Statement of

Daniel F. C. Crowley

K&L Gates LLP

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"Preventing Sexual Harassment in the Congressional Workplace:

Examining Reforms to the Congressional Accountability Act"

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Chairman Harper, Ranking Member Brady, and Members of the Committee:

Thank you for the opportunity to testify at today's hearing. My name is Dan Crowley and I lead the global financial services policy practice at K&L Gates LLP, a law firm that represents capital markets participants, leading global corporations, as well as middle-market and emerging growth companies in every major industry. However, I appear before you today on my own behalf to provide some historical context and, hopefully, some useful perspectives as the Committee considers reforms to the Congressional Accountability Act of 1995 (Pub. L. No. 104-1, hereinafter "CAA" or "the Act"). I'd like to take this opportunity at the outset to note that my comments are my own and do not represent the views of the firm, my colleagues or any firm clients.

I had the privilege of serving as counsel to the Committee under Congressman William M. Thomas (R-CA) from March, 1991 through early 1998, a period straddling the 1994 election and that comprised the later stages of the Republican Revolution. Indeed, the first plank of the Contract with America was to ensure that the laws that apply to the rest of the country also apply to Congress. Fulfillment of that promise, at least as it pertains to federal employment laws, is manifest in the CAA. However, it is important to note that these are not fundamentally partisan issues; rather they are institutional in nature. In fact, the Committee's consideration of this landmark legislation began under the previous Democratic Majority.[1] In many ways, consideration of the CAA represented the culmination of an unprecedented bipartisan focus on reforming House non-legislative operations in the wake of a series of highly publicized scandals.

The basic principles that in the past guided the Committee in this area are:

> If a law is right for the private sector, it is right for Congress;
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> Congress will write better laws when it has to live by the same laws it imposes on the private sector and Executive Branch; and
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> The separation of powers embodied in the Constitution must be respected. [2]

The challenge faced by the Committee more than two decades ago was to reconcile these principles. At that time, it was felt that the procedures established to provide a means for redress of grievances by employees must take into consideration that, in the Congressional context, allegations can be career ending - even if they subsequently prove to be untrue. In order to assist the Committee with its consideration of reforms prompted by recent revelations, my comments will focus on the historical context of the CAA and the Constitutional provisions[3] at issue.

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[1] *See, e.g.*, H.R. Rept. No. 103-650, Part 2, Committee on House Administration. 103d Congress, 2d Session, August 2, 1994.
[2] Id at p. 11.
[3] For an excellent and more detailed discussion of these issues, *see*: "The Speech of Debate Clause; Constitutional Background and Recent Developments," Congressional Resource Service, by A. Dolan and T. Garvey, August 8, 2012, upon which I rely heavily throughout these comments.

Finally, I will provide some background on steps that many House employing authorities took following enactment of the CAA to prevent harassment of all forms in the Congressional workplace.

Historical Context of the Congressional Accountability Act

During my time on Committee staff, the Committee investigated a series of House scandals which resulted in public concern over corruption, malfeasance, self-dealing and patronage. These included the House Bank Scandal, involving systematic overdrafts amounting to interest free loans, as a result of which four ex-Members, a Delegate, and the House Sergeant-at Arms were convicted of wrongdoing; the House Post Office Scandal, in which the House Postmaster pled guilty and implicated two senior Members of criminal wrongdoing and a former full committee Chairman was subsequently convicted and incarcerated for embezzlement and money laundering involving trading of stamps and postal vouchers for cash; and the House Restaurant Scandal, in which large tabs were run up by Members that in many cases went unpaid for extended periods of time.

To begin dealing with such problems, on April 9, 1992, the House passed the House Administrative Reform Resolution of 1992, H. Res. 423 (102nd Cong.), which abolished the Office of the Postmaster and established the House Inspector General and the Director of Non-Legislative and Financial Services, as well as the Committee on House Administration's ("CHA") Subcommittee on Administrative Oversight to provide policy direction and oversight for these new offices. The Subcommittee was bipartisan, except that tie votes were referred to the full Committee for resolution, which effectively gave the Committee Majority final say on such matters.

