The Last Plantation: Will Employment Reform Come to Capitol Hill?

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Nearly half a century has passed since most American workers were guaranteed the right to bargain with employers over the terms and conditions of their employment. Recognizing the need for employment safeguards, Congress has enacted a wave of labor reforms establishing

1. National Labor Relations Act, 29 U.S.C. §§ 151 to 166 (1976). Enacted in 1935, the National Labor Relations Act was designed to eliminate obstructions to the free flow of commerce by encouraging collective bargaining and protecting workers' freedom of association to negotiate the terms and conditions of their employment. Id. § 151.
minimum wages, equal pay, and health and safety standards, as well as protections against discrimination in hiring and promotions. In 1972, extension of equal employment opportunity laws to previously exempted federal employees assured that they would no longer be "second class citizens," and that the federal government would be a "model of equal employment opportunity." Federal employees working for the United States Congress, however, did not receive this extended coverage, and to this day they remain outside the ambit of every employment protection statute.

The failure of Congress to adhere to the strict employment standards it prescribed for the rest of the country became the focus of national attention in 1974. It was revealed that the Congressional Placement Office regularly accepted discriminatory job requests from the offices of members of Congress. Typical requests specified that applicants "must be young," or directed that "no blacks," "no women," or "no Spanish-surnamed" need apply. When newspapers across the country ran stories about the blatant

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2. Fair Labor Standards Act, 29 U.S.C. §§ 201 to 219 (1976). Congress sought to prevent "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and [the] general well-being of workers" through the establishment of minimum wages and maximum hours for the work week. Id. at §§ 202, 206, 207.


4. Occupational Safety and Health Act, 29 U.S.C. §§ 651 to 678 (1976). Congress sought to assure every working person in the nation safe and healthy working conditions. Id. at §§ 651(b), 654.

5. The Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), made it unlawful for an employer either to discharge, refuse to hire, or to otherwise discriminate against any individual with respect to terms or conditions of employment because of such individual's race, color, religion, sex, or national origin. Id. at § 2000-2(a)(1). See also The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976), which forecloses arbitrary age discrimination in employment by prohibiting an employer from discharging or refusing to hire an individual based upon age. Id. at § 623(a). Discrimination in compensation, terms, conditions, or privileges of employment was also outlawed. Id.

6. The Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16 (1976), provides that the federal government shall not discriminate with respect to race, color, religion, sex, or national origin. Id. Federal government employees were excluded from the original Civil Rights Act of 1964 because the United States was excluded from the definition of "employer." 42 U.S.C. § 2000e(b) (1976).


8. Id. at 4929 (remarks of Sen. Cranston).

9. An investigative reporter for the Fort Worth Star Telegram discovered that at least nineteen representatives and one senator made discriminatory requests. See Wash. Post, Aug. 18, 1974, § A, at 1, col. 2. It also was learned that placement office employees were instructed to place a "B" on employment forms of black job applicants. See Wash. Post, Aug. 24, 1974, § A, at 3, col. 2. An investigation by the Joint Committee on Congressional Operations revealed a total of 48 job orders containing notations of exclusionary preferences or instructions. 120 Cong. Rec. S22386 (daily ed. 1974) (remarks of Sen. Metcalf).
job discrimination on Capitol Hill, Congress put an end to the placement office's practice. Nevertheless, subsequent investigations by congressional committees revealed that job discrimination on Capitol Hill was closer to the rule, rather than the exception.\(^\text{10}\) Recently, the Fifth Circuit compounded the problems arising from the lack of statutory employment protections for Hill workers when it ruled that a congressional employee who alleged a prima facie case of employment discrimination under the fifth amendment was not entitled to a damage remedy.\(^\text{11}\)

The exclusion of congressional employees from the fair employment laws raises complex constitutional questions under the speech or debate and the equal protection clauses. Given the uniquely vulnerable status of these employees and the constitutional issues raised by attempts to regulate the activities of the legislative branch, this article will examine the problem of employment discrimination on Capitol Hill, focusing upon alternatives which afford congressional employees greater employment protections. Any approach to the exclusion problem must first determine whether the doctrines of separation of powers and legislative immunity bar or restrict an inquiry into the employment practices of an allegedly offending member. Additionally, the parameters of congressional immunity must be examined to define those circumstances under which members of Congress are traditionally held accountable by law for certain types of misconduct. Finally, current and potentially available remedies will be explored in an attempt to provide a means of redress for victims of congressional employment discrimination.

I. THE SCOPE OF THE PROBLEM

The lack of detailed and accurate information on congressional employment practices is, in itself, a reflection of the employment problem on Capitol Hill. Members of Congress are not required to keep employment records. Employees can be hired and fired at will, thereby inhibiting those willing to come forward with information. Nevertheless, in the past four years several investigations and studies have provided sufficient data to illustrate the severity of the problem.

An independent study of Capitol Hill employment practices by the Capitol Hill Women's Political Caucus disclosed the absence of uniform job


\(^{11}\) Davis v. Passman, 571 F.2d 793 (5th Cir.), cert. granted, 99 S. Ct. 308 (1978).
standards in congressional offices. Since no uniform policies exist for Congress as an institutional employer, job descriptions, salary scales, and leave policies vary widely and are set by no one except the individual member, and only if he or she so chooses. As a result, the duties and salary associated with a job title vary greatly from office to office. While these variations make generalizations difficult, the Women's Caucus was able to demonstrate significant disparities in salaries among men and women employees. After comparing more than two thousand full-time employees, the Caucus found the median salary of women to be more than seven thousand dollars lower than the median salary for males. Although the gap narrowed when comparing salaries above $18,000, on the whole, the median salary for women remained consistently lower.

This pattern of relegating women to lower salaried positions, or compensating women with salaries lower than men employed in the same positions, was confirmed by a report of the House Commission on Administrative Review, the "Obey Commission." The Obey Commission analyzed salary distribution by job title and found that women em-

12. Sexists in the Senate? A Study of Differences in Salary by Sex Among Employees in the United States Senate, prepared by the Capitol Hill Women's Political Caucus, reprinted in Discrimination Hearings, Part I, supra note 10, at 44-71 [hereinafter cited as Sexists in the Senate]. The Caucus concluded that there were four positions having commonly understood responsibilities: administrative assistant, legislative assistant, press secretary, and case worker. Id. at 46. The Obey Commission, in its investigation of House employment practices, concurred with the Caucus' overall finding that job titles were unreliable. OBEY COMMISSION REPORT, supra note 10, at 96. In some offices, for example, the office manager is the head clerical employee, while in others he or she may perform administrative and substantive duties normally associated with the position of administrative assistant. Id.

13. See generally OBEY COMMISSION REPORT, supra note 10, at 81. There are, however, some guidelines regarding employment on House committee staffs. This results from the fact that unlike the situation with regard to individual members, there is specific statutory authority for some aspects of committee employment. 2 U.S.C. § 72(a) (1976). The House Committee on the District of Columbia, for example, has detailed provisions regarding staff appointments, duties, and wages. HOUSE SELECT COMM. ON CONGRESSIONAL OPERATIONS, 95TH CONG., 1ST SESS., RULES ADOPTED BY THE COMMITTEES OF THE HOUSE OF REPRESENTATIVES 65-67 (Comm. Print 1977). Moreover, several House committees have personnel policies regarding job descriptions, salary scales, performance evaluations, and affirmative action. See OBEY COMMISSION REPORT, supra note 10, at 108, Table 22. In contrast, a review of Senate committee rules discloses only three committees having rules relating to staff employment (Foreign Relations, Ethics, and Intelligence), and in each case these rules are directed at the staffs' duties, particularly their duty to remain non-partisan. SENATE COMM. ON RULES AND ADMINISTRATION, 95TH CONG., 1ST SESS., RULES ADOPTED BY COMMITTEES OF THE UNITED STATES SENATE 49-52, 88-89, 115-17 (Comm. Print 1977).

14. Sexists in the Senate, supra note 12, at 64. The Caucus acknowledged that the study was limited by non comparability of job titles and lack of data concerning educational level and experience of employees. Nevertheless, its findings showed that the median salary of women employees was $10,260 compared to $17,670 for men. Salaries above $18,000 reflected a median salary for women of $22,627 and $28,091 for men. Id.

15. OBEY COMMISSION REPORT, supra note 10, at 117. The Obey Commission, chaired
ployed in professional positions as administrative assistants, legislative assistants, and press secretaries were invariably paid less than their male counterparts. Ninety-one percent of women press secretaries drew salaries below $20,000, while only fifty-three percent of men in the same job category earned less than $20,000.16

A survey by Cox Newspapers17 produced equally dramatic figures on racial employment discrimination. The survey revealed that among 340 employees earning more than $30,000 on the twenty-two House standing committees, only fifteen, or four percent, were black. Of the hundreds of professional level employees on the Senate’s standing committees, only eleven were black.18

These findings reflect only the situations of those persons directly employed by senators, representatives, or committees. Exclusion from employment law protection equally affects many congressional employees who do not work directly for legislators. In the Senate, for example, the Sergeant at Arms controls employment practices for the capitol police, pages, janitors, and post office employees. The Secretary of the Senate sets work conditions for the Parliamentarian, printing clerk, and staffs of the document room, library, and the reporter of debates. The Architect of the Capitol, who serves both the Senate and House, employs restaurant workers as well as the congressional custodial force and the staff for the various repair shops.19 An analysis of employment policies of these organizations noted that personnel practices run the gamut from being fairly regularized by Rep. David R. Obey, was established in the wake of the congressional scandals to investigate and recommend improvement in House administrative operations and services.

16. Id. at 96, Table 11. The Commission noted generally that at the lower end of the salary range — $20,000 and below — women outnumber men by as much as two to one. Id. at 86. Even when educational levels are equal, women earn less than men. Id. at 89. Although the Commission cautioned against interpreting this data as concrete evidence of discrimination, it acknowledged that some significant portion of the variation in salary levels is caused by racial and sexual considerations. Id. at 89, 97. In terms of sheer numbers, the Commission found that “[a]pproximately 90% of staff directors, general counsels and committee staff legislative and professional assistants are male. In contrast, 98% of the clerical staffs are female.” Id. at 104.


18. Id. See also a survey by the Ad Hoc Committee of Black Senate Legislative Staff, estimating that of 1,100 Senate professionals on both the personal staffs of Senators and committee staffs, less than 30 are black. Discrimination Hearings, supra note 10, Part 1, at 34 (testimony of Alan G. Boyd and Loftus C. Carson II).

19. A COMPILATION OF PAPERS PREPARED FOR THE COMMISSION ON THE OPERATION OF THE SENATE, 94TH CONG., 2d SESS., SENATE ADMINISTRATION 72-84 (Comm. Print 1976). The Commission was created to examine, inter alia, strategies for Senate management improvement, personnel practices and policies, fiscal management and accounting, and printing procedures. The Commission’s mandate was to identify particular problems and potential improvements in overall Senate administration. Id. at 1-2.
and formalized to casual word-of-mouth administration. The report concluded that it was "tantamount to a double standard for the Senate to pass on laws requiring certain types of personnel practices for the remainder of the federal government, while, in effect, exempting themselves."

