Loyola University Chicago Law Journal

Volume 11
Issue 1 *Fall 1979*

Article 8

1979

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Davis v. Passman: Implied Constitutional Remedies for Congressional Employees

INTRODUCTION

As long ago as 1803, the Supreme Court recognized that constitutional liberties are mere words unless means are available to compel their vigorous enforcement. In *Marbury v. Madison,* Chief Justice Marshall stated,

> [t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.[1]

In its 1978 Term, the Supreme Court translated these lofty principles into action. In *Davis v. Passman,*[2] the Court held that a cause of action and a damages remedy can be implied directly from the Constitution if the due process clause of the fifth amendment is violated and no alternative remedy is available.[3]

The *Davis* Court's use of an implied remedy, however, creates a potential source of friction between the judicial and legislative branches of government since the defendant was a member of Congress and Congress chose to exempt noncompetitive employees, such as the plaintiff from Title VII.[4] The likelihood of abrasion is magnified by the defendant's assertion that the speech or debate clause of the Constitution provides him with an absolute defense to the plaintiff's charges.[5]

This comment will examine the *Davis* Court's use of an implied constitutional remedy. The article will then consider whether the judiciary has made an impermissible excursion into the legislative province by conducting a review of congressional employment practices. In addition, the special immunity that attaches to Passman by virtue of the speech or debate clause will be analyzed, with a view

1. Marbury v. Madison, 1 Cranch 137, 163 (1803).
2. 99 S. Ct. 2264 (1979).
3. *Id.* at 2271.
4. In 1972, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* [hereinafter Title VII] was amended to include congressional employees in the competitive service. 42 U.S.C. § 2000e-16 (1972). Davis was not hired through the competitive service. *See* 2 U.S.C. § 92 (1977).
5. The Supreme Court did not reach the merits of Passman's defense. A full trial on the discrimination issue may be precluded by this claim of immunity. *See* notes 58 through 88 *infra* and accompanying text.

to the resolution of the issue on remand. Finally, the impact of the *Davis* decision will be discussed.

Implied Constitutional Remedies

In the landmark decision of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,*[6] the Supreme Court considered whether a remedy could be implied directly from the Constitution. That case involved the warrantless search of Webster Bivens by federal narcotics agents.[7] Bivens brought suit against the agents, alleging that their unlawful conduct caused him great humiliation, embarassment and mental suffering.[8] The Supreme Court found that if Bivens' complaint were taken as true, the conduct of the agents violated his fourth amendment rights.[9] Rather than allow the otherwise remediless plaintiff to drift in the vagaries of state tort law, the Court implied a federal remedy for him directly from the fourth amendment.[10]

The trend since *Bivens* has been to extend the decision beyond its fourth amendment roots.[11] Although the Supreme Court did not directly address the issue, in *Butz v. Economou,*[12] the Court intimated that implied remedies should exist for injuries to other constitutionally protected interests.[13] In addition, several courts of ap-

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6. 403 U.S. 388 (1971).

7. *Id.* at 389.

8. *Id.* at 389-90.

9. *Id.* at 393-97. U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

10. 403 U.S. at 390-91. The Court rejected the argument that Bivens must look to state law for redress. The Court reasoned that such a scheme would only end up forcing the plaintiff to file in state court, where it is the policy of the Department of Justice to remove the cause to federal court for decision based on state law. State law would treat federal agents as ordinary citizens. *Id.*

11. *See* Davis v. Passman, 571 F.2d 795, 807, n.6 (5th Cir. 1978) (Goldberg, J., dissenting), for cases which have extended *Bivens* beyond the fourth amendment. *See also* Lehman, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action For Torts Committed by Government Officials,* 4 Hastings Const. L.Q. 531 (1977).

12. 438 U.S. 478 (1978).

13. *Id.* at 486. The *Butz* decision dealt with the scope of immunity available to federal officials. However, the *Butz* Court would not have reached the immunity question unless it had assumed the existence of a constitutional cause of action that reached beyond the fourth amendment. Comment, *Bivens Actions For Equal Protection Violations: Davis v. Passman,* 92 Harv. L. Rev. 745 (1979) [hereinafter cited as *Bivens Actions*].

