OVERSIGHT OF SECTION 220 OF THE CONGRESSIONAL ACCOUNTABILITY ACT: IMPLEMENTING THE RIGHTS OF CONGRESSIONAL STAFF TO COLLECTIVELY BARGAIN

HEARING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

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WEDNESDAY, MARCH 2, 2022

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to call, at 2:02 p.m., in Room 1310, Longworth House Office Building, Hon. Zoe Lofgren [Chairperson of the Committee] presiding.

Present: Representatives Lofgren, Raskin, Aguilar, Scanlon, Leger Fernandez, Davis, Loudermilk, and Steil.

Staff Present: Jamie Fleet, Democratic Staff Director; Sean Jones, Professional Staff; Teri Morgan, Deputy Staff Director; Eddie Flaherty, Director of Operations; Hannah Carr, Professional Staff; Khalil Abboud, Deputy Democratic Staff Director; Lauren Doney, Rep. Raskin Deputy Chief of Staff; Kyle Parker, Rep. Butterfield Chief of Staff; Tim Monahan, Minority Staff Director; Nick Crocker, Minority Deputy Staff Director; Gineen Breeso, Minority Special Counsel; and Aubrey Wilson, Minority Special Projects Director.

The CHAIRPERSON. A quorum being present, the Committee on House Administration will come order.

We want to say good afternoon to everyone. As we begin, I want to note that we are holding this hearing both in person and remotely, and, therefore, in compliance with the regulations for remote committee proceedings pursuant to House Resolution 8.

If you are joining remotely, please keep your microphone muted when not speaking to limit background noise and always keep your camera on.

And for those joining us in the hearing room, we are holding this hearing in compliance with the most recent guidance issued by the Office of the Attending Physician. Let me just say, it is a relief to be back in person, and it is wonderful to be here safely with our extra ventilation and without our masks.

So, with that, I ask unanimous consent that the chair be authorized to declare a recess of the Committee at any point, and that all Members have five legislative days in which to revise and extend their remarks and have any written statements be made part of the record. And, without objection, that is ordered.

Now, let me just say, one of the first votes I cast as a brand-new member of the House of Representatives—it was late on my very

first day in that Congress—was to pass the Congressional Accountability Act. Not a single Member of the House of Representatives voted against it.

As someone who grew up in a union family, and as a former congressional staffer, and as a long-time advocate of workers' rights and protections, I was proud to cast that vote and proud to be part of an institution that sent a strong message to Legislative Branch employees and the American public by unanimously approving that bill.

Less than two weeks later, we voted again on a very similar version of the bill sent to the House and Senate. Again, not a single member of the House voted against it, and that version of the bill was signed into law by then- President Bill Clinton.

The CAA was a landmark bipartisan reform for the Congress. Until its enactment, Congress was exempt from workplace discrimination laws, and this included, for example, finally extending rights and protections of the Fair Labor Standards Act of 1938 to Legislative Branch employees.

However, one provision of the bill we unanimously approved required additional action—the provision of the CAA that provided for Legislative Branch employees to organize and collectively bargain as employees in other workplaces can.

That part of the law directed the new Office of Compliance, now called the Office of Congressional Workplace Rights, to recommend implementing regulations to the Congress which, when adopted, would take effect and permit employees to organize.

The Office of Compliance did its part. The Office of Compliance carefully reviewed the issue, and after careful review and public notice, the office's Board of Directors recommended regulations that, as the law said should be the default, followed the substantive regulations already issued by the Federal Labor Relations Authority. These regulations as required by the CAA needed to be approved by Congress before they could be implemented.

Our most recent oversight hearing on OCWR on November 19, 2021, included discussion of the issue of unionization for congressional staff. During that hearing, Barbara Camens, a member of the OCWR Board of Directors, testified that, and I quote, those regulations were issued by our board 25 years ago, before the current iteration of the Board. We have not looked at them, we have not reexamined them, and we have not taken a position on them.

Since our November 2021 hearing, there has been increased and significant attention to the issue of unionization of congressional staff and the 1996 regulations from both Members, staff, and the press.

Accordingly, in continuing our oversight of this issue, I wrote to the OCWR Board and asked for their views of the 1996 regulations. The Board responded on February 22, 2022, and said that following a fresh review of the regulations the board originally recommended, OCWR continues to support them and endorses their adoption.

And, without objection, I ask that my February 8, 2022, letter to the OCWR and the Board's February 22 response be inserted into the record.

The CHAIRPERSON. Two important principal goals of the Congressional Accountability Act were to improve the work environment

for legislative branch staff and provide them with the same rights and protections afforded to workers in other sectors, and to ensure that Congress operates under the laws it enacts for private sector workplaces.

We took important steps forward in a bipartisan basis in passing the original CAA, and we again acted together on a bipartisan basis to add additional reforms, including strengthening protections for staff, and increasing accountability for Members in recent years with this Committee playing a lead role.

However, Congress has still failed to follow through on an important part of the law, and that would provide Legislative Branch staff with the option to organize but only if they choose.

It is well past time for Congress to follow through on that promise. Today's hearing is an important opportunity to learn more specific aspects of the CAA and Congress' options for moving forward.

I would now recognize the Ranking Member, Mr. Davis, for any opening comments he may have.

[The statement of Chairperson Lofgren follows:]

Chairperson Zoe Lofgren
Oversight of Section 220 of the Congressional Accountability Act:
Implementing the Rights of Congressional Staff to Collectively Bargain
March 2, 2022
Opening Statement

Today, we are here to examine the rights of congressional staff to collectively bargain. One of the first votes I cast as a brand-new Member of the House of Representatives was to pass the Congressional Accountability Act. Not a single Member of the House of Representatives voted against it. As someone who grew up in a union family, and as a long-time advocate of workers' rights and protections, I was proud to cast that vote and proud to be part of an institution that sent a strong message to Legislative Branch employees and the American public by unanimously approving that bill.

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However, one provision of the bill we unanimously approved required additional action---the provision of the CAA that provided for Legislative Branch employees to organize and collectively bargain as employees in other workplaces can. That part of the law directed the new Office of Compliance, now called the Office of Congressional Workplace Rights, to recommend implementing regulations to the Congress which, when adopted, would take effect and permit employees to organize.

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We took important steps forward in a bipartisan basis in passing the original CAA, and we again acted together on a bipartisan basis to add additional reforms, including strengthening protections for staff, and increasing accountability for Members in recent years with this Committee playing a lead role. However, Congress has still failed to follow through on an important part of the law, and that would provide Legislative Branch staff with the option to organize but only if they choose.

It is well past time for Congress to follow through on that promise. Today's hearing is an important opportunity to learn more specific aspects of the CAA and Congress' options for moving forward. I would now recognize the Ranking Member, Mr. Davis, for any opening comments he may have.

Mr. DAVIS. Well, thank you, Madam Chairperson, for holding this hearing on this topic, but I am just glad that we are back here too. I mean, I feel like—you mentioned 1995, party like it is 1995 here in the hearing room again, frankly, party like it is February of 2020. I like this. I think this is our way of getting Congress to get back to normal and get back to more bipartisanship.

It is refreshing to have the majority talk about this topic before it goes to the Floor for a vote and especially on an issue that is this impactful to our institution.

I do want to begin by stating that I believe unions can and do play an important role in helping to facilitate a fair working environment in many industries across America.

During my time in Congress, I have been a strong supporter of Davis-Bacon provisions. I have supported union workers throughout my district, including the laborers, the carpenters, the operating engineers, and the mine workers, as well as many others in the building trades and outside the building trades. I have also been a supporter of existing unions here on Capitol Hill, in places where they make sense, like the Capitol Police or the Architect of the Capitol, other labor and trade unions.

Democrats say they have called this hearing to discuss the status of congressional staff. Considering that they have held the majority for three years, this is long overdue as the first hearing of any standing committee to seriously discuss any improvements to Hill staff pay and working conditions.

Now that the majority is finally talking about these issues, they are focusing on unworkable, impractical ideas like congressional staff unionization, collective bargaining for people who already have some of the best benefits in the country.

Unions do a lot of good to ensure hardworking folks across the country can earn a great middle-class living, but they are simply not feasible for congressional offices. Not only do most congressional staff already have the benefits most unions fight for, voting to unionize Congressional offices and committees would create serious problems and lead to even more dysfunction in Washington.

Congress' unique office structure, fluctuating partisan balance, unpredictable schedule changes, and unavoidable turnover due to elections make unions impractical in our offices and committees. This is a concept that could create numerous conflicts of interest and impact members' constitutional responsibilities to the American people without the guarantee that any improvements for staff well-being would materialize.

As a former Congressional staffer myself, I understand the unique working situation that all staff face. I know both the incredible opportunities and challenges of being on that side of a congressional office.

Like Members of Congress, staff are public servants. They are essential to the Legislative Branch, and our country is fortunate to have the benefit of their unique expertise and skill sets. We need to set realistic expectations of what unionizing in Congress would accomplish, which is to say very little.

First, there is no employment law gap for Congressional staff.

Second, staff unionization would fail to address one of staffers' main issues: low staff pay. Not only does Federal law prevent this,

union dues would simply take more from their paychecks without any assurance that improvement to staffers' work environment would come to fruition.

Further, congressional staff are all political appointees, not part of the Civil Service, and unionization would not change that. In other words, collective bargaining would simply add unworkable, additional layers without achieving much of anything.

Yet we acknowledge that there is more work that needs to be done to improve staff well-being. Both Chairperson Lofgren and I are members of the Select Committee on the Modernization of Congress, where we have had multiple conversations on how to improve the recruitment, treatment, and retention of staff.

This Committee has implemented several of these recommendations stemming from those conversations, for example, instituting the HR Help, the one-stop shop for human resource information for the whole House.

However, there are more recommendations that this Committee should consider. Instead of focusing on those, this hearing is only focusing on one narrow, unworkable pathway, rather than all the possible solutions that could directly address the concerns raised by staff.

After silence for nearly thirty years on these regulations, OCWR and the outgoing majority want to implement them overnight, without appropriate consideration. We need to approach this issue with eyes wide open, have all our questions answered before committing to a course of action.

Our staff and this institution deserve better, as do the American people. This Committee should focus on regular oversight of these issues and review the recommendations from the Modernization Committee.

Unions, again, many whom I have worked with on Capitol Hill and off, in government and outside of government, they play an important role in many workplaces. They just aren't the right answer for Congressional offices.

I yield back.

[The statement of Mr. Davis follows:]

Ranking Member Rodney Davis
Oversight of Section 220 of the Congressional Accountability Act:
Implementing the Rights of Congressional Staff to Collectively Bargain
March 2, 2022
Opening Statement

Thank you, Madam Chairperson, for holding this hearing on this topic, but I am just glad we are back here as well. I like this. I think this is our way of getting Congress to get back to normal and get back to more bipartisanship. It is refreshing to have the Majority talk about this topic before it goes to the Floor for a vote and especially on an issue that is this impactful to our institution.

I do want to begin by stating that I believe unions can and do play an important role in helping to facilitate a fair working environment in many industries across America. During my time in Congress, I have bene a strong supporter of Davis-Bacon provisions. I have supported union workers throughout my district, including the laborers, the carpenters, the operating engineers, and the mine workers, as well as many others in the building trades and outside the building trades. I have also been a supporter of existing unions here on Capitol Hill, in places where they make sense, like the Capitol Police or the Architect of the Capitol, other labor and trade unions.

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Unions do a lot of good to ensure hardworking people across the country can earn a great middle-class living, but they are simply not feasible for Congressional offices. Not only do most Congressional staff already have the benefits most unions fight for, voting to unionize Congressional offices and committees would create serious problems and lead to even more dysfunction in Washington, D.C.

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Further, Congressional staff are all political appointees, not part of the Civil Service, and unionization would not change that. In other words, collective bargaining would simply add unworkable, additional layers without achieving much of anything. Yet we acknowledge that there is more work that needs to be done to improve staff well-being. Both Chairperson Lofgren and I are members of the Select Committee on the Modernization of Congress, where we have had multiple conversations on how to improve the recruitment, treatment, and retention of staff.

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Unions, again, many whom I have worked with on Capitol Hill and off, in government and outside of government, they plan an important role in many workplaces. They just aren't the right answer for Congressional offices. I yield back.

The CHAIRPERSON. The gentleman yields back.

Other Members are invited to submit any opening statements for the record.

I would now like to welcome our witnesses. Our first witness is John Uelmen, who is the General Counsel for the Office of Congressional Workplace Rights. Mr. Uelmen previously served at OCWR as acting General Counsel, Deputy General Counsel, and Supervising Attorney. In December of 2015, the Board of Directors appointed him as the General Counsel.

In his capacity as the General Counsel, Mr. Uelmen is responsible for investigating and enforcing violations of the labor laws in the CAA, as well as ensuring compliance with health and safety and public access laws that are included in the CAA.

Prior to working with the OCWR, Mr. Uelmen prosecuted labor and employment cases before administrative tribunals, trial courts, and courts of appeal, for more than twenty years in Milwaukee, Wisconsin.

We welcome you, Mr. Uelmen.

And our second witness is Mark Strand, who is President of the Congressional Institute. The Institute produces resources such as a House Floor procedures manual and a survival guide for congressional staff.

Mr. Strand has served as president since 2007, and is also an adjunct professor of legislative affairs at George Washington University's Graduate School of Political Management. He is the co-author of the book "Surviving Inside Congress."

And like some of us, Mr. Strand is also a former congressional staffer, having spent nearly 24 years on Capitol Hill in both the House and Senate, most recently serving as the Chief of Staff to former Senator Jim Talent.

On behalf of the Committee, I really want to thank both of our witnesses for their long-standing interest in improving the Legislative Branch and for being willing to share their thoughts with us today.

I would remind the witnesses that their entire written statements will be made part of the record, and we would ask that you confine your oral testimony to about five-minutes.

So first, Mr. Uelmen, we are happy to recognize you.

Could you pull the microphone just a little bit closer? There we go.

Mr. UELMEN. All right.

The CHAIRPERSON. Much better.

STATEMENTS OF MR. JOHN D. UELMEN, GENERAL COUNSEL, OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS, WASHINGTON, D.C.; AND MR. MARK STRAND, PRESIDENT, THE CONGRESSIONAL INSTITUTE

STATEMENT OF JOHN D. UELMEN

Mr. UELMEN. Okay. Thank you for this opportunity to speak with you today about implementing the rights of congressional staff to collectively bargain under Section 220 of the Congressional Accountability Act.

As you know, I am the General Counsel of the Office of Congressional Workplace Rights, and under the CAA, I have specific statutory responsibilities with respect to Section 220. I know that many of you have questions about today's topic, so I will keep my oral statement brief.

Prior to the hearing, I did provide the Committee with a detailed written statement and a document from my office containing answers to frequently asked questions about unionization and collective bargaining.

In my written statement, I tried to provide you with three types of information concerning the past, the present, and the possible future, if a resolution approving the OCWR regulations is passed by the House.

Regarding the past, I provided some background information about the regulations approved by the board in 1996, how lack of congressional approval of these regulations affects the collective bargaining rights of congressional staff under Section 220, and how the current board responded to the Chairperson's recent inquiry as to whether the 1996 regulations are still being recommended for approval given the changes made to the CAA in the Reform Act.

As you know, the members are now unanimous in recommending that the regulations adopted by the 1996 board be approved by Congress. The statutory procedures under Section 220 were not changed by the Reform Act, and the regulations are not obsolete because of changes in the House or the Senate since 1996.

Regarding the present, I noted the pending approval resolution now before this Committee and suggested some steps the Committee might take regarding the language. I also provided a brief explanation about how unionization and collective bargaining currently operate under the OCWR regulations that were approved and issued in 1996 and which apply to other staff in the legislative branch, since these are the same regulations that would apply to congressional staff if the House were to approve the pending regulations that the board has not yet been able to issue.

These regulations contain procedures that are able to resolve representation questions, such as who must be included or excluded from a bargaining unit, as well as negotiability and all other issues.

Finally, regarding the future, I tried to answer some of the big picture questions about how unionization and collective bargaining might work if the rights of congressional staff would be implemented in the House. Because the definition of employing office in the CAA and because most decisions regarding staff working conditions are made by the management of each Member office, unions would have to organize at the Member and committee office level. There cannot be one bargaining unit for most House employees because the House of Representatives itself is not an employing office.

On the other hand, it would be possible to have more than one bargaining unit in an employing office. For example, committees would likely have two bargaining units which would be split by party affiliation.

Since I have noticed a change in the type of questions I have been receiving in the last few days, I also want to talk briefly about

the duty to bargain under the Federal Service Labor-Management Relations Statute, most of which is incorporated into Section 220. For convenience, I am going to refer to this as the statute.

The duty to bargain is very limited under the statute. It is nothing like what exists in the private sector under the National Labor Relations Act. When we talk about the duty to bargain, we are talking about proposals made by a union that management must bargain over.

Under the statute, the only mandatory subject of bargaining is over conditions of employment, which is defined in the statute as personnel practices, policies, and matters, whether established by rule, regulation, or otherwise, affecting working conditions. And that is in Section 7103(a)(14).

In addition, there is a broad prohibition against proposals contrary to law and a very expansive definition of management rights in Section 71(6)(a) that prevents mandatory bargaining on any proposal that would keep management or severely restrict management's right to do such things as determining its mission, budget, organization, number of employees, internal security, hiring and firing, disciplining, and making job assignments. So many of the bread-and-butter issues that labor unions can compel management to bargain over in the private sector are usually off the table for Federal employees under this statute.

The union can, under certain circumstances, compel bargaining over procedures which management will use when exercising a management right or appropriating arrangements for employees adversely affected by the exercise of a management right, but this is a far more limited form of bargaining than what exists in the private sector.

[The statement of Mr. Uelmen follows:]

Written Statement of John D. Uelmen, General Counsel, Office of Congressional Workplace Rights Before the Committee on House Administration

Oversight of Section 220 of the Congressional Accountability Act: Implementing the Rights of Congressional Staff to Collectively Bargain
March 2, 2022

Good afternoon Chairperson Lofgren, Ranking Member Davis, and other members of the Committee. Thank you for this opportunity to speak with you today about implementing the rights of Congressional staff to organize for the purpose of collective bargaining under Section 220 of the Congressional Accountability Act (CAA), 2 U.S.C. § 1351, which grants certain employees the right to form, join, or assist a labor organization without fear of penalty or reprisal.

As the General Counsel of the Office of Congressional Workplace Rights (OCWR), I have specific responsibilities under Section 220 of the CAA. The statute grants me the authority to investigate and prosecute cases involving unfair labor practices. It also allows me to investigate issues raised by labor-management petitions to the OCWR Board of Directors when directed to do so by the Board. I also advise the Board and the Executive Director on collective bargaining matters and defend the Board's decisions in most of these matters before the U.S. Court of Appeals for the Federal Circuit. For those of you who are not familiar with the concept of "unfair labor practices" under this section of the statute, an unfair labor practice is committed when an employing office or a union fails to comply with a statutory duty imposed by Section 220. Since an unfair labor practice can be committed at any stage of the collective bargaining process – from the earliest organizing efforts all the way through the termination of a collective bargaining agreement – my staff and I are generally familiar with the stages of the collective bargaining process and how these rights are implemented through the various processes provided by the OCWR under the CAA. However, because I am not directly responsible for the processing of representation petitions, I may not be able to answer certain questions without consulting with others in the office.

I know that members of the Committee have many questions about how the collective bargaining rights of Congressional staff would be implemented if the House approved the Regulations adopted by the OCWR Board, so I want to keep my opening remarks brief. But to provide a framework for my answers to your questions, there are three topics that I need to cover briefly.

First, since the topic of this hearing is implementing collective bargaining rights for Congressional staff, I will briefly review with you the mechanics of how these rights can be activated under the CAA. Second, since implementing these rights involves approving regulations, I will briefly describe the procedures we have established in these regulations to resolve issues that occur during the collective bargaining process. Finally, I will provide you with my answers to two "big picture" questions that have been posed. I say these are "my" answers because I am appearing here today solely as the General Counsel of the OCWR and any opinion or suggestion that I express here today is not necessarily that of the OCWR Board of Directors or the Executive Director, or the official position of the Office of Congressional Workplace Rights.

With that caveat, let me move to my first topic. As you know, Section 220 of the CAA incorporates most of the statutory provisions contained in the Federal Service Labor-Management Relations Statute and applies those provisions to employing offices, covered employees, and union representatives in the legislative branch. Under this section of the CAA, covered employees are granted collective bargaining rights and employing offices are guaranteed certain management rights. Although Congressional staffers working for Member and Committee offices are "covered employees" under the CAA, their statutory right to collectively bargain does not become effective until the effective date of regulations covering their offices. See 2 U.S.C. §§ 1351(e), 1351(f)(2). The regulations for these offices must be proposed, adopted, and issued by the OCWR Board, but the Board cannot issue these regulations until a resolution approving them is passed by the House or the Senate, or both the House and the Senate. A one-house approval resolution allows the Board to issue regulations for the offices of that house only.

So, where are we now in this process? In 1996, the Board of Directors of the OCWR (then known as the Office of Compliance) did propose and adopt the regulations needed to effectuate the rights of Congressional staff to collectively bargain, and sent them to both the House and the Senate for approval. No action was taken on this approval request until recently when House Resolution 915 was introduced, which would apply the regulations solely to House offices and employees. That resolution is now before this Committee. The regulations themselves are straightforward: They state that the same regulations that already apply to all of the other employees, labor representatives, and offices in the legislative branch covered by the CAA (i.e., the existing OCWR Substantive Regulations on Collective Bargaining and Unionization) would apply to the employees, labor representatives, and offices listed in section 220(e)(2) of the CAA, which includes Member and Committee offices. Recently, in response to a letter from Chairperson Lofgren, the OCWR Board confirmed that it unanimously agrees with the majority of the 1996 Board that these are the regulations that Congress should approve. These letters are included with my statement.

Since the resolution is now before this Committee for consideration, the first step probably should be to review carefully its wording for technical accuracy to ensure that the resolution does what its proponents want it to do. The CAA is very specific regarding what language "shall" be used in a one-house approval resolution. This language is set forth in 2 U.S.C. § 1384(c)(4). While the CAA is silent about what happens if this language is not used, I wanted to make sure that you are aware of this provision.

What happens, then, if the House passes a resolution approving regulations that cover House offices? Under the CAA, the regulations must still be formally issued by the OCWR Board. This happens after the OCWR Board formally transmits them to the House and the Senate for publication in the Congressional Record. 2 U.S.C. § 1384(d)(1). The date of issuance is the date they are published. 2 U.S.C. § 1384(d)(2).

But what is the effective date of the regulations? Under the CAA, regulations become effective not less than 60 days after they are issued, but the Board may provide for an earlier date if good cause is found. Should the Committee believe that there is good cause for specifying an earlier effective date, it might want to describe that good cause in any report that is issued. Remember, under the CAA, the effective date for statutory collective bargaining rights is the effective date of the regulations.

Now that we have covered the mechanics of how collective bargaining rights for Congressional staff can become effective, let me proceed to my second topic, which is to briefly describe how the current OCWR procedures would implement these rights. Covered employees would have a protected right to discuss in the workplace their desire to form, join, and assist a labor organization without reprisal. Typically, unionization of an employing office begins when an established labor union tries to organize a group of employees in an employing office for the purpose of collective bargaining. The union will make an initial determination of who should be in the bargaining unit and then start obtaining written consent for an election from at least 30% of the bargaining unit members. Upon obtaining consent to an election from 30% of the members, the union will file a petition for an election with the OCWR together with proof that there is a sufficient "showing of interest" – that is, documentation showing that at least 30% of the members of the proposed bargaining unit want to have an election. A copy of the petition is served on the employing office, the OCWR can require that the petition be posted and distributed in certain ways, and procedures are in place to resolve any pre-election issues.

Many pre-election issues concern the appropriateness of the proposed bargaining unit. There may be disagreements over who should be in included in or excluded from the bargaining unit. There is guidance in the statute and the case law regarding what factors should be considered when determining the appropriateness of a unit; ultimately, the issue comes down to whether there is a "community of interest" – i.e., whether it makes sense for this particular group of employees to bargain collectively over their working conditions. When there is an issue regarding who should be excluded from the bargaining unit, it usually involves whether certain employees are management officials or confidential employees. Management officials are those employees whose duties and responsibilities require or authorize the individual to formulate, determine, or influence the policies of the employing office. Confidential employees are those employees who work in a confidential capacity with respect to a management official. Frankly, these issues are often resolved by the parties themselves, since both union and

management have a vested interest in getting the bargaining unit right; however, if the parties cannot reach an agreement, there are procedures in place to resolve these disputes, which can include investigations, hearings, and testimony to resolve any factual disputes and determine who should or should not be part of the bargaining unit.

After all pre-election issues are resolved, an election is conducted by the OCWR. If a majority of the voting bargaining unit members vote to be represented by the union, the OCWR certifies the union as the exclusive representative for all of the members of the bargaining unit. No member of the bargaining unit can be compelled to join the union as a dues-paying member, and the union must fairly represent all bargaining unit employees regardless of their union membership. Once a union is certified as the exclusive representative, the employing office must negotiate conditions of employment with union and cannot directly negotiate with bargaining unit employees who are not union representatives. Bargaining between union representatives and management officials usually continues until a collective bargaining agreement is reached. There are various procedures under the regulations that can be used to resolve issues over the negotiability of proposals made during collective bargaining. There are also procedures in place to resolve impasses in bargaining should they occur.

After giving you this very cursory description of how the union organizing process works under the CAA, I can attempt to answer two "big picture" questions about unionization: how will the House Member offices unionize, and how will Committee offices unionize? To answer these questions, we must start with the basic definitions of "covered employee" and "employing office" in Section 101 of the CAA. Under the CAA, the term "covered employee" means any employee of the House of Representatives (2 U.S.C. § 1301(3)(A)), which in turn means any individual occupying a position "the pay for which is disbursed by the Chief Administrative Officer of the House of Representatives" or "a position in an entity that is paid with funds derived from the clerk-hire allowance" that is not employed by another employing office (2 U.S.C. § 1301(7)). Using this definition, I believe there are approximately 10,000 "covered employees" in the House.

Turning now to the definition of "employing office," the first thing to note is that the House of Representatives itself is not an employing office. Instead, the employing offices in the House are the personal offices of Members, Committees of the House, and "any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions or privileges of the employment of an employee of the House of Representatives." 2 U.S.C. § 1301(9). Consequently, if you add up all the Member offices, Committees, and other offices headed by a person with hiring and firing authority, I believe there are approximately 500 "employing offices" in the House.

What this means, of course, is that because union organizing must take place at the employing office level, it must be done separately within each Member's office or Committee office. This answers one of the questions that I have heard: Can there be one bargaining unit to represent all House staffers? No, it is not possible to create one bargaining unit representing all or most House employees. Similarly, collective bargaining takes place at the employing office level; however, there could be opportunities for multiple House offices to collectively bargain jointly.

Likewise, there cannot be one bargaining unit to represent all Committee staffers. In fact, there is a possibility that some House Committees will have more than one bargaining unit. In House Committees, the Chairperson does not usually set the terms and conditions of employment for minority staff; these are usually determined by the Ranking Member. It is likely that there would have to be separate bargaining units based upon party affiliation. Again, if there are any disputes about the appropriateness of a bargaining unit that cannot be resolved by the labor and management representatives, there are procedures in place to resolve these disputes.

I know that members of the Committee may have questions about how we are planning for the possible implementation of collective bargaining rights in the House. I can assure you that we are actively developing plans in three areas: education of stakeholders, refresher training for OCWR staff, and resource acquisition. If you have specific questions about these plans, I will be happy to answer them as best I can, either during this hearing or during separate discussions with the Committee's staff.

Having now covered my three topics, I am ready to answer your questions. Please note that we have prepared a document containing answers to Frequently Asked Questions (FAQs) which is either on our website or in the process of being posted to the website. I have also included the latest draft of this document with my statement and I hope you will find it useful.

February 8, 2022

Ms. Barbara Childs Wallace
Chair of the Board of Directors
Office of Congressional Workplace Rights
110 Second Street, SE
Room LA-200
Washington, D.C. 20540-1999

Dear Ms. Wallace,

As you are aware, when Congress overwhelmingly passed the Congressional Accountability Act of 1995 (CAA) on near unanimous votes in both the House and Senate, it extended a number of statutory protections for workers in the private sector to employees in the legislative branch. Among others, Congress expressly provided for employees to organize and bargain collectively. However, the CAA required the Office of Congressional Workplace Rights (then called the Office of Compliance) to issue regulations which would first have to be approved by Congress.

The following year, in 1996, OCWR fulfilled its role by adopting regulations and submitting them to Congress for approval. The regulations proposed by OCWR provided additional guidance for how legislative branch employees could exercise their statutory right to form or join labor organizations, as Congress expressly intended. Congress failed to act on the proposed regulations at that time.

The Committee on House Administration (CHA) recently held an oversight hearing on OCWR, on November 9, 2021, which included discussion of this specific issue. In her testimony, your colleague, Director Barbara Camens noted that in the ensuing quarter century since OCWR recommended regulations to Congress, the current members of the Board of Directors "have not looked at them, we have not reexamined them, and we have not taken a position on them." Ms. Camens also noted that OCWR's adoption of regulations in 1996 predated the service of the "current iteration of the board."

Much has changed since 1996. For example, CHA recently took a lead role in drafting and enacting a reform law with significant bipartisan input and support to update the protections of the CAA to provide greater protections for legislative branch employees, including making it easier for them to assert their rights and protections under the law. Accordingly, I request that

the Board of Directors of the Office of Congressional Workplace Rights review the regulations it proposed in 1996 related to collective bargaining. It is my hope that an expeditious review will inform the House's consideration of how to better improve the workplace for our Congressional staff.

I appreciate your quick attention to this matter. If you have any questions, please do not hesitate to contact me directly or the Committee Staff Director, Jamie Fleet.

Sincerely,

Zoe Lofgren
Chairperson

advancing workplace rights, safety & health, and accessibility in the legislative branch

Office of Congressional Workplace Rights

February 22, 2022

Via: Electronic Mail

Hon. Zoe Lofgren
Committee on House Administration
1309 Longworth House Office Building
Washington, D.C. 20515

Dear Chairperson Lofgren:

I have received your letter dated February 8, 2022 requesting that the OCWR Board of Directors (Board) conduct an expeditious review of the regulations adopted by a previous Board in 1996 that were promulgated under section 220(e)(1) of the Congressional Accountability Act (CAA) [2 U.S.C. § 1351(e)(1)] and would govern unionizing and collective bargaining rights in the personal offices of Members of the House of Representatives or Senators, as well as in committee, leadership and other enumerated offices.

The Board has conducted a thorough review and now unanimously endorses the regulations adopted by the 1996 Board and urges Congress to approve these regulations.

As you know, while Congress has not yet approved the Board's adopted regulations under CAA section 220(e)(1), Congress did approve the Board's adopted regulations under CAA section 220(d) that apply to all covered employees, labor representatives, and employing offices not identified in section 220(e)(2). The section 220(d) regulations are on our website as the Substantive Regulations on Collective Bargaining and Unionization and can be found here: https://www.ocwr.gov/wp-content/uploads/2021/09/final_regulations_lmr_19960930.pdf. The section 220(d) regulations were issued by the Board on October 1, 1996, and became effective on November 30, 1996. Like the regulations under section 220(e), the section 220(d) regulations are required by the CAA to be the same as the comparable FLRA regulations except where good cause exists for a modification that would be more effective for implementation of the rights and protections under this section. Consequently, the regulations issued by the Board in 1996 under section 220(d) closely follow the comparable FLRA regulations. Like the FLRA regulations upon which these regulations are based, the section 220(d) regulations provide procedures for resolving all disputes that may arise during organizing and collective bargaining, including potential exemptions from those rights, in a manner that is both informed and impartial.

The regulations adopted by the Board in 1996 under section 220(e) of the CAA are quite straightforward. They state that the same regulations that apply to all of the other employees, labor representatives, and offices in the legislative branch covered by the CAA (the existing

OCWR Regulations on Collective Bargaining and Unionization) will apply to the employees, labor representatives, and offices listed in section 220(e)(2).

In your letter, you specifically requested that the Board review the 1996 section 220(e) adopted regulations in light of the changes made by the CAA Reform Act in 2018. Since none of the Reform Act changes made in 2018 affected section 220 of the CAA, the Board has concluded that there is no need for any changes to the regulations adopted by the Board in 1996. While the CAA Reform Act changed the name of the Office of Compliance to the Office of Congressional Workplace Rights, the Reform Act also provides that "[a]ny reference to the Office of Compliance in any law, rule, regulation, or other official paper in effect as of such date shall be considered to refer and apply to the Office of Congressional Workplace Rights." Pub. L. 115-397, title III, § 308(d) (Dec. 21, 2018). For this reason, the Board does not believe that it even needs to propose a technical change to the name of the office in the adopted regulations.

Upon receiving your letter, we circulated it among the majority and minority staff of our oversight committees in both the House and the Senate and requested comments. We received comments suggesting that no changes need to be made to the 1996 adopted regulations. We also received comments suggesting that the Board should carefully review the 1996 adopted regulations to determine whether technical changes should be made because some office names have changed and some changes may have been made to the underlying statutes. Although CAA section 220(e)(2)(H) allows the Board to identify by regulation other Congressional offices that perform functions comparable to those listed in section 220(e)(2), it is not necessary for the Board to do so given its conclusion that the same regulations should apply to all offices. While this analysis would be necessary if the Board adopted special regulations for the Congressional offices identified in section 220(e)(2), no such special regulations are being proposed.

Regarding the underlying statute, section 220 incorporates specific sections of the Federal Service Labor Management Relations Statute (FSLMRS). Since 1996, there have been no significant changes to those sections of the statute that would affect the implementation of collective bargaining and unionization in the Congressional offices identified in CAA section 220(e)(2).

For these reasons, the Board does not see the need for any technical changes and unanimously requests that Congress approve the 1996 section 220(e) regulations previously adopted by the Board so that the Board can formally issue them. A copy of those regulations is attached. As provided in the CAA, the substantive rights under the FSLMRS made applicable to Congressional offices do not apply until the section 220(e) regulations are issued.

The Board will be publishing your letter and this response on our website and in the *Congressional Record* for public information.

Very respectfully yours,

Barbara C. Wallace

Barbara Childs Wallace
Chair of the Board of Directors

1996 ADOPTED REGULATIONS

Sec.

2472 Specific regulations regarding certain offices of Congress

2472.1 Purpose and Scope

The regulations contained in this section implement the provisions of chapter 71 as applied by section 220 of the CAA to covered employees in the following employing offices:

(A) the personal office of any member of the House of Representatives or of any Senator;

(B) a standing select, special, permanent, temporary, or other committee of the Senate or House of Representatives, or a joint committee of Congress;

(C) the Office of the Vice President (as President of the Senate), the office of the President pro tempore of the Senate, the Office of the Majority Leader of the Senate, the Office of the Minority Leader of the Senate, the Office of the Majority Whip of the Senate, the Office of the Minority Whip of the Senate, the Conference of the Majority of the Senate, the Conference of the Minority of the Senate, the Office of the Secretary of the Conference of the Majority of the Senate, the Office of the Secretary of the Conference of the Minority of the Senate, the Office of the Secretary for the Majority of the Senate, the Office of the Secretary for the Minority of the Senate, the Majority Policy Committee of the Senate, the Minority Policy Committee of the Senate, and the following offices within the Office of the Secretary of the Senate: Offices of the Parliamentarian, Bill Clerk, Legislative Clerk, Journal Clerk, Executive Clerk, Enrolling Clerk, Official Reporters of Debate, Daily Digest, Printing Services, Captioning Services, and Senate Chief Counsel for Employment;

(D) the Office of the Speaker of the House of Representatives, the Office of the Majority Leader of the House of Representatives, the Office of the Minority Leader of the House of Representatives, the Offices of the Chief Deputy Majority Whips, the Offices of the Chief Deputy Minority Whips, and the following offices within the Office of the Clerk of the House of Representatives: Offices of Legislative Operations, Official Reporters of Debate, Official Reporters to Committees, Printing Services, and Legislative Information;

(E) the Office of the Legislative Counsel of the Senate, the Office of the Senate Legal Counsel, the Office of the Legislative Counsel of the House of Representatives, the Office of the General Counsel of the House of Representatives, the Office of the Parliamentarian of the House of Representatives, and the Office of the Law Revision Counsel;

(F) the offices of any caucus or party organization;

(G) the Congressional Budget Office, the Office of Technology Assessment, and the Office of Compliance; and

(H) the Executive Office of the Secretary of the Senate, the Office of Senate Security, the Senate Disbursing Office, the Administrative Office of the Sergeant at Arms of the Senate, the Office of the Majority Whip of the House of Representatives, the Office of the Minority Whip of the House of Representatives, the Office of House Employment Counsel, the Immediate Office of the Clerk of the House of Representatives, the Immediate Office of the Chief Administrative Officer of the House of Representatives, the Office of Legislative Computer Systems of the House of Representatives, the Office of Finance of the House of Representatives and the Immediate Office of the Sergeant at Arms of the House of Representatives.

2472.2 Application of Chapter 71.

(a) The requirements and exemptions of chapter 71 of title 5, United States Code, as made applicable by section 220 of the CAA, shall apply to covered employees who are employed in the offices listed in section H2472.1 in the same manner and to the same extent as those requirements and exemptions are applied to other covered employees.

(b) The regulations of the Office, as set forth at section 2420-29 and 2470-71, shall apply to the employing offices listed in section 2472.1, covered employees who are employed in those offices, and representatives of those employees.

Labor-Management Relations in the Legislative Branch Frequently Asked Questions (FAQs)

The Office of Congressional Workplace Rights (OCWR) administers the Congressional Accountability Act (CAA) and works to guarantee the rights provided by the CAA to employees and employing offices within the legislative branch. Pursuant to Section 220 of the CAA, 2 U.S.C. § 1351, for employees who are eligible to join a union, the OCWR investigates and processes petitions for union representation and union elections, and the OCWR General Counsel investigates and prosecutes charges alleging unfair labor practices (ULPs). Below are FAQs about the representation process, negotiability and impasse procedures, and ULP charges and complaints.

The framework for the labor-management program in the legislative branch is set forth in the CAA and described in more detail in the OCWR's substantive regulations on collective bargaining and unionization. These regulations are cited in these FAQs as "OCWR Substantive Regulations."

Disclaimer: These FAQs contain general information and are not legal authority or legal advice. Particular answers may have unstated exceptions, qualifications, and/or limitations, or may become outdated due to changes in the law. For these reasons, please consult with an attorney prior to initiating any proceeding described in these FAQs.

If you have additional questions about labor-management issues in the legislative branch, please email LMR@ocwr.gov.

General Labor-Management FAQs

Do I have the right to unionize?

- **Covered legislative branch employees under CAA Section 220(d) and other laws**

The CAA currently provides union rights to many legislative branch employees, including employees of the United States Capitol Police, the Office of the Architect of the Capitol, the Office of Congressional Accessibility Services, the Office of Attending Physician, the Stennis Center for Public Service, and offices in the Senate and House of Representatives that are not listed in Section 220(e)(2) of the CAA.

Some legislative branch offices have union rights under laws other than the CAA. The Federal Service Labor-Management Relations Statute (FSLMRS) provides union rights to employees of

the Library of Congress and Government Publishing Office. 5 U.S.C. § 7103. Similarly, while the FSLMRS itself does not grant union rights to employees of the Government Accountability Office (GAO), the GAO Personnel Act guarantees the rights of GAO employees to form, join, or assist, or not to form, join, or assist, an employee organization freely and without fear of penalty or reprisal. 31 U.S.C. § 732(e). These rights are enforced by the GAO Personnel Appeals Board.

- **Covered legislative branch employees under CAA Section 220(e)**

The general definition of "covered employee" in the Congressional Accountability Act includes employees of the House of Representatives and the Senate. However, Section 220(e) requires that additional regulations be adopted and approved before the employees of the offices listed in Section 220(e)(2) have the right to organize for the purpose of collective bargaining. These regulations were adopted by the OCWR Board under Section 220(e)(1) in 1996 but have not yet been approved by Congress. A House resolution was introduced in the 117th Congress to approve the regulations for House employees. A similar resolution may be introduced in the Senate to approve the regulations for Senate employees.

The Senate and House employing offices listed in Section 220(e)(2) are:

(1) the personal office of any Member of the House of Representatives or of any Senator;

(2) a standing, select, special, permanent, temporary, or other committee of the Senate or House of Representatives, or a joint committee of Congress;

(3) the Office of the Vice President (as President of the Senate), the Office of the President pro tempore of the Senate, the Office of the Majority Leader of the Senate, the Office of the Minority Leader of the Senate, the Office of the Majority Whip of the Senate, the Office of the Minority Whip of the Senate, the Conference of the Majority of the Senate, the Conference of the Minority of the Senate, the Office of the Secretary of the Conference of the Majority of the Senate, the Office of the Secretary of the Conference of the Minority of the Senate, the Office of the Secretary for the Majority of the Senate, the Office of the Secretary for the Minority of the Senate, the Majority Policy Committee of the Senate, the Minority Policy Committee of the Senate, and the following offices within the Office of the Secretary of the Senate: Offices of the Parliamentarian, Bill Clerk, Legislative Clerk, Journal Clerk, Executive Clerk, Enrolling Clerk, Official Reporters of Debate, Daily Digest, Printing Services, Captioning Services, and Senate Chief Counsel for Employment;

(4) the Office of the Speaker of the House of Representatives, the Office of the Majority Leader of the House of Representatives, the Office of the Minority Leader of the House of Representatives, the Offices of the Chief Deputy Majority Whips, the Offices of the Chief Deputy Minority Whips and the following offices within the Office of the Clerk of the House of Representatives: Offices of Legislative Operations, Official Reporters of Debate, Official Reporters to Committees, Printing Services, and Legislative Information;

(5) the Office of the Legislative Counsel of the Senate, the Office of the Senate Legal Counsel, the Office of the Legislative Counsel of the House of Representatives, the Office of

the General Counsel of the House of Representatives, the Office of the Parliamentarian of the House of Representatives, and the Office of the Law Revision Counsel; and

(6) the offices of any caucus or party organization.

In addition, employees of the Congressional Budget Office (CBO) and the Office of Congressional Workplace Rights do not currently have the right to unionize, because these offices are also identified in Section 220(e)(2) of the CAA.

- **How would a House or Senate resolution approving regulations adopted by the OCWR Board of Directors affect the union rights of legislative branch employees?**

None of the employees of the offices listed in Section 220(e)(2) of the CAA will have union rights until the House, the Senate, or both pass a resolution approving regulations adopted by the OCWR Board under Section 220(e)(1). These adopted regulations provide that the same regulations applying to all of the other legislative branch offices, employees, and union representatives would apply to the offices listed in Section 220(e)(2) and their employees and union representatives. Should the House pass such a resolution, the employees of the House offices listed in Section 220(e)(2) would have union rights after the OCWR Board formally issues the regulations through publication in the Congressional Record. The same would be true for employees of the Senate offices identified in Section 220(e) if the Senate were to pass such a resolution. Employees of the CBO and OCWR would not have union rights unless both the House and Senate passed a concurrent resolution approving the regulations.

- **Are confidential employees and management officials eligible?**

No. Confidential and management employees – including but not limited to supervisors, human resources, and management officials – do *not* have the right to unionize for the purpose of collective bargaining even if they work for a covered employing office. These terms are defined in the OCWR Substantive Regulations at sections 2421.3(j) (management official) and 2421.3(l) (confidential employee).

- **Are unpaid interns eligible employees?**

No. Although the CAA provides unpaid interns with protections against certain types of unlawful discrimination, it does not provide unpaid interns with a statutory right to unionize.

Who can help me with my labor-management related problem?

The Office of Congressional Workplace Rights (OCWR) handles labor-management issues for legislative branch employees. Such matters include identifying appropriate units and supervising union elections, handling negotiability appeals, conducting impasse proceedings, and investigating unfair labor practices.

However, the Federal Labor Relations Authority (FLRA) handles labor-management issues for employees of the Library of Congress and Government Publishing Office, and the GAO Personnel Appeals Board handles labor-management issues for employees of the GAO.

What labor-management rights are protected by the CAA?

The Congressional Accountability Act incorporates by reference 5 U.S.C. §§ 7102, 7106, 7111 through 7117, 7119 through 7122, and 7131 for application to the legislative branch. These sections provide:

- 7102 - Employees' rights.
- 7106 - Management rights.
- 7111 - Exclusive recognition of labor organizations.
- 7112 - Determination of appropriate units for labor organization representation.
- 7113 - National consultation rights.
- 7114 - Representation rights and duties.
- 7115 - Allotments to representatives.
- 7116 - Unfair labor practices.
- 7117 - Duty to bargain in good faith; compelling need; duty to consult.
- 7119 - Negotiation impasses; Federal Service Impasses Panel.
- 7120 - Standards of conduct for labor organizations.
- 7121 - Grievance procedures.
- 7122 - Exceptions to arbitral awards.
- 7131 - Official time.

In addition, the CAA provides the OCWR with the authorities provided to the FLRA in sections 7103(b), 7105, 7111, 7112, 7113, 7115, 7117, 7118, and 7122 of Title 5.

Representation FAQs

What are "representation proceedings"?

The term "representation proceedings" in labor-management relations usually refers to elections, clarifications of bargaining units, consolidations of bargaining units, and/or decertifications of bargaining units. OCWR Representation Petition Form 1351D is used to request an election, determine eligibility for dues allotment in an appropriate unit without an exclusive representative, and clarify, amend, consolidate, or decertify a bargaining unit.

Election for a Union

How do eligible employees become represented (or not) by a union?

Eligible employees who are not represented by a union may petition for an election to decide whether a union will represent a proposed bargaining unit of eligible employees. This petition and election process involves the following steps:

(1) The employees provide the union with a "showing of interest," i.e., signatures of at least 30% of the employees of an appropriate bargaining unit showing their wish to be represented by this union.
(2) The union petitions the OCWR using the OCWR Representation Petition Form 1351D.
(3) The OCWR investigates and resolves all pre-election issues raised by the parties.
(4) Any other union can gain a place on the ballot by filing a petition showing that they are supported by at least 10% of the employees.
(5) The OCWR holds an election.
(6) Employees have the opportunity to vote to choose which labor organization, if any, they would like to represent them.
(7) If a majority of the voting employees vote to be represented by a particular union, the OCWR Board of Directors certifies the union as the employees' exclusive representative.

What is a "showing of interest"?

A "showing of interest" demonstrates that an employee wants to be represented by a union.

- **How many employees must show interest for an election petition?**

At least 30% of employees in the proposed bargaining unit must show interest in voting for a union representative.

- **What documentation is needed to show interest for an election petition?**

An "authorization" or "signature" card which is signed and dated by the employee is most often used to show interest. However, other documentation may be used to show interest, such as a document which is signed and dated by multiple employees authorizing the union to represent them, a signed and dated allotment of dues form, and/or evidence of employees' membership in a union.

- **Is an employee's signature on an authorization card a vote for a union?**

No. An employee who signs a "showing of interest" card is not voting for a union by signing the card; rather, the employee is merely indicating that the employee would like an election to occur. In addition, an employee's signature on an authorization card or document does *not* commit the employee to vote for the union.

- **Will the OCWR recognize an employee's electronic signature on an authorization card as valid?**

OCWR Procedural Rule 1.05 allows for electronic signatures on any "filing" that is filed electronically. The OCWR Board has never specifically determined whether this rule applies to authorization cards and petitions filed electronically. If signatures on authorization cards are obtained electronically, it would be a good practice to maintain a record of the email interactior or other similar documentation in case an investigation into the authentication of the signatures conducted.

What is a union election?

A union election is the decision to have a labor organization represent employees with management and is made in a secret ballot election among the unit employees. The OCWR supervises the union election and certifies the results of the election. A majority of the employe in the bargaining unit who vote must be in favor of unionization for a labor organization to become their exclusive representative.

What is an election petition?

The OCWR Representation Petition Form 1351D is the petition form used to request an electio to determine whether a group of employees will or will not be represented by a union.

- **Who may file an election petition?**

A labor organization that is interested in representing a group of employees may file a petition form.

- **What to file**

A labor organization must file documentation to establish the proper showing of interest and an alphabetical list of the people showing interest, together with OCWR Representation Petition Form 1351D.

The questions and instructions in the petition form further describe the information required, including but not limited to contact information for all stakeholders, a description and estimated size of the bargaining unit(s) at issue, a statement of the results sought by the petitioner, a verification that the showing of interest requirement has been met for the election petition, and a signature of the person filing the petition. For more information, see sections 2422.2 – 2422.5 o the OCWR Substantive Regulations.

- **Where to file**

The election petition form and supporting documentation must be filed with the OCWR Executive Director. The form may be emailed to ocwrefile@ocwr.gov, faxed to (202) 426-1913 (limit 75 pages), or hand delivered to the Office of Congressional Workplace Rights, John Adams Building, 110 Second Street, SE, Room LA-200, Washington, DC 20540-1999. Please

call the OCWR office at (202) 724-9250 prior to making a hand delivery to ensure that someone is present to receive the document.

What happens after a union files an election petition?

After the election petition is filed, the OCWR Executive Director, acting on behalf of the OCWR Board of Directors, will investigate any issue raised by the parties, including the adequacy of the showing of interest, the appropriateness of the proposed bargaining unit, and any other issue that must be resolved for the election to go forward. The OCWR Executive Director may hold a pre-election investigative hearing.

Can the election petition be challenged?

Yes. Many aspects of the election petition may be challenged, including the validity of the showing of interest, the composition of the bargaining unit, the status of the labor union, and the timeliness of the petition if there is a time bar because of a previous election, collective bargaining agreement, or other bars.

For more information, please see the OCWR Substantive Regulations at sections 2422.10 (validity of showing of interest), 2422.11 (challenging status of the labor union), or 2422.12 (timeliness).

Can more than one union seek to be the exclusive representative?

Yes, by filing a request to "intervene." Any other union can gain a place on the ballot by filing a request to intervene before the pre-election investigatory hearing opens, showing they are supported by at least 10% of the employees.

Can the union and employing office agree to the details of the election?

Yes. Parties may enter into a voluntary election agreement, and are encouraged to do so.

What happens if the parties cannot agree on the election details?

If the parties are unable to agree on procedural matters – e.g., how long an employee must be working for the employing office to be eligible to vote, method of election, dates, hours, location of the election, etc. – the OCWR Executive Director decides the election procedures and issues a Direction of Election.

How does the election process work?

A notice of election will be posted by the employing office and/or distributed to employees in the proposed bargaining unit. The notice must contain all the information that employees need in order to vote, including but not limited to the date, time, and location of the election.

The election will follow the parties' Election Agreement or the Direction of Election. The votes will be cast by secret ballot. A person's right to vote may be challenged prior to the person voting. After the election is concluded, the OCWR Executive Director or their designee will tally the ballots and certify the election results.

What happens if the labor organization wins the election?

The labor organization is certified by the OCWR Executive Director on behalf of the OCWR Board of Directors and becomes the exclusive representative of the bargaining unit for collective bargaining.

If the labor organization wins the election, do I have to join the union?

No. Under the statute, no employee can be forced to join a union. All employees are free to join, or not join, a union without fear of penalty or reprisal.

What if I am subject to reprisal for engaging in organizing activity or because I joined, or did not join, a union?

This type of reprisal constitutes an unfair labor practice (ULP) and you can file a ULP charge with the OCWR General Counsel. See the Unfair Labor Practices FAQs below.

Will dues be taken out of my paycheck if the union wins the election?

Many collective bargaining agreements provide that member dues will be deducted from paychecks. This provision is commonly referred to as a "dues check off" provision. Only those employees who join the union pay dues. No dues are deducted until after a collective bargaining agreement with a dues check off provision is reached and becomes effective.

Unit FAQs

What is an "appropriate unit"?

For a bargaining unit to be an "appropriate unit," the employees must share a "clear and identifiable community of interest" and the unit must promote "effective dealings" with, and efficiency of the operations of, the employing office involved. A pre-election hearing may be necessary to resolve disputes about the appropriateness of a unit proposed in a petition.

What is a "clarification of unit"?

If there is a dispute about whether an employee, or group of employees, should be part of an established bargaining unit, an employing office or union can petition the OCWR to resolve the dispute using the procedures set forth in Section 2422 of the OCWR Substantive Regulations.

What is a "consolidations of units"?

Unions or employing offices may petition to consolidate two or more bargaining units within the same employing office.

Decertification Election FAQs

What is a decertification election?

Employees already represented by a union may petition the OCWR to conduct an election for representation by another union or to be unrepresented.

How do bargaining unit employees decertify (or choose not to decertify) a union?

Bargaining unit employees who are already represented by a union may petition for an election to end the union from being their exclusive representative. A decertification petition involves the following steps:

(1) The employees gather a "showing of interest," i.e., signatures of at least 30% of the employees in the bargaining unit, showing their wish to no longer be represented by their existing union.
(2) The employees petition the OCWR using OCWR Representation Petition Form 1351D.
(3) The OCWR certifies the validity of the signatures on the petition.
(4) The OCWR holds an election.
(5) Employees have the opportunity to vote to choose which labor organization, if any, they would like to represent them.
(6) If a majority of the voting employees vote that they no longer wish to be represented by their existing union, the OCWR Board of Directors decertifies the union as the employees' exclusive representative.

Negotiability and Impasse FAQs

What is "collective bargaining"?

"Collective bargaining" is the performance of the mutual obligation of the employing office and the exclusive representative of employees to meet at reasonable times and consult and bargain in a good faith effort to reach agreement on personnel policies, practices, and matters affecting working conditions.

Are there topics that cannot be bargained?

Yes. There are management rights that are not subject to bargaining. A list of these management rights is provided in 5 U.S.C. § 7106(a) and includes such topics as determining the mission, budget, organization, number of employees, and internal security practices of the employing office. However, even if a topic is designated as a management right, this does not preclude bargaining over procedures that the employing office will observe when exercising that right or appropriate arrangements for employees adversely affected by the exercise of that right. This is commonly referred to as "impact and implementation" bargaining. See 5 U.S.C. § 7106(b).

What happens if an employing office believes that a proposal is not negotiable?

Negotiability disputes can be resolved by filing a petition with the OCWR Board of Directors using the procedures set forth in Section 2424 of the OCWR Substantive Regulations. Alternatively, refusal to bargain over a proposal that is clearly negotiable may constitute an unfair labor practice and a dispute of this nature can be resolved by filing an unfair labor practice charge with the OCWR General Counsel. See the OCWR Substantive Regulations at section 2423, and the unfair labor practice FAQs below. A labor organization must choose between the unfair labor practice procedures or the negotiability petition procedures; both set of procedures cannot be used. The regulations and section 8.06 of the OCWR Procedural Rules provide for expedited review of negotiability disputes.

What happens if the employing office and the union cannot reach a collective bargaining agreement?

Impasse is the point in the negotiation over conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement. The OCWR Board of Directors serves the same function as the FLRA impasse panel and can resolve issues which have caused an impasse. Impasse procedures are initiated by filing an Impasse Services Request for Assistance form with the OCWR. The complete impasse procedures are set forth in Section 2471 of the OCWR Substantive Regulations.

Unfair Labor Practices FAQs

What are unfair labor practices?

The term "unfair labor practices" (ULPs) refers to provisions of the FSLMRS, as applied by the CAA, that prohibit both employing offices and labor organizations from engaging in conduct that is contrary to the labor-management rights established by law. Both labor organizations and employing offices are prohibited from, among other things:

- interfering with, restraining, coercing, or taking reprisal against employees in the exercise of their labor organizing rights; and
- refusing to negotiate in good faith over terms and conditions of employment.

For a more comprehensive list of unfair labor practices, please see section 2421.4(d) of the OCWR Substantive Regulations.

What can I do about unfair labor practices?

If you believe that an employing office or a labor organization has committed an unfair labor practice, you may file a ULP charge with the General Counsel of the OCWR. The official forms for a ULP Charge Against an Employing Office or a ULP Charge Against a Labor Organization contain information about what information to include and how to file. It is best to include as much supporting documentation as you can along with the charge. If you file a charge with the

General Counsel, you must also provide a copy of the signed charge to the charged party or the charged party's representative. See section 2423.6(b) of the OCWR Substantive Regulations for more information.

How long do I have to file a charge?

You have **180 days** from when the alleged violation occurred to file a timely charge. A charge will be deemed "filed" when it is received by the Office of the General Counsel.

What happens after I file a charge?

Once a charge is filed, attorneys in the OCWR Office of General Counsel determine whether the charge is sufficient to warrant an investigation. They then request position papers from the parties and conduct an investigation to assess the merits of the charge. After a thorough and impartial investigation, if the charge is determined to have merit and the parties are unable to reach a settlement, the General Counsel may file a complaint with the Executive Director of the OCWR. Complaints are adjudicated before a Hearing Officer, whose decision may be appealed to the OCWR Board of Directors and the U.S. Court of Appeals for the Federal Circuit. If the charged party is ultimately found to have committed an unfair labor practice, they will typically be required to post a notice informing bargaining unit employees of the ULP, and other remedies may also be ordered.

The CHAIRPERSON. Thank you, Mr. Uelmen. Your time has expired, but your full written report is available. It will be on our website, not only for the Members, but for staff and other interested members of the public to thoroughly review. We do appreciate it, and we will hold you available for questions after we hear from Mr. Strand, who will now be recognized remotely for five minutes.

Mr. Strand.

STATEMENT OF MARK STRAND

Mr. STRAND. Thank you, Chairperson Lofgren and Ranking Member Davis and other Members of the Committee. Thank you for inviting me to testify on the issue of congressional staff unionization.

I believe unionizing would ultimately harm Congress and inhibit the work of elected Representatives and threaten their independence. I want to make clear, though, that I am not against labor unions. I am the son of a union shop steward. As a former staffer who served in the House and Senate for 24 years, I am mindful of the often challenging circumstances of being a congressional employee.

My written testimony contains a lot of open-ended questions that need to be answered before taking a single step towards allowing employee unions among your staff. Because once you start down this road, you might find it extremely difficult to turn back.

For the first hundred years of our government, Congress didn't have staff. It wasn't until a joint committee in the 1970s pushed through a number of reforms that modernized Congress that we arrived at the current number of staffers working for individual Members.

I mention this because citizens do not elect staff. They elect a single individual to represent them. Members then are given broad latitude to hire the staff they think will best serve their constituents.

The Executive Branch currently has more than two million employees, plus 4,000 political appointees, all of whom help the President execute his agenda. For Congress to compete, it requires strong individual legislators. We empower Members to organize in offices based on the unique needs of their district.

The independence of each individual Member is the key to Article I powers invested in the Legislative Branch through our Constitution. Our system of government was intentionally created to invest significant power in individual lawmakers. By contrast, the political parties in the parliamentary system control most staff, which serves as a check against individual Members, showing independence from party leaders. To give up that kind of independence that is engrained in our system would put Congress at an even greater disadvantage against the Executive Branch.

The essential problem with unionization is that the union will share control over terms and conditions of employment with the elected Representative that intersect at vital points with the ability of a Member to represent his or her constituents.

A classic example is the right to discharge an employee. A lawmaker hires a legislative aide to assist with that Member's primary

committee assignment. The aide performs adequately on most issues but develops a contentious relationship with committee staff which, in turn, threatens the Member's ability to participate in the committee process.

Is there a just cause to discharge the employee and hire someone who can get along with the committee staff and thereby ensure the Member's legislative agenda is achieved? How do you prove that in grievance procedure? Do you get affidavits from committee staff?

What if, while that process is going on, the committee is passing a comprehensive reauthorization that won't occur again for another ten years? How will the Member explain to voters that internal staff disputes led to legislative failures but that Member still deserves to be reelected?

What if the staff member performs their job functions well enough but makes a very poor impression on constituents, like a front desk person who has difficulty making people feel welcome? What if the scheduler makes periodic mistakes that embarrass the office with double booking meetings or not factoring in travel times in the district? How many mistakes are enough to justify replacement?

Unionization would require uniform jobs in each office ultimately, which would take an incredible amount of agency away from lawmakers. Right now, a staff assistant in one office might also be a press assistant, but in another, she oversees interns or handles one or two smaller policy issues.

How would standardizing the job of a staff assistant help young employees learn the other roles needed in a Capitol Hill office?

A union, under the guise of improving workplace conditions, might enforce labor hours, but congressional committee schedules can vary from week to week, even day to day. Washington, D.C. staff can put in long hours during session, but during recess periods, it is the district staff who is no longer working traditional nine to five, and instead is staffing their boss at breakfast, dinners, and weekend events. These are the normal feast or famine hours for congressional staff.

But if union decides that such long hours are detrimental, what happens then? How is a Member sufficiently served when someone other than she and the chief of staff determine when employees can work within reasonable limits? What happens to a committee if a markup runs long or extends into the morning hours? Are time-sensitive negotiations put on hold because staff must remain off the job for certain periods to comply with union mandates?

Senator Robert Byrd, a supporter of unions, spoke against Capitol Hill unions. He said, Senators will no longer have the ability to structure and manage their staffs consistent with the unique needs of the States which they represent without first consulting with union representatives.

Congressional staffers, just like Members, get pulled to public service. Working conditions can certainly be improved, but the correct approach is robust oversight through this Committee or even by looking at what your colleagues on the Select Committee on the Modernization of Congress have done.

Discretion over things like salary levels, job responsibilities, titles, hours to a reasonable extent, among a myriad of other issues, need to be left to the Members themselves.

Thank you for inviting me to testify.

[The statement of Mr. Strand follows:]

Testimony from Congressional Institute President Mark Strand
Submitted to the
U.S. House Committee on Administration

Hearing: Oversight of Section 220 of the Congressional Accountability Act: Implementing the Rights of Congressional Staff to Collectively Bargain

March 2, 2022

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Chair Lofgren, Ranking Member Davis and other Members of the Committee. Thank you for inviting me to testify on the issue of congressional staff unionization.

I am not against labor unions. I am the son of a union shop steward. And, as a former staffer who served in the House and Senate for 24 years, I am mindful of the often-challenging circumstances of being a congressional employee.