Although the public record is devoid of concrete reasons for congressional exemption from the fair employment laws, some suggest that elected officials have a peculiar need for political compatibility and loyalty from their staffs. More commonly, it is argued that application of the employment laws to the legislature would result in a serious breach of legislative immunity and would create separation of powers problems of a constitutional dimension. Furthermore, the Constitution grants Congress exclusive authority to govern its internal affairs.

II. THE SPEECH OR DEBATE CLAUSE: THE EVOLVING DOCTRINE OF LEGISLATIVE IMMUNITY

Separation of powers, the doctrine implicit in the tripartite structure of our federal government, is rooted in the political philosophies of Plato, Aristotle, and Montesquieu. In search of the secret of good government, Plato advocated a "mixed state" to assure practical stability. Aristotle proposed three levels of political functions: the deliberative, magisterial,
and judicative. It was Montesquieu, however, who first conceived of the three functions of government exercised by three distinct organs, each juxtaposed against the others.

Embracing Montesquieu's philosophy, Articles I, II, and III of the Constitution vest powers in the legislative, executive, and judicial branches. In the exercise of the powers assigned to them severally, the three branches of government operate harmoniously and independently of each other; action by one branch in the lawful exercise of its powers is not subject to control by the others. It is apparent from the face of the Constitution that the legislative branch was intended to be well-insulated from encroachment by the other branches of government.

Members of the legislative branch are afforded a variety of privileges and immunities by the Constitution. They are shielded from arrest while attending or traveling to and from a session of either House, except in cases of "Treason, Felony and Breach of Peace." It is further provided that "for any Speech or Debate in either House, they shall not be questioned in any other Place." The Congress is also given power to "determine the Rules of its Proceedings, punish its Members for disorderly behavior, and, with the Concurrence of two thirds, expel a Member." This language grants Congress broad rule-making power for governing its internal operations, and thus suggests that the drafters of the Constitution intended Congress to have exclusive authority to resolve controversies unique to the legislative branch. The three clauses, taken together, provide a broad protection for the legislature in its dealings with the executive and the judiciary.

The speech or debate clause serves not only as the basis for the doctrine of legislative immunity, but also as the mainstay of the separation of powers, insulating Congress in its relations with the other branches. The

30. See Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935); O'Donoghue v. United States, 289 U.S. 516, 530 (1933). Separation of powers is designed to preclude a commingling of essentially different powers of government. Each department should be kept completely independent to assure that its acts shall never be controlled by, or subjected to, the coercive influence of either of the other departments. Id. at 530.
31. See text accompanying notes 32-37 infra.
33. Id. at cl. 2.
34. U.S. CONST. art. I, § 5, cl. 2.
clause protects Congress from two kinds of threats to its deliberative autonomy: it blocks the use of grand jury investigations and criminal prosecutions by executive officials to question legislative acts, and it insures that the legislators are neither distracted from nor hindered by challenges to their individual legislative actions. The language of Article I, section 6 was adopted following only brief debate and with no opposition. Because the tradition of legislative privilege was firmly engrained in our constitutional history, until recently the conduct of United States' legislators was rarely questioned.

Early Supreme Court cases generally sustained a broad interpretation of the speech or debate clause. In Kilbourn v. Thompson, the first such case, the Sergeant at Arms, pursuant to a House resolution, arrested Kilbourn, a private citizen, and cited him for contempt for refusing to answer questions and furnish books and papers requested by Congress. After acquittal of any alleged wrongdoing, Kilbourn sued the Speaker of the House, five members, and the Sergeant at Arms for false imprisonment. The Court found that while the House had improperly punished Kilbourn for contempt, the legislators themselves were not liable for his false imprisonment. Although Kilbourn was permitted to proceed against the Sergeant at Arms, he was denied legal recourse against the legislators on the grounds that it would be a "narrow view of the constitutional provision to limit [the clause] to words spoken in debate." Rather, the clause's pro-

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38. United States v. Johnson, 383 U.S. 169, 177 (1966). Until 1967, there had been only four Supreme Court cases involving the speech or debate clause. Since then, there have been five cases.

39. 103 U.S. 168 (1880).

40. Id. at 204.

41. Id. The Court relied upon the early case of Coffin v. Coffin, 4 Mass. 9 (1808) as "perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies," and cited extensively from that opinion. Id. Coffin involved a slander action against a member of the Massachusetts House of Representatives for comments made in a passageway within the walls of the House. The Supreme Judicial Court of Massachusetts construed the privilege broadly to cover acts resulting from the nature and in the execution of the office. Nevertheless, the Court applied the principal narrowly and found that Coffin was not executing the duties of office or acting as a representative when he uttered the defamatory remarks. 4 Mass. 9, 31-32, 34 (1808). The court said of the immunity:

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the right of the People, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal.

103 U.S. at 203 citing 4 Mass. 1 [sic] (1808).
tective shield was extended "to things generally done in a session of the House by one of its members in relation to the business before it."42 This phrase became the classic expression defining the scope of the privilege.43

A state legislature's investigation of subversive activities was found protected by the privilege in Tenney v. Brandhove.44 Quoting James Wilson, a member of the Constitutional Convention responsible for drafting the clause, the Court reasoned that legislators "should be protected from the resentment of everyone, however powerful, to whom the exercise of [the liberty of speech] may occasion offense."45 The claim of an unworthy purpose in the conduct of a legislative hearing, the Court noted, did not destroy the privilege that immunizes legislators from deterrents to the uninhibited discharge of their legislative duty.46

Relying on Kilbourn and Tenney, the Court again broadly read the scope of the privilege in United States v. Johnson.47 Johnson, a former congressman, had been convicted for violating a federal conflict of interest statute and for conspiring to defraud the United States.48 In affirming the reversal of the conspiracy conviction, the Supreme Court declared that the intensive judicial inquiry, made in the course of a prosecution by the executive branch under a general conspiracy statute, violated the express language of the speech or debate clause. The essence of the charge was that the Congressman's conduct was improperly motivated. This, however, was precisely what the clause generally foreclosed from executive or judicial inquiry.49

Finally, in Dombrowski v. Eastland50 and Powell v. McCormack,51 the

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42. 103 U.S. at 204-05.
44. 341 U.S. 367 (1951). A committee of the California State Legislature summoned a witness to reappear before the committee following his circulation of a petition urging members of the legislature not to appropriate further funds for the committee. The witness appeared but refused to give further testimony and was cited for contempt.
45. 341 U.S. at 373, quoting II WORKS OF JAMES WILSON 38 (Andrews ed. 1896).
46. 341 U.S. at 377.
48. 337 F.2d 180 (D.C. Cir. 1964). The court found that the government's charge that Johnson conspired to make a speech was barred by the speech or debate clause. Id. at 189-90.
49. 383 U.S. at 177, 180. In its prosecution, the government's conspiracy theory depended upon a showing that a particular speech was made not as a congressman prepares or delivers an ordinary speech, but rather primarily to serve private interests. The Court declared that however reprehensible it might be for a member to abuse his position by conspiring to give a particular speech for remuneration from private interests, the key to the charge was that the conduct (the speech) was improperly motivated. Id.
50. 387 U.S. 82 (1967).
Court reaffirmed the traditional view that actions falling within the "sphere of legitimate legislative activity" should be protected. In Dombrowski, an action for unlawful seizure of private papers was dismissed against a senator. The Court concluded that his use of the papers during hearings was within the sphere of legitimate legislative activities. Likewise, in Powell, action taken by members of the 90th Congress to exclude Representative Adam Clayton Powell was held to be privileged from judicial review by the speech or debate clause. Both holdings embraced the view that legislators should be protected not only from the results of litigation, but also from the burden of defending themselves. The purpose of the protection, stated the Court, was "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."

The scope of legislative immunity was discernably narrowed in the Court's next three opinions addressing the privilege issue. In United States v. Brewster, a district court dismissed a bribery indictment against Senator Daniel B. Brewster on legislative immunity grounds. The Supreme Court conceded that the clause protected members of Congress from inquiry into their legislative acts or the motivation behind them, but declared that the clause was never regarded "as protecting all conduct relating to the legislative process." Accordingly, Senator Brewster was denied protection from prosecution on bribery charges. Moreover, the

52. Plaintiff sued the chairman and staff for allegedly conspiring with state officials to unlawfully seize his private papers. The evidence indicated possible involvement of the staff in the raid by state officials. In contrast, the senator's participation was limited to receiving the papers for use during his legislative investigation. The Court held that a cause of action had been stated against the staff, but not the senator, since his use of the papers during hearings was protected within the sphere of legitimate legislative activities. 387 U.S. at 84-85. Had the senator participated in the raid, a non-legislative function, it is likely that he would have been unprotected.

53. Following his exclusion from the 90th Congress, Representative Adam Clayton Powell and voters from his congressional district brought an action against the Speaker, other members, and House officers, charging that the House action had been unconstitutional. One of the arguments posed by the respondent House members and officers was that judicial review of their action was foreclosed by the speech or debate clause. As in Kilbourn and Dombrowski, the Court held that although the congressmen were protected by the clause, the petitioners were entitled to maintain their action against House employees. 395 U.S. at 515 (emphasis in original). The dissentors refused to distinguish between the legislative act of voting, which was admittedly protected, and the promise to be influenced in voting, which the majority considered outside the protection from inquiry. The dissentors felt the
Court characterized various "entirely legitimate" activities engaged in by members in discharging their official functions as "political" rather than legislative in nature and not entitled to legislative immunity.\(^\text{59}\)

**Gravel v. United States,**\(^\text{60}\) decided the same day as *Brewster,* involved a subpoena of Senator Gravel's aide by a federal grand jury investigating matters relating to public disclosure of the "Pentagon Papers."\(^\text{61}\) Senator Gravel moved to intervene in an action brought by the aide to quash the subpoena. The Senator contended that questioning the aide would contravene the speech or debate clause. The Court extended legislative immunity to officers and employees of the legislative body for activities that would be protected if performed by the legislator.\(^\text{62}\) The Court defined legislative activity in part as those acts comprising "an integral part of the deliberative and communicative process."\(^\text{63}\) Distinguishing its decisions in *Kilbourn, Dombrowski,* and *Powell* where employees were held liable for actions directed by their congressional employers, the Court extended *Brewster* by declaring that had a senator or representative performed the challenged activity in those cases, he or she would also have been held liable.\(^\text{64}\) *Brewster* and *Gravel* thus established the principle that the speech or debate clause privileges neither a member of Congress nor an aide to violate a valid criminal law in preparation for or implementation of legis-

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59. *Id.* at 512. See notes 102-03 and accompanying text infra.
60. 408 U.S. 606 (1972).
61. At a meeting of the Senate Public Works Committee's Subcommittee on Public Buildings and Grounds, Chairman Mike Gravel read portions of the Pentagon Papers into the record. These papers contained a classified Defense Department study entitled *A History of the United States Decision-Making Process on Viet Nam Policy.* Arrangements were subsequently made for publication of the record by Beacon Press, a private, non-profit publishing house. A federal grand jury investigating matters relating to the public disclosure of the papers subpoenaed the senator's aide.
62. 408 U.S. at 618.
63. *Id.* at 625. *But see* In re Grand Jury Investigation into Possible Violations of Title 18, 47 U.S.L.W. 2292 (3d Cir. Nov. 7, 1978). The Third Circuit held that a Congressman has immunity against evidentiary use of telephone charge records. Relying on *Gravel,* the court found the records as well as the calls themselves to be part of the "deliberative and communicative processes." *Id.*, quoting *Gravel v. United States* 408 U.S. 606 (1972).
64. 408 U.S. at 621. The Court stated that no prior case had extended immunity to members of Congress who individually executed an invalid resolution carrying out an illegal arrest, or to those who seized the property or invaded the privacy of a citizen in order to secure information for a hearing. In the Court's view, such acts are not more essential to legislating than the conduct held unprotected in United States v. Johnson. *Id.*
In *Doe v. McMillan*, the Court stressed the need for some "reasonable bounds" to determine the scope of immunity for legislative acts. As had several prior cases, *Doe* involved the protection available to non-members performing legislative functions. The Court held that the clause limits immunization for congressional employees who publish and distribute otherwise actionable materials to the "reasonable requirements of the legislative function." Justice White found that these requirements were satisfied by distribution of congressional material within the Congress. In this case, public distribution of a report went beyond those reasonable requirements, and thus the defendant printers were not afforded legislative immunity.