A fifth amendment cause of action was implied by the Supreme Court several decades ago in Jacobs v. U.S., 290 U.S. 13 (1933). However, the just compensation clause, not due process, was involved.

peals have found that *Bivens* principles are equally applicable to the fifth amendment.[14] In *Davis*, the Supreme Court considered this extension.

DAVIS *v.* PASSMAN

Background

Shirley Davis was relieved of her duties as a deputy administrative assistant to Congressman Passman after he determined that the position would be better served by a man.[15] Davis filed suit against Passman for an award of backpay,[16] claiming that he terminated her employment solely on the basis of her sex. The gravamen of her complaint was that Passman's conduct constitutes discrimination in violation of her fifth amendment rights.[17] The district court dismissed the complaint for failure to state a claim upon which relief could be granted.[18]

A Fifth Circuit Court of Appeals panel reversed,[19] finding that if Davis' allegations were taken as true, her gender-based dismissal violated the equal protection component of the fifth amendment's due process clause. The Fifth Circuit held that a cause of action for damages arose directly under the fifth amendment, despite the lack of legislative protection afforded Davis.[20] The panel also found that

14. Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978), *cert. pending sub nom* Moffit v. Loe, 78-1260 (action by pretrial detainee against federal marshals for denial of medical treatment); Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1352 (9th Cir. 1977) *rev'd in part and aff'd in part on other grounds sub nom.* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 99 S. Ct. 1171 (1979) (landowners challenging land use ordinances under interstate compact); Bennett v. Campbell, 564 F.2d 329 (9th Cir. 1977) (knowing and malicious detention by federal officers); Weir v. Muller, 527 F.2d 872 (5th Cir. 1976) (complaint alleged violations of plaintiff's constitutional rights in course of federal criminal investigation and prosecution); States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (4th Cir. 1974) (suit against customs officers for seizure of goods); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (infringement of demonstrators' fourth and fifth amendment rights by law enforcement officials); United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972) (action against federal officers for damages resulting from use of fraudulent testimony in criminal prosecution).

15. In a letter to Davis, Passman stated in part:

> You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load 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. I believe you will agree with this conclusion.

99 S. Ct. 2264, 2269 n.3 (1979).

16. *Id.* Since Passman did not return to Congress, Davis was foreclosed from obtaining other forms of relief such as reinstatement, a promotion or a salary increase.

17. *Id.* at 2269.

18. *Id.*

19. 544 F.2d 865 (5th Cir. 1977).

20. *Id.* at 882.

Passman's conduct was not shielded from liability by the speech or debate clause of the Constitution.[21]

On rehearing en banc, the Fifth Circuit reversed its earlier decision and determined that the fifth amendment was an inappropriate source from which to imply a cause of action for damages.[22] The en banc court reached its decision by applying criteria which were developed to determine if a private cause of action should be inferred from a federal statute.[23] The court noted that Congress had failed to provide a remedial scheme for noncompetitive congressional employees[24] and that, this failure manifested a will of Congress which the court was not constitutionally mandated to controvert.[25] Since the complaint was dismissed, the en banc court did not decide the merits of the speech or debate clause defense.

The Supreme Court Opinion

The Supreme Court, in reversing the en banc court of appeals, used a three-part analysis in determining whether a cause of action and damages remedy existed under the fifth amendment.[26] First, the Court examined whether the right to be free from gender discrimination was guaranteed to Davis by the fifth amendment.[27] The Court reasoned that gender discrimination is violative of the equal protection component of the fifth amendment's due process clause unless it is substantially related to the achievement of important governmental objectives.[28] Since Davis has the right to be free from

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21. *Id.*

22. 571 F.2d 793 (5th Cir. 1978).