For the first hundred years of our government, there was no staff. We did not get to the current number of staff until the 1970s, following the work of a Joint Committee on congressional reform. I bring this up because citizens do not elect staff. They elect a single individual to represent them. Members of Congress are, consequently, given broad latitude to hire the staff they think will best serve their constituents.

For Congress to compete with the Executive Branch, it requires strong individual legislators. We empower Members to control the size and job duties of their staff based on the unique needs of their districts. Members are supposed to be the primary voice for their constituents in government. When we talk about earmark reform, for example, it is because we want to give Members a powerful and individual voice in how federal dollars are spent in their district.

The independence of each individual Member is key to the Article One powers invested in the Legislative Branch.

This is dramatically different from parliamentary systems where the Prime Minister is a member of the legislature. In our system, the President represents the Executive Branch with about 2 million employees and thousands of political appointees who help the President to conduct his agenda. In a parliamentary system, individual lawmakers tend to have just a few staffers - typically about three - and all other employees are either controlled by the political parties or are institutional and non-partisan.

Eighteen full-time staffers – the current limit for House offices – would be the envy of any lawmaker serving in a parliament. But the political parties in parliamentary systems control the majority of employees as a check against individual lawmakers showing independence from party leaders. It is true that partisanship has sometimes led the 21st Century Congress to behave like a parliament with its party-line votes, but this is a departure from tradition and history where Members have voted the interests of their districts above the interests of their party.

Our system of government was intentionally created to invest significant power in individual Members of Congress. To give up that independence would put Congress at an even greater disadvantage in the never-ending competition between the branches of government.

The essential problem with unionization is that union will share control over terms and conditions of employment with the elected representative that intersect at vital points with the ability of a Member to represent his constituents. The classic example is the right to discharge an employee. A lawmaker hires a legislative aide to assist with that Members' primary committee assignment. The aide performs adequately on most issues but develops a contentious relationship with committee staff, which, in turns, threatens the Member's ability to participate in the committee process. Is there just cause to discharge the employee and hire someone who can get along with committee staff and thereby ensure the Member's legislative agenda is achieved? How do you prove that in some kind of grievance procedure? Do you get affidavits from committee staff? What if, while that process is going on, the committee is passing a comprehensive reauthorization that won't occur again for another ten years? How will the Member explain to voters that internal staff disputes led to legislative failures but that Member still deserves to be re-elected?

What if the staff member performs their job functions well enough but makes a very poor impression on constituents – like a front desk person who has difficulty making people feel welcome? What if the scheduler makes periodic mistakes that embarrass the office with

double booking meetings or not factoring in travel times in the district? How many mistakes are enough to justify replacement?

Another mark against unionization is that Members would need to have uniform jobs from one office to another. Work conditions vary from week to week and even day to day, depending on the congressional and committee schedule. Sometimes the Washington staff puts in long hours, but when Congress is in recess, the Washington hours are more normal while district staff could be working six or seven days from early morning to late in the evening. These are the normal "feast or famine" hours of congressional staff. A feature of unionization is to create standard schedules, but how would that work for committee markups that can run many hours longer than expected and into the early morning hours? Would committee staff be able to walk off the job if a mark-up runs too long? Consider the impact that would have on the legislative process.

In congressional offices, a job title in one can mean something different in another. You can have caseworkers who also do outreach. You can have a staff assistant who also does legislative correspondence, but in another office, the staff assistant is a press assistant, and perhaps in another office, the intern coordinator and tours director. Some legislative assistants handle a single issue for committee work while others handle multiple issues. One of the practical problems is how do you negotiate union rules for staff whose titles mean different things in different offices for the specific purpose of best representing constituents on behalf of the elected Member. Different kinds of responsibilities might determine different pay rates for each of these employees.

In the Executive Branch, essentially all non-supervisory staff with some exceptions have the right to organize and collectively bargain. So, would most legislative assistants and committee staff be included in a congressional system under the Federal Labor Relations Authority similar to the regulations governing Executive Branch employees?

As Senator Robert Byrd pointed out in 1995, if there were employee unions on Capitol Hill, "Senators will no longer have the ability to structure and manage their staffs consistent with the unique needs of the States which they represent without first consulting with union representatives."

Senator Byrd was known to champion the rights of union employees so his opposition should give pause to anyone wanting to form congressional staff unions.

There are other, practical considerations. What happens if such a union made political contributions against a Member of Congress whose staff were paying dues? What if only the staff of one party joined a union, and that party from time to time – as tends to happen – suddenly finds itself in the minority with no control over the agenda and schedule? Wouldn't that party be at a huge disadvantage during an important mark-up or Floor debate if the union rules prevent staffers from working past a certain number of hours? What if unions chose to target certain Members for grievances based on their party or their ideology while soft-peddling issues in the offices of party leaders or committees that have important jurisdiction over union rules? It's not far-fetched to think that union officials might play the process differently depending on the power or attitude of the Member on other issues. Would employees be allowed to sue unions for failing to represent them properly?

Could union actions slowdown the legislative process and even threaten to cause government shutdowns? After all, to gain benefits for their members unions need leverage. Autoworkers make cars. Legislative staff make legislation. The main leverage of a legislative staff union would be threatening the legislative process. What would happen if a union representing caseworks decided on an action such as a work slowdown or a "sick out"? That's the potential control a congressional staff union could exert over how a Member represents their constituents. That would be intolerable.

No one elects congressional staff. They have no rights under our system of government to shape the legislative process in any way other than at the express direction of the elected

Member whose office they serve in. Deciding that direction is the job of the elected representatives.

I'm not saying that there aren't Members of Congress who do a poor job managing staff and that there aren't legitimate staff grievances. A good member of Congress sees their staff as their most important resource after their own time. A smart Member sets up a good management team that allows the staff to do great work on legislation, keep constituents informed of their actions, conduct outreach, and fight on behalf of constituents who have problems with Executive Branch agencies. This is the difference between a really good Member and an average one. Good staff exponentially increases the ability of a Member to do excellent work for constituents – both in terms of legislation and more district-focused activities.

Congress has made significant progress against the excesses of bad Members by preventing staff from being able to contribute to their bosses' campaigns, preventing age and racial discrimination, addressing sexual harassment, and providing training, assistance, and counseling to all levels of employees, including chiefs, district directors, and committee staff directors. It can do more, and the Select Committee on Modernization of Congress has been examining many of these issues. Congressional salaries are notoriously low, especially when compared to the private sector salaries senior staff can command. Passing the current fiscal year Legislative Appropriation bill would go a long way toward addressing some of that issue.

As a Capitol Hill staffer for nearly 24 years during which time I served in nearly every position you can hold except for the elected one, I can tell you that staffers do not do this job for the pay, the cushy hours, or the spacious offices. Like Members, staff also serve the public and swear an oath to defend and protect the Constitution. Much of that work can be quite rewarding and fulfilling, but we serve the country through the people's representatives - the elected Members of Congress. When we forget whose name is on the door, it is time to move on.

About a hundred of your colleagues, including some of you, began your time on Capitol Hill as staff. Jobs in Congress are not for everybody and attempts to unionize staff cannot change that. This work requires unselfish service and long hours with modest pay. This is as true for Members as it is for staff.

There are better ways to deal with the problems facing staff in the Congress than unionization. The right system is one where the Committee on House Administration, in collaboration with the Office of Workplace Rights and the Office of Employee Advocacy, does robust oversight to prevent abuses, like sexual harassment or bullying, but leaves discretion over judgment questions such as general hiring, pay levels, job responsibilities and titles, hours (to a reasonable extent), and the general direction of the office, among myriad other issues, to the Members themselves.

The Congressional Institute studies the internal operations of Congress and advocates for reforms that will make the institution more effective. I believe that steps to unionize would ultimately harm Congress and inhibit the work of elected representatives and threaten their independence. Thank you for inviting me to testify. I posed a lot of open questions that need to be answered before taking a single step more toward allowing employee unions among your staff. While we all have the same goal of making Congress a better place to work, we must be mindful of the potential conflicts of interest and unintended consequences – because once you start down that road, you might find it extremely difficult to turn back.

The CHAIRPERSON. Thank you very much, Mr. Strand.

And now is the time when Members of the Committee can ask questions for as long as five-minutes, and I will turn first to the Ranking Member, Mr. Davis, for his questions.

Mr. DAVIS. Thank you, Madam Chairperson.

Mr. Strand, I appreciate you being our witness today and great to see you again. You mentioned in your testimony, did I hear you correctly, that former Senator Byrd from West Virginia did not support unionizing congressional employees because of the unique office type of experience?

Mr. STRAND. Yes, that is correct. And, of course, Senator Byrd was a strong supporter of unions in West Virginia, but he just felt——

Mr. DAVIS. That is what I was going to ask you.

Mr. STRAND. Yes.

Mr. DAVIS. Has he ever been accused of being anti-union?

Mr. STRAND. No. He just didn't think it would work on Capitol Hill. The reason for that, as you know, he was a great institutionalist of Congress, and what he said was that they will no longer have the ability to structure and manage their staff consistent with the unique needs of their States.

Because this is a unique relationship. When you are elected by the voters, they elect you; and whenever you invite somebody else into that process of how you are represented, whether it is staff or a union representative or someone else, you are necessarily getting in between the Member and their constituents. And this is a dangerous place to be, because it already undermines the ability of Members to do the job the way they think it is best for their district.

Mr. DAVIS. And former Senator Byrd, who had some other unique historical perspectives, felt this way, that it would disrupt the—could impact the legislative process and also maybe disrupt the congressional process that we follow here in the House?

Mr. STRAND. Yes. And I think this is——

Mr. DAVIS. Do you agree?

Mr. STRAND. Yes. I think he agreed with that statement, and I agree with your assessment there.

The biggest challenge continually is that what is the leverage that unions would have? Auto workers make automobiles, and so their leverage is to stop making automobiles in a strike.

Legislative staff make legislation. Caseworkers do casework. Staff assistants perform constituent services. And these are all at the—but they don't do them independently. They do them at the express direction of the Member of Congress who hires them.

So once you invite somebody else into that process, there is multiple influences generating how they perform their duties serving constituents. And this is where the problem comes for the independence of individual Members of Congress.

Mr. DAVIS. Well, listen, I know you mentioned the Select Committee on the Modernization of Congress and recommendations. I think you and I both agree that some of those recommendations ought to be discussed at this Committee's level.

So I appreciate your time today, Mark. It is great to see you again and give my best to your family too.

Mr. Uelmen, I was very impressed with your resume until I saw that you actually went to a law school that let my colleague Mr. Steil in. So a little lower there knowing that you both went to the University of Wisconsin-Madison Law School.

Mr. STEIL. Hey, hey.

Mr. DAVIS. No, I will not yield, Mr. Steil.

In a letter from February 22 of 2022, from Barbara Childs Wallace to Chairperson Lofgren, she stated that the board urges Congress to approve these regulations. Do you think it is the proper role for OCWR to advocate for the adoption of certain policies?

Mr. UELMEN. Well, I think it is the position of the board that the policies have already been decided by the Congressional Accountability Act. I mean, I think it is Congress' role to determine the policy. The Congressional Accountability Act clearly provides that these rights exist for employees, and it is just a technicality that they haven't been implemented for congressional staff. So, if Congress does not believe that unionization is something good for Congress, they should pass legislation that says that. I don't think the CAA says that.

Mr. DAVIS. Has OCWR crafted a handbook or guidance on the organization and management of unions in the House of Representatives?

Mr. UELMEN. Well, it is going to be a challenge, you know——

Mr. DAVIS. So the answer is no?

Mr. UELMEN. No. I mean, I think we had a challenge with the Reform Act, and we met that challenge. I think the same thing would be true with this effort, you know, with—and, again, it is very hard to predict exactly how many petitions we are going to get.

I mean, it is going to be extremely difficult for a union to organize, and it is going to be even more difficult to get a collective bargaining agreement, so——

Mr. DAVIS. Well, again, another question. My time is running short. I apologize Mr. Uelmen. It was announced during an OCWR-hosted brown bag lunch last week that your office is compiling a resource of frequently asked questions. Is this correct?

Mr. UELMEN. Yes. In fact, it is up on our website.

Mr. DAVIS. All right. It is just inexcusable that the only guidance your office is offering is FAQs. It is clear that there are a lot of unknowns and that your office hasn't provided the necessary information for staff and employing authorities alike for them to fully understand the impacts of what we are discussing today.

So, with that, Madam Chairperson, I am out of time, and I yield back.

The CHAIRPERSON. The gentleman yields back.

I believe that Mr. Raskin is joining us remotely. I would recognize Mr. Raskin if that is correct.

Mr. Raskin is not appearing on our screen, so I will turn to Mr. Aguilar, who is also, I understand, participating remotely. Mr. Aguilar would be recognized.

Oh, apparently, Mr. Raskin was trying to log on, so we will go back to Mr. Raskin, to recognize him remotely.

Mr. Raskin.

Apparently he has lost the feed. So we will go to Ms. Scanlon, who is here in person for her questions. And hopefully the two remote Members, who they noted, both of them, publicly, have tested positive for COVID and have to participate remotely, will be able to reconnect.

Ms. Scanlon.

Ms. SCANLON. Thank you, Chairperson Lofgren, for holding this important hearing, and thank you to our witnesses for being here. Obviously, this is a topic of intense interest, both on the Hill and off, and I really welcome the opportunity to dig into this a little bit.

I have worked for many years in the legal services field, and many of the arguments we are hearing here are similar to the arguments that we heard when legal services lawyers tried to organize. Also, there are many of the same reasons why legal services lawyers tried to organize.

If you look at their union, as they started talking to each other, they found out that they had widely shared concerns. Resources were problematic. Workers from around the country found that their working conditions weren't great. There were problems with hours and treatment and those kind of things, some of the things we see right here in Congress, where, as has been mentioned, the working conditions are not always ideal.

So I do welcome the opportunity to talk about what are the barriers to unionization, so that they can be addressed, and what can we do to make it easier.

I too have served on the Committee, the Select Committee on the Modernization of Congress, and we have had many, many discussions about things that need to be done to make life on the Hill more livable for everyone.

I was really interested in reading, in the May 23, 1996, Congressional Record, there was debate about staff unionization efforts that could not include pay, health insurance, or retirement benefits. These are typically things that people negotiate with through their unions. So can you talk a little bit about that, just so it is clear to people.

Mr. UELMEN. Sure. And that was the point I was trying to make about how limited both the duty to bargain is as well as the scope of bargaining is under the statute. So really what I would call the bread-and-butter issues really cannot be bargained under the statute because they are usually determined by law or they would infringe upon a management right, so——

Ms. SCANLON. And can you compare or contrast that to how other Federal employees are treated?

Mr. UELMEN. It is really the same.

Ms. SCANLON. Okay.

Mr. UELMEN. You know, there may be more opportunity in Congress, simply because there are less laws that regulate, you know, some of these areas, you know, so—and then those opportunities would probably have to be decided by the board, you know, by a petition. But for the most part, those are the same restrictions that are on all other Federal employees, so——

Ms. SCANLON. So what do you see as the greatest impediments to unionization that would need to be addressed?

Mr. UELMEN. Well, I am not sure some of them can be addressed. As I said, unions would have to organize them on the Member level. So you can't have one Member for one bargaining unit for everybody in Congress.

Now, there are ways that you can collectively bargain with multiple employers. So, if a union was able to organize multiple offices and the management of those offices agreed to bargain collectively with the union, you can come up with either a master agreement or a lead agreement that would apply to all of the offices.

So, I mean that is something that management would have to decide, and that would be something where the union would have to, you know, be able to—one union would have to be able to organize multiple offices, so——

Ms. SCANLON. So that would be similar to implementing model employment rules——

Mr. UELMEN. Sure, sure. I mean——

Ms. SCANLON [continuing]. For the offices?

Mr. UELMEN. I mean, this is something, like, for instance, that happens a lot in the construction industry where you have multiple small employers. So there is a master agreement that all of them have signed onto——

Ms. SCANLON. Right.

Mr. UELMEN [continuing]. You know, so——

Ms. SCANLON. Okay. It is just really interesting to tease it out, especially this idea that it would have to be office by office. So if we can only have 16 employees, some of whom are part time, whatever, those are pretty small units, but there could be a greater collective bargaining space.

I am very interested in the organization movement. I represent southeastern Pennsylvania. That is union country like no other, and it has served our country well. It has built the middle class, and we have seen how the rollback of the ability to organize and collectively bargain has really hurt our middle class. I am really, really heartened by the fact that we are seeing a resurgence in interest in organizing around the country, in places where people previously said it was impossible, like legal services, although that has existed for a while; like Starbucks, for example. So I am interested in teasing out what we can do in this area, so thank you.

The CHAIRPERSON. The gentlelady yields.

The gentleman from Georgia is recognized for five minutes.

Mr. LOUDERMILK. Well, thank you, Madam Chairperson. Appreciate the opportunity to be here today, and this is an important issue, and it is important that we discuss these issues.

I think this is a solution looking for a problem, and—but still, an idea is an idea, and we have to look at it reasonably. Another committee I am on, we took on a nonsensical idea, the Post Office becoming a bank. So as we went through the process, we realized, I think everybody realized that was not a good idea. I think we do need to look at this.

But there are several pitfalls that unionization would have that would—and I agree with Senator Byrd. The uniqueness of this institution requires flexibility. It requires each individual office to meet the unique needs of its constituency. It is not just State by State, it is district by district.

A homogenous type of operation, I think, would create many more problems, and those who would suffer from that would be the constituency of the people in America. I even think back of what happens when the staffers decide to go on strike right at the end of a government shutdown and we can't really function here? I mean, these are the types of things that, ah, you are crazy. Well, there is crazier things that have happened in the world, and we must think through these.

My office is very transitional, you may say, in the way that we have operated. My staff and what they do now is different than the staff that I had when I first came in. I have made up positions to meet the unique needs of our district. As Georgia's economy has grown, even after the pandemic, we have grown substantially.

Many, many more new businesses are coming into the State, so I created a staff position for someone to go and just introduce themselves to new businesses and new organizations to let them know how we can represent them and work with them.

So, the duties in my office is based on the strength, the talent, and the interest of each staff member. I have at one time, I had a scheduler here and a scheduler in the district. My scheduler in the district also took on other duties when I was up here. I may have a legislative correspondent who also works as a staff assistant, or I have one right now that is a legislative correspondent and is working as a legislative assistant because they have an interest there, but they still like doing the legislative correspondent work.

We actually look at the interest and the talent of every member, and we know how to best operate our office, and we transition as needed.

So, Mr. Strand, unions appear to be more effective. Now, I am in a right-to-work State of Georgia. The unions we have in Georgia are predominantly in larger businesses, larger construction companies, larger industries. You very rarely find unionization in the small businesses because, quite frankly, the employees don't want to be unionized, and the uniqueness of each small business is they must have the flexibility within their staff. The makeup of Congress, because of the way the MRA is done, the way that we do our own hiring, is we operate more as individual, small businesses.

So, Mr. Strand, the independence of each individual member is key to the Article I power invested in the Legislative Branch. Can you elaborate on that and what some of the pitfalls of a homogenous-type operation would be?

Mr. STRAND. Well, thank you, sir. I think that it goes back to the whole central issue that if you have another interest negotiating the terms—the control and terms of conditions of employment besides yourself, that voters are getting someone they didn't vote for. And this is the challenge continually is that I do staff retreats all over, and every office is different.

Every Member has their own unique needs in their districts. They do things differently, from outreach to casework to the legislative staff and setup. So, the uniqueness of the office is based on your unique relationship with the voters. And therefore I think it is just not practical to do it, especially on an office-by-office level. You know, I am not sure how that would work on a practical basis.

Now, this is not to say there aren't bad employers up there, but the key thing is that I think most Members recognize that, other than their own time, their most precious resource is their staff. You can exponentially increase your influence and your ability to do the job when you have good management and good staff. And that is something you can't change through a union, that is something that you must do as Members.

Mr. LOUDERMILK. All right. Thank you. We could go on this all day, but I see I am out of time. And you are right, this is a unique employment. This is not generally a career path for people who work here. I have got folks in this room that used to work in my office and moved on to other things. Hopefully, they enjoyed our time there, but still, there are bad employers and that is something that must be dealt with individually.

With that, Madam Chairperson, I yield back.

The CHAIRPERSON. The gentleman yields back. I understand the technical difficulties have been resolved, and Mr. Raskin is now recognized for five minutes.

Mr. RASKIN. Madam Chairperson, thanks so much for calling this important hearing. As I was listening to my distinguished colleague speak just now, I was reflecting how——

The CHAIRPERSON. Mr. Raskin.

Mr. RASKIN. Yes, can you hear me?

The CHAIRPERSON. Oh, apparently, I was—oh, there he is. Mr. Raskin, you are recognized for five minutes.

Mr. RASKIN. Thank you very much, Madam Chairperson.

You know, all employers are unique in his or her or its own way. The history of the labor movement, of course, is confronting employers who say, we are different, we are unique, and we take care of our people, and we are sensitive to the needs of our employees and so on. So I think we have got to take that with a grain of salt.

Well, what is unique about our situation is the point that I think Mr. Strand and the Ranking Member make, which is that we are the Congress of the United States, and we have to get the job of lawmaking done.

Having said that, under Article I, we have the power to pass all laws necessary and proper to the functioning of our institution. So, we can design it the way we think we need to design it, in order both to vindicate the interest of staff to having a fair workplace, where their interests are recognized and taken into account, as well as the paramount interest of the government in legislation. I think we can do both.

So, Mr. Uelmen, let me come to you. First, does the right to organize exist now in the staffers? In other words, is there anything that would stop, under the First Amendment and under this legislation already passed, workers, staff members in a particular committee or office getting together, meeting, caucusing, and then saying they want to present the Member with requests or demands of some kind?

Mr. UELMEN. Well, that is a difficult question. I mean, yes, certainly they can do that. The problem is they probably could not enforce any type of agreement they reach through our procedures and then through the OCWR, so——

Mr. RASKIN. And then that is the necessity of action right now, but theoretically, the right of them to get together exists. After all, Section 7 of the National Labor Relations Act itself was based on the First Amendment and the idea of people having the right to speak, to assemble, to associate, and get together. And that is really all we are talking about doing is vindicating that right.

There are particular complexities that are attendant to the legislative function of the national government. So help us with this. What exactly is the bargaining unit? Is it each Member's office? Is it each committee's office? Or is it, I could contemplate the situation where it is all the press secretaries from all the offices. Is it the Democratic and Republican and Independent members together, or is it each separate? Is that going to be defined by regulation by us or is that going to be defined through a kind of common-law process of considering collective bargaining agreements and attempts to organize?

Mr. UELMEN. Well, I think the question you are asking is literally what we call the appropriateness of the bargaining unit. So, the way the process works is a union would propose a bargaining unit, and if there was a disagreement with management regarding the appropriateness of that unit, they would then use the OCWR procedures to resolve that disagreement.

Generally, I mean, a bargaining unit must be composed of staff members of the same employer. So, I think that you can't have a bargaining unit representing, you know, from multiple employers. As I said, you may be—there may be opportunities after you form the union to bargain, you know, jointly, but from an organizing perspective, I think it must be from each employing office.

Mr. RASKIN. Okay. I hear you are defining an employer as a Member, is that right, or a committee or subcommittee?

Mr. UELMEN. Yes. The problem is the CAA says an employing office is not the House of Representatives; it is each office of a Member or each committee office.

Mr. RASKIN. Okay. Good. All right. So, I think what probably gives everybody pause on this is the nightmare scenario invoked by some of our colleagues, which is, you know, what happens if we face some kind of massive strike or shutdown in the middle of, you know, the appropriations period or something like that.

I know that there are public sector workers who have the right to organize but not, for example, the right to strike. I think it works that way with a lot of teachers and, you know, other public employees. Is that something that would be determined along the way or is that something that will be built into the legislation that we are considering right now?

Mr. UELMEN. Yes. The statute itself actually, you know, totally prohibits both strikes and lockouts. So, I mean, that really isn't an issue. It has never been an issue with Federal employees, so——

The CHAIRPERSON. The gentleman's time has expired.

Mr. RASKIN. Madam Chairperson, thank you. I ask unanimous consent to insert a statement by our colleague, Andy Levin, from Michigan.

The CHAIRPERSON. Of course. Without objection.

Mr. RASKIN. Thank you.

The CHAIRPERSON. Mr. Steil is recognized for five minutes.

Mr. STEIL. Thank you very much, Madam Chairperson.

Mr. Uelmen, appreciate you being here. It is good to see a fellow Badger alum despite what Ranking Member Davis says. It is good to have you here.

I want to discuss with you the process of developing the regulations. I know your team recently went through an expedited review of the draft regulations from the 1990s and, to my knowledge, had no edits. Is that correct?

Mr. UELMEN. Excuse me. I didn't hear the——

Mr. STEIL. You reviewed the draft regulations that were produced in the 1990s with your team and you had no additional edits?

Mr. UELMEN. Yes. The board did review the 1996 regulations that were adopted by the 1996 board, you know, so yes.

Mr. STEIL. So, there were no recommended changes or——

Mr. UELMEN. No.

Mr. STEIL [continuing]. Edits to that regulation. Is that accurate?

Mr. UELMEN. Right. That is correct.

Mr. STEIL. And can you explain the process of the review that your team went through when reviewing these regulations?

Mr. UELMEN. Well, again, they went through the Notice of Adoption, which is very detailed. It went through all the comments and the 1996 board's response to the comments. They reviewed kind of the dissenting views and determined that—and really the regulations themselves, all they say is that the regulations that apply to everybody else are going to apply to Congress. So, we have had those regulations in place since 1996.

Mr. STEIL. And how many days total did that process take, Mr. Uelmen?

Mr. UELMEN. Well, it is the date between the two letters. I mean, it pretty much ended—began when we received the letter. It ended, I believe, on the date that the board sent the letter.

Mr. STEIL. Do you recall what those dates were, just how many days that might have been?

Mr. UELMEN. Off hand, I don't. If I could look——

Mr. STEIL. A handful of days? Weeks? Months?

Mr. UELMEN. I mean, it was twenty days. I—you know, I think it was around there.

Mr. STEIL. Couple weeks, okay. Well, maybe we can get that for the record later.

And then following that process, you sent the regulations to the board for their approval. Is that accurate?

Mr. UELMEN. Again, the regulations, the way it works is the regulations are published in the Congressional Record once they are adopted by the board. So those regulations are still there. I mean, we did send another copy to the Chairperson, but those regulations have already been published and have been out there since 1996.

Mr. STEIL. Okay. And, obviously, a lot has changed since 1996. I think there is a lot of staffers on the Hill that probably weren't born at that time.

Have you considered whether it would be necessary or appropriate to have an additional notice and comment period since it is, you know, approaching 25, 30 years since it was initially drafted?

Mr. UELMEN. Just so we are clear, you know, this is the decision of the board. That is not my decision to make.

Mr. STEIL. Understood. But in your opinion, would that be a helpful process or a not necessary process?

Mr. UELMEN. You know, unless they are going to change what they proposed in 1996, it really—there is no——

Mr. STEIL. You don't see a need for it?

Okay. Committee staff in both the House and the Senate have requested to see copies, I think, of the original comments that were made during the initial notice and comment period, but I believe your office stated that those no longer exist. Is that accurate?

Mr. UELMEN. No. I think what we—there were three comments, I think—no, the comments are fully described in the Notice of Adoption. I think the actual letters, I think we found three out of the six. So, I think we are still looking for the other three.

Mr. STEIL. So slightly incomplete record, it would be at least my analysis of it.

Have you considered kind of the potential conflict of interest congressional unions may create with their Members? And let me put a pin on this. In your comments, I believe, to my colleague, Ms. Scanlon, you noted that a bargaining unit could exist with more than one Member. Is that piece accurate?

Mr. UELMEN. No.

Mr. STEIL. It would be one Member to one bargaining unit?

Mr. UELMEN. Each Member office would have to have a separate bargaining unit.

Mr. STEIL. So you couldn't have a group of Members come together into one cohesive bargaining unit under your understanding?

Mr. UELMEN. I don't believe that is possible under the CAA.

Mr. STEIL. Okay. Very good. And then would a committee staff, would that bargaining unit be a minority and a majority staff, or would that be all under the chair of any given committee?

Mr. UELMEN. I think, as I indicated, I think it would have to be split along partisan lines, because the Ranking Member determines for the minority and the Chairperson determines the working conditions for the majority.

Mr. STEIL. Even though the employing authority might be just the chair on a committee?

Mr. UELMEN. Right. An employing office can have more than one bargaining unit. I mean, we have multiple bargaining units in——

Mr. STEIL. Okay. And do you see a conflict that would exist if the Senate and the House chose different paths?

Mr. UELMEN. A different path?

Mr. STEIL. Different path. If the House chose to unionize and the Senate did not, or the Senate chose to unionize, and the House did not.

Mr. UELMEN. Well, the CAA allows that, I mean, since it can be adopted by one House resolution. So at least the Act itself contemplated that, where one House would adopt regulations and the other wouldn't, so——

Mr. STEIL. Thank you very much. I appreciate your testimony today.

Madam Chairperson, I yield back.

The CHAIRPERSON. The gentleman yields back.

Mr. Aguilar, we will see if our technology is working and can we recognize you for five minutes.

Mr. AGUILAR. Madam Chairperson, can you hear me?

The CHAIRPERSON. We can hear you, but we can't see you.

Mr. AGUILAR. Well, I assure you I am around. We will see if they can switch the——

The CHAIRPERSON. Ah, there you are.

Mr. AGUILAR. There we go. Thank you, Madam Chairperson. Appreciate the importance of this hearing.

Mr. Uelmen, I will get to you. According to the OCWR, when employees file a petition to eventually be certified as an official bargaining unit, the petition—I want to get this right—must have the signatures of thirty percent of the employees. Is that what you testified?

Mr. UELMEN. Yes. There must be a showing of interest by thirty percent of the employees in a bargaining unit.

Mr. Aguilar. Our colleague from Georgia talked about the [inaudible] so let's go with that. Knowing that some of our offices are small, the bargaining units could be comprised of two or three staffers, and if an individual leaves a bargaining unit, how does that change a union in an individual office? Is the union still legal? What if all the employees covered in the bargaining unit leave their positions over the course of the congressional term, what would happen in that case?

Mr. UELMEN. Excuse me. I didn't catch the end of that.

Mr. AGUILAR. What if the employees covered in the bargaining unit—let's just say that it is a bargaining unit of four people—what if there is a transition and over the course of the two-year cycle in Congress, all those employees end up moving on to other positions? You know, what would happen in that case?

Mr. UELMEN. You know, generally the way union—collective bargaining agreements operate is that once the agreement is in place, it really—it is in place for those positions, and so it doesn't matter whether the actual people in those positions has changed.

Mr. AGUILAR. Okay. I appreciate that.

In your testimony, I wanted to get a little deeper into the membership and management piece. You noted that management officials are—and I am quoting here—those employees whose duties and responsibilities require or authorize the individual to formulate, determine, or influence the policies of the employing office.

Can you tell us a little bit more about what kind of staffers would be considered management?

Mr. UELMEN. Well, generally management are those staffers who determine the conditions of employment. The idea is to separate those staffers who are going to be on one side of the table from those who are, you know, going to be on the other side of the table. So, if you are going to bargain, you are going to bargain with the people who are determining the terms and conditions of the employment, so that is really the dividing line.

Mr. AGUILAR. So it doesn't have to do specifically with supervisory responsibilities and roles? I think that is just an area of confusion.

Mr. UELMEN. Yes. I mean—I mean, as I said, that is how you divide it. So, whatever you call the position, the question is whether this is a position that is deciding what the rules of the office are going to be, or is this someone on the other side who is being subjected to those procedures, so——

Mr. AGUILAR. Yes. No, I understand that. I just think from the perspective of an employee, it oftentimes, you know, might feel like management is whoever is supervising you. So, if you are an intern, you know, your supervisor is a staff assistant potentially. If you are a staff assistant, your supervisor might be the chief of staff or deputy chief of staff. So, I just think that there is some confusion in that sense that we might need to clear up.

House committees also have nuance management structures. How would the committee staffers fit in in those respects on the management side? Is it still the same answer?

Mr. UELMEN. Yes. Again, it would be who in the committee is deciding what the conditions of employment are. So, it would undoubtedly be the senior staff.

Mr. AGUILAR. But do you have any more guidance on what that definition of senior staff might be?

Mr. UELMEN. Again, some of these questions obviously can be tricky, I mean, which is why we have procedures in place to determine if somebody should be included or excluded from a bargaining unit. I mean, there is a difference between what we would call a lead worker position and somebody who is really in management. Somebody who merely is giving direction for work but doesn't really have a role in determining the conditions of employment is not going to be considered management, so-and-so——

Mr. AGUILAR. I appreciate that.

My time is running short, so I will yield back, Madam Chairperson.

The CHAIRPERSON. The gentleman yields back.

The gentlelady from New Mexico is recognized for five minutes.

Ms. LEGER FERNANDEZ. Thank you so much, Madam Chairperson, and for our witnesses for shedding light on this issue.

In the fourteen months I have been here, I truly admire our staffers. They are committed to this institution. They are committed to their jobs. I think them speaking out about this now is a good thing.

And it strikes me, listening to the testimony and reading it, that the CAA was adopted, as was pointed out, decades ago. It was in the Congressional Accountability Act that set up the process for this unionization. So, Congress already did this.

And it also strikes me, sitting here today after that great State of the Union Address last night, that President Biden said, when we invest in our workers, we can do something we haven't done in a long time—build a better America.

I think if we apply that principle everywhere, we will want to apply it here as well, so we can build a better Congress to better serve our constituents, because that is indeed what we are trying to do.

So in looking at this, Mr. Strand, you have spent decades committed to this institution and committed to making sure that the workplace works for different people in these offices. Do you think

that when we strengthen our staff's working conditions and pay, we also strength Congress' capacity, especially increasing our capacity as a coequal branch of government, yes or no?

Mr. STRAND. No, I think that the conditions of the workplace for employees makes a huge difference in the ability of staffers to serve the country, just like the Members of Congress.

The biggest thing you have to have been that that is the responsibility of the Member to ensure those conditions——

Ms. LEGER FERNANDEZ. But I was asking whether you believe that strengthening the employees was a good thing, and I think you have indeed said——

Mr. STRAND. Oh, I absolutely agree with you, that——

Ms. LEGER FERNANDEZ. Fine.

Mr. STRAND. Yeah.

Ms. LEGER FERNANDEZ. Thank you so very much.

You know, my district is the size of Pennsylvania, and so I have staffers that are sent out over a very large, large area. I want to make sure that they work at a job that they love, but that they can stay at it if they so desire.

Mr. Uelmen, you described the unionization process in detail. Mr. Strand earlier expressed his concern about a union preventing staff from working long hours or changing the at-will nature or changing some of the things that are already in the Congressional Accountability Act.

Could you just clarify, if a office chooses to unionize, could they change the provisions of the Congressional Accountability Act that says at will, strikes are not allowed, those other matters that he pointed to?

Mr. UELMEN. No.

Ms. LEGER FERNANDEZ. Can you point to examples from other unions on the Hill that might account for varied responsibilities, different working hours? I mean, there are, I could imagine, quite a few unions that are dealing with complex working conditions. Is that correct?

Mr. UELMEN. Sure. We have, I think, twenty-some bargaining units on the Hill. I think the largest one is the Capitol Police. You know, so they provide, you know, a lot of complex tasks that—and then happily they just entered into another agreement, so—after many years of bargaining, so——

Ms. LEGER FERNANDEZ. Well, that is a good thing, right? I believe that what we are looking at here is the fact that we are now hearing from our staffers about these issues. And that if we want to invest in our staff and we want to be able to listen to our staff, would you describe a unionization process and a union as a way of increasing management's ability to listen to the issues that affect those workers?

Mr. UELMEN. I mean, certainly. I mean, anytime you sit at the table together to discuss working conditions, each party is going to learn a little bit more about the other. I mean, labor is going to understand—have a better idea what the challenges are of management, and management is going to have a much better understanding of what the real concerns are of labor, so—even if you don't get a collective bargaining—even if you don't get an agreement, if you sit down and discuss it, I mean, you are likely to have

a better understanding of where the other party sits. I mean—so——

Ms. LEGER FERNANDEZ. Yes, indeed, this concept of listening is a wonderful thing to do, and we all are committed to doing that with our constituents. And this would give us an opportunity—not an opportunity but an obligation to sit and listen to our staffers.

With that, Madam Chairperson, my time has expired, and I yield back.

The CHAIRPERSON. The gentlelady yields back.

I have just a couple final questions. First, as you have mentioned, Mr. Uelmen, the issues that can be bargained is fairly small compared to what you would have under the National Labor Relations Act: pay, health insurance, retirement benefits.

Some have asked the question, what about when dramatic changes need to happen quickly? For example, because of the pandemic, the Attending Physician's Office told us work remote. We did—you know, we changed on a moment's notice to remote for health reasons. Telework, masking, social distancing, hybrid work arrangements, office cleaning and the like.

Would those changes be subject to collective bargaining or not?

Mr. UELMEN. Again, that may be a difficult question to answer, but what I can point out is that there is an exception for emergency situations so that, generally in an emergency, management can act very quickly and even—it might mean that bargaining might be very expeditious, and it might be a call to the union, saying, this is what we are going to do, we have to do it, it is an emergency. But there is a provision in the statute that does allow for kind of very prompt action by management during emergencies, so——

The CHAIRPERSON. Let me ask you. We have had occasions where a Member dies in office and the Clerk maintains the office staff until the election provides a successor. Is the Clerk—what would happen in that instance where the Clerk is running the office that was unionized, how would that work?

Mr. UELMEN. Yes. I am not sure I have a clear answer for that, I will be honest with you. I think what we would have to look at would be kind of the successor type cases and try to apply a similar type of analogy. So, in many cases, with a corporation, for instance, if there is a change, that doesn't necessarily mean that the collective bargaining agreement goes away, so——

The CHAIRPERSON. Okay. If there is a dispute between a Member and—the union and the Member, and then that Member leaves the office, what happens to this dispute and the bargaining unit in that case? How would you resolve that?

Mr. UELMEN. Well, I think that again, most of the—if there is a collective bargaining agreement, there probably is a grievance procedure in place. If for some reason, you know, management or the Clerk, if that is who it is would refuse to use that bargaining unit, then it could be resolved through the unfair labor practice procedure. So, I mean, there are procedures that would resolve that issue, so——

The CHAIRPERSON. Would it be assumed, since none of us are entitled to this job until reelected, that the terms of the agreement

would be renegotiated after every election, or would it be a continuing agreement, do you think?

Mr. UELMEN. Again, I am not sure. I mean, if the same officeholder is there and the office is the same, it may be a possibility to continue the agreement, you know, into the next term. Obviously if a Member is defeated, then the office changes and——

The CHAIRPERSON. Right.

Mr. UELMEN [continuing]. You know, so——

The CHAIRPERSON. Well, I just think those are outlier situations and should not dominate any decision-making, but I hope that we can think through some of the odd cases that might come up, make sure we know what the answers are.

Accordingly, the hearing record will be open for five days. If Members of the Committee have additional questions for either of our witnesses, we will send them to you, and certainly ask that you respond as best you can so that we can make both the questions and the answers part of the written record.

I just want to thank the witnesses and the Committee members for their attention today. It has been mentioned that we had unanimity. I think I am the only Member here who was a Member of Congress in 1995. This was unanimous. We had two votes in the House. The first was 429 to 0, and the second was 390 to 0. It included those measures, unionization for the staff.

I will just mention, in 1998, one observer wrote this, this is a quote: The Office of Compliance drafted regulations implementing the section which concerns the unionization of legislative employees, but Congress has not approved them. This is a disgrace to the principles supporting the CAA.

He continued: The result is that no regulations are in effect, and this section of the Act is not being implemented.

Who said that? Senator Chuck Grassley. I would ask, without objection, that Senator Grassley's law review article from the Harvard Journal on Legislation from the winter of 1998, where he made that observation, be included in the record.

I also would ask unanimous consent that the following items be made part of the record: An August 11, 1994, Washington Post article; a January 9, 1995, New York Times article; a May 2, 1995, Congressional Research Service report; a January 1, 2011, Office of Compliance publication, Labor Representation, Collective Bargaining Rights in the Congressional Workplace; a March 2, 2022, written statement of Daniel Schuman, the policy director for Demand Progress.

The CHAIRPERSON. I think we have additional thinking to do on—on this, but I think that this very helpful hearing has helped us focus on the few remaining nuance issues that need answers.

I would just note that we all value our staff. This institution could not run without our staff. I was just thinking, I recently had my District Director, only my second, who retired after 22 years in my district office. As we were celebrating her years of service, another member of my district office staff mentioned that she has been working for me since 1987, in both my local office and now in the congressional office.

So we go back a long ways with these valuable people who do the people's business, and their rights need to be respected and consid-

ered as was envisioned by those unanimous votes my freshman year in Congress.

So unless there are further issues before us, we will thank the witnesses and the Members and adjourn this hearing without objection.

[Whereupon, at 3:13 p.m., the Committee was adjourned.]

advancing workplace rights, safety & health, and accessibility in the legislative branch

Office of Congressional Workplace Rights

Office of the General Counsel

March 18, 2022

Via Email

Hon. Zoe Lofgren
Committee on House Administration
1309 Longworth House Office Building
Washington, D.C. 20515

Dear Chairperson Lofgren:

At the request of the committee, I am hereby submitting my written responses to the Questions for the Record following the Hearing titled "Oversight of Section 220 of the Congressional Accountability Act: Implementing the Rights of Congressional Staff to Collectively Bargain," held on March 2, 2022.

Respectfully yours,

John D. Uelmen
General Counsel

COMMITTEE ON HOUSE ADMINISTRATION
MARCH 2, 2022 HEARING: "OVERSIGHT OF SECTION 220 OF THE CONGRESSIONAL ACCOUNTABILITY ACT:
IMPLEMENTING THE RIGHTS OF CONGRESSIONAL STAFF TO COLLECTIVELY BARGAIN"
MINORITY QUESTIONS FOR THE RECORD

1. **How limited is the scope of collective bargaining agreements that congressional staff could pursue if unionization regulations are finalized?**
   a. **Please list the items you anticipate being the focus of most of the collective bargaining negotiations and agreements.**
   b. **Please also list the items typically included in private sector collective bargaining agreements that could not be included in a congressional collective bargaining agreement.**

Both the duty to bargain and the scope of bargaining in the federal sector are limited under the Federal Service Labor-Management Relations Statute (FSLMRS), most of which is incorporated into the Congressional Accountability Act (CAA) and applied to the legislative branch. At the outset, bargaining is limited to "conditions of employment" and there is no duty to bargain over proposals that are contrary to federal law, government-wide regulations, or agency rules for which there is a compelling need. The scope of bargaining is further limited by the management rights provision, 5 U.S.C. § 7106, incorporated by the CAA. Notable management rights include the employing office's right to determine the mission, budget, organization, number of employees, and internal security practices of the office. Further, in accordance with other laws, management has the right to select and hire employees, discipline, assign work, determine the personnel by which the office's operations shall be conducted, and take whatever actions may be necessary to carry out the office's mission during emergencies.

However, notwithstanding these management rights, the employing office may negotiate the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or the technology, methods, and means of performing the work. 5 U.S.C. § 7106(b)(1). Additionally, the procedures and appropriate arrangements regarding these management rights are negotiable. 5 U.S.C. §§ 7106(b)(2) and (b)(3).

It is very difficult for me to speculate on the items that may be the focus of collective bargaining negotiations and agreements. Collective bargaining and the resulting agreement vary greatly based on the needs and previous problems experienced by the bargaining unit employees and employing office. Collective bargaining can serve as a platform for management and employees to come together and identify the office's strengths, explore the office's weaknesses, and reach solutions to problems that become embodied in the resulting agreement.

In the private sector, virtually all "terms and conditions" of employment are subject to bargaining, which means that wages, bonuses, disciplinary systems, grievance procedures, holidays, job security, jury duty, layoffs, meals, off-duty conduct, outside employment, pension and retirement plans, health insurance, promotions, seniority, vacation, and hours of work have all been found to be mandatory subjects of bargaining. In the federal sector the scope of bargaining is much more limited, because many of these subjects are covered by statutory provisions, government-wide regulations, or agency rules for which there is a compelling need, or are subjects that fall within the management rights provision. For example, the list of permissible subjects of bargaining in 5 U.S.C. § 7106(b)(1) (i.e., subjects that can be bargained over at the discretion of management) would all be considered mandatory subjects of bargaining in the private sector (i.e., subjects that must be bargained over).

Because labor unions in the federal sector often have concerns similar to those in the private sector, federal sector labor unions can be expected to make bargaining proposals on many of the same subjects as private sector unions to the extent that this is permitted under the FSLMRS; however, due to the limitations on federal sector bargaining, federal sector labor unions may focus more on provisions involving official time and the grievance/arbitration process. Subjects that fall within the category of management rights under Section 7106 will be in proposals containing procedures and appropriate arrangements, since this is all that the statute permits in this area. Labor union proposals will probably also be made on all subjects that are permissible under 5 U.S.C. § 7106(b)(1) in the hope that management will agree to negotiate on these subjects.

It is also important to note that, under the CAA, labor unions in the legislative branch, like all federal sector labor unions, cannot "call, or participate in, a strike, work stoppage, or slowdown, or picketing if such picketing interferes with an [employing office's] operations" or even condone any such activity "by failing to take action or prevent or stop such action." In fact, a labor organization clearly commits an unfair labor practice if it engages in any such activity. 5 U.S.C. §§ 7116(b)(7)(A)-(B). What this means is that federal sector labor unions simply do not have the same type of leverage possessed by private sector unions to successfully bargain and obtain a collective bargaining agreement with management. This can result in more protracted collective bargaining negotiations in the federal sector than what exists in the private sector.

2. **Taking into consideration the numerous uncertainties regarding the development, management, terms, and coordination of bargaining units that could form across House employing offices, as well as the central role OCWR will play in advising, facilitating dispute resolution, etc., do you feel that OCWR is adequately resourced to take on this additional workload?**
   a. **If not, what additional resources do you foresee being necessary?**

Please see my answer to Majority Question No. 5 under Process and Structure.

3. **Does OCWR anticipate that congressional unions could create potential conflicts of interest with Members' constitutional duties, among others? If so, please list the potential conflicts.**

   The answers to these questions were thoroughly addressed in the Notice of Adoption issued by the Board of Directors in 1996. A copy of the Notice of Adoption is attached to these answers. Please see pages H10021-H10026.

4. **If the 1996 regulations were approved, what additional guidance would OCWR need from House Administration? In what situations would OCWR come back to House Administration for guidance?**

   Most of the work that the OCWR would be performing involves deciding issues in cases that are presented to the office. Under the CAA, the OCWR must decide these issues independently and without oversight from House Administration; consequently, at this time, I do not foresee the need for any additional guidance from House Administration.

5. **Please submit for the record the following documents:**
   a. **Copies of all six original comments received by the Office of Compliance during the original consideration of these draft regulations. If OCWR no longer maintains copies, please explain your office's efforts to secure them. If OCWR is not able to secure copies, please explain why and what efforts your office will undertake to improve its record-keeping procedures.**

   b. **Copies of all statements, including statements of support and statements of dissent, made by Board members during both the original and recent consideration of these draft regulations. If OCWR no longer maintains copies, please explain your office's efforts to secure them. If OCWR is not able to secure copies, please explain why and what efforts your office will undertake to improve its record-keeping procedures.**

   c. **If the regulations are adopted, what role, if any, do you foresee for the Office of Employee Advocacy with congressional unions?**

   In response to 5a, please see the attached letters containing the original comments from the six commenters. In response to 5b, the only statements made by Board members known to me are those contained in the attached Notice of Adoption and in the attached letter to Chairperson Lofgren. In response to 5c, the role of the Office of Employee Advocacy must be decided by the House of Representatives. I have no opinion regarding what role it might or might not have with respect to congressional unions.

   Respectfully submitted this 18th day of March, 2022.

   John D. Uelmen
   General Counsel
   Office of Congressional Workplace Rights

coverage, to simplify the administration of health insurance, and for other purposes;

H.R. 3139. An act to redesignate the United States Post Office building located at 245 Centereach Mall on Middle County Road in Centereach, New York, as the ''Rose Y. Caracappa United States Post Office Building'';

H.R. 3448. An act to provide tax relief for small business, to protect jobs, to create opportunities, to increase the take-home pay for workers, to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer owned vehicles, and to amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate and to prevent job loss by providing flexibility to employers in complying with minimum wage and overtime requirements under that Act;

H.R. 3680. An act to amend title 18, United States Code, to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes;

H.R. 3734. An act to provide for reconciliation pursuant to section 201(a)(1) of the concurrent resolution on the budget for fiscal year 1997;

H.R. 3834. An act to redesignate the Dunning Post Office in Chicago, Illinois, as the ''Roger P. McAuliffe Post Office''; and

H.R. 3870. An act to authorize the Agency for International Development to offer voluntary separation incentive payments to employees of that agency.

SENATE ENROLLED BILL SIGNED

The SPEAKER announced his signature to an enrolled bill of the Senate of the following title;

S. 1316. An act to reauthorize and amend title XIV of the Public Health Service Act (commonly known as the ''Safe Drinking Water Act''), and for other purposes.

BILLS PRESENTED TO THE PRESIDENT

Mr. THOMAS, from the Committee on House Oversight, reported that that committee did on this day present to the President, for his approval, bills of the House of the following titles:

On August 2, 1996:

H.R. 782. An act to amend title 18 of the United States Code to allow members of employee associations to represent their views before the United States Government.

On August 7, 1996:

H.R. 1975. An act to improve the management of royalties from Federal and Outer Continental Shelf oil and gas leases, and for other purposes.

On August 8, 1996:

H.R. 3448. An act to provide tax relief for small businesses, to protect jobs, to create opportunities, to increase the take-home pay of workers, to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer owned vehicles, and to amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate and to prevent job loss by providing flexibility to employers in complying with minimum wage and overtime requirements under that Act.

On August 9, 1996:

H.R. 3834. An act to redesignate the Dunning Post Office in Chicago, Illinois, as the ''Roger P. McAuliffe Post Office'';

H.R. 3870. An act to authorize the Agency for International Development to offer voluntary separation incentive payments to employees of that agency;

H.R. 3680. An act to amend title 18, United States Code, to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes;

H.R. 3129. An act to redesignate the United States Post Office Building located at 245 Centereach Mall on Middle County Road in Centereach, New York, as the ''Rose Y. Caracappa United States Post Office Building'';

H.R. 2739. An act to provide for a representational allowance for Members of the House of Representatives, to make technical and conforming changes to sundry provisions of the law in consequence of administrative reforms in the House of Representatives, and for other purposes; and

H.R. 3103. An act to amend the Internal Revenue Code of 1986 to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes.

On August 19, 1996:

H.R. 3734. An act to provide for reconciliation pursuant to section 201(a)(1) of the concurrent resolution on the budget for the fiscal year 1997.

ADJOURNMENT

Mr. WELDON of Pennsylvania. Mr. Speaker, I move that the House do now adjourn.

The motion was agreed to; accordingly (at 9 o'clock and 31 minutes p.m.), the House adjourned until Thursday, September 5, 1996, at 10 a.m.

NOTICE OF PROPOSED RULEMAKING

OFFICE OF COMPLIANCE,
Washington, DC, August 19, 1996.

Hon. NEWT GINGRICH,
Speaker of the House, House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: Pursuant to Section 304(b) of the Congressional Accountability Act of 1995 (2 U.S.C. §1384(b)), I am transmitting on behalf of the Board of Directors the enclosed notice of adoption of regulations, together with a copy of the regulations for publication in the Congressional Record. The adopted regulations are being issued pursuant to Section 220(e).

The Congressional Accountability Act specifies that the enclosed notice be published on the first day on which both Houses are in session following this transmittal.

Sincerely,

GLEN D. NAGER,
Chair of the Board.

OFFICE OF COMPLIANCE

The Congressional Accountability Act of 1995: Extension of Rights, Protections and Responsibilities Under Chapter 71 of Title 5, United States Code, Relating to Federal Service Labor-Management Relations (Regulations under section 220(e) of the Congressional Accountability Act)

NOTICE OF ADOPTION OF REGULATIONS AND SUBMISSION FOR APPROVAL

Summary: The Board of Directors of the Office of Compliance, after considering comments to both the Advance Notice of Proposed Rulemaking published on March 16, 1996 in the Congressional Record and the Notice of Proposed Rulemaking published on May 23, 1996 in the Congressional Record, has adopted, and is submitting for approval by Congress, final regulations implementing section 220(e) of the Congressional Accountability Act of 1995, Pub. L. 104-1, 109 Stat. 3.

For Further Information Contact: Executive Director, Office of Compliance, 110 2nd Street, S.E., Room LA 200, John Adams Building, Washington, D.C. 20540-1999, (202) 724-9250.

Supplementary Information:

1. Statutory Background

The Congressional Accountability Act of 1995 (''CAA'' or ''Act'') was enacted into law on January 23, 1995. In general, the CAA applies the rights and protections of eleven federal labor and employment law statutes to covered Congressional employees and employing offices.

Section 220 of the CAA addresses the application of chapter 71 of title 5, United States Code (''chapter 71''), relating to Federal Service Labor-Management Relations. Section 220(a) of the CAA applies the rights, protections, and responsibilities established under sections 7102, 7106, 7111 through 7117, 7119 through 7122, and 7131 of chapter 71 to employing offices, covered employees, and representatives of covered employees.

Section 220(d) of the Act requires the Board of Directors of the Office of Compliance (''Board'') to issue regulations to implement section 220 and further states that, except as provided in subsection (e), such regulations ''shall be the same as substantive regulations promulgated by the Federal Labor Relations Authority (`FLRA') to implement the statutory provisions referred to in subsection (a) except—

''(A) to the extent that the Board may determine, for good cause shown and stated together with the regulations, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section; or

''(B) as the Board deems necessary to avoid a conflict of interest or appearance of conflict of interest.''

The Board adopted final regulations under section 220(d), and submitted them to Congress for approval on July 9, 1996.

Section 220(e)(1) of the CAA requires that the Board issue regulations ''on the manner and extent to which the requirements and exemptions of chapter 71 . . . should apply to covered employees who are employed in the offices listed in'' section 220(e)(2). The offices listed in section 220(e)(2) are:

(A) the personal office of any Member of the House of Representatives or of any Senator;

(B) a standing select, special, permanent, temporary, or other committee of the Senate or House of Representatives, or a joint committee of Congress;

(C) the Office of the Vice President (as President of the Senate), the Office of the President pro tempore of the Senate, the Office of the Majority Leader of the Senate, the Office of the Minority Leader of the Senate, the Office of the Majority Whip of the Senate, the Office of the Minority Whip of the Senate, the Conference of the Majority of the Senate, the Conference of the Minority of the Senate, the Office of the Secretary of the Conference of the Majority of the Senate, the Office of the Secretary of the Conference of the Minority of the Senate, the Office of the Secretary for the Majority of the Senate, the Office of the Secretary for the Minority of the Senate, the Majority Policy Committee of the Senate, the Minority Policy Committee of the Senate, and the following offices within the Office of the Secretary of the Senate: Offices of the Parliamentarian, Bill Clerk, Legislative Clerk, Journal Clerk, Executive Clerk, Enrolling Clerk, Official Reporters of Debate, Daily Digest, Printing

Services, Captioning Services, and Senate Chief Counsel for Employment;

(D) the Office of the Speaker of the House of Representatives, the Office of the Majority Leader of the House of Representatives, the Office of the Minority Leader of the House of Representatives, the Offices of the Chief Deputy Majority Whips, the Offices of the Chief Deputy Minority Whips, and the following offices within the Office of the Clerk of the House of Representatives: Offices of Legislative Operations, Official Reporters of Debate, Official Reporters to Committees, Printing Services, and Legislative Information

(E) the Office of the Legislative Counsel of the Senate, the Office of the Senate Legal Counsel, the Office of the Legislative Counsel of the House of Representatives, the Office of the General Counsel of the House of Representatives, the Office of the Parliamentarian of the House of Representatives, and the Office of the Law Revision Counsel;

(F) the offices of any caucus or party organization;

(G) the Congressional Budget Office, the Office of Technology Assessment, and the Office of Compliance; and,

(H) such other offices that perform comparable functions which are identified under regulations of the Board.

These offices shall be collectively referred to as the ''section 220(e)(2) offices.''

Section 220(e)(1) provides that the regulations which the Board issues to apply chapter 71 to covered employees in section 220(e)(2) offices ''shall, to the greatest extent practicable, be consistent with the provisions and purposes of chapter 71 and of [the CAA] . . .'' To this end, section 220(e)(1) mandates that such regulations ''shall be the same as substantive regulations issued by the Federal Labor Relations Authority under such chapter,'' with two separate and distinct provisos:

First, section 220(e)(1)(A) authorizes the Board to modify the FLRA's regulations ''to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.''

Second, section 220(e)(1)(B) directs the Board to issue regulations that ''exclude from coverage under this section any covered employees who are employed in offices listed in [section 220(e)(2)] if the Board determines that such exclusion is required because of--

(i) a conflict of interest or appearance of a conflict of interest; or

(ii) Congress' constitutional responsibilities.''

The provisions of section 220 are effective October 1, 1996, except that, ''[w]ith respect to the offices listed in subsection (e)(2), to the covered employees of such offices, and to representatives of such employees, [section 220] shall be effective on the effective date of regulations under subsection (e).''

II. Advance Notice of Proposed Rulemaking

In an Advance Notice of Proposed Rulemaking (''ANPR'') published on March 16, 1996, the Board provided interested parties and persons with the opportunity to submit comments, with supporting data, authorities and argument, concerning the content of and bases for any proposed regulations under section 220. Additionally, the Board sought comment on two specific issues related to section 220(e)(1)(A): (1) Whether and to what extent the Board should modify the regulations promulgated by the FLRA for application to employees in section 220(e)(2) offices? and (2) Whether the Board should issue additional regulations concerning the manner and extent to which the requirements and exemptions of chapter 71 apply to employees in section 220(e)(2) offices? The Board also sought comment on four issues related to section 220(e)(1)(B): (1) What are the constitutional responsibilities and/or conflicts of interest (real or apparent) that would require exclusion of employees in section 220(e) offices from coverage? (2) Whether determinations as to such exclusions should be made on an office-wide basis or on the basis of job duties and functions? (3) Which job duties and functions in section 220(e) offices, if any, should be excluded from coverage, and what is the legal and factual basis for any such exclusion? and (4) Are there any offices not listed in section 220(e)(2) that are candidates for the application of the section 220(e)(1)(B) exclusion and, if so, why? In seeking comment on these issues, the Board emphasized the need for detailed legal and factual support for any proposed modifications in the FLRA's regulations and for any additional proposed regulations implementing sections 220(e)(1) (A) and (B).

The Board received two comments in response to the ANPR. These comments addressed only the issue of whether the Board should grant a blanket exclusion for all covered employees in certain section 220(e)(2) offices. Neither commenter addressed issues arising under section 220(e)(1)(A) or any other issues arising under 220(e)(1)(B).

III. The Notice of Proposed Rulemaking

On May 23, 1996, the Board published a Notice of Proposed Rulemaking (''NPR'') (142 Cong. R. S5552-56, H5563-68 (daily ed., May 23, 1996)) in the Congressional Record. Pursuant to section 304(b)(1) of the CAA, the NPR set forth the recommendations of the Executive Director and the Deputy Executive Directors for the House and the Senate.

A. Section 220(e)(1)(A)

In its proposed regulations, the Board noted that, under section 220(e)(1)(A), the Board is authorized to modify the FLRA's regulations only ''to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under [section 220(e)].'' The Board further noted that no commenter had taken the position that there was good cause to modify the FLRA's regulations for more effective implementation of section 220(e). Nor did the Board independently find any basis to exercise its authority to modify the FLRA regulations for more effective implementation of section 220(e). Thus, the Board proposed that, except as to employees whose exclusion from coverage was found to be required under section 220(e), the regulations adopted under section 220(d) would apply to employing offices, covered employees, and their representatives under section 220(e).

B. Section 220(e)(1)(B)

With regard to section 220(e)(1)(B), the Board concluded that the requested blanket exclusion of all of the employees in certain section 220(e)(2) offices was not required under the stated statutory criteria. However, the Board did propose a regulation that would have allowed the exclusion issue to be raised with respect to any particular employee in any particular case. In addition, the Board again urged commenters who supported any categorical exclusions, in commenting on the proposed regulations, to explain why particular jobs or job duties require exclusion of particular employees so that the Board could exclude them by regulation, where appropriate.

C. Section 220(e)(2)(H)

Finally, in response to a commenter's assertion and supporting information, the Board found that employees in four offices identified by the commenter performed functions ''comparable'' to those performed by employees in the other section 220(e)(2) offices. Accordingly, the Board proposed, pursuant to section 220(e)(2)(H), to identify those offices in its regulations as section 220(e)(2) offices.

IV. Analysis of Comments and Final Regulations

The Board received six comments on the NPR, five from congressional offices and one from a labor organization. Five commenters objected to the proposed regulations because all covered employees in the section 220(e)(2) offices were not excluded from coverage. These commenters further suggested that the Board has good cause, pursuant to section 220(e)(1)(A), to modify the FLRA's regulations by promulgating certain additional regulations. One of the commenters stated its approval of the proposed regulations.

The Board has carefully reexamined the statutory requirements embodied in 220(e), and evaluated the comments received, as well as the recommendations of the Office's statutory appointees. Additionally, the Board has looked to ''the principles and procedures'' set forth in the Administrative Procedure Act, 5 U.S.C. §553 (''APA''), which sections 220(e) and 304 of the CAA require the Board to follow in its rulemakings. See 2 U.S.C. §1384(b). Finally, the Board has carefully considered the constitutional provisions and historical practices that make Congress a distinct institution in American government.