In the most recent application of the speech or debate clause, *Eastland v. United States Serviceman's Fund*, a private organization sought to enjoin the issuance of a congressional subpoena. Relying on *Gravel*, the Court stated that the activities would have to be "an integral part of the deliberative and communicative process" in order to activate the clause's absolute bar to interference. Issuance of the subpoena was held essential to legislating. Consequently, while the Constitution continues to immunize legislators from challenges to certain legislative acts, the conduct meriting this protection is no longer all-encompassing.

65. *Id.* at 621-22. Members of Congress are not only accountable when they violate a criminal law, but may also be accountable when they violate certain civil statutes. *See* note 129 *infra.*


67. *Id.* at 315-16. Plaintiffs, parents of District of Columbia students, sued the Chairman of the House District Committee, committee members and staff, the Superintendent of Documents, Public Printer, and others, alleging that a committee report contained derogatory information concerning named students. The Court found that the members and staff of the committee had done nothing more than "conduct hearings, prepare the report, and authorize its publication." *Id.* at 318. Therefore, the complaint as to them had been properly dismissed. *Id.* at 317-20.

68. *Id.* at 315-16.

69. *Id.* at 315-18.

70. 421 U.S. 491 (1975).

71. The issue was whether a federal court may enjoin issuance of a congressional subpoena directing a bank to produce the records of an organization claiming a first amendment privilege. The United States Serviceman's Fund (USSF) was a nonprofit membership organization having a reputation as the focus of military dissent during the Vietnam war. In seeking the injunction, the USSF alleged that the sole purpose of the congressional investigation was to force public disclosure of private beliefs and to harass the USSF membership, thereby chilling their exercise of first amendment rights.

72. *Id.* at 504.
III. CONGRESSIONAL EXEMPTION FROM THE EMPLOYMENT LAWS

The Supreme Court, in interpreting the speech or debate clause, has acknowledged the need to properly insulate the legislature and preserve a separation of powers. At the same time, however, it has recognized that not every act performed by a legislator requires protection from inquiry. Notwithstanding the restraints the Court has recently imposed on the privilege, Congress continues to warn of the separation of powers problems resulting from inquiry into its affairs, and has explicitly cited this concern to justify its exemption from the fair employment laws. In the Congress' view, enforcement of these laws by the executive and judiciary would encourage exactly the kind of intrusion into its internal affairs from which it believes itself immune under the separation of powers doctrine. It is argued, moreover, that congressional aides are "alter egos" of their legislator-employers, and as such, the legislator's conduct with respect to these aides may not be questioned.

Until the congressional employment scandals of recent years, little, if any, attention was focused on the exclusion of congressional employees from job protection laws. To date, neither congressional body has established mandatory grievance procedures for its employees. Despite the

73. CONSTITUTIONAL IMMUNITY REPORT, supra note 36, at 29. Senator Fulbright stressed that judicial restraint in reviewing allegations of congressional impropriety was entirely consistent with the doctrine of separation of powers. Id. Senator Ervin implied that the separation of powers concept and the speech or debate clause required that inquiry into congressional behavior remain the exclusive responsibility of the legislative branch. Id.

74. The Obey Commission Report stated, "[b]ecause of restrictions implied by the doctrine of separation of power," employees of the Congress were excluded from coverage under various employment laws." OBEY COMMISSION REPORT, supra note 10, at 98-99. Congressional employees are excluded, for example, from the Equal Employment Opportunity Act, the Fair Labor Standards Act, and the Age Discrimination in Employment Act, all of which extend coverage only to federal government employees in the legislative and judicial branches of the federal government who have positions in the competitive service. 42 U.S.C. § 2000e-16(a); 29 U.S.C. § 203(e)(2)(A)(iii) (1976); 29 U.S.C. § 633a(a) (1976). The "competitive service" consists mostly of civil service positions in the executive branch. Several non-executive branch and D.C. government positions are included in the competitive service by statute. 5 U.S.C. § 2102(a) (1976). No statute designates congressional employees as members of the competitive service.

75. The "alter-ego" argument stems from the Supreme Court's holding in Gravel that aides are entitled to legislative immunity for legislative acts which would render a member immune. If aides are so important to a member's ability to function that they are given coextensive legislative immunity, it is argued, the decision by a member to hire or fire an aide is as central a legislative function as a decision to support or oppose legislation. Brief for the United States as Amicus Curiae at 4, Davis v. Passman, 544 F.2d 865 (5th Cir. 1977). Cf. Casenote 46 GEO. WASH. L. REV. 137, 149 (1977) (the relevant inquiry remains whether the firing of an aide is a legislative act, not whether the aide is important to the member's discharge of duties).

Obey Commission's investigation into employment inequities, none of its recommendations pertaining to employment practices have been adopted.\textsuperscript{77}

Some small steps in the direction of greater job protection for congressional employees have been taken within the past two years, however. The House has adopted a rule forbidding employment discrimination.\textsuperscript{78} Although the rule is a positive step, it lacks enforcement mechanisms, without which the situation for most employees remains unchanged. A number of House members have also signed a voluntary House Fair Employment Practice Agreement.\textsuperscript{79} The Agreement establishes a voluntary fair employment practices panel composed of three representatives and three staff members to investigate complaints from employees or potential employees of those members who have signed the nondiscrimination pledge. The most the panel can do if it believes a complaint is justified, however, is recommend remedial action to the member. Although signatory members say they will abide by the panel's recommendations, they are merely required to accept or reject the Committee's action in writing.\textsuperscript{80}

Currently, the only other recourse for House employees alleging discrimination is to file a formal complaint with the House Ethics Committee. The Committee will only accept a complaint directly from an employee if three members of the House have refused to file it for him or her. The complaint must be in writing and made under oath. Upon receipt of a formal complaint, the Committee will conduct a preliminary investigation. Following its investigation and upon the approval of a majority of its

\textsuperscript{77} Obey Commission Report, supra note 10, at 115-20. The Commission had proposed a plan to redesign the Congressional Placement Office, requiring it to establish an affirmative action recruitment program as well as a procedure to handle employee grievances. It further recommended that the House establish a fair employment practices panel to assist in enforcing anti-discrimination rules.

\textsuperscript{78} Clause 9 of the House Code of Official Conduct, House Rule XLIII (43) provides that:

A Member, officer or employee of the House of Representatives shall not discharge or refuse to hire any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The Rule was adopted as part of H.R. Res. 5, 94th Cong., 1st Sess., 121 Cong. Rec. 33 (1975). House and Senate rules do not have the force and effect of law, although a member, officer, or employee found guilty of a violation may be reprimanded, censured, or expelled. See also note 114 infra.

\textsuperscript{79} U.S. House of Representatives, House Fair Employment Practices Agreement. See also Obey Commission Report, supra note 10, at 99.

\textsuperscript{80} Representative Henry Waxman declined to sign the Agreement after discussing the matter with his staff. They felt that the Agreement was meaningless without an enforcement mechanism. Other members have objected to the Agreement as tokenism, and, therefore, regressive. See Isbell, Congress as Ol' Massa, 4 Civ. Lib. Rev. 46, 49 (1978).
members, the Committee will recommend to the full House "such action as it may deem appropriate in the circumstances." Because this protection route has remained untried to date by any congressional employee, a lack of faith in its efficacy can be inferred.

The Senate has adopted a rule similar to that of the House, prohibiting employment discrimination on the basis of race, color, religion, sex, national origin, age, or physical handicap. Enacted as part of the Senate Ethics Code, the rule's effective date was delayed for nearly two years until January, 1979, with the understanding that the Senate would use the intervening time to adopt a grievance procedure to enforce the rule. The Senate Governmental Affairs Committee held hearings on the issue and reported a resolution establishing procedures to implement the rule in April, 1978. The Resolution would establish a Fair Employment Relations Board to hear discrimination complaints and to supervise a Fair Employment Relations Office which would process discrimination complaints and study present Senate personnel practices. After the Board made a determination on a complaint, either party could appeal it to the Senate Ethics Committee. The Senate did not vote on the resolution during the 95th Congress; nevertheless, it is expected to be reintroduced in the 96th Congress. The only other Senate remedial measure pending at the close

82. Senate Rule L (50) was adopted as part of a general ethics resolution, S. Res. 110, 95th Cong., 1st Sess., 123 CONG. REC. S5396 (daily ed. April 1, 1977). It provides that:
   (a) refuse to hire an individual;
   (b) discharge an individual;
   (c) discriminate against an individual on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.
84. S. Res. 431, supra note 83, at § 321.
85. See Wash. Post, Sept. 13, 1978, § A, at 2, col. 4; 36 CONG. Q. 2530 (1978); Wash. Post, Sept. 27, 1978, § A, at 22, col. 1. The Senate Democratic Policy Committee decided not to bring the resolution to a vote in the 95th Congress despite the fact that its passage was assured. One supporter of the measure, Joseph Rauh, charged that the resolution had been buried "solely for the reason that it would pass." 36 CONG. Q. 2530. In the last days of the 95th Congress, during Senate consideration of H.R. 50, the Full Employment and Balanced Growth Act of 1978 (Humphrey-Hawkins), Senator Brooke offered S. Res. 431 as an amendment to H.R. 50. 124 CONG. REC. S18206 (daily ed. Oct. 11, 1978) (remarks of Senator Brooke). After much heated debate on the merits of the resolution, as well as expressions of concern about the amendment's posing a threat to the enactment of Humphrey-Hawkins, Senator Brooks made what he characterized as a "painful and tragic" decision to withdraw the amendment. 124 CONG. REC. S18874 (daily ed., October 13, 1978) (remarks of Senator Brooke).
of the 95th Congress was S. 3086, a bill to extend coverage of all existing employment laws to congressional employees. This measure was not even considered by a committee and its chances for receiving any attention in the 96th Congress while the more moderate resolution is available are slim.