These reforms were codified in House Rules at the beginning of the 103rd Congress.[4] At that time, the Subcommittee's procedures were changed to adhere to the usual parliamentary rules in which a tie vote fails. In any such case, leadership was to be notified. By agreement between the Chairman and the Ranking Member, the full Committee delegated all relevant power given to CHA under House Rules to the Oversight Subcommittee. In other words, the Republican Minority was essentially given equal status with the Democratic Majority on matters relating to oversight of non-legislative and administrative House functions.

This experimentation in bipartisan oversight produced a number of reform proposals for improvement of non-legislative House operations. Among them was the CAA. On July 25, 1994, H.R. 4822, the Congressional Accountability Act (103rd Cong.), was introduced by Representatives Christopher Shays (R-CT) and Dick Swett (D-NH). It was considered by CHA and favorably reported on July 28, 1994, and passed the House by a vote of 427 – 4 (Roll no. 390) on August 8, 1994. However, H.R. 4822 was not considered by the Senate. Instead, CHA

[4] House Rules & Manual, 103rd Congress, § 654.

and bipartisan leadership had planned to adopt these reforms unilaterally under House Rules. Then the 1994 election happened, resulting in the first House Republican Majority in 40 years.

Soon after the 1994 election, bicameral staff was directed to meet to iron out differences between the chambers with an eye toward enactment of the CAA early in the 104th Congress. The product of those negotiations was introduced as H.R. 1 on January 4, 1995. This legislation passed the House unanimously the following day by a vote of 429 - 0 (Roll no. 15). It was substituted for the text of S. 2 and passed the Senate by unanimous consent on January 12, 1995, then sent back to the House for consideration under suspension of the rules on January 17, 1995. S. 2 passed the House by a vote of 390 - 0 (Roll no. 16). It was signed into law by President Clinton on January 23, 1995, and became Public Law 104-1, the first law passed by the new Republican Congress.

Other than administrative and technical amendments enacted in 2015 relating to the process for appointing mediators, the CAA remains largely unchanged since it passed the House by unanimous vote (twice) in 1995. A series of recent sexual harassment allegations against Members of Congress provides a basis upon which to assess whether revisions to the CAA are needed at this point in time. The Constitutional issues that confronted Members in 1995 remain applicable and, if anything, court decisions since then have made these issues even more complicated and challenging.

Speech or Debate Clause Immunity

Article I, Section 6, clause 1, United States Constitution provides, in pertinent part:

> The Senators and Representatives shall … in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and <u>for any Speech or Debate in either House, they shall not be questioned in any other Place.</u> *Emphasis added.*

The last phrase of clause 1 is generally referred to as the Speech or Debate Clause and has repeatedly been interpreted by the U.S. Supreme Court as providing immunity for Members of Congress with respect to their "legislative acts."[5] This protection, derived from our common law heritage and the English Bill of Rights, which was enacted in 1689 following a long struggle for

[5] *See, e.g., United States v. Helsotski*, 442 U.S. 477 (1979)(excluding evidence of legislative action in a criminal prosecution of a Member of the House); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975)(dismissing civil suit to enjoin a Senate Committee investigation); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)(dismissing a civil conspiracy claim against members of a Senate committee); *United States v. Johnson*, 383 U.S. 169 (1966)(reversing criminal conspiracy conviction based on Speech or Debate Clause immunity). Source: The Speech of Debate Clause; Constitutional Background and Recent Developments, Congressional Research Service, by A. Dolan and T. Garvey, August 8, 2012.

Parliamentary supremacy, has long been "…recognized as an important protection of the independence and the integrity of the legislature."[6]

Protected legislative acts include not only speech or debate in either House, but also other matters that are "…an integral part of the deliberative and communicative process by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[7]

Moreover, lower courts have ruled that Speech or Debate Clause immunity attaches to employment decisions by Members in certain circumstances. For example, in *Browning v. Clerk*, the U.S. Court of Appeals for the D.C. Circuit ruled that the Speech or Debate Clause protects Members from liability based on personnel actions they took if the impacted "employee's duties were directly related to the due functioning of the legislative process."[8]

Against this Constitutional backdrop, the Committee sought to establish a procedure to address violations of the federal labor and employment laws by Members without compromising legislative branch prerogatives as a co-equal branch of government under the Separation of Powers Doctrine. Toward that end, the CAA provided for the creation of the Office of Compliance ("OOC") within the Legislative Branch and charged it with responsibility for promulgating implementing regulations, conducting studies and, importantly, carrying out an education program for Members and other employing authorities of the Legislative Branch regarding the laws made applicable to them under the Act. The Committee made clear that the OOC also has responsibility for educating employees, and informing them of their rights and the process by which they can access the enforcement procedures of the OCC under these laws.[9]

