan v. Hamden Pub. Schs*., 2011 U.S. Dist. LEXIS 76708 (D. Conn. July 15, 2011), the court held a plaintiff "adequately alleged a stigma-plus claim, and the individual defendants are not entitled to qualified immunity because the law in this area is clearly established," where she "assert[ed] that the individual defendants procured a stigmatizing statement implicating her in criminal conduct that she claims is false." *Id.* at *39 (noting she specifically alleged a statement that she "assaulted" another person was "publicly disseminated" and "used to justify her termination" without "pre-termination due process.").

As Gowdy concedes, the D.C. Circuit has clearly recognized the right to be free of a publicized defamatory statement, in conjunction with a termination, that one has committed a serious crime. *See* GM at 21 (quoting *Fonville*, 38 F. Supp. 3d at 14, and citing *Mazaleski*, 562 F.2d at 714 & nn. 32-36). And that is precisely the right that Gowdy violated by stating on national television that Plaintiff mishandled classified information despite the fact that he knew that Plaintiff had done no such thing—leading millions of people to believe that Plaintiff committed a serious crime. Moreover, under D.C. Circuit precedent it is well established that Plaintiff should have received something "approximating a 'hearing'" between the time his employer "completed its investigation and decide to terminate [him]," and Plaintiff here received nothing resembling a hearing. *Doe*, 753 F.2d at 1112 n.23. Tellingly, none of the procedural due process cases that Gowdy cites framed the right as specifically as Gowdy does here or focused on whether an employee's rights would be vitiated because he publicly denies the false allegation around the same time that the employer airs and stands by the false allegation publicly.

D. <u>Gowdy Enjoys No Sovereign or Absolute Immunity for His Defamatory Statements</u>

The only real argument Gowdy raises on Plaintiff's defamation claim is that he enjoys sovereign and absolute immunity. GM at 8-13. Gowdy makes no serious effort to demonstrate why the defamation claim fails on the merits. *Id.* at 7. Contrary to his undeveloped merits arguments, his right to a "self-defense" privilege – and Plaintiff's ability to overcome that privilege with a showing of malice – will turn on questions of fact that cannot be decided on a motion to dismiss,[40] and Plaintiff can obtain an injunction – or at least at retraction – in this case.[41]

1. <u>Gowdy Has No Absolute Immunity</u>

Gowdy argues that he enjoys absolutely immunity under D.C. law, as his statements were made within the outer limits of his official duties and his acts were discretionary. GM at 10-11.

In limited circumstances, absolute immunity under D.C. law may apply to the conduct of government officials. *Moss v. Stockard*, 580 A.2d 1011, 1020 (D.C. 1990) ("absolute immunity [is] available when (1) the official acted within the 'outer perimeter' of his official duties, and (2)

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[40] Without analysis or reference to any facts in the record, Gowdy bodly asserts his defamatory statements would be covered by D.C.'s "self-defense" privilege. GM at 7 (citing two summary judgment decisions, *Rosen v. Am. Isr. Pub. Affairs Comm., Inc*., 41 A.3d 1250, 1256 (D.C. 2012), and *Novecon Ltd. v. Bulgarian-American Enter. Fund*, 190 F.3d 556, 566 (D.C. Cir. 1999). But while the "existence of the privilege is a question of law for the court; whether it was abused by the defendant, is a question of fact for the jury." *Novecon*, 190 F.3d at 566 (citations omitted). Indeed, Gowdy fails to identify a statement where Plaintiff even criticized Gowdy to put the privilege in play. And even if the self-defense privilege applies, Plaintiff may overcome it by showing sufficient evidence of malice. Resolution of these questions necessarily requires consideration of facts that cannot be decided on a motion to dismiss.