23. The en banc court used the four-part analysis set out in Cort v. Ash, 422 U.S. 66 (1975). The test, and the en banc court's responses are as follows: (1) Is the plaintiff a member of the class for whose special benefit the provision relied upon was created? The court was not convinced that Davis' fifth amendment rights protected her from gender-based discrimination in her employment with the same "certainty" that the fourth amendment protected Bivens from unreasonable searches. 571 F.2d at 797. *But see* note 29 *infra* and accompanying text. (2) Is there a specific legislative intent to deny or create a remedy? Changing its focus from the fifth amendment to Title VII, the court found such an intent in Congress' failure to include Davis within its legislative scheme. *Id.* at 798. (3) Is it consistent with the purpose of the right asserted to imply such a remedy? The court reasoned that "the breadth of the concept of due process indicates that the damage remedy sought will not be judicially manageable . . ." *Id.* at 799. (4) Is the action more appropriately relegated to federal law? The court answered in the affirmative, concluding that an implied action would "expand federal jurisdiction into broad fields of law presently occupied by state court systems." *Id.*

24. 571 F.2d at 800.

25. *Id.*

26. This analysis asks the following three questions: (1) Does the plaintiff have a right to be free from gender discrimination? (2) Is there a cause of action by which to assert this right? (3) Is there a form of judicial relief available? 99 S. Ct. at 2271.

27. *Id.*

28. Two lines of authority were dovetailed to support this conclusion. Cases recognizing

any gender discrimination which cannot meet this standard,[29] the Court concluded she has a potential fifth amendment right.

The next issue in the Court's analysis is whether Davis has a cause of action to assert this fifth amendment right. The Court noted that since Davis' claim rested directly on the Constitution, it is the judiciary which has the power to enforce her rights.[30] Statutory rights, on the other hand, are established and enforced through congressional legislation.[31] For this reason, the Supreme Court determined that the court of appeals erred in applying to Davis' constitutional claim a test developed to assess statutory rights.[32] Consequently, the Court found that Davis is an appropriate party to in-

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that the fifth amendment due process clause contains an equal protection guarantee included: Vance v. Bradley, 99 S. Ct. 939 (1979) (mandatory retirement age for foreign service employees); Hampton v. Mow Son Wong, 426 U.S. 88 (1976) (civil service regulation barring resident aliens from federal employment); Buckley v. Valeo, 424 U.S. 1 (1976) (challenge to constitutionality of Federal Election Campaign Act); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (gender-based distinction in Social Security Survivors benefits); Bolling v. Sharpe, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools).

The "substantial relation" - "important governmental objectives" standard for evaluating classifications by gender originated in Craig v. Boren, 429 U.S. 190 (1976). There, a state statute discriminating against males in the sale of beer was held to violate the fourteenth amendment equal protection clause. The test was also applied to a federal statute in Califano v. Webster, 430 U.S. 313 (1977), which upheld a Social Security Act provision favoring female wage earners in computation of old-age benefits. The *Davis* Court relied on both cases.

The Court did not cite Frontiero v. Richardson, 411 U.S. 677 (1973) in which four justices (three of whom were in the *Davis* majority) determined that sex was a "suspect class" to which strict judicial scrutiny should apply. This position has never been accepted by a full majority of the Court.

Thus, a standard which was developed to evaluate statutory classifications by gender will control the discrimination issue on remand in *Davis*. Query whether this application to a constitutional claim is consistent with the *Davis* Court's distinction between the analysis of statutory and constitutional rights? *See* text accompanying note 32 *infra*.

29. 99 S. Ct. at 2271. The Supreme Court implicitly overrules the Fifth Circuit on this issue. *See Id.* at 2274, n.18.

The Court also notes the House of Representatives itself has a rule prohibiting sex discrimination. Clause 9 of Rule XVIII of the House of Representatives provides:

> 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 the individual's race, color, religion, sex, or national origin.

99 S. Ct. at 2276.

30. *Id.* at 2275. The Court assumed that this would be true "[a]t least in the absence of 'a textually demonstrable constitutional commitment of [the] issue to a coordinate political department.'" *Id., citing* Baker v. Carr, 369 U.S. 186 (1962). *See* note 93 *infra* and accompanying text.