Perhaps the most significant provisions in the CAA provide for a right of limited judicial review "to set aside a final decision of the OCC Board if it is determined that the decision was –

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
(2) not made consistent with required procedures; or
(3) unsupported by substantial evidence."[10]

Jurisdiction is granted to the U.S. Court of Appeals of the Federal Circuit only "to seek redress for a violation for which the employee has competed counseling and mediation."[11] In a proceeding "in which the application of a regulation issued under this Act is at issue, the court

[6] *Johnson*, 383 at 181.
[7] *Gravel*, 408 U.S. at 652.
[8] 789 F.2d 923 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 996 (1986).
[9] "The Committee believes strongly these education programs are a key and integral part of the Office's mission." H.R. Rept. No. 103-650, Part 2, p. 21.
[10] CAA Sec. 407(d).
[11] CAA Sec. 408(a).

may review the validity of the regulation."[12] Other judicial review is expressly prohibited.[13] Finally, Section 413 of the CAA specifically provides that this limited authorization to bring judicial proceedings does not constitute a waiver of Speech or Debate Clause immunity.[14]

Another important CAA provision respects Speech or Debate Clause immunity for employment decisions made by Members with respect to legislative staff. Specifically, Section 502 provides: "It shall not be a violation of any [employment discrimination] provision…to consider the - (1) party affiliation; (2) domicile, or (3) political compatibility with the employing office…" In other words, such factors provide an affirmative defense to allegations of discrimination. As described in the Committee Report:

> "This provision and the exemptions listed therein recognize the special nature of employment in Congress by allowing Member offices, as well as Committee and leadership offices, to incorporate these three factors in employment decisions without prejudice to the legality of such decisions. The political compatibility exemption, while subject to broad interpretation, is intended to provide Members, Committee offices and leadership offices with more flexibility than is available under the party affiliation and domicile exemptions."[15]

Although my testimony is primarily intended to provide some of the historical context that gave rise to the CAA, I would be remiss if I did not point out that case law since enactment of the CAA leaves open the question of how far Speech or Debate Clause immunity extends to personnel decisions. In one case, the 10th Circuit Court of Appeals distinguished between "legislative" acts that are entitled to immunity, and non-legislative acts that are not.[16] In subsequent cases, the DC Circuit has determined that the Speech or Debate Clause does not require the dismissal of suits brought under the CAA, but it also held:

> "If the employer's nondiscriminatory reason for taking the adverse employment action is motivated by a legislative act, the Speech or Debate Clause protection may prevent a plaintiff from being able to challenge the Member's assertion, since Members remain protected from "inquiry into legislative acts or the motivation for actual performance of legislative acts."[17]

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[12] CAA Sec. 409.
[13] CAA Sec. 410.
[14] CAA Sec. 413. PRIVILEGES AND IMMUNITIES. The authorization to bring judicial proceedings under sections 405(f)(3), 407, and 408 shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, of the Constitution, or a waiver of any power of either the Senate or the House of Representatives under the Constitution, including under article I, section 5, clause 3, or under the rules of either House relating to records and information within its jurisdiction.
[15] H.R. Rept. No. 103-650, Part 2, p. 27.
[16] *Bastien v. Office of Senator Ben Nighthorse Campbell,* 390 F.3d 1301 (10th Cir. 2006).
[17] *Fields v. Office of Eddie Bernice Johnson,* 459 F.3d 1 at 14 (D.C. Cir. 2006).

In other cases, the courts have held that the scope of immunity may be narrower depending on the circumstances. However, it is clear from the jurisprudence that in employment cases in which Speech or Debate Clause immunity is asserted, it will be up to the courts to determine whether the privilege applies on a case-by-case basis. In other words, absent legislative clarification about the intended scope of immunity with respect to personnel decisions, by default the courts will continue to define the scope of protection. I note that, notwithstanding the CAA, the Committee on Ethics has broad discretion to discipline Members for violating standards of official conduct, [18] which may provide another meaningful avenue to explore as the Committee considers solutions in this area.