[41] Gowdy asserts Plaintiff "cannot overcome this claim's facial defect in seeking only equitable relief." GM at 7 (citing *Richardson v. Easterling*, 878 A.2d 1212, 1217-18 (D.C. 2005)). But *Richardson* does not state there is an absolute bar on a plaintiff seeking equitable relief when he sues for defamation—only that "ordinarily" an injunction cannot be sought. 878 A.2d at 1217-18. And *Richardson*, in turn, cites *Pierce*, where the D.C. Circuit which expressly stated "'under certain circumstances, declaratory and injunctive relief may be obtained against defamatory statements by government officials.'" *Pierce*, 814 F.2d at 672 (quoting *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 566 F.2d 289, 294 n.16 (D.C. Cir. 1977) (en banc)). *Pierce* made clear a plaintiff may seek "a retraction," a form of equitable relief, if he is able to "prove [his] slander claim." *Id.*; *accord Smithsonian Institution*, 566 F.2d at 294 n.16 (having government officials retract defamatory statements is "unlikely to deter" a public official "in the vigorous pursuance of his duties").

the particular government function at issue was 'discretionary' as opposed to 'ministerial.'").

Plaintiff does not dispute Gowdy made the statements within the outer perimeter of his official duties. But Gowdy is not entitled to absolute immunity as he broke a clear command of a federal law when he made the defamatory statements, and thus his acts were not discretionary.

In *District of Columbia v. Thompson*, 570 A.2d 277 (1990), the D.C. Court of Appeals adopted a two-part standard to determine whether a government official's actions are discretionary as opposed to ministerial. First, the Court considers whether there is a law that constrains the government official's discretion; if a law leaves the official with no choice, the inquiry ends with the conclusion that the act was not discretionary. *See id.* at 296-97. This rule comports with the Supreme Court, D.C. Circuit, and D.C. Court of Appeals' prior descriptions of how an employee does not engage in a discretionary act if a statute, regulation or other policy bars the act that the employee has engaged in, because an employee has no choice but to follow the law.[42]

Second, "absent legislative guidelines," the Court applies four "policy factors to determine whether the governmental action at issue allows significant enough application of choice to justify official immunity." *Id.* at 297.

Gowdy has no absolute immunity under these standards. Gowdy skips past these standards and rushes ahead to focus exclusively on the four factors, GM at 12-13, and thereby fails to address in the first instance whether "the law" or "legislative guidelines" constrained his discretion.

[42] *United States v. Gaubert*, 499 U.S. 315, 322 (1991) ("The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee had no rightful option but to adhere to the directive.'") (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) ("conduct cannot be discretionary unless it involves an element of judgment or choice")); *Biscoe v. Arlington Co.*, 738 F.2d 1352, 1363 (D.C. Cir. 1984) (officer's decision was "especially" ministerial in nature, not discretionary, where "the officer is constrained both by regulations and clearly established policy and standards"); *Rustin v. District of Columbia*, 491 A.2d 496, 500 (D.C. 1985) (stating discretionary functions are those involving "policy considerations" where "no statutory or regulatory requirements [limit] the exercise of policy discretion." (internal quotations and citations omitted).

Thompson, 570 A.2d at 296-97. But as Plaintiff alleges in the FAC, Gowdy's October 11 and 12, 2015 interviews in which he defamed Plaintiff violated the CAA's mandate that counseling and mediation "shall be strictly confidential," 2 U.S.C. § 1416(a)-(b), as well as the Mediation and Confidentiality Agreement that required Gowdy and the Committee to keep the mediation discussions confidential. FAC ¶¶ 61-63. In fact, in the very same breadth that Gowdy violated the CAA's confidentiality mandate concerning mediation by talking about what was and was not discussed during mediation between the Plaintiff and the Committee, Gowdy described how Plaintiff had "mishandled classified information," and that was the real reason he was terminated, as opposed to the issues Plaintiff raised in mediation after he "was losing in mediation."[43] And, further, Gowdy made these statements during the mediation period. FAC ¶¶ 54-64. The CAA's confidentiality provision that Gowdy indisputably violated has been described by courts as a strict mandate that may only be disregarded in a single situation that does not apply here.[44] In none of these cases did the D.C. Circuit or any other court suggest a Congressman has a choice to disregard the CAA's strict mandate of confidentiality of mediation.