With the exception of S. 3086, every proposal under consideration preserves for Congress most, if not all, authority for processing employee grievances. The proposed Senate procedure, while establishing an independent Board, maintains final decision making authority in the Senate Ethics Committee. The House voluntary grievance system permits members to ignore the fair employment practices panel's recommendations. This leaves the cumbersome Ethics Committee route as the only alternative. The limited extent of these "in-house" remedies has arguably been justified by the separation of powers problems which could result should Congress be subject to the employee protection remedies of existing law.

A closer analysis of the current status of legislative immunity and an examination of those laws under which Congress traditionally is held accountable, however, suggests that political and policy considerations alone deny congressional employees the protection of current employment law.

IV. THE LIMITS OF LEGISLATIVE IMMUNITY

While speech or debate clause immunity is arguably an absolute legislative privilege, an examination of both its roots in English Parliamentary history and the Supreme Court's interpretation of the clause illustrates the limits of the type of conduct it will protect.

A. The Parameters of the Privilege

Legislative immunity is an outgrowth of the long struggle for parliamentary supremacy in England. The speech or debate clause put an end to the use successive monarchs had made of criminal and civil laws to suppress and intimidate critical legislators. The privilege was not created to

86. S. 3086, 95th Cong., 2d Sess., 124 CONG. REC. S7567 (daily ed., May 16, 1978). This bill would remove the congressional exemption from nine laws, including all the employment protection laws. Introducing the measure, Senator Leahy said, "[s]imple equity and fairness demand passage of this legislation. It is time that we in Congress begin to live by the same rules we have set for others. We should no longer allow such a double standard." Id. at S7523.

87. OBEY COMMISSION REPORT, supra note 10, at 98-99.


89. United States v. Johnson, 383 U.S. at 178. For discussion of the historical roots of
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avoid private suits, but rather to prevent intimidation by the executive and possible accountability to a hostile judiciary for actions taken by legislators in discharging their official functions. While our history does not reflect the catalog of executive abuses giving rise to the privilege in England, the clause nonetheless was meant to assure the legislature wide freedom of speech, debate, and deliberation. Unlike the privilege in England, however, our clause, interpreted in light of the American experience, is designed to preserve legislative independence, not supremacy. Thus, it is in keeping with the view that the powers assigned to the three branches of our government also harness the power of each branch. The three branches were not meant to be water-tight compartments. Rather it was recognized that efficient operation of the federal government required that each organization provide a check and balance on too great an acquisition of power by another.

Legislative immunity does not bar all judicial review of legislative acts, nor was it ever intended to do so. That issue was implicitly resolved as early as 1803 in the landmark Marbury v. Madison decision. While it has been suggested that the Congress alone has ultimate power to determine the scope of its immunity under the speech or debate clause, it has been established that the courts have exclusive power to interpret the Constitution and give meaning to the clause. Thus, in its first decision on the subject of legislative immunity, Kilbourn v. Thompson, the Supreme Court noted that Congress' popular origin and "its ability to encroach on the domain of a coordinate branch without arousing public distrust," necessitated careful review of congressional acts, particularly when those acts are questioned by another tribunal. The Court cited with approval an early Massachusetts case holding that the legality of congressional action is properly subject to judicial scrutiny to determine whether its proceedings

the speech or debate clause, see generally Reinstein and Silverglate, supra note 88, at 1127; Comment, The Constitutional Limits of the Speech or Debate Clause, 25 U.C.L.A. L. REV. 796, 798-99 (1978).


91. United States v. Brewster, 408 U.S. at 508. The Court noted, for example, that nothing in our history was comparable to the practice of imprisoning a member of Parliament in the Tower without a hearing or meaningful recourse to a writ of habeas corpus. Nevertheless, this difference, in the Court's opinion, did not detract from the framers' concern for the independence of the legislative branch. Id.

92. Id. See generally THE FEDERALIST NOS. 47-48 (J. Madison), 49-51 (A. Hamilton or J. Madison).

93. 5 U.S. (1 Cranch) 137 (1803).

94. See, e.g., discussion of judicial supremacy in note 198 and accompanying text infra.

95. 103 U.S. 168 (1880).

96. Id. at 192.
are in conformity with the Constitution and laws. The Court stressed that it was not prepared to say that an "utter perversion of their powers to a criminal purpose would be screened from punishment" under the freedom of debate privilege. Nor has the Court hesitated to sustain private individual rights when Congress has acted outside its legislative role. Even in Kilbourn and the other early cases broadly interpreting the privilege, at least some qualification on the privilege was discussed, and the Court specifically limited these early holdings to the facts of each case.

The parameters of the privilege were further delineated in United States v. Brewster. The Court specifically described activities falling outside speech or debate clause protection. These activities ranged from "errands" performed for constituents to such tasks as making appointments with government agencies, assisting in securing government contracts, and preparing constituent newsletters, news releases, and speeches delivered outside the Congress. Although the Court found these activities to be entirely legitimate, it classified them as political activities, unrelated to the functioning of the legislative process. The Court did not imply as a corollary that everything "related" to the office of a member was shielded by the clause. On the contrary, it read both Johnson and Kilbourn to protect only those acts ordinarily performed in the process of enacting legislation.

In summary, nowhere has the Court viewed the speech or debate clause as an insulation for all conduct relating to the legislative process. On the

97. The Supreme Judicial Court of Massachusetts held that the "House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this Court." Burnham v. Morrissey, 80 Mass. (14 Gray) 226 (1856) quoted in 103 U.S. at 199.
98. 103 U.S. at 204-05.
99. Tenney v. Brandhove, 341 U.S. at 376-77. The Court had gone so far as to indicate there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act. Id. at 379-80 (Black, J., concurring). For a discussion of the case, see note 44 supra.
102. Id. at 512. See note 59 and accompanying text supra.
103. 408 U.S. at 512. See generally CONSTITUTIONAL IMMUNITY REPORT, supra note 36, and see casenote 46 GEO. WASH. L. REV. 137, 151 (1977), for the view that the Supreme Court's "legislative or political" standard announced in Brewster and Gravel unrealistically restricts members of Congress in the day-to-day activities of their office. See also Note The Bribed Congressman's Immunity from Prosecution, 75 YALE L.J. 335, 346 (1965) (the speech or debate clause should encompass all representative functions that a modern Congress performs).
104. 408 U.S. at 513-14.
contrary, in every case it has considered, the Court has limited application of the clause to acts that are clearly a part of the legislative process.\textsuperscript{105} The clause was never intended to make members of Congress super-citizens. In fact, this is exactly what Madison feared and what the Court discussed in \textit{Kilbourn}. The authors of the Constitution were cognizant of the history of and need for the privilege, as well as the potential abuses which could flow from overbroad safeguards. The privilege was written to protect member behavior neither tolerated nor protected in private citizen action. The shield, however, was not intended to protect more than the fundamental integrity of the legislative process.\textsuperscript{106}

Nevertheless, the absolute freedom members currently enjoy with respect to their employees does precisely that; it places them above the law and gives them power to do that which no other citizen may do — discriminate at will. This extension of the privilege beyond its intended scope, its literal language, and its history, is the type of legislative abuse that the Supreme Court has specifically sought to foreclose.

Members of Congress both require and are entitled to loyal and politically compatible employees. These requirements, however, are not unique to the legislature. Corporate executives and officials in the executive branch require no less, yet are subject to employment laws.\textsuperscript{107} Moreover, while employment decisions undeniably are "related" to the functioning of the legislative process, not everything related to the office of a member is shielded by the privilege. Legislative privilege has been broadly defined to apply to "anything done in a session of the House by one of its members in relation to the business before it ..."\textsuperscript{108} Logically, discriminatory employment practices should not be protected even under this expansive definition. Such practices are no more essential to legislating\textsuperscript{109} than receiving a bribe is to voting.\textsuperscript{110} The speech or debate clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative

\textsuperscript{105} Id. at 515-16. "We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process." \textit{Id.}

\textsuperscript{106} \textit{Id. at} 517.

\textsuperscript{107} The loyalty argument urged by members of Congress is the same as that used by private businessmen who opposed the Civil Rights Act of 1964. 36 CONG. Q. 337 (1978).

\textsuperscript{108} \textit{Kilbourn v. Thompson}, 103 U.S. at 203-04.

\textsuperscript{109} There is, however, the opposite point of view, maintaining that since congressional aides are "alter egos" of their legislator-employers, the legislator’s conduct with respect to these aides may not be questioned. \textit{See Davis v. Passman}, 544 F.2d 865, 882 (5th Cir. 1977) (Jones, J., dissenting); \textit{Discrimination Hearings, supra} note 10, at 330-34; and Brief for the United States as Amicus Curiae at 4-5, \textit{Davis v. Passman}, 544 F.2d 865 (5th Cir. 1977). \textit{See also} discussion in note 75 and accompanying text supra.

\textsuperscript{110} Bribery can perhaps be regarded as more closely related to the legislative process
functions. Accordingly, conduct unprotected by the clause may be examined without giving rise to separation of powers problems. A member of Congress thus may not only be questioned about certain "non-legislative" activities, but also may be held accountable by law.

B. Congressional Accountability

Members may be accountable for conduct exceeding the bounds of legitimate legislative activity and may even be arrested for violations of criminal law if proof of the illegal act is separable from legislative activity. When inquiry into misconduct is proscribed by the speech or debate clause, members may be accountable under internal House or Senate rules of conduct. Under the constitutional "housekeeping" provision, members may be punished by censure or expulsion. The restraint Congress has exercised in asserting these powers, however, has resulted in few instances of punishment.

When members of Congress exceed the bounds of their legitimate legislative activity, they are subject to the same constraints as other employees. Neither the Court nor Congress has considered the former deserving of protection. See United States v. Brewster, 408 U.S. 501 (1972). See id. at 515-16.


113. U.S. Const. art. I, § 5, cl. 2. The Supreme Court acknowledged Congress' broad rule-making authority under Art. I, § 5, in United States v. Ballin, 144 U.S. 1, 5 (1892). In that case, the Court considered the validity of a House rule permitting the clerk to record names of those members present but not voting. Noting that the Constitution empowers each house to determine its procedural rules, the Court refused to question the advantages, disadvantages, wisdom or folly of such a rule. Id. at 5. Nevertheless, the Court warned that Congress' rules may not contravene constitutional restraints or violate fundamental rights. Id.