Based on its analysis of the foregoing, on the present rulemaking record, the Board has determined that:

Under the terms of the CAA, the requirements and exemptions of chapter 71 shall apply to covered employees who are employed in section 220(e)(2) offices in the same manner and to the same extent as those requirements and exemptions are applied to covered employees in all other employing offices;

No additional exclusions from coverage of any covered employees of section 220(e) offices because of (i) a conflict of interest or appearance of conflict of interest or (ii) Congress' constitutional responsibilities are required; and

In accord with section 220(e)(2)(H) of the CAA, eight additional offices beyond those identified in the Board's NPR perform ''comparable functions'' to those offices identified in section 220(e)(2).

The Board is adopting final regulations that effectuate these conclusions. The Board's reasoning for its determinations, together with its analysis of the comments received, is as follows:

A. Section 220(e)(1)(A) Modifications

Section 220(e)(1) provides that the Board ''shall issue regulations pursuant to section 304 on the manner and extent to which the requirements and exemptions of chapter 71 should apply to covered employees'' in section 220(e)(2) offices. In response to the Board's ANPR, no commenter suggested that the Board's regulations should apply differently to section 220(e)(2) employees and employing offices than to other covered employees and employing offices. Several commenters have now suggested that the regulations should be modified in various respects for section 220(e)(2) employees who are not excluded pursuant to section 220(e)(1)(B). The Board, however, is not persuaded by any of these suggestions.

First, contrary to one suggestion, the Board is neither required nor permitted ''to issue regulations specifying in greater detail the application of [Chapter 71] to the specific offices listed in section 220(e)(2).'' Section

220(e)(1) provides that the Board's ''regulations shall, to the greatest extent practicable, be consistent with the provisions and purposes of chapter 71 and of this Act.'' Section 220(e)(1) further specifically states that the Board's ''regulations shall be the same as subjective regulations issued by the Federal Labor Relations Authority under'' chapter 71. (Emphasis added.) While section 220(e)(1)(B) makes an ''except[ion]'' to these statutory restrictions ''to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section,'' this exception neither authorizes nor compels the requested regulations.

As the Board has explained in other rulemakings, it is not possible to clarify by regulation the application of the pertinent statutory provisions and/or the pertinent executive branch agency's regulations (here, the FLRA's regulations) while at the same time complying with the statutory requirement that the Board's regulations be ''the same as substantive regulations'' of the pertinent executive branch agency. Moreover, modification of substantive law is legally distinct from clarification of it. In this context, to conclude otherwise would improperly defeat the CAA's intention that, except where strictly necessary, employing offices in the legislative branch should live with and under the same regulatory regime—with all of its attendant burdens and uncertainties—that private employers and/or executive branch agency employers live with and under. Much as the Chairman of the House Committee on Economic and Educational Opportunities stated at the time of passage of the CAA: ''The Congress should not be allowed to escape the problems created by its own failure to draft laws properly and, perhaps, through this approach [it] will be forced to revisit and clarify existing laws which, because of a lack of clarity, are creating confusion and litigation.'' 141 Cong. Rec. H264 (Jan. 17, 1995) (remarks of Rep. Goodling).

Indeed, in the Board's judgment, adding new regulatory language of the type requested here (e.g., references to job titles) would be contrary to the effective implementation of the rights and protections of the CAA. Such new regulatory language would itself have to be interpreted, would not be the subject of prior interpretations by the FLRA, and would needlessly create new ground for litigation about additional interpretive differences.

Second, the Board cannot accede to the request that it issue regulations providing that all employees of personal, committee, Leadership, General Counsel, and Employment Counsel offices are ''confidential employees'' within the meaning of 5 U.S.C. §7103(13). As noted above, to the extent that this commenter seeks a declaratory statement that clarifies the appropriate application of 5 U.S.C. §7103(13), the Board is not legally free to provide such clarifications through its statutorily limited rulemaking powers. Moreover, contrary to the proposal of a commenter, the Supreme Court has approved, and the NLRB and the FLRA have applied, a definition of ''confidential employee'' that is narrowly framed and that applies only to employees who, in the normal course of their specific job duties, properly and necessarily obtain in advance or have regular access to confidential information about management's positions concerning pending contract negotiations, the disposition of grievances, and other labor relations matters. See NLRB v. Hendricks County, et al., 454 U.S. 170, 184 (1981); In re Dept. of Labor, Office of the Solicitor, Arlington Field Office and AFGE Local 12, 37 F.L.R.A. 1371, 1381–1383 (1990). In fact, in both the private and public sectors, it has been held that ''bargaining unit eligibility determinations [must be based] on testimony as to an employee's actual duties at the time of the hearing rather than on duties that may exist in the future;'' ''[b]argaining unit eligibility determinations are not based on evidence such as written position descriptions or testimony as to what duties had been or would be performed by an employee occupying a certain position, because such evidence might not reflect the employee's actual duties.'' Id. at 1377 (emphasis added). Since these rulings have not been addressed or distinguished by the commenter, the Board must conclude that the requisite ''good cause'' to modify the FLRA's regulations has not been established.

Third, the Board similarly must decline the request that it promulgate regulations: (a) excluding from bargaining units all employees of the Office of Compliance as employees ''engaged in administering the provisions of this chapter,'' within the meaning of 5 U.S.C. §7112(b)(4); and (b) excluding from bargaining units all employees of the Office of Inspector General as employees ''primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency,'' within the meaning of 5 U.S.C. §7112(b)(7). To the extent that these requests seek clarification concerning the application of existing statutory provisions, the Board is foreclosed by statute from providing such regulatory clarifications (especially for the Office of Inspector General, which does not appear to be a section 220(e)(2) office and which, in contrast to inspector general offices in the executive branch, appears primarily to audit or investigate employees of other employing offices, as opposed to auditing employees of its own agency). Moreover, to the extent that these requests seek to have the Board make eligibility determinations in advance of a specific unit determination and without a developed factual record, the commenters again seek a modification in the substantive law for which no ''good cause'' justification has been established.

Fourth, the Board similarly must decline the suggestion that it promulgate regulations: (a) limiting representation of employees of section 220(e)(2) offices to unions unaffiliated with noncongressional unions; (b) clarifying that a Member's legislative positions are not properly the subject of collective bargaining; (c) clarifying the ability of a Member to discharge or discipline an employee for disclosing confidential information or for taking legislative positions inconsistent with the Member's positions; and (d) authorizing section 220(e)(2) offices to forbid their employees from acting as representatives of the views of unions before Congress or from engaging in any other lobbying activity on behalf of unions. The issues raised by the suggested regulations are of significant public interest. But, to the extent that the suggested regulations are requested merely to clarify the application of existing statutory or regulatory provisions, the Board may not properly use its limited rulemaking authority to promulgate such regulatory clarifications. Moreover, there is not ''good cause'' to so ''modify'' the FLRA's regulations, as section 220(e) does not itself provide the Board with authority to modify statutory requirements such as those found in 5 U.S.C. §7112(c) (specifying limitations on whom a labor organization may represent), 5 U.S.C. §§7103(A)(12), 7106, 7117 (specifying subjects that are not negotiable), 5 U.S.C. §7116(a) (specifying prohibited employment actions), and 5 U.S.C. §7102 (specifying scope of protected employee rights).

Finally, for similar reasons, the Board must reject the request that it place regulatory limitations and prohibitions on the proper uses of union dues. Again, the Board cannot properly use its statutorily-limited regulatory powers either to clarify what commenters find ambiguous or to codify what commenters find unambiguous. Moreover, nothing in chapter 71 (or the CAA) authorizes a labor organization and an employing office to establish a closed shop, union shop, or even an agency shop; accordingly, under chapter 71 (and the CAA), employees cannot be compelled by their employers to join unions against their free will and, concomitantly, employees can resign from union membership and cease paying dues at any time without risk to the security of their employment. In these circumstances, there is no evident basis—legal or factual—for the Board to seek to regulate the proper uses of voluntarily-paid union dues.

In sum, the proposed modifications of the FLRA's regulations are not a proper exercise of the Board's section 220(e) and section 304 rulemaking powers. Accordingly, the Board may not adopt them.

B. Section 220(e)(1)(B) Exclusions

Section 220(e)(1)(B) provides that, in devising its regulations, the Board ''shall exclude from coverage under [section 220] any covered employees [in section 220(e)(2) offices] if the Board determines that such exclusion is required because of—

(i) a conflict of interest or appearance of a conflict of interest; or

(ii) Congress' constitutional responsibilities.'' Accordingly, the Board has, with the assistance of the Office's Executive Director and two Deputy Executive Directors, carefully examined the comments received, other publicly available materials about the workforces of the section 220(e)(2) offices, and the likely constitutional, ethical, and labor law issues that could arise from application of chapter 71 to these workforces. The Board has also carefully examined the adequacy of the requirements and exemptions of chapter 71 and section 220(d) of the CAA for: (a) addressing any actual or reasonably perceived conflicts of interests that may arise in the context of collective organization of employees of section 220(e)(2) offices; and (b) accommodating Congress' constitutional responsibilities. Having done so, on the present rulemaking record the Board concludes that additional exclusions from coverage beyond those contained in chapter 71 and section 220(d) are not required by either Congress' constitutional responsibilities or a real or apparent conflict of interest; and the Board now further concludes that an additional regulation specially authorizing consideration of these issues in any particular case is unnecessary in light of the authority available to the Board under chapter 71's implementing provisions and precedents and the Board's regulations under section 220(d).

1. Additional exclusions from coverage are justified under section 220(e)(1)(B) only where necessary to the conduct of Congress' constitutional responsibilities or to the resolution of a real or apparent conflict of interest

In the preamble to its NPR, the Board expressed its view that additional exclusions of employees from coverage are justified under section 220(e)(1)(B) only where necessary to the conduct of Congress' constitutional responsibilities or to the resolution of a real or apparent conflict of interest. Although several commenters have objected to the Board's construction of the statute, the Board is not persuaded by these objections.

First, the Board finds no basis for the suggestion that ''the Board has been instructed

by the statute to exclude offices from coverage based on any of the specified'' statutory criteria. (Emphasis added.) What is mandated is an inquiry by the Board concerning whether exclusion of an employee is justified by the statutory criteria; specifically, an exclusion of a covered employee is mandated only ''if [as a result of the Board's inquiry] the Board determines such exclusion is required.'' (Emphasis added). Thus, the exclusion provision is only conditional, and the exclusion inquiry is to be addressed on an employee-by-employee basis, not on an office-by-office basis, as the commenter erroneously suggests.

Second, contrary to another commenter's suggestion, the statutory language does not require exclusion of employees where such exclusions would merely be ''suitable'' or ''appropriate'' to the conduct of Congress' constitutional responsibilities or to the resolution of a real or apparent conflict of interest. The statutory language cannot properly be read in this fashion.

The statute expressly states that an exclusion of an employee is appropriate only ''if the Board determines that such exclusion is required because of'' the stated-statutory criteria. (Emphasis added.) The term ''[r]equired implies something mandatory, not something permitted. . . .'' Mississippi River Fuel Corporation v. Slayton, 359 F.2d 106, 119 (8th Cir. 1966) (Blackmun, J.). Moreover, while the term ''required'' is capable of different usages, the usage equating with ''necessity'' or ''indispensability'' is the most common one. See Webster's Third New International Dictionary 1929 (1986). And, as part of an ''except[ion]'' to a statutory requirement that the Board's regulations be ''the same'' as the FLRA's regulations and be consistent with the ''provisions and purposes'' of chapter 71 to the ''greatest extent practicable,'' it is highly unlikely that Congress would mandate ''exclusion from coverage''—with loss of not only organization rights, but also rights against discipline or discharge because of engagement in otherwise protected activities—when less restrictive alternatives (e.g., exclusion from a bargaining unit; limitation on the union that may represent the employee) would adequately safeguard Congress' constitutional responsibilities and resolve any real or apparent conflicts of interest.

In these circumstances, the term ''required'' cannot properly be read to require additional exclusions from coverage merely because they would be ''suitable'' or ''appropriate'' to the conduct of Congress' constitutional responsibilities or to the resolution of a real or apparent conflict of interest. Such an interpretation would not be, ''to the greatest extent practicable,'' ''consistent with the provisions and purposes of chapter 71,'' as section 220(e) requires. Moreover, such an interpretation would be contrary to the CAA's promise that, except where strictly necessary, Congress will be subject to the same employment laws to which the private sector and the executive branch are subject. Indeed, contrary to the CAA's purpose, such an interpretation would rob Members of direct experience with traditional labor laws such as chapter 71, and leave them without the first-hand observations that would help them decide whether and to what extent labor law reform is needed and appropriate.

Third, for these reasons, the Board also rejects one commenter's suggestion that the omission of a ''good cause'' requirement from section 220(e)(1)(B) suggests that a lesser standard for exclusion from coverage was intended. The omission of a ''good cause'' requirement in section 220(e)(1)(B) is more naturally explained: The term ''required'' sets the statutory standard in section 220(e)(1)(B), and the ''good cause'' standard is simply not needed.

Finally, contrary to the objections, the legislative history does not support the commenters' view that additional exclusions from coverage are mandated even if not strictly necessary to the conduct of Congress' constitutional responsibilities or to the resolution of a real or apparent conflict of interest. It appears that, at one point in the preceding Congress, some Members expressed ''concern that, if legislative staff belonged to a union, that union might be able to exert undue influence over legislative activities or decisions. Even if such a conflict of interest between employees' official duties and union membership did not occur, the mere appearance of undue influence or access might be very troubling. Furthermore, there is a concern that labor actions could delay or disrupt vital legislative activities.'' S. Rep. No. 397, 103d Cong., 2d Sess. 8 (1994). But the legislative sponsors did not respond to these concerns by excluding all legislative staff from coverage or by requiring exclusion of any section 220(e)(2) office's employees wherever it would be ''suitable'' or ''appropriate.''

Rather, the legislative sponsors responded by applying chapter 71 (rather than the NLRA) to the legislative branch. Senators John Glenn and Charles Grassley urged this course on the ground that chapter 71 ''includes provisions and precedents that address problems of conflict of interest in the governmental context and that prohibit strikes and slowdowns.'' Id. at 8; 141 cong. rec. S444-45 (daily ed., Jan. 5, 1995) (statement of Sen. Grassley).

To be sure, the legislative sponsors further provided that, ''as an extra measure of precaution, the reported bill would not apply labor-management law to Members' personal or committee offices or other political offices until the Board has conducted a special rulemaking to consider such problems as conflict of interest.'' Id. However, the legislative sponsors made clear that an appropriate solution to a real or apparent conflict of interest would include, for example, precluding certain classes of employees ''from being represented by unions affiliated with noncongressional or non-Federal unions.'' Contrary to the commenter's argument, exclusion of section 220(e)(2) office employees from coverage was not viewed as inevitably required, even where a conflict of interest is found to exist. 141 Cong. Rec. S626 (daily ed., Jan. 9, 1995). Moreover, the legislative sponsors expressly stated that the rulemaking so authorized ''is not a standardless license to roam far afield from such executive branch regulations. The Board cannot determine unilaterally that an insupportably broad view of Congress' constitutional responsibilities means that no unions of any kind can work in Congress.'' Id. That, of course, would be precisely the result of the commenters' proposed standard.

2. No additional exclusion from coverage of any covered employee of a section 220(e)(2) office is necessary to the conduct of Congress' constitutional responsibilities or to the resolution of a real or apparent conflict of interest

The question for the Board, then, is whether, on the present rulemaking record, the additional exclusion from coverage of any covered employee of a section 220(e)(2) office is necessary to the conduct of Congress' constitutional responsibilities or to the resolution of a real or apparent conflict of interest. The Board concludes that no such additional exclusions from coverage are required.

a. No additional exclusion from coverage is necessitated by Congress' constitutional responsibilities

The CAA does not expressly define the ''constitutional responsibilities'' with which section 220(e)(1)(B) is concerned. But, as one commenter has suggested, it may safely be presumed that this statutory phrase encompasses at least the responsibility to exercise the legislative authority of the United States; to advise and consent to treaties and certain presidential nominations; and to try matters of impeachment. Even so defined, however, the Board has no factual or legal basis for concluding that any additional employees of the section 220(e)(2) offices must be excluded from coverage in order for Congress to be able to carry out these constitutional responsibilities or any others assigned to Congress by the Constitution.

Chapter 71 was itself ''designed to meet the special requirements and needs of the Government.'' 5 U.S.C. §7101(b). Thus, chapter 71 authorizes the exclusion of any agency or subdivision thereof where necessary to the ''national security,'' and completely excludes from coverage aliens and noncitizens who occupy positions outside of the United States, members of the uniformed services, and ''supervisors'' and ''management officials.'' Id. at §§7103(a)(2), 7103(b). In addition, chapter 71 requires that bargaining units not include ''confidential'' employees, employees ''engaged in personnel work,'' employees ''engaged in administering'' chapter 71, both ''professional employees and other employees,'' employees whose work ''directly affects national security,'' and employees ''primarily engaged in investigation or audit functions relating to the work of individuals'' whose duties ''affect the internal security of the agency.'' Id. at §7112(b). Likewise, chapter 71 provides that a labor organization that represents (or is affiliated with a union that represents) employees to whom ''any provision of law relating to labor-management relations'' applies may not represent any employee who administers any such provision of law; and, chapter 71 prohibits according exclusive recognition to any labor organization that ''is subject to corrupt influences or influences opposed to democratic principles,'' id. at §§7112(c), 7111(f), and precludes an employee from acting in the management of (or as a representative for) a labor organization where doing so would ''result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.'' Id. at §7120(e). Furthermore, chapter 71 broadly preserves ''Management rights,'' limits collective bargaining to ''conditions of employment,'' and, in that regard, among other things, specifically excludes matters that ''are specifically provided for by Federal statute.'' Id. at 7106, 7103(12)(a), (14). Finally, chapter 71 makes it unlawful for employees and their labor organizations to engage in strikes, slowdowns, or picketing that interferes with the work of the agency. Id. at 7116(b)(7).

Just as the provisions and precedents of chapter 71 are sufficient to allow the Executive Branch to carry out its constitutional responsibilities, the provisions and precedents of chapter 71 are fully sufficient to allow the Legislative Branch to carry out its constitutional responsibilities. Congress is, of course, a constitutionally separate branch of government with distinct functions and responsibilities. But, by completely excluding ''supervisors'' and ''management officials'' from coverage, and by preserving ''Management rights,'' chapter 71 ensures that Congress is not limited in the exercise of its constitutional powers. Furthermore, by denying ''exclusive recognition'' to any labor organization that ''is subject to corrupt influences or influences opposed to democratic principles,'' chapter 71 ensures that labor organizations will not become a foothold for those who might seek to undermine or overthrow our nation's republican

form of government. In addition, by outlawing strikes and other work stoppages, chapter 71 ensures that employee rights to collective organization and bargaining may not be used improperly to interfere with Congress' lawmaking and other functions. Indeed, by specifying that its provisions, ''should be interpreted in a manner consistent with the requirement of an effective and efficient Government,'' 5 U.S.C. §7101(b), chapter 71 makes certain that its provisions will expand and contract to accommodate the legitimate needs of Government, which no doubt in this context include the fulfillment of Congress' constitutional responsibilities.

The Board cannot legally accept the suggestion of some commenters that collective organization and bargaining rights for section 220(e)(2) office employees are ''inherently inconsistent'' with the conduct of Congress' constitutional responsibilities. These commenters' position may be understood in political and administrative terms. But, under the CAA, such a claim must legally be viewed with great skepticism, for the CAA adopts the premise of our nation's Founders, as reflected in the Federalist papers and other contemporary writings, that government work better and is more responsible when it is accountable to the same laws as are the people and is not above those laws. Such interpretive skepticism is particularly warranted in this context, for the claim that collective bargaining and organization rights for section 220(e)(2) office employees are ''inherently inconsistent'' with Congress' constitutional responsibilities is in considerable tension with the CAA's express requirement that the Board examine the exclusion issue on an employee-by-employee basis. Indeed, section 220(e) of the CAA expressly requires the Board to accept, ''to the greatest extent practicable,'' the findings of Congress in chapter 71 that ''statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—(A) safeguards the public interest, (B) contributes to the effective conduct of public business, and (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment.'' 5 U.S.C. §7101(a). The statutory instruction to honor these findings to ''the greatest extent practicable'' is directly at odds with the commenters' ''inherent inconsistency'' argument.

Moreover, contrary to the commenters' suggestion, neither the allegedly close working relationships between the principals of section 220(e)(2) offices and their staffs nor the allegedly close physical quarters in which section 220(e)(2) office employees work can legally justify the additional exclusions from coverage that the commenters seek. Chapter 71 already excludes from coverage all ''management officials'' and ''supervisors''—i.e., those employees who are in positions ''to formulate, determine, or influence the policies of the agency,'' and those employees who have the authority to hire, fire, and direct the work of the office. Moreover, chapter 71 excludes from bargaining units ''confidential employees,'' ''employees engaged in personnel work,'' and various other categories of employees who, by the nature of their job duties, might actually have or might reasonably be perceived as having irreconcilably divided loyalties and interests if they were to organize. Beyond these carefully crafted exclusions, however, chapter 71 rejects both the notion that ''unionized employees would be more disposed than unrepresented employees to breach their obligation of confidentiality,'' and the notion that representation by a labor organization or ''membership in a labor organization is in itself incompatible with the obligations of fidelity owed to an employer by its employee.'' In re Dept. of Labor, Office of the Solicitor, Arlington Field Office and AFGE Local 12, 37 F.L.R.A. at 1389 (citations omitted; internal quotations omitted). Rather, as the Supreme Court recently reiterated, the law in the private and public sectors requires that acts of disloyalty or misuse of confidential information be dealt with by the employer through, e.g., non-discriminatory work rules, discharge and/or discipline. See NLRB v. Town & Country Electric, Inc., 116 S. Ct. 450, 457 (1995). These rulings are especially applicable and appropriate in the context of politically appointed employees in political offices of the Legislative Branch, since such employees generally are likely to be uniquely loyal and faithful to their employing offices.

In this same vein, the Board cannot legally accept the suggestion that additional exclusions from coverage of section 220(e)(2) office employees are justified by reference to Members' understandable interest in hiring and firing on the basis of ''political compatibility.'' While a long and forceful tradition in this country, hiring and firing on the basis of ''political compatibility'' is not a constitutional right, much less a constitutional responsibility, of the Congress or its Members. Moreover, while section 502 of the CAA provides that it ''shall not be a violation of any provision of section 201 to consider the . . . political compatibility with the employing office of an employee,'' 2 U.S.C. §1432, section 502 noticeably omits section 220 from its reach. Thus, the Board has no legal basis for construing section 220(e)(1)(B) to require additional exclusions from coverage in order to protect the interest of Members in ensuring the ''political compatibility'' of section 220(e)(2) office employees.

Furthermore, the Board cannot legally accept the suggestion that exclusion of all employees in personal, committee, leadership or legislative support offices is justified to prevent labor organizations from obtaining undue influence over Members' legislative activities. The issue of organized labor's influence on the nation's political and legislative processes is one of substantial public interest. But commenters have not explained how organized labor's effort to advance its political and legislative agenda legally may be found to constitute an interference with Congress' constitutional responsibilities. Moreover, chapter 71 only authorizes a labor organization to compel a meeting concerning employees' ''conditions of employment'' that are not specifically provided for by Federal statute. Thus, a labor organization may not lawfully use chapter 71 either to demand a meeting about a Member's legislative positions or to seek to negotiate with the Member about those legislative positions.

Finally, the Board cannot legally accept the suggestion that additional exclusions from coverage of section 220(e)(2) office employees are necessary to ensure that Members are neither inhibited in nor distracted from the performance of their constitutional duties. The Board does not doubt that, if employees choose to organize, compliance with section 220 may impose substantial administrative burdens on Members (just as compliance with the other laws made applicable by the CAA surely does). Such administrative burdens might have been a ground for Congress to elect in the CAA to exempt Members and their immediate offices from the scope of section 220 (just as the Executive Office of the President is exempt from chapter 71 and from many of the other employment laws incorporated in the CAA). But Congress did not do so. Instead, Congress imposed section 220 on all employing offices and provided an ''except[ion]'' for employees of section 220(e)(2) offices only where exclusion from coverage is required by Congress' constitutional responsibilities (or a real or apparent conflict of interest). The Board cannot now lawfully find that the administrative burdens of compliance with section 220 are the constitutional grounds that justify the additional exclusion from coverage of any section 220(e)(2) office employees; on the contrary, the Board is bound to apply the CAA's premise that Members of Congress will better and more responsibly carry out their constitutional responsibilities if they are in fact subject to the same administrative burdens as the laws impose upon our nation's people.

b. No additional exclusion is necessitated by any real or apparent conflict of interest

Nor can the Board lawfully find on this rulemaking record that additional exclusions from coverage of employees of section 220(e)(2) offices are required by a real or apparent conflict of interest. Since the phrase ''conflict of interest or appearance of conflict of interest'' is not defined in the CAA, it must be construed ''in accordance with its ordinary and natural meaning.'' FDIC v. Meyer, 114 S. Ct. 996, 1001 (1994). The ''ordinary and natural meaning'' of ''conflict of interest or appearance of conflict of interest'' is a real or reasonably apparent improper or unethical ''conflict between the private interests and the official responsibilities of a person in a position of trust (such as a government official).'' Webster's Ninth New Collegiate Dictionary 276 (1990). Accord, Black's Law Dictionary 271 (5th ed. 1979). Specifically, as Senate and House ethics rules make clear, under Federal law the phrase ''conflict of interest or appearance of conflict of interest'' refers to ''a situation in which an official's conduct of his office conflicts with his private economic affairs.'' House Ethics Manual 87 (1992); Senate Rule XXXVII. After thorough examination of the matter, the Board has found no tenable legal basis for concluding that additional exclusions from coverage of any employees of section 220(e)(2) offices are necessary to address any real or reasonably perceived incompatibility between employees' private financial interests and their public job responsibilities.

As noted above, by excluding ''management officials'' and ''supervisors'' from coverage, and by requiring that bargaining units not include ''confidential employees'' and ''employees engaged in personnel work,'' chapter 71 already categorically resolves the real or apparent conflicts of interest that may be faced by employees whose jobs involve setting, administering or representing their employer in connection with labor-management policy or practices. Similarly, by requiring that bargaining unit not include employees ''engaged in administering'' chapter 71, chapter 71 already resolves real or apparent conflicts of interest that might arise for employees of, for example, the Office of Compliance. Furthermore, by precluding an employee from acting in the management of (or as a representative for) a labor organization, where doing so would ''result in a conflict of interest or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee,'' chapter 71 already directly precludes an employee from assuming a position with the union (or from acting on behalf of the union) where he or she could confer a personal economic benefit on him or herself. And, as an added precaution, the Board has adopted a regulation under section 220(d) that authorizes adjustment of the substantive requirements of section 220 where ''necessary to avoid a conflict of interest or appearance of conflict of interest.'' Therefore, all conceivable real and apparent conflicts of interests are resolvable without the need for additional exclusion from coverage.

The Board finds legally untenable the suggestion of several commenters that, by directing the Board to consider these real or apparent conflict of interest issues in its rulemaking process, section 220(e)(1)(B) entirely displaces and supersedes the conflict of interest provisions and precedents of chapter 71 and section 220(d) where employees of section 220(e)(2) offices are concerned. Section 220(e) specifically provides that the Board's regulations for section 220(e)(2) offices ''shall, to the greatest extent practicable, be consistent with the provisions and purposes of chapter 71'' and ''shall be the same as substantive regulations issued by'' the FLRA. As pertinent here, it makes an ''except[ion]'' only ''if the Board determines that * * * exclusion [of a section 220(e)(2) office employee] is required because of * * * a conflict of interest or appearance of a conflict of interest.'' This conditional exception—applicable only ''if'' the Board determines that an exclusion from coverage is ''required'' by a real or apparent conflict of interest—plainly does not displace or supersede the provisions and precedents of chapter 71 and section 220(d) that section 220(e) expressly applies to section 220(e)(2) offices. Indeed, as the statutory language and legislative history discussed above confirm, section 220(e)(1)(B) requires this rulemaking merely as a ''special precaution'' to ensure that chapter 71 and section 220(d) appropriately and adequately deal with conflict of interest issues in this context.

The Board similarly cannot legally accept the suggestion that exclusion of employees in personal, committee, leadership and party caucus offices in necessary to address ''the most important legislative conflict of interest issue—the appearance or reality of influencing legislation.'' While understandable in political terms, this suggest has no foundation in the law which the Board is bound to apply.

To begin with, the Board has no basis for concluding that the provisions and precedents of chapter 71 and section 220(d) are inadequate to resolve any such conflict of interest issues. Although commenters correctly point out that the Executive Office of the President is not covered by Chapter 71, they provide no evidence that this exclusion resulted from conflict of interest concerns. Moreover, though commenters suggest that employees of the Executive Branch engage in only administrative functions, the Executive Branch in fact has substantial political functions relating to the legislative process—including e.g., recommending bills for consideration, providing Congress with information about the state of the Union, and vetoing bills that pass the Congress over the President's objection. Furthermore, almost every executive agency covered by chapter 71 has legislative offices with both appointed and career employees who, like section 220(e)(2) office employees, are responsible for meeting with special interest groups, evaluating and developing potential legislation, and making recommendations to their employers about whether to sponsor, support or oppose that or other legislation. Chapter 71 does not exclude from its coverage Executive Branch employees performing such policy and legislative-related functions (much less the secretaries and clerical personnel in their offices); and, contrary to one commenter's suggestion, chapter 71 does not exclude from its coverage schedule ''C'' employees who are outside of the civil service and who are appointed to perform policy-related functions and to work closely with the heads of Executive Branch departments. See U.S. Dept. of HUD and AFGE Local 476, 41 F.L.R.A. 1226, 1236–37 (1991). Since the Board has no evidence that the conflict of interest issues for section 220(e)(2) office employees materially differ from the conflict of interest issues that these Executive Branch employees face, the Board has no proper basis for finding that additional section 220(e)(2) office employees must be excluded from coverage simply because they too are outside of the civil service and perform legislative-related functions.

Second, the Board is not persuaded that the concern expressed by the commenters—i.e., that labor organizations will attempt to influence the legislative activities of employees who they are seeking to organize and represent—even constitutes a ''conflict of interest or appearance of conflict of interest'' within the meaning of that statutory term. As noted above, under both common usage and House and Senate ethics rules (as well as under federal civil service rules and other federal laws), the statutory phrase ''conflict of interest or appearance of conflict of interest'' refers to a situation in which an official's conflict of his office actually or reasonably appears unethically to provide him or her with a private economic benefit. While the Board understands that accepting gifts from labor organizations might actually or apparently constitute receipt of such an improper pecuniary benefit, the Board fails to see how working with labor organizations concerning their legislative interests confers or appears to confer any improper private economic benefit on legislative employees—just as the Board does not see how working on legislative matters with other interest groups to which the employee might belong (such as the American Tax Reduction Movement, the Sierra Club, the National Rifle Association, the National Right to Work Foundation, the NAACP, and/or the National Organization of Women) would do so. On the contrary, it is the employees' job to meet with special interest groups of this type, to communicate the preferences and demands of these special interest groups to the Members of committees for which they work, and, where allowed or instructed to do so, to assist or opposed these special interest groups in pursuing their legislative interests.

It is true, as one commenter notes, that, in contrast to other interest groups, a labor organization could, in addition to its legislation activities, seek to negotiate with an employing office about the employees ''conditions of employment.'' But each of the employees would have to negotiate individually with the employing office if the union did not do so collectively for them. Moreover, since those who negotiate for the employing office and decide whether or not to provide or modify any such ''conditions of employment'' may by law not be part of the unit that the union represents, section 220(e)(2) office employees could not through the collective negotiation of their ''conditions of employment'' unethically provide themselves or appear to provide themselves with an improper pecuniary benefit for the way that they perform their official duties for the employing office. Thus, collective organization of section 220(e)(2) office employees would not create a real or apparent conflict of interest—just as it does not for appointed and career employees in the Executive Branch who perform comparable policy or legislative related functions.

To be sure, because of an employee's sympathy with or support for the union (or any other interest group), the employee could urge the Member or office for which he or she works to take a course that is not in the employer's ultimate best political or legislative interest. Indeed, it is even conceivable that, because of the employee's sympathy with or support for a particular interest group such as organized labor, the employee could act disloyally and purposefully betray the Member's or the employing office's interests. But employees could could have such misguided sympathies, provide such inadequate support, and/or act disloyally whether or not they are members of or represented by a union. Thus, just as was true in the context of Congress' constitutional responsibilities (and as is true for Executive Branch employees), the legally relevant issues in such circumstances are ones of acceptable job performance and appropriate bargaining units, work rules, and discipline—not issues of real or apparent conflicts of interest. See NLRB v. Town and Country Electric, Inc, 116 S. Ct, at 456–57.

It is also true that organized labor has a particular interest in legislative issues relating to employment and that, if enacted, some of the resulting laws could work to the personal economic benefit of employees in section 220(e)(2) offices and, indeed, sometimes even to the economic benefit of Members (e.g. federal pay statutes). But whenever Members or their staffs work on legislation there is reason for concern that they will seek to promote causes that will personally benefit themselves or groups to which they belong—whether it be with respect to, e.g., their income tax rates, their statutory pay and benefits, the grounds upon which they can be denied consumer credit, or the ease with which they can obtain air transportation to their home states. These concerns, however, will arise whether or not employees in section 220(e)(2) offices are allowed to organize and bargain collectively concerning their ''conditions of employment,'' and cannot conceivably ''require'' the exclusion of additional section 220(e)(2) office employees from coverage under section 220. As a Bipartisan Task Force on Ethics has so well stated:

''A conflict of interest is generally defined as a situation in which an official's private financial interests conflict or appear to conflict with the public interest. Some conflicts of interest are inherent in a representative system of government, and are not in themselves necessarily improper or unethical. Members of Congress frequently maintain economic interests that merge or correspond with the interests of their constituents. This community of interest is in the nature of representative government, and is therefore inevitable and unavoidable.''

House Bipartisan Task Force on Ethics, Report on H.R. 3660, 101st Cong, 1st Sess. 22 (Comm. Print, Comm, on Rules 1989), reprinted in 135 Cong. Rec. H9253, H9259 (daily ed. Nov. 21, 1989).

The Board does not mean to suggest that the public does not have a legitimate interest in knowing about the efforts that interest groups (such as organized labor) make to influence Members and their legislative staffs or the financial benefits that Members and their legislative staffs receive. But, as the recently enacted Lobbying Disclosure Act evidences, and as the Bipartisan Task Force on Ethics long ago concluded, lobbying contact disclosure and ''public financial disclosure, coupled with the discipline of the electrical process, remain[s] the best safeguard[s] and the most appropriate method[s] to deter and monitor potential conflicts of interest in the legislative branch.'' House Bipartisan Task Force on Ethics, 135 Cong. Rec. at H9259.

For these reasons, the Board also declines to adopt the suggestions that it exclude from coverage by regulation, on the ground of ''conflict of interest or appearance of conflict or interest,'' all employees of section 220(e)(2) offices who are shown in an appropriate case to be ''exempt'' employees within the meaning of the Fair Labor Standards Act (''FLSA''). This suggestion would improperly

allow unions and/or the General Counsel to challenge an employing office's compliance with section 203 of the CAA in the context of a section 220 proceeding. Moreover, under both private sector law and chapter 71, employees are not uniformly excluded from coverage by viture of their ''exempt'' status, even though such employees may exercise considerable discretion and independent judgment in performing their duties, serve in sensitive positions requiring unquestionable loyalty to their employers, and/or have access to privileged information. Thus, doctors who are responsible for the counseling and care of millions of ill persons are allowed to organize; engineers who are responsible for ensuring the safety of nuclear power plants are allowed to organize; lawyers who are responsible for providing privileged advice and for prosecuting actions on behalf of the Government (such as attorney at the Department of Labor and at the NLRB) are allowed to organize; and schedule ''C'' employees who are outside of the civil service, work closely with the heads of Executive Branch department, and assist in the formulation of Executive Branch policy are not excluded from coverage under chapter 71. Nothing about those employees' ''exempt'' status itself establishes a real or apparent incompatibility between an employee's conduct of his office and his private economic affairs. Not tenable legal basis has been offered for reaching a different conclusion about the ''exempt'' employees of section 220(e)(2) offices.

For similar reasons, the Board declines to adopt the suggestion that it exclude from coverage by regulation, on the ground of ''conflict of interest or appearance of conflict of interest,'' all employees in section 220(e)(2) offices who hold particular job titles—e.g., Administrative Assistants, Staff Directors, and Legislative Directors. The Board has no doubt that many section 220(e)(2) office employees in such job classifications will, because of the actual duties that these employees perform, be excluded from coverage as ''management officials'' or ''supervisors''. And the Board similarly has no doubt that many section 220(e)(2) office employees in these or other job classifications will, because of the actual duties that these employees perform, be excluded from particular bargaining units as ''confidential employees,'' ''employees engaged in personnel work,'' ''professional employees,'' etc. But, as decades of experience in myriad areas of employment law have taught, these legal judgments must turn on the actual job duties that the employees individually perform, and not on their job titles or job classifications. It is the actual job duties of the employees that dictate whether the concern of the particular law in issue is actually implicated (e.g., whether there is a real or apparent conflict of interest); and the use of job titles in a regulation would unwisely have legal conclusions turn on formalisms that are easily subject to manipulation and error (e.g., different employing offices may assign the same job title or job classification to employees who perform quite distinct job responsibilities and functions).

In sum, the six month period during which the job titles and job classifications applicable to section 220(e)(2) office employees have been thoroughly investigated and studied by the Board, neither the statutory appointees nor the Board—or, for that matter, any commenter—has identified any job duty or job function that, in the context of collective organization, would categorically create a real or apparent conflict of interest that is not adequately addressed by the provisions and precedents of chapter 71 and the Board's section 220(d) regulations. Accordingly, on this record, the Board has no legal basis for excluding any additional section 220(e)(2) office employees from coverage by regulation; and, for the reasons here stated, it would be contrary to the effective implementation of the CAA for the Board to reframe existing regulatory exclusions in terms of the job titles or job classifications presently used by certain section 220(e)(2) offices.

3. Final regulations under section 220(e)(1)(B)

For these reasons, the Board will not exclude any additional section 220(e)(2) office employees from coverage in its final section 220(e) regulations. Moreover, the Board will not adopt a regulation that specially authorizes consideration of these exclusion issues in any particular case. Although the Board proposed to do so in its NPR (as a precautionary measure to ensure that employing offices were not prejudiced by the paucity of comments provided in response to the ANPR), commenters have vigorously objected to any such regulation. Having carefully considered this matter and determined both that no exclusions are required on this rulemaking record and that all foreseeable constitutional responsibility and conflict of interest issues may be appropriately accommodated under section 220(d) and chapter 71, the Board now concludes that no such regulation is necessary.

We now turn to the partial dissent. With all due respect to our colleagues, we strongly disagree that the CAA envisions a different rulemaking process for the Board's section 220(e)(1)(B) inquiry than the one that the Board has followed in this rulemaking and in all of its other substantive rulemakings. The section 220(e)(1)(B) inquiry is unique only in terms of the substantive criteria which the statute directs the Board to apply and the effective date of its provisions. In terms of the Board's process, section 220(e) expressly requires—just as the other substantive sections of the CAA expressly require—the Board to adopt its implementing regulations ''pursuant to section 304'' of the CAA, 2 U.S.C. §1351(e), which in turn requires that the Board conduct its rulemakings ''in accordance with the principles and procedures set forth'' in the APA, 2 U.S.C. §1384(b). The partial dissent's argument that a different and distinct process is required under section 220(e)(1)(B) is at odds with these express statutory requirements.

Nor is there any basis for the partial dissent's charge that the Board's section 220(e)(1)(B) inquiry was ''passive,'' ''constrained solely by written submissions,'' and undertaken without ''sufficient knowledge of Congressional staff functions, responsibilities and relationships. . .'' In the ANPR and the NPR, the Board afforded all interested parties two opportunities to address these issues. The Board carefully considered the comments received from employing offices and their administrative aids—i.e., those who are most knowledgeable about the job duties and functions of congressional staff and who should have had the most interest in informing the Board about the relevant issues in this rulemaking. Moreover, over the past six months, the Board has received extensive recommendations from the Executive Director and the Deputy Executive Directors of the House and Senate—recommendations that were based upon the statutory appointees' own legislative branch experiences, their substantial knowledge of these laws, their appropriate discussions with involved parties and those knowledgeable about job duties and responsibilities in section 220(e)(2) offices, and their own independent investigation of the pertinent factual and legal issues. In addition, the General Counsel has provided interested Board members with extensive legal advice about these issues. Indeed, during the past six months, members of the Board were able to review vast quantities of publicly available materials that, among other things, describe in detail the job functions, job responsibilities, and office work requirements and restrictions for employees of the section 220(e)(2) offices. The claim of the partial dissent that this material still needs to be found is thus completely mystifying to the Board; and, since neither the dissenters nor the commenters have pointed to any other information that would be of assistance in deciding the section 220(e)(1)(B) issues, it seems clear that the dissenting members' objection is not with the sufficiency of the information available to themselves or to the Board, but rather is with the result that the Board has reached.

In advocating a different result about the appropriateness of additional exclusions from coverage, however, the partial dissent simply ignores the statutory language and legislative history of section 220 of the CAA. For all of its repeated exhortations about the need to implement the will of Congress, the partial dissent does not identify the constitutional responsibilities or conflicts of interests that supposedly require the additional exclusions from coverage that the dissenters raise for consideration. Indeed, the partial dissent does not even conclude which of its various suggested possible exclusions from coverage are ''required'' by section 220(e)(1)(B) or why.

The partial dissent's critique of the Board's analysis is similarly bereft of legal authority. While criticizing the Board for relying on precedents under chapter 71, the partial dissent ignores section 220(e)'s express command that the Board's implementing regulations under section 220(e)(1)(B) be consistent ''to the greatest extent practicable'' with the ''provisions and purposes'' of chapter 71. Moreover, while noting that legislative branch employees of state governments have not been granted the legal right to organize, the partial dissent fails to acknowledge that this gap in state law coverage results from state laws having generally been modelled after federal sector law (which, until the CAA's enactment, did not cover congressional employees); and, in all events, the partial dissent fails to acknowledge that section 220 itself rejects this state law experience by covering without qualification non-section 220(e)(2) office employees and by allowing exclusion of section 220(e)(2) office employees only if required by the stated statutory criteria. Finally, while asserting that employees in the section 220(e)(2) offices perform functions that are not comparable to functions employed by any covered employees in the Executive Branch, the partial dissent never specifically identifies these supposedly unique job duties and functions and, even more importantly, never explains why the provisions of chapter 71 and section 220(d) are inadequate to address constitutional responsibility or conflict of interest issues arising from them. In short, with all respect, the partial dissent does not provide any acceptable legal basis for concluding that additional regulatory exclusions from coverage are required to address any constitutional responsibility or conflict of interest issues.

The partial dissent similarly errs in suggesting that the Board has ''apparent reluctance or disdain'' for regulatory resolutions and instead prefers adjudicative resolutions. Like our dissenting colleagues, the Board applauds the NLRB's innovative effort—undertaken under the leadership of then-NLRB Chairman Jim Stephens, who is now Deputy Executive Director for the House—to use rulemaking to address certain bargaining unit issues that have arisen in the health care industry. But the issue here is not

whether the NLRB should be praised for having done so or, for that matter, whether regulatory resolutions are generally or even sometimes superior to adjudicative resolutions in that or other contexts. Nor is the issue whether Congress has stated a preference for regulatory resolutions in the CAA. Rather, the issue here is whether additional exclusions from coverage are required to address any constitutional responsibility or conflict of interest issues that may arise in connection with collective organization of section 220(e)(2) office employees. For the reasons earlier stated, the Board has concluded that no such additional exclusions from coverage are required to do so. Thus, to the extent that any constitutional responsibility or conflict of interest issue is left to be resolved adjudicatively, it is only because, where complete exclusion from coverage is not required, the CAA instructs the Board to follow chapter 71's preference for addressing matters of this type in the context of a particular case, and because any constitutional responsibility or conflict of interest issue may be satisfactorily addressed by approaches that are less restrictive than complete exclusion from coverage of section 220(e)(2) office employees. The Board regrets that the partial dissent confuses the Board's respect for the commands of the CAA with a ''disdain'' for rulemaking that the Board does not have.

With all respect to our colleagues, the partial dissent's own lack of attention to the commands of the CAA is strikingly revealed by its discussion of the uncertainty and delay that allegedly will result from not resolving all constitutional responsibility and conflict of interest issues through additional exclusions from coverage. Regulatory uncertainty and delay should be reduced where legally possible and appropriate. But inclusion of the constitutional responsibility and conflict of interest issues in the mix of issues that inevitably must be addressed in a unit determination will not have the unique practical significance that the dissent claims, since employment in the legislative branch is in fact not substantially more transient than is employment in many parts of the private and federal sectors (e.g., construction, retail sales, canneries in Alaska), since private and Executive Branch employers also work under ''time pressures'' that ''are intense and uneven,'' and since the Board has designed its section 220(d) procedures to deal with all unit determination issues as promptly as or more promptly than comparable issues are dealt with in the private and federal sectors. And, in all events, it is clear that administrative burdens of the type discussed by the partial dissent cannot legally justify additional exclusions from coverage, because these administrative burdens legally have nothing to do with the constitutional responsibility and conflict of interests inquiries to which the Board is limited under the statute; indeed, as noted above, the premise of the CAA is that Congress will better exercise its constitutional responsibilities if it is subject to the same kinds of administrative burdens as private sector and Executive Branch employers are subject to under these laws.

The Board appreciates its dissenting colleagues' concern that, if employees of section 220(e)(2) offices should choose to organize, elected officials in Congress may have to negotiate about their employees' ''conditions of employment'' with political friends or foes. But the Board cannot agree that these political concerns require or allow the additional possible exclusions from coverage that are mentioned in the partial dissent. Such political concerns do not legally establish an interference with Congress' constitutional responsibilities or a real or apparent conflict of interest; and the CAA by its express terms only allows additional exclusions from coverage that are required by such constitutional responsibilities or conflicts of interest. If the CAA is to achieve its objectives and the Board is to fulfill its responsibilities, the Board must adhere to the terms of the law that the Congress enacted and that the President signed; the Board may not properly relax the law so as to address non-statutory concerns of this type.

C. Section 220(e)(2)(H) Offices

Section 220(e)(2)(H) of the CAA authorizes the Board to issue regulations identifying ''other offices that perform comparable functions'' to those employing offices specifically listed in paragraph (A) through (G) of section 220. In response to a comment on the ANPR, the Board proposed in the NPR to so identify four offices—the Executive Office of the Secretary of the Senate, the Office of Senate Security, the Senate Disbursing Office, and the Administrative Office of the Sergeant at Arms of the Senate. No comments were received regarding this proposal, and the final regulation will specifically identify these offices, pursuant to section 220(e)(2)(H), as section 220(e)(2) offices.

In response to comments received by the Board, the final regulation will also identify and include the following employing offices in the House of Representatives as performing ''comparable functions'' to those offices specified in section 220(e)(2)) of the CAA: the House Majority Whip; the House Minority Whip; the Office of House Employment Counsel; the Immediate Office of the Clerk; the Office of Legisaltive Computer Systems; the Immediate Office of the Chief Administrative Officer; the Immediate Office of the Sergeant at Amrs; and the Office of Finance.

As explained by one of the commenters, these offices have responsibilities and perform functions that are commensurate with those offices specifically listed in section 22)(e)(2) or those offices identified in the proposed regulations. Thus, the duties and functions of the House Majority and Minority Whips are similar to the Offices of the Chief Deputy Majority Whips and the Offices of the Chief Deputy Minority Whips, which are expressly included in section 220(e)(2)(D). The Office of House Employment Counsel was created, following the enactment of the CAA, to provide legal advice and representation to House employing offices on labor and employment matters; this office performs functions similar to those of the Office of the House General Counsel, which is included in section 220(e)(2)(E), and those of the Senate Chief Counsel for Employment, which is identified in section 220(e)(2)(C).

Similarly, the Immediate Office of the Clerk of the House performs functions parellel to those performed by the Executive Office of the Secretary of the Senate, which is treated as a section 220(e)(2) office under these final regulations. Both offices are responsible for supervising activities that have a direct connection to the legislative process. Likewise, the Immediate Office of the House Sergeant at Arms has duties that correspond to those of the Administrative Office of the Senate Sergeant at Arms. Both offices are charged with maintaining security and decorum in each legislative chamber.

The House Office of Legislative Computer Systems runs the electronic voting system and handles the electronic transcription of official hearings and of various legislative documents; these functions are similar to those functions performed by the Office of Legislative Operations and Official Reporters, both of which are listed in section 220(e)(2)(D).

The Immediate Office of the Chief Administrative Officer has responsibilities and performs functions that are comparable to those performed by the Executive Office of the Secretary of the Senate and the Administrative Office of the Senate Sergeant at Arms, which are treated as section 220(e)(2) offices under these final regulations. Similarly, the House Office of Finance, like the Senate Disbursing Office, is responsible for the disbursement of payrolls and other funds, together with related budget and appropriation activities, and therefore will be treated, pursuant to section 220(e)(2)(H), as a section 220(e)(2) office.

VI. Method of Approval

The Board received no comments on the method of approval for these regulations. Therefore, the Board continues to recommend that (1) the version of the regulations that shall apply to the Senate and employees of the Senate should be approved by the Senate by resolution; (2) the version of the regulations that shall apply to the House of Representatives and employees of the House of Representatives should be approved by the House of Representatives by resolution; and (3) the version of the regulations that apply to other covered employees and employing offices should be approved by concurrent resolution.

Accordingly, the Board of Directors of the Office of Compliance hereby adopts and submits for approval by the Congress the following regulations.

Signed at Washington, D.C., on this 19 day of August, 1996.

GLEN D. NAGER,
Chair of the Board of Directors,
Office of Compliance.

Member Seitz, concurring: In section 220 of the Congressional Accountability Act (''CAA'' or ''Act''), Congress instructed the Board of Directors of the Office of Compliance (''the Board'') to issue regulations that provide Congressional employees with certain rights and protections of chapter 71 of Title 5 of the United States Code. Most significantly, Congress commanded that the regulations issued be ''the same as substantive regulations issued by the Federal Labor Relations Authority'' unless the Board determines either that modified regulations would more effectively implement the rights and protections of chapter 71 (section 220(e)(1)(A)) or that exclusion from coverage of employees in the so-called political offices is ''required'' because of a conflict of interest or appearance of conflict of interest or because of Congress' constitutional responsibilities 220(e)(1)(B)). The Board faithfully fulfilled its statutory duty: We conducted the rulemaking required under section 304 of the Act, adhering to the principles and procedures embodied in the Administrative Procedure Act, as Congress instructed us to do. We examined and carefully considered the comments received and—with the assistance of the experienced and knowledgeable Executive Director and Deputy Executive Directors of the Office—we independently collected and analyzed the relevant factual and legal materials. Ultimately, the Board determined that there was no legal or factual justification for deviation from Congress' principal command—that the regulations issued to implement chapter 71 be the same as the regulations issued by the Federal Labor Relations Authority. The regulations we issue today reflect that considered determination.

The dissent unfairly attacks both the Board's processes and its conclusion.

The dissent attacks the Board's processes by stating both that section 220(e)(1)(B) of the Act requires some kind of a different ''proactive'' rulemaking process and that ''the Board did not undertake to make an

independent inquiry'' regarding the regulatory issues. As the preamble details, this attack is baseless. The Board conducted the statutorily-required rulemaking, a process which included substantial supplementation of the comments received with independent inquiry and investigation and the application of its own—and its appointees'—expertise.

The dissent's suggestion that the Board majority and the Board's appointees did not, in fact, do the spadework necessary to make the judgments made in both ungenerous and untrue, as it impugns the hard work and careful thought devoted to a sensitive issue by all concerned. And, indeed, the dissenters, like the Board majority, had access both to the publicly available materials that might have been relevant to the Board inquiry—such as job descriptions for various positions in Congress—and to legal and factual analyses generated by Board appointees.

To be sure, the Board would not approve ex parte factfinding contacts between Board members and interested persons in Congress during the rulemaking period in order to preserve the integrity of its rulemaking process. But neither the commenters nor the dissenting Board members have suggested even one additional fact that should have been considered by the Board. Accordingly, the dissent's attack on the Board's processes merely reflects the dissent's unhappiness with the Board's substantive determination. But, it is both wrong and unjust to accuse the Board of failing to engage in an appropriate process simply because the Board ultimately disagreed with those advocating substantial exclusions from coverage under section 220(e)(1)(B).

The dissent's attack on the substance of the Board's conclusion is similarly misguided. It makes no attempt to ground itself in law, and, in fact, ignores fundamental principles of statutory interpretation: First, in interpreting a statute one looks initially and principally to its language; here the statute authorizes exclusions from coverage only when ''required'' by the statutory criteria. Second, in interpreting a statute, the most relevant legislative history is that addressing the particular provision at issue; here what legislative history there is acknowledges that the substitution of chapter 71 for the National Labor Relations Act ensured the elimination of perceived problems with permitting employee organization in Congress and reveals that section 220(e)(1)(B) was inserted only to make that assurance doubly sure and not as a ''standardless license to roam far afield from . . . executive branch regulations.'' Third, in interpreting a statute, the broad purposes of legislation illuminate the meaning of particular provisions; here the Act in question was designed to bring Congress under the same laws that it has imposed upon private citizens. That purpose has already been diluted by Congress' application to itself of only the limited rights and protections of chapter 71, rather than the broader provisions of the National Labor Relations Act; it would be eviscerated altogether by broad exclusions from coverage of the sort the dissent would endorse.

Nothing in the comments received or in the independent investigation done by the Board suggests that broad exclusions of employees from the coverage of chapter 71 are ''required'' by conflicts of interest (real or apparent) or by Congress' constitutional responsibilities. As noted in the preamble, chapter 71, by application through the Act, broadly excludes numerous employees from coverage, narrowly confines the permissible arena of collective bargaining, and eliminates most of labor's leverage by barring strikes and slowdowns. There is nothing to fear here, unless one fears the (minimal) requirement that a Congressional employer and its employees communicate about terms and conditions of employment (or, at least those not set by statute) before the employer sets them. And the substantial limits that chapter 71 places on employee organization and collective bargaining fully protect Congress' ability to carry out its constitutional responsibilities and entirely prevent any employee conflicts of interest (real or apparent). While we agree with the dissent that Congress is an exceptional institution, that exceptionalism does not warrant a broad exception from the coverage of chapter 71; neither the dissent nor the Board has identified any constitutional reasonability or conflict of interest that chapter 71's provisions do not adequately address.

The Board's determination that no further regulations are ''required'' under section 220(e)(1)(B) does not render that section a nullity, as the dissent states. Nor does it indicate a ''disdain'' for regulatory resolutions. Section 220(e)(1)(B) does not require either regulations or exclusions; it requires a Board inquiry into whether any such exclusions by regulation are necessary. The Board has conducted such an inquiry and has made the statutorily-required determination. That determination is the result of principled statutory interpretation, factual investigation, and legal analysis.

It is, in fact, the dissent's position that would render a portion of the CAA a nullity, because it would insulate Members of Congress from direct experience with employees dignified by labor-relations rights and protections. The Board's position keeps the promise of the Congressional Accountability Act. If the language, legislative history, and fundamental purpose of that Act are to be directly contradicted, that decision is for Congress alone. Such a result cannot lawfully be achieved by Board regulation.

Member Lorber, joined by Member Hunter, dissenting in part: The Congressional Accountability Act (''CAA'') is one of the most significant legislative achievements of the Congress in many years. While its reach is peculiarly insular, covering only the employees of the Congress and designated instrumentalities of the Congress, its import is global. As the bipartisan leadership of the Congress stated upon the CAA's enactment, this law brings home the promise first offered by Madison in the Federalist Papers that the Congress would experience itself the impact of the [employment] laws it passes and requires of all [employers].

The CAA established an Office of Compliance within the Congress to operationally carry out the functions of the CAA. The CAA established an independent Board of Directors appointed by the Bi-Partisan Congressional leadership to supervise the operation of the Office, prepare regulations for Congressional approval and act in an appellate capacity for cases adjudicated within the Office of Compliance procedures. As noted by Senator Byrd when the CAA was debated, this tri-partite responsibility of the Board is somewhat unique. In the present rulemaking, the Board is acting in its role as regulator, not adjudicator.

Pursuant to the CAA, the Board was charged with conducting a detailed review of all existing Executive Branch regulations implementing eight labor laws, deciding which of those regulations were appropriate to be adapted for implementation under the CAA and then drafting them to conform with the requirements of the CAA. For the regulations issued and adopted to date and for most future regulations, the Board engaged or will engage in a notice and comment process which was modeled after similar procedures followed by the Executive Branch. For the regulations adopted prior to the current rulemaking, after the conclusion of the comment period and after its analysis of the comments, the Board promulgated final regulations formally recommended by its statutory appointees and submitted them for the consideration of Congress.

We believe that this background discussion is appropriate since we are here publishing our dissenting opinion regarding the preamble and recommendation regarding regulations to implement section 220(e)(1)(B) of the Congressional Accountability Act. We note that these proposed regulations also address the statutory inquiry required by section 220(e)(1)(A) of the Act which require the Board to modify applicable regulations issued by the Federal Labor Relations Authority for good cause shown, to determine whether the regulations adopted pursuant to section 220(d) will apply to the political offices listed in section 220(e) and regulations required by section 220(e)(2)(H) of the Act which requires the Board to determine if there are other offices which meet the standards of section 220(e)(2) so as to be included in the consideration required by section 220(e)(1)(B). We do not dissent from the Board's final resolution of these regulatory issues.

We do not undertake to issue this first dissent in the Board's regulatory function lightly. At the outset, the Board appropriately decided that would endeavor to avoid dissents on regulatory matters. We felt then, and indeed do so now, that the public interest and the Congressional interest in a responsible implementation of the CAA required that the Board work out, in its own deliberative process, differences in policy or procedure. While the issues there addressed were are some of the most contentious employment issues in the public debates, the Board and staff worked through the issues with a remarkable degree of unity and comity.

However, in enacting the Congressional Accountability Act, the Congress included one section that differs from all others in requirements of the Board and in its process of adoption. Indeed, unlike any other substantive provision of the CAA, this section finds no parallel in the published regulations of the Executive Branch. Section 220 of the CAA, which adopts for Congressional application the relevant sections of the Federal Labor Relations Act contains within it subsections 220(e)(1)(B) and (e)(2), which deal with the application of the FLRA to the staff of Congressional personal offices, committee offices and the other offices listed in section 220(e)(2), (''the political offices'').

Section 220(e)(1)(B) of the Act requires the Board to undertake its own study and investigation of the impact of covering the employees in the political offices and determine itself, as a matter of first impression and after its own inquiry, whether such coverage of some of all of those employees would create either a constitutional impediment or a real or apparent conflict of interest such as to require the Board to exempt from coverage, by regulation, some or all of those employees or some or all of the positions employed in the political offices. Due to the speed of enactment, and apparently because the CAA culminated a protracted period of prior debate by previous Congresses on this issue, neither the statute nor any accompanying explanations provided specific guidance as to the method and procedure the Board was to follow in reaching its 220(e)(1)(B) recommendations.

The section in question contains two separate requirements for the Board. Section 220(e)(1)(A) repeats the standard for all other Executive Branch Regulations that the Board may, for good cause shown, amend the

applicable FLRA regulations as applied to the Congress. As previously noted, we join the Board's resolution of this section. However, unique to the CAA, section 220(e)(1)(B) requires of the Board that it independently review the coverage question for the political offices enumerated in section 220(e)(2) in order to determine if the Board should, by regulation, recommend that some or all of the employees of those offices be excluded from coverage. This exclusion from coverage merely means that the Board has determined that certain positions be exempted from inclusion in bargaining units for the statutory reasons set forth in section 220(e)(1)(B). The other applicable exemptions found in the FLRA and noted by the majority are unaffected by section 229(e)(1)(B). Thus, reference to the applicability of those exemptions may have been necessary to respond to certain commenters but are irrelevant for these purposes. Again, unlike any other regulation proposed by the Board, the 220(e) regulations will not take effect until affirmatively voted on by each House of Congress. It should be noted that 220(d) regulations governing application of the FLRA to Congressional employees not working in the 220(e)(2) political offices are not affected by this enactment requirement. This requirement was necessary in part because there are no comparable Executive Branch regulations which will come into effect in the absence of Congressional action. Thus, the Congress must exercise greater oversight in reviewing these regulations because there is no preexisting regulatory model against which to compare the Board's decision. By requiring this independent analysis, the Congress clearly intended for the Board to investigate these issues a manner different from the passive or limited review as defined by the majority.

Faced with this novel requirement, the Board attempted to fashion a means of addressing this issue which would continue its practice of ensuring fair, prompt and informed consideration of regulatory issues. The majority adopted as its guide the process heretofore followed by the Board in its previous regulatory actions in the standard notice and comment manner. Its methodology was apparently modeled after its belief that the 'Administrative Procedure Act {''APA''} is either directly incorporated into the CAA or that the reference to the APA in section 304 binds the Board in a way so as to preclude it functioning in a normal and accepted regulatory manner. Of course, if the majority does not now assert that its analysis is constrained by its restrictive interpretation of the APA, then we are in some doubt about the majority's stated reason for its passive review of written comments and failure to undertake any examination on its own of the issues here before us.

The Board attempted to frame the 220(e)(1)(B) issue broadly enough to encourage informed comment by the regulated groups. It responded to the comments received by proposing a regulatory scheme (in this case a decision not to issue any 220(e)(1)(B) elicited comments on the proposed regulations after which it reached the decision published today. The undersigned members believe, however, that section 220(e)(1)(B) charged the Board with a different role. We believe that the Board had the obligation to direct its staff and that the staff itself with independent obligations to each respective House of Congress had to undertake a more involved role. We believe that the uniqueness of this statutory provision required the Board to be proactive in its approach and analysis. Indeed by its very inclusion in the statute, and the requirement that the Congress affirmatively approve of its resolution, section 220(e)(1)(B) indicated a concern on behalf of the entire Congress that potential unionization of the political employees of the political offices in the Congress might pose a constitutional or operational burden (as defined by a conflict or apparent conflict or interest) on the effective operations of the legislative branch. Whatever the individual views of any Board member regarding this section, we believe that our responsibility is to effectuate the intent of the Congress as reflected in the Statute.