As Gowdy had no choice but to follow the CAA's strict mandate, his CAA violation bars him from proving his acts were discretionary. *Thompson*, 570 A.2d at 296-97; *Gaubert*, 499 U.S. at 322; *Briscoe v. Arlington County*, 738 F.2d 1352, 1363 (D.C. Cir. 1984); *Rustin*, 491 A.2d at

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[43] Ari Melber, *Ex-Benghazi Investigator Alleges Rep. Gowdy Violated Federal Law*, NBC News (Oct. 12, 2015) ("Gowdy . . . told NBC News' Kristin Welker that Podliska was a 'lousy employee' who mishandled classified information, and that his criticism of the committee's focus on Hillary Clinton only arose when he 'was losing in mediation on his reservist claim.'") (cited in FAC ¶ 62 & n.8).

[44] *Taylor v. Duncan*, No. 3:09-CV-318, 2011 U.S. Dist. LEXIS 20797, 13-14 (E.D. Tenn. Mar. 2, 2011) (stating that "Congress mandated strict confidentiality" when it stated "both counseling and mediation 'shall be strictly confidential,'" and "[t]he only statutory exception to this strict confidentiality is that, with respect to counseling, 'the Office and a covered employee may agree to notify the employing office of the allegations.'") (quoting 2 U.S.C. § 1416(a)-(b)); *accord Blackmon-Malloy v. United States Capitol Police Bd.*, 575 F.3d 699, 711 (D.C. Cir. 2009) (describing how the same "provisions, sections 1416(a) and (b), provide that counseling and mediation, respectively, 'shall be strictly confidential'" and even "protects the appointed mediator" from being subpoenaed).

500. Thus, Gowdy's discussion of the four factors in *Thompson* is irrelevant.

2. <u>Gowdy Has No Sovereign Immunity</u>

Gowdy complains that Mr. Podliska's defamation claim is barred by sovereign immunity because Gowdy's conduct arises out of only official conduct. Gowdy is wrong.

First, because Plaintiff's defamation claim only seeks prospective injunctive relief against a federal officer (Gowdy) his claims are not barred by sovereign immunity. Under nearly identical circumstances the D.C. Circuit held a chair of a Congressional Committee – like Gowdy – did not have sovereign immunity. *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984). *Walker* rejected a claim of sovereign immunity where the plaintiff-employee brought claims against the chair of a Congressional Committee but did not "seek money from the United States Treasury." *Id.* at 927 n.6. Like the plaintiff in *Walker*, in pursuing his defamation claim Plaintiff does not seek any money from the Treasury or even Gowdy. *See* FAC ¶ 91 ("Plaintiff does not seek any damages associated with his common law defamation claim against Chairman Gowdy," only injunctive relief against Gowdy). *Walker* is even more directly on point, as there the plaintiff – like Plaintiff here – accused Chairman Jones of defaming her by making false statements about her in conjunction with terminating her. 733 F.2d at 927, 933 (stating plaintiff alleged Jones "made public statements, which Walker alleges to be untrue, charging Walker with inefficiency, improper bookkeeping practices, misappropriation, and 'skimming' funds"); *see also Jefferson*, 2016 U.S. Dist. LEXIS 35685, at *41 (stating that sovereign immunity does not bar the "prospective relief that" plaintiff seeks against a federal official "to ameliorate the harm done to his reputation"). Indeed, as the Ninth Circuit recently explained in rejecting a federal official's sovereign immunity claim, "[p]rospective relief requiring, or having the effect of requiring, governmental officials to obey the law has long been available," including long before Congress

amended 5 U.S.C. § 702. *EEOC v. Peabody Western Coal Co*., 610 F.3d 1070, 1085 (9th Cir. 2010). "Sovereign immunity does not bar such relief." *Id.*

Second, in deciding Speech or Debate Clause cases, the Supreme Court has suggested that when members of Congress are sued for defamation their overall immunity does not extend beyond the immunity the Speech or Debate Clause supplies and historical precedent shows that Congressmen can be held responsible for defamatory statements.[45] Thus, if Plaintiff overcomes Gowdy's Speech or Debate Clause arguments, Gowdy is not entitled to any further immunity.

Third, Gowdy clearly broke the CAA's strict mandate of confidentiality when he defamed Plaintiff. *Supra* at 72-73. Thus, "'there is no sovereign immunity to waive—it never attached in the first place.'" *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996) (quoting *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682 (1949) ("if the federal officer, against whom injunctive relief is sought, allegedly acted in excess of his legal authority, sovereign immunity does not bar a suit."); *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1138 (D.C. Cir. 2015) (when officer "fail[s] to act as the law specifically prescribes, the conduct is not shielded by [sovereign] immunity," including not following a law, regulation, or policy).