114. See Senate Comm. on Rules and Administration, Subcomm. on Privileges and Elections, Senate Election, Expulsion and Censure Cases from 1793 to 1972, S. Doc. No. 92-7, 92d Cong., 1st Sess. (1972); Joint Comm. on Cong. Operations, 93d Cong., 1st Sess., House of Representatives Exclusion, Censure and Expulsion Cases from 1789 to 1973 (Comm. Print 1973). See generally, Congressional Quarterly's Guide to Congress 681-714 (2d ed. 1976). Congress has power under Art. I, § 5, to censure or expel members for disorderly or improper conduct. For nearly two hundred years Congress has used this power infrequently. Seven senators, eighteen representatives, and one territorial delegate have been formally censured for misconduct. Fifteen senators and three representatives have been expelled. Moreover, to avoid what it perceives to be harsh measures, Congress has recently developed other methods of disciplining its members. Members may be fined, stripped of committee chairmanships, reprimanded or denied the right to vote. Guide to Congress at 681-714. The House Ethics Committee recommended the lightest penalty possible for a member involved in the South Korean influence-buying scandals. Charges against another member were dropped. See Wash. Post, Oct. 5, 1978, § A, at 1, col. 1. The full House voted to reprimand three members for their receipt of cash contributions from South Korean businessman Tongsun Park. One reprimanded congressman called the "censure" "cruel and unusual punishment." Wash. Post, Oct. 14, 1978, § A, at 7, col. 1.
lative powers, inquiry into the misconduct is not proscribed by the speech or debate clause, and external remedial measures have historically been available. For example, Congress has broad power to conduct investigations and to punish for contempt. Its authority is not unlimited, however, and the courts have not hesitated to sustain the rights of private individuals when Congress has overstepped the bounds of legitimate legislative activity. In *Marshall v. Gordon*, the Supreme Court acknowledged the legitimacy of the contempt power, but held that in this instance the House lacked constitutional justification to punish the person involved for contempt. The individual had written and published an ill-tempered letter about the actions and purposes of a subcommittee of a House Committee. Since the letter was not calculated or likely to jeopardize the House's ability to carry out its legislative functions, the Court found the issuance of the contempt citation to be an excessive use of its power.

Similarly, in *McGrain v. Daugherty*, the Court held that the investigatory authority does not grant Congress general powers to inquire into private affairs and compel disclosures. A witness may rightfully refuse to answer a question when the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry because the Court has declared that the Bill of Rights imposes special restraints upon congressional investigations. Not every congressional investigation is justified by a public need that outweighs private rights affected. Any such assumption would "abdicate the responsibility placed by the Constitution upon the judiciary to ensure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion, or assembly."

The privilege from arrest afforded to members of Congress is also subject to stringent limitations. The Constitution shields members from arrest while attending or traveling to or from a congressional session, except in the case of "Treason, Felony, and Breach of the Peace." Since the Court has interpreted the exceptions broadly to include all criminal offenses, however, protection from arrest has been limited to civil cases.

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117. *Id.* at 173-74.
118. *Id.* But see *Hutchinson v. United States*, 369 U.S. 599 (1962). In that case, the Court found that the question the plaintiff refused to answer was clearly within the scope of the committee's inquiry. The Court denied that it could judicially determine when a committee had acquired sufficient information for its legislative purposes. *Id.* at 618-19.
120. U.S. CONST. art I, § 6, cl. 1.
121. *Williamson v. United States*, 207 U.S. 425 (1907). According to a 1976 Justice Department ruling, members of Congress are no longer immune from arrest in Washington,
Furthermore, the privilege against civil arrest has been narrowed to exclude protection from the service of process. As a result, members have been accountable under a variety of criminal and some civil statutes. While most statutes under which legislators have been held criminally liable specifically include members of Congress within the scope of their application, senators and representatives may be held accountable under any criminal law.

The bribery, fraud, and conflict of interest laws, which specifically include members within their coverage, are the most common statutes under which members have been prosecuted. In *Burton v. United States*, a senator was found guilty of violating a statute prohibiting members from receiving compensation from services rendered in matters before United States departments or agencies. Since a senator may appear before an executive department provided he receives no compensation for his services, the Court found that the statute neither encroached upon a senator’s authority nor interfered with his “legitimate functions, privileges, or rights.” Similarly, in *United States v. Brewster*, Senator Brewster was prosecuted on charges of soliciting and accepting a bribe in violation of federal law. The question before the Supreme Court was whether investigation of the bribe also involved the questioning of a legislative act. The Court justified the Brewster inquiry by rejecting the notion that a bribe is

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D.C. for crimes such as drunk driving and soliciting prostitution. When he announced the ruling, former Washington Police Chief Cullinane said the nonarrest policy was based on a “misinterpretation of the meaning” of the privilege from arrest clause. It was thought that the more sweeping policy against arrest was to avoid offending the legislators, who controlled the D.C. police department budget. GUIDE TO CONGRESS, supra note 114, at 714.

122. Long v. Ansell, 293 U.S. 76 (1934). When the Constitution was adopted, arrests in civil suits were still common.


124. Compare 18 U.S.C. § 203 (1976) (prohibiting compensation to members of Congress, officers and others in matters affecting the government) with 18 U.S.C. § 1505 (“whoever” obstructs proceedings before departments or agencies) [and] United States v. Bramblett, 348 U.S. 503 (1955), in which a former member of Congress was found guilty of having falsely and fraudulently represented to the Disbursing Office of the House of Representatives that a woman was entitled to compensation as his official clerk. Bramblett claimed that the Disbursing Office was not a department or agency within the meaning of the law. The Court held that within the purpose of the statute “department” described executive, legislative, and judicial branches of government. Id. at 509.

125. 202 U.S. 344 (1906).

126. Id. at 367.

127. 408 U.S. at 502. Recently, particularly during the 95th Congress, there has been a wave of criminal indictments brought against members of Congress. Representatives Flood, Eilberg and Diggs, for example, were each charged with financial misconduct. See generally, Greider, *Do We Want a Congress That's Clean?*, Wash Post. Nov. 5, 1978, § D, at 1, col. 1, for an incisive political commentary on the recent crop of congressional scandals.
any part of the legislative process or function,\textsuperscript{128} or that any inquiry into the purpose of a bribe impermissibly draws into question the legislative acts of the member or his motives for performing them.\textsuperscript{129}

The above cases illustrate that a key to congressional accountability is the scope of the immunity provided by the speech or debate clause. If the improper or illegal conduct occurred in the course of legislative activity, accountability may be limited to internal congressional review procedures. When Congress, through its investigatory powers, exceeds the scope of its authority and violates an individual's constitutional rights, or when a member violates a criminal or civil law, however, inquiry into and accountability for that conduct is permissible so long as its proof does not depend on privileged legislative activity.

Given this interpretation, congressional staffing decisions are not privileged legislative actions. Accountability for discriminatory employment practices therefore need not be limited to internal congressional procedures. Whether such conduct can properly be regulated by statute and thus subjected to judicial or administrative review, however, raises issues

\textsuperscript{128} 408 U.S. at 526. \textit{Accord}, McSurely v. McClellan, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), \textit{cert. dismissed}, 438 U.S. 189 (1978). In \textit{McSurely} two individuals sought damages from a U.S. Senator and his aides for an alleged violation of the plaintiffs' constitutional rights. The Court held that absent a showing of legislative purpose, distribution of photocopies of plaintiffs' private papers outside legislative channels was not legislative activity entitled to absolute immunity under the speech or debate clause. The employment of an unlawful means to implement an otherwise proper legislative objective was not, in the Court's view, "essential to legislating." As with taking a bribe, the court found that resort to criminal or unconstitutional methods of investigation is "no part of the legislative process or function." \textit{Id}. at 1288.

\textsuperscript{129} A member may only be prosecuted under a criminal statute if the government's case does not rely on legislative acts or the motive for such acts. United States v. Johnson, 383 U.S. 169, 185. In United States v. Dowdy, 479 F.2d 213 (4th Cir.) \textit{cert. denied}, 414 U.S. 823 (1973), the court held that the speech or debate clause does not bar a prosecution founded on a general criminal statute which "does not draw into question the legislative acts of the defendant member or his motives for performing them." 479 F.2d at 222. Similarly, in Hoellen v. Annunzio, 468 F.2d 522 (7th Cir. 1972), \textit{cert. denied}, 412 U.S. 953 (1973), a congressman's improper use of the franking privilege in violation of a civil statute was found not protected by the speech or debate clause. The court reasoned that "it follows \textit{a fortiori} from the holding in \textit{Brewster} that if conduct by a Member of Congress which is outside the sphere of purely legislative activity is not immunized from criminal prosecution, then conduct in that category is not immunized from injunctive relief." 468 F.2d at 527 n.8. In United States ex. rel. Hollander v. Clay, 420 F. Supp. 853 (D.D.C. 1976), the court held that the conduct of a member of Congress is generally not subjected to judicial review or made the basis of civil or criminal judgments when that conduct is within the sphere of legitimate legislative activity. "The constituent communications aspect [of falsified travel vouchers] does not constitute the type of activity defined by the cases to be within the clause." 420 F. Supp. at 856. \textit{See generally} Reinstein and Silverglate, \textit{supra} note 88, at 1146 (assault and battery or armed robbery should be beyond the scope of the privilege even if fortuitously committed within the walls of the Capitol).
similar to those considered in *United States v. Brewster*.130

In *Brewster*, the Court observed that when Congress specifically extends statutory accountability to its members, the potential for harassment or intrusion by a coordinate branch is not a threat sufficiently real to warrant absolute congressional immunity.131 In the context of the federal bribery laws, the Court noted that although Congress was free to exempt its members from these laws if the potential for harassment so required, Congress had made no effort to do so in the more than one hundred years since the enactment of the laws. The Court not only considered the possibility of harassment to be remote, but also suggested that it must be balanced against the potential danger flowing from the absence of a bribery statute applicable to members of Congress.132 The Court reasoned that the purpose of the speech or debate clause was not only to protect the individual legislator, but also to preserve the independence and integrity of the legislative process. Abuses, such as financial misconduct involving bribery, would do more, in the Court's opinion, to undermine legislative integrity and defeat the right of the public to honest representation than would any assertion of executive power to enforce these laws.133 Depriving the executive and the judiciary of the power to investigate and punish bribery, the Court concluded, was unlikely to enhance legislative independence.134

Underlying the Court's position is the notion that accepting a bribe in exchange for a vote is so repugnant to the integrity of the legislative process that it must not be tolerated even at the risk of some intrusion into protected legislative activity. Since employment discrimination is not related to protected legislative activity in the same way that taking a bribe is related to voting, regulating such conduct need not raise the same concerns for impermissible executive interference, and thus presents an easier case for permitting some intrusion. Moreover, if the possibility of harassment must be balanced against the potential dangers to the integrity of the system in the case of a law having a greater potential for intrusion into protected activity, surely a similar balance must be struck in determining the appropriateness of applying the employment laws to Congress. It seems apparent that if the risk of some intrusion must be tolerated to regulate conduct possibly related to a legislative act, if the conduct at issue is not a

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130. 408 U.S. 501 (1972). Former Senator Daniel Brewster was indicted on charges of soliciting and accepting a bribe in exchange for his actions on legislation proposing changes in postal rates. The indictment was brought under 18 U.S.C. §§ 201(c)(1) and (g), provisions specifically applicable to acts of bribery by members of Congress.
131. 408 U.S. at 524.
132. *Id.*
133. *Id.* at 524-25.
134. *Id.* at 525.
legislative activity within the meaning of the speech or debate clause, then there can be no risk of intrusion and no need to exempt Congress from the law. Even if it could be argued that employment decisions require the same degree of protection as voting, the violation of individual constitutional rights involved must be considered at least as damaging to the integrity of the legislative system as buying votes. One federal court of appeals has agreed with this analysis, finding that speech or debate clause immunity does not protect a congressman from liability for discriminating against a member of his staff.