Response to the Board's initial invitation for informed input was not substantial. However, after the Notice of Proposed Rulemaking was published, substantial comments were received. In fact, the Board made special efforts to elicit comments and even briefly extended the comment period to accommodate interested parties who could offer assistance. By the end of the process, the Board did receive comments from most of the interested Congressional organizations. It received only one comment from a labor organization during the ANPR period and a separate letter during the NPR period in which the labor organization indicated that it reaffirmed its opposition to a total exemption of the political offices employees. The quality and informative content of the comments received are subject to differing views. The majority of the Board apparently believes that the comments were not particularly helpful or informative. We can only reach this conclusion by noting that the Board took pains to disclaim the substance and import of the comments received except apparently to credit substantive weight to the sole comment urging that the Board refuse to exercise its authority under 220(e)(1)(B). We believe, on the other hand, that the substantive comments did articulate a cogently expressed concern about the coverage of the employees in question and the disruptive effect a case by case adjudicatory process would have on the activities of the Congress. In any event, the section of the statute here in question requires the Board to move its inquiry beyond the written submissions.

Unfortunately, the Board did not undertake to make independent inquiry regarding these questions or to engage in inquiry of Congressional employees or informed outside experts. Rather, the Board continued its nearly judicial practice by which it analyzed the comments as submitted and neither requested follow up submissions nor conducted any independent review. Contrary to the majority's opinion, the undersigned believed that the submitted comments were helpful in indicating areas of concern and setting forth possible methods of addressing this issue. And in any event, under the majority's own standards, the lack of any substantive comments supporting the majority's ultimate conclusion is telling.

In the type of insulated analysis undertaken by the Board, where it relies so heavily upon submitted comments, we find it curious that the majority apparently adopted a position that it was only the obligation of those supporting a full or partial exclusion under section 220(e)(1)(B) to persuade the Board and that those opposing such exclusion can rely upon the Board's own analysis. We believe that the Board was charged with a different task and that it had to reach its own conclusions unanchored to the quality or inclusiveness of the comments. The undersigned relied, in addition, on our own understanding of the responsibilities of the Congress and the various offices designated for consideration, the criteria set forth for decision in the Statute, and our own experience. We believe that the Board's deliberations were hampered by its constricted view of its role and by not undertaking its own investigative process so as to better understand the tasks generic to the various Congressional job titles in the political offices.

The Board's discussions were detailed and frank. They were carried out in a professional and collegial manner. Various formulations of resolution were put forth by various commenters and the dissenters, including regulatory exemption of all employees, regulatory exemption of employees with designated job titles, regulatory exemption of all employees deemed to be exempt as professional employees under section 203 of the Act (the FLSA) and other regulatory formulations. We believed that the statute did not give the Board the discretion to set its analytical standards so high as to make a nullity of section 220(e)(1)(B). Indeed, we believe that the statute legally compelled the Board to undertake efforts to give meaning to the exemptions. The majority has been resistant to any formulation which would apply the 220(e)(1)(B) regulatory exemption. The result of the Board's deliberations are found in the proposed 220(e)(1)(B) regulations (or lack thereof) and the explanatory preamble.

We dissent from this resolution for several reasons. As set forth above, we believe that the Board was charged with a different and unique role. In this case, the credibility of the Board's response to section 220(e)(1)(B) demanded a proactive, investigatory effort under the authority of the Board which we believe simply did not occur. The majority, as expressed in the preamble, relied instead upon past precedents and concepts which we believe inapplicable or at least not determinative of the complex issue raised by 220(e)(1)(B). Indeed, as discussed below, its limited view of the leeway regulators have to interpret their statutes so as to give meaning and substance to Congressional enactment mars this entire process. We note, for example, the majority's reliance on In re Department of Labor, Office of the Solicitor and AFGE Local 12, 37 F.L.R.A. 1371 (1990), for its discussion of ''confidential employees'' and for other purposes. While this case may be pertinent if that issue comes before the Board in an adjudicatory context, we fail to see its relevance when the statute commands the Board to view the issue of unionization of politically appointed employees who work in political offices in the legislative body under separate and novel standards. Indeed, as we noted above, the standard statutory exemptions for professional or confidential employees are simply irrelevant to this discussion. Thus, in the case relied upon so heavily by the majority, we would simply note that Labor Department attorneys are, like the vast majority of federal employees covered by the FLRA, career civil servants who must conduct their professional activities in a nonpartisan environment. We believe that the conflict or apparent conflict of interest implicated by each workplace environment and type of employee is different. Politically appointed employees in political offices are under different constraints.

We note as well that the majority looked to private precedent decided under the National Labor Relations Act for guidance. If the majority believes that NLRB precedent is of assistance to our deliberations, we too would look to applicable NLRB precedent for guidance. Apparently faced with a growing caseload and inconsistent decisions by the appellate courts, the NLRB undertook in 1989 to decide by formal rulemaking the appropriate number of bargaining units for covered health care institutions. At the conclusion of this rulemaking process, the NLRB decided that in the absence of exceptional circumstances defined in the regulation, see 29 CFR §130.30 (1990), eight bargaining units would be appropriate. This rulemaking was challenged on several grounds including citation to §159(b) of the NLRA

which appears to state that the NLRB should establish appropriate bargaining units in each case (emphasis added). However, in American Hospital Association v NLRB 499 US 606(1991), a unanimous Supreme Court rejected the view that the NLRB was constrained from deciding any matter on the basis of rulemaking and was compelled to decide every matter on a case by case basis. The Court cited its precedents in other statutory cases for the proposition that a regulatory decision maker ''has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.'' 499 US 606, 612, (citations omitted.) In our statute, the Congress has clearly stated its preference for a regulatory resolution. Indeed, the Court cited with approval the following from Kenneth C. Davis, described by the Court as ''a noted scholar'' on administrative law:

''[T]he mandate to decide 'in each case' does not prevent the Board from supplanting the original discretionary chaos with some degree of order, and the principal instruments for regularizing the system of deciding 'in each case' are classifications, rules, principles, and precedents. Sensible men could not refuse to use such instruments and a sensible Congress would not expect them to (emphasis added.) 499 US at 612.''

We see absolutely nothing in the CAA which nullifies this observation. The majority finds statutory constraints where we find statutory encouragement to act in the manner of ''the sensible man'' as defined by Davis and relied upon by the Supreme Court. To the extent other similar experience is relevant, we would look to the fact that the Board was informed that no state legislative employees are included in unions even in states which otherwise encourage full union participation for their own public employees. Unfortunately, the majority neglected to analyze the relevance of this fact.

The preamble reflects the majority's belief that it was constrained to act only upon the public rulemaking record. We believe that this analytical model is flawed. The Board cites the reference to the Administrative Procedure Act in section 304 of the Act as implicity signaling that the Congress somehow incorporated that Act's procedural requirements into the CAA. The majority's view overstates the statutory reality. Most simply, the statutory reference does not command slavish adherence to a formalistic APA inquiry. While APA procedures are certainly good starting points for any rulemaking process, its intricacies and judicial interpretations cannot be deemed binding on the CAA process. Indeed, with respect to most of our regulatory activities, the statute places additional limitations on the Board's discretion and inquiry far more limited than that permitted by the APA. Particularly with regard to section 220(e)(1)(B), the statute clearly places different responsibilities and procedural requirements on the Board. The majority erred in adopting its passive analytical role.

But perhaps more importantly, we believe that the Board's understanding of the appropriate response by regulators to Rulemaking obligations is seriously constricted. Rulemaking never required a hermetically sealed process in which the decision makers sit in a judicial like cocoon responding only to the documents and case before them. Since this Board has disparate functions, it must adapt itself to the specific role rather than bind itself to a singular method of operation, particularly when the issue in question calls for a unified decision and guidance rather than the laborious and time consuming process inherent in case by case resolution. And in any event, as it has evolved, modern rulemaking encourages active participation by regulatory decision makers in the regulatory process, including staff fact finding and recommendation, contacts with involved parties so that all information is obtained and other independent means of acquiring the information necessary to reach the best policy decision. There is no requirement that regulatory decision makers be constrained solely by written submissions which are subject to the expository ability of the commenters rather than the actual facts and ideas they wish to convey. Indeed, while every other regulatory responsibility of this Board is limited to merely reviewing existing federal regulations, in this one area the statute demands that the Board act proactively on a clean slate. This the Board did not do.

We note as well the majority's equation of the Executive Branch functions with the legislative process of the Congress in its citations to past FLRA cases and in its general analysis. We frankly find this comparison to be without any legal or constitutional support. The two branches have wholly different functions. While the Executive Branch has officials who obviously interact with the Congress, their role is not the same as legislative employees who directly support the legislative process in the political offices and institutions of the Congress. Perhaps it should be noted with some emphasis that advocacy before the Congress is not the same as working in the Congress. Thus, it is simply wrong to suggest, as the majority does, that Executive Branch employees perform legislative functions. Or that the Board is somehow bound, in this instance, to mutely follow the holding of one FLRA case which addressed the bargaining unit status of government attorneys employed to interpret and enforce a host of laws directed at employment issues, the vast majority of which have absolutely nothing to do with labor management issues. The issue before us requires a sufficient knowledge of Congressional staff functions, responsibilities and relationships so that the statutorily required determination will be meaningful.

We wish to comment on the majority's appearance or disdain for at least a partial regulatory resolution of this issue. Case by case adjudication of individual factual issues may well be the best means of assuring procedural due process as well as fundamental fairness to the parties involved. The history (until recently) of labor management enforcement had shown a reluctance for regulatory resolution of labor management issues and opted instead for case by case resolution. However, the decisions by the NLRB and the Supreme Court in the American Hospital Association case and more recent efforts by the NLRB to engage in more extensive rulemaking indicates that even in the labor-management arena, in which we find ourselves, there is a recognition that regulatory resolution of global issues requiring resolution is often preferable to time consuming and expensive case by case litigation. We share the concern of some of the commenters that a process of adjudicatory resolution, regardless of the efficient manner in which it may be conducted by the Office of Compliance, is time consuming and subject to delay. To add to this, we note that the Board is a part time body whose members must pursue their professional activities as well as serve in the capacity of Board Member. The Board has justified its refusal to issue advisory opinions on other interpretative matters in part on its resource limitations. We agreed with that decision. We merely think it appropriate that the implications and rationale of that decision be applied to the matter before us.

Cognizance must also be taken of the fact that the offices and employees at issue here are transient. In some instances, the entire composition of an employing office may change every two years. We understand that employment in the positions at issue is often not considered a career opportunity but rather represents a period in the professional life of such an employee where they devote their energy and ability to a public pursuit before embarking on their private careers. We point out that case by case adjudication of the eligibility of various employees of various employing offices to be included within collective bargaining units may not be resolved until the employee or the office itself is no longer part of Congress. Thus, while the coverage issue is litigated on a case-by-case, employee-by-employee basis, final resolution of the underlying representational issue is delayed. In a body such as Congress where time pressures are intense and uneven, the inherent disruption and confusion attendant to such uncertainty is highly unfortunate. We believe that the Congress recognized this dilemma by including section 220(e)(1)(B) in the statute. In addition, we look to the impact on employees in those offices who may nevertheless be eligible to join a union if their positions are otherwise not deemed exempt under whatever formulation and note that their statutory rights will be denied because of the insistence on treating this issue as merely another adjudication.

We finally must address one argument put forward by the Board that suggests that since Congressional employees are apparently free to join, in their private capacity, whatever organizations they wish such as the Sierra Club, the National Right to Work Committee, or NOW, (but ses section 502(a) of the CAA), distinguishing between these activities and union membership or ceding authority to the collective bargaining representative represents an unfair discrimination against unions in violation of the FLRA. While of some obvious surface appeal, this argument is entirely frivolous. We must observe that there is one salient difference between those organizations and the labor representation we are here discussing. The organizations cited by the majority do not represent the employees for the purpose of their employment and working conditions. They have no official status regarding the working relationships and responsibilities of their members. In contrast, the major purpose of labor organizations, aside from their historical and active participation in the political process, is to represent bargaining unit employees with respect to the terms and conditions of their employment as permitted by law. In the case of the FLRA, once a union is the certified bargaining representative, it represents the employee regardless of whether the employee is a member of the union or not. Thus, the reference to other organizations is of absolutely no relevance to issues being decided today and, in fact, raises issues not before us now and not even within the scope of the CAA.

For at least the reasons set forth above, we must dissent from the Board's decision regarding Section 220(e)(1)(B) regulations and the explanation for that decision set forth in the Preamble to the final regulation. We emphasize that this dissent should not be deemed as precedent for future divisions of the Board. We cannot emphasize enough the unique requirements of section 220(e)(1)(B). Indeed, the statute itself recognizes this distinction by treating employees of the instrumentalities in a wholly different manner than employees of the 220(e)(2) offices. The Board has spent extensive time reviewing this issue. The majority comes to its conclusions backed by its view of the historical treatment of labor management issues and its belief that its scope of review is limited. In short, the Board adopted an unjustified

stance regarding its legal authority and self-perceived constraints in the statute. We believe, however, that precedent and our statute command a different treatment. We also believe that the majority ignores the modern developments in regulatory issues. Thus, in view of the explanations offered in the preamble and the decisions reached by the majority, we regretfully believe those decisions to be wrongly considered and wrongly decided.

We add a brief coda to our dissent to simply respond to our colleagues who apparently feel that their lengthy preamble insufficiently set forth their views. We begin by apologizing to the Congress by burdening it at this extraordinary time in the second session of the 104th Congress with these arcane arguments regarding the meaning of the CAA, or PL 104-1. Indeed it is precisely this time constraint which partially drives our concern over the majority's action. We have no doubt that cannery workers, construction workers or sales persons have time constraints. So do health care workers. The Congress will have less than thirty days to complete this session. Critical public business must be completed. These are the time pressures inherent in the Congress which find little parallel in other workplace environments. We respectfully question whether section 220(e)(2) employees are the same as the aforementioned employees, or indeed Executive Branch employees who must perform their critical public business of administering or enforcing the laws Congress passes over a normal full year time span. To underscore our comments in the dissent, our colleagues surely understand the constitutional difference between Article I employees and Article II employees and the constitutionally different responsibilities assigned to each.

Our colleagues suggest that we did not read or misunderstood the wealth of materials gathered during the six month period this issue has been before us. While we applaud the majority's acknowledgement now expressed that it must go beyond the submitted comments, we confess not having had the privilege of knowing that these materials existed. But of much more importance, if these materials existed and were of such weight in the majority's consideration, then its own articulately stated view of the statutory obligations of notice and comment should have required that this information be described and listed in the various notices so that the commenters could fairly respond and argue how this information impacted their comments. It wasn't.

We respectfully submit that our colleagues misconstrue the discussion regarding the American Hospital Association case. Our point was not to laud the NLRB or even our Deputy Executive Director, which we surely do. Rather it was to suggest that the Supreme Court precedent involving both labor-management laws and regulatory flexibility did provide the guidance and legal authority we understand our colleagues to be searching for. We particularly note that the Court there apparently considered the observations of an administrative law scholar regarding the need to impute into every statute establishing regulatory authority the obligation of sensible interpretation as being as of much or even more precedential weight as the prior decisions of that Court.

Too much has been written on this issue. We hope that the Congress does devote some time to considering the recommendation being sent to it by the Board of the Office of Compliance. If this dissent has some resonance, perhaps the Congress might consider returning it to the Board with some guidance as to its intentions regarding the factors to be considered and methodology to be followed by the Board in reaching its recommendations.

ADOPTED REGULATIONS

§ 2472 Specific regulations regarding certain office of Congress

§ 2472.1 Purpose and Scope

The regulations contained in this section implement the provisions of chapter 71 as applied by section 220 of the CAA to covered employees in the following employing offices:

(A) the personal office of any member of the House of Representatives or of any Senator;

(B) a standing select, special, permanent, temporary, or other committee of the Senate or House of Representatives, or a joint committee of Congress;

(C) the Office of the Vice President (as President of the Senate), the office of the President pro tempore of the Senate, the Office of the Majority Leader of the Senate, the Office of the Minority Leader of the Senate, the Office of the Majority Whip of the Senate, the Office of the Minority Whip of the Senate, the Conference of the Majority of the Senate, the Conference of the Minority of the Senate, the Office of the Secretary of the Conference of the Majority of the Senate, the Office of the Secretary of the Conference of the Minority of the Senate, the Office of the Secretary for the Majority of the Senate, the Office of the Secretary for the Minority of the Senate, the Majority Policy Committee of the Senate, the Minority Policy Committee of the Senate, and the following offices within the Office of the Secretary of the Senate: Offices of the Parliamentarian, Bill Clerk, Legislative Clerk, Journal Clerk, Executive Clerk, Enrolling Clerk, Official Reporters of Debate, Daily Digest, Printing Services, Captioning Services, and Senate Chief Counsel for Employment;

(D) the Office of the Speaker of the House of Representatives, the Office of the Majority Leader of the House of Representatives, the Office of the Minority Leader of the House of Representatives, the Offices of the Chief Deputy Majority Whips, the Offices of the Chief Deputy Minority Whips, and the following offices within the Office of the Clerk of the House of Representatives: Offices of Legislative Operations, Official Reporters of Debate, Official Reporters to Committees, Printing Services, and Legislative Information;

(E) the Office of the Legislative Counsel of the Senate, the Office of the Senate Legal Counsel, the Office of the Legislative Counsel of the House of Representatives, the Office of the General Counsel of the House of Representatives, the Office of the Parliamentarian of the House of Representatives, and the Office of the Law Revision Counsel;

(F) the offices of any caucus or party organization;

(G) the Congressional Budget Office, the Office of Technology Assessment, and the Office of Compliance; and

(H) the Executive Office of the Secretary of the Senate, the Office of Senate Security, the Senate Disbursing Office, the Administrative Office of the Sergeant at Arms of the Senate, the Office of the Majority Whip of the House of Representatives, the Office of the Minority Whip of the House of Representatives, the Office of House Employment Counsel, the Immediate Office of the Clerk of the House of Representatives, the Immediate Office of the Chief Administrative Officer of the House of Representatives, the Office of Legislative Computer Systems of the House of Representatives, the Office of Finance of the House of Representatives and the Immediate Office of the Sergeant at Arms of the House of Representatives.

§ 2472.2 Applicant of Chapter 71.

(a) The requirements and exemptions of chapter 71 of title 5, United States Code, as made applicable by section 220 of the CAA, shall apply to covered employees who are employed in the offices listed in section 2472.1 in the same manner and to the same extent as those requirements and exemptions are applied to other covered employees.

(b) The regulations of the Office, as set forth at section 2420-29 and 2470-71, shall apply to the employing offices listed in section 2472.1 covered employees who are employed in those offices and representatives of those employees.

EXECUTIVE COMMUNICATIONS, ETC.

Under clause 2 of rule XXIV, executive communications were taken from the Speaker's table and referred as follows:

4531. A letter from the Administrator, Agricultural Marketing Service, transmitting the Service's final rule—Fresh Prunes Grown in Washington and Oregon; Handling Requirement Revision; Fruits; Import Regulations; Fresh Prune Import Requirements [Docket No. FV95-924-IFR] received August 7, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

4532. A letter from the Agricultural Marketing Service, transmitting the Service's final rule—Apricots and Cherries Grown in Designated Counties in Washington and Prunes Grown in Designated Counties in Washington and in Umatilla County, Oregon; Assessment Rates [Docket No. FV95-922-IFR] received August 7, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

4533. A letter from the Administrator, Agricultural Marketing Service, transmitting the Service's final rule—Spearmint Oil Produced in the Far West; Assessment Rate [Docket No. FV96-985-2 FIR] received August 7, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

4534. A letter from the Administrator, Agricultural Marketing Service, transmitting the Service's final rule—Kiwifruit Grown in California; Assessment Rate [Docket No. FV96-920-1 IFR] received August 5, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

4535. A letter from the Administrator, Agricultural Marketing Service, transmitting the Service's final rule—Olives Grown in California and Imported Olives; Establishment of Limited-Use Style Olive Grade and Size Requirements [Docket No. FV96-932-3 FIR] received August 5, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

4536. A letter from the Administrator, Agricultural Marketing Service, transmitting the Service's final rule—Milk in the Carolina, Southeast, Tennessee Valley and Louisville-Lexington-Evansville Marketing Areas; Interim Amendment of Rules [Docket No. AO0388-A9, et al.; DA-96-08] received August 9, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

4537. A letter from the Administrator, Agricultural Marketing Service, transmitting the Service's final rule—Cranberries Grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York; Assessment Rate [Docket No. FV96-929-3 IFR] received August 14, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

4538. A letter from the Administrator, Agricultural Marketing Service, transmitting

COMMITTEE ON ECONOMIC
AND EDUCATIONAL OPPORTUNITIES
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

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(TTY)—(202) 226-3372
MINORITY—(202) 225-3725
(TTY)—(202) 226-3113

July 2, 1996

Chair of the Board of Directors
Office of Compliance
Room LA 200, John Adams Building
110 Second Street, S.E.
Washington, DC 20540-1999

Dear Mr. Chairman:

These comments are in response to the Notice of Proposed Rulemaking of May 23, 1996 (S5552), concerning extension of the Federal Service Labor-Management Relations Act to certain Congressional offices under Section 220(e)(1)(B) of the Congressional Accountability Act.

As you know, we have long advocated extension of private sector workplace laws to the Congress and are particularly proud that passage of the Congressional Accountability Act (CAA) occurred in the opening days of the 104th Congress. The futility of past efforts, in Committee and on the Floor, to apply these laws to the House in prior Congresses are now, fortunately, a distant memory. What was once unprecedented has now become the norm.

The principle of "what is good for the private sector is good for the Congress" was the overarching theme of the CAA, and when specific laws had different requirements applicable to the private sector and the public sector, special efforts were made to apply the private sector requirements. For example, the waiver provisions and the liquidated damage remedies of the Age Discrimination in Employment Act were made applicable to the Congress even though neither of these provisions are applicable to the executive branch of the Federal government.

However, the CAA also recognized that in a few areas strict adherence to private sector requirements was not possible. Hence, special rules for "interns" are allowed and punitive damages are excluded. Indeed, adoption of the Federal Service Labor-Management Relations Act (FSLMRA) instead of the private sector National Labor Relations Act was in recognition that it would be inappropriate for Congressional employees to have the right to strike.

Similarly, Section 220(e)(1)(B) also recognizes that there may be situations in which a simple extension of the FSLMRA to offices charged with evaluating and developing legislation may not be appropriate for various specified reasons.

Section 220(e)(1)(B) provides (emphasis added):

> *(B) that the Board shall exclude from coverage under this section any covered employees who are employed in offices listed in paragraph (2) if the Board determines that such exclusion is required because of--*
>
> *(i) a conflict of interest or appearance of a conflict of interest; or*
>
> *(ii) Congress' constitutional responsibilities.*

The offices listed in "paragraph (2)" range from committees, to Member personal offices, to the Office of the Speaker, to the Office of the Minority Leader, to other types of legislative offices. However, purely administrative support offices, such as the Capitol Police and the Architect, are not covered.

While the Board has been instructed by the statute to exclude offices from coverage based on any of the specified three criteria, the Board has proposed exempting no offices and has issued proposed regulations providing that questions of whether or not a particular office should be excluded should be left to determination on a case-by-case basis. Under this approach, the Board would not resolve the question as to whether or not a specific office should be excluded under section 220(e)(1)(B) until that office has been subject to an organizing campaign. Presumably, the issue of whether that particular office should be excluded would then be litigated in a representational proceeding or during consideration of an unfair labor practice charge. This is a recipe for chaos and perpetual uncertainty. The purpose of section 220(e)(1)(B) in instructing the Board in mandatory language to examine the

numerous offices listed was to avoid this uncertainty, and in proposing a rule of case-by-case analysis, the Board has failed in its statutory responsibilities. The fact the Board proposed exempting no offices whatever, in and of itself, is indicative of this failure and, worse, suggests a bias towards a pre-ordained result of blanket coverage in the face of the contrary statutory language.

Comments submitted jointly by the Office of General Counsel and the Office of House Employment Counsel address these same issues in substantially more detail and we commend those comments to you for your review.

We urge the Board to reexamine its position.

Sincerely,

Bill Goodling

BILL GOODLING
Chairman
Committee on Economic and
Educational Opportunities

Harris W. Fawell

HARRIS W. FAWELL
Chairman
Subcommittee on Employer-
Employee Relations

RKJ:kaw

Congress of the United States
House of Representatives
COMMITTEE ON HOUSE OVERSIGHT
1309 LONGWORTH HOUSE OFFICE BUILDING
(202) 225-6281
Washington, DC 20515-6250

June 14, 1996

Mr. Glen Nager
Chairman of the Board of Directors
Office of Compliance
Room LA-200
John Adams Building
110 Second Street
Washington D.C. 20540-1999

Re: Comments on Proposed Regulations

Dear Glen:

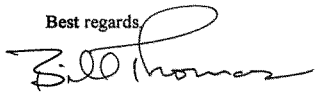
The Committee on House Oversight has jurisdiction over employment of persons by the House in accordance with House Rule X, Clause 1(h)(3), and is responsible for oversight of the Office of Compliance under Public Law 104-1 Sec. 301 (i). In addition, the Committee establishes and classifies all positions under the Officers, and Inspector General, of the House. *See,* the House Employees Position Clarification Act, 2 U.S. C. 291 *et seq.*

The Committee has primary jurisdiction over the Legislation which became Public Law 104-1 (S. 2, *see, also* H.R. 1), the Congressional Accountability Act of 1995 (the Act). Procedurally, S. 2 was considered in the House immediately upon receipt from the Senate, therefore the Committee did not have the opportunity to issue a report on the bill. However, the predecessor to the Committee, the Committee on House Administration, held several hearings on the accountability issue and considered several bills during the 103rd Congress, which comprise the House legislative history of the Act (*See,* H.R. 4822, which passed the House by a vote of 427 to 4 on August 10, 1994. H. Rept. No. 103-650, Part II; H.R. 2729; H.R. 349; and H. Res. 578, which passed the House by a vote of 348 to 3 on October 7, 1994).

The Committee offers the attached comments and observations prepared in conjunction with the Office of General Counsel and the Office of House Employment Counsel with respect to the Office of Compliance Notice of Proposed Rulemaking which was published in the Congressional Record on May 15, 1996 (H5153).

Please contact Mark Blencowe or Dan Crowely, Committee Counsel, at 225-8281 if you have any questions about these comments, or if we can provide further information.

Best regards,



Bill Thomas
Chairman

WMT/mtb

COMMENTS PREPARED BY HOUSE EMPLOYMENT COUNSEL IN CONJUNCTION WITH HOUSE GENERAL COUNSEL

INTRODUCTION

In response to the Notice of Proposed Rulemaking of the Board of Directors of the Office of Compliance (the "Board"), we submit the following comments regarding the proposed regulations implementing Section 220 of the Congressional Accountability Act of 1995 ("CAA" or "Act"). Section 220 of the CAA addresses the application of Chapter 71 of Title 5, United States Code ("Chapter 71"), the Federal Service Labor-Management Relations Act ("FSLMRA").

Section 220(a) of the CAA applies the rights, protections, and responsibilities established under Sections 7102, 7106, 7111 through 7117, 7119 through 7122, and 7131 of Chapter 71 to employing offices, covered employees, and representatives of covered employees.

Additionally, Section 220(d) authorizes the Board to issue regulations to implement section 220 and further states that, except as provided in subsection (e), such regulations issued under paragraph (1) "shall be the same as substantive regulations promulgated by the Federal Labor Relations Authority ["FLRA"] to implement the statutory provisions referred to in subsection (a) except:

(A) to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section; or

(B) as the Board deems necessary to avoid a conflict of interest or appearance of a conflict of interest."

In enacting Chapter 71, Congress recognized that it could not merely transplant private employment statutes to the public employment sector. Rather it would have to "establish procedures which are designed to meet the requirements and needs of the Government." 5 USC § 7101(b). Thus, Chapter 71 strikes a balance between the need to strengthen employees' bargaining rights and the need not to unduly interfere with government operations. In commenting on the proposed regulations implementing Section 220 of the CAA we recognize that the House of Representatives is a unique institution containing employing offices different in organization and mission from agencies found in the executive branch of government. It is our hope that these comments will help to strike a balance between establishing procedures which are designed to meet the special needs of employees of Congressional employing offices and their employers consistent with the requirement of providing effective and efficient Government which is free from conflict of interests or the appearance of conflict of interests.

In order to provide comments on the NPR to the Board which would best achieve this goal, we requested an extension of time to develop comments to both §§ 220(d) and (e). We believed that with more time, we could ensure that the two sets of regulations would be consistent and harmonious. Because the Board only granted a limited extension, and refused to allow both

sets of comments to be submitted together, we trust that the Board recognizes its §§ 220(d)(A) and (B) responsibilities to fully analyze the impact and effect of this set of regulations and comments upon the regulations implementing § 220(e) of the CAA.

1. FAILURE TO PROMULGATE CERTAIN REGULATIONS

Section 220(c)(1) granted to the Board the authority that the President of the United States has under 5 USC § 7103(b). That authority grants the President the ability to exclude any executive branch agency or subdivision thereof from coverage under chapter 71 based on certain limited factors. Under this section the President can exclude from coverage agencies or subdivisions who have "as a primary function intelligence, counterintelligence, investigative, or national security work". Because there are certain House offices which have one of these enumerated duties as their primary functions, we recommend that the Board issue regulations to implement this section. Specific offices to be excluded on this basis are detailed below.

2. GENERAL DEFINITION

a. "Employing Office" §2421.3(c)

Section 2421.3(c) of the proposed regulations defines the term "employing office." It appears that in developing many of the definitions defining the general terms of the CAA, the Board adopted the definitions contained in FLRA's regulation section 2421.2, which refers to the statutory definitions in 5 USC § 7103(a). In Section 7103(a)(3), Congress excluded from the definition of "agency" several agencies based on 5 U.S.C. §§ 7112(b)[1] and 7103(b)(1). In its definition of "employing office," however, the Board chose not to propose regulations to exempt parallel House offices based on these factors. This failure thwarts the CAA's goal of developing regulations which would not only protect the rights of employees, but also of avoiding real and apparent conflicts of interest.

We recommend that the Board exercise its authority under Section 220(2)(b) of the CAA and 5 USC § 7103 (b)(1) to exclude certain employing offices from the definition of "employing office" in a manner similar to the exclusions contained in the FLRA's regulation defining "agency." We suggest that these exclusions considered separately from the exclusions under section 220(e).

We recommend, at the very least, that the following employing offices be excluded:

---

[1] This section of the FSLMRA sets forth a list of employees who can not be included in bargaining units. This provision excludes (1) management officials and supervisors; (2) confidential employees; (3) employees engaged in personnel work (other than purely clerical employees); (4) employees engaged in administering the provisions of the FSLMRA; (5) professional employees; (6) employees engaged in intelligence, counterintelligence, investigative, or national security work; and (7) employees engaged in investigative functions which would directly affect the internal security of the agency.

(a) Office of Compliance: Like the FLRA, which is excluded under 5 USC § 7103(a)(3)(F), the OOC's primary function is to administer the provisions of the FSLMRA, as applied by the CAA.

(b) Inspector General: Like the GAO, which is excluded under 5 USC § 7103(a)(3)(A), the primary function of this office is to investigate and audit.

(c) Committee on Standards of Official Conduct: The primary function of this office is also to investigate and audit.

(d) Permanent Select Committee on Intelligence, Committee on National Security, Committee on International Affairs, Appropriation Subcommittee on National Security, Government Reform and Oversight Subcommittee on National Security, International Affairs, and Criminal Justice: The primary function of all of these employing offices is intelligence, investigative or national security work.

(e) Office of Personnel and Benefits: The primary function of this office is to engage in personnel work, specifically the administration of employee benefits.

(f) Office of Employee Assistance: The primary function of this office is also to engage in personnel work. Specifically, the Office provides Members, employees, managers, and their immediate families with a comprehensive system of timely and confidential assessment, consultation, short-term problem resolution, referral, and follow-up services for a variety of personal problems to alleviate or prevent their impact on the employee's job performance and productivity.

(g) Office of Policy and Administration: The primary function of this office is to engage in personnel work. Specifically, this office is responsible for coordinating human resources requirements for all CAO offices and serves as a resource for all House offices on operational matters pertaining to human resources.

(h) Office of Fair Employment Practices: The primary function of this office is to engage in personnel work. Specifically, this office works to ensure the enforcement and administration of employee rights and protections within the House.

This approach would reduce costly and burdensome litigation as these determinations would be made through regulation rather than in the unit determination or unfair labor practice processes. We also believe that such modification would be more effective for the implementation of the rights and protections under this section as well as to avoid obvious conflict of interest questions.

b. "Labor Organization" §2421.3(d)

The Board modified without explanation the definition of "labor organization" found in FLRA's regulation section 2421.2. The FLRA in its regulation used the definition set forth in 5 U.S.C. § 7103(a) which states:

> (4) "labor organization" . . . does not include --
>
> > (A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition . . . .

(Emphasis added.)

The Board simply deleted "bylaws, tacit agreement among its members," from its definition. The Board has not stated any good cause reason for the elimination of this phrase from the definition, nor does there appear to be one. We suggest that the Board has failed to meet its § 220(d) burden of proof to justify the modification, and we therefore recommend that the FLRA's original definition be used.

c. Condition Of Employment §2421.3(m)

We recommend that the Board modify §2421.3(m)(3) to recognize that the exception to the term "conditions of employment" is not limited to "policies, practices, and matters -- to the extent such matters are specifically provided for by Federal statute." Each House of Congress is empowered by the Constitution to "determine the Rules of its Proceedings". US Const. art I, §5, cl. 2. This Rulemaking Clause is a "broad grant of authority" to each House to govern its own internal affairs. Consumers Union v. Periodical Correspondents' Ass'n, 515 F.2d 1341, 1343 (1975). Many courts have found that House and Senate rules have the force and effect of law. See Shape of Things to Come v. County of Kane, 588 F. Supp. 1192 (N.D. Ill. 1984); Randolph v. Willis, 220 F. Supp. 355, 358 (S.D. Cal. 1963) (House Rules "are admittedly valid and have the force of law"); see also Yellin v. US, 374 US 109, 114 (1963) ("rules of Congress and its committees are judicially cognizable"); Christoffel v. US, 338 US 84, 88-89 (1949). Furthermore, courts generally will not examine rules promulgated under the Rulemaking Clause. See US v. Ballin, 144 US 1, 5 (1892) (Supreme Court found that judicial review of Congressional rules was limited to instances where a rule "ignore[s] constitutional restraints or violate[s] fundamental rights"; but, within these limitations, the rulemaking power is "absolute and beyond the challenge of any other body or tribunal" (emphasis added)). In recognition of the constitutional authority of the House to make rules and resolutions which are generally beyond review of the courts or other tribunals, we recommend amending § 2421.3(m)(3) by inserting a comma after "federal statute", and adding "resolutions, rules, regulations and other pronouncements of the House of Representatives and/or the Senate having the force and effect of law."

3. MISCELLANEOUS GENERAL TERMS

We would recommend that throughout the text of the proposed regulations the term "disability" be substituted for "handicapped condition."

4. ENFORCEMENT OF DECISIONS OF THE ASSISTANT SECRETARY OF LABOR

It is our position that Part 2428 of the FLRA's regulations is applicable under the CAA and that there should be no modifications. Part 2428 of the FLRA's regulations provides a procedure for the Assistant Secretary of Labor for Labor-Management Relations to petition the FLRA to enforce decisions and orders of the Assistant Secretary with respect to a labor organization's conduct.

We agree with the Board's analysis that the Assistant Secretary has no enforcement authority over covered employing offices or covered employees. We also agree that nothing in the CAA removes the Assistant Secretary of Labor's authority to regulate the conduct of labor organizations or to preclude the Assistant Secretary from petitioning the Board to enforce a decision and order involving a labor organization under the jurisdiction of the CAA.

However, we do disagree with the Board's failure to adopt Section 2428.3(a). This section would require the Board to enforce any decision or order of the Assistant Secretary unless it is "arbitrary and capricious or based upon manifest disregard of the law." Section 2428.3(a) is simply the standard of review the Board must apply to determine whether to enforce an order or decision of the Assistant Secretary of Labor. Failure to adopt § 2428.3(a) could produce incongruent results. For example, a labor organization that violated a standard of conduct as provided in 5 USC § 7120 possibly could be precluded from being accorded recognition by the FLRA but still be accorded recognition by the Board.

The adoption of § 2428.3(a) would not violate § 225(f)(3) of the CAA, which states that nothing in the CAA should be "construed to authorize enforcement by the executive branch." Section 225(f)(3) of the CAA states that the CAA does not authorize executive branch enforcement of the Act. Enforcement of any decision or order of the Assistant Secretary would be against a union, not against Congress. Part 2428 of the FLRA's regulations specifically states that it only sets forth procedures under which the FLRA will enforce decisions and orders of the Assistant Secretary in standards of conduct matters arising under 5 U.S.C. § 7120. 5 CFR § 2428.1. In fact, the Assistant Secretary must petition for enforcement (5 CFR § 2428.2) and the FLRA has the right to enforce, enforce as modified, refuse to enforce the order or to remand (5 CFR § 2428.3(b)). There is nothing in Part 2428 that allows executive branch enforcement of the Assistant Secretary's order against Congress. Instead, the decision to enforce the Assistant Secretary's order (even if Section 2428.3(a) is adopted) would still rest solely in the discretion of the Board.

5. EXERCISE OF INVESTIGATIVE AND ADJUDICATORY RESPONSIBILITIES

Contrary to the Board's comments to the proposed regulations, there simply is no question that section 220(c)(1) requires that **all** representation, arbitration, negotiability and unfair labor practice issues that come before the Board first be referred to a hearing officer for decision under § 405 of the CAA.

The Board concludes that "Congress did not intend to require the Board to refer all issues to a hearing officer for initial decision under Section 405." 5-15-96 NPR at 15. Instead, the Board asserts that only unfair labor practice complaints are to be referred to a hearing officer. 5-15-96 NPR at 14-15. The Board's position is contrary to the clear language of the CAA.

Section 220(c)(1) of the CAA provides:

> For purposes of this section, any petition or other submission that, under chapter 71 of title 5, United States Code, would be submitted to the Federal Labor Relations Authority shall, if brought under this section, be submitted to the Board. The Board shall refer any matter under this paragraph to a hearing officer for decision pursuant subsections(b) through (h) of section 405, subject to review by the Board pursuant to section 406.

(Emphasis added.)

The statute is thus clear that the Board must refer any matter under § 220(c)(1) to a hearing officer. Yet, the Board somehow infers that it need not refer to a hearing officer "any petition or other submission" relating to representation issues, negotiability issues and exceptions to arbitral awards, even though these are undeniably matters under § 220(c)(1).

Even more astonishingly, the Board finds that the only matters which it is required to refer to a hearing officer are unfair labor practice complaints, which are dealt with separately under § 220(c)(2). That paragraph provides:

> For purposes of this section, any charge or other submission that, under chapter 71 of title 5, United States Code, would be submitted to the General Counsel of the Federal Labor Relations Authority shall, if brought under this section, be submitted to the General Counsel. . . . The complaint shall be submitted to a hearing officer for decision pursuant to subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406.

Thus, the CAA clearly distinguishes between "any petition or other submission . . . to the Board," dealt with in Section 220(c)(1), and "any charge or other submission [of unfair labor practice] . . . to the General Counsel," dealt with in Section 220(c)(2). The Board would reverse

this distinction by reading the "any matter" language of Section 220(c)(1) as meaning only unfair labor practice issues. Even more significantly, the Board's reading would render the last sentence of Section 220(c)(2), which expressly requires the referral of unfair labor practice complaints to a hearing officer, utterly redundant and meaningless.

The Board attempts to bolster its statutory construction by pointing to the fact that the CAA permits it to direct the General Counsel to carry out the Board's "investigative authorities." 5-15-96 NPR at 15. The Board asserts, without explanation, that this provision is somehow inconsistent with the referral of a matter to a hearing officer. However, there is simply no inconsistency between the General Counsel's conducting an investigation and a hearing officer's rendering a decision. This is precisely what happens, of course, in the case of unfair labor practice matters.

The real reason for the Board's reading of the statute appears to be its view that referring certain matters to a hearing officer would be "overly cumbersome." 5-15-96 NPR at 15-16. Even if we agreed with this view (and we do not), it would not justify a regulation contrary to the plain intent of Congress. See Chevron, 467 U.S. 837, 842-43 (1984).

6. SELECTION OF THE UNFAIR LABOR PRACTICE PROCEDURE OF THE NEGOTIABILITY PROCEDURE

We disagree with the Board's decision to delete the concluding sentence of sections 2423.5 and 2424.5 of the FLRA's regulation. The Board claims that not modifying this section would improperly prevent judicial review in certain circumstances. The concluding sentences of the referenced regulations merely preclude a labor organization from filing an unfair labor practice charge in cases where an employing office claims that the duty to bargain in good faith does not extend to a proposed bargaining topic not involving actual or contemplated changes in conditions of employment. In such cases, those proposed deleted sentences of the regulations provide that a labor organization may only file a petition for review of a negotiability issue.

The Board's assertion that the CAA does not provide for direct judicial review of Board decisions and orders on petition for review of negotiability issues appears to be in error. Section 220(c)(3) provides for judicial review of all issues except for those involving arbitration awards or determination of bargaining units. Because the Board has not provided good cause for making this modification, it should not be adopted.

7. GOVERNMENT-WIDE REGULATION

Part 2424.1 of the FLRA regulations and 5 USC § 7117 of the Act state that parties are not required to bargain over matters governed by a "Government-wide rule or regulation." The Board should, pursuant to § 220(d)(1), issue a regulation clarifying that the term "Government-wide" should be read to mean rules or regulations issued by the House (or Senate, as appropriate).

8. RULES OF EVIDENCE

Section 2422.18(b) of the proposed regulations states that "[f]ormal rules of evidence do not apply." Section 7.09 of the Board's Procedural rules states that the Hearing Officer "shall apply the Federal Rules of Evidence . . . ." The Board should make this regulation consistent with the OOC's procedural rules. Similarly, the Board should make the proposed regulations governing service of subpoenas consistent with its own procedural regulations.

9. POSTING

Sections 2422.7 and 2422.23 of the FLRA's regulations should be modified pursuant to § 220(d)(2)(B). The two referenced sections of the FLRA's regulations provide, respectively, that an employing office may be directed to post a notice advising affected employees of the filing of a representation petition, and that an employing office will post a notice of election when an election is to be conducted. In both instances the notices, must be posted in places where notices are normally posted for the affected employees and/or they may be distributed in a manner by which notices are normally distributed. Sections 2422.7 and 2422.23 of the Board's proposed regulations give the Executive Director the authority to determine the placement of the posting and/or distribution of the notice.

Many employing offices do not have a regular place where notices are normally posted for employees. In its comments, the Board recognized that this posting requirement could be tailored to the practices of the employing office. 5-15-96 NPR at 26 ("Nothing in the FLRA's regulations requires that notices be posted in public areas; the referenced notices must only be posted or distributed in the manner that other information affecting employees is posted or distributed."). In recognition of this fact, we recommend that the choice as to the manner in which the information is to be disseminated to employees should be left to the discretion of the employing office with review by the Executive Director.

ADDITIONS

a. Conflict Of Interest

Section 220(d)(2)(B) of the CAA authorizes the Board to make such regulations "as the Board deems necessary to avoid a conflict of interest or appearance of a conflict of interest." There is no requirement for a showing of good cause under this provision. The purpose of this provision is to ensure that, even as to offices not covered by §220(e), the Board will eliminate by regulation the possibility, and even the appearance of the possibility, that the contents of legislation or legislative policy might be influenced by the union membership of congressional employees. S. Rep. No. 397, 103d Cong., 2d Sess., 8 (1994). Therefore, the Board should promulgate a regulation providing for the exclusion from a bargaining unit of any employee whose membership or participation in the labor organization would present an actual or apparent conflict of interest with the duties of the employee. This regulation should permit the exclusion not only of employees who might have a conflict of interest with respect to labor organizations

generally, but those who might have a conflict of interest only with respect to the specific labor organization that has filed a petition for representation of the bargaining unit.

Modern unions do not merely represent workers on "condition of employment" issues. Today they are also chartered to conduct political activity including legislative lobbying. We recommend, therefore, that the Board scrutinize closely (and promulgate appropriate regulations on) the following subjects: (1) union lobbying; (2) the use of union dues and assessments for political activity; and (3) access to House Members by labor organizations.

b. Public hearings.

Section 2422.18(b) of the proposed regulations provides for public hearings to resolve issues raised in petitions. This provision appears to be included to comply with the Sunshine Act, which provides for open government-held proceedings where possible. Because the Sunshine Act does not apply to Congress, the Board should not adopt this public hearing requirement.

KELLY D. JOHNSTON
SECRETARY

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THE CAPITOL
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United States Senate
OFFICE OF THE SECRETARY

MEMORANDUM

TO: Glen D. Nager, Chair of the Board of Directors
Office of Compliance

FROM: Kelly D. Johnston
Secretary of the Senate

DATE: June 14, 1996

RE: Response of the Secretary of the Senate to the Notice of Proposed Rulemaking
142 Cong. Rec. S5070-5089 (daily ed. May 15, 1996)

The Office of the Secretary of the Senate submits the attached comments to the Board of Directors of the Office of Compliance in response to the Notice of Proposed Rulemaking, 142 Cong. Rec. S5070-5089 (daily ed. May 15, 1996).

I. General Comments

Section 220(d) of the Congressional Accountability Act ("CAA") mandates that the Board of Directors of the Office of Compliance ("the Board") issue regulations to implement section 220 and requires that such regulations "be the same as substantive regulations promulgated by the Federal Labor Relations Authority" ("FLRA"). The Board has authority to issue regulations that vary from the FLRA substantive regulations only to the extent the Board can show "good cause" that such regulations as modified are more effective for implementation of the rights and protections of section 220, or the modifications are necessary to avoid an actual or perceived conflict of interest. The Board has no authority, however, to modify the language of section 220 or to issue regulations that conflict with the statutory provisions.

In its Notice of Proposed Rulemaking ("NPR"), the Board initially concludes that virtually all of the regulations promulgated by the FLRA pursuant to the sections of chapter 71 made applicable by the CAA are substantive and thus should be adopted. The Board then explains its belief that good cause exists to modify certain of the regulations, delete portions of the regulations and create new regulations. In articulating what it believes to be good cause to modify certain of the regulations, however, the Board makes some incorrect assertions concerning the provisions of section 220. Because some of the factual assertions upon which the Board bases its finding of good cause are incorrect, there appears to be no good cause for certain of the proposed modifications, particularly those concerning representation and negotiability proceedings. This is especially so given that the regulations the Board proposes based on these incorrect assertions are inconsistent with the specific language of section 220. As noted earlier, the Board has no authority to issue regulations that eviscerate the language of the statute. While good cause exists for several of the modifications proposed by the Board, as discussed in more detail below the Board should reconsider those modifications that are based on an incorrect reading of section 220.

II. Specific Comments Addressed to the Board's Proposed Modifications

A. Exercise of Investigative and Adjudicatory Responsibilities

With respect to petitions that are filed pursuant to section 220(c)(1) of the CAA, the Board's proposed regulations differ significantly from the FLRA regulations and actually conflict with the language of section 220(c)(1). Further, the Board's argument that such modifications are for good cause is based substantially on a misreading of section 220.

The Board has proposed that all proceedings conducted pursuant to section 220(c)(1) (this includes representation issues, negotiability issues and exceptions to arbitral awards) be deemed "investigatory proceedings" and be conducted under the authority of the Executive Director pursuant to a procedure devised by the Board allegedly based on the procedures followed in similar proceedings under the FLRA regulations. The CAA, however, specifically directs that section 220(c)(1) proceedings be referred to a hearing officer and conducted pursuant to section 405 of the CAA. While the Board acknowledges this statutory language, it nevertheless finds "good cause"

essentially to disregard this language and instead to vest the Executive Director (or her designee) with sole authority to conduct section 220(c)(1) proceedings. The Board's asserted "good cause" for deviating from the FLRA regulations and the language of section 220, however, is based substantially on the Board's incorrect assertion that section 220 provides judicial review only for decisions on unfair labor practice complaints. Section 220(c)(3) provides judicial review of Board decisions issued pursuant to both 220(c)(2) (unfair labor practice proceedings) and 220(c)(1) (petition proceedings), with the exception of unit determinations and exceptions to arbitral awards. All other issues regarding representation and negotiability may be subject to judicial review pursuant to section 220(c)(3).

The language of section 220(c)(1) clearly states that petitions filed pursuant to that section shall be referred to a hearing officer for decision pursuant to section 405. Section 220(c)(1) provides:

> For purposes of this section, any petition, or other submission . . . shall, if brought under this section, be submitted to the Board. The Board shall refer any matter under this paragraph to a hearing officer for decision pursuant to subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406. . . .

Notwithstanding the plain language of the statute, the Board claims that "Congress did not intend in the CAA to require that all issues first be presented to a hearing officer under section 405." NPR, at 14. The Board derives its conclusion from two assertions: 1) that section 220(c)(1) gives to the General Counsel the Board's investigative authority, and 2) that section 220(c)(3) limits judicial review to Board actions on unfair labor practice complaints filed pursuant to section 220(c)(2). As explained above, the second assertion is incorrect; section 220(c)(3) provides for judicial review of Board decisions on petitions filed pursuant to 220(c)(1) (other than petitions concerning unit determinations and exceptions to arbitral awards) as well as complaints filed pursuant to 220(c)(2).

Thus, the primary basis for the Board's transfer of authority concerning matters covered by section 220(c)(1) from a hearing officer as provided in section 405 of the CAA to the Executive Director is the provision in section 220(c)(1) that provides investigative authority to the General Counsel. As discussed below, the Board also proposes procedures (different from section 405 procedures) to be followed in hearings conducted by the Executive Director. The Secretary of the Senate ("the Secretary") respectfully submits that the investigative authority the Board relies on as the basis for these proposed regulations does not constitute good cause for the Board to disregard the procedural mechanisms provided for in section 220(c)(1) and to impose on covered employers and employees procedures the Board may feel are more appropriate. Petition proceedings brought pursuant to section 220(c)(1) must be referred to a hearing officer for decision pursuant to section 405, as directed by the statute.

B. Consultation Rights

1. National Consultation Rights

In comments submitted in response to the Board's Advance Notice of Proposed Rulemaking for section 220(d), the Secretary asserted that the significantly small size of legislative employing offices compared to the substantial size of most of the executive agencies covered by chapter 71 constitutes good cause to increase the 10% threshold requirement a labor organization must meet to obtain national consultation rights. The Board rejected this comment, asserting with little explanation that the much smaller size of legislative employing offices did not constitute good cause to change the threshold requirement. Yet, in the same breath, the Board cites exactly that reason - the significant difference in size between the legislative offices and executive branch agencies - as good cause for eliminating the alternative threshold requirement of 3,500 employees: "By contrast, the same concern for the small size of many employing offices has prompted the Board to conclude that good cause exists to modify the alternate threshold requirement." NPR, at 19.

Thus, while the Board acknowledges that the employing offices under the CAA are significantly smaller than the employing offices covered by chapter 71, it asserts nonetheless that 10% of the employees in an employing office is a "significant enough proportion of the employee complement to allow for meaningful consultations." The Secretary urges the Board to reconsider its conclusion. Some of the employing offices under the CAA have as few as 10 employees. Under the 10% threshold, a union could gain consultation rights on the basis of the interest of 1 employee. That hardly allows for "meaningful consultations." For the same reason the Board eliminated the 3,500 employee threshold, the Board should increase the 10% threshold requirement.

2. Consultation Rights on Government-Wide Rules or Regulations

As the Board notes, section 2426.11(a) requires that "[a]n agency shall accord consultation rights on Government-wide rules or regulations to a labor organization that . . . [h]olds exclusive recognition for 3,500 or more employees." NPR, at 20. The Board has proposed substituting "ten percent (10%) or more of the total number of employees employed by the employing office" for the 3,500 or more employee-threshold the FLRA regulations provide. Such a change, however, is a change in substance. By making the threshold 3,500 employees, instead of 3,500 employees or 10% of the employees, as was provided for for national consultation rights, the FLRA explicitly determined that consultation rights on Government-wide rules and regulations should be allowed only in large agencies that have more than 3,500 employees. To substitute "10% " for the "3,500" is to change the intent of the section. Given, as the Board has stated, that no employing office under the CAA has 3,500 or more employees, consultation on Government-wide rules or regulations should not be a requirement under the CAA.

C. Enforcement of Decisions of the Assistant Secretary of Labor

The Board has proposed to adopt virtually all of part 2428 of the FLRA regulations concerning enforcement of decisions and orders of the Assistant Secretary of Labor concerning the standards of conduct of labor organizations. The Board proposes not to adopt, however, section 2428.3(a), which would require the Board to enforce a decision or order of the Assistant Secretary unless it is "arbitrary and capricious or based upon manifest disregard of law." The Board cites section 225(f)(3) of the CAA, which states that the CAA does not authorize executive enforcement of the Act, as the basis for its proposed deletion of 2428.3(a).

The Secretary submits that the Board has not shown good cause to delete section 2428.3(a). As the Board notes, part 2428 was promulgated pursuant to 5 U.S.C. § 7120(d), which authorizes the Assistant Secretary to regulate the conduct of labor organizations and is incorporated into the CAA. Requiring the Board to enforce a decision or order of the Assistant Secretary concerning the conduct of a labor organization unless that decision is arbitrary or capricious does not constitute "executive branch enforcement of the Act." The Board still maintains final authority to enforce the decision or order of the Assistant Secretary, with the understanding that the Board will defer to the Assistant Secretary's decision in this area unless arbitrary or capricious. Such deference is appropriate given the Assistant Secretary's historical jurisdiction over the standard of conduct of labor organizations. Thus, the Secretary urges that if the Board adopts part 2428, it adopt the section in its entirety.

D. Production of Evidence in Pre-Election Investigatory Hearings

In its discussion of the "Exercise of Investigative and Adjudicatory Responsibilities" referred to above, the Board argues that one reason section 220(c)(1) proceedings should not be conducted by a hearing officer pursuant to section 405 is because there is no need to create a record of such proceedings for use in subsequent judicial review. Again, this is based on the Board's incorrect assertion that section 220(c)(3) does not provide for judicial review of section 220(c)(1) decisions. In this regard, the Board states, "Since one of the key purposes of the section 405 hearing process is to create a record for judicial review, this limitation of the judicial review process is another textual suggestion that Congress intended to require referral to a hearing officer of only those matters that require a hearing of the type contemplated by section 405 - i.e., a formal adversary hearing that establishes a record for Board and then judicial review." NPR, at 15. Later in its discussion, however, under the section entitled "Production of Evidence in Pre-Election Investigatory Hearings," the Board acknowledges that "in order to properly decide disputed representation issues and effectively implement section 220 of the CAA, a complete investigatory record comparable to that developed by the FLRA under chapter 71 is necessary." Thus, the Board finds good cause to "modify section 2422.18 of the FLRA regulations" to provide a procedure for producing documents and witnesses to the Executive Director in connection with section 220(c)(1) hearings. This modification is wholly unnecessary given the language of section 220(c)(1) which, as discussed above, requires that such proceedings be referred to a hearing officer to be conducted pursuant to

section 405 of the CAA. Thus, the Secretary submits that there is no good cause to modify section 2422.18 to provide for such procedures.

E. Selection of the Unfair Labor Practice Procedure or the Negotiability Procedure

The Board proposes to delete the concluding sentences of sections 2423.5 and 2424.5 based on its assertion that "the CAA does not provide for direct judicial review of Board decisions and orders on petitions for review of negotiability issues." As already discussed, this assertion is incorrect. Negotiability issues are covered by section 220(c)(1) of the CAA. Section 220(c)(3) specifically provides that a person or entity "aggrieved by final decision of the Board under paragraph (1) or (2) of this subsection, may file a petition for judicial review in the United States Court of Appeals for the Federal Circuit pursuant to section 407." Thus, no good cause exists to delete the concluding sentences of sections 2423.5 and 2424.5.

F. Inapplicable Concepts

In the NPR, the Board has stated that "contrary to one commentator's suggestion that the terms 'activity' and 'Government-wide rule' be omitted or modified, the Board is of the view that these concepts have applicability in the context of the CAA and should therefore not be deleted or modified." NPR, at 13. It is neither apparent nor explained what these terms mean in the context of the CAA or how they are applicable. It is the position of the Secretary that the terms "activity" and "Government-wide rule or regulation," in addition to the term "primary national subdivision" have no meaning or place within the context of the CAA and should, therefore, be omitted. If the Board holds a different view, the Secretary respectfully requests that the Board explain what these terms mean in the context of the CAA and illustrate their place in the scheme of the CAA. In this regard, the Secretary notes that the CAA is premised upon the "employing office," not a sub-group of an employing office, being the responsible entity on management side. *See, e.g.*, 2 U.S. C. § 405(a).

Section 220(a)(2) of the CAA defines references to the term "agency" in the Federal Labor Relations Act to include "an employing office." Given that in the context of the CAA, the term "agency" means solely "an employing office," it is the position of the Secretary that the term "employing office" should be substituted in the regulations issued by the Board for the term "agency" in the FLRA regulations.

G. Additional Comments

The authority given to the Board in section 220(c)(1) includes the authority of "the President under section 7103(b) of title 5, United States Code." Section 7103(b) allows the President to issue an order excluding any agency from coverage under chapter 71 if:

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative or national security work, and

(B) the provisions of chapter 71 cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

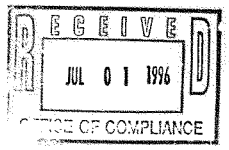
It appears that the Board has not issued any proposed regulations implementing this section of chapter 71 as applicable by the CAA, notwithstanding the existence of several legislative offices that appropriately would be excluded from coverage of section 220 of the CAA pursuant to this language. It would be helpful if the Board would issue proposed regulations identifying the employing offices it believes are appropriately excluded from coverage pursuant to this language. While some of the offices appropriately excluded pursuant to this language also may be appropriately excluded pursuant to section 220(e) of the CAA, given that section 7103(b) was expressly incorporated in the CAA through section 220(c)(1), the Secretary urges the Board to address the issue of which offices should be excluded from coverage of the chapter 71 provisions pursuant to this language.

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C 20006
(202) 637-5000

July 1, 1996

Mr. Glen D. Nager, Chair
Board of Directors
Office of Compliance
Room LA 200
John Adams Building
110 Second Street, S.E.
Washington, D.C. 20450



Dear Mr. Nager:

I am writing on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in response to the two Notices of Proposed Rulemaking issued by the Board of Directors setting forth proposed regulations under § 220(d) and § 220(e) of the Congressional Accountability Act. On April 11, 1996, the AFL-CIO submitted more detailed comments in response to the Advance Notice of Proposed Rulemaking issued by the Board.

As we noted there, the largest question facing the Board under § 220(e) is whether to grant a blanket exclusion to certain categories of "employing offices." For the reasons set forth in our comments, and as developed more fully in the Board's Notice of Proposed Rulemaking, we concur with the Board's decision not to grant any such blanket exemption.

We likewise support the Board's decision essentially to adopt the Federal Labor Relations Authority's regulations and apply those regulations to the legislative branch employees covered by the CAA. And without necessarily endorsing each and every modification of those regulations proposed by the Board, we submit that the statutory interests would be served best by promulgating the proposed regulations as expeditiously as possible so that legislative branch employees can begin to exercise the rights promised to them by § 220 of the Act.

Sincerely,

Jonathan P. Hiatt

Jonathan P. Hiatt
General Counsel

JPH/LEG/hmp

John W. Lainhart IV
Inspector General

Office of Inspector General
U.S. House of Representatives
Washington, DC 20515-9990

MEMORANDUM

TO: Chair of the Board of Directors
Office of Compliance

FROM: John W. Lainhart IV
Inspector General

DATE: July 1, 1996

SUBJECT: Comments to Notice of Proposed Rulemaking

Attached are an original and ten (10) copies of the Office of Inspector General comments to the Board's Notice of Proposed Rulemaking on section 220(e) of the Congressional Accountability Act, as published in the Congressional Record on May 23, 1996 (142 Cong. Rec. H5563).

Please call me, or Bob Frey or Tom Buchanan of this office, on X61250, if you have any questions.

Thank you.

Attachments

COMMENTS OF THE OFFICE OF INSPECTOR GENERAL U.S. HOUSE OF REPRESENTATIVES

I. Introduction

These comments are submitted in response to the Notice of Proposed Rulemaking published by the Board of Directors of the Office of Compliance regarding proposed regulations to implement section 220 of the Congressional Accountability Act of 1995 (CAA). Section 220 extends to covered Congressional employees and employing offices the rights, protections, and responsibilities established under chapter 71 of title 5, United States Code, relating to Federal service labor-management relations, effective October 1, 1996.

The Board initially issued proposed regulations pursuant to section 220(d) of the CAA. *See* 142 Cong. Rec. H5153 (daily ed. May 15, 1996). Subsequently, the Board issued proposed regulations pursuant to section 220(e) of the CAA. *See* 142 Cong. Rec. H5563 (daily ed. May 23, 1996). In this latter set of proposed regulations (hereinafter "5-23-96 NPR"), the Board "urges commenters who support any categorical exclusions . . . to explain why particular jobs or job duties require exclusion of particular employees so that the Board may exclude them by regulation, where appropriate." 5-23-96 NPR at H5565. These comments are submitted in response to this issue.