31. 99 S. Ct. at 2274-75. Legislative intent determines who may enforce a statutory right; the *Cort* test (*see* note 23 *supra*) is the judicial means for discerning this intent. *Id.*

32. The Court distinguished enforcement of statutory rights, which are "often embedded in complex regulatory schemes," from that of rights under the Constitution, which "speaks instead with a majestic simplicity." The legislature may provide for enforcement of the former through alternative mechanisms if a private cause of action is unavailable. *Id.* at 2275.

voke the general federal question jurisdiction to seek relief on her constitutional claim.[33]

Finally, the Court considered whether a damages remedy was an appropriate form of relief.[34] Before deciding the applicability of *Bivens*, the Court made several prefatory remarks. First, it noted that as a general rule, if legal rights have been invaded "federal courts may use any available remedy to make good the wrong done."[35] In addition, the Court recognized that federal courts have had much experience in computing backpay claims under Title VII of the Civil Rights Act of 1964.[36] Finally, the Court noted that Davis had no alternative remedy available.[37]

Bivens held that a court may provide relief in the form of damages for the violation of constitutional rights unless there are special factors counselling hesitation.[38] The *Davis* Court noted that "a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns," but the Court held that "these concerns are coextensive with the protections afforded by the speech or debate clause."[39] The Court further stated that if Passman's actions are not shielded by the speech or debate clause, then he should be subject to the principle that "legislators ought . . . generally to be bound by [the law] as are ordinary persons."[40] Therefore, if Davis is able to prevail on the merits, damages is an appropriate remedy.[41]

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33. *Id.* at 2276.

34. *Id.* at 2277. The opinion noted that damages were historically regarded as the ordinary remedy for invasions of personal rights and declared that such relief would be judicially manageable. In addition, the Court recognized that Davis had no alternative remedy (*see* note 16 *supra*). Since reinstatement was not possible, the Court did not reach the question of the appropriateness of equitable relief. 99 S. Ct. at 2277 n.24.

35. *Id.* at 2276.

36. 99 S. Ct. at 2277.

37. "For Davis, as for Bivens, 'it is damages or nothing.' " *Id.* at 2277. Since reinstatement was not possible the Court did not reach the question of the appropriateness of equitable relief. 99 S. Ct. at 2277 n.24.

38. 403 U.S. 388, 396 (1971).

39. 99 S. Ct. at 2277.

40. *Id.*

41. The Court disposed of the contention that Congress' failure to extend the protection of Title VII to Davis was intended to foreclose other remedies available to her. *Id.* at 2278. The Court also rejected the "floodgates" argument propounded by the Fifth Circuit *en banc* decision. *Id.* The conservation of judicial resources should not work to undercut the protections of the Constitution. "Were crowded dockets to be our gyroscopes, courts might routinely strip litigants of their constitutional rights out of fear that others might follow their judicial path." Davis v. Passman, 571 F.2d 793, 820 (5th Cir. 1978) (Goldberg, J., dissenting). *See* notes 44 through 47 *infra* and accompanying text.

THE PROPRIETY OF JUDICIAL INQUIRY

The en banc court of appeals determined that Congress had explicitly stated its intent to deny relief to persons in Davis' position by failing to extend protection to noncompetitive congressional employees when Title VII was amended in 1972.[42] The Supreme Court, however, refused to view this congressional inaction as a clear statement foreclosing alternative remedies to noncompetive congressional workers.[43] Since this aspect of the *Davis* decision creates a potential for friction between the judicial and legislative branches of government, it warrants close examination.

In *Brown v. General Services Administration,*[44] the Supreme Court held that federal employees who are covered by the 1972 Amendment to Title VII are limited to that statute for vindication of the rights that it guarantees.[45] However, the *Davis* Court determined that the *Brown* rationale did not fit this case because Davis did not fall within the purview of the statute and therefore, unlike the plaintiff in *Brown,* had no remedy under Title VII.[46] The Court's reasoning is supported by the holding in *Hampton v. Mow Sung Wong.*[47] There, the Supreme Court sustained a constitutional challenge to a Civil Service Commission regulation which excluded aliens from employment, even though aliens are not protected by Title VII.[48] Thus, under the rationale of *Hampton,* Congress' failure

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42. 571 F.2d 793, 800 (5th Cir. 1978).