V. Davis v. Passman: A Case of Congressional Employment Discrimination

In January, 1974, Shirley Davis was Deputy Administrative Assistant to Representative Otto E. Passman. Davis’ employment was terminated in July, 1974. A dismissal letter from the Representative stated, “you are able, energetic and a very hard worker . . . . However, on account of the unusually heavy workload in my Washington office, and the diversity of the job, I concluded that it was essential that the understudy to my administrative assistant be a man.” Davis sued Passman, claiming his action violated the equal protection component of the fifth amendment’s due process clause, and seeking specific relief, damages, and declaratory relief. Passman moved to dismiss the complaint on three grounds: first,

135. See note 75 supra, for a discussion of the view that employment decisions are as central a legislative function as voting.

136. See Reinstein and Silverglate, supra note 88, at 1174-75. According to the authors, when an individual's constitutional rights are pitted against an assertion of legislative privilege, courts should exercise their jurisdiction and consider redress for the individuals. Thus operation of the speech or debate clause should differ according to whether it is asserted against executive intrusions or against legislative invasions of individual rights. Id. See also Note, The Speech or Debate Clause as a Defense in Private Civil Suits, 10 GA. L. REV. 953, 954 (1976) (the use of the speech or debate clause as an obstruction to private civil suits is not warranted by the history or original purpose of the clause); Comment, supra note 89, at 807, 814 (unconstitutional activity is, by definition, not within the “legitimate legislative sphere” since constitutional rights are paramount to an assertion of congressional immunity).


138. Id. at 868. Davis’ action was brought under 42 U.S.C. § 1983 (1976) which provides:

Every person who, under color of any statute, ordinance, regulation custom or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

Davis alleged a violation of her constitutional rights by an agent of the federal government and therefore was precluded from using section 1983. See District of Columbia v. Carter,
that his conduct was not unconstitutional; second, that the law afforded Davis no private right of action; and third, that the doctrines of sovereign and official immunity barred the suit. The district court rejected the immunity argument, but dismissed the action on the first two grounds.139

A panel of the Court of Appeals for the Fifth Circuit reversed, holding that Davis' allegations, if proven, would establish a constitutional violation for which she would have a private right of action.140 At the outset, the panel noted that sex discrimination by the federal government violates the equal protection component of the fifth amendment's due process clause.141 Davis' allegations, the panel found, established a prima facie case of sex discrimination, even though the discrimination was not pursuant to a statutory classification.142 Furthermore, Representative Passman offered the panel no governmental interest in support of his action, nor was the panel able to imagine one.143 Having determined that Davis alleged a

409 U.S. 418 (1972), in which the Supreme Court reviewed the legislative history of § 1983 and determined that the District of Columbia was not a "state or Territory" within the meaning of the statute. Id. at 424. The court ruled that the statute does not extend to purely private conduct and, with the exception of the Territories, actions of the federal government and its officers are facially exempt from its proscriptions. Id. at 424-25.

139. The United States District Court for the Western District of Louisiana, in an unprinted opinion, held that Davis did not state a claim against Passman upon which relief could be granted. The discharge of plaintiff on alleged grounds of sex discrimination, according to the court, was not violative of the fifth amendment because the law affords the plaintiff no private right of action for this claim. The court was of the opinion, however, that the doctrines of sovereign and official immunity urged by defendant as grounds for dismissing the action were not well founded. Davis v. Passman, No. 74-745, Slip op. at 53 (W.D. La. Feb. 26, 1975).

140. 544 F.2d at 868.

141. Id. The panel noted that although the fourteenth amendment's equal protection clause applies only to the states, the fifth amendment's due process clause contains an equal protection component applicable to the federal government. Id. citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Further, the panel relied on Supreme Court decisions to assert that just as sex discrimination by the states violates the fourteenth amendment unless supported by sufficient justification, sex discrimination by the federal government violates the fifth amendment. 544 F.2d at 868 citing Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Frontiero v. Richardson, 411 U.S. 677 (1973).

142. 544 F.2d at 869. Under 2 U.S.C. § 92, a representative may dismiss a member of his or her staff with or without cause. Although this statute is nondiscriminatory on its face, equal protection principles apply to the discriminatory application of a facially neutral statute. 544 F.2d at 869 citing Yick Wo v. Hopkins, 118 U.S. 356 (1886). The court further reasoned that in determining whether a facially nondiscriminatory statute has been administered in a manner violative of equal protection, the question to be answered is whether "there is shown to be present in it an element of intentional or purposeful discrimination." Id. citing Snowden v. Hughes, 321 U.S. 1 (1944). The court found that Passman's termination letter established a prima facie case of "intentional" and "purposeful" discrimination in employment based on sex as a class. 544 F.2d at 870.

143. 544 F.2d at 871. The court acknowledged that the need for "wide discretion in staff employment decision[s] cannot be ignored, but the constitutional proscription of blatant sex
constitutional violation, the panel next examined whether the claim was one upon which relief could be granted.

The specific relief Davis sought included reinstatement, promotion, and an injunction against unlawful discrimination against her. The panel found that the injunction claim might raise a sovereign immunity issue even though the doctrine does not bar complaints against federal officials which allege unconstitutional behavior. Additionally, although the reinstatement and promotion prayers would not be amenable to sovereign immunity attack, these demands were likely to raise difficult issues concerning the proper exercise of equitable remedial discretion. The panel was hesitant to order reinstatement of a representative's personal assistant. Intervening events diminished the importance of these issues since Representative Passman was defeated in his primary election and would no longer be a member of Congress.

The panel then analyzed several issues to determine the availability of damages. First, it found that damages were available under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, in which the Supreme Court held that a damage remedy for unconstitutional search and seizure by federal officials could be implied directly from the Constitution. Although Davis' claim arose under the fifth amendment, rather than the fourth as in Bivens, the panel could find no basis in Bivens' language or rationale for according any significance to the distinction because the "rights protected by the fifth amendment due process clause are every bit as fundamental as fourth amendment rights." The panel found the case for implying a constitutional damages remedy especially compelling when, as in Davis' case, there was no meaningful alternative remedy. Second, the panel noted that a previous Supreme Court decision, Brown v.
General Services Administration,\textsuperscript{150} did not dictate a contrary result. In Brown, the Court held that the thirty day limitation on bringing Title VII employment discrimination suits against the federal government could not be circumvented by the simple expedient of bringing the action directly under the Constitution and the Bivens remedies rule. The panel observed that because Title VII excludes the staffs of members of Congress, Ms. Davis never had a Title VII remedy available to her. Brown only establishes Title VII as the exclusive judicial remedy for federal employment discrimination to which Title VII extends, but does not affect remedies for employees not protected by that statute.\textsuperscript{151}

Ultimately, the panel examined the various immunity doctrines raised by Passman as bars to the action. It found Davis' claim to be against Passman as an individual, not against an official of the United States, and therefore dismissed the claim of sovereign immunity.\textsuperscript{152} Further, the panel concluded that representatives are not immune under the speech or debate clause from inquiry into their decisions to dismiss staff members because "when members dismiss employees they are neither legislating nor formulating legislation."\textsuperscript{153} Passman also claimed protection under the doctrine of absolute official immunity which protects federal government officials from civil damage suits. Passman was precluded from asserting this immunity because it is coextensive with the speech or debate clause.\textsuperscript{154} Finally, the panel examined the doctrine of qualified immunity to determine whether the need to afford members broad discretion in their staffing decisions warranted the application of qualified immunity for legislators. Qualified immunity differs from absolute official immunity in that it does not totally preclude an action against an official; at trial the official must demonstrate that he or she acted in good faith and nonmaliciously. The panel concluded that a violation of constitutional rights could not be just-
fied by ignorance or disregard of the law, and sex discrimination by the federal government, unsupported by legitimate justifications, was unconstitutional. Representative Passman was precluded from maintaining a good faith defense even under the liberal qualified immunity standard the panel prescribed for congressional staffing decisions. The Fifth Circuit Court of Appeals, rehearing the case en banc on Representative Passman’s petition, reversed the panel in part. Focusing on the portion of the panel’s decision entitling Davis to money damages under the due process clause of the fifth amendment, the court reasoned that: first, the Constitution did not compel an action for money damages implied from the due process clause; second, Congress avoided creating an action for money damages for congressional aides in noncompetitive positions; and third, implying such a damage action would necessarily draw into the federal judicial system a wide range of cases, the resolution of which Congress did not commit to the federal judiciary.

The court acknowledged that most circuits have allowed plaintiffs alleging similar invasions of their due process rights to recover money damages under the Bivens rule. It nevertheless found it necessary to employ a two-step analysis to determine whether or not the Bivens remedy was appropriate in this case. First, it reviewed the employment laws to determine whether a damage action for congressional employees could be implied

155. 544 F.2d at 881. Even under the doctrine of absolute official immunity, a federal official may not with impunity ignore the Constitution or any other law. See notes 182-93 and accompanying text infra.
156. 544 F.2d at 882.
157. 571 F.2d 793 (5th Cir. 1978).
158. Id. at 800-01.
159. Id. at 798.
160. Id. at 800-01.
161. The court listed several circuits that have allowed plaintiffs to base Bivens implied actions solely upon the concept of due process. See, e.g., Gentile v. Wallen, 562 F.2d 193, 196 (2d Cir. 1977) (teacher’s claim of denial of due process by school board stated a cause of action directly under the fourteenth amendment); Owen v. City of Independence, 560 F.2d 925, 932 (8th Cir. 1977) (discharged police chief has implied right of action for monetary relief arising under fourteenth amendment); Jacobson v. Tahoe Regional Planning Agency, 558 F.2d 928, 942 (9th Cir. 1977) (rights protected by fifth amendment due process give rise to cause of action); Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 718-19 & n.7 (7th Cir. 1975) (denying relief, but holding action could be maintained directly under the fourteenth amendment against public hospital for excluding father from delivery room); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (claim of deprivation of property in violation of constitutional rights is appropriate claim for money damages); United States ex rel. Moore v. Koelzer, 457 F.2d 892, 894 (3rd Cir. 1972) (complaint alleging violation of fourth and fifth amendment rights states a claim upon which relief can be granted). The court noted that other circuits have “commented favorably upon extension of Bivens to actions implied from the concept of due process”. 571 F.2d at 795 n.4.
from these statutes. Second, if this initial inquiry did not suggest such an implied action, it would determine whether the Constitution compelled a damage remedy. In the first part of its analysis, the court looked to the congressional intent behind employment protection legislation and decided that Congress had specifically declined to create a cause of action for money damages for congressional employees. Finding such an implied cause of action, the court said, "would have the anomalous result of granting federal employees in non-competitive positions, whom Congress did not intend to protect, a remedy far more extensive than Congress adopted for federal employees in the competitive service, whom it did intend to protect." The court was also concerned that permitting this type of remedy would require the federal judiciary to resolve cases previously not committed to it. The court therefore declined to create a remedial right under its federal common law powers.