In view of the mission and responsibilities of the Office of Inspector General (OIG), we request that the Board, in issuing regulations under section 220 of the CAA, specifically exempt the OIG, pursuant to the statutory exemption for "investigation or audit functions" contained in section 7112(b)(7), title 5, United States Code. Such an exemption would be

consistent with the application of this statute to investigation and audit units in the Executive Branch OIGs. The specific application of this exemption in the Executive Branch has been developed through the case precedents of the Federal Labor Relations Authority (FLRA) but is not set forth, with any specificity, in the FLRA regulations. We believe that a Compliance Board regulation addressing this statutory exemption would be consistent with the provisions and purposes of chapter 71 of title 5 U.S. Code, and would be more effective in implementing and clarifying the rights and protections afforded to Congressional employees under section 220 of the CAA.[1]

The mission and organization of the OIG, and our legal and factual basis for requesting this regulation, are set forth below.

II. The OIG's Mission and Responsibility

The mission and responsibility of the Office of Inspector General of the House of Representatives is set forth in Rule VI of the *Rules of the House of Representatives effective for the 104th Congress.* (See Tab A.) Under Rule VI, the Inspector General is responsible for:

- Conducting periodic audits of the financial and administrative functions of the House;

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[1]In a June 7, 1996, memorandum to the Executive Director, Office of Compliance, we indicated our plans to seek a regulatory exclusion pursuant to section 7112(b)(7) of title 5, although it was not entirely clear whether the Office of Inspector General fell under section 220(e) of the CAA. As this appeared to be a "gray area" we asked that any comments submitted by this office within the 30-day comment period of the 5-23-96 NPR be considered as timely. In responding to our memorandum, a representative of the Office of Compliance advised that the comment period for the 5-23-96 NPR was extended to July 1, 1996. (142 Cong. Rec. H6114 (daily ed. June 10, 1996).)

- Informing the Officers or other officials who are the subject of an audit of the results of that audit and suggesting appropriate curative actions;
- Notifying the House Leadership and the Committee on House Oversight of any financial irregularity discovered in the course of carrying out the OIG's responsibilities;
- Submitting to the House Leadership and the Committee on House Oversight a report of each audit conducted; and
- Reporting to the Committee on Standards of Official Conduct information involving possible violations by any Member, Officer, or employee of the House of any rule of the House or of any law applicable to the performance of official duties or the discharge of official responsibilities.

Consistent with this mission, the OIG has conducted a number of audits of House programs and operations, and has carried out investigative reviews of several allegations of fraud and financial irregularities. The OIG routinely reviews, among other things, the extent of compliance with policies, procedures, laws, and regulations; the safeguarding of assets; and the adequacy of internal controls.[2]

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[2]The mission of the House OIG is similar in nature to that of the Executive Branch OIGs which were created to:

- Conduct audits and investigations of the programs and operations of the agency;
- Recommend policies to promote economy, efficiency, and effectiveness; and
- Keep the head of the agency and the Congress informed about any problems and deficiencies and the necessity for, and progress of, corrective action.

See section 2, title 5, U.S. Code appendix 3.

A copy of the OIG's Policies and Procedures Manual, Chapter I, *Mission, Functions and Authority*, is attached at Tab B.

III. Organizational Structure and Personnel

Nineteen individuals are employed in the OIG. The office is headed by an Inspector General, assisted by a Deputy Inspector General. The office is organized functionally as follows: (a) Performance and Financial Audits, (b) Information Systems Audits, (c) Contract Audit Services, and (d) Computer Assisted Audit Techniques. The OIG employs a total of 14 individuals in these units. The OIG also employs an investigator, an administrative assistant, and a secretary. A detailed description of the OIG's organizational structure and functional responsibilities is attached at Tab C.

IV. Statutory Exemption for Audit and Investigative Personnel

Subsection (b) of section 7112, title 5, U.S. Code, provides --

> A unit shall not be determined to be appropriate [for labor organization representation] under this section . . . if it includes --
>
> . . .
>
> (7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

In accordance with this provision, as far as we are aware, there are no "appropriate" representational units in any of the Executive Branch OIG's or audit organizations.[3] Section 7112(b)(7) expressly "forbids the formation of bargaining units containing employees primarily engaged in investigating other agency employees to ensure they are acting honestly--an apt description of investigators working for the Inspector General." *United States Department of Justice, Immigration and Naturalization Service v. Federal Labor Relations Authority,* 39 F. 3d 361, 365, FN 5 (D.C. Cir. 1994). The specific application of this statutory exemption has been developed through FLRA case precedents. For example, in a recent "representation" case, the FLRA held that auditors of the Naval Audit Service should be excluded from any appropriate unit of employees under this statute because the auditors were --

> primarily involved in auditing or investigating programs, activities, systems, and functions of the Navy regarding, among other things, the extent of compliance with policies, procedures, laws, and regulations, the safeguarding of assets, and the adequacy of internal controls.

U.S. Department of the Navy, Naval Audit Service, Southeast Region and National Federation of Federal Employees, 46 FLRA 512 (1992). (See Tab D.)

In this case, the FLRA agreed with the decision of its Regional Director, who concluded that

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[3]In preparing these comments, we surveyed the Executive Branch OIG community. Of those OIGs responding to our survey, 100% indicated that their offices were exempt from the provisions of chapter 71 of title 5, in view of section 7112(b)(7). Those offices responding were the OIGs at the Departments of Agriculture, Education, Energy, Health and Human Services, Labor, and Treasury, and the Office of Personnel Management, the Federal Deposit Insurance Corporation, the Environmental Protection Agency, the National Archives and Records Administration, and the Small Business Administration.

the auditors were "engaged in investigation and audit functions relating to the work of individuals employed by the Navy, and that such functions were encompassed within the meaning of the section 7112(b)(7) exclusion." *Id.* at 514. *See also, U.S. Department of Labor, Office of Inspector General, Region I, Boston, Massachusetts,* 7 FLRA 834 (1982) and *U.S. Small Business Administration,* 34 FLRA 392 (1990). The FLRA recognized the fact that the auditors, in auditing the operation of the Navy's programs, were "reviewing the work of the individuals whose duties involve the implementation of Navy programs." The FLRA noted that the auditors were "required in every audit that they perform to monitor compliance with those internal controls so as to protect agency assets and to detect possible fraud, waste or abuse." 46 FLRA at 518.

The same rationale applies to the work of the House of Representatives Office of Inspector General. The House OIG reviews the financial and administrative functions of the House and, in so doing, reviews the work of the House employees responsible for those functions. The OIG's auditors and investigator check for, among other things, the extent of compliance with policies, procedures, laws, and regulations; the safeguarding of assets; and the adequacy of internal controls. In addition, the Inspector General must report any instances of fraud or financial irregularity to the House Leadership, the Committee on House Oversight, and the Committee on Standards of Official Conduct.

Applying the above FLRA case precedent, the House OIG falls squarely within the statutory exclusion in section 7112(b)(7) of title 5, U.S. Code.[4]

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[4]Under the same body of FLRA case law, this statutory exclusion would also extend to the Inspector General's secretary and administrative assistant. *NLRB and NLRB Union,* 40 FLRA 1249 (1991). (See Tab D.)

V. Rationale for OIG Exclusion through Office of Compliance Regulation

The 5-23-96 NPR asks for commenters "to explain why particular jobs or job duties require exclusion of particular employees" from the provisions of chapter 71 of title 5 *"so that the Board may exclude them by regulation, where appropriate."* (Emphasis added.) Aside from the statutory exclusion mandated by section 7112(b)(7), it is plain to see why OIG investigators and auditors should not be allowed to participate in a bargaining unit. At a minimum, union membership or other union activity among OIG staff could create the appearance of a conflict of interest, if not an actual conflict. OIG audits and investigations often result in management follow-up action which can affect an organization's workforce. If investigators or auditors were allowed to participate in a bargaining unit, they could be accused of tailoring official findings in order to favor labor over management. Management might suspect that audit results submitted by a union-member auditor were slanted in such a way as to make management look bad. If an OIG investigation led to a disciplinary proceeding against a union employee, an investigator might have to testify against a fellow union member. For these and other reasons, Congress wisely saw fit to exempt audit and investigative units from the provisions of chapter 71.

The specific application of the section 7112(b)(7) exemptions has been developed through the case precedents of the FLRA and the courts, but the FLRA regulations do not specifically address these issues. In the 5-23-96 NPR, the Board indicates that, instead of exempting any offices by regulation, the issue of exclusions under section 220(e) of the CAA will be "raised and decided on a case-by-case basis." We disagree with this approach. We believe that a Board regulation "up front," providing for appropriate exclusions in accordance with the case law precedents, is a much more efficient approach, and would reduce the costly and burdensome

litigation likely to ensue in "case-by-case" adjudications by the Office of Compliance. Accordingly, we believe it is appropriate for the Board to exclude the OIG positions by regulation.

Attachments

under the direction of the Speaker or Chairman, and, pending the election of a Speaker or Speaker pro tempore, under the direction of the Clerk, execute the commands of the House, and all processes issued by authority thereof, directed to him by the Speaker.

2. The symbol of his office shall be the mace, which shall be borne by him while enforcing order on the floor.

3. He shall enforce strictly the rules relating to the privileges of the Hall and be responsible to the House for the official conduct of his employees.

4. He shall allow no person to enter the room over the Hall of the House during its sittings; and fifteen minutes before the hour of the meeting of the House each day he shall see that the floor is cleared of all persons except those privileged to remain, and kept so until ten minutes after adjournment.

5. In addition to any other reports required by the Speaker or the Committee on House Oversight, the Sergeant-at-Arms shall report to the Committee on House Oversight not later than 45 days following the close of each semiannual period ending June 30 or on December 31 on the financial and operational status of each function under the jurisdiction of the Sergeant-at-Arms. Each report shall include financial statements, a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

6. The Sergeant-at-Arms shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

RULE V

CHIEF ADMINISTRATIVE OFFICER

1. The Chief Administrative Officer of the House shall have operational and financial responsibility for functions as assigned by the Speaker and the Committee on House Oversight, and shall be subject to the policy direction and oversight of the Speaker and the Committee on House Oversight.

2. In addition to any other reports required by the Speaker or the Committee on House Oversight, the Chief shall report to the Committee on House Oversight not later than 45 days following the close of each semiannual period ending on June 30 or December 31 on the financial and operational status of each function under the jurisdiction of the Chief. Each report shall include financial statements, a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

3. The Chief shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

RULE VI

OFFICE OF INSPECTOR GENERAL

1. There is established an Office of Inspector General.

2. The Inspector General shall be appointed for a Congress by the Speaker, the majority leader, and the minority leader, acting jointly.

3. Subject to the policy direction and oversight of the Committee on House Oversight, the Inspector General shall be responsible only for—

(a) conducting periodic audits of the financial and administrative functions of the House and joint entities;

(b) informing the Officers or other officials who are the subject of an audit of the results of that audit and suggesting appropriate curative actions;

(c) simultaneously notifying the Speaker, the majority leader, the minority leader, and the chairman and ranking minority party member of the Committee on House Oversight in the case of any financial irregularity discovered in the course of carrying out responsibilities under this rule;

(d) simultaneously submitting to the Speaker, the majority leader, and the chairman and ranking minority party member of the Committee on House Oversight a report of each audit conducted under this rule; and

(e) reporting to the Committee on Standards of Official Conduct information involving possible violations by any Member, officer, or employee of the House of any rule of the House or of any law applicable to the performance of official duties or the discharge of official responsibilities which may require referral to the appropriate Federal or State authorities pursuant to clause 4(e)(1)(C) of rule X.

RULE VII

DUTIES OF THE CHAPLAIN

The Chaplain shall attend at the commencement of each day's sitting of the House and open the same with prayer.

RULE VIII

DUTIES OF THE MEMBERS

1. Every Member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented; and shall vote on each question put, unless he has a direct personal or pecuniary interest in the event of such question.

2. Pairs shall be announced by the Clerk immediately before the announcement by the Chair of the result of the vote, by the House or Committee of the Whole from a written list furnished him, and signed by the Member making the statement to the Clerk, which list shall be published in the Record as a part of the proceedings, immediately following the names of those not voting. However, pairs shall be announced but once during the same legislative day.

3. (a) A Member may not authorize any other individual to cast his vote or record his presence in the House or Committee of the Whole.

(b) No individual other than a Member may cast a vote or record a Member's presence in the House or Committee of the Whole.

(c) A Member may not cast a vote for any other Member or record another Member's presence in the House or Committee of the Whole.

RULE IX

QUESTIONS OF PRIVILEGE

1. Questions of privilege shall be, first, those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; and second, those affecting the rights, reputation, and conduct of Members, individually, in their representative capacity only.

2. (a)(1) A resolution reported as a question of the privileges of the House, or offered from the floor by the majority leader or the minority leader as a question of the privileges of the House, or offered as privileged under clause 1, section 7, article I of the Constitution, shall have precedence of all other questions except motions to adjourn. A resolution offered from the floor by a Member other than the majority leader or the minority leader as a question of the privileges of the House shall have precedence of all other questions except motions to adjourn only at a time or place, designated by the Speaker, in the legislative schedule within two legislative days after the day on which the proponent announces to the House his intention to offer the resolution and the form of the resolution.

(2) The time allotted for debate on a resolution offered from the floor as a question of the privileges of the House shall be equally divided between (A) the proponent of the resolution, and (B) the majority leader or the minority leader or a designee, as determined by the Speaker.

(b) A question of personal privilege shall have precedence of all other questions except motions to adjourn.

RULE X

ESTABLISHMENT AND JURISDICTION OF STANDING COMMITTEES

The Committees and Their Jurisdiction

1. There shall be in the House the following standing committees, each of which shall have the jurisdiction and related functions assigned to it by this clause and clauses 2, 3, and 4; and all bills, resolutions, and other matters relating to subjects within the jurisdiction of any standing committee as listed in this clause shall (in accordance with and subject to clause 5) be referred to such committees, as follows:

May 1996

Office of Inspector General
U.S. House of Representatives
Policies and Procedures Manual

Chapter I - Mission, Functions and Authority

1. PURPOSE. To provide a statement of the mission of the Office of Inspector General (OIG) and the functions assigned to carry out mission responsibilities.

2. MISSION. The OIG was established by House Rule VI, clause 2 (103rd Congress), pursuant to the House Administrative Reform Resolution of 1992 (H. Res. 423, 102nd Congress), and reestablished in the 104th Congress by House Rule VI, which provides that:

a. The Inspector General shall be appointed for a Congress by the Speaker, the majority leader, and the minority leader, acting jointly.

b. Subject to the policy direction and oversight of the Committee on House Oversight, the Inspector General shall be responsible only for:

(1.) Conducting periodic audits of the financial and administrative functions of the House and joint entities;

(2.) Informing the Officers or other officials who are the subject of an audit of the results of that audit and suggesting appropriate curative actions;

(3.) Simultaneously notifying the Speaker, the majority leader, the minority leader, and the chairman and ranking minority party member of the Committee on House Oversight in the case of any financial irregularity discovered in the course of carrying out responsibilities under this rule;

(4.) Simultaneously submitting to the Speaker, the majority leader, the minority leader, and the chairman and ranking minority party member of the Committee on House Oversight a report of each audit conducted under this rule; and

(5.) Reporting to the Committee on Standards of Official Conduct information involving possible violations by any Member, officer, or employee of the House of any rule of the House or of any law

- expeditiously report the suspected violation(s) to the Committee on Standards of Official Conduct or other appropriate authority. (See Chapter V of this manual for guidance on the identification of irregularities.)

g. Cooperate and participate fully with the Committee on House Oversight in developing an equal employment opportunity affirmative action plan and in making efforts regarding staffing, motivation, and training to develop all OIG employees.

4. AUDIT AUTHORITY.

a. House Rule VI, clause 2 (103rd Congress), pursuant to the House Administrative Reform Resolution of 1992 (H. Res. 423, 102nd Congress), established the OIG and authorized the Inspector General responsibility for conducting periodic audits of the financial functions under the Director of Non-legislative and Financial Services, Clerk, Sergeant at Arms, and Doorkeeper.

b. The OIG was reestablished in the 104th Congress under House Rule VI, and the authority of the Inspector General was broadened to conducting audits of all House financial and administrative functions. (The Office of Doorkeeper was abolished, and a Chief Administrative Officer replaced the Director of Non-legislative and Financial Services.)

5. OFFICE ORGANIZATION. The OIG consists of the following organizational units, each reporting to the Inspector General through the Deputy Inspector General:

a. Performance and Financial Audits. This unit is responsible for all performance and financial audits of U.S. House of Representatives entities and sub-entities in order to:

(1.) Evaluate the effectiveness of internal controls and audit trails;

(2.) Evaluate the economy and efficiency of operations; and

(3.) Detect and help prevent fraud and abuse in such operations.

The unit is headed by the Director, Performance and Financial Audits, who supervises two performance and financial audit teams. Each team consists of an auditor-in-charge and an auditor.

The unit is headed by the Director, Contract Audit Services, who supervises an Assistant Director, Contract Audit Services. The Director and Assistant Director oversee all contract audit services performed on behalf of the OIG.

e. Investigator. The investigator serves as principal advisor to the Inspector General on investigative issues and:

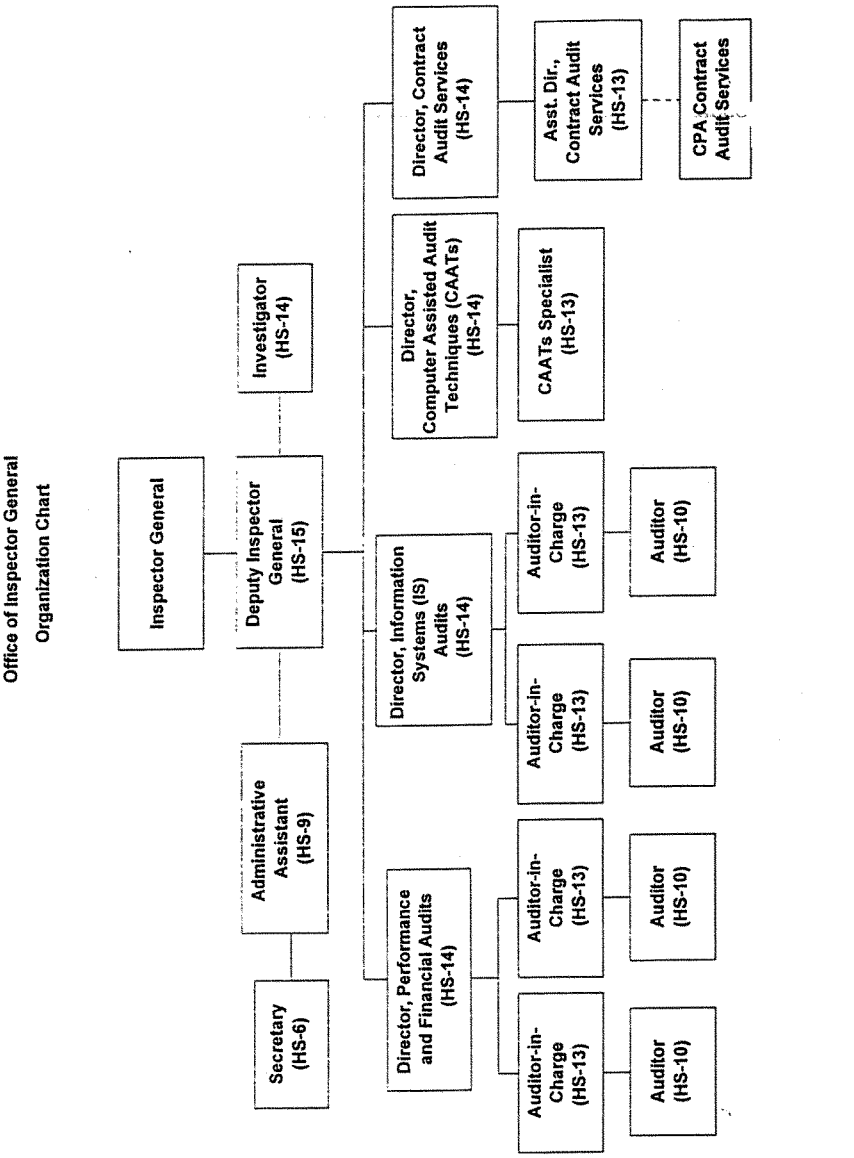
(1.) Provides technical advice, consultation, and guidance to the OIG;

(2.) Recommends and carries out appropriate actions in matters which indicate the potential for irregularities, fraud, or criminal acts; and

(3.) Establishes and maintains liaison with the staff of the Committee on Standards of Official Conduct.

Exhibit

Office of Inspector General
Organization Chart



Change No. 1 - dated May 1996

OFFICE ORGANIZATION

The Office of Inspector General consists of the following organizational units, each reporting to the Inspector General through the Deputy Inspector General:

A. Performance and Financial Audits

This unit is responsible for all performance and financial audits of U.S. House of Representatives entities and sub-entities in order to:

1. Evaluate the effectiveness of internal controls and audit trails;

2. Evaluate the economy and efficiency of operations; and

3. Detect and help prevent fraud and abuse in such operations.

The unit is headed by the Director, Performance and Financial Audits, who supervises two performance and financial audit teams. Each team consists of an auditor-in-charge and an auditor.

B. Information Systems Audits

This unit is responsible for all audits of U.S. House of Representatives information systems, including reviews of :

1. General and application controls and data integrity;

2. System development life cycle activities and acquisitions; and

3. Information Resources Management.

The unit is headed by the Director, Information Systems Audits, who supervises two information systems audit teams. Each team consists of an auditor-in-charge and an auditor.

C. Computer Assisted Audit Techniques

This unit is responsible for:

1. Computer assisted audit and information systems support to all OIG audit and administrative staff;

2. Administration and security of the OIG's Local Area Network (LAN), LAN server, and all other computer hardware and software; and

3. Advising the Inspector General on information systems issues with respect to the U.S. House of Representatives.

The unit is headed by the Director, Computer Assisted Audit Techniques, who supervises one computer assisted audit techniques specialist.

D. Contract Audit Services

This unit is responsible for the management and direction of all contract audit services performed of U.S. House of Representatives entities and sub-entities designed to:

1. Evaluate the House's financial statements and operations;

2. Evaluate the effectiveness of internal controls and audit trails;

3. Evaluate the economy and efficiency of operations; and

4. Detect and help prevent fraud and abuse in such operations.

The unit is headed by the Director, Contract Audit Services, who supervises one Assistant Director, Contract Audit Services.

E. Investigator

The investigator serves as principal advisor to the Inspector General on investigative issues and:

1. Provides technical advice, consultation, and guidance to the OIG;

2. Recommends and carries out appropriate actions in matters which indicate the potential for irregularities, fraud, or criminal acts; and

3. Establishes and maintains liaison with the staff of the Committee on Standards of Official Conduct.

46 FLRA No. 47

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE NAVY
NAVAL AUDIT SERVICE
SOUTHEAST REGION
(Activity)

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES
(Labor Organization/Petitioner)

3-RO-10012
(44 FLRA 717 (1992))

DECISION AND ORDER ON REVIEW

November 10, 1992

Before Chairman McKee and Members Talkin and Armendariz.

I. Statement of the Case

This case is before the Authority for review of the Regional Director's Decision and Order dismissing the petition for exclusive recognition filed by the Petitioner (NFFE or the Union). NFFE sought to represent a unit of approximately 72 auditors. The Regional Director found that section 7112(b)(7) of the Statute precludes a finding that the unit sought is appropriate.

NFFE filed an application for review of the Regional Director's decision. Subsequently, we granted review pursuant to section 2422.17 of the Authority's Rules and Regulations. We stated that a question was raised as to whether the employees involved in this case are "primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency . . ." within the meaning of section 7112(b)(7) of the Statute. We permitted the parties to submit briefs on this issue. Both parties filed briefs.

For the reasons discussed below, we affirm the Regional Director's dismissal of NFFE's petition.

II. Background and Regional Director's Decision

The Union filed a petition seeking to represent a unit of approximately 72 GS-511 auditors at the Activity's Southeast Region. The Union contended that the proposed unit of auditors constituted a distinct group of employees who share a clear and identifiable community of interest. The Activity objected to the proposed unit on the grounds that: (1) the employees who would be included in the unit are exempt from inclusion in any bargaining unit under section 7112(b)(7) of the Statute because their duties directly affect the internal security of the Activity;*/ and (2) the proposed regional unit is inappropriate because the employees in that unit do not possess a community of interest separate and distinct from other Naval Audit Service (NAS) employees across the country and the proposed unit would not promote the efficiency of Agency operations.

According to the Regional Director, the auditors conduct internal audits that involve: (1) evaluating and making recommendations concerning the integrity and reliability of financial and other data used to make management decisions; (2) determining the adequacy of policies and procedures affecting the expenditure of funds, safeguarding and determining the efficient use of resources, and the achievement of management objectives and program results; and (3) determining the extent of compliance with applicable policies, procedures, laws, and regulations.

The Activity is part of the NAS, which is the internal audit organization within the Department of the Navy (Navy) and is under the direction of the Auditor General of the Navy. The Auditor General develops and implements Navy audit standards, policies and procedures consistent with the guidance of the Inspector General, Department of Defense.

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*/ Section 7112(b)(7) of the Statute provides that a bargaining unit shall not include:

> any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

The Naval Inspector General inspects, investigates, or inquires into matters of importance concerning fraud, waste, inefficiency, and related improprieties throughout the Navy. However, the Regional Director found that the internal audit function performed by the auditors "serves a primary role of preventing and detecting fraud and illegal acts." Regional Director's Decision at 3. The Regional Director found, in this regard, that the auditors are required to submit copies of all procurement-related fraud reports and standards of conduct reports to the Naval Inspector General. In addition, the Regional Director found that in cases of suspected criminal activity, the auditors are required to submit a written report of suspected fraud to the Naval Investigative Service Command (NISC) with a copy to the activity's commanding officer or the immediate superior in command when the commanding officer may be involved. According to the Regional Director, where such criminal activity is suspected during the audit, notification and dissemination of the auditors' reports are coordinated with the NISC in order to preclude compromise of the investigation or destruction and/or alteration of the evidence.

The Regional Director found that auditors also are responsible for identifying indicators of fraud sufficient to warrant recommending an investigation. The Regional Director noted that the NAS may use investigators from the NISC on selected audits of areas susceptible to fraudulent activities, such as procurement, and found that auditors assist the NISC in documenting fraud.

Citing U.S. Department of Labor, Office of Inspector General, Region I, Boston, Massachusetts, 7 FLRA 834 (1982) (Department of Labor) and U.S. Small Business Administration, 34 FLRA 392 (1990) (SBA), the Regional Director concluded that the auditors "are engaged in investigation and audit functions relating to the work of individuals employed by the Navy, and that such functions are encompassed within the meaning of the section 7112(b)(7) exclusion set forth in the Statute." Id. at 4. Specifically, the Regional Director found, based on the evidence in the record, that "the claimed auditors are primarily responsible for the conduct of audits of Department of the Navy programs, contracts, and operations." Id. at 5. The Regional Director noted, however, that although the audits concern agency programs, "they necessarily include auditing the individuals who operate these programs." Id. The Regional Director concluded, therefore, that "the potential always exists that a particular audit may result in an investigation of Activity employees concerning fraud, misuse of funds, or

malfeasance." Id. The Regional Director found that the auditors may review employee information, such as information showing that certain Navy employees were paid for travel that did not occur.

The Regional Director also found that, in the course of conducting audit functions related to matters external to the Navy, an investigation of Navy employees may result. The Regional Director noted, for example, that an auditor's advisory report concerning competition for aircraft wing work revealed a violation of Federal law involving an employee who allegedly accepted a bribe in return for providing a contractor with information.

The Regional Director concluded that because the auditors are engaged in audit and investigation functions within the meaning of section 7112(b)(7) of the Statute they must be excluded from any appropriate unit of employees under the Statute. Therefore, the Regional Director dismissed the petition. In reaching his decision, the Regional Director also found that section 7112(b)(7) of the Statute "precludes a finding that a separate unit of auditors is appropriate [because] such [a] unit would create a conflict of interest in that the auditors have the role of internal policemen vis a vis Agency employees who may be represented by the same or another labor organization." Id. at n.2 (emphasis in original). The Regional Director noted that there was no statutory provision for auditors to be represented by a separate, unaffiliated labor organization.

III. Positions of the Parties

A. NFFE

NFFE contends that the legislative history of the Statute demonstrates that in enacting section 7112(b)(7) of the Statute, Congress intended to exclude from bargaining units employees who are engaged primarily in an agency's audit or investigative functions relating to that agency's internal security. Noting the dictionary definition of "primarily," NFFE asserts that "to be 'primarily engaged' in a duty must mean that an employee performs that duty more often and most importantly above all other assigned duties; that is the employee's main duty." NFFE's Brief at 3.

NFFE contends that the record in this case does not demonstrate that the auditors' main duty is to perform audits relating to the work of individuals whose duties directly affect internal security. Rather, according to NFFE, the employees' "audit functions relating to the work

c ndividuals whose duties directly affect internal
s rity[]" constitute "an occasional ancillary activity, resulting from their primary duty of performing financial and program audits." Id. at 5. In this regard, NFFE asserts that the vast majority of Activity audits are program audits and that only a small percentage of the audits concern internal security functions. Accordingly, NFFE contends that the employees involved in this case are eligible for inclusion in a bargaining unit and that the appropriateness of the proposed region-wide unit must be decided by the Regional Director.

B. Activity

The Activity asserts that employees proposed for inclusion in bargaining units may not be included in units under section 7112(b)(7) of the Statute if: (1) the employees investigate, audit, or both; (2) the investigations or audits are related to the work of other agency employees; (3) the duties of such other agency employees directly affect the agency's internal security; (4) the investigations or audits are done to ensure that the duties of such other agency employees are discharged honestly and with integrity; and (5) the employees proposed for inclusion in a unit are engaged primarily in such internal investigations, audits, or both. The Activity contends that the record establishes t these criteria are met in this case and, therefore, the em oyees involved in this case should not be included in a bargaining unit.

In particular, the Activity asserts that the auditors perform investigative and audit functions and that these functions are related to the work of other Navy employees. The Activity contends that the audits performed by the auditors primarily concern Navy programs and employees of these programs and are conducted "to prevent any mismanagement or fraud by individual [Navy] employees." Activity's Brief at 8. The Activity asserts that although the audits are not directed initially at individuals, "they do evaluate the work of groups of individuals[], and if mismanagement by one or more individuals is found, such individual or individuals [are] held accountable . . . ." Id.

Further, the Activity contends that "[t]he duties of the [Navy] employees whose work is audited or investigated by the . . . auditors directly affect [the Navy's] internal security." Id. The Activity maintains that the audits evaluate the adequacy of internal controls and that such controls consist of internal security measures that are used

to ensure the safeguarding of assets, the integrity and reliability of data, and the prevention of fraud, waste, and abuse. Additionally, the Activity asserts that the internal audits are performed to determine if agency personnel are performing their duties with honesty and integrity.

With respect to the last criterion set forth above, the Activity maintains that the auditors "are engaged primarily in internal audits[,]" including performance and program audits. Id. at 11. According to the Activity, the auditors "primarily audit [Navy] programs and the employees who run these programs, and such audits may uncover employee fraud, misuse of funds, or malfeasance." Id. The Activity notes that in Department of Labor the Authority held that other auditors met the "primarily engaged in" test when they primarily conducted internal audits.

Finally, the Activity asserts that the proposed bargaining unit is inappropriate "because a union [sic] of . . . auditors could affect the internal security of the [Navy] by creating a conflict of interest for . . . auditors in performing functions that relate to the honesty and integrity with which other [Navy] employees conduct their work. This conflict arises because of the . . . auditors' role of internal policemen . . . vis-a-vis [Navy] employees." Id.

IV. Analysis and Conclusions

For the following reasons, we conclude that the auditors in this case meet the criteria of section 7112(b)(7) of the Statute. Therefore, the auditors must be excluded from any appropriate unit of employees under the Statute and we will dismiss the Union's petition.

Section 7112(b)(7) of the Statute provides that employees cannot be included in any appropriate unit if they are primarily engaged in investigation or audit functions relating to the work of individuals employed by the agency whose duties directly affect the internal security of the agency, as long as the functions are undertaken to ensure that those duties are discharged honestly and with integrity. See generally SBA, 34 FLRA at 400-02. In essence, NFFE argues that the exclusion set forth in section 7112(b)(7) does not apply to the claimed auditors because their primary duty is to perform financial and program audits and only a small percentage of the audits performed by them concerns audits of individuals whose duties directly affect internal security. Therefore, according to NFFE, the claimed auditors should not be excluded from an appropriate unit on the basis of section 7112(b)(7) of the Statute. We disagree.

Section 7112(b)(7) of the Statute excludes from any appropriate unit employees who are primarily engaged in investigation or audit functions "relating to the work of" individuals whose duties directly affect the agency's internal security, but only if those functions are undertaken to ensure that the duties are discharged honestly and with integrity. In this case, it is clear that, in auditing the operation of the Navy's programs, the auditors are reviewing the work of the individuals whose duties involve the implementation of Navy programs. Therefore, the fact that only a small percentage of the audits performed by the auditors in this case actually results in investigations or audits of Navy employees whose duties directly affect the Navy's internal security does not mean that section 7112(b)(7) of the Statute is not dispositive of the unit status of those auditors. Rather, the proper inquiry is whether the claimed auditors are primarily engaged in investigation or audit functions "relating to the work of" individuals whose duties directly affect the Navy's internal security, as long as those functions are undertaken to ensure that the duties are discharged honestly and with integrity.

Interpreting section 7112(b)(7) in this manner, we find that the record in this case supports the Regional Director's conclusion that the claimed auditors should be excluded from any appropriate unit of employees under the Statute. Based on the record, we find that the auditors in this case are primarily involved in auditing or investigating programs, activities, systems, and functions of the Navy regarding, among other things, the extent of compliance with policies, procedures, laws, and regulations, the safeguarding of assets, and the "adequacy of internal controls[.]" Transcript at 68. The phrase "internal controls" refers to "the procedures and policies . . . as well as organizational structure that management has in place to ensure the safeguarding of assets, the integrity . . . of data, and to be able to prevent fraud, waste or abuse." Id. at 76. Auditors are required in every audit that they perform to monitor compliance with those internal controls so as to protect agency assets and to detect possible fraud, waste or abuse. Id. at 66, 68, 71, and 72. In performing these audits or investigations, the auditors review the work product of the employees who implement those programs, activities, systems, and functions; for example, the auditors review financial statements, contracts, and other documents prepared by employees as a part of their duties. Id. at 74.

We conclude, therefore, based on the record, that the auditors in this case are primarily engaged in financial and

program audits relating to the work of individuals employed by the Navy whose duties directly affect the Navy's internal security and that the audits are undertaken to ensure that those individuals perform their duties with honesty and integrity. Specifically, because the audits are designed to detect possible fraud, waste, and abuse in the work performed by Navy employees whose duties directly affect the Navy's internal security, we find that the audits are undertaken to ensure that the work of those Navy employees is performed with honesty and integrity. Consequently, we find that the auditors sought by the Union in this case meet the criteria of section 7112(b)(7) of the Statute. Inasmuch as section 7112(b)(7) of the Statute provides that no unit shall be determined to be appropriate if it includes employees who meet the criteria set forth therein, we agree with the Regional Director's conclusion that the auditors do not constitute an appropriate unit. See Department of Labor, 7 FLRA at 835 (finding that section 7112(b)(7) of the Statute applied to auditors who were "responsible for the conduct of audits of Department of Labor programs and the employees who run these programs, potentially auditing to uncover employee fraud, misuse of funds, or malfeasance").

V. Order

The petition is dismissed.

40 FLRA No. 110

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL LABOR RELATIONS BOARD
(Agency/Petitioner)

and

NATIONAL LABOR RELATIONS BOARD UNION
(Labor Organization)

3-CU-00022

ORDER DENYING APPLICATION FOR REVIEW

May 31, 1991

Before Chairman McKee and Members Talkin and Armendariz.

I. Statement of the Case

This case is before the Authority on an application for review filed by the National Labor Relations Board Union (the Union) under section 2422.17(a) of the Authority's Rules and Regulations. In his Decision and Order On Petition For Clarification of Unit, the Regional Director found that the recognized bargaining unit should be clarified by excluding all employees in the Agency's Office of Inspector General on the grounds that they are engaged in investigation and audit functions within the meaning of section 7112(b)(7) of the Statute.

The Union seeks review of the Regional Director's decision. The Agency did not file an opposition to the Union's application for review. For the reasons discussed below, we find that the Union has not established any basis for review of the Regional Director's Decision and Order. Accordingly, we deny the application for review.

II. Regional Director's Decision

Since 1969, the Union has been the exclusive representative of a bargaining unit of all nonprofessional

employees "under the jurisdiction of the General Counsel on s or her Headquarters Staff." Regional Director's cision at 1. Following the establishment of the positions of Staff Assistant and of Secretary to the Inspector General, the Agency filed a petition seeking to clarify the bargaining unit to exclude all employees in the Office of Inspector General.

The parties stipulated as to the duties performed by the Staff Assistant and the Secretary. The parties also stipulated that "all employees of the Office of Inspector General, including the Staff Assistant and the Secretary to the Inspector General positions . . . should be excluded from any Agency bargaining unit in which they would otherwise be included because they are engaged in investigation and audit functions within the meaning of section 7112(b)(7) of the Statute." Id. at 3.

Although the Union agreed that all employees of the Office of Inspector General were excludable under section 7112(b)(7) of the Statute, the Union nonetheless argued that the employees "should be excluded on the basis that they are not under the jurisdiction of the General Counsel and, therefore, do not meet the express terms of the unit description." Id. The Regional Director found that: (1) the position descriptions and notices of vacancies for the positions of Staff Assistant and Secretary indicated hat the Chairman of the Agency and the General Counsel share concurrent jurisdiction over the positions; (2) the supervisory certifications of the position descriptions were signed by both the Chairman and the General Counsel; and (3) the Inspector General indicated that both the Chairman and the General Counsel share supervision over the Office of Inspector General.

The Regional Director found that the Staff Assistant and the Secretary positions, therefore, are "within the express terms of the unit description"; that is, they "are under the jurisdiction of [the] Office of the General Counsel." Id. at 3-4. The Regional Director concluded that although the positions are "under jurisdiction of the General Counsel, in view of the parties' agreement that the Staff Assistant and the Secretary to the Inspector General are engaged in investigation and audit functions within the meaning of section 7112(b)(7) of the Statute, I find that they should be excluded from the unit." Id. at 4. The Regional Director stated that, absent the filing of an application for review, he would take appropriate action to clarify the bargaining unit "by excluding from said unit all employees in the Office of Inspector General." Id.

III. The Union's Application for Review

The Union contends that the Regional Director erred in finding that the Staff Assistant and the Secretary positions are under the jurisdiction of the Office of the General Counsel. The Union contends that "[s]uch finding on the sole issue in this proceeding is 'prejudicial' to the Inspector General Act of 1978, as amended, and Congressional intent, and further is based on a clearly erroneous fact which also prejudices the rights of the Union." Application for Review at 1.

The Union states that the Joint Explanatory Statement of the Committee of Conference for the Inspector General Act, which was attached to the parties' stipulation to the Regional Director, designates the Chairman of the Agency as the agency head for purposes of the Inspector General Act. The Union argues, therefore, that the Regional Director's finding that employees of the Inspector General are under the jurisdiction of the Agency's General Counsel is clearly erroneous.

The Union does not dispute the Regional Director's finding that the employees of the Inspector General are engaged in investigation and audit functions within the meaning of section 7112(b)(7) of the Statute. Rather, the Union contends that the Regional Director failed to resolve the issue of what unit such employees would be a part of "but for their [section] 7112(b)(7) status." Id. at 2. The Union asserts, in essence, that the Regional Director should have found that the employees of the Inspector General come under the jurisdiction only of the Chairman of the Agency and not under the jurisdiction of the General Counsel. The Union explains that it "has practical concerns about to whom the Agency Inspector General reports and, in turn, who is responsible for the Agency Inspector General's conduct[.]" Id. at 3.

IV. Analysis and Conclusions

We conclude, for the reasons stated below, that no compelling reasons exist within the meaning of section 2422.17 of the Authority's Rules and Regulations for granting the application for review.

The Agency's petition in this case sought a determination by the Regional Director that the bargaining unit in this case be clarified by excluding the employees in the Office of the Inspector General on the grounds that they are engaged in investigation and audit functions within the

meaning of section 7112(b)(7) of the Statute. The Regional Director granted the requested clarification, based on the parties' stipulation that the Inspector General's employees are engaged in investigation and audit functions within the meaning of section 7112(b)(7) of the Statute.

As noted above, the Union does not dispute the Regional Director's finding that the Inspector General's employees are engaged in investigation and audit functions within the meaning of section 7112(b)(7) of the Statute. The Union contends, however, that the Regional Director should also have determined that the employees of the Inspector General would be excluded from the bargaining unit because they are not "under the jurisdiction of the General Counsel."

We find that the Union's application presents no basis for review of the Regional Director's decision. Section 7112(b) provides that where, as here, it is determined that employees are engaged in investigation and audit functions within the meaning of subsection (b)(7), no unit shall be found appropriate that would include such employees. There is no dispute that the employees of the Inspector General are engaged in investigation and audit functions within the meaning of section 7112(b)(7). Accordingly, they may not be included in any unit of the Agency's employees.

As there was no dispute before the Regional Director that the employees of the Inspector General are engaged in investigation and audit functions within the meaning of section 7112(b)(7), the Regional Director properly granted the Agency's petition on that basis. Contrary to the Union's contention, we find that the Regional Director had no obligation to determine whether the employees of the Inspector General would be excluded from the bargaining unit on any other basis. We find, likewise, that the Authority has no obligation to make such a determination. In this regard, we specifically disavow the Regional Director's finding that the employees of the Inspector General are under the jurisdiction of the General Counsel. That finding was unnecessary to his decision on the petition before him. Moreover, the question of the jurisdiction over the employees of the Inspector General is a matter covered by the Inspector General Act of 1978, as amended. Accordingly, we find that the Regional Director's decision is not prejudicial to the Union within the meaning of section 2422.17 of the Authority's Regulations.

We conclude, therefore, that the Union's application presents no compelling reason for granting review of the

Regional Director's decision. Accordingly, we will deny the application for review.

V. Order

The application for review is denied.

GEORGE P. RADANOVICH
18TH DISTRICT, CALIFORNIA
COMMITTEE ON BUDGET
WORKING GROUP:
ECONOMIC AND REGULATORY REFORM
COMMITTEE ON RESOURCES
SUBCOMMITTEES:
WATER AND POWER RESOURCES
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OFFICE OF COMPLIANCE

JUL 0 8 1996

July 2, 1996

Mr. Glen Nager
Chair, Board of Directors
Office of Compliance
Room LA 200
John Adams Building
110 Second Street, S.E.
Washington, D.C. 20540-1999

Dear Sir:

Thank you very much for the opportunity to review and comment on the proposed rules relating to Labor-Management issues and their applicability to the House of Representatives, as it applies to personal offices of Members of this House. I have not completed a line by line analysis of the proposed rules, and am confident that some other management oriented organization will review and comment in detail concerning the specific procedural and recognition sections of the rule. I have in my prior career developed such rules, and am familiar with their substance and application.

However, in a very practical sense, the details of such rules and regulations are not as important as the overall statement being made by having such rules apply to members' personal offices. In my opinion, there is no room for union organization within the personal offices of members of Congress. The reason there is no room for such organization is both a physical reality - there is not sufficient privacy in crowded personal offices to conduct confidential business outside of the involvement of basically all the staff - and a practical reality: employees who must meet a "political compatibility" test to obtain and retain employment cannot then have an intermediary represent them (and their views) to their employer.

The "political compatibility" test makes personal office employees effectively "at-will". "At-will" employees have a direct and personal relationship with the employer upon which their employment depends. "At-will" status is inconsistent with representation in the employer-employee relationship. If nothing else, what if (as may be the case in some offices) union participation is a politically incompatible act? Such logical absurdity makes the rule upon which it relies unenforceable and in fact a nullity.

When a comprehensive labor agreement is negotiated between employers and employees, in a very real sense (and in fact in the language of bargaining) the employee becomes a "union employee", which is to say, subject to the rules that the union negotiates rather than the rules of

the employer. Can union employees then be asked to carry out the interests of their employer, the Member of Congress, rather that those of the Union? How about when they are inconsistent with the position of the union - say in the repeal of the Davis-Bacon Act? Are Members then subject to the participation of unions and union representatives in the deliberation that leads to taking such a policy position?

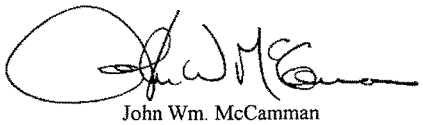
Members of executive agencies of the federal government are able to organize in unions in order to conduct their employer-employee relations. However, this executive agency authorization *excludes* the White House, where employees of the Executive Office of the President are not able to be represented by an employee organization. The reason the White House is excluded is because having union represented employees involved in the policy formulation that is conducted at the White House is a potential conflict in the development of policy - a conflict between the President and his staff is inappropriate, and that is acknowledged in the regulatory scheme. Similarly, such a conflict in the personal office of the members - where the policy formulation job is *the job* of the office - is inappropriate.

There are many practical considerations, as well. I do not believe that the Office of Compliance wants each office bargaining as to hours, wages and working conditions; however, each Member does not want some central bureaucracy negotiating on his or her behalf. The level of knowledge, ability and willingness of each office to participate in bargaining issues, or to administer the results, varies substantially, and I would not want to delegate the legal obligations of an employment agreement to 435 members. I can see a whole new level of bureaucratic administration as a part of the House of Representatives as a result of such regulations.

Please be aware that this office, for one, objects to the potential for union organization in personal offices of members of the House of Representatives.

Thank you very much for your consideration of these comments.

Sincerely,



John Wm. McCamman
Chief of Staff

advancing workplace rights, safety & health, and accessibility in the legislative branch

Office of Congressional Workplace Rights

February 22, 2022

Via: Electronic Mail

Hon. Zoe Lofgren
Committee on House Administration
1309 Longworth House Office Building
Washington, D.C. 20515

Dear Chairperson Lofgren:

I have received your letter dated February 8, 2022 requesting that the OCWR Board of Directors (Board) conduct an expeditious review of the regulations adopted by a previous Board in 1996 that were promulgated under section 220(e)(1) of the Congressional Accountability Act (CAA) [2 U.S.C. § 1351(e)(1)] and would govern unionizing and collective bargaining rights in the personal offices of Members of the House of Representatives or Senators, as well as in committee, leadership and other enumerated offices.

The Board has conducted a thorough review and now unanimously endorses the regulations adopted by the 1996 Board and urges Congress to approve these regulations.

As you know, while Congress has not yet approved the Board's adopted regulations under CAA section 220(e)(1), Congress did approve the Board's adopted regulations under CAA section 220(d) that apply to all covered employees, labor representatives, and employing offices not identified in section 220(e)(2). The section 220(d) regulations are on our website as the Substantive Regulations on Collective Bargaining and Unionization and can be found here: https://www.ocwr.gov/wp-content/uploads/2021/09/final_regulations_lmr_19960930.pdf. The section 220(d) regulations were issued by the Board on October 1, 1996, and became effective on November 30, 1996. Like the regulations under section 220(e), the section 220(d) regulations are required by the CAA to be the same as the comparable FLRA regulations except where good cause exists for a modification that would be more effective for implementation of the rights and protections under this section. Consequently, the regulations issued by the Board in 1996 under section 220(d) closely follow the comparable FLRA regulations. Like the FLRA regulations upon which these regulations are based, the section 220(d) regulations provide procedures for resolving all disputes that may arise during organizing and collective bargaining, including potential exemptions from those rights, in a manner that is both informed and impartial.

The regulations adopted by the Board in 1996 under section 220(e) of the CAA are quite straightforward. They state that the same regulations that apply to all of the other employees, labor representatives, and offices in the legislative branch covered by the CAA (the existing

OCWR Regulations on Collective Bargaining and Unionization) will apply to the employees, labor representatives, and offices listed in section 220(e)(2).

In your letter, you specifically requested that the Board review the 1996 section 220(e) adopted regulations in light of the changes made by the CAA Reform Act in 2018. Since none of the Reform Act changes made in 2018 affected section 220 of the CAA, the Board has concluded that there is no need for any changes to the regulations adopted by the Board in 1996. While the CAA Reform Act changed the name of the Office of Compliance to the Office of Congressional Workplace Rights, the Reform Act also provides that "[a]ny reference to the Office of Compliance in any law, rule, regulation, or other official paper in effect as of such date shall be considered to refer and apply to the Office of Congressional Workplace Rights." Pub. L. 115-397, title III, § 308(d) (Dec. 21, 2018). For this reason, the Board does not believe that it even needs to propose a technical change to the name of the office in the adopted regulations.

Upon receiving your letter, we circulated it among the majority and minority staff of our oversight committees in both the House and the Senate and requested comments. We received comments suggesting that no changes need to be made to the 1996 adopted regulations. We also received comments suggesting that the Board should carefully review the 1996 adopted regulations to determine whether technical changes should be made because some office names have changed and some changes may have been made to the underlying statutes. Although CAA section 220(e)(2)(H) allows the Board to identify by regulation other Congressional offices that perform functions comparable to those listed in section 220(e)(2), it is not necessary for the Board to do so given its conclusion that the same regulations should apply to all offices. While this analysis would be necessary if the Board adopted special regulations for the Congressional offices identified in section 220(e)(2), no such special regulations are being proposed.

Regarding the underlying statute, section 220 incorporates specific sections of the Federal Service Labor Management Relations Statute (FSLMRS). Since 1996, there have been no significant changes to those sections of the statute that would affect the implementation of collective bargaining and unionization in the Congressional offices identified in CAA section 220(e)(2).

For these reasons, the Board does not see the need for any technical changes and unanimously requests that Congress approve the 1996 section 220(e) regulations previously adopted by the Board so that the Board can formally issue them. A copy of those regulations is attached. As provided in the CAA, the substantive rights under the FSLMRS made applicable to Congressional offices do not apply until the section 220(e) regulations are issued.

The Board will be publishing your letter and this response on our website and in the *Congressional Record* for public information.

Very respectfully yours,

Barbara C. Wallace

Barbara Childs Wallace
Chair of the Board of Directors

Room LA 200, Adams Building · 110 Second Street, SE · Washington, DC 20540-1999 · t/202.724.9250 · f/202.426.1913

www.ocwr.gov

1996 ADOPTED REGULATIONS

Sec.

2472 Specific regulations regarding certain offices of Congress

2472.1 Purpose and Scope

The regulations contained in this section implement the provisions of chapter 71 as applied by section 220 of the CAA to covered employees in the following employing offices:

(A) the personal office of any member of the House of Representatives or of any Senator;

(B) a standing select, special, permanent, temporary, or other committee of the Senate or House of Representatives, or a joint committee of Congress;

(C) the Office of the Vice President (as President of the Senate), the office of the President pro tempore of the Senate, the Office of the Majority Leader of the Senate, the Office of the Minority Leader of the Senate, the Office of the Majority Whip of the Senate, the Office of the Minority Whip of the Senate, the Conference of the Majority of the Senate, the Conference of the Minority of the Senate, the Office of the Secretary of the Conference of the Majority of the Senate, the Office of the Secretary of the Conference of the Minority of the Senate, the Office of the Secretary for the Majority of the Senate, the Office of the Secretary for the Minority of the Senate, the Majority Policy Committee of the Senate, the Minority Policy Committee of the Senate, and the following offices within the Office of the Secretary of the Senate: Offices of the Parliamentarian, Bill Clerk, Legislative Clerk, Journal Clerk, Executive Clerk, Enrolling Clerk, Official Reporters of Debate, Daily Digest, Printing Services, Captioning Services, and Senate Chief Counsel for Employment;

(D) the Office of the Speaker of the House of Representatives, the Office of the Majority Leader of the House of Representatives, the Office of the Minority Leader of the House of Representatives, the Offices of the Chief Deputy Majority Whips, the Offices of the Chief Deputy Minority Whips, and the following offices within the Office of the Clerk of the House of Representatives: Offices of Legislative Operations, Official Reporters of Debate, Official Reporters to Committees, Printing Services, and Legislative Information;

(E) the Office of the Legislative Counsel of the Senate, the Office of the Senate Legal Counsel, the Office of the Legislative Counsel of the House of Representatives, the Office of the General Counsel of the House of Representatives, the Office of the Parliamentarian of the House of Representatives, and the Office of the Law Revision Counsel;

(F) the offices of any caucus or party organization;

(G) the Congressional Budget Office, the Office of Technology Assessment, and the Office of Compliance; and

(H) the Executive Office of the Secretary of the Senate, the Office of Senate Security, the Senate Disbursing Office, the Administrative Office of the Sergeant at Arms of the Senate, the Office of the Majority Whip of the House of Representatives, the Office of the Minority Whip of the House of Representatives, the Office of House Employment Counsel, the Immediate Office of the Clerk of the House of Representatives, the Immediate Office of the Chief Administrative Officer of the House of Representatives, the Office of Legislative Computer Systems of the House of Representatives, the Office of Finance of the House of Representatives and the Immediate Office of the Sergeant at Arms of the House of Representatives.

2472.2 Application of Chapter 71.

(a) The requirements and exemptions of chapter 71 of title 5, United States Code, as made applicable by section 220 of the CAA, shall apply to covered employees who are employed in the offices listed in section H2472.1 in the same manner and to the same extent as those requirements and exemptions are applied to other covered employees.

(b) The regulations of the Office, as set forth at section 2420-29 and 2470-71, shall apply to the employing offices listed in section 2472.1, covered employees who are employed in those offices, and representatives of those employees.

COMMITTEE ON HOUSE ADMINISTRATION
MARCH 2, 2022 HEARING: "OVERSIGHT OF SECTION 220 OF THE CONGRESSIONAL ACCOUNTABILITY ACT:
IMPLEMENTING THE RIGHTS OF CONGRESSIONAL STAFF TO COLLECTIVELY BARGAIN"
MAJORITY QUESTIONS FOR THE RECORD

EDUCATION AND OUTREACH

1. **You testified that the Office of Congressional Workplace Rights (OCWR) does not currently have a handbook or guidance on unionization other than a frequently asked questions (FAQ) section on your website. Does OCWR have plans to craft a handbook or other guidance for staff and Members?**

   Yes. The FAQ recently published on the website is designed to function as a comprehensive handbook for representation issues and related OCWR procedures. It provides basic information, but also provides links to regulations, forms, and other information that is very comprehensive regarding representation petitions. In addition, the Substantive Regulations on Collective Bargaining and Unionization, also available on the OCWR website, provide detailed information on the procedures and processes involved in unionization. As required by the CAA, these substantive regulations are basically the same as the regulations issued by the Federal Labor Relations Authority (FLRA) for the provisions of the Federal Service Labor-Management Relations Statute (FSLMRS) incorporated into Section 220 of the CAA; consequently, most of the guidance provided by the FLRA is useful for legislative branch employing offices and employees. We plan to publish another more comprehensive FAQ on the Duty to Bargain and the Scope of Bargaining that will cover procedures, regulations, and other information regarding bargaining issues. We will also be updating our live and virtual training programs to include information on unionization and collective bargaining.

2. **What kind of best practices do you recommend for Members who have staff who want to start a union in their office? What are some examples of potential unfair labor practices you could envision in a Congressional office environment?**

   Obviously, Members want to avoid engaging in conduct that might be considered an unfair labor practice. During organizing campaigns, the most common unfair labor practices are those set out in 5 U.S.C. § 7116(a)(1)-(3), which make it unlawful to:

   > (1) interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
   > (2) encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment; or

(3) sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status.

Illegal conduct during organizing campaigns could include:

- Threatening, coercing, disciplining, firing, rewarding or promoting employee(s) based on their organizing activity.
- Promising any changes in conditions of employment, for engaging or not engaging in organizing activity.
- Questioning employees about their support or lack of support for a union.
- Establishing and controlling a "company union."
- Recognizing a union after you are notified that another union has filed a valid election petition. (If your employees are already represented, however, you must continue to recognize and bargain with the incumbent union – unless it has lost majority status – even after a rival union files a valid petition.)
- Recognizing, bargaining with, or executing an agreement with a union whose majority status you helped it obtain through unlawful assistance.
- Engaging in conduct that benefits one union at the expense of another, or that reasonably tends to coerce employees to support or join a union. (You may, however, tell your employees that you favor a particular union.)
- Requiring or encouraging employees to sign dues checkoff authorizations. (You may, however, give employees dues checkoff authorization forms.)
- Remitting dues to a union absent a validly executed dues checkoff authorization.
- Failing to honor a timely revocation of a dues checkoff authorization.

3. Why did OCWR not list unionization as an issue under your biennial section 102b report also known as OCWR's recommendations to Congress report? Has OCWR ever listed unionization as a recommendation in any of your written reports? If not, why?

Since there may be some confusion in this area, please let me clarify. The Board's decision to adopt regulations under Section 220(e) is not a recommendation that Congress be unionized. The decision to allow unionization in Congress was made by Congress in 1995 when it passed the CAA. Section 220(e)(1) merely requires the Board to adopt regulations that, absent good cause, must be the same as the unionization regulations issued by the FLRA. This is what was done in 1996 and this is what the current Board reviewed again recently. These regulations are mostly procedural: they primarily explain the procedures used to resolve the issues surrounding unionization and collective bargaining.

Section 102(b) of the CAA, 2 U.S.C. § 1302(b), requires the Board to biennially submit a report containing recommendations regarding the applicability of federal workplace rights, safety and health, and public access laws and regulations to the legislative branch.

My understanding is that the Board's 102(b) Reports typically have reported on the status of regulations when it has adopted new regulations or amended existing regulations in response to substantive changes in the underlying laws or regulations implementing those laws, such as when the Board adopted amended regulations in order to implement changes to the Family and Medical Leave Act provisions of the CAA in 2016 and 2019. Since 1996, when the predecessor Board adopted the regulations under section 220(e) of the CAA and transmitted them to Congress with a recommendation that Congress approve them, there have been no significant intervening changes in the FSLMRS or associated regulations.

The 1996 Board's 220(d) regulations were approved by Congress and, once issued, provided procedures for unionization among many employing offices in the legislative branch. My understanding is that, since 1996, the Board has never been asked by any stakeholder to review or reconsider the 220(e) regulations with respect to unionization of Member offices and Committees. Moreover, until recently, no stakeholder has asked the Board about the status of the 1996 Board's 220(e) regulations. When asked, the current Board merely recommended that the 1996 Board's 220(e) regulations be approved.

PROCESS AND STRUCTURE

1. **Can you describe the process for unionization in a Member's personal office versus a Committee?**

   The basic process is the same. The labor union would need to file a representation petition specifying who would be in the proposed bargaining unit and show that at least 30% of the proposed bargaining unit members want an election. The showing of interest can be done confidentially so that the employing office is not told by the OCWR who is interested in a union election. The only difference for a Committee is that, because management of Committees is bifurcated by party affiliation, any proposed bargaining unit might be limited to employees under the same management, which could mean there would be at least two separate bargaining units, with each limited by party affiliation.

2. **Do you have an estimate on how long it would take a personal office to establish a union? For other legislative branch agencies that have unionized, what has been the timeline?**

   The length of time is largely determined by the size of the unit (a larger unit may take longer to reach a 30% showing of interest), the strength of the organizing effort, the complexity of legal problems identified, and whether or how vigorously an employing office contests the unionization effort. If there are no issues concerning the showing of interest, who will be in the bargaining unit, or election procedures, the process for certifying the labor union as the exclusive representative for the bargaining unit could happen fairly quickly – perhaps in as little as 30 days after an election petition is filed. On

the other hand, if all of these issues are litigated using the existing procedures, the process could take much longer.

3. **Since Rep. Andy Levin introduced H.Res. 915, has OCWR reviewed how they would possibly handle the volume of offices who want to unionize?**
   a. **What processes would OCWR put in place to ensure timeliness in processing petitions if presented with a large volume?**

   Yes, we have reviewed how we would handle an increase in volume. The statute and the regulations give the OCWR flexibility regarding how to handle petitions. While petitions are directed to the OCWR Board, the regulations allow the Executive Director to act on behalf of the Board in certain matters and also allow the use of the General Counsel and hearing officers to investigate and resolve issues that may arise out of representation petitions. We are revising our internal procedures to allow for expeditious processing of petitions by the Executive Director when there are few or no contested issues. This includes dividing the investigation of contested petitions among staff from the offices of the Executive Director and General Counsel, with referral to hearing officers when factual issues need to be resolved, and expeditious review by the OCWR Board of Directors. Consistent with the goals set forth in our strategic plan, when investigating petitions, we will encourage parties to resolve pending issues amongst themselves and narrow the issues that must be resolved by a neutral party through adjudication.

4. **How many employees are employed with the Office of Congressional Workplace Rights?**
   a. **Is the Executive Director of OCWR in charge of overseeing each petition, and election up until the certification process?**
   b. **How many union petitions has OCWR been responsible for overseeing from petition to certification?**

   There are 31 FTEs in the OCWR. Yes, generally the Executive Director, acting on behalf of the Board, is in charge of overseeing the petition and certification process. Under the statute and regulations, the Executive Director can obtain assistance from the General Counsel and hearing officers to investigate and resolve issues. The OCWR has overseen approximately twenty petitions from petition to certification.

5. **Does your office have the personnel and resources to handle the high potential case load of unionization petitions from Congressional offices, committees, and leadership staff?**
   a. **Is there an estimate on how much additional funding and/or personnel your office may need to carry out its functions?**
   b. **How soon would it take OCWR to scale up on personnel to cover unionization of the House Congressional workforce?**

   If there is a large number of unionization petitions filed at or near the same time, it would be extremely challenging for the office to handle these expeditiously with existing

personnel and resources, particularly if there are many representation issues that need to be investigated and resolved. Because there are likely to be renewed unionization efforts at the beginning of each Congress, funding and personnel would need to be increased to meet these demands. We have tentatively estimated that we would need another $500,000.00 in funding and two additional FTEs to adequately handle this increased case load. We believe that we would need 60 days to scale up on personnel to cover unionization of the House Congressional workforce.