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[45] *Davis*, 442 U.S. at 246 (holding any concerns about suing a Congressman for "actions taken in the course of his official conduct" "[a]re coextensive with the protections afforded by the Speech or Debate Clause," and if a Congressman's "actions are not shielded by the [Speech or Debate] Clause, we apply the same principle that 'legislators ought . . . generally to be bound by [the law] as are ordinary persons.'") (quoting *Gravel*, 408 U.S. at 615); *Hutchinson*, 443 U.S. at 127-28 (stating that "the precedents" from the early days of the Republic "abundantly support that a Member [of Congress] may be held liable for republishing defamatory statements originally made in either House. We see no basis for departing from that long-established rule."). *Hutchinson* quoted at length Justice Story's commentary. *Id.* ("'No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so *in the actual discharge of his duties in congress, that furnishes no reason, why he should be enabled through the medium of the press to destroy the reputation, and invade the repose of other citizens*. It is neither within the scope of his duty, nor in furtherance of public rights, or public policy. Every citizen has as good a right to be protected by the laws from . . . defamatory imputations, as a member of congress has to utter them in his seat.'") (quoting 2 J. Story, Commentaries on the Constitution § 863, p. 329 (1833) (emphasis added)).

Finally, Gowdy's arguments that fail to address the above authority should be rejected. Gowdy argues sovereign immunity protects a federal employee from having to disclose knowledge he acquired in his official work for the government, erroneously relying on *In re Subpoena In Collins*, 524 F.3d 249, 252-53 (D.C. Cir. 2008). *Collins* held sovereign immunity may prevent a federal employee from *having to disclose* in response to a subpoena his personal observations he makes "to satisfy his job responsibilities." *Id.* But here Plaintiff is not asking Gowdy to make a disclosure—he already disclosed the relevant information to the national media. And unlike *Collins*, Gowdy did not personally observe *any* of the key details about Plaintiff he chose to tell the media. FAC ¶ 65 (Gowdy "suggested that he lacked knowledge about Plaintiff's termination," and stated he had not "been part of the mediation process.").[46]

Moreover, Gowdy is wrong that Plaintiff seeks to constrain Gowdy from acting in his official capacity. GM at 9-10. As noted above, in several months the Committee will dissolve and Gowdy will no longer be the Committee's Chair. *Supra* at 65 n.37. Thus, any future equitable or injunctive relief Plaintiff obtains from Gowdy on his defamation claim will merely limit Gowdy's ability to personally repeat the defamatory statements or require him to retract prior statements.

CONCLUSION

For the reasons stated above, the motions to dismiss should be denied.

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[46] Gowdy's invocation of the statement in *Wuterich v. Murtha*, 562 F.3d 375, 384-85 (D.C. Cir. 2009), that a Congressman often speaks "to the press during regular working hours" is misleading. In *Wuterich* the Court focused on the scope of employment of a Congressman because the scope of employment is factor to establish immunity under the Westfall Act. *Id.* at 380-81, 83-85. But as he implicitly concedes, the Westfall Act (which itself limits the Federal Tort Claims Act) has no application here, as Plaintiff does not seek damages for his defamation claim and therefore does not implicate the FTCA. *See* GM at 9 n.11. In fact, one of the cases *Gowdy* cites specifically notes that the FTCA only applies to "'civil actions on claims against the United States, . . . for money damages[.]'" *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003). Moreover, contrary to Gowdy's suggestion, *Jacobs v. Vrobel*, 724 F.3d 217, 222-23 (D.C. Cir. 2013), did not address whether an order that would prevent an employer from discussing a former employee's performance would affect the need for sovereign immunity—that case, like *Wuterich*, only dealt with whether a federal employer performing a reference check was within his scope of employment for Westfall Act purposes. *Jacobs*, 724 F.3d at 220-23.

April 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2016, I caused the foregoing to be served on all counsel of record via this Court's ECF system.

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