Under the second step of its analysis, the court explored whether or not the Constitution compelled an action for money damages implied from the fifth amendment's due process clause. It concluded that it did not, reasoning, inter alia, that "not every right conceivably wedged within the literal breadth of due process demands federal protection through a cause of action for monetary damages."

Judge Jones concurred in the result, basing his argument entirely on the potential separation of powers problems resulting from permitting relief to a congressional employee. He concluded that hiring and firing of congressional aides was a legislative activity protected by the speech or debate clause since aides serve as alter egos of the member employer. Judge

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162. Id. at 798-800.
163. Id. at 800-01.
164. Id. at 798. The court suggested that in exempting its employees from Title VII, Congress was adhering to the legislative judgment expressed in the statute according to which member's personal staffs are removable "at anytime . . . with or without cause." Id. quoting 2 U.S.C. § 92 (1970).
165. Id. The court observed that when Congress amended Title VII to include federal employees, the separate administrative remedy for discrimination in federal employment was not extended to congressional employees who are not in the competitive service. Id. Congressional employees are thus not entitled to the review in federal courts provided other federal employees under section 717. Id.
166. Id. at 800.
167. Id. The court compared the damage remedy provided by 42 U.S.C. § 1983 with a remedy under the Constitution. See note 138 supra. In the court's opinion the "range of interests protected by procedural due process is not infinite," regardless of any express statutory mandate for a damage action. 571 F.2d at 800 citing Paul v. Davis, 424 U.S. 693 (1976).
168. Id.
169. Id. at 801-02 (Jones, J., concurring). See note 75 supra for a discussion of the "alter-ego" theory. The reasoning is particularly inapplicable to Shirley Davis who, Passman acknowledged, was a secretary. In his termination letter to Davis, Passman expressed certainty...
Goldberg, the author of the panel opinion, wrote a lengthy dissent stating that the "court today chooses to deny a right of action to the victim of as blatant a case of gender-based discrimination as is within my experience on this court." He rejected the court's Bivens analysis step by step, emphasizing that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

VI.  **DAVIS I AND II: NO ABSOLUTE IMMUNITY FOR DISCRIMINATION BY MEMBERS OF CONGRESS**

The two important issues raised by Davis are first, whether members of Congress who discriminate against their employees are protected from liability under any immunity theory, and second, assuming the action is not barred, what remedies are available to the discrimination victim. After Davis I and II, the answer to the first question appears to be that members may be held accountable for acts of employment discrimination. But whether a discrimination victim will have any meaningful remedy is uncertain after Davis II. The Supreme Court will have an opportunity to decide both issues when it hears the Davis case this term.

The damage remedy announced by the Court in Bivens arose primarily from the fourth amendment's proscription of unreasonable searches and seizures. In a concurring opinion, Justice Harlan noted that the monetary relief created by the majority was a permissible form of redress in a claim arising under the fourth amendment, but not one that would necessarily apply to other types of constitutionally protected interests. He suggested that the appropriateness of money damages may vary with the nature of the personal interest asserted. While a number of federal courts have been unwilling to extend Bivens to cases not involving the fourth amendment, an overwhelming number of lower federal courts have extended or have indicated their willingness to extend the Bivens doctrine beyond fourth amendment claims. Both the majority and the dissent in Davis II acknowledged this pattern. The Fifth Circuit itself, prior to

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170. 571 F.2d at 805 (Goldberg, J., dissenting).
172. 403 U.S. at 397. *See* note 146 *supra*.
173. 403 U.S. at 408-09.
Davis, had extended Bivens remedies to cases involving other amendments.\textsuperscript{175} One explanation for the court's refusal to extend the remedy to Davis may be the political sensitivities associated with imposing liability on a member of a coordinate branch. Yet it is interesting that the majority in Davis II was willing to consider reinstatement as a remedy had Passman still been in office.\textsuperscript{176} Ironically, Judge Goldberg, speaking for the panel in Davis I, was concerned that this type of remedy would be inappropriately intrusive.\textsuperscript{177} What the court in fact would have done had Passman been re-elected remains unclear.

What can be said with increased certainty after Davis I and II is that members of Congress may be held accountable for acts of employment discrimination. Since the district court rejected the immunity arguments and the court of appeals in Davis II reversed only that portion of the panel decision permitting a damages remedy, the panel opinion provides the rationale for this view. The panel held that employment discrimination suits will not be barred by the doctrine of sovereign immunity, provided the action is brought against the member in his or her individual capacity. Nor will they be barred under the doctrines of absolute executive/official immunity or speech or debate clause immunity. The panel analyzed the history of the speech or debate clause and concluded that representatives are not immune from inquiry into their employment decisions because such conduct involves neither legislating nor formulating legislation.\textsuperscript{178} Relying on Gravel v. United States,\textsuperscript{179} the panel determined that dismissal decisions are not an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings.\textsuperscript{180} While the Constitution establishes an immunity for aberrations in a representative's legislative activities, "Members of Congress become

\textsuperscript{175} 571 F.2d at 796. The court acknowledged its own decision extending Bivens to fifth amendment claims. \textbf{See}, e.g., Weir v. Muller, 527 F.2d 872 (5th Cir. 1976), in which plaintiff alleged a deprivation of his fifth amendment right to due process during an investigation leading to his conviction for federal income tax evasion. The court held that the district court erred in finding no jurisdiction to consider damage claims based upon implied causes of action under the fifth amendment's due process clause. \textbf{But see} Rodriguez v. Ritchey, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc court declined to rule on appropriateness of extending Bivens).

\textsuperscript{176} 571 F.2d at 800. The court maintained that its refusal to imply a cause of action for money damages does not render the constitutional rights of congressional employees meaningless because "[a] plaintiff might still seek equitable relief where the employer remained in office." \textit{Id.}

\textsuperscript{177} 544 F.2d at 872.

\textsuperscript{178} \textit{Id.} at 800.

\textsuperscript{179} 408 U.S. 606 (1972).

\textsuperscript{180} 544 F.2d at 880.
mere mortals when they operate in more mundane fields.”

The panel also held that the inapplicability of speech or debate clause protection foreclosed a member from asserting an absolute official immunity because one privilege was coextensive with the other. In *Barr v. Matteo*, a libel action against an agency official brought by former employees of the Office of Rent Stabilization, Justice Harlan explained that absolute official immunity developed as a means for officers of the government to defend themselves against civil damage suits for defamation and other torts. He characterized suits against government officials as conflicts between the need to protect individual citizens from damages and the public interest involved in shielding responsible government officers from the harassment of vindictive or ill-found damage suits. He noted, however, that the decisions have always limited immunity to action within the scope of the official’s powers. The Court underscored that the privilege is not “a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.”

Although there are apparently no cases holding executive branch immunity available to legislators, the Justice Department, in an amicus brief filed on behalf of Representative Passman in *Davis II*, argued that staffing decisions are essential to a member’s official functions and should be protected by the absolute official immunity described in *Barr*. The Court in *Barr*, however, clearly equated the judicially developed doctrine of official immunity with the constitutional privilege of speech or debate. In *Doe v. McMillan*, when it was argued that federal legislators were entitled to official immunity for publishing and disseminating a report allegedly violative of plaintiffs’ rights to privacy, the Court explained that any official immunity available to legislators was equivalent to the immunity available under the speech or debate clause.

Moreover, after the Court’s recent decision in *Butz v. Economou*, it is unlikely that immunity will protect employment decisions such as Pass-
man's. *Butz* concerned a claim for damages against Department of Agriculture officials alleging that they had conducted an investigation and an administrative proceeding against the plaintiff in retaliation for his criticism of the agency. The district court dismissed the action, finding that the individual federal officials were entitled to absolute immunity for all discretionary acts within the scope of their authority. The court of appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government.

In affirming the decision of the court of appeals, the Supreme Court noted that *Barr* did not purport to depart from the general rule prohibiting a federal official from ignoring the limitations which the controlling law has placed on his or her power. The Court also noted that *Barr* did not protect an official who not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution. Since government officials are liable when they exceed their statutory authority, they clearly may not willfully or knowingly violate constitutional rights. The Court concluded that in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to qualified immunity. Thus, even if Passman could assert his entitlement to the same executive immunity available to other federal government officials, it is clear after *Butz* that his claim would be limited to a qualified, not absolute, immunity. Under the traditional qualified immunity standard reaffirmed in *Butz* and relied upon in *Davis*, it is unlikely that a congressperson could successfully assert even a qualified immunity for a willful or knowing violation of an individual's constitutional rights.

### VII. What's Left After *Davis*?

Although these decisions are not final, after *Davis I* and *II*, a member of Congress can be sued for discriminating against a staff member. Depending on whether the Supreme Court affirms or reverses *Davis II*, however, the employee may be without a remedy even in a proven case of discrimination. At least the action will not be dismissed at the outset based upon an assertion of legislative immunity if the Court lets the three lower court opinions stand. If the action against the member is not barred, the rationale for excluding congressional employees from remedies available to other workers under the employment protection laws is no longer valid. Whether congressional employees will ever benefit from these protections

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192. 98 S. Ct. at 2902.
193. *Id.* at 2905.
is questionable, however, in view of the sensitive political and policy considerations at play.

A. Congressional Employment Safeguards: Alternative Enforcement Procedures

Unlike other citizens who freely lobby the Congress to enact laws of special interest to them, the traditional elements of the legislative process are not available to Capitol Hill staff. Many victims of congressional employment discrimination are unwilling to demand the necessary reforms for fear of losing their jobs. Some employees acquiesce to and others actually condone current practices because of the benefits gained from going along with the system. It is almost impossible for congressional employees to enlist outside support on this issue because some past supporters of employment protection laws are unwilling to jeopardize other measures for which they are lobbying. Fundamentally, the problems of Capitol Hill employees are not of great concern to the public at large. Congressional jobs are associated with status, glamour, special privileges, and large salaries. It is unlikely that a member would lose more than a handful of votes among his or her electorate for voting against employment protections for Hill workers. Notwithstanding these difficulties, several preliminary steps in the direction of reform have been taken. To assure that this momentum is not lost, alternative methods of protecting congressional employees should be examined, taking into consideration both the preceding discussion of legislative immunity and the political realities inseparable from this issue.

Rules prohibiting employment discrimination are already in effect in both the House and Senate. The remaining task is to devise an enforcement mechanism that will both protect congressional employees and be sufficiently unobtrusive to the legislators who must sanction it. The alternatives fall along a broad spectrum: complete coverage under existing law for all congressional employees; complete coverage under existing law for a select group of congressional employees; limited coverage under existing law; no coverage under existing law, but an independent enforcement

194. The Constitution grants Congress alone the power to legislate. Congress cannot be ordered to pass any law, nor can rules of conduct be externally imposed upon it. U.S. CONST. art. I, § 1, cl. 1.
196. The lack of political liability attached to this issue is evident from the Senate's decision to remove S. Res. 431, from the calendar of measures to be considered prior to the close of the 95th Congress, and its unwillingness to amend Humphrey-Hawkins to include it. See note 85 supra.
mechanism with an internal appeals process; and finally, a completely internal and voluntary system.