6. **In what ways can Congress support the needs of OCWR during their increased capacity if a resolution passes the House?**

   Congress can encourage management and labor to resolve issues themselves and use mediation rather than litigation to help settle disputes. While there are times when parties need an outside neutral party to impose a solution upon them, the keys to good labor-management relations are often good communication between the parties, understanding and respect for each party's position, and a willingness to compromise. Fostering this attitude will help prevent the OCWR from being overwhelmed with cases demanding resolution of issues that the parties themselves should be able to address and resolve, and may lead to more productive and less contentious labor-management relationships, should employees ultimately choose to be represented by an exclusive bargaining representative.

   In addition, Congress can support the efforts of the OCWR and other legislative branch offices by adopting the recommendation of the Select Committee on the Modernization of Congress with respect to delinking OCWR staff pay from Member pay. Currently, the pay of all OCWR officers (Executive Director, two Deputy Executive Directors, and General Counsel), as well as OCWR Board members, is linked to Member pay since the salary cap is determined by the salary of the officers of the Senate and the House (which in turn is linked to Member pay). To effectively and efficiently implement Section 220, both Congress and the OCWR will need to recruit and retain experienced attorneys with both the necessary legal and managerial experience. This may become increasingly difficult, given the current salary caps that have not been raised over many years.

7. **The CAA provides that, "It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by 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." In OCWR's view, is activity by a covered employee to advocate for the passage of regulations like those recommended by OCWR under Section 220 protected activity under this provision? Is activity by a covered employee to advocate either for organizing in either in their office specifically or for House employees to organize in general protected activity under this provision, absent adoption by the House of any other implementing regulations?**

Since these are questions that may come before me as General Counsel when investigating unfair labor practice charges and may come before the OCWR Board in a case, it would be inappropriate for me to answer them. Relevant legal issues that will need to be resolved include whether advocating for the approval of Section 220(e) regulations by a covered employee constitutes "opposing any practice made unlawful" by the CAA or "participating in [an] other proceeding" under the CAA. In deciding these questions, there would also have to be a determination regarding who is a "covered employee." While "any employee of the House of Representatives" is a "covered employee" within the meaning of Section 101(a)(3) of the CAA, the employees of the offices listed in Section 220(e)(2) do not have the rights specified in Section 220(a) and (b) until the effective date of the regulations required by Section 220(e)(1). It is an unresolved legal issue whether an employee of these offices is a "covered employee" with respect to the rights provided by Section 220 without the issuance of the implementing regulations.

8. **The February 22, 2022, FAQ, "Labor-Management Relations in the Legislative Branch," states that, "Under the statute, no employee can be forced to join a union. All employees are free to join, or not join, a union without fear of penalty or reprisal." The FAQ also says clearly that "reprisal for engaging in organizing activity … constitutes an unfair labor practice (ULP)," which can form the basis of a ULP charge. In OCWR's view, under the CAA alone – without House passage of the regulations recommended by OCWR – are House employees who advocate for organizing activity protected against retaliation or reprisal for engaging in that activity?**

   Please see my answer to Question 7. For the reasons specified in this answer, it is an unresolved legal issue whether, without House passage of the regulations adopted by the OCWR Board, attempts to seek legal protection for this type of advocacy through the unfair labor practices process would be successful.

COLLECTIVE BARGAINING

1. **The Congressional Accountability Act (CAA) extends a provision of the Federal Service Labor-Management Relations Statute stating that a union can bargain over terms and conditions of employment that are not set by statue. While some federal employees cannot bargain over their salary, as it is determined by the GS scale, congressional staff salaries are not set in statue. Therefore, can a union bargain over staff salaries provided that such bargaining is within the limits of the MRA? Or would they be barred since salaries come from a budget set by the legislative branch appropriation bill?**

   These types of categorical questions are difficult for me to answer, both because they are questions that may come before the OCWR it its quasi-judicial role and because the answer to a negotiability question is dependent upon the particular language of a specific proposal. What I can tell you is how questions of this nature would be decided under the

procedures embodied in the regulations. Collective bargaining involves an exchange of specific proposals. As a general matter, there is no duty to bargain over proposals that are contrary to law, a government-wide regulation, or an agency rule for which there is a compelling need or that would unduly interfere with the exercise of a management right. Negotiability questions can come before the OCWR in one of three ways. First, a party can file an unfair labor practice charge if the other party refuses to bargain over a proposal that it is clearly negotiable. Second, if the parties cannot decide whether a proposal is negotiable, either party can file a negotiability petition with the OCWR, and the OCWR Board will determine whether the proposal is negotiable. Finally, if a party refuses to comply with a provision in a collective bargaining agreement because it is allegedly contrary to law, regulation, or agency rule, or in conflict with the management rights granted by statute, the other party may use the grievance procedure in the collective bargaining agreement or file an unfair labor practice charge, and those proceedings will eventually determine whether the provision is enforceable.

This being said, there is no referee at the bargaining table telling the parties what they can and cannot bargain over. A collective bargaining agreement can contain provisions that may ultimately be found to be unenforceable, but the issue of enforceability may never arise because both parties abide by the agreement. When a labor union makes a proposal it will usually consider whether it can compel management to bargain over it (i.e., whether there is a duty to bargain because it is not contrary to law or does not abrogate a management right) and whether the provision would be enforceable if management agreed to it. For various reasons, both parties may agree to provisions that may not ultimately be enforceable.

So, to get back to your question, it is probably accurate to say that there is more opportunity for a labor union to draft an enforceable proposal relating to salary that is not contrary to law when there are no relevant laws setting salary scales. While setting salary is not one of the management rights specifically enumerated in 5 U.S.C. § 7106(a), the right to determine budget, organization, and number of employees is protected. Consequently, a proposal relating to salary that unduly interferes with management's right to determine budget, organization, or number of employees would not be negotiable. On the other hand, a proposal relating to salary that involves procedures which management officials will observe in exercising a management right or appropriate arrangements for employees adversely affected by the exercise of a management right would probably be negotiable under 5 U.S.C. § 7106(b)(2) and (b)(3). In addition, at the election of management, the parties can negotiate the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or about the technology, methods, and means of performing work. See 5 U.S.C. § 7106(b)(1).

2. **During the hearing, you stated that staff who decide to unionize cannot collectively bargain over their at-will status. Does a union prevent staff from collectively bargaining to reduce working long hours or any provisions in the CAA?**

For the reasons identified in my answer to the last question, this type of categorical question is difficult for me to answer because the negotiability of a specific proposal is dependent upon the language of the proposal. Under 5 U.S.C. § 7106(a)(2)(A), management has the right, in accordance with applicable laws, to "hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees." As noted previously, this does not preclude negotiation over procedures which management officials will observe in exercising a management right or appropriate arrangements for employees adversely affected by the exercise of a management right.

So, in answer to your first question, it is possible for the parties to agree to a provision that contains procedures or appropriate arrangements that may affect the "at will" status of employees in the sense that management would have to utilize certain procedures and adhere to certain arrangements when discharging an employee. Existing federal-sector collective bargaining agreements do contain provisions that are written in such a way that progressive discipline, advisory panels, or consideration of certain facts and circumstances are required when deciding upon the appropriate penalty for a workplace offense, and these provisions have been found to be consistent with the management right to discipline and discharge employees.

Your second question appears to ask whether the parties can negotiate over the length of the work day or over provisions covered by the CAA. Under 5 U.S.C. § 7106(b)(1), at the election of the employing office, the parties can negotiate over the "tour of duty" which is generally recognized to include hours of work. The parties can also negotiate over appropriate arrangements for employees who are required to work long hours. When allowed to do so, parties have reached agreements over such things as core hours, non-varying work schedules, arrangements regarding the setting or rotation of overtime, flex schedules, or other methods for guaranteeing a sustainable work schedule. Regarding your question concerning provisions covered by the CAA, the parties cannot agree to a provision that would be contrary to the CAA, but they can agree to incorporate the protections of the CAA into the Collective Bargaining Agreement, thereby allowing use of the grievance procedure to resolve disputes covered by the CAA such as violations of overtime and discrimination laws.

3. **What are some examples of potential unfair labor practices you could envision in a Congressional office environment?**

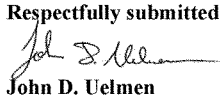
Please see my answer to question 2 under Education and Outreach for a list of potential unfair labor practices. Other potential unfair labor practices could include:

- Disciplining or discriminating against an employee because the employee has filed a complaint, affidavit or petition, or has given information or testimony.
- Refusing to consult or negotiate in good faith with a labor organization.
- Failing or refusing to cooperate in impasse procedures and impasse decisions.
- Failing to participate in arbitration proceedings or comply with arbitration awards as required by law and the collective bargaining agreement.

4. **When you discussed management roles in committees for unionization purposes you stated that undoubtedly this would mean senior staff. What is your definition of senior staff?**

Senior staff in this context refers to any staffer who meets the definition of "supervisor" or "management official" within the meaning of the statute. The OCWR's Substantive Regulations on Collective Bargaining and Unionization defines "Supervisor" as an individual having the authority to "to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment[.]" Substantive Regulations at §2421.3(i). This is the same definition provided in 5 U.S.C. § 7103(a)(10). Our regulations define "Management official" as an individual whose duties and responsibilities "require or authorize the individual to formulate, determine, or influence the policies" of the office. Substantive Regulations at §2421.3(j); *see also* 5 U.S.C. § 7103(a)(11). Who is senior staff will vary from office to office. In some Member offices, senior staff might only consist of the Member and the Staff Director. In other offices, where management decisions regarding conditions of employment and the policies of the office are disbursed among other staffers, senior staff would include all who are making these decisions. In addition, it should be noted that management includes anyone who is a "confidential employee" which means "an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations." Substantive Regulations at §2421.3(l); *see also* 5 U.S.C. § 7103(a)(13). So, for example, an employee of the office who bargains on behalf of the office during negotiations would be considered management even if this employee has no managerial responsibilities, since this individual has access to confidential information about management's strategies and bargaining positions.

Respectfully submitted this 18th day of March, 2022.



John D. Uelmen
General Counsel
Office of Congressional Workplace Rights

COMMITTEE ON HOUSE ADMINISTRATION
MARCH 2, 2022 HEARING: "OVERSIGHT OF SECTION 220 OF THE CONGRESSIONAL ACCOUNTABILITY ACT:
IMPLEMENTING THE RIGHTS OF CONGRESSIONAL STAFF TO COLLECTIVELY BARGAIN"
MAJORITY QUESTIONS FOR THE RECORD

1. What information did you rely on to suggest that Members may find trouble terminating employees, or potentially be forced to create standard schedules for staff? Did you rely on information about private sector unions or the Executive branch?

   Unionization negotiations typically include the number of hours and when employees will work.

2. During your time as a congressional staffer were you familiar with the Office of Compliance, now the Office of Workplace Rights (OCWR)?
   a. If so, did you ever consult OCWR about any potential concerns over the ability of Congressional staff to organize and bargain?

   Yes, I was aware of the Office of Compliance. As is the case now, staff were not able to unionize, nor was unionization considered practical, during my time on the Hill.

3. Your testimony suggests that, "the main leverage of a legislative staff union would be threatening the legislative process." You suggest that employees would be able to engage in work slowdowns or "sick outs," for example. The 1996 Notice of Proposed Rulemaking issued by OCWR (then OOC) made clear that strikes and slowdowns would be prohibited. Do you disagree? Do you believe the regulations issued by OCWR provide insufficient protection against these activities?

   I am concerned that unions would use their leverage to influence the legislative process, particularly when the legislation could impact the unions. I do not believe the regulations provide protection against unions having undue influence over Members and the legislative process.

4. Do you have any expertise in employment law or unions in general that help shaped your testimony?

   I testified as a former congressional staffer who served in the House and Senate for 24 years. I know firsthand the challenges that congressional staff face. I also know that outside organizations, such as national unions, want to ensure their interests are considered in the legislative process.

House Votes To Extend Laws to Hill; Bill Gives Labor Rights To Congressional Staff; Senate Passage Awaited

Cooper, Kenneth J . The Washington Post (pre-1997 Fulltext) ; Washington, D.C. [Washington, D.C]. 11 Aug 1994: a01.

ABSTRACT (ABSTRACT)

The [Dick Swett]-[Christopher Shays] bill would skirt the separation of powers issue by putting enforcement in the hands of a new Office of Compliance and the federal courts. Swett said that the office would function as an Equal Employment Opportunity Commission for Congress and be more independent than existing House and Senate fair employment practices committees.

The four members who voted against the bill were Reps. William "Bill" Clay (D-Mo.), Barbara-Rose Collins (D-Mich.), William D. Ford (D-Mich.) and Henry B. Gonzalez (D-Tex.).

CHART CAPTION: MAKING CONGRESS CONFORM The bill specifies that the following laws would apply to Congress: - Fair Labor Standards Act - Title VII of the Civil Rights Act of 1964, which prohibits employer discrimination based on disability or race - Americans With Disabilities Act - Age Discrimination in Employment Act - Family and Medical Leave Act - Occupational Safety and Health Act - Federal Labor Management Relations Act - Employee Polygraph Protection Act - Worker Adjustment and Retraining Notification Act (plant closing notification) - Rehabilitation Act of 1973

FULL TEXT

Responding to political pressure from radio talk show hosts, Ross Perot supporters and freshmen lawmakers, the House yesterday overwhelmingly approved bipartisan legislation that would give employees of Congress the same rights under labor laws as workers in the private sector.

More than 35,000 employees of Congress and its support agencies would get the legal right to organize unions, file discrimination lawsuits and work in safe environments under legislation to make 10 labor laws fully applicable to the legislative branch. The House passed the bill, 427 to 4, and sent it to the Senate, where supporters expect passage despite resistance from some senior members.

"What's good for the country ought to be good for the government," declared Rep. Dick Swett (D-N.H.), who cosponsored the bill with Rep. Christopher Shays (R-Conn.).

Congress has at least partially exempted itself from the 10 laws - including the Fair Labor Standards Act of 1938, the Civil Rights Act of 1964 and the Occupational Safety and Health Act of 1970 - to avoid politically inspired enforcement actions from executive branch agencies in violation of the constitutional separation of powers.

But constitutional arguments have not impressed congressional critics such as talk show hosts and members of Perot's United We Stand America who argue that the exemptions symbolize Congress's arrogance and explain its alleged insensitivity to regulatory burdens imposed on business. Congressional compliance with labor laws was one of the few proposals Democratic as well as Republican House freshmen endorsed last year in their separate reform packages.

In recent years, the House and Senate have taken steps toward giving their workers more rights but neither has voted on legislation to grant employee protections under as many laws.

The political appeal of the compliance legislation, formally known as the Congressional Accountability Act, has

grown so obvious this election year that Rep. Lee H. Hamilton (D-Ind.) last month predicted that no one would vote against the bill. Hamilton, who was chairman of the Joint Committee on the Organization of Congress, worried that other reforms the bipartisan panel favored would go nowhere without the compliance bill as a "sweetener" in the package.

The Swett-Shays bill would skirt the separation of powers issue by putting enforcement in the hands of a new Office of Compliance and the federal courts. Swett said that the office would function as an Equal Employment Opportunity Commission for Congress and be more independent than existing House and Senate fair employment practices committees.

Aggrieved employees could file lawsuits directly in federal district court or, after a three-step administration procedure, with the U.S. Court of Appeals for the Federal Circuit here, which handles appeals from the Merit Systems Protection Board and other specialized government cases.

Currently, House employees have no such recourse in the courts, but Senate employees can sue under four anti-discrimination laws covering race, sex, age and disability claims.

House Speaker Thomas S. Foley (D-Wash.) said the legislation represents "some treading on the principle of separation of powers" but was acceptable because "it indicates Congress is determined to apply to itself the laws we apply to the private sector in every possible way that is relevant and important."

Congress has a reputation of being a workplace where employees who believed they had suffered discrimination or unfair treatment did not dare or bother to complain because they could not prevail. Office staff feared merely making a formal complaint would make it impossible to get another job on Capitol Hill, and recently established grievance procedures rarely have been used. The frequency of arbitrary treatment has caused some employees to call Congress "the last plantation."

The compliance legislation, if enacted into law, would probably have more impact on the blue-collar workers who maintain and secure the Capitol complex than the college-educated congressional aides.

A local labor leader who represents 164 workers in House restaurants, which a private contractor operates, predicted that Capitol Police officers, House Post Office employees and other blue-collar workers would form unions to bargain on their behalf.

"If they get that {right}, there's going to be a mass attempt to organize on the Hill," said Minor Christian, president of Local 32 of the Food and Beverage Workers Union. "We're the only union up there right now."

Christian suggested enacting the legislation would end the influence of political patronage - already on its way out - and protect workers from arbitrary demands. "They can't say, `You're going to do it because I am a congressman,' " he said.

Besides the House and Senate, the compliance legislation would cover the Library of Congress, Government Printing Office, General Accounting Office, Architect of the Capitol, Office of Technology Assessment and other legislative agencies.

The four members who voted against the bill were Reps. William "Bill" Clay (D-Mo.), Barbara-Rose Collins (D-Mich.), William D. Ford (D-Mich.) and Henry B. Gonzalez (D-Tex.).

"I'm sick and tired of them bashing the Congress," said Collins. "We work hard, and they keep bringing up bills like we're loafers or pikers or feeding at the trough. I'm just tired of it."

Illustration

CHART CAPTION: MAKING CONGRESS CONFORM The bill specifies that the following laws would apply to Congress: - Fair Labor Standards Act - Title VII of the Civil Rights Act of 1964, which prohibits employer discrimination based on disability or race - Americans With Disabilities Act - Age Discrimination in Employment Act - Family and Medical Leave Act - Occupational Safety and Health Act - Federal Labor Management Relations Act - Employee Polygraph Protection Act - Worker Adjustment and Retraining Notification Act (plant closing notification) - Rehabilitation Act of 1973

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Congress, a Soon-to-Be Law Says, Must Now Do Unto Itself as It ...
By NEIL A. LEWIS Special to The New York Times
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Congress, a Soon-to-Be Law Says, Must Now Do Unto Itself as It Already Does Unto Others

By NEIL A. LEWIS
Special to The New York Times

WASHINGTON, Jan. 8 — For decades Capitol Hill has often been derided as "The Last Plantation," a reference to legislators' habits of exempting themselves from many of the laws on civil rights, workers' safety and employment that are enacted for the rest of the nation.

But soon, under a measure passed quickly by the House last week and likely to be voted on by the Senate early this week, that practice may end. Still, it is unclear if the changes encompassed in the Congressional Accountability Act — the first item in the House Republicans' "Contract With America" — will make much of a difference to the approximately 40,000 people on Capitol Hill.

The proposal, if enacted into law as is likely, would extend 10 statutes to the Senate and House, including the Civil Rights Act, the Occupational Safety and Health Act and the Fair Labor Standards Act of 1938, which sets minimum wages and limits working hours.

The measure should have at the least a symbolic effect, making Congress seem less distant from the strictures it places on ordinary Americans. Representative Christopher Shays, a Connecticut Republican who is a principal sponsor of the House measure, said it should make lawmakers more sensitive to the effect of the bills they approve if they have to live by them as well.

"We will write better laws because of this," he said in a recent interview.

Yet in the view of some Capitol Hill employees and lawyers, it may be little more than symbolic. In recent years, Congress had already extended many of these laws to cover itself. Although it is in reality no longer the plantation it once was, it has still labored under the sobriquet.

The civil rights laws, for example, have explicitly applied to the House and the Senate since 1991 and in more ambiguous form for years before that. One significant change in the new proposal is that House employees who bring civil rights complaints on the basis of race or sex, for example, would be able to appeal a losing judgment to a Federal Court. Senate employees already have that right.

Karen Rose, a longtime staff aide who is a member of the Capitol Hill Women's Political Caucus, a bipartisan group addressing issues like sexual discrimination and harassment, said that women who worked for members of Congress had long had a mechanism to tender complaints.

"The problem has always been, there is a great disincentive for women to press their complaints," Ms. Rose said.

Will a new law improve life for the Hill's employees?

Janina Jaruzelski, a lawyer on Capitol Hill who is also involved with the women's caucus, said that the nature of Congress generally discouraged women from complaints.

"Anybody who wants to have a long-term career on the Hill or in politics in general has a strong disincentive to file such a complaint," she said. "A person who did that would be dead professionally. The reason is that Congress is an extraordinarily insular place."

Still, Judith Lichtman, president of the Women's Legal Defense Fund, hailed the impending change. Ms. Lichtman said Congress had a history of members' deviously pushing to include such provisions in civil rights legislation in the belief that the measures would would ultimately be defeated.

One area in which the new proposal may make a tangible difference is in extending the protections of the Occupational Safety and Health Act to Congress, which has never extended those rules to itself. A 1992 study found numerous violations of the codes that the agency imposes on private businesses and the executive branch.

The study by the General Accounting Office, an arm of Congress, found "work conditions and practices that represented serious hazards." The accounting office said that among the hazards were lack of proper fire sprinklers, excessive noise levels, exposed blades on power saws and poor ventilation where noxious chemicals were used.

Those findings underscore the fact that there are two different universes in Congress. One is the professional staff, the white- collar workers who serve in members' and committee offices. The other includes workers in the cafeterias, the carpenter shops and the folding room, where documents are sorted.

"Traditionally, one doesn't find office workers at risk," said Cheryl Brolin, a spokeswoman for the Occupational Safety and Health Administration. Rather, it is the blue-collar workers who could benefit from enforcement of such regulations. Ms. Brolin said that complaints common to white-collar workers on Capitol Hill — cramped working space, repetitive stress injuries from computer terminals and stale air — are typically not covered by safety regulations, although the agency is considering moving into that areas.

Under the proposed law, the enforcement of the 10 statutes would not be left to Federal agencies because they are part of the executive branch. That could raise questions concerning the separation of powers, that is, one branch of Government having authority over another. So instead of the Labor Department enforcing OSHA regulations or the Equal Employment Opportunity Commission enforcing sexual harassment guidelines, Congress would set up its own Office of Compliance.

Any challenges from that office could be taken to the courts as they are now from executive agencies. Although the courts are yet another equal branch of Government, they have long been recognized as having the authority to interpret the law and decide controversies involving the other branches.

If the law is enacted, the Congressional Budget Office has estimated that it would cost $1 million initially and from $4 million to $5 million annually after that.

Some of that cost would be to insure compliance with the Fair Labor Standards Act, which generally mandates time-and-a-half pay for overtime beyond 40½ hours a week. But most employees who work the long hours in Congressional offices are deemed professionals who are not eligible for overtime, the Budget Office has estimated. In fact, the House has adopted the Fair Labor Standards Act by rule and few staff aides are eligible for overtime.

Another area that could prove tricky is the issue of whether people are paid at an equal rate for equal work as required by Title VII of the Civil Rights Act

Rick Shapiro, the executive director of the Congressional Management Foundation, a study group financed by private foundations, said annual studies done by his office showed significant disparities in the pay scales for men and women and minorities. Even when the figures are corrected to account for experience, age and education, they show women earning less than men, and minorities less than their white counterparts.

Women account for 39 percent of the four top-paying jobs in House offices: press secretary, administrative assistant, legislative director and district director. Minorities account for 11.6 percent of such jobs, according to the studies.

95-557 A

CRS Report for Congress

CONGRESSIONAL ACCOUNTABILITY ACT OF 1995

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May 2, 1995

Congressional Research Service · The Library of Congress

CONGRESSIONAL ACCOUNTABILITY ACT OF 1995

SUMMARY

In the first two weeks of the 104th Congress, the House and Senate completed action on the Congressional Accountability Act of 1995 (CAA) (Pub. L. No. 104-1, 109 Stat. 3) and sent the measure to President Clinton, who quickly signed the bill into law. The act applies eleven civil rights, labor, and workplace laws to employees of the legislative branch of the federal government, and establishes remedies and procedures for aggrieved employees in instances of violations of the laws. Some of the eleven laws had previously been extended to certain employees of the legislative branch, but the CAA expanded the scope of employees covered by the laws and granted, as specified in the act, a right of judicial review to all covered employees. Enforcement authority under the CAA is vested in the Office of Compliance, to be headed by a five-member Board of Directors.

This report provides an overview of the CAA, the Office of Compliance, the administrative and judicial dispute-resolution procedures under the act, and the provisions of the laws applied to the legislative branch.

The CAA states that "the following laws shall apply, as prescribed by this Act, to the legislative branch of the Federal Government": Fair Labor Standards Act of 1938; Title VII of the Civil Rights Act of 1964; Americans with Disabilities Act of 1990; Age Discrimination in Employment Act of 1967; Family and Medical Leave Act of 1993; Occupational Safety and Health Act of 1970; Chapter 71 of Title 5, U.S. Code (relating to federal service labor-management relations); Employee Polygraph Protection Act of 1988; Worker Adjustment and Retraining Notification Act; Rehabilitation Act of 1973; and Chapter 43 of title 38, U.S. Code (relating to veterans' employment and reemployment). The act also calls for a study by the Board of provisions of federal law relating to the terms and conditions of employment and access to public services and accommodations. The Board is to recommend to Congress whether provisions that are inapplicable to the legislative branch should be amended to encompass the legislative branch.

The rights under the various laws extended to the legislative branch become effective one year after the date of enactment of the CAA (*i.e.*, January 23, 1996), except the Federal Labor-Management Relations Statute, which becomes effective on October 1, 1996, and the Occupational Safety and Health Act and the public services and accommodations provisions of the Americans with Disabilities Act, which become effective on January 1, 1997. Some of the laws applied by the CAA were previously extended to the House and Senate, and transition provisions of the CAA govern the procedure for some claims that may arise prior to the date that certain laws are applied pursuant to the terms of the CAA.

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CONGRESSIONAL ACCOUNTABILITY ACT OF 1995

INTRODUCTION

In the first two weeks of the 104th Congress, the House and Senate completed action on the Congressional Accountability Act of 1995 (CAA) and sent the measure to President Clinton, who quickly signed the bill into law.[1] The act applies eleven civil rights, labor, and workplace laws to employees of the legislative branch of the federal government,[2] and establishes remedies and procedures for aggrieved employees in instances of violations of the laws.

Some of the eleven laws had previously been extended to certain employees of the legislative branch, but the CAA expanded the scope of employees covered by the laws and granted, as specified in the act, a right of judicial review to all covered employees. Enforcement authority under the CAA is vested in the Office of Compliance (Office), to be headed by a five-member Board of Directors (Board).

This report provides an overview of the CAA, the Office, the administrative and judicial dispute-resolution procedures under the act, and the provisions of the laws applied to the legislative branch.

LAWS APPLIED

The CAA states that "the following laws shall apply, as prescribed by this Act, to the legislative branch of the Federal Government":

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[1] S. 2, 104th Cong., Pub. L. No. 104-1, 109 Stat. 3 (1995). The measure was approved by the President on January 23, 1995. In order to obtain prompt passage, the legislation was not referred to committee in either the House or the Senate, and thus the legislative history is limited to the floor debate in both chambers. However, Senator Grassley, the bill's sponsor, inserted in the *Congressional Record* a detailed section-by-section analysis of the measure which not only summarizes the bill but offers guidance on its intended interpretation. 141 *Cong. Rec.* S622-31 (daily ed. Jan. 9, 1995)[hereafter, Grassley section-by-section analysis]. Senator Roth, the chairman of the Senate Governmental Affairs Committee, which has jurisdiction over such measures, explained that S. 2 was a "modified version" of H.R. 4822, 103rd Cong., as reported by the Governmental Affairs Committee (S. Rept. No. 103-397, 103rd Cong., 2d Sess. (1994)). 141 *Cong. Rec.* S475 (daily ed. Jan. 5, 1995).

[2] Section 505 of the CAA calls for a study by the Judicial Conference of the United States on the application of the same laws to the judicial branch of the federal government.

- Fair Labor Standards Act of 1938 (FLSA)
- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act of 1990 (ADA)
- Age Discrimination in Employment Act of 1967 (ADEA)
- Family and Medical Leave Act of 1993 (FMLA)
- Occupational Safety and Health Act of 1970 (OSHA)
- Chapter 71 of Title 5, U.S. Code (relating to federal service labor-management relations)
- Employee Polygraph Protection Act of 1988 (EPPA)
- Worker Adjustment and Retraining Notification Act (WARN)
- Rehabilitation Act of 1973
- Chapter 43 of title 38, U.S. Code (relating to veterans' employment and reemployment)[3]

The act also calls for a study by the Board of provisions of federal law relating to the terms and conditions of employment and access to public services and accommodations. The Board is to recommend to Congress whether provisions that are inapplicable to the legislative branch should be amended to encompass the legislative branch.[4]

EFFECTIVE DATE

The rights under the various laws extended to the legislative branch become effective one year after the date of enactment of the CAA[5] (*i.e.*, January 23, 1996), except the Federal Labor-Management Relations Statute, which becomes effective on October 1, 1996,[6] and OSHA[7] and the public services and accommodations provisions of the ADA,[8] which become effective on January 1,

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[3] CAA, § 102(a).

[4] *Id.*, § 102(b). The Grassley section-by-section analysis, *supra* note 1, 141 *Cong. Rec.* at S623, explains: "Thus, the Board will review laws already in existence at the time of enactment that are not addressed or fully addressed by this act, and will, in the future consider as well legislation enacted after the enactment of this act."

[5] CAA, §§ 201(d), 202(e)(1), 203(d)(1), 204(d)(1), 205(d)(1), 206(d)(1).

[6] *Id.*, § 220(f)(1). Regulations to be adopted to implement the Federal Labor-Management Relations Statute are to determine whether employees in certain offices (listed in § 220(e)(2)) are excluded from coverage because of a conflict of interest or because of Congress' constitutional responsibilities. *Id.*, § 220(e). With respect to covered employees in such offices, rights, protections, and remedies under the Federal Labor-Management Relations Statute shall be effective on the effective date of implementing regulations. *Id.*, § 220(f)(2).

[7] *Id.*, § 215(g)(1).

[8] *Id.*, § 210(h)(1).

1997.[9] Some of the laws applied by the CAA were previously extended to the House and Senate,[10] and transition provisions of the CAA govern the procedure for some claims that may arise prior to the date that certain laws are applied pursuant to the terms of the CAA.[11]

COVERED ENTITIES

Section 102(a) of the act states that the laws enumerated above "shall apply, as prescribed by this act, to the legislative branch of the Federal Government...." Title II details the rights, protections and remedies extended under the various laws to legislative branch employees. To determine the entities and employees subject to a particular law, it is necessary to consult the section in Title II of the act that governs the terms of the application of that law.

In delineating the scope of coverage, the provisions of Title II extending the laws to legislative branch entities refer repeatedly to "covered employees." That term means any employee[12] of the House of Representatives, the Senate, the Capitol Guide Service, the Capitol Police, the Congressional Budget Office, the

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[9] With regard to the General Accounting Office (GAO), the Government Printing Office (GPO), and the Library of Congress, a number of the laws applied by the CAA become effective one year after the transmission to Congress of a study, mandated by § 230 of the act, of the application of the various laws to these instrumentalities. See, *e.g.*, CAA, § 215(g)(2). The application of the laws pursuant to the CAA to GAO, GPO, and the Library of Congress is beyond the scope of this report. See note 17, *infra*.

[10] For an overview of the application of workplace laws to Congress prior to enactment of the CAA, see *Congress' Exemption from Selected Major Legislation: A Legal Analysis*, CRS Rept. No. 92-294 (Mar. 19, 1992).

[11] CAA, § 506(a). See also *id.*, § 506(b)(transition provisions for employees of the Architect of the Capitol); § 506(c)(transition provision relating to matters other than employment under § 509 of the ADA).

[12] "Employee" is defined to include an applicant for employment and a former employee. CAA, § 101(4).

Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance,[13] or the Office of Technology Assessment.[14] In outlining the scope of coverage, some of the sections in Title II also specifically provide for the application of the rights, protections, and responsibilities under certain laws to "employing offices,"[15] a term with a fixed meaning under the CAA[16] but which is specifically broadened by some sections of the act to include additional entities in the legislative branch.[17]

OFFICE OF COMPLIANCE

OFFICE ESTABLISHED

The act establishes the Office of Compliance "as an independent office within the legislative branch of the Federal Government...."[18] The Office is to

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[13] See text accompanying note 18, *infra*.

[14] CAA, § 101(3). The universe encompassed by the term "covered employees" may be narrowed by other provisions of the CAA and by regulations to be adopted by the Board. See *id.*, § 203(a)(2)(excluding interns from coverage under FLSA); § 220(e)(Board to issue regulations on manner and extent to which provisions of chapter 71 of Title 5, U.S. Code, relating to federal service labor-management relations, are to apply to covered employees in specified offices).

[15] See, *e.g.*, CAA, § 220(a), relating to federal service labor-management relations. Rights under the public services and accommodations provisions of the ADA are not limited to employees. Accordingly, the coverage of such provisions encompasses specified offices and entities, and is not limited to "employing offices." CAA, § 210(a).

[16] "Employing office" is defined to include the personal office of a Member of the House or of a Senator; a House, Senate, or joint committee; "any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate"; the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. *Id.*, § 101(9).

[17] See, *e.g.*, *id.*, § 205 (for purposes of WARN, "employing office" includes the GAO and the Library of Congress, and "covered employee" includes employees of these two instrumentalities). The application of the laws pursuant to the CAA to GAO, GPO, and the Library of Congress is beyond the scope of this report. However, it is noted that § 230 of the act mandates a study by the Administrative Conference of the United States, to be completed no later than December 31, 1996, of the application of the various laws to these three support agencies, and the effective date of certain laws applied to these entities is delayed until one year after the study is transmitted to Congress. See, *e.g.*, § 215(g)(2)(OSHA provisions shall be effective with respect to GAO and the Library of Congress one year after study is transmitted to Congress).

[18] CAA, § 301(a). Section 225(f)(3) expressly declares that the CAA is "not to be construed to authorize enforcement by the executive branch of this Act."

be open for business not later than one year after the date of enactment of the CAA.[19]

BOARD OF DIRECTORS

The Office is to be headed by a five-member Board of Directors, consisting of five individuals appointed jointly by the Speaker of the House, the Majority Leader of the Senate, and the Minority Leaders of the House and the Senate. Appointments of the first five members of the Board are to be completed not later than 90 days after the date of enactment.[20] Board members are to be selected "without regard to political affiliation and solely on the basis of fitness to perform the duties of the Office," and are to have training or experience in the application of rights under at least one of the laws applied to the legislative branch by the CAA.[21]

Board members will generally serve one five-year term, but of the members first appointed to the board, one shall have a term of three years and two shall have a term of four years.[22] A Board member may be removed from office by a majority decision of the appointing authorities, but only for specified cause.[23]

FUNCTIONS

In addition to its principal function of enforcing the laws, the Office is also directed to (a) carry out an educational program for Members, other employing authorities of the legislative branch, and employees, with regard to the provisions of laws applied to the legislative branch and (b) compile and publish statistics on the use of the Office by covered employees.[24]

STAFF

The Chair of the Board, subject to Board approval, is to appoint, and may remove, the executive director,[25] a deputy executive director for the Senate,[26]

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19 *Id.*, § 301(j).

20 *Id.*, § 301(b).

21 *Id.*, § 301(d)(1).

22 *Id.*, § 301(e).

23 *Id.*, § 301(f).

24 *Id.*, § 301(h).

25 *Id.*, § 302(a). The executive director is the chief operating officer of the Office and, except as otherwise specified in the act, is to carry out all of the responsibilities of the Office under the act. *Id.*, § 302(a)(4). The first executive director is to be appointed no later than 90 days after the initial appointment of the Board. *Id.*, § 302(a)1).

and a deputy executive director for the House.[27] The Chair is also to appoint, subject to Board approval, the general counsel.[28]

PROCEDURAL RULES

The executive director shall, subject to Board approval, adopt rules governing the procedures of the Office, including the procedures of hearing officers, which shall be submitted for publication in the *Congressional Record*. The procedural rules may be amended in the same manner.[29]

SUBSTANTIVE REGULATIONS

The Board is to adopt for the implementation of the act[30] three separate

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[26](...continued)

[26] *Id.*, § 302(b).

[27] *Id.*

[28] *Id.*, § 302(c). Although § 302(c)(6)(A) provides for removal of the general counsel by the Chair for cause, a question as to removal authority is raised by the language of § 302(c)(6)(B), which seems to contemplate removal of the general counsel by the Speaker and the President pro tempore of the Senate.

[29] *Id.*, § 303(a).

[30] All of the sections of Title II of the act which extend statutory provisions to the legislative branch, except § 201 (relating to rights and protections under the Civil Rights Act of 1964, the ADEA, the Rehabilitation Act, and title I of the ADA), direct the Board to issue regulations "to implement the rights and protections" conferred by those sections. *Id.*, §§ 202(d), 203(c), 204(c), 205(c), 206(c), 210(e), 215(d), 220(d). The language in § 204(c), relating to the implementation of the Employee Polygraph Protection Act, is typical of that found in the various sections directing the Board to issue implementing regulations:

> (1) In general.--The Board shall, pursuant to section 304, issue regulations to implement this section.
>
> (2) Agency regulations. The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsections (a) and (b) except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.

Although § 201 does not direct the Board to issue regulations for the implementation of the employment provisions of the civil rights laws applied pursuant to the CAA, the act would not seem to preclude the Board from promulgating such regulations pursuant to (continued...)

bodies of substantive regulations, which shall apply to (a) the Senate and employees of the Senate; (b) the House and employees of the House; and (c) all other covered employees and employing offices.[31] Regulations that are applicable to either House may be approved by that House by simple resolution or by Congress by concurrent resolution or by joint resolution. Regulations applicable to other covered employees may be approved by Congress by concurrent resolution or by joint resolution.[32] Regulations approved by a joint resolution have the force and effect of law.[33] After regulations have been approved, they are to be submitted by the Board to the Speaker and the President pro tempore of the Senate for publication in the *Congressional Record*. Regulations are deemed to be issued on the date on which they are published in the *Record*, and become effective not less than 60 days after they have been issued.[34]

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[30](...continued)
the specified procedure for the issuance of substantive regulations. See *id.*, § 304. This interpretation finds support in the legislative history of the act. 141 *Cong. Rec.* H264 (daily ed. Jan. 17, 1995)(remarks of Rep. Goodling).

Representative Shays compared the CAA, which applies the various workplace laws directly to the legislative branch, with the version of the Accountability Act passed by the House in the 103rd Congress, which gave the Office of Compliance a greater role in the implementation of the laws. 141 *Cong. Rec.* H270 (daily ed. Jan. 17, 1995). For the rulemaking authority of the Office under the 103rd Congress legislation, see H.R. 4822, 103rd Cong., § 5(c). The more limited role of regulations in applying the laws under the legislation enacted by the 104th Congress is evidenced in the language, such as that quoted above from § 204(c) of the CAA, dictating that regulations governing the legislative branch are generally to be the same as substantive regulations adopted by the executive branch.

[31] CAA, § 304(a).

[32] *Id.*, § 304(c)(1).

[33] *Id.*, § 304(c)(5). Under § 409, if a regulation that has been approved by joint resolution is the subject of judicial review, it may be challenged only on constitutional grounds. A regulation that has not been approved by joint resolution could be challenged not only on constitutional grounds but also on the ground that it is inconsistent with the underlying law applied to Congress pursuant to the CAA. See Grassley section-by-section analysis, *supra* note 1, at S630.

[34] *Id.*, § 304(d). In any hearing before a hearing officer, in any appeal to the Board, or in a judicial proceeding under the act (either a trial *de novo* or an appeal to the Court of Appeals for the Federal Circuit), if the Board has not issued a regulation on a matter for which the act "requires a regulation to be issued, the hearing officer, Board, or court...is to 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." *Id.*, § 411. (This section requiring the application of executive branch regulations does not apply to a proceeding to enforce the federal service labor-management relations provisions with respect to specified offices. *Id.*)
(continued...)

ADMINISTRATIVE AND JUDICIAL DISPUTE-RESOLUTION PROCEDURES

The procedure for consideration of alleged violations of the laws applied pursuant to the CAA consists of several steps, and the process depends in part upon an election to be made by a covered employee after completing the first two steps. The procedure outlined below applies to all the laws extended by virtue of the CAA except OSHA, the Federal Labor-Management Relations Statute, and the public services and accommodations provisions of the ADA.[35] The procedure established by the CAA for enforcement of those laws is reviewed separately.[36]

COUNSELING

A covered employee who alleges a violation of a statutory right begins a proceeding by making a request, within 180 days of the alleged violation, for counseling by the Office. During a 30-day counseling period, the Office is to provide the employee with all relevant information with regard to his rights.[37]

MEDIATION

No later than fifteen days after the employee receives written notification from the Office of the end of the counseling period, the employee is to file a request for mediation with the Office. During a 30-day period, the mediation process is to include meetings with the parties separately or jointly in an effort to resolve the dispute between the employee and the employing office.[38]

ELECTION OF PROCEEDING

No sooner than 30 days after the employee receives written notification from the Office of the end of the mediation period, but no later than 90 days after receipt of such notice, the employee may elect to pursue either of two procedural paths. The first path (hereafter, "administrative proceeding") involves the filing of a formal complaint with the Office by the employee, an administrative hearing, Board review and, finally, judicial review in the U.S. Court of Appeals for the Federal Circuit. The second path (hereafter, "civil

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[34](...continued)
Similarly, if in a judicial proceeding a court determines that a regulation issued under the CAA is invalid, the court is to apply "to the extent necessary and appropriate" the most relevant executive agency regulation. *Id.* § 409.

[35] *Id.*, § 401.

[36] See notes 50-56 and accompanying text, *infra*.

[37] CAA, § 402.

[38] *Id.*, § 403.

action") involves the filing of a civil action in U.S. district court.[39] Both paths are explained in more detail below.

ADMINISTRATIVE PROCEEDING

Under the first path, the employee may, upon the completion of mediation, file a complaint with the Office. The respondent to the complaint is to be the employing office involved in the violation or in which the violation is alleged to have occurred.[40] An independent hearing officer is to be appointed by the executive director to consider the complaint and render a decision.[41] A claim that is found to be frivolous or that fails to states a claim upon which relief may be granted is subject to dismissal by the hearing officer.[42] The hearing is to be conducted in closed session on the record by the hearing officer and is generally to be conducted in accordance with the procedures established in 5 U.S.C. §§ 554-557. The hearing is to commence within 60 days after the filing of the complaint, except that the Office may, for good cause, extend the time for commencing a hearing by up to 30 days.[43]

The hearing officer is to issue a written decision no later than 90 days after the conclusion of the hearing. The decision is to contain, *inter alia*, a determination of whether a violation occurred, and order such remedies as are appropriate under the CAA.[44]

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[39] *Id.*, §§ 401(3), 404. The Grassley section-by-section analysis, *supra* note 1, at S631, addressed a major difference between the two paths:

> A principal distinction between the administrative dispute resolution proceedings conducted under this act and the proceedings in district court authorized under section 408 is the confidentiality of the administrative proceedings. Under...[§ 416], all counseling, mediation, and hearings are confidential. The record developed in the hearing and the decisions of hearing officers and the board may be made public only for purposes of judicial review under section 407. This requirement of confidentiality does not preclude the Executive Director from disclosing to committees of Congress information sought; however, such information shall remain subject to the confidentiality requirements of [§ 416]....

[40] CAA, § 405(a).

[41] *Id.*, § 405(b).

[42] *Id.*, § 405(b).

[43] *Id.*, § 405(d).

[44] *Id.*, § 405(g).

Any party aggrieved by the decision of a hearing officer may file a petition for review by the Board within 30 days of the entry of the decision in the records of the Office.[45] The Board is to issue a written decision that affirms or reverses the hearing officer's decision or that remands the matter to the hearing officer for further proceedings.[46]

The U.S. Court of Appeals for the Federal Circuit has jurisdiction over any proceeding commenced by a party aggrieved by a final decision of the Board.[47] The court is to set aside a final decision of the 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."[48]

CIVIL ACTION

Under the second path, the employee may file a civil suit in federal district court for the district in which he is employed or for the District of Columbia. The defendant in such a suit is to be the employing office alleged to have committed the violation or in which the violation is alleged to have occurred. Any party may demand a jury trial where a jury trial would be available in an action against a private defendant under the law made applicable by the CAA.[49] Any appeal from a decision of the district court would be within the jurisdiction of the U.S. Court of Appeals for the circuit in which the district court is situated.

PROCEDURE UNDER THE PUBLIC SERVICES AND ACCOMMODATIONS PROVISIONS OF THE ADA, OSHA, AND THE FEDERAL LABOR-MANAGEMENT RELATIONS STATUTE[50]

The procedure under the public services and accommodations provisions of the ADA, OSHA, and the Federal Labor-Management Relations Statute differs from that, discussed above, which governs the application of the other laws pursuant to the CAA. Under these statutes, a major role is played by the General Counsel[51] of the Office in inspecting facilities, filing complaints,

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45 *Id.*, § 406(a).

46 *Id.*, § 406(e).

47 *Id.*, § 407(a).

48 *Id.*, § 407(d).

49 *Id.*, §§ 404; 408.

50 Subsequent sections of this report provide more detailed examinations of these laws, as applied pursuant to the CAA.

51 The intended role of the General Counsel is sketched in the Grassley section-by-section analysis, *supra* note 1, at S628.

seeking judicial review, etc. Furthermore, under these statutes, there is no election of proceedings. Only an administrative proceeding (including, as a final stage, appellate judicial review) is available. No civil action may be commenced.

Public Services and Accommodations Provisions of the ADA

A qualified individual with a disability, who alleges a violation of rights and protections against discrimination in the provision of public services and accommodations established under specified sections of the ADA, may file a charge against any entity responsible for correcting the violation with the General Counsel, who is to investigate the charge. The General Counsel may request mediation between the charging individual and any entity responsible for correcting the alleged violation. If the dispute is not resolved through the mediation process, and if the General Counsel believes that a violation may have occurred, he may file a complaint with the Office against any entity responsible for correcting the violation. The administrative procedure before the hearing officer, and in the appeal to the Board, would be the same in such a case under the ADA as in any other type of case filed under the CAA. An individual who filed a charge with the General Counsel and who intervened in the administrative proceeding, or any respondent to the complaint, if aggrieved by a final decision of the Board following an administrative proceeding, may seek judicial review before the U.S. Court of Appeals for the Federal Circuit.[52]

Occupational Safety and Health Act of 1970

Under OSHA, pursuant to a written request of any employing office or covered employee, the General Counsel shall inspect and investigate places of employment. The General Counsel shall also issue a citation or notice to any employing office responsible for correcting a violation or a notification to any employing office that the General Counsel believes has failed to correct a violation for which a citation was issued. If, after the General Counsel issues a citation or notification, the General Counsel determines that a violation has not been corrected, the General Counsel may file a complaint with the Office against the employing office. The administrative procedure before the hearing officer, and in the appeal to the Board, would be the same in an OSHA case as in any other type of case filed under the CAA. The General Counsel or the employing office aggrieved by a final decision of the Board following an administrative proceeding may seek judicial review before the U.S. Court of Appeals for the Federal Circuit.[53]

Federal Service Labor-Management Relations Statute

The Board is to refer certain matters (including, *inter alia*, those related to recognizing labor organizations, determining the appropriateness of units for labor organization representation, hearings on complaints based on charges of

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[52] CAA, § 210.

[53] *Id.*, § 215.

unfair labor practices, and reviewing arbitral awards) to a hearing officer for decision, subject to review by the Board. The final decision of the Board is subject to judicial review in the Court of Appeals for the Federal Circuit, upon the filing of a petition for review by the General Counsel or the respondent to the complaint. The procedure before the hearing officer, in the appeal to the Board, and in the judicial review process is the same in such a proceeding as in any other type of case filed under the CAA.[54]

If any person charges an employing office or a labor organization with an unfair labor practice, the General Counsel shall investigate the charge and may file a complaint with the Office, which is to be submitted to a hearing officer for decision pursuant to the usual procedure under the CAA, subject to review by the Board. The General Counsel or the respondent to the complaint, if aggrieved by a final decision of the Board, may file a petition for review in the Court of Appeals for the Federal Circuit.[55] Excepted from the scope of the CAA section authorizing judicial review pursuant to provisions of the Federal Labor-Management Relations Statute are certain final orders of the Board involving awards by arbitrators and final orders involving appropriate unit determinations.[56]

PAYMENT OF AWARDS AND SETTLEMENTS

Generally, awards and settlements under the CAA are to be paid only from funds which were appropriated to an account of the Office in the Treasury for the payment of awards and settlements.[57] Thus, it appears that Members will not be personally liable for payment of awards and settlements.[58] However, the act makes clear that Members, officers, and employees of the House and Senate remain subject to the disciplinary authority of the House Committee on Standards of Official Conduct and the Senate Select Committee on Ethics for violations of House and Senate rules on discrimination in employment.[59]

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54 *Id.*, § 220(c)(1), (3).

55 *Id.*, § 220(c)(2), (3).

56 *Id.*, § 220(c)(3).

57 *Id.*, § 415(a). Funds to correct violations of § 201(a)(3) (prohibiting discrimination based on disability), § 210 (public services and accommodations provisions of ADA), or § 215 (OSHA) may be paid only from funds appropriated to the employing office or entity responsible for correcting such violations. *Id.*, § 415(c).

58 See 141 *Cong. Rec.* S450 (daily ed. Jan. 5, 1995)(remarks of Senator Glenn).

59 CAA, § 503.

PENALTIES AND PUNITIVE DAMAGES

The act specifies that "no civil penalty or punitive damages may be awarded with respect to any claim" under the act.[60]

ATTORNEY'S FEES

If a covered employee, or a qualified person with a disability (with respect to any claim under the public services and accommodations provisions of the ADA) is a prevailing party in an administrative proceeding or a civil action, "the hearing officer, Board, or court, as the case may be, may award attorney's fees, expert fees, and any other costs as would be appropriate if awarded under § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k))."[61]

ANALYSIS OF LAWS APPLIED PURSUANT TO CAA[62]

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Perhaps the least novel aspect of the Congressional Accountability Act is the statutory extension of Title VII of the 1964 Civil Rights Act to employees of the Congress and certain congressional instrumentalities. The Civil Rights Act of 1991 had previously applied to House employees and applicants the "rights and protections under Title VII" as enforced through a three-step internal procedure authorized by the House Fair Employment Practices Resolution (House Resolution 558), in effect since 1988, but without recourse to judicial review. Procedures adopted by the 1991 Act also prohibited "any discrimination" under Title VII based on race, color, religion, or national origin in "all Senate personnel actions" and permitted judicial review of final decisions of the Senate Office of Fair Employment Practices by appeal to the United States Court of Appeals for the Federal Circuit. Indeed, many features of the Congressional Accountability Act in relation to enforcement of nondiscrimination on Title VII grounds appear to be drawn directly from these earlier legislative precedents. Perhaps for this reason, and because of the extensive body of substantive rules that have developed over three decades of experience with Title VII in public and private sector cases, the application of Title VII to congressional employees does not depend upon Office of Compliance rulemaking as do other laws included within Accountability Act coverage.

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60 *Id.*, § 225(c). The Grassley section-by-section analysis, *supra* note 1, at S626, states that the prohibition on civil penalties and punitive damages is "in keeping with longstanding rules applicable to the Federal Government...."

61 CAA, § 225(a).

62 The laws are presented here in the order in which they appear in Title II of the CAA.

Scope of Coverage

Section 102 of the act appears to make all of Title VII,[63] including provisions now applicable to private employers and the federal government, applicable to the "legislative branch of the Federal Government." The "Complaint and Hearing" provisions in § 405(h) similarly dictate that hearing officers be "guided by judicial decisions under the laws made applicable by Title I" and Board decisions under the act. Title VII coverage of Congress is defined by § 201(a)(1) to encompass all "personnel actions affecting covered employees." This is parallel to language in 1972 amendments which first included Title VII protection for federal executive branch employees,[64] and Senate coverage enacted by the 1991 Civil Rights Act. It differs from wording in the private sector Title VII provisions which, besides safeguarding applicants and employees from discrimination in hiring, promotion, discharge, or other personnel actions, explicitly mandate equality as to all "terms, conditions, and privileges of employment. . ." The difference is probably more technical than substantive here, however, in view of proponents' oft-stated objective of achieving parity of coverage between Congress and the private sector. Furthermore, based on its own review of the legislative history, the Supreme Court in *Chandler v. Roudebush*[65] read the 1972 Title VII Amendments to confer on executive branch "employees or applicants. . .the full rights available in the courts as are granted to individuals in the private sector." Accordingly, the Congressional Accountability Act generally bars discrimination in hiring, discharge, promotion and in other congressional "personnel actions." In addition, it probably includes protection from discrimination in all "terms, conditions, or privileges" of congressional employment[66] commensurate with private sector coverage.

Disparate treatment of women and minorities in regard to employment terms and conditions has been at the center of many contemporary workplace discrimination issues that may assume equal significance under the Congressional Accountability Act. Some examples follow.

Workplace Harassment

Title VII prohibits employers from creating or condoning a hostile work environment based on incidents of harassment or unequal treatment.[67] "Hostile environment" discrimination occurs as the result of a "pattern or practice of harassment" based on race, religion, or sex that is so abusive or

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63 Section 102(a)(2) references "42 U.S.C. 2000e *et seq.*"

64 42 U.S.C. § 2000e-16.

65 425 U.S. 840, 841 (1976).

66 42 U.S.C. § 2000e-2(a).

67 *Meritor Saving Bank v. Vinson*, 477 U.S. 57 (1986).

offensive as to alter employment terms or conditions by substantially interfering with the reasonable employee's ability to function on the job. An employer will generally be liable for this form of discriminatory workplace condition 1) if the harasser is the employer or one of its agents, or supervisory personnel,[68] or 2) the employer knew or should have known of harassment caused by coworkers, but failed to take corrective action.[69] The standard for finding conduct so severe or pervasive as to create a hostile work environment is both objective--what a reasonable persons considers to be abusive--and subjective--what the victim perceives to be abusive.[70]

Pregnancy

Discrimination because of pregnancy-related matters was prohibited in 1978, when Congress passed the Pregnancy Discrimination Act, amending Title VII to prohibit disparate treatment of pregnant women for all employment-related purposes. The measure does the following:

> Prohibits termination or refusal to hire or promote a woman solely because she is pregnant.
>
> Bars mandatory leave for pregnant women arbitrarily set at a certain time in their pregnancy and not based on their individual inability to work.
>
> Protects reinstatement rights of women on leave for pregnancy-related reasons, including rights to credit for previous service, accrued retirement benefits, and accumulated seniority, and requires employers to treat pregnancy and child birth the same way they treat other causes of disability.
>
> Prohibits treating pregnancy or childbirth less favorably than other medical conditions under fringe-benefit plans such as disability benefits, sick leave, and health insurance.

Religious Accommodations

Title VII requires an employer to "reasonably accommodate" an employee's religious beliefs or practices unless it can demonstrate that such accommodation would create an undue hardship on its business. Employees must inform the employer that their religious beliefs conflict with a work requirement before the employer has a duty to attempt an accommodation. The scope of "reasonable accommodation" and "undue hardship" has been the subject of most of the

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68 *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

69 *See Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992).

70 *Harris v. Forklift Systems*, 114 S.Ct 367 (1993).

litigation in the religious discrimination arena. In accommodating an employee's religious beliefs, the U.S. Supreme Court has held that an employer does not have to violate the seniority rights of co-workers or a collective bargaining agreement, does not have to incur more than minimal expense, and does not have to deny shift and job preferences of other employees.[71]

Title VII disparate impact claims, based on allegations that protected minorities and women are adversely affected by job standards and qualifications that have no reasonable business justification,[72] may also be brought under the Congressional Accountability Act. Certain employment standards that might otherwise provide the basis for disparate impact claims are exempted by the act, however. These include job qualifications predicated on party affiliation, domicile, or "political compatibility with the employing office" of applicants or employees on the staffs of the congressional leadership, committees, or Senate and House members.

Other basic exemptions to Title VII coverage may also be relevant to congressional employment under the Accountability Act. First, employers and unions are permitted by §§703(e) and 704(b) of Title VII[73] to discriminate on the basis of religion, sex, or national origin where these factors are a "bona fide occupational qualification" (bfoq) for the particular employment. Historically, however, the bfoq exception has rarely been applied by the courts to defeat Title VII claims and has been held to provide a legal defense only where the discrimination is found necessary or essential to the employer's business operations.[74] Similarly, current exceptions in § 703(h)[75] for discrimination that results from the operation of "bona fide" merit or seniority systems, or the application of professionally developed ability tests that are demonstrably valid predictors of successful job performance, would permit the use of such standards and procedures in the congressional employment setting.

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71 *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

72 42 U.S.C. § 2000e-2(k).

73 42 U.S.C. §§ 2000e-2(e), 2000e-3(b).

74 *See Dothard v. Rawlinson*, 433 U.S. 321, 324 (1977)("the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."); *Diaz v. Pan American World Airways*, 442 F.2d 385, 388 (5th Cir), *cert. denied*, 404 U.S. 950 (1971)("discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively"); *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969)(employer could rely on bfoq exception only by proving "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely or efficiently the duties of the job involved").

75 42 U.S.C. § 2000e-2(h).

Remedies

The remedies authorized for civil rights violations by § 201(b) generally incorporate those forms of "make-whole" relief--including orders to hire, reinstate, or promote discrimination victims, backpay, and compensatory damages--provided for private sector employees by Title VII.[76] In this regard, the Accountability Act seems to preserve a dichotomy that exists in the current law for damage actions authorized in Title VII cases by the 1991 Civil Rights Act. That is, in gender and religious discrimination actions, § 201(a)(1)(A) adopts as a maximum ceiling on compensatory damages the $300,000 limit applicable to the largest private employers under the Civil Rights Act of 1991[77] and permits jury trials where the complainant elects, after counseling and mediation, to file a civil action in federal district court under §§ 404 and 408 in lieu of pursuing administrative remedies before the Office. In race discrimination cases, the Accountability Act would permit "such compensatory damages as would be appropriate if awarded under [42 U.S.C. § 1981]," an amount which is not subject to limits imposed by the 1991 act. Consequently, following the private sector model, race discrimination claimants under the Accountability Act would apparently not be subject to the monetary limits on compensatory damages imposed on persons complaining of gender or religious discrimination. No punitive damages could be awarded in any discrimination action under the Accountability Act.

Both structural and funding aspects of the Accountability Act suggest that members or supervisors would probably not incur individual liability for damages or other monetary relief awarded under the act. First, the "employing office," rather than individual Members, supervisors, or other office heads, is explicitly designated the proper respondent or defendant for purposes of all authorized administrative and enforcement proceedings. Under § 405(a), all complaints are to be filed against "the employing office" and only a "party" to a Board proceeding may be named respondent in a judicial appeal under § 407 (b). Similarly, in a civil action under § 408(b), "the defendant shall be the employing office alleged to have committed the violation" rather than the head of the office or other appointing authority. Finally, an "Awards and Settlements" appropriation account is authorized by § 415 "for the payment of awards under this Act." No provision is made for individual recoupment for payments made from this accounts.

In addition, Title VII judicial precedents are to guide Board decisions under the bill. Prior to the 1991 Civil Rights Act, when compensatory and punitive damages first became available in Title VII actions, only equitable relief--including reinstatement and backpay--was authorized by that law. Because the courts viewed the employer as in a better position to grant such relief, individual liability on the part of supervisors and employees was generally denied.

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[76] 42 U.S.C. §§ 2000e-5(g) and 2000e-5(k).

[77] 42 U.S.C. § 1981a(b)(3)(D).

However, in pre-1991 act decisions, the Fourth and Sixth Circuits ruled that individual liability may be imposed under Title VII.[78] The majority of the federal circuit courts to rule on the individual liability issue since have held to the contrary. Thus, the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have held that individual liability may not be imposed upon supervisory or management personnel under Title VII, the ADEA or the ADA.[79] Substantial division among district courts of the other circuits persists on the subject, however.

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

The CAA provides generally, in section 102(a)(4), that the Age Discrimination in Employment Act of 1967, as amended,[80] shall apply to the legislative branch of the federal government. More specifically, the act provides in section 201(a) that "all personnel actions affecting covered employees shall be made free from any discrimination based on ... (2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967...."[81]

"Covered employee" is defined in section 101(3) of the CAA and is further defined in section 15(a) of the ADEA as employees who are at least 40 years of age. The term "personnel actions" is not defined in either act, but a definition which may be relevant is found in 5 U.S.C. § 2302(a)(2). Under this definition[82] a personnel action includes an appointment, promotion, disciplinary action, a detail, transfer, reassignment, reinstatement, restoration, reemployment, performance evaluation, decisions concerning pay, benefits, or awards, or any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level. Thus any action taken with respect to a covered employee who is at least 40 years of age and which can be considered a "personnel action" must be made free from discrimination on the basis of age. Covered employees under the CAA specifically include applicants

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78 *See Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *vacated in part on rehearing on other grounds*, 900 F.2d 27 (4th Cir 1990); *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1990).

79 *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir. 1994); *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994); *Sims v. KCA Inc.*, 1994 U.S. App. LEXIS 15065 (10th Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991).

80 29 U.S.C. § 621 *et seq.*.

81 29 U.S.C. § 633a.

82 This section specifically prohibits discrimination in personnel actions on the basis of age in federal executive agencies (by reference to section 15 of the ADEA) and the Government Printing Office, so its definition of personnel actions is particularly relevant to legislative branch interpretations.

for employment and former employees as well as current legislative branch employees.

Section 15 of the ADEA does not define what constitutes "discrimination on the basis of age" in the federal sector. In fact, section 15(f) specifically states that the other provisions of the ADEA which generally apply to the private sector and which do give considerable detail concerning what practices may constitute age discrimination (including burdens of proof and exceptions) shall not be applicable to federal sector employees.[83] Thus, one would look to the implementing regulations of the Equal Employment Opportunity Commission (EEOC) (for current federal sector interpretations) or to the Office of Compliance (for future interpretations under this act for legislative branch employees). However, the current executive branch regulations implementing section 15 of the ADEA do not contain substantive interpretations defining what constitutes age discrimination in particular cases; rather, the regulations only contain generally applicable procedural requirements for the various federal agencies.[84]

One substantive area of interpretative authority specifically given to the EEOC under current law and which apparently may be exercised by the Office of Compliance is the authority to establish reasonable exemptions to the provisions of section 15 for maximum age requirements on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of a particular position.