Past Steps to Prevent Sexual Harassment in the Congressional Workplace

Following enactment of the CAA, the Committee provided oversight for the OOC as they set about promulgating implementing regulations. This process was sometimes contentious as the Committee sought to ensure that Congressional prerogatives were respected, particularly when it came to proposed regulations under CAA Sec. 220(e) having to do with possible unionization of legislative staff.[19] We also worked with the Office of House Employment Counsel to develop model anti-harassment policies for consideration by employing authorities. At that time, many offices implemented policies along the following lines:

> The Office reiterates its commitment to preventing harassment of any kind in the workplace, including sexual harassment. The Office takes its responsibility to investigate and address any harassing behavior very seriously. All personnel must read this policy, print it out, sign where indicated below, and return it to your immediate supervisor.
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> All employees will be treated, and are to treat each other, fairly and with respect. Employees will not be subjected to, and will not subject each other to harassment of any kind; the office will not tolerate any kind of harassment. *Any employee who violates the anti-harassment policy will face appropriate discipline, up to and including termination.*
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> There are two basic forms of sexual harassment:
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> (1) Prohibited "quid pro quo" sexual harassment occurs when a supervisor or manager makes unwelcome sexual advances, requests sexual favors, or engages in other verbal or physical conduct of a sexual nature, if the implication is that submission to such conduct is expected as part of the job. It would also be prohibited for a supervisor or manager to make employment decisions affecting the individual on the basis of whether the individual submits to or rejects sexual conduct.

[18] Rule XI, clause 3, Rules of the House of Representatives, 115th Cong., January 5, 2017.
[19] *See, e.g.*, "Oversight Hearing: Office of Compliance," Committee on House Oversight (n/k/a Committee on House Administration), 105th Cong., 1st Session, March 19, 1997.

(2) Prohibited "hostile work environment" sexual harassment occurs when unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment. This includes, for example, displaying sexually suggestive material in the workplace, unwelcome flirtation or advances, requests for sexual favors, or any other offensive words or actions of a sexual nature.

In addition to sexual harassment, other kinds of harassment on the basis of race, color, sex, age, religion, national origin, age and disability may constitute a violation of law and is prohibited. Insults, jokes, slurs, or other verbal or physical conduct or activity relating to race, color, sex, religion, national origin, age and disability may constitute a violation if they create an intimidating, hostile, or offensive work environment, or if they unreasonably interfere with an individual's performance.

We emphasize that it is the responsibility of each employee for compliance with the anti-harassment policy. Personal behavior and language that are "acceptable" to one individual may be "offensive" to another. All employees must recognize that the focus of a non-discrimination policy is on the *effect* of one's actions, not the *intent*. Even an employee who believes he or she is "just kidding around" or "didn't mean to harm" may act in ways that have the effect of intimidating or demeaning another employee, and thereby violating the policy.

Any employee who in good faith believes that he or she has been subjected to or has witnessed actions that violate the policy should promptly advise management so the office can immediately investigate and take corrective action where appropriate. An employee may advise his or her direct supervisor, or any other management official with whom the employee feels comfortable discussing such issues. The information obtained during an investigation will be disclosed only to those who have a "need to know" in order to complete the investigation or to take appropriate corrective action. Anyone who brings such a matter forward is assured that he or she will not suffer any retaliation, discrimination or reprisal for having done so.

Again, the preceding model policy was adopted by many House employing authorities two decades ago. Certainly, it is not current and does not reflect changes in law since then. Fortunately, you have real experts with current knowledge on the state of applicable law on the panel today who can advise the committee on what steps might be taken going forward.

Conclusion

The Congressional Accountability Act of 1995 is legislation that attempted to reconcile Member intent to subject themselves to the same laws they impose on others, consistent with the

legitimate Constitutional protections afforded by the Speech or Debate Clause. After more than two decades, it is important to review the CAA as well as the standards of official conduct to determine whether updates are necessary or appropriate.

These are complicated issues that remain difficult to resolve. That said, the steps the Committee took more than two decades ago mean that you now have experts - including my follow panelists - who are available to ensure that employing authorities are appropriately advised. Finally, I believe today as I did then that a commitment to taking prompt corrective action - up to and including termination - must be unequivocal. Thank you again for inviting me to testify today. I would be happy to respond to any questions you may have.