1. Complete Coverage Under Existing Law for Congressional Employees

In the 95th Congress, a bill was introduced in the Senate to extend existing employment protection laws to Congress. The argument for this approach is that since employment practices are not protected by the speech or debate clause, members can be sued when they discriminate. Congress has not exempted itself from the bribery laws for fear of intrusion or harassment by the executive branch even though accepting a bribe in exchange for a vote is closely related to the legislative process. Bribery may appear to more directly detract from the integrity of the legislative process, but a strong argument can be made that invasion of constitutional rights resulting from employment discrimination deserves equal statutory sanctions.

On the other hand, even if the speech or debate clause does not bar an action against a member, thereby eliminating potential separation of powers problems, Congress arguably should not be compelled to follow the commands of the executive branch in an area as sensitive as employment relations. Although such interference may be constitutionally permissible, it could negatively impact upon the compatible operation of the three branches of government, and for that reason should not be contemplated. In the context of a discussion of judicial supremacy, Judge Learned Hand observed that constitutions must be interpreted to incorporate those unexpressed provisions necessary to "prevent the defeat of the venture at hand." In his view, the Supreme Court appropriately assumes authority to keep the states, Congress, and the President within their prescribed powers, but since judicial power is not constitutionally mandated, it need be exercised only when a court deems it appropriate to do so. According to this theory, even though employment discrimination by members of Congress may invade the constitutionally protected rights of some persons, the consequences of exercising a court's power of judicial review should not be risked. While a narrow view of legislative immunity may permit congressional accountability under the employment laws, such day to day interference in the operations of the legislature — whether or not such acts are integrally related to the legislative process — may be too destructive of the "venture at hand."

199. Id.
2. Complete Coverage Under Existing Law for Some Congressional Employees

The Supreme Court has extended legislative immunity to congressional aides performing acts similar to those afforded protection if performed by members of Congress. This extension of the privilege to aides evoked the argument that legislators should be insulated from inquiry into their dealings with their "alter egos." Although the argument prevents members from discriminating against their aides with impunity, it also precludes executive branch involvement in employment decisions relating to those aides who perform sensitive legislative and political tasks for their legislator-employers. This claim of "peculiar sensitivities" has little relevance, however, for those aides in clerical and support positions, and no relevance for those persons not employed by individual members. An alternative enforcement scheme, therefore, may involve extending complete coverage of the employment laws to only some congressional employees. Although individual determinations of coverage could prove difficult, the problem is not insurmountable. Employees who provide services to the entire Congress do not serve as "alter egos" of anyone. Thus it would not intrude on a member's personal employment decisions to require the safeguards of existing law for these employees. A more difficult problem exists, however, for personal office staff or committee appointments. Non-uniform extension of coverage in those cases could prove infeasible. Protection could also work to disadvantage those persons hoping to be promoted from lower to higher level positions.

3. Limited Coverage Under Existing Law

Two possibilities exist in this category: complete coverage under the employment laws, enforced by a separate office within the Civil Service Commission to handle congressional complaints; and limited coverage patterned after the employment protections afforded Library of Congress employees.

Under the first proposal, congressional employees would receive all the protections of the current employment laws, but a separate office would be established within the Civil Service Commission to handle their complaints. To assure minimal intrusion by the executive branch, Congress could appoint members of an independent panel within the separate office structure to review complaints.

The second proposal would parallel the procedure established for Library of Congress employees under section 717 of the Civil Rights Act.

201. See notes 75 and 169 supra for discussion of the "alter ego" theory.
This section was added primarily to guarantee that all personnel actions affecting federal government employment were free from discrimination; secondly, to empower and require the Civil Service Commission to evaluate and enforce federal agency equal employment opportunity plans and programs; and thirdly, to provide remedies in federal district courts for any employee who had exhausted the complaint procedure within his federal agency. Although Library of Congress employees were initially excluded from section 717, it was amended prior to its enactment to grant Library employees the nondiscrimination protection of subsection (a), and the right to federal district court redress under subsection (c). Enforcement procedures of subsection (b) were withheld. Instead, administrative and enforcement authority was delegated to the Librarian of Congress. A similar solution for congressional employees would not satisfy those who reject internal enforcement mechanisms, but it would at least provide congressional employees with a remedy in the federal courts, a critical element after Davis v. Passman.

4. An Independent Enforcement Mechanism

Independent enforcement was encompassed in S. Res. 431. The resolution would establish personnel guidelines, grievance procedures, and an independent board to review complaints. The drawback of this approach is that it permits an internal appeal to the Senate Ethics Committee, thereby placing enforcement in the hands of the same persons whose conduct is being regulated. Although this procedure dispenses with problems of intrusiveness involved in any external mechanisms, obvious disadvantages exist to permitting Congressional self-policing. The Constitution's "housekeeping" provision has rarely provoked punishment of members for acts of misconduct. Moreover, as the Supreme Court noted in United States v. Brewster, which considered application of bribery laws to federal legislators, definite risks are involved in permitting congressional self-discipline. The Court observed that if Congress were responsible for overseeing activities of its members related to the legislative function, the "independence of individual members might actually be impaired."

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203. The drafters believed that including the Library under the enforcement authorities of the Civil Service Commission would raise substantial questions about the appropriateness of the Congress' delegating to an executive agency the legislative function of overseeing one of its own arms. Id.
204. 571 F.2d 793 (5th Cir. 1978).
205. See note 114 supra for a discussion of Congress' self-disciplining activities.
207. Id. at 519. See The Bribed Congressman's Immunity from Prosecution, 75 YALE L.J.
Congressional self-discipline, the Court stressed, will not invoke the protective shields present in a criminal bribery case.\textsuperscript{208} The Court concluded that it could not be assumed that "the triers would be wholly objective and free from considerations of party politics and the passions of the moment."\textsuperscript{209} Political alliances may be the most important argument against any internal congressional employment safeguard. The unwillingness of members to adopt the mild enforcement procedure embodied in S. Res. 431 may be a forewarning of their inability to seriously and responsibly regulate their own conduct in this area.

5. A Completely Internal, Voluntary Grievance Mechanism

A final alternative, one currently in effect in the House, is an internal, voluntary mechanism. Unlike S. Res. 431, which has a mandatory grievance and review procedure and becomes internal at the appeals stage, the Voluntary Fair Employment Practices Agreement has no enforcement authority and depends strictly on the cooperation of individual members. This alternative has the advantage of being completely unintrusive, but has the disadvantage of voluntary compliance and an internal review procedure.

B. Remedies Available to Congressional Employees in the Absence of Statutory Safeguards

In view of the lack of statutory safeguards for congressional employees, and in the absence of any internal procedures for enforcing House and Senate anti-discrimination rules, the question remains whether any causes of action are available to discrimination victims. Section 1 of the Civil Rights Act of 1871, the predecessor of section 1983, was enacted for the express purpose of enforcing the fourteenth amendment and is thus the provision under which most discrimination actions are brought.\textsuperscript{210} Section 1983 provides a remedy only to those persons whose federal rights have been violated under color of state law, however, and, as \textit{Davis v. Passman} illustrates, has no application to cases of federal employment discrimina-

\textsuperscript{335} 349 (1965) (a court trial provides an accused congressman with the benefit of constitutional protections); Comment, \textit{The Constitutional Limits of the Speech or Debate Clause}, 25 U.C.L.A. L. REV. 796, 817 (1978) (the courts are better equipped to impartially consider questions of improper behavior by legislators because they are insulated from the political process and enforce procedural safeguards).

\textsuperscript{208} 408 U.S. at 519. \textit{See Wash. Post,} October 25, 1978, § A at 2, col. 1. In a confrontation with the former special counsel of the Senate Ethics Committee, Senator Edward Brooke told the committee chairman, "I'd rather be before a grand jury or a court of law. My rights would be protected. I have no rights here." \textit{Id.} at col. 3.

\textsuperscript{209} 408 U.S. at 519-20.

\textsuperscript{210} See generally note 138 \textit{supra} for a discussion of § 1983.
tion. Davis had no choice but to bring her action under the fifth amendment and to rely on Bivens for monetary relief. A congressional employee may be able to avoid the Bivens dilemma by bringing an action under section 1981 of the Civil Rights Act of 1870. 211 Although this provision is limited to racial discrimination, 212 it may provide an appropriate cause of action for a congressional employee because it is not limited to state action. 213 While it may be argued, as it was in Davis, that Brown v. General Services Administration 214 would preclude such an action, Brown only established Title VII as the exclusive judicial remedy for federal employment discrimination to which Title VII applied. 215 Employees who are outside the protection of that statute and who allege racial discrimination may be able to bring an action under section 1981. Congressional employees who allege sex discrimination, however, would still be forced to rely upon the fifth amendment and Bivens.

VIII. Conclusion

Unlike their counterparts in both the public and private sectors, Capitol Hill employees continue to work without the protections of any employment laws. This situation persists because many members of Congress insist that application of the employment laws to congressional employees is constitutionally precluded by the doctrines of separation of powers and legislative immunity. Employment decisions fall squarely outside the speech or debate clause's protection, however, under the Supreme Court's recent opinions regarding the scope of protected legislative activities. One

211. 42 U.S.C. § 1981 (1976) provides:
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

212. Section 1981 has not been limited to allegations of racial discrimination by blacks alone, but has been held available to whites who are allegedly victims of racial discrimination. In McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273, 285-96 (1975), the Supreme Court held § 1981 applicable to racial discrimination in private employment against white persons as well as non-whites. Id.

213. See generally C. Antieau, Federal Civil Right Acts § 16 (1971). Section 1981 finds constitutional support not only in the fourteenth amendment, but also in the thirteenth amendment, and the Article One power of Congress over the District of Columbia and the Territories. The latter constitutional provisions are not limited to "state action" and accordingly § 1981 cases need not be limited to state action or color of law. Id.


215. See text accompanying notes 150-51 supra. Although Brown would preclude the action brought under section 1981 in McDonald, it has no impact on the general availability of § 1981 to whites alleging racial discrimination.
federal court of appeals has refused to allow a congressman to bar an employment discrimination suit based on a claim of speech or debate clause immunity. Notwithstanding these decisions, congressional employees remain "second class citizens" in the context of employment safeguards.

In an effort to come to terms with what some members have acknowledged to be the legitimate complaints of congressional employees, while at the same time preserving a perceived need for noninterference in its internal affairs by a coordinate branch, both the House and Senate are taking small steps to afford their employees minimal employment protections. Among the alternative procedures for providing Capitol Hill employees with some remedy for acts of employment discrimination, at least three possibilities have reasonable chances for passage. With the exception of the two poles—complete coverage under existing law and a completely voluntary, internal procedure—there are alternatives sufficiently limited to alleviate members' fears of executive intrusion or harassment. The fact that an employment discrimination action against a member is constitutionally permissible does not eliminate the need for an enforcement mechanism. Presently, an employee who has successfully brought a sex discrimination action under the fifth amendment may remain without any remedy other than the satisfaction of having had her day in court, although the Supreme Court may change this result. Since ultimately the passage of employment protections for congressional employees will depend on the conscience of the Congress, employees may be well advised to test actions based upon racial discrimination under section 1981 and to bring other sex discrimination actions under the fifth amendment in the hopes of a favorable ruling on a damages remedy.

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