Section 201(2) of the CAA provides that the waiver provisions of section 7(f) of the ADEA shall apply to covered legislative branch employees.[85] These provisions set forth the conditions under which an individual may waive any rights or claims relating to age discrimination. Standards are set forth to ensure that when an employee chooses to waive rights under the ADEA the waiver is "knowing and voluntary". Some of the requirements which must be met include the following: the waiver agreement must be in writing and in understandable

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[83] Despite the fact that the other statutory ADEA provisions are not specifically applicable to federal employees covered by section 15, courts have looked to the general body of case law surrounding age discrimination claims in the private sector for guiding principles in discerning the elements of actions and burdens of proof for federal sector age discrimination cases, as well as looking to EEOC interpretations applicable to the private sector. Thus, federal courts, in analyzing age discrimination claims will, in most cases, cite the same elements of a "prima facie" case as courts in private sector disputes. *See, e.g., Odon v. Frank,* 781 F. Supp. 1191 (N.D. Tex. 1991), *Valaris v. Army & Air Force Exchange Service,* 577 F. Supp. 282 (N.D. Cal. 1983).

[84] These regulations are found primarily at 29 C.F.R. § 1613.501 *et seq.* and § 1614.101 *et seq.* Certain procedural provisions, such as exhaustion of administrative remedies requirements, are standardized under the Accountability Act and are summarized at pp. 7-10, *supra.* Attorneys fees provisions and remedies for intimidation or reprisal are also standardized under the CAA.

[85] Section 7(f) of the ADEA may be found at 29 U.S.C. § 626(f).

language, and the individual must be advised to consult an attorney; the waiver must specifically refer to rights or claims arising under the ADEA; the individual may not waive rights or claims which may arise after the date the waiver is executed; the individual may only waive rights or claims in exchange for consideration in addition to anything of value to which the person is already entitled; the individual must be given at least 21 days within which to consider the agreement and longer if the agreement involves an exit incentive program; the waiver must be revocable for 7 days after the agreement is signed. If a dispute should arise over the terms of a signed waiver agreement, the party asserting the validity of the waiver agreement shall have the burden of proving that the waiver was knowing and voluntary.

Section 201(b)(2) of the CAA states that the remedy in an age discrimination action shall be "(A) such remedy as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)); and (B) such liquidated damages as would be appropriate if awarded under section 7(b) of such Act (29 U.S.C. 626(b))." Section 15(b) of the ADEA provides that its provisions shall be enforced "through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section." Thus, the EEOC, under this section, and the Office of Compliance, under the Congressional Accountability Act, has considerable discretion in fashioning appropriate remedies in age discrimination cases. The Office of Compliance also has the authority to award liquidated damages in cases involving willful violations, as provided under section 7(b) of the ADEA, 29 U.S.C. § 626(b). As under current law with respect to federal employees, punitive damages are not available for age discrimination claims under the CAA.

The current executive branch regulations for section 15 of the ADEA contain detailed provisions outlining remedies which constitute full relief in age discrimination cases.[86] These regulations provide guidance to the Office of Compliance in designing regulations applicable to legislative branch employees. Appropriate remedies, as set forth in these current executive branch regulations, include such actions as reinstatement, retroactive promotion, payment of loss of earnings, cancellation of an unwarranted personnel action, expunction from agency records of any reference to an unwarranted disciplinary action, full participation in an employee benefit denied, backpay, attorneys fees, etc.

The effect of the ADEA provisions on other federal laws, such as those mandating early retirement or prescribing pension benefits based upon age criteria, has been addressed by the courts. In general, court decisions have affirmed that other federal statutes, such as those prescribing mandatory retirement for certain categories of federal employees, do not conflict with the

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[86] See the regulations beginning at 29 C.F.R. § 1613.271 *et seq.*

ADEA provisions, and were not meant to be repealed by enactment of the ADEA.[87]

AMERICANS WITH DISABILITIES ACT OF 1990

The CAA states that the ADA,[88] as detailed in the CAA, is applied to the legislative branch of the Federal Government. The ADA as originally enacted contained a provision relating to coverage of Congress and the legislative branch agencies.[89] However, although this section essentially tracked the substantive provisions of the ADA,[90] it did not incorporate the remedies that generally were available under the ADA. The CAA added remedies that are analogous to those in the ADA.[91] The application of the ADA to the legislative branch has two main components: its application to employment issues and its application regarding public services and accommodations.

Employment

The CAA provides that "All personnel actions affecting covered employees shall be made free from any discrimination based on -- disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791)[92] and sections 102 through 104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-12114)."[93] The ADA sections cited are the core provisions regarding employment discrimination. Basically, they prohibit discrimination against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

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87 *See, e.g., Patterson v. United States Postal Service,* 901 F. 2d 927 (11th Cir. 1990) and *Benford v. Frank,* 943 F. 2d 609 (6th Cir 1991).

88 42 U.S.C. §§ 12101 *et seq.*

89 Pub. L. No. 101-336, § 509.

90 There were some differences since section 509 of the ADA contained three different subsections: one affirming commitment to Senate rule XLII and applying the Rehabilitation Act of 1973 to the Senate, one applying the ADA to the House, and one applying the ADA to the instrumentalities of Congress.

91 In addition to the provisions in the CAA that apply the ADA, section 509 of the ADA also was amended to expand the application of the ADA to GAO, GPO, and the Library of Congress by providing for judicial remedies for these entities. A discussion of the application of the ADA to these congressional instrumentalities is beyond the scope of this report.

92 The Rehabilitation Act provisions are discussed in another section.

93 CAA, § 201(a).

These sections cited in CAA do not include the definitional sections on disability, qualified individual with a disability, and reasonable accommodation but section 225(f)(1) of the CAA specifically provides that "except where inconsistent with the definitions and exemptions provided in this Act, the definitions and exemptions in the laws made applicable by this Act shall apply under this Act." The ADA defines disability as meaning with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment, or being regarded as having such an impairment.[94] A qualified individual with a disability is a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires."[95] Reasonable accommodation is defined as including: "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[96]

The ADA has specific prohibitions against certain types of preemployment examinations or inquiries, essentially prohibiting any inquiries that involve the nature or severity of the individual's disability or whether the individual has a disability. However, an employer may ask about the ability of an employee to perform job-related functions.[97] It should also be noted that when determining whether a function is essential to the job, the ADA specifies that a written job description, prepared prior to advertising or interviewing applicants, shall be considered reasonable evidence of the essential functions of the job.[98]

There are certain specific defenses to a charge of discrimination enumerated in the ADA. It is a defense that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity and such performance cannot be accomplished by reasonable accommodation.[99] The term "reasonable accommodation" was described above. In describing what the term discriminate includes, the ADA states that discrimination includes not making a reasonable

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94 42 U.S.C. § 12102(2).

95 42 U.S.C. § 12111(8).

96 42 U.S.C. § 12111(9).

97 42 U.S.C. § 12112(c).

98 42 U.S.C. § 12111(8).

99 42 U.S.C. § 12113.

accommodation to an individual with a disability *unless* it can be demonstrated that the accommodation would impose an undue hardship on the operation of the covered entity. The term "undue hardship" is defined in the ADA as meaning "an action requiring significant difficulty or expense, when considered in light of the factors set forth...." The factors to be considered include "(i) the nature and cost of the accommodation ... (ii) the overall financial resources of the facility ... involved...; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business...; the number, type and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and function of the workforce of such entity...."[100]

The limits of reasonable accommodation were explored in a recent decision by the seventh circuit, *Zande v. State of Wisconsin Department of Administration*.[101] In that case, the court found that an employer, even a large employer like a state agency, is not required to expend "enormous sums in order to bring about a trivial improvement in the life of a disabled employee." If this decision is followed in other circuits or affirmed by the Supreme Court, it could mean that the types of accommodations that Congress would be required to provide may be somewhat limited.[102]

The ADA also specifically states that "[t]he term 'qualifications standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[103] Direct threat is defined in the ADA as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[104] The Supreme Court analyzed the issue of dangerousness under section 504 of the Rehabilitation Act[105] and found that such determinations must be made on a case-by-case basis considering the following factors: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur

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100 42 U.S.C. § 12111(10).

101 44 F.3d 538 (7th Cir. 1995).

102 The Job Accommodation Network, a free consultant service funded by the President's Committee on Employment of People with Disabilities, provides assistance for questions relating to accommodations. Their telephone number is 800-232-9675.

103 42 U.S.C. § 12113(b).

104 42 U.S.C. § 12111(3).

105 Section 504 jurisprudence was used as a basis for the ADA.

and the imminence of the potential harm.[106] These factors would most likely also be applied to the CAA.[107]

The CAA provides that the remedies applicable for a violation of the ADA are those delineated in the ADA. However, section 225(f)(3) of the CAA provides that the CAA shall not be construed to permit executive branch enforcement. This provision, coupled with the general procedural requirements of section 401, indicates that the EEOC enforcement scheme for the ADA is not applicable in the congressional context. The CAA contains its own procedural rules for the Office of Compliance which are detailed in a previous section. There is a right to judicial review but the CAA in section 225(c) specifically eliminates civil penalties and punitive damages. The CAA also specifically provides that a prevailing party may be awarded attorneys' fees, expert fees and other costs.[108]

Public Services and Accommodations

The CAA applies the rights and protections against discrimination in the provisions of public service and accommodations established by sections 201-230, 302, 303, and 309 of the ADA. Essentially, these ADA provisions require that no qualified individual with a disability shall, by reason of such a disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity, or be discriminated against in the full and equal enjoyment of a place of public accommodation. With regard to state and local governments, the Department of Justice has interpreted the ADA as prohibiting the denial of access to public meetings to individuals with disabilities or denying such individuals an equal opportunity to participate. This has been interpreted to require city councils to provide a deaf individual with access to what is said, and mobility impaired individuals with an opportunity to attend such meetings.[109]

The CAA sets up its own procedural rules for dealing with alleged violations of the nondiscrimination requirements concerning public services and public accommodations. First, the qualified individual with a disability, as defined in section 201(2) of the ADA,[110] who alleges a violation may file a

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106 *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987).

107 The factors were set forth in the ADA regulations. See 29 C.F.R. § 1630(r).

108 CAA, § 225(a).

109 Department of Justice, *The Americans with Disabilities Act Title II Technical Assistance Manual* 9.

110 The ADA definition states: "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural communications, or transportation barriers, or the provision of auxiliary aids and services, meets the essential

(continued...)

charge against the entity responsible for correcting the violation with the General Counsel of the Office of Compliance within 180 days of the occurrence. The General Counsel shall investigate the charge. If the General Counsel believes that a violation may have occurred and that mediation may be helpful, the General Counsel may request mediation between the charging individual and any entity responsible. If the dispute is not resolved by mediation, and the General Counsel believes that a violation may have occurred, the General Counsel may file a complaint against any entity responsible for correcting the violation with the Office of Compliance. This complaint shall be submitted to a hearing officer and any person who has filed a complaint may intervene as a matter of right. The decision of the hearing officer is subject to review by the Compliance Board. If the charging individual is aggrieved by a final decision of the Board, he or she may file a petition for review in the United States Court of Appeals for the Federal Circuit pursuant to the general procedural requirement of the CAA.

If new appropriated funds are necessary to correct a violation, compliance shall take place as soon as possible but no later than the fiscal year following the end of the fiscal year in which the order requiring correction becomes final. The Compliance Board shall issue regulations that are to be the same as those issued by the Departments of Justice and Transportation under the ADA except that for good cause shown and stated, a modification may be made if the modification would be more effective for the implementation of the rights and protections of the section. The regulations shall also include the methods of identifying the entity responsible for the correction of the violation. This will be a key provision in the regulations since it is not always clear whether an individual office or the Architect of the Capitol has the responsibility for a correction.

The General Counsel is also obligated to inspect the covered facilities regularly, at least once during each Congress, in order to insure compliance. On the basis of this inspection, the General Counsel is to prepare and submit a report to the Speaker of the House, the President Pro Tempore of the Senate and the Office of the Architect of the Capitol, or other entity responsible, on the results of the inspection. This report shall describe the steps necessary to correct any violations and the estimated cost and time needed for abatement. The first inspection and report are to be done prior to July 1, 1996 and the time until December 31, 1996 shall be available to take actions to abate any violations.

REHABILITATION ACT OF 1973

The Congressional Accountability Act provides in section 201 that "[a]ll personnel actions affecting covered employees shall be made free from any discrimination based on -- ...(3) disability, within the meaning of section 501 of

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[110](...continued)
eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

the Rehabilitation Act of 1973 (29 U.S.C. §791)...."[111] In addition, section 102 of the CAA also states that the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, is one of the laws that "shall apply, as prescribed by this Act, to the legislative branch of the Federal Government."[112]

The exact interaction of these two provisions is not clear. Perhaps the most likely interpretation is that the general language including section 791 *et seq.* is limited by the more specific statutory language in section 201. This interpretation would be similar to the pattern followed regarding the ADA where the general statement in section 102 of the act simply refers to the ADA as a whole, but *as prescribed by this Act*, while section 201 delineates certain specific sections of the ADA, i.e., the prescriptions of the CAA. On the other hand, it could be argued that the CAA is much more specific in delineating the procedural differences in the application of the ADA to Congress (i.e., filing complaints with the Office of Compliance rather than the EEOC) than it is regarding section 501. It could be argued, therefore, that Congress did not intend such a broad application. However, the difficulty with this argument is that its result is that there is then a statutory reference to section 501 which is given no effect. It is a generally accepted rule of statutory construction that wherever possible, effect is to be given to all the provisions of a statute. Assuming, then, that some effect was intended by the reference to section 501, the question arises concerning exactly how limiting is the limitation in section 201.

Does the provision stating that sections 791 *et seq.* shall apply *as prescribed by this Act* mean that in effect only the definitional section of section 791 is applicable since the more specific section in the CAA prohibits discrimination in employment on the basis of disability "within the meaning of section 501"? Weighing against this interpretation is the fact that the definition applicable to section 501 is essentially the same as that in the ADA which is also referenced. And, as observed above, it is a rule of statutory construction that wherever possible statutory language is to be given some effect.

An alternative interpretation is that the statutory language and judicial interpretations surrounding section 501 determinations of discrimination are to be utilized. Although section 501 has been seen by commentators as generally providing the same substantive provisions as under section 504 (the statutory provision on which the ADA was based), there are some situations in which employers may have greater obligations under section 501 than under section 504 or the ADA.[113]

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[111] CAA, § 201(a).

[112] *Id.*, § 102(a).

[113] See Tucker, Bonnie, and Goldstein, Bruce, *Legal Rights of Persons with Disabilities* 9:13-14 (1992).

Section 501 of the Rehabilitation Act establishes the federal interagency committee on employees who are individuals with disabilities, requires federal agencies to establish affirmative action plans for the hiring, placement and advancement of individuals with disabilities and submit these plans to the committee and the Equal Employment Opportunities Commission (EEOC) for approval, and places certain requirements on the EEOC. It is difficult to reconcile the requirement to submit an affirmative action plan with the scheme of the CAA. The CAA does not indicate who should prepare this plan. Section 501 provides for the preparation by each "department, agency, and instrumentality." The analogous divisions for the Congress are not readily apparent. Also, there is some uncertainty concerning where this plan might be filed. It would appear that the plan, or plans, would not be filed with the EEOC. The CAA specifically provides that "this Act shall not be construed to authorize enforcement by the executive branch...."[114] The failure of the CAA to provide particulars concerning the affirmative action provision makes it somewhat uncertain whether the provision was intended to apply.

FAMILY AND MEDICAL LEAVE ACT OF 1993

Section 202 of the CAA makes the rights and protections of sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA)[115] applicable to congressional employees.

Leave Entitlement

The FMLA provides an entitlement of up to 12 weeks of unpaid leave during any 12 month period to any eligible employee for any of the following reasons:

- birth of child or to care for such child;
- placement of child with employee for adoption or foster care;
- care for spouse, child, or parent with a serious health condition; or
- serious health condition that makes the employee unable to perform the functions of the job.[116]

An *eligible employee* is a covered employee who has been employed by an employing office for 12 months, and for at least 1,250 hours during the previous

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[114] CAA, § 225(f)(3).

[115] P.L. 103-3, §§ 1-1-105, Feb. 5, 1993, 107 Stat. 7, 29 U.S.C. §§ 2611-15. The Department of Labor regulations on family and medical leave are codified at 29 C.F.R. §§ 825.100-801.702.

[116] 29 U.S.C. § 2612(a)(1).

12 months.[117] A covered employee earns entitlement to family and medical leave without regard to transfers between offices. In other words, a covered employee would become eligible after working 12 months and 1250 hours, even if the employee changed employing offices.[118]

A *serious health condition* is an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care professional.[119]

When the need for leave is foreseeable, the employee must give at least 30 days advance notice; if the need is unforeseen, the employee must give as much notice as is practicable. The employer may require certification of the serious health condition by the health care provider. After returning from leave, the employee must be restored to the same job or to an equivalent position, without loss of any employment benefits accrued prior to the leave. Benefits, however, may not be accrued while on leave.

Benefits

The employer must maintain group health benefits during the employee's absence at the same level and under the same conditions as if the employee had continued to work. If the employee fails to return from leave, the employer can recover the premiums paid for the continued health coverage.

Remedies

The remedies for violations are the same that would be appropriate under section 107(a)(1) of the FMLA. An employer who violates FMLA becomes liable:

- for damages equal to the amount of lost wages, salary, benefits, or other compensation;
- if compensation has not been denied, for any actual monetary loss, such as the cost of providing care;
- for interest on the amount of such damages;

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[117] Section 101(2)(A)(i) & (ii) of the FMLA defines an eligible employee as one who has been employed by the employer "(i) for at least 12 months . . . and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." Since the CAA omits the part-time minimum hourly exclusion from eligibility, congressional coverage is broader than coverage in the private sector.

[118] Grassley section-by-section analysis, *supra* note 1, 141 *Cong. Rec.* at S623.

[119] 29 U.S.C. § 2611(11).

- for an additional amount of liquidated damages equal to the amount of damages and interest; and,

- for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.[120]

FAIR LABOR STANDARDS ACT OF 1938

Section 203 of the CAA provides that the rights and protections of sections 6(a)(1), 6(d), 7, and 12(c) of the Fair Labor Standards Act of 1938[121] shall apply to all covered employees. The FLSA requires minimum wage and overtime pay, prohibits oppressive child labor, requires record-keeping by employers, and mandates inspections by the Labor Department. The law also requires equal pay for equal work for men and women employees in the same establishment. The sections applicable to Congress are the following:

- Section 6(a)(1) provides for a minimum wage of $ 4.25 per hour.[122]

- Section 6(d), as added by the Equal Pay Act of 1963, prohibits discrimination in wages on the basis of sex. No employer may discriminate in any establishment between employees on the basis of sex by paying employees at a wage rate less than the rate paid to members of the opposite sex for equal work on jobs which require equal skill, effort, and responsibility.[123]

- Section 7 requires overtime compensation at one and one-half times the regular rate of compensation for all hours in excess of 40 in one week.[124]

- Section 12(c) provides that no employer shall employ any oppressive child labor, as that term is defined in child labor orders issued by the Secretary of Labor.[125]

It should be noted that there are a number of employment practices which the FLSA does not regulate, and which are matters for agreement between the employer and the employees or their representative. FLSA does not require:

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120 29 U.S.C. § 2617(a)(1).

121 Act of Jun. 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C. §§ 201-219.

122 29 U.S.C. § 206(a)(1).

123 29 U.S.C. § 206(d).

124 29 U.S.C. § 207.

125 29 U.S.C. § 212(c). Child labor orders and regulations are codified at 29 C.F.R. §§ 570.1--570.129 (1994).

- vacation, holiday, severance, or sick pay;
- meal or rest periods, holidays off, or vacations;
- premium pay for weekend or holiday work;
- pay raises or fringe benefits;
- discharge notice, reason for discharge, or immediate payment of final wages to terminated employees;
- wage payment or collection procedures for wages in excess of those required by FLSA; or,
- limitation on the number of hours in a day or days in a week that an employee may be required or scheduled to work if the employee is at least 16 years old.[126]

Coverage

The CAA provides that the term "covered employee" does not include an *intern*, as that term will be defined by regulation. Volunteers will not be covered if they receive no compensation, but may receive expenses, reasonable benefits, and a nominal fee.

Compensatory Time

Unlike state and local public employees, employees under the CAA must be compensated in cash for overtime, and may not be given compensatory time-off in lieu of overtime.

Irregular Work Schedule

The CAA requires the Board to issue regulations for covered employees whose work schedules directly depend on the schedule of the House or the Senate. The regulations must be comparable to the provisions in the FLSA that apply to employees who have irregular work schedules. The FLSA provision on employment necessitating irregular hours of work allows an employer to employ individuals for more than 40 hours in a week, provided there is guaranteed compensation which includes overtime pay.

Section 7(f) allows extra hours if employment is pursuant to a bona fide individual contract or collective bargaining agreement, if the duties necessitate irregular hours of work, and if the contract specifies a regular rate of pay above the minimum wage, specifies overtime compensation at one and one-half times the regular rate, and provides a weekly guaranty of pay for not more than 60

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126 "Handy Reference Guide to the Fair Labor Standards Act," WH Publication 1282, U.S. Department of Labor, May 1992, at 2.

hours at the specified rates. "Section 7(f) is the only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from week to week."[127]

Exempt Employees

Bona fide executive, administrative, and professional employees are exempt from wage and hour coverage under the FLSA, but not from equal pay and record keeping requirements. The exemption from the minimum wage and overtime requirements applies to any employee employed in a "bona fide executive, administrative, or professional capacity," as those terms are defined and delimited from time to time by regulations of the Secretary of Labor.[128]

Regulations issued by the Secretary define an *executive employee* as one who primarily manages the enterprise or a department or subdivision; customarily and regularly directs the work of two or more employees; has authority to hire or fire, or to recommend hiring or firing; customarily and regularly exercises discretionary powers; devotes less than 20 per cent of hours worked to nonexempt activities; and, is compensated by salary or fee at least $155 per week.[129]

An *administrative* employee primarily performs office or nonmanual work directly related to management policies or general business operations; customarily and regularly exercises discretion and independent judgment; regularly and directly assists a proprietor or executive or administrative employee, performs along specialized or technical lines, or executes special assignments or tasks; does not devote more than 20 per cent of hours to nonexempt tasks; and is compensated by salary or fee at least $155 per week.[130]

A *professional* employee is one whose work requires knowledge of an advanced kind in a field of science or learning, or is original and creative in character; whose work requires the consistent exercise of discretion and judgment in its performance; whose work is predominantly intellectual and varied in character, and whose result or output cannot be standardized in relation to a given period of time; who devotes less than 20 per cent of hours worked to nonexempt work; and who is compensated by salary or fee at least $170 per week.[131]

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127 29 C.F.R. § 778.403.

128 29 U.S.C. § 213(a)(1).

129 29 C.F.R. § 541.1.

130 29 C.F.R. § 541.1.

131 29 C.F.R. § 541.3.

Remedy

The remedy for a violation is the same that would be appropriate under section 16(b) of the FLSA. An employer who violates the FLSA becomes liable for the unpaid minimum wages and the unpaid overtime compensation, together with an additional equal amount as liquidated damages (double back pay).[132]

EMPLOYEE POLYGRAPH PROTECTION ACT

Section 204 of the CAA provides that no employing office may require a covered employee to take a lie detector test, if the testing would be prohibited under subsections 3(1), 3(2), or 3(3) of the Employee Polygraph Protection Act of 1988 (EPPA).[133] Under the EPPA, employers may not use lie detectors to screen applicants for employment, or to screen employees during the course of employment. The act specifically makes it illegal for an employer:

- to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;
- to use, accept, refer to, or inquire concerning the results of any such lie detector test;
- to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against an employee who refuses to take a test, or on the basis of the results of the test.[134]

Waivers Prohibited

The rights and procedures of the EPPA may not be waived by contract or otherwise, unless the waiver is part of a written settlement agreed to and signed by the parties to a pending action or complaint under that act.[135]

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132 29 U.S.C. § 216(b).

133 Pub.L. 100-347, Jun. 27, 1988, 102 Stat. 646, 29 U.S.C. §§ 2001-2009. Department of Labor regulations are codified at 29 C.F.R. §§ 801.1-801.75.

134 29 U.S.C. § 2002(1),(2),(3).

135 29 U.S.C. § 2005(d).

Capitol Police

Nothing in the CAA precludes the Capitol Police from using lie detectors in accordance with regulations issued by the Board.[136]

Remedy

The remedy for a violation is the same remedy that would be appropriate under section 6(c)(1) of the EPPA. An employer who violates the EPPA becomes liable for such equitable relief as may be appropriate, including employment, reinstatement, promotion, and the payment of lost wages and benefits.[137]

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

Section 205 of the CAA provides that no employing office shall be closed, and no mass layoff may be ordered, within the meaning of section 3 of the Worker Adjustment and Retraining Notification Act,[138] until the end of a 60-day period after notice has been given to the covered employees or their representative.

Section 3 of the WARN Act provides that an employer may not order a plant closing or mass layoff until the end of the 60-day period after the employer has served notice to:

- each collective bargaining representative of the affected employees, or, if none, to each affected employee; and
- to the State dislocated worker unit and chief elected official of the local government unit[139]

Under the WARN Act, a *plant closing* means the permanent or temporary shutdown of a single site of employment, if the shutdown results in an employments loss to 50 or more full-time employees during any 30 day period. A *mass layoff* means a reduction in force which:

- is not a plant closing, and

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136 CAA, § 204(a)(3). Section 7(d) of the EPPA provides a limited exemption for ongoing investigations. Polygraph testing, subject to restrictions, may be applied to employees who are reasonably suspected of involvement in a workplace incident, such as theft or embezzlement, that resulted in specific economic loss to the employer. 29 U.S.C. § 2006(d). This section was not made applicable to the Congress by the CAA.

137 29 U.S.C. § 2005(c)(1).

138 29 U.S.C. §§ 2101-2109.

139 29 U.S.C. § 2102(a).

- results in an employment loss at a single site of employment during any 30-day period for at least 33 percent of the full-time employees and at least 50 full-time employees.

A mass layoff also includes an employment loss at a single site during any 30-day period for at least 500 full-time employees, regardless of the percentage of the workforce.[140]

Affected employees are those who may reasonably be expected to experience an employment loss as a consequence of a proposed closing or layoff. An employment loss is an employment termination, other than a discharge for cause, voluntary departure, or retirement; a layoff exceeding 6 months; or, a 50 percent reduction in hours of work during each month of a 6-month period. Part-time employees are those who work an average of fewer than 20-hours per week, or fewer than 6 of the prior 12 months.[141]

Reductions to Required Notice Period

Section 3 of the WARN Act provides for a reduction of the 60-day notice period under certain circumstances:

- An employer may order a shutdown at a single site before the end of the 60-day notice period if the notice would have precluded the employer from actively seeking capital or business which would have enabled the employer to avoid or postpone the shutdown (failing business exception).

- An employer may order a plant closing or mass layoff before the end of the 60-day notice period if caused by business circumstances not reasonably foreseeable at the time notice was required (unforeseeable circumstance exception).

- No notice is required if the plant closing or mass layoff is due to any form of natural disaster, such as flood, earthquake, or drought.[142]

Remedies

The remedy for a violation is the same remedy that would be appropriate under subsections 5(a)(1), 5(a)(2), and 5(a)(4) of the WARN Act. An employer who violates the WARN Act becomes liable for:

- Back pay for each day of violation, up to 60 days, at the higher of the employee's average regular rate for the last three years, or the final

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140 29 U.S.C. § 2101(a)(2),(3).

141 29 U.S.C. § 2101(a).

142 29 U.S.C. § 2102(b).

regular rate. Liability cannot exceed one-half the number of days of employment.

- Benefits due under any employee pension or welfare benefit plan, including the cost of medical expenses incurred during the employment loss which would have been covered.[143]

The employer's liability is reduced by

- any wages paid during the period of violation;
- any voluntary and unconditional payment that is not required by any legal obligation; and
- any payment by the employer to a third party or trustee, such as premiums for health benefits or payments to pension plans, for the period of the violation.[144]

If the employer proves that the violation was in good faith, and that the employer had reasonable grounds for believing it was not a violation, then the amount of liability may be reduced.[145]

VETERANS EMPLOYMENT AND REEMPLOYMENT: UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT ACT OF 1994

Section 206 of the CAA applies to employing offices the rights and protections of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[146] Under section 206(a)(1) the CAA, it is unlawful for an employing office to *discriminate* against an eligible employee, to *deny reemployment rights* to an eligible employee, or to *deny benefits* to an eligible employee.

Discrimination

The USERRA protects any person who "is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service." The statute prohibits denial of initial employment, reemployment, retention in employment, promotion, or any benefit

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143 29 U.S.C. § 2104(a)(2). The WARN Act protects benefits under ERISA-covered plans, as defined in ERISA, 29 U.S.C. § 1002(3). Congressional employees are not covered by ERISA, which exempts governmental plans maintained by the United States for its employees. 29 U.S.C. § 1003(b)(1); 29 U.S.C. § 1002(32).

144 29 U.S.C. § 2104(a)(2).

145 29 U.S.C. § 2104(a)(4).

146 38 U.S.C. §§ 4301-4333.

of employment on the basis of covered service.[147] An employer violates the law if the person's service was a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such service.[148]

Reemployment Rights

A person absent for service is entitled to reemployment rights and benefits if advance notice was given to the employer, the cumulative length of previous absences does not exceed five years, and the person reports to work or submits an application for reemployment.[149] Employers are not required to reemploy a person under USERRA if the employer's circumstances have so changed as to make such reemployment impossible or unreasonable, if employment would impose an undue hardship on the employer, or if employment was for a brief, nonrecurrent period, with no reasonable expectation that it would continue indefinitely or for a substantial period. The employer has the burden of proving the impossibility or unreasonableness, undue hardship, brief or nonrecurrent nature, or lack of reasonable expectation.[150]

Benefits

A reemployed person is entitled to seniority and other rights and benefits determined by seniority as of the date of commencement of service, plus the additional seniority and rights and benefits that would have been attained if the person had remained continuously employed.[151] If a person (or the person's dependent) has coverage under an employee health plan, the person may elect to continue plan coverage while absent to perform service, up to a maximum of 18 months, or until the return to work, whichever is earlier. The covered person may be required to pay not more than 102 percent of the cost of continued coverage.[152] Rights under pension plans are also protected. A person who is reemployed does not incur a break in service under the plan. Each period in the uniformed services constitutes service with the employer for determining the accrual of benefits and the nonforfeitability of benefits under the plan.[153]

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147 38 U.S.C. § 4311(a).

148 38 U.S.C. § 4311(b).

149 38 U.S.C. § 4312(a).

150 38 U.S.C. § 4312(d)(1).

151 38 U.S.C. § 4316.

152 38 U.S.C. § 4317.

153 38 U.S.C. § 4318.

Eligible employee means a covered employee performing service in the uniformed services, who has not been terminated by a dishonorable or bad conduct discharge; separated under other than honorable conditions; dismissed by sentence of a general court-martial, by commutation of such sentence, or by order of the President in time of war; or, dropped from the rolls because of absence without authority for 3 months or because sentenced to confinement.[154]

Service in the uniformed services means voluntary or involuntary duty under competent authority, and includes active duty, active duty for training, full-time National Guard duty, and time absent for examination for fitness for such duty. The *uniformed services* are the Armed Forces, National Guard, Public Health Service, and any other category of persons designated by the President in time of war or emergency.

Employees in Legislative Branch

Unlike many other employment-related federal laws, veterans reemployment rights have applied to the legislative branch of the federal government for many years. Under USERRA, if the employer determines that reemployment in the legislative branch is impossible or unreasonable, then the person shall be ensured an offer of employment in an alternative position in a Federal executive agency.[155] The Office of Personnel Management (OPM) must identify an equivalent position somewhere in the executive branch of the federal government. If OPM cannot locate a position which is fully equivalent in terms of seniority, status, and pay to the old position, then OPM is required to identify the closest approximation consistent with the person's qualification and the circumstances of the case. In addition to the remedies under OPM jurisdiction, the additional remedies of reinstatement or appointment in the legislative branch may be offered by the Office of Compliance. Returning veterans are provided with assistance with respect to their rights and benefits through the Veterans' Employment and Training Service of the Department of labor.[156]

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154 38 U.S.C. § 4304.

155 38 U.S.C. § 4314(b). Before the enactment of USERRA in 1994, 38 U.S.C. § 4303(b) formerly provided that a person who was employed, immediately before entering the Armed Forces, in the legislative branch "shall be so restored or employed by the officer who appointed such person to the position...." If it was not possible for the person to be restored or employed, then the Director of the Office of Personnel Management was required only to determine whether or not there was a position in the executive branch for which the person was qualified, *and which was vacant or held by a temporary appointee.* The new law strengthens this requirement; now, the person "*shall,* upon application to the Director of the Office of Personnel Management, *be ensured an offer of employment in an alternative position in a Federal executive agency* on the basis described in subsection (b)" (emphasis supplied).

156 38 U.S.C. § 4321.

Remedy

The remedy for a violation of a veteran's rights is the same remedy that would be appropriate under the USERRA. The federal courts have remedial authority to require the employer to comply with the provisions of the statute, to pay lost wages or benefits, and to pay an additional equal amount as liquidated damages if the failure to comply was willful.[157] No fees or court costs may be charged or taxed against any person claiming rights under the statute.[158] The court may use its full equitable powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under the statute.[159] These remedies are in addition to, not substitutes for, the existing remedies available to covered employees under USERRA.[160]

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Section 215 of the CAA requires each employing office and each covered employee to comply with the provisions of section 5 of the Occupational Safety and Health Act of 1970 (OSHA).[161] Section 5(a) of OSHA requires every covered employer to comply with a *general duty* to furnish each employee with employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to those employees, and a *specific duty* to comply with occupational safety and health standards promulgated under the law.[162] Section 5(b) requires covered employees to comply with occupational safety and health *standards*, and with all rules, regulations, and orders issued pursuant to OSHA which are applicable to their actions and conduct.[163]

Procedures

Any employing office or covered employee may request the General Counsel to inspect and investigate places of employment under the jurisdiction of the employing offices. A citation or notice may be issued by the General Counsel to

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157 38 U.S.C. § 4323(c)(1).

158 38 U.S.C. § 4323(c)(2)(A).

159 38 U.S.C. § 4323(c)(3).

160 Grassley section-by-section analysis, *supra* note 1, 141 *Cong. Rec.* at S624.

161 Pub.L. 91-596, Dec. 29, 1970, 84 Stat. 1590, 29 U.S.C. §§ 651-78. See "All About OSHA," OSHA 2056, U.S. Department of Labor, Occupational Safety and Health Administration, 1992 (Revised).

162 29 U.S.C. § 654(a).

163 29 U.S.C. § 654(b).

any employing office that is responsible for correcting a violation of OSHA, or that has failed to correct a violation within the period permitted for correction. The citation normally will state a date by which corrective action is to be completed. The citation is issued only against the employing office that is responsible for the particular violation, as determined by regulations to be issued by the Board. A notification may be issued to any employing office that has failed to correct a violation within the permitted time. The CAA does not provide for the issuance of citations to employees. If a violation is not corrected, the General Counsel may file a complaint against the employing office with the Office of Compliance. The complaint is then submitted to a hearing officer for decision, with subsequent review by the Board.[164]

Variances

An employing office may apply to the Board for a variance from an applicable OSHA standard. The Board is to exercise the authorities granted to the Secretary of Labor under sections 6(b)((6) and 6(d) of OSHA. Under section 6(b)(6), the Secretary may issue a *variance* if an employer cannot comply with a standard. A *temporary variance* can be issued under section 6(b)(6) if an employer cannot comply with the standard by its effective date. It can be issued because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance, or because necessary construction or alteration of facilities cannot be completed by the effective date. The employer must take all available steps to safeguard employees against the hazard, and must have an effective program for compliance as quickly as practicable.[165] Under section 6(d), a *permanent variance* from a standard may be issued if the conditions, practices, means, methods, operations, or processes used by the employer will provide employment as safe and healthful as that which would prevail if the employer had complied with the standard.[166]

Responsibility for Citations

OSHA violations will be the responsibility of the Architect of the Capitol (AOC) and of the employing office. A citation or notification may only be issued to a person that is responsible for correcting a violation as determined under regulations of the Board of Directors. Situations may arise where the same workplace is subject to the overlapping control of the Member or Committee Chair, on one hand, and the Architect of the Capitol, on the other. Under

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[164] CAA § 215(c). The Grassley section-by-section analysis, *supra* note 1, 141 *Cong. Rec.* at S625, explains: "The decision whether to follow a citation with a complaint once it is evident that there has not been compliance, or to file a notification before the filing of the complaint, will normally turn on whether the General Counsel believes that good faith efforts are being undertaken to comply with the citation, but the time period for complete remediation of the citation has expired."

[165] 29 U.S.C. § 655(b)(6).

[166] 29 U.S.C. § 655(d).

OSHA, this is an issue of multi-employer responsibility.[167] In *Brennan v. OSHRC*,[168] the court held that, where an employer is in control of an area, and responsible for its maintenance, then to prove a violation it need only be shown that a hazard has been committed, and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking.

Periodic Inspections

The CAA requires the General Counsel to conduct periodic inspections of all facilities of the Congress to report on compliance with OSHA at least once during each Congress. The General Counsel must report the results, identifying the responsible employing offices, describing corrective steps, and assessing risks.[169]

Initial Period for Study and Corrective Action

The period from enactment of the CAA to December 31, 1996, is available for the Architect of the Capitol and other employing offices to identify any OSHA violations, to determine the costs of compliance, and to take any necessary corrective action to abate any violations. The Office of Compliance is to assist the AOC and other employing offices by arranging for inspections and other technical assistance. The General Counsel is to conduct a thorough inspection prior to July 1996 and report to Congress.[170]

Remedy

The remedy for a violation of the duties imposed by OSHA is an order to correct the violation, including an order appropriate under section 13(a) of OSHA. Section 13(a) grants federal court jurisdiction to issue orders to restrain any conditions or practices in any place of employment which could cause death or immediate serious physical harm. An order may require steps to avoid, correct, or remove the imminent danger, and prohibit the employment or presence of any individuals not necessary to mitigate the danger.[171]

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167 See Rothstein, *Occupational Safety and Health Law*, 3d ed. 1990), chapter 7, page 197: "Multi-employer liability is one of the most difficult areas of OSHA law: The citation and notification should probably be issued to the person who has control of the workplace, or to the person who is responsible for abating the violation, or to both."

168 513 F.2d 1032 (2d Cir. 1975).

169 CAA, § 215(e).

170 *Id.*, § 215(f).

171 29 U.S.C. § 662(a).

FEDERAL LABOR-MANAGEMENT RELATIONS STATUTE

Section 220 of the CAA applies specified rights, protections, and responsibilities established under the Federal Labor-Management Relations Statute (FLMRS)[172] to employing offices and to covered employees and their representatives. The CAA incorporates, by express reference, sections 7102, 7106, 7111-7117, and 7119-7122 of Title 5 of the U.S. Code. The FLMRS is administered by the Federal Labor Relations Authority (FLRA), an independent agency. The FLRA consists of the Authority, the General Counsel and the Federal Service Impasses Panel. The CAA delegates duties of the FLRA and the Impasses Panel to the Board of Directors of the Office of Compliance, and those of the Authority's General Counsel to the Office's General Counsel.[173]

Applicability of the FLMRS to Congress

In general, the rights and responsibilities of the above-designated provisions of the FLMRS apply to "employing offices" and "covered employees," as defined elsewhere under the CAA.[174] But, the Board, in its directive to issue regulations consistent with those promulgated by the FLRA, is also authorized to exclude from coverage employees in designated offices if an exclusion is required because of (1) a conflict or an appearance of a conflict of interest, or (2) Congress' constitutional responsibilities.[175] Offices designated for potential exclusion from coverage encompass virtually all legislative components of the Congress.[176]

Employee Rights

Pursuant to these statutes, covered employees have a protected right to form, join, or assist a labor organization or to refrain from such activity freely and without fear of penalty or reprisal. This includes the right of an employee to act as a representative for a labor organization and to present the views of the labor organization to heads of agencies or other appropriate authorities. Employees have the right to engage in collective bargaining.[177] Among the

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172 FLMRS was enacted as Title VII of the Civil Service Reform Act of 1978, Pub.L. 95-454, Title VII, Oct. 13, 1978, 92 Stat. 1192, 5 U.S.C. §§ 7101-35. See "A Guide to the Federal Service Labor-Management Relations Statute," FLRA Doc. 1213, U.S. Federal Labor Relations Authority, Rev. 1992.

173 CAA, § 220(c)(1)(2) & (4).

174 CAA, § 220(a)(1). The terms "covered employee" and "employing office" are defined broadly at § 101(3) & (9).

175 CAA, § 220(e)(1)(B)(i) & (ii).

176 CAA, § 220(e)(2).

177 5 U.S.C. § 7102.

rights conferred by recognition as exclusive representative of the employees is the opportunity to be represented in discussions between the agency, which -- under the CAA -- is defined to include an employing office,[178] and one or more employees concerning any grievance, disciplinary action, or any personnel policy or practices or other general conditions of employment.

The right of exclusive representation does not, however, preclude an employee from being represented by an attorney or other representative of the employee's own choosing, or exercising grievance or appellate rights established by law, rule, or regulation.[179]

Management Rights

The FLMRS expressly reserves to management the authority to determine the mission, budget, organization, number of employees, and internal security practices of the agency. In accordance with applicable laws, management may hire, assign, direct, layoff, and retain employees in the agency or suspend, reduce in grade or pay, or take other disciplinary action against such employees.[180]

Management may assign work and make determinations respecting contracting out and the personnel who will conduct agency operations. With respect to filling positions, management may make selections for appointments from among properly ranked and certified candidates for promotion, and take whatever actions may be necessary to carry out the agency mission during emergencies.

Labor organizations, however, are *not* precluded from negotiating, at the election of the agency, on the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods and means of performing work; and, appropriate arrangement for employees adversely affected by the exercise of these authorities.

Recognition of Labor Organizations

Under the FLMRS, an agency shall accord exclusive recognition to a labor organization if the organization has been selected as representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election. The Authority (under the CAA, the Board) determines the appropriateness of any unit. This includes the determination whether the appropriate unit should be established on an agency, installation, functional or other basis, and whether the unit will ensure a clear and identifiable community of interest among the employees in the unit and will

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178 CAA, § 220(a)(2).

179 5 U.S.C. § 7114.

180 5 U.S.C. § 7106.

promote effective dealings with, and efficiency of the operations of the agency involved.[181]

A unit cannot include several express categories of employees, including any management official or supervisor; a confidential employee; an employee engaged in administering the FLMRS; both professional and other employees, unless a majority of the professional employees vote for inclusion in the unit; and, any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security.[182]

Representation Petitions

The CAA directs the Board to issue regulations to implement the FLMRS in Congress. Such regulations "shall be the same as the substantive regulations promulgated by the Federal Labor Relations Authority" unless the Board can demonstrate "good cause" to support modification.[183] Regulations under the FLMRS establish several types of petitions: for exclusive recognition of a labor organization requesting an election to determine whether it should be recognized as the exclusive representative; for an election to determine if a labor organization should be decertified; a petition for clarification relating to representation; a petition to determine whether the currently certified labor organization continues to represent a majority of the employees; a petition seeking clarification of, or an amendment to, a certification or recognition already in effect; a petition for determination of eligibility for dues allotment by a labor organization; or, a petition to consolidate existing exclusively recognized units.[184]

Exclusive Representative's Rights and Obligations

In addition to the right to negotiate collective bargaining agreements and represent employees in formal negotiations and at employee examinations, the exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.[185]

Members of the exclusive representative are entitled to use payroll deductions to pay regular and periodic dues to the exclusive representative upon submission to the agency of a written assignment. Allotments are at no cost to

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181 5 U.S.C. §§ 7111-12.

182 Many of these classes of employees are defined under § 7103 of the FLMRS, which is not incorporated into the CAA.

183 CAA, § 220(d).

184 5 C.F.R. § 2422.1 (1993).

185 5 U.S.C. § 7114.

the employee or the exclusive representative. Assignments cannot be revoked for one year, and allotments for dues deductions may terminate when the exclusive representative ceases to be applicable to the employee, or the employee is suspended or expelled from membership in the union.[186]

The exclusive representative must adopt and subscribe to standards of conduct that assure it will maintain democratic principles and a system of financial responsibility.[187] Any employee representing an exclusive representative in collective bargaining negotiations is entitled to authorized official time for such purposes, including attendance at impasse proceedings.[188]

Collective Bargaining

An agency and any exclusive representative in any unit in the agency are to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement.[189] "Collective bargaining" under the FLMRS means "the performance of the mutual obligations of the representative of an agency and the exclusive representative of the employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement (CBA) reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession."[190] "Conditions of employment" generally refers to personnel policies, practices, and matters affecting working conditions.

The FLMRS delineates aspects of the duty of an agency and a labor representative to negotiate in good faith, including the obligations to approach negotiations with a sincere resolve to reach a CBA, to meet at reasonable times and convenient places as frequently as may be necessary, to furnish the union with data which is reasonably available and necessary for collective bargaining negotiations. An agreement between an agency and the labor organization is subject to approval by the head of the agency.[191]

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186 5 U.S.C. § 7115.

187 5 U.S.C. § 7120.

188 5 U.S.C. § 7131.

189 5 U.S.C. § 7114.

190 5 U.S.C. § 7103(12).

191 5 U.S.C. § 7114(b) & (c).

Negotiated Grievance Procedures

Every CBA is required to provide procedures for the settlement of grievances, including questions of what can be taken to arbitration.[192] Except where an employee is provided a statutory option, the grievance procedure is the exclusive means for resolving covered grievances. Grievance procedures do not apply to grievances over alleged violations relating to prohibited political activities; retirement, life insurance, or health insurance; a suspension or removal for national security reasons; any examination, certification, or appointment; or the classification of any position which does not result in the reduction in grade or pay of the employee.

Resolution of Negotiation Impasses

Under the FLMRS, the Federal Mediation and Conciliation Service (FMCS) is directed to provide services and assistance in the resolution of negotiation impasses. The FMCS determines under what circumstances and the manner in which it shall provide these services.

If the FMCS fails to resolve a negotiation impasse, either party may request the services of the Federal Service Impasses Panel, whose function is delegated to the Board under the CAA. Parties may agree to adopt a procedure for binding arbitration if the procedure is approved by the Panel, or, the Panel itself may be requested to consider the matter. The Panel may investigate the impasse and recommend procedures to effect resolution or issue its own recommendation.[193]

Appeals over Negotiability

There are established procedures for resolving disputes over the negotiability of a matter proposed to be bargained. If an agency involved in a CBA alleges that the duty to bargain does not extend to a particular matter, the labor organization may appeal to the Authority, or the Board under the CAA.[194] These procedures are the sole means available to resolve such matters where there are no actual or contemplated changes in conditions of employment.

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192 5 U.S.C. § 7121.

193 5 U.S.C. § 7119.

194 5 U.S.C. § 7117.

Exceptions to Arbitration Awards

The FLMRS requires CBA's to provide procedures for settlement of grievances, including questions of arbitrability.[195] This section is made applicable to Congress under the CAA. Either party to arbitration may file an exception of any award with the Board.[196]

The Authority will review an arbitrator's award to determine if it is deficient (1) because it is contrary to any law, rule, or regulation, or (2) on other grounds similar to those applied by federal courts in private sector labor-management relations. The Authority may take such action and make recommendations concerning the award as it considers necessary.

Unfair Labor Practices

Unfair practices for management and labor organizations are set forth under the FLMRS.[197] Management shall not:

- interfere with, restrain, or coerce any employee in the exercise of legal rights;
- encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;
- sponsor, control or otherwise assist any labor organization, other than by furnishing customary and routine services and facilities;
- discipline or otherwise discriminate against an employee because the employee has filed a complaint or given testimony;
- refuse to consult or negotiate in good faith;
- fail or refuse to cooperate in impasse procedures; and
- enforce any rule or regulation which is in conflict with any applicable CBA if the agreement was in effect before the date of the rule or regulation.

It is an unfair labor practice for a labor organization:

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195 5 U.S.C. § 7121.

196 5 U.S.C. § 7122. CAA § 220(c)(1) empowers the Board to exercise all authorities of the FLRA, including exceptions to arbitral awards under 5 U.S.C. § 7122.

197 5 U.S.C. § 7116.

- to interfere with, restrain or coerce employees in the exercise of rights assured them by statute whether or not they choose to join a union;

- to cause or attempt to cause an agency to discriminate against any employee in the exercise of his or her rights;

- to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity or the discharge of the members duties as an employee;

- to discriminate against an employee with regard to the terms or conditions of membership in the union on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

- to refuse to consult or negotiate in good faith with management;

- to fail or refuse to cooperate in impasse procedures;

- to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations; or

- to condone any of the activity described above by failing to take action to prevent or stop it.

It is also an unfair labor practice for any exclusive representative to deny membership to any employee in the appropriate unit except for failure (1) to meet reasonable occupational standards uniformly required for admission, or (2) to tender dues uniformly required as a condition of membership.

Remedies

Under the FLMRS, enforcement is vested in the Authority, the General Counsel and the Federal Service Impasses Panel. The Authority is composed of three members who serve five year terms. The responsibilities of the Authority include:

- determining the appropriateness of units for labor organizations;

- supervising or conducting elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit;

- prescribing criteria and resolving issues relating to determining compelling need for rules or regulations;

- resolving issues relating to the duty to bargain in good faith;
- prescribing criteria relating to the granting of consultation rights with respect to conditions of employment;
- conducting hearings and resolving complaints of unfair labor practices; and
- resolving exceptions to arbitrators' awards.

The CAA delegates the Authority's duties to the Board of Directors of the Office of Compliance.[198] The Board may, however, direct that its General Counsel carry out the Board's investigative responsibilities.

Likewise, the CAA delegates to the Board's General Counsel those responsibilities generally reposed in the FLRA's General Counsel.[199] Under the FLMRS, the General Counsel has independent responsibility to investigate alleged unfair labor practices, and the filing and prosecution of unfair labor practice complaints before the Authority. Under the CAA, if any person charges an employing office or a labor organization with engaging in an unfair labor practice, and makes such charge within 180 days of the alleged occurrence, the Board's General Counsel shall investigate the charge and may file a complaint with the Office of Compliance. Complaints, hearings, and appeals to the Board are conducted in accordance with §§ 405 and 406 of the CAA. With the exception of decisions governing the determination of appropriate units for labor organization representation and certain arbitral awards, parties aggrieved by a final decision of the Board may file a petition for judicial review in the U.S. Court of Appeals for the Federal Circuit.[200]

Functions of the Federal Service Impasses Panel (FSIP), which provides assistance in resolving negotiation impasses between agencies and exclusive representatives, are delegated to the Board of Directors. At the request of the Board, the Executive Director shall appoint a mediator to perform the functions of the FSIP.[201]

PROHIBITION OF INTIMIDATION OR REPRISAL

Section 207 of the CAA provides one uniform remedy for intimidation or reprisal taken against covered employees for exercising rights and pursuing remedies of violations of rights conferred by the act. It is unlawful for an

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198 CAA, § 220(c)(1).

199 CAA, § 220(c)(2).

200 CAA, § 220(c)(3).

201 CAA, § 220(c)(4).

employing office to take reprisal against, or otherwise discriminate against, any covered employee because the employee:

- opposed any practice made unlawful by the act,
- initiated proceedings,
- made a charge, or,
- testified, assisted, or participated in any manner in a hearing or other proceeding.

The remedy for a violation is the legal or equitable remedy that would be appropriate to redress the violation.[202]

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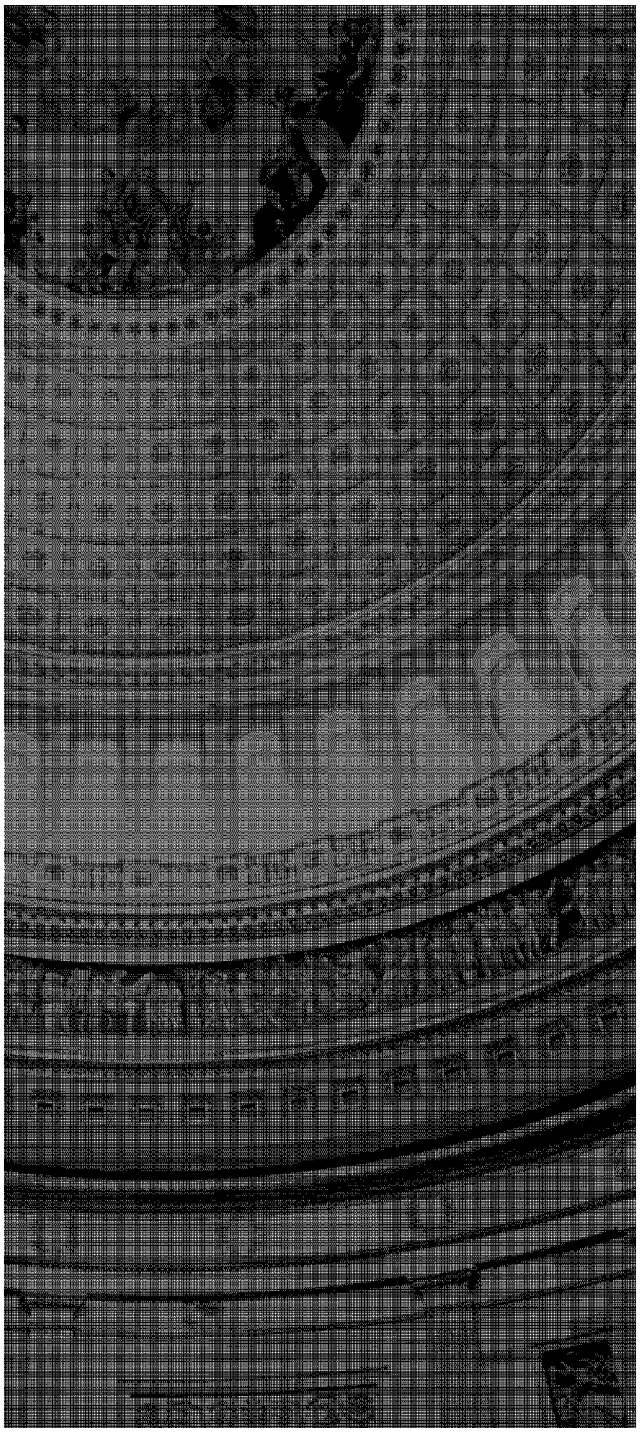
202 CAA, § 207.

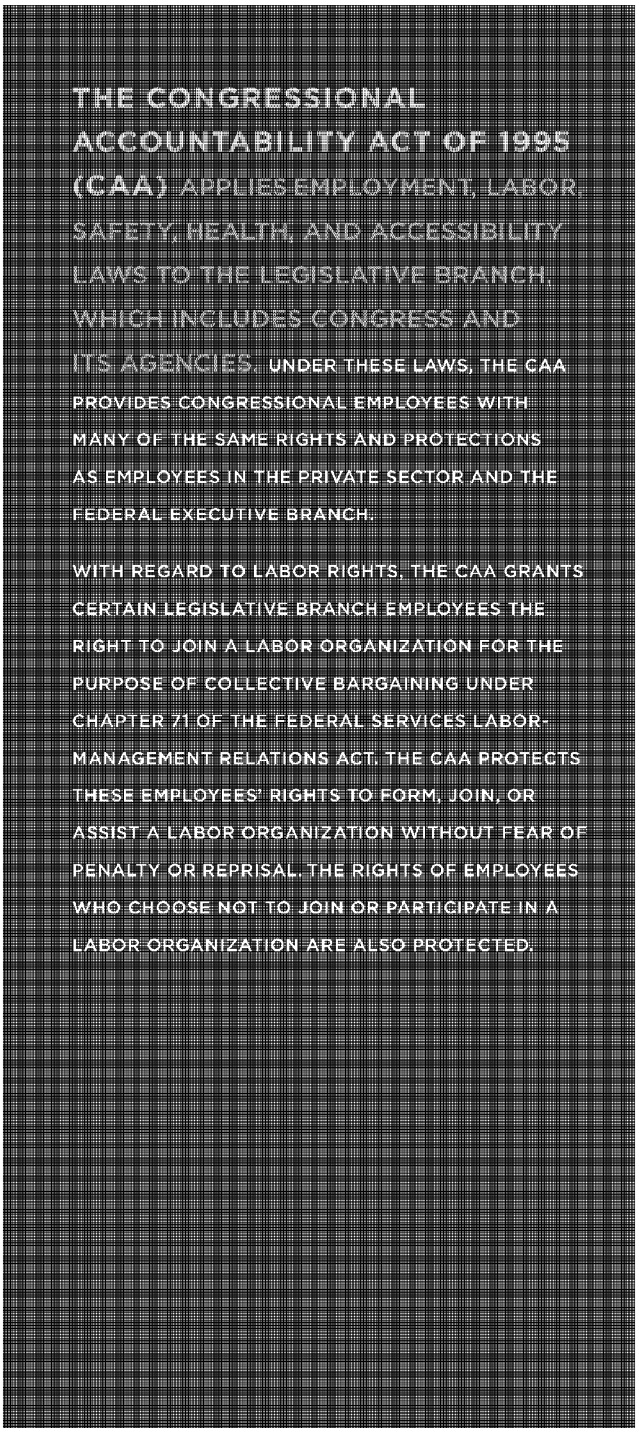
LABOR REPRESENTATION

COLLECTIVE BARGAINING RIGHTS IN THE CONGRESSIONAL WORKPLACE

OFFICE OF COMPLIANCE—ADVANCING WORKPLACE RIGHTS, SAFETY, HEALTH, AND ACCESSIBILITY IN THE LEGISLATIVE BRANCH

www.compliance.gov




THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 (CAA) APPLIES EMPLOYMENT, LABOR, SAFETY, HEALTH, AND ACCESSIBILITY LAWS TO THE LEGISLATIVE BRANCH, WHICH INCLUDES CONGRESS AND ITS AGENCIES. UNDER THESE LAWS, THE CAA PROVIDES CONGRESSIONAL EMPLOYEES WITH MANY OF THE SAME RIGHTS AND PROTECTIONS AS EMPLOYEES IN THE PRIVATE SECTOR AND THE FEDERAL EXECUTIVE BRANCH.
WITH REGARD TO LABOR RIGHTS, THE CAA GRANTS CERTAIN LEGISLATIVE BRANCH EMPLOYEES THE RIGHT TO JOIN A LABOR ORGANIZATION FOR THE PURPOSE OF COLLECTIVE BARGAINING UNDER CHAPTER 71 OF THE FEDERAL SERVICES LABOR-MANAGEMENT RELATIONS ACT. THE CAA PROTECTS THESE EMPLOYEES' RIGHTS TO FORM, JOIN, OR ASSIST A LABOR ORGANIZATION WITHOUT FEAR OF PENALTY OR REPRISAL. THE RIGHTS OF EMPLOYEES WHO CHOOSE NOT TO JOIN OR PARTICIPATE IN A LABOR ORGANIZATION ARE ALSO PROTECTED.

WHO IS ELIGIBLE FOR LABOR REPRESENTATION?

Certain employees of the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Accessibility Services, and the United States Capitol Police are eligible to form or join a labor organization. Not all Congressional employees are permitted to seek representation through a labor organization. For example, managers and supervisors cannot be represented by a labor organization. Employees of certain other offices, including the personal staff of Members of Congress and the staff of Congressional committees, are also not currently eligible for representation.

SEEKING REPRESENTATION BY A LABOR ORGANIZATION

If employees of a particular employing office would like to have a labor organization represent them, a labor organization must first file a representation petition with the Office of Compliance (OOC). This petition must show that at least 30 percent of employees of an appropriate bargaining unit wish to be represented for the purpose of collective bargaining by an exclusive representative.

If the OOC certifies the validity of the signatures on the petition, an election will be held so that employees can vote to choose whether or not to join the labor organization. After the initial petition is filed, any other labor organization can gain a place on the ballot by filing a petition showing they are supported by at least 10 percent of employees in the bargaining unit. Employees will have the opportunity to choose which labor organization they would like to represent them.

Labor representation elections are held at a time and in a manner agreed to by both the labor organization and the employing office. The election is conducted and overseen by the OOC. If a majority of the voting employees vote to be represented by a particular labor organization, the Board of Directors of the OOC will certify the labor organization as the employees' exclusive representative.

EMPLOYEE AND EMPLOYER OBLIGATIONS

Upon the certification of a labor organization as an exclusive bargaining representative, an employing office is under an obligation to recognize the labor organization as the bargaining agent of its employees. The employing office and the labor organization are required to negotiate in good faith over terms and conditions of employment, in order to reach a collective bargaining agreement.

As the exclusive representative of employees, a labor organization has both the right and the obligation to negotiate in good faith with an employing office over conditions of employment. A labor organization is responsible for representing the interests of all employees in the unit it represents, regardless of whether an employee is a member of the union.

WHAT IS COLLECTIVE BARGAINING?

"Collective bargaining" is the performance of the mutual obligation of the employing office and the exclusive representative of employees to meet at reasonable times and consult and bargain in a good faith effort to reach agreement on personnel policies, practices, and matters affecting working conditions.

UNFAIR LABOR PRACTICES

The CAA prohibits many types of unfair labor practices by both employing offices and labor organizations.

Employing offices are prohibited from:

- Interfering with, restraining, coercing, or taking reprisals against employees in the exercise of the labor organizing rights provided by the CAA
- Encouraging or discouraging membership in a particular labor organization
- Refusing to consult or negotiate in good faith with a labor organization over terms and conditions of employment

Labor organizations are prohibited from:

- Interfering with, restraining, coercing, or taking reprisals against employees in the exercise of their labor organizing rights provided by the CAA
- Discriminating against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status, or handicapping condition
- Refusing to consult or negotiate in good faith with an employing office
- Going on strike

This is not a complete list of prohibited labor practices. Please contact the OOC or visit its website for further information on labor practices prohibited by the CAA.

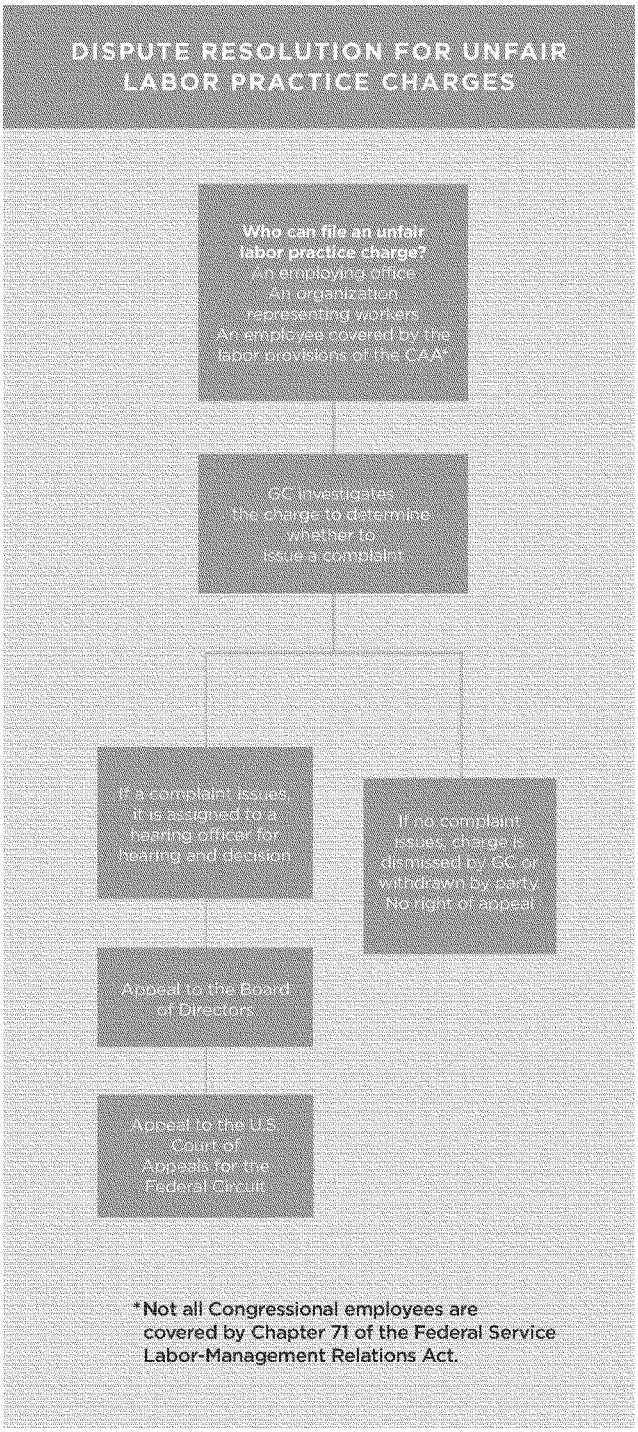
DISPUTE RESOLUTION FOR VIOLATIONS OF FEDERAL LABOR LAWS

An employing office, a labor organization, or an individual may file an unfair labor practice charge with the General Counsel of the OOC. The General Counsel investigates and prosecutes unfair labor practice charges before a hearing officer and the OOC Board of Directors. The charge must be filed within six months from the date the alleged unfair labor practice occurred.

The Board of Directors of the OOC has the authority to issue final decisions on union representation and elections issues, questions of arbitrability, and exceptions to arbitrator's awards. The Board also serves as the appellate body for hearing officer decisions on unfair labor practice complaints.

FOR FURTHER INFORMATION

This pamphlet is a basic guide to the CAA's labor rights provisions. For more information about the CAA and labor rights, please contact the OOC. Information is also available online at **www.compliance.gov.**


DISPUTE RESOLUTION FOR UNFAIR LABOR PRACTICE CHARGES
Who can file an unfair labor practice charge?
An employing office
An organization representing workers
An employee covered by the labor provisions of the CAA*
GC investigates the charge to determine whether to issue a complaint
If a complaint issues, it is assigned to a hearing officer for hearing and decision
If no complaint issues, charge is dismissed by GC or withdrawn by party. No right of appeal
Appeal to the Board of Directors
Appeal to the U.S. Court of Appeals for the Federal Circuit
*Not all Congressional employees are covered by Chapter 71 of the Federal Service Labor-Management Relations Act.

THE OFFICE OF COMPLIANCE (OOC) ADVANCES WORKPLACE RIGHTS, SAFETY, HEALTH, AND ACCESSIBILITY IN THE LEGISLATIVE BRANCH, WHICH INCLUDES CONGRESS AND ITS AGENCIES. ESTABLISHED AS AN INDEPENDENT AGENCY BY THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 (CAA), THE OOC EDUCATES EMPLOYEES AND EMPLOYING OFFICES ABOUT THEIR RIGHTS AND RESPONSIBILITIES UNDER THE CAA, PROVIDES AN IMPARTIAL DISPUTE RESOLUTION PROCESS, AND INVESTIGATES AND REMEDIES VIOLATIONS OF THE CAA.

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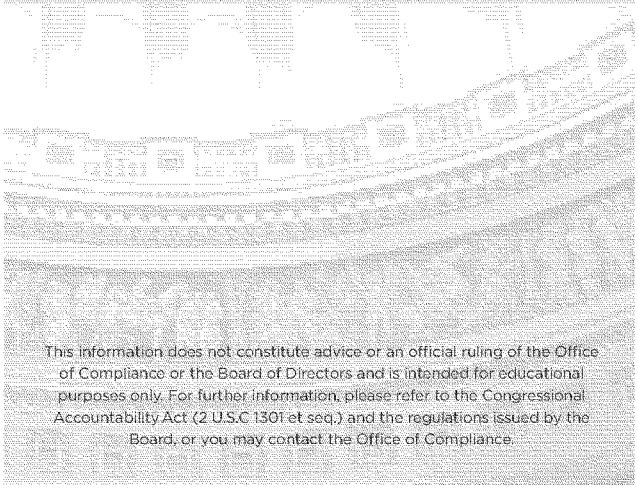

This information does not constitute advice or an official ruling of the Office of Compliance or the Board of Directors and is intended for educational purposes only. For further information, please refer to the Congressional Accountability Act (2 U.S.C 1301 et seq.) and the regulations issued by the Board, or you may contact the Office of Compliance.

**Testimony of Daniel Schuman, Policy Director, Demand Progress,
Before the Committee on House Administration,
On March 2, 2022,
Regarding Oversight of Section 220 of the Congressional Accountability Act; Implementing the Rights of Congressional Staff to Collectively Bargain**

Chairman Lofgren, Ranking Member Davis, and Members of the Committee, thank you for the opportunity to submit written testimony concerning the rights of congressional staff to collectively bargain. My name is Daniel Schuman and I serve as policy director at Demand Progress, a non-governmental organization focused on strengthening our democracy. We conduct research and engage in advocacy concerning strengthening Congress's ability to legislate and conduct oversight.

Congressional staff work hard under demanding circumstances. This has always been true, but the last year has been particularly traumatic.[1] Staff survived the insurrection, are slogging through the COVID pandemic, and are shouldering dramatically increasing workloads and heartbreaking requests for assistance.[2] The necessity of allowing staff to advocate for better working conditions are obvious, with one in eight staff not earning a living wage,[3] half of staff struggling to make ends meet,[4] and a long history of staff suffering from harassment, discrimination, unsafe working conditions, and having their benefits used as a political football.[5] These recent and ongoing experiences continue to take a mental and physical toll on staff. Many have reached — and some have passed — the breaking point.[6]

Business Insider reports "Current staff and outside experts fear that the exhaustion and trauma are pushing qualified people out the door, exacerbating the long-running problem of brain drain on Capitol Hill while denying lawmakers talented staff as they try

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[1] *Rampage Weighs on Congressional Staff Members and Capitol Workers*, New York Times (January 2021) https://www.nytimes.com/2021/01/08/us/politics/capitol-rampage-congressional-staff.html
[2] *Congress wakes up to its staff retention problems after Covid, bomb threats and riots: While lawmakers raise the cap on employee salaries and try to increase office budgets, some staffers say this year's strain on their mental health may still push them to leave*, Politico (September 2021) https://www.politico.com/news/2021/09/10/congress-staff-retention-problems-510879
[3] *Fair Pay: Why Congress Needs to Invest in Junior Staff*, Issue One (January 2022) https://issueone.org/wp-content/uploads/2022/01/Fair-Pay-Why-Congress-Needs-to-Invest-in-Junior-Staff.pdf
[4] *Briefing: Congressional Working Conditions Survey*, Congressional Progressive Staff Association (January 2022) https://static1.squarespace.com/static/616b86c93a6fd661d131ee40/t/61f08a1ce6f4ed211c8d51d6/1643153948206/CPSA+Briefing.pdf
[5] See, e.g., *Obamacare supporters, critics united against requirement for Congress, staff*, Baltimore Sun (October 2013) https://www.baltimoresun.com/health/bs-md-federal-workplace-congress-healthcare-20131028-story.html
[6] See generally *Capitol Strong* https://www.capitolstrong.org/

to tackle some of the most pressing issues to face the country in generations."[7] Making matters worse, in the midst of the pandemic, some staff were ridiculed by their superiors for wanting to wear masks at the office or to work from a remote location[8] while others were not informed or properly protected as insurrectionists stormed the Capitol Building, shattering any illusion that their personal safety would be placed above politics.

This is an acceleration of already troubling trends. House Majority Leader Steny Hoyer recently said "Each year we lose talented and experienced staff with deep institutional knowledge to the private sector because we do not offer competitive compensation and benefits. At the same time, we are failing to recruit and retain the more diverse workforce that we have said we want to attract."[9] House Administration Committee Ranking Member Rodney Davis sounded a similar note: "You can't always say 'let's put the Congress first,' because you're gonna have to put your families first. That's a decision I don't want to see staffers have to continue to make."[10]

Congress has begun to acknowledge the difficult circumstances for staff. The House Select Committee on the Modernization of Congress made numerous recommendations on improving the quality of life for Congressional staff.[11] They include delinking staff pay from member pay, addressing unequal treatment for student loan repayment and health care benefits, creating a voluntary pay band system, increasing the MRA to allow for increased salaries, improving human resources, and regularly surveying staff on ways to improve pay, benefits, and quality of life. The House Inspector General recently provided your office with a series of recommendations on adjusting the number of staff per office, increasing the amount of funds available per office, providing a COLA, and more.[12]

These recommendations, and measures undertaken by the House Rules, Administration, and Appropriations Committees to implement them and other reforms, are undeniably welcome. But the need for these reforms also indicates the current state of affairs. The feedback mechanism for reform is too slow and the signal received by Congress about staff distress is too weak. Staff need a mechanism by which their voices are heard with respect to their workplace conditions and terms of employment.

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[7] *Capitol Hill staffers are burned out and heading for the exits after a hellish year bookmarked by a pandemic and an insurrection*, Kayla Epstein, Business Insider (April 2021) https://web.archive.org/web/20210420080226/https://www.businessinsider.com/congress-capitol-hill-staff-burnout-remote-work-january-6-insurrection-2021-4?r=US&IR=T

[8] *GOP Staffers Detail Ridicule for Wearing Masks at Capitol,* Adam Raymond, the Intelligencer (July 2020) https://nymag.com/intelligencer/2020/07/gop-staffers-detail-ridicule-for-wearing-masks-at-capitol.html

[9] *Congress Eager to Increase Staff Pay But Fear Voter Backlash*, Emily Wilkins, BGOV (April 2021) https://www.bgov.com/core/news/#!/articles/QS7T2FDWRGG9

[10] Id.

[11] *The Select Committee on the Modernization of Congress - Final Report* (H. Rept. 116-562) https://www.congress.gov/congressional-report/116th-congress/house-report/562/1

[12] Letter from the Chief Administrative Officer to the Committee on House Administration concerning analysis pursuant to section 104 of H. Res. 756, https://s3.amazonaws.com/demandprogress/documents/House_IG_to_CHA_on_staff_funding_2021-12-02.pdf

One traditional way that employees work with employers to address their needs is through unions. As President Biden recently declared: "We must always protect the right of workers to unite and bargain for their own mutual aid or protection."[13] This is an avenue open to Congress, even if the history of the prior effort to allow for unionization has largely been forgotten.

In 1995, Congress enacted the Congressional Accountability Act, which was a key plank in the *Contract with America*. The CAA applied eleven federal laws addressing federal and private sector employers to Congress, *including the right to unionize*. It was the culmination of a 5-year bipartisan effort to "make Congress subject to the laws it passes," in the words of Sen. Grassley, a prime mover in the effort.[14]

> "The need for the legislation was clear. For example, in 1992, Congressman John Boehner (R-Ohio) asked the Occupational Safety and Health Administration ("OSHA") to inspect his office for violations.... OSHA found violations that could have resulted in fines to any other employer of $1,500.... In 1993, a *Washington Post* survey of Congressional staff revealed that one-third of the women questioned said they had been sexually harassed.... Further, the Congressional Management Foundation reported that women working as chiefs of staff on Capitol Hill made less money than similarly qualified men."[15]

Many arguments were made against applying these laws to Congress. But Sen. Grassley's arguments won the day. He was joined by Senators Lieberman (D-CT) and Nickels (R-OK), as well as Reps. Shays (R-CT), Goodling (R-PA), and Thomas (R-CA).

The Congressional Accountability Act allows staff to "form, join, or assist a labor organization for the purpose of collective bargaining without fear of penalty or reprisal."[16] But the CAA created a two-track system for unionization.

The first track allowed certain Legislative branch agencies and support staff to unionize, such as employees of the Capitol Police. The second track allowed for personal and committee staff to unionize, as well as some support office staff, but only after the Office of Compliance engaged in a notice-and-comment rulemaking and the proposed regulations are adopted by the chamber to which they would pertain (or by both chambers for certain shared entities, such as the Congressional Budget Office.)

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[13] *A Proclamation on Workers Memorial Day, 2021*, Pres. Biden (April 2021) https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/27/a-proclamation-on-workers-memorial-day-2021/

[14] *Practicing What We Preach: A Legislative History of Congressional Accountability*, Sen. Charles Grassley and Jennifer Shaw Schmidt, 35 Harv. J. on Legis. 33 (1998)

[15] See *Practicing What We Preach*.

[16] *Collective Bargaining and Unionization*, Office of Congressional Workplace Rights https://www.ocwr.gov/rights-protections/other-workplace-protections/collective-bargaining-and-unionization

The Office of Compliance Board issued regulations that would apply to second-track staff in the House and in the Senate in 1996.[17] But, though it would only require the passage of a simple resolution for most entities, neither the House nor the Senate acted to place the regulations into effect. Twenty-five years later, the consequences of overlooking and ignoring congressional staff have been made manifest to the detriment of staff and the institution which they serve.

Recently, in response to questions from the House Administration Committee, the Office of Congressional Workplace Rights addressed a number of important outstanding questions regarding applying the Congressional Accountability Act to staff who have not yet been afforded the opportunity to unionize:

- Can the House or Senate still pass a simple resolution pursuant to the CAA to allow for that chamber's personal, committee, and support staff to unionize?
- Are the regulations fit for 2021 and beyond?

The short answer to these questions, per the OCWR Board, is yes.[18] "The Board has conducted a thorough review and now unanimously endorses the regulations adopted by the 1996 Board and urges Congress to approve these regulations."

Rep. Levin introduced a resolution, H.Res.915, on February 9, 2022 that would put the regulations into effect.[19] The Congressional Workers Union, a volunteer group of staffers that are organizing to unionize the personal offices and committees of Congress, endorsed that resolution and called for a floor vote "at the earliest opportunity."[20] Many civil society organizations and unions have joined that call.

Congressional staff are essential to the success of Congress. Accordingly, Congress should provide its staff the ability to collectively advocate for measures that improve the operations of the Congress and the lives of those who serve in it.

The time is right for the House of Representatives to enact Rep. Levin's resolution that would activate legal protections for House staff who seek to unionize. We urge you to favorably report the measure.

Thank you for the opportunity to submit this testimony.

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[17] *A Brief Recent History of Unionization in Congress*, Daniel Schuman, First Branch Forecast (September 2020) https://firstbranchforecast.com/2020/09/29/a-brief-recent-history-of-unionization-in-congress/

[18] Letter from the OCWR to the House Administration Committee (February 22, 2022) https://s3.amazonaws.com/demandprogress/documents/2022.02.22_Letter_from_OCWR_Chair_to_Chairperson_Lofgren_re_collective_bargaining_regulations.pdf

[19] See H.Res.915 (117th Congress) https://www.congress.gov/bill/117th-congress/house-resolution/915

[20] CONGRESSIONAL WORKERS UNION APPLAUDS 130 CO-SPONSORS OF HOUSE RESOLUTION TO EXTEND ORGANIZING PROTECTIONS TO HOUSE STAFF, Congressional Workers Union, https://www.congressionalworkersunion.org/press-releases/congressional-workers-union-applauds-130-co-sponsors-of-house-resolution-to-extend-organizing-protections-to-house-staff

Written Testimony of Representative Andy Levin, Submitted to the Committee on House Administration on March 2, 2022, Regarding Oversight of Section 220 of the Congressional Accountability Act; Implementing the Rights of Congressional Staff to Bargain Collectively

Chairman Lofgren, Ranking Member Davis, and Members of the Committee, thank you for your attention to this important issue: establishing labor protections for Congressional staff to bargain collectively.

I introduced H.Res. 915 because I fervently believe all workers deserve the chance to have a union and to be protected in pursuing one. This resolution would approve regulations originally proposed by the Office of Compliance (OOC), now the Office of Congressional Workplace Rights (OCWR), in 1996. These regulations provide additional guidance for how legislative branch employees can exercise their statutory right to form or join labor organizations, as Congress expressly intended. The resolution is now cosponsored by over 160 of my House colleagues.

The matter of staff unionization was addressed twenty-six years ago when the Congressional Accountability Act (CAA) was passed. The CAA was a bipartisan effort that applied eleven federal laws addressing federal and private sector employers to the Legislative Branch, including the right to unionize. Twenty-six years ago, the concurrent resolution extending rights to federal employees of the Government Accountability Office and Library of Congress moved in the House. It was introduced on August 1, 1996, discharged by all committees and passed on the floor by unanimous consent a mere day later on August 2, 1996.[1] Despite this prompt action for other employees covered by the CAA, House and Senate staffers find themselves in the same position in 2022 as they were in 1996. We must bring them under the umbrella of the CAA's legal protections as quickly as possible.

As Republican Senator Chuck Grassley wrote in 1998, "It is simply not fair, or good governance, for the Congress of the United States to enact laws for the American people, while exempting itself from compliance." [2] Congress cannot create an exception to its own rules when it becomes inconvenient to implement them. Congressional offices are not above basic workplace protections. More importantly, Congressional staffers fundamentally deserve the labor protections that they help enact for other workers across every state and every district in this country.

I recognize it has been twenty-six years since the initial writing of the regulations. The way Congressional staffers complete their work has changed, to be certain. Despite these changes, the *nature* of staffers' jobs and duties has not changed. The regulations lay out the protected right and legal process for staff to organize, should they choose, and for employers to observe those

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[1] H.Con.Res.207 Bill History, https://www.congress.gov/bill/104th-congress/house-concurrent-resolution/207/all-actions?s=1&r=2

[2] Grassley, Senator Charles and Jennifer Shaw Schmidt. *Policy Essay: Practicing What We Preach: A Legislative History of Congressional Accountability*. 35 Harv. J. on Legis. 33, 34 (1998).

rights. Even if the OCWR sought to alter the regulations, it has publicly stated that it does not possess the authority to reconsider them. In a 1997 House Oversight hearing, then-Chair of the OOC Glen Nager testified on the process for reconsidering OOC regulations.[3] Mr. Nager testified for OOC that under law, they cannot – nor can a committee – demand a rewrite of the regulations absent three specific conditions.

Staffers have joined together and bravely told the world that they want a union. We must allow staff to exercise their protected labor rights without fear of retaliation. Congressional staff deserve, at long last, much-needed protections as they consider forming and joining unions here in Congress. I urge the Committee to discharge this Resolution and allow it to be enacted by the full House.

[3] Grassley, *supra* note 1 at 48.s

35 Harv. J. on Legis. 33

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Policy Essay
Senator Charles Grassley [a1] with Jennifer Shaw Schmidt [aa1]

PRACTICING WHAT WE PREACH: A LEGISLATIVE HISTORY OF CONGRESSIONAL ACCOUNTABILITY

Senator Grassley was the author of the Congressional Accountability Act of 1995. This Act required Congress to abide by many of the labor and civil rights laws governing the country. In this Essay, the author chronicles his struggle in the 1990s to make Congress pass such legislation. In 1994, the Congressional Accountability Act became a tenet of the Republican "Contract with America" and was the first law enacted by the 104th Congress in January 1995. In 1996, Congress enacted the Presidential and Executive Office Accountability Act, thereby making two of the three branches of government "accountable." In conclusion, the author notes the continuing battles not only to implement the Congressional Accountability Act, but also to create similar legislation for the Judicial Branch.

[Members of Congress] can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples, but without which every government degenerates into tyranny. If it be asked, what is to restrain [Members of Congress] from making legal discrimination in favor of themselves and a particular class of society? I answer: the genius of the whole system; the nature of just and Constitutional laws; and above all, the vigilant and manly spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature as well as on the people, the people will be prepared to tolerate anything but liberty.

—James Madison, *Federalist 57* [1]

***34** It is in this spirit that I worked for years to make Congress subject to the laws it passes. The major accomplishment on this front was the passage of the Congressional Accountability Act of 1995 ("CAA"), [2] the first law passed by the 104th Congress. This Act is undoubtedly one of Congress's greatest achievements during my tenure in Congress. It changed the practice of exempting us, in Congress, from the labor laws that govern the rest of the country. This Essay discusses my attempts to have Congress live by the laws it makes, and the challenges faced by the proponents of the CAA in securing passage of this landmark legislation.

I. MY PHILOSOPHY

I hold a strong belief that we, in Congress, are merely representatives of the people. We are not better than the people we represent and we are not, by definition and determination, different than the people we represent. We are, as representative government intends, the people themselves. I hold this view in all votes that I cast and all legislation that I introduce. The United States government must be accountable to the people. This is the same belief that led me to investigate and criticize the Pentagon for its $1,800 toilet seat [3] and the FBI crime lab for its improper and incompetent work. [4] It is also what fuels my battle to make Congress more like the rest of America.

It is simply not fair, or good governance, for the Congress of the United States to enact laws for the American people, while exempting itself from compliance. As most Senators know, I pushed for the adoption of the original Congressional

Accountability Act and similar legislation for many years before it was enacted. Finally, in the last Congress, with Senator Joseph Lieberman's (D-Conn.), Senator Don Nickles's (R-Okla.) and my sponsorship in the Senate, and Congressman Christopher Shays's (R-Conn.), Congressman William Goodling's (R-Pa.) and Congressman William Thomas's (R-Cal.) sponsorship in the House, Congress made the CAA law. With passage of this Act, we said that we in Congress are no better than the businessmen and ***35** women in our states. We are not different and we, too, must live under the laws that we pass. We no longer sit in Washington and look down upon the people and tell them how to run their businesses. This is a democracy, and therefore, we make laws for the people, and we, too, must follow these laws.

The CAA was passed by the Senate on January 12, 1995 and signed by President Clinton on January 23, 1995. It applied eleven laws to all of Congress and its instrumentalities, such as the Library of Congress and the Capitol Hill Police. These laws include wage and hour laws, collective bargaining laws, as well as Occupational Safety and Health Act protections guaranteeing a safe workplace. [5]

The need for this legislation was clear. For example, in 1992, Congressman John Boehner (R-Ohio) asked the Occupational Safety and Health Administration ("OSHA") to inspect his office for violations, even though he could not be cited for violations because the Occupational Safety and Health Act did not apply to Congress. OSHA found violations that could have resulted in fines to any other employer of $1,500. Violations included ragged carpets, overloaded electrical outlets, ill-designed file cabinets, and the absence of a fire extinguisher. [6] In 1993, a *Washington Post* survey of Congressional staff revealed that one-third of the women questioned said they had been sexually harassed by other aides, Members, or lobbyists, the same percentage of women who report being sexually harassed at business offices. [7] Further, the Congressional Management Foundation reported that women working as chiefs of staff on Capitol Hill made less money than similarly qualified men. [8]

Moreover, constituents often tell me that government regulation makes it difficult for them to run their businesses. We can never really understand what they mean unless we, too, are subject to the laws. If we find a law that makes it difficult for us to do our jobs, chances are that American businesses have the same result. The CAA gives us an incentive to change the laws that we, based on firsthand experience, find unnecessary and burdensome. The Act also makes it more likely that Congress ***36** will apply any future legislation to itself as well as to the rest of the country. This, hopefully, will give Congress pause before it passes legislation that may stifle business because we, too, will have to live with the consequences of our actions.

Yet, many arguments were raised by Members of Congress to justify Congressional exemption from labor laws. Two Constitutional arguments were among the most commonly heard. Some lawmakers argued that the Constitution's Speech and Debate Clause [9] precluded them from responsibility for their treatment of legislative staff. Others said that the Separation of Powers doctrine [10] prohibited the Legislative Branch from being subject to regulation by the Executive Branch. These critics prefer self-regulation. My opinion is that self-regulation, when not conducted by a disinterested and neutral third party, does not constitute credible regulation at all.

Other, more political arguments were also made in an attempt to exempt Congress from the laws affecting the rest of the country. Members were concerned that involvement in litigation and other dispute resolution proceedings that might result from such liability would detract from the time they had to spend on their public duties. In addition, they felt, and perhaps still feel, that Members of Congress are particularly vulnerable to baseless accusations for political purposes, and our careers can be hurt and even ended based on ill-timed charges.

II. A LONG ROAD

> I agree that it is important to end any discrimination against individuals with disabilities—and to end discrimination nationwide .... But nationwide means just that it does not, or should not, exempt this little enclave up here in Capitol Hill .... Does this Chamber have any more right to make second-class citizens of certain people, while prescribing it if done by any other person, or business? ... If it's too burdensome for the U.S. Senate to live by this bill's command, then why is it any less burdensome for a small business to comply with it?
>
> —Senator Grassley, 1989 [11]

***37** Proponents worked for years before successfully gaining Congressional approval of legislation that requires Congress to live under the laws that apply to businesses. It took many Members of Congress a great deal of time and effort to attain this goal. One of my first attempts in this effort was to amend the Americans with Disabilities Act of 1990 ("ADA") [12] to expand its coverage to include Congress.

The ADA aims to end discrimination against people with disabilities by prohibiting discrimination in employment and public services and by requiring reasonable public accommodations. On September 7, 1989, the Senate adopted the Grassley amendment that made applicable the provisions of the bill to the Senate, House of Representatives and all of the instrumentalities of Congress. [13] I was joined in this effort by Senator Bob Dole (R-Kan.), Senator Arlen Specter (R-Pa.), and Senator Gordon Humphrey (R-N.H.). During discussion of my amendment, I highlighted Congress's practice of exempting itself from the laws that it applies to everyone else. I listed many of the laws that did not apply to Congress, and made the point that this exemption goes to a lack of public accountability. At its worst, it is raw hypocrisy. My amendment was accepted.

In negotiating the adoption of my amendment, I reached an agreement with the Senate sponsors of the ADA that my amendment would be carefully considered in the conference committee. In my opinion, it was not. The version of the amendment that made it into public law was significantly weakened. It pretended to guarantee the same rights as the legislation, but left it to Congress to self-regulate. [14] Without a neutral, third party to enforce the rights, the intention and purpose of my amendment was ignored and eviscerated.

In July 1990, I attempted to offer a Congressional coverage amendment to the 1990 Civil Rights Act. [15] As I said on the floor of the Senate,

> ***38** If civil rights bills are alleged to be crucial in the fight against discrimination, why is Congress not joining in that fight other than in the capacity of saying it is good for everyone else, but it is not good for us? [16]

The amendment was tabled by a vote of 63-26, and the leadership instead supported an amendment by Senator Wendell Ford (D-Ky.) that provided the Senate Ethics Committee with jurisdiction over discrimination charges. [17] This arrangement is like having the fox guarding the chicken coop.

I found another opportunity to press my cause the following year. In October 1991, during consideration of the Family and Medical Leave Act, [18] I attempted to offer an amendment providing for Congressional coverage. The leadership asked me to withdraw the amendment, [19] and finally promised me consideration during the Civil Rights Act debate several weeks later. For this reason, and with reliance on the promise that the Senate leadership would finally turn to this issue, I withdrew my amendment.

In the following weeks, I held a press conference and made other efforts to gain support for an amendment that would make Congress live under the same laws as the rest of the country. At my press conference announcing that I would introduce an amendment to the upcoming Civil Rights Bill that would apply coverage to Congressional employees, I was joined by the National Federation of Independent Businesses, the National Taxpayers Union, the U.S. Business and Industrial Council, and the Citizens for Congressional Reform. [20] In addition, the *Wall Street Journal* and *USA Today* ran editorials supporting my efforts. [21]

The effort to have Congress comply with Federal law continued to gain steam. The Clarence Thomas-Anita Hill hearings and ***39** the bounced-check scandal in the House of Representatives helped build momentum by highlighting the double standard. Had Anita Hill been a Congressional employee, she would have had no legal recourse to pursue her claims had she chosen to do so. It also became clear that members of the House of Representatives had access to bank terms and conditions which were unavailable to ordinary Americans. It seemed that the public was disenchanted with Congress and the actions of some of my colleagues in both bodies. This helped put pressure on members to support efforts to make Congress live under the laws it passes for others. The notion that Congress could self-regulate was not plausible to the public.

During consideration of the Civil Rights Act of 1991, [22] I was able to work out a compromise amendment with Senator George Mitchell (D-Me.), the Senate Majority Leader. [23] This compromise resulted in the application of law that is similar to that applied to the private sector, rather than identical. I had hoped to apply identical law, but some concessions were made to get the amendment passed and get on the road to full Congressional coverage. Although not perfect, the amendment was groundbreaking. For the first time, legislation covered Senate employees under the Civil Rights Act of 1964, [24] the Age Discrimination Act of 1967, [25] the Age Discrimination Act Amendments of 1975, [26] the Civil Rights Restoration Act of 1988, [27] and the ADA. [28] The Senate Office of Fair Employment Practices was to be the impartial enforcement body. The amendment was controversial and caused great debate, but in the end, it was agreed to by voice vote. [29]

***40** The amendment established the Senate Office of Fair Employment Practice and prescribed procedures for the resolution of employee complaints. An employee would begin proceedings by filing a claim with the office. The office would then use mediation to attempt to settle the claim. If this was unsuccessful, the employee could request an administrative hearing. The hearing would take place before three independent hearing officers. The hearing and decision would both be on the record. Any decision by the panel was reviewable by the Senate Ethics Committee, who could reverse, uphold or remand the decision of the panel. A majority of the Committee was required to reverse or remand, so these decisions had to be bipartisan. [30] Further judicial review would be available by appealing to the U.S. Court of Appeals for the Federal Circuit. This process was available to all employees, from legislative staff to the restaurant and mail room workers. [31] There were no exemptions.

The amendment's opponents complained how difficult it would be for them to live by the civil rights laws. Some argued that key legislative employees should not be entitled to any court review. [32] They cited the Constitution's Speech and Debate Clause [33] as a source of immunity from employment laws. [34] But the Speech and Debate Clause is not implicated by a law that is as simple as prohibiting Senators from discriminating against their employees. It is not constitutionally protected speech or debate when the Senate office hires or fires on the basis of race or sex, or fails to put a stop to sexual harassment. In addition, Senators argued that the judicial review in the amendment violated the Separation of Powers doctrine. [35]

To assuage some opponents' concerns, the language in the compromise codified existing law and recognized that a Senator may consider an employee's party affiliation, state of residence, or political compatibility when making employment decisions. [36]
***41** This was a giant leap forward in getting Senators to live by similar rules that we expect other people in the country to live by, a first step back to the vision of the founders that the very legitimacy of legislative rule in our democracy would be contingent upon congressional rulers following the rules we apply to all of society. President George Bush urged Congress to "submit to the laws it imposes on others … and do so by year's end." [37] He warned us that we are improperly treating ourselves as a "privileged class of rulers who stand above the law." [38]

My amendment did not provide the same enforcement procedures that are available to the private sector, but it was a good start. Senators' Separation of Powers concerns [39] led me to modify my original amendment. I knew that this amendment was a meaningful precedent, but not a complete solution. The momentum generated by debate and passage of my amendment was an important step that led to continued discussion of this issue, and ultimately, passage of the CAA. The Employment Policy Foundation called passage of this amendment "an especially significant law" in its 1994 study of the applicability of labor laws to Congress. [40] Some Senators said this amendment would ultimately be fought out in court with great legal fees. It was not.

Congress took further steps to address the issue of compliance with federal law. In 1992, the House and Senate established a bipartisan twenty-eight-member Joint Committee on the Organization of Congress. [41] The purpose of the commission was to present a legislative reorganization plan the following year. [42] A major issue for the commission was the legislative branch's compliance with federal laws. [43] The Joint Committee held hearings on May 27 and June 8, 1993. [44] I testified in the June 8 hearing to stress the importance of Congressional compliance with the laws. [45] Congressman Dick Swett (R-N.H.) and Congressman ***42** Shays testified that they had 227 cosponsors of their legislation in the House. [46] Senator Nickles and Congressman Harris Fawell (R-Ill.) also testified in support. [47] Additionally, Senator William Cohen (R-Me.), a member of the Committee, expressed his support for my efforts. [48]

In December 1993, the Joint Committee issued a three-volume report.[49] The Senate Members of the Joint Committee did not propose specific legislation on coverage, but decided instead to defer specific legislative proposals until the bipartisan Task Force, created specifically for the purpose of studying Congressional compliance, completed its work and issued its recommendations.[50]

The Senate Task Force on Congressional Coverage was created in October 1992 at the close of the 102nd Congress.[51] I had considered offering an amendment to the Legislative Branch Appropriations bill that would apply the labor laws to Congressional employees. But in light of the Senate leaders serious attention to this issue, and their offer to create a Task Force to study the issue, I decided to defer until the Task Force made recommendations. A resolution introduced by the Senate leadership, which I cosponsored, established this bipartisan Senate Task Force.[52] I expressed hope that the Task Force would call for serious congressional coverage under the laws. The amendment passed by voice vote.[53]

Although I served on this bipartisan Task Force, I was not happy with its results. The Task Force held only one public meeting, in June 1993. In the end, the Task Force set up a separate process that was even weaker than current Senate rules. Dissatisfied with the Task Force's findings and report, Senator Nickles and I drafted a letter to the Senate leadership in January 1994.[54] In this letter, we stated that the group's proposal would ***43** simply "perpetuate the Senate's lack of accountability."[55] We offered an alternative to the Task Force's proposals for Congressional coverage and called for hearings on legislation that applies private sector laws to Congress and its instrumentalities.[56] I felt, and we stated in our letter, that the Task Force's work should have involved more openness and public involvement. We also disputed the Task Force's assertion that not all laws should be applied to Congress.[57]

Senate leaders refused to release the Task Force's report. Regardless, the press did obtain a copy and the public was made aware of its contents. *Roll Call*, a newspaper that primarily covers Congress and politics stated, "It fails to give Senate employees the right to sue, creates new Senate bodies to hear complaints instead of allowing employees to appeal to executive branch bodies, and fails to give Senate employees the right to bargain collectively."[58]

The Task Force findings and continued frustration led me to join Senator Lieberman in introducing legislation that would apply federal law to Congress. On May 4, 1994, we introduced S. 2071, the CAA.[59] It built on the Grassley-Mitchell amendment to the civil rights bill by expanding the coverage and strengthening the enforcement mechanism.

This bill was not everything that I wanted. It did not provide for the executive branch agencies to enforce the labor laws on Congress, as they do on the private sector. Instead, we created a separate Congressional agency to enforce the laws.[60] But I know that a majority of my colleagues would have said that the Constitution does not permit the executive branch to enforce the laws against Congress. I disagreed, but I was not, as the saying goes, going to let the perfect be the enemy of the good.

A great deal of work went into bringing attention to this new legislation. I testified in favor of Congressional coverage before ***44** the Senate Rules Committee on February 24, 1994, even before the bill was introduced. I said that I hoped that the CAA would be made part of the comprehensive congressional reform initiative.

Our next big break came in August, when *The New York Times* called on the Senate to pass this bill.[61] The House passed similar legislation, sponsored by Congressman Shays, by a vote of 427-4.[62] In September, American Enterprise Institute scholar and Congress-watcher Norman Ornstein endorsed our specific plan for congressional accountability.[63] We held a press conference to call for swift action in the Senate.

By this time, the movement to apply labor laws to Congress had gained real momentum. A non-partisan group calling itself the Congressional Coverage Coalition[64] sent letters to Senators urging that the Senate schedule a vote on the CAA.[65] Other groups that supported Lieberman-Grassley were Common Cause, Lead or Leave, and Working Assets.[66] Unfortunately, this legislation was never considered by the full Senate.

During the end of 1994, proponents kept working to secure consideration and passage of this legislation, hopefully at the beginning of the 104th Congress. We kept this issue in the public eye, especially by making it an election issue. [67] This resulted in the CAA securing a place as one of the first legislative items considered in 1995.

*45 III. VICTORY AT LAST

> It follows therefore that it is preferable that law should rule rather than any single one of the citizens. Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men.

—Aristotle, *Politics*, c. 322 B.C. [68]

In the 104th Congress, Senator Lieberman, Senator Nickles and I reintroduced the CAA, which was the second bill introduced in the Senate. [69] The House bill, H.R. 1, was sponsored by Congressman Shays, Congressman Goodling and Congressman Thomas. Neither bill was referred to committee in hopes of obtaining quick passage of the legislation. The House passed the legislation on January 5, and the Senate followed on January 12. The President signed the CAA into law on January 23, 1995, making it the first law passed by the 104th Congress.

As enacted into law, it applies eleven workplace laws to employees of the legislative branch of the Federal government. These laws are: the Fair Labor Standards Act of 1938, [70] Title VII of the Civil Rights Act of 1964, [71] the Americans with Disabilities Act of 1990, [72] the Age Discrimination in Employment Act of 1967, [73] the Family and Medical Leave Act of 1993, [74] the Occupational Safety and Health Act of 1970, [75] Chapter 71 (relating to federal service labor-management relations) of Title 5, the Employee Polygraph Protection Act of 1988, [76] the Worker Adjustment and Retraining Notification Act, [77] the Rehabilitation Act of 1973, [78] and Chapter 43 (relating to veterans' employment and reemployment) of Title 38.

The Act covers legislative branch employees. [79] These are employees of the U.S. Senate, the U.S. House of Representatives, *46 the Capitol Guide Service, the Capitol Police, [80] the Congressional Budget Office, the Office of the Architect of the Capitol, [81] the Office of the Attending Physician, the Office of Compliance, and the former Office of Technology Assessment. [82]

A centerpiece of the Act is the creation of the Office of Compliance. [83] While I do not agree with the claims that Executive Branch enforcement of existing labor law regulations on the Legislative Branch violates the Separation of Powers, [84] the CAA makes accommodations for the critics that do believe this would be a violation. The Office of Compliance is an independent, nonpartisan office within the Legislative Branch set up to administer and enforce the laws applied by the Congressional Accountability Act. [85] This office has a Board of Directors of five individuals appointed jointly by the Majority and Minority Leader of the Senate, and the Speaker and Minority Leader of the House. [86] The Act requires that Board members have labor law experience. [87]

This Board adopts, through a rulemaking process set out in the Act, the regulations that Congress must live by. I favored using the Executive Branch regulations, but Separation of Powers concerns and political considerations made many of my colleagues reluctant, if not opposed, to living under the Executive Branch system. For these reasons, we created the Office of Compliance to enforce the law and draft the regulations. The Act established that regulations should be as similar to the Executive Branch regulations as possible.

The CAA establishes a special dispute resolution system. [88] An employee who alleges a violation of a statutory right begins a proceeding by making a request for counseling by the Office of Compliance within 180 days of the alleged violation. [89] This starts a 30-day counseling period. [90] For fifteen days following the end *47 of the counseling period, an employee may file a request for mediation. [91] If the mediation is unsuccessful, then the employee has a choice of two paths, either an

administrative proceeding or civil action. [92] The administrative proceeding involves the filing of a formal complaint with the Office of Compliance, an administrative hearing, and review by the Office of Compliance's Board of Directors. [93] The decision may also be reviewed by the Court of Appeals for the Federal Circuit. [94] The other avenue is to file a civil action in U.S. District Court. [95]

IV. CONTINUING EFFORTS

Since passage of the CAA, there have been continued efforts to make sure that we, in Congress, live under the laws that we make. When the Senate considered labor legislation earlier this year, I offered an amendment to apply its provisions to Congress. [96] This bill, S. 4, would allow businesses to let their employees work flexible schedules and give their employees compensatory time in lieu of overtime pay. [97] The Executive Branch currently allows employees these options. If we are going to change the law for the private sector, we must also change it for Congress. The best way to know how a law affects the private sector is to live under it ourselves. The bill and amendment are still pending, due to opposition by the labor leaders and opponents in the Senate.

V. CONTINUING BATTLES

There are two outstanding issues that remain. The first is finishing implementation of the CAA. All but one provision of the Act have been implemented. Section 220(e) of the Act, which requires regulations to execute portions of the Federal Service Labor-Management Relations Act, [98] has not been implemented. ***48** Many sections of the Act require the Office of Compliance to draft regulations that Congress then approves. [99] Most sections that require Congressional approval of regulations provide a fall-back. If Congress does not approve regulations by a certain date, then Executive Branch regulations go into effect, enforced by the Office of Compliance. [100] The exception is Section 220(e) which does not prescribe fall-back regulations. The Office of Compliance drafted regulations implementing this section, which concerns the unionization of legislative employees, but Congress has not approved them. [101]

This is a disgrace to the principles supporting the CAA. Congress has not approved these regulations because a number of powerful members disagree with their content. The regulations, as drafted, basically allow all legislative employees to unionize. The House Oversight Committee voted to send the regulations back to the Office of Compliance, citing questions about the method used to promulgate these regulations. The Office of Compliance claims that it does not have the authority to redraft the regulations. Whether it has the authority is unclear, but the point is that this issue is at a stalemate. All of us in Congress, as well as the Office of Compliance, are responsible for working out this stalemate. The result is that no regulations are in effect, and this section of the Act is not being implemented. Congressman Shays and I will continue to work together and with others on this effort.

Beyond implementing section 220(e), the last challenge is to bring the Judicial Branch of the federal government under the labor laws. Following the example of the CAA, last year Congress passed the Executive Branch Accountability Act. [102] This Act applies the labor laws to the administration. [103] This leaves the Judicial Branch as the so-called last plantation. The CAA contemplated this coverage. Just as we, in Congress, should live under the laws we make, the Judiciary should live under the laws it interprets. Section 505 of the CAA requires the Judicial Conference to complete a study and submit a report to Congress that ***49** "shall include any recommendations the Judicial Conference may have for legislation to provide to employees" the rights guaranteed to Congressional employees by the CAA. [104] During discussion about the CAA, we contemplated covering the Judiciary. The purpose of this study was to allow the Judiciary to decide how it could best be covered. Unfortunately, the Judiciary's completed study recommended that it not be covered and said that self-regulation is the best plan. [105] Not surprisingly, I am skeptical of this study's findings. If followed, these recommendations would make the Judiciary the only remaining branch of the federal government that is not required to live with this country's labor laws. In my opinion, this indicates that the Judiciary believes that its work is more important than the work of any other American business or branch of government. In addition, the arguments made in this study to justify its continued exemption are strikingly similar to the arguments made by Congressional opponents of the CAA. Some of these arguments made are the Judicial Branch's tradition of exemption, the necessity of independence, the risk of disrupting operations, and concern that application of the laws would affect "Constitutional responsibilities," and cause "a conflict or appearance of a conflict of interest." [106]

I believe that it is important that we finish what we started. It is only fair and just that we, in government, live under the same laws that we enact for the rest of the nation. We are not different. We are not special. We are the representatives of a great democracy and we should work and act accordingly.

Footnotes

a1 Member, United States Senate (R-Iowa). B.A., University of Northern Iowa, 1955; M.A., University of Northern Iowa, 1956. Senator Grassley was a Member of the U.S. House of Representatives from 1975 to 1981. He is Chairman of the Senate Special Committee on Aging and serves on the Senate Budget, Finance, Agriculture, and Judiciary Committees.

aa1 Senior Counsel to Senator Grassley. B.A., Texas Christian University, 1989; J.D., University of Kansas, 1994.

1 THE FEDERALIST NO. 57, at 291 (James Madison) (Buccaneer Books ed., 1992).

2 Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified as amended in scattered sections of 2 U.S.C.).

3 *See* 141 CONG. REC. S16,106 (1995) (statement of Sen. Grassley).

4 *See* 143 CONG. REC. S6387 (1997) (statement of Sen. Grassley).

5 *See* 2 U.S.C. § 103(a) (1995) (listing all statutes the CAA makes applicable to the Legislative Branch of the federal government).

6 *See* 138 CONG. REC. S15990 (1992) (statement of Rep. Boehner).

7 *See* Richard Morin, *Female Aides on Hill: Still Outsiders in a Man's World*, WASH. POST, Feb. 21, 1993, at A1.

8 *See id.*

9 U.S. CONST. art. I, § 6, cl. 1.

10 *See* THE FEDERALIST NO. 47, at 143 (James Madison) (Buccaneer Books ed., 1992) (discussing separation of powers).

11 *See* 135 CONG. REC. S10,780 (1989).

12 42 U.S.C. §§ 12,101-12,213 (1995).

13 S. 933, 101st Cong., amend. 720 (1989). The amendment read as follows:
Notwithstanding any other provision of this Act or of Law, the provisions of this Act shall apply in their entirety to the Senate, the House of Representatives, and all the instrumentalities of the Congress, or either House thereof.
135 CONG. REC. S10,780 (1989).

14 *See* 42 U.S.C. § 12,209(7) (1990) (amended 1995).

15 S. 2104, 101st Cong., amend. 2114 (1990). For coverage of the debate over the amendment, see 136 CONG. REC. S9342-72 (1990).

16 *See* 136 CONG. REC. S9361 (1990).

17 S. 2104, 101st Cong., amend. 2112 (1990). For coverage of the debate over Senator Ford's amendment, see 136 CONG. REC. S9342-72 (1990).

18 S. 5, 102d Cong. (1991). The President ultimately vetoed this bill. The House of Representatives sustained the veto.

19 My amendment threatened to delay the vote on the Family and Medical Leave bill and interfere with the Senate's consideration of the nomination of Clarence Thomas to be an Associate Justice of the United States Supreme Court. The vote on the Thomas confirmation, however, was ultimately delayed by Anita Hill's allegations of sexual harassment. The subsequent hearings on Hill's allegations highlighted the Congressional exemption from anti-discrimination laws.

20 For coverage of the press conference, see Carleton R. Bryant, *Bill Seeks to Curtail Congress' Exemptions*, WASH. TIMES, Oct. 9, 1991, at A4.

21 *See Congress's Wild Ganders*, WALL ST. J., Oct. 10, 1991, at A14; *Our View*, USA TODAY, Oct. 10, 1991, at 12A.

22 Pub. L. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). The Civil Rights Act of 1991 was the successor to the Civil Rights Act of 1990. The latter was passed by both Houses of Congress, but vetoed by President Bush. Congress failed to override the veto. It was reintroduced in a slightly modified form in 1991 and enacted into law.

23 S. 1745, 102d Cong., amend. 1287 (1991). For the full text of the bill, see 137 CONG. REC. S15,503 (1991).

24 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

25 29 U.S.C. §§ 621-634 (1985).

26 Pub. L. No. 94-135, 89 Stat. 713 (codified as amended in scattered sections of 42 U.S.C.).

27 Pub. L. No. 100-259, 102 Stat. 28 (codified in scattered sections of 20, 29, and 42 U.S.C.)

28 42 U.S.C. §§ 12,101-12,213 (1995).

29 *See* 137 CONG. REC. S15,447-48 (1991) (coverage of voice vote).

30 The Senate Ethics Committee has an equal number of Republican and Democratic members.

31 *See supra* note 23.

32 For coverage of the debate over this issue, see 137 CONG. REC. S15, 371 (1991).

33 *See supra* note 9 and accompanying text.

34 *See* 137 CONG. REC. S15,331, S15,353, S15,453 (debating the applicability of the Speech and Debate Clause) (1991).

35 *Supra* note 10 and accompanying text. For coverage of the debate on this issue, see 137 CONG. REC. S15,331, S15,352, S15,461, S15,480 (1991).

36 S. 1745, 102d Cong. § 316 (1991). *See* 137 CONG. REC. S15,511 (1991).

37 *Bush Reflects on Congress*, WALL ST. J., Oct. 28, 1991, at A16.

38 *Id.*

39 *See supra* note 10 and accompanying text.

40 *See* THOMAS W. REED & BRADLEY J. CAMERON, EMPLOYMENT POLICY FOUNDATION, ABOVE THE LAW: CONGRESSIONAL COVERAGE UNDER FEDERAL EMPLOYMENT LAWS 9 (1994).

41 *See* H.R. Con. Res. 192, 102d Cong. (1992).

42 *See id.*

43 *See id.*

44 *See Hearings Before the Joint Comm. on the Org. of Congress*, 103d Cong. 23 (1993) (covering the Joint Committee's hearings).

45 *See id.* (testimony of Sen. Grassley).

46 *See id.* at 32, 36. (testimony of Rep. Swett and Rep. Shays).

47 *See id.* at 24-26, 30. (testimony of Sen. Nickles and Rep. Fawell).

48 *See id.* (statement of Sen. Cohen).

49 *See* H.R. REP. NO. 103-413 (vol. I) (1993) (final report of House members); H.R. REP. NO. 103-413 (vol. II) (1993) (final report of Joint Committee), S. REP. NO. 103-215 (vol. I) (1993) (final report of Senate members); S. REP. NO. 103-215 (vol. II) (1993) (final report of Joint Committee).

50 *See* H.R. REP. NO. 103-413 (vol. II), at 131.

51 *See* 138 CONG. REC. S15,974 (1992). The Task Force was chaired by Senator Ford and Senator Ted Stevens (R-Alaska). Other members were myself, Senator Nickles, Senator Daniel Akaka (D-Haw.) and Senator Harry Reid (D-Nev.).

52 *See id.* at 116.

53 *See id.* at 135.

54 Letter from Senators Charles Grassley and Don Nickles to Senate Leadership (Jan. 1994) (on file with author).

55 *Id.*

56 *See id.*

57 *See id.*

58 *See Stop Stalling Coverage*, ROLL CALL, Feb. 28, 1994.

59 *See* S. 2071, 103d Cong. (1994); *see also* 140 CONG. REC. S5179 (1994). Other cosponsors were Senators Ben Nighthorse Campbell (R-Colo.), Barbara Boxer (D-Cal.), William Cohen (R-Me.), Dennis DeConcini (D-Ariz.), Dianne Feinstein (D-Cal.), Herb Kohl (D-Wis.), Howard Metzenbaum (D-Ohio), Barbara Mikulski (D-Md.), Carol Moseley-Braun (D-Ill.), Don Nickles (R-Okla.), Donald Riegle, Jr. (D-Mich.), Charles Robb (D-Va.), Harris Wofford (D-Pa.), Bob Kerrey (D-Mass.), and John Glenn (D-Ohio).

60 *See id.*

61 *See Make Congress Obey Congress*, N.Y. TIMES, Aug. 18, 1994, at A22.

62 *See* H.R. REP. NO. 103-841 (Oct. 6, 1994) (House version of congressional accountability bill).

63 *See* Norman J. Ornstein, *Let the End Games Begin: How the Closing Weeks of this Session Will Make or Break the 103rd Congress*, ROLL CALL, Sept. 9, 1994.

64 *See* Senator Charles Grassley, Press Release (Sept. 9, 1994) (on file with author). The coalition contained the American Industrial Hygiene Association, the Council for Citizens Against Government Waste, the National Association of Manufactures, the National Federation of Independent Business, the National Restaurant Association, the Society for Human Resource Management, Truth in Government, United We Stand America, and the U.S. Chamber of Commerce.

65 *See* Letter from Congressional Coverage Coalition to United States Senators (on file with author).

66 *See supra* note 63.

67 *See, e.g.*, NEWT GINGRICH ET AL., CONTRACT WITH AMERICA: THE BOLD PLAN 8 (Ed Gillespie & Bob Schellhas eds., 1994) ("On the first day of the 104th Congress, the new Republican majority will immediately pass the

following major reforms, aimed at restoring the faith and trust of the American people in their government: *First*, require all laws that apply to the rest of the country also to apply equally to the Congress.").

68 ARISTOTLE, THE POLITICS 78 (Steven Everson ed. & Benjamin Jowett trans., Cambridge Univ. Press 1988).

69 *See* S. 2, 104th Congress (1995).

70 29 U.S.C. §§ 201-219 (1978).

71 42 U.S.C. § 2000e to 2000e-17 (1994).

72 42 U.S.C. §§ 12,101-12,213 (1995).

73 29 U.S.C. §§ 621-634 (1985).

74 Pub. L. No. 103-3, 107 Stat. 6 (codified in scattered sections of 5 & 29 U.S.C.).

75 29 U.S.C. §§ 651-678 (1985).

76 29 U.S.C. §§ 2001-2009 (1997).

77 29 U.S.C. §§ 2101-2109 (1997).

78 29 U.S.C. §§ 701-797b (1997).

79 *See* 2 U.S.C. § 1301(3).

80 This includes any member or officer of the Capitol Hill Police. *See id.* § 1301(6).

81 This includes any employee of the Office of the Architect of the Capitol, the Botanic Garden, or the Senate Restaurants. *See id.* § 1301(5).

82 *See id.* § 1301(3). The Office of Technology Assessment was eliminated by Pub. L. No. 104-53, 109 Stat. 514 (1995). The Office of Compliance was created by the Congressional Accountability Act to administer and enforce the laws applied to Congress by the Act.

83 *See id.* §§ 1381-1385.

84 *See supra* note 10 and accompanying text.

85 *See* 2 U.S.C. § 1381(a) (1997).

86 *See id.* § 1381(b).

87 *See id.* § 1381(d).

88 *See* 2 U.S.C. § 1401 (1997).

89 *See id.* § 1402.

90 *See id.*

91 *See id.* § 1403.

92 *See id.* § 1404.

93 *See id.* §§ 1405-1406.

94 *See id.* § 1407.

95 *See id.* § 1408.

96 *See* 143 CONG. REC. S5221 (amend. 256) (1997).

97 S. 4, 105th Cong. (1997).

98 Pub. L. No. 95-454, 92 Stat. 1191 (1978) (codified in scattered sections of 5 U.S.C.).

99 *See* 2 U.S.C. § 1384 (1997).

100 *See, e.g., id.* § 1312(d)(2) (regulations under the Family and Medical Leave Act of 1993).

101 *See* 142 CONG. REC. S9835-9847 (1996) (text of regulations).

102 Pub. L. No. 104-331, 110 Stat. 4053 (1996) (codified as amended in scattered sections of 3 & 28 U.S.C.).

103 *See* 3 U.S.C. § 402 (1997).

104 *See* 2 U.S.C. § 1434 (1997).

105 *See* JUDICIAL CONFERENCE OF THE UNITED STATES, STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 (1996).

106 *Id.* at 3.

35 HVJL 33

February 8, 2022

Ms. Barbara Childs Wallace
Chair of the Board of Directors
Office of Congressional Workplace Rights
110 Second Street, SE
Room LA-200
Washington, D.C. 20540-1999

Dear Ms. Wallace,

As you are aware, when Congress overwhelmingly passed the Congressional Accountability Act of 1995 (CAA) on near unanimous votes in both the House and Senate, it extended a number of statutory protections for workers in the private sector to employees in the legislative branch. Among others, Congress expressly provided for employees to organize and bargain collectively. However, the CAA required the Office of Congressional Workplace Rights (then called the Office of Compliance) to issue regulations which would first have to be approved by Congress.

The following year, in 1996, OCWR fulfilled its role by adopting regulations and submitting them to Congress for approval. The regulations proposed by OCWR provided additional guidance for how legislative branch employees could exercise their statutory right to form or join labor organizations, as Congress expressly intended. Congress failed to act on the proposed regulations at that time.

The Committee on House Administration (CHA) recently held an oversight hearing on OCWR, on November 9, 2021, which included discussion of this specific issue. In her testimony, your colleague, Director Barbara Camens noted that in the ensuing quarter century since OCWR recommended regulations to Congress, the current members of the Board of Directors "have not looked at them, we have not reexamined them, and we have not taken a position on them." Ms. Camens also noted that OCWR's adoption of regulations in 1996 predated the service of the "current iteration of the board."

Much has changed since 1996. For example, CHA recently took a lead role in drafting and enacting a reform law with significant bipartisan input and support to update the protections of the CAA to provide greater protections for legislative branch employees, including making it easier for them to assert their rights and protections under the law. Accordingly, I request that

the Board of Directors of the Office of Congressional Workplace Rights review the regulations it proposed in 1996 related to collective bargaining. It is my hope that an expeditious review will inform the House's consideration of how to better improve the workplace for our Congressional staff.

I appreciate your quick attention to this matter. If you have any questions, please do not hesitate to contact me directly or the Committee Staff Director, Jamie Fleet.

Sincerely,

Zoe Lofgren
Chairperson

advancing workplace rights, safety & health, and accessibility in the legislative branch

Office of Congressional Workplace Rights

February 22, 2022

Via: Electronic Mail

Hon. Zoe Lofgren
Committee on House Administration
1309 Longworth House Office Building
Washington, D.C. 20515

Dear Chairperson Lofgren:

I have received your letter dated February 8, 2022 requesting that the OCWR Board of Directors (Board) conduct an expeditious review of the regulations adopted by a previous Board in 1996 that were promulgated under section 220(e)(1) of the Congressional Accountability Act (CAA) [2 U.S.C. § 1351(e)(1)] and would govern unionizing and collective bargaining rights in the personal offices of Members of the House of Representatives or Senators, as well as in committee, leadership and other enumerated offices.

The Board has conducted a thorough review and now unanimously endorses the regulations adopted by the 1996 Board and urges Congress to approve these regulations.

As you know, while Congress has not yet approved the Board's adopted regulations under CAA section 220(e)(1), Congress did approve the Board's adopted regulations under CAA section 220(d) that apply to all covered employees, labor representatives, and employing offices not identified in section 220(e)(2). The section 220(d) regulations are on our website as the Substantive Regulations on Collective Bargaining and Unionization and can be found here: https://www.ocwr.gov/wp-content/uploads/2021/09/final_regulations_lmr_19960930.pdf. The section 220(d) regulations were issued by the Board on October 1, 1996, and became effective on November 30, 1996. Like the regulations under section 220(e), the section 220(d) regulations are required by the CAA to be the same as the comparable FLRA regulations except where good cause exists for a modification that would be more effective for implementation of the rights and protections under this section. Consequently, the regulations issued by the Board in 1996 under section 220(d) closely follow the comparable FLRA regulations. Like the FLRA regulations upon which these regulations are based, the section 220(d) regulations provide procedures for resolving all disputes that may arise during organizing and collective bargaining, including potential exemptions from those rights, in a manner that is both informed and impartial.

The regulations adopted by the Board in 1996 under section 220(e) of the CAA are quite straightforward. They state that the same regulations that apply to all of the other employees, labor representatives, and offices in the legislative branch covered by the CAA (the existing

OCWR Regulations on Collective Bargaining and Unionization) will apply to the employees, labor representatives, and offices listed in section 220(e)(2).

In your letter, you specifically requested that the Board review the 1996 section 220(e) adopted regulations in light of the changes made by the CAA Reform Act in 2018. Since none of the Reform Act changes made in 2018 affected section 220 of the CAA, the Board has concluded that there is no need for any changes to the regulations adopted by the Board in 1996. While the CAA Reform Act changed the name of the Office of Compliance to the Office of Congressional Workplace Rights, the Reform Act also provides that "[a]ny reference to the Office of Compliance in any law, rule, regulation, or other official paper in effect as of such date shall be considered to refer and apply to the Office of Congressional Workplace Rights." Pub. L. 115-397, title III, § 308(d) (Dec. 21, 2018). For this reason, the Board does not believe that it even needs to propose a technical change to the name of the office in the adopted regulations.

Upon receiving your letter, we circulated it among the majority and minority staff of our oversight committees in both the House and the Senate and requested comments. We received comments suggesting that no changes need to be made to the 1996 adopted regulations. We also received comments suggesting that the Board should carefully review the 1996 adopted regulations to determine whether technical changes should be made because some office names have changed and some changes may have been made to the underlying statutes. Although CAA section 220(e)(2)(H) allows the Board to identify by regulation other Congressional offices that perform functions comparable to those listed in section 220(e)(2), it is not necessary for the Board to do so given its conclusion that the same regulations should apply to all offices. While this analysis would be necessary if the Board adopted special regulations for the Congressional offices identified in section 220(e)(2), no such special regulations are being proposed.

Regarding the underlying statute, section 220 incorporates specific sections of the Federal Service Labor Management Relations Statute (FSLMRS). Since 1996, there have been no significant changes to those sections of the statute that would affect the implementation of collective bargaining and unionization in the Congressional offices identified in CAA section 220(e)(2).

For these reasons, the Board does not see the need for any technical changes and unanimously requests that Congress approve the 1996 section 220(e) regulations previously adopted by the Board so that the Board can formally issue them. A copy of those regulations is attached. As provided in the CAA, the substantive rights under the FSLMRS made applicable to Congressional offices do not apply until the section 220(e) regulations are issued.

The Board will be publishing your letter and this response on our website and in the *Congressional Record* for public information.

Very respectfully yours,

Barbara C. Wallace

Barbara Childs Wallace
Chair of the Board of Directors