43. 99 S. Ct. 2264, 2278 (1979).

In his dissent, Chief Justice Burger disputes this position and concludes that Congress' failure to provide a remedy for Davis is significant:

> Congress could, of course, make *Bivens* type remedies available to its staff employees - and to other congressional employees - but it has not done so. On the contrary, Congress has historically treated its employees differently from the arrangements for other Government employees.

99 S. Ct. 2264, 2279 (1979). (Burger, C.J. dissenting.)

This position is echoed by Justice Powell in a separate dissenting opinion in which he concludes that deference should be paid to the fact that Congress "took pain to exempt itself from the coverage of Title VII." 99 S. Ct. 2264, 2281 (1979) (Powell, J. dissenting).

The opinions of Justice Powell and Chief Justice Burger also speak to the speech or debate clause issue and are discussed further at notes 76 through 78 *infra* and accompanying text.

44. 425 U.S. 820 (1976).

45. The en banc court of appeals noted that *Davis* was not within the coverage of the amendment to Title VII. It read this exclusion in conjunction with the holding in *Brown* and concluded that the failure to include *Davis* within the amendment to Title VII evidenced "the clearly discernible will of Congress." 571 F.2d 793, 800 (5th Cir. 1978).

46. 99 S. Ct. 2264, 2278, n.26 (1979).

47. 426 U.S. 88 (1976).

48. In *Hampton,* plaintiffs successfully challenged the regulation on the grounds that it violated the equal protection component of the fifth amendment due process clause. The Court concluded that the Civil Service Commission had not shown any overriding governmen-

to protect Davis with Title VII does not foreclose her right to a remedy.

The *Davis* decision is also supported by another line of reasoning. It has been held that Congress may not completely eliminate a constitutional right.[49] In addition, *Bivens* made it equally clear that Congress cannot accomplish indirectly through its silence, what it cannot do directly.[50] The duty of the Court in such a situation is to provide a means to right the constitutional wrong.[51] In this case, since Congress has failed to provide a remedy, it has effectively eliminated a constitutional right and the Court has the duty to correct this inadequacy.

Even if Congress' silence could correctly be interpreted as an explicit declaration of its intent to deny Davis a remedy, judicial review in this case does not unjustifiably invade the legislative sphere. It is axiomatic that the Supreme Court is the ultimate interpreter of the Constitution.[52] If the Court determines that a congressional scheme does not adequately safeguard constitutional rights, it is the duty of the Court to remedy the situation,[53] even if the result is conflicting interpretations of the Constitution by the branches of

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tal interest furthered by the regulation. Aliens are not within the coverage of Title VII. Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973).

49. Miranda v. Arizona, 384 U.S. 436, 491 (1966).

50. 403 U.S. at 397.

51. There has been considerable discussion among commentators concerning the origin of the Court's power to imply constitutional remedies.

See, e.g., Dellinger, *Of Rights and Remedies: The Constitution As A Sword*, 85 HARV. L. REV. 1532 (1972) [hereinafter cited as Dellinger]; Monaghan, *The Supreme Court 1974 Term - Forword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978).

Professor Dellinger asserts that the power is merely a byproduct of the language of article III and that an action predicated directly on a constitutional provision is "paradigmatically" a question arising under the Constitution. Dellinger, *supra* at 1541. Professor Monaghan contends that such power is derived from a constitutional common law. *But see* Schrock & Welsh, *supra*.

Jurisdiction to hear cases asserting constitutional claims is predicated on U.S. CONST. art. III, § 2, cl. 1, which provides in part that "(t)he judicial Power shall extend to all Cases . . . arising under this Constitution." *See also* 28 U.S.C. § 1331 (1976).

52. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 703 (1974), where the Court noted that "[m]any decisions of this Court . . . have unequivocally reaffirmed the holding of Marbury v. Madison . . . that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' " (citations omitted); Ames v. Kansas, 111 U.S. 449, 471 (1884); Ableman v. Booth, 2 How. 506, 518 (1859); Tennessee v. Davis, 100 U.S. 257, 264-66 (1880); Cohens v. Virginia, 6 Wheat. 264, 413, 416, (1821); Martin v. Hunter's Lessee, 1 Wheat. 304, 340-42, 347-51 (1816). *See generally* E. DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 337-38 (1964). *See* note 51 *supra* and accompanying text.

53. *See Bivens Actions*, *supra* note 21, at 753; Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1112-13 (1969). The Court would be choosing between the legislative intent not to include Davis and her fifth amendment right to be free of gender discrimination.

government.[54] Thus, the Court would have had the right to fashion relief for Davis, even if congressional silence had been properly construed to be part of a remedial scheme.

If, by implying a remedy, the Court infringes on legislative autonomy, the effect should be minimal since Congress is not precluded from substituting its own remedial scheme in place of the Court's.[55] Congress could enact legislation which specifies the remedies and enforcement procedures for noncompetitive congressional employees.[56] If such legislation meets the minimal standard of safeguarding constitutionally guaranteed rights, the Court would consider itself bound.[57]

THE SPEECH OR DEBATE CLAUSE

A potentially more troublesome separation of powers question is raised by Passman's assertion that his conduct was shielded by the speech or debate clause.[58] The immunity issue was briefed,[59] but the

54. In Powell v. McCormack, 395 U.S. 486 (1969), the Court concluded: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the Courts' avoiding their constitutional responsibility." *Id.* at 549. *See also* Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977).

55. Dellinger, *supra* note 51, at 1556; *See also Bivens Actions, supra* note 13.

56. *See* notes 89 through 96 *infra* and accompanying text.

57. It would be for the Court to determine, in exercise of its review powers, whether the minimal standard was met. *See generally* Dellinger, *supra* note 51, at 1548 n.89.

58. U.S. CONST. art. I, § 6, cl. 1 provides in part:

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

The speech or debate clause had its roots in England, where it proved necessary to insulate parliament from the fallout of its long and bitter feud with the Crown. Reinstein and Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1120-21 (1973). Members of Parliament were often harrassed and punished by the Tudor and Stuart monarchs for "seditious" and "licentious" speech. *Id.* at 1126. This persecution, a result of the Crown's disapproval of legislative infringement on its decision making, was carried out by a hostile judiciary. *Id.* at 1127-28. Thus, it was necessary to set up a buffer between the courts and parliament. It is from this background that the speech or debate clause emerged as a part of the Constitution, after only a minimal amount of discussion at the Constitutional Convention. Comment, *Separation of Power, Prevents Judicial Review of Senate Subcommittee's Issuance of Subpoena Duces Tecum*, 46 MISS. L.J. 1112, 1117 (1975). For a general discussion of the history of the speech or debate clause, *see*, Justice Frankfurter's opinion in Tenny v. Brandhove, 341 U.S. 367 (1951); Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175 (1973); Suarez, *Congressional Immunity: A Criticism of Existing Distinctions and a Proposal For a New Definitional Approach*, 20 VILLANOVA L. REV. 97 (1974); Reinstein and Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973).

59. *See* Petitioner's Brief at 50-62; Respondent's Brief at 21-34.

Supreme Court declined to consider it prior to the determination of the existence of Davis' cause of action.[60] Justice Brennan's majority opinion makes no attempt to reconcile this decision with earlier cases which hold that the speech or debate clause protects legislators even from the burden of having to mount a defense.[61] If these earlier decisions were followed, the Court might have held as a threshold matter that the immunity extended to Davis' dismissal and the case would have been disposed of without burdening Passman.[62] Apparently, though, Passman's claim will be dealt with on remand.

Background

The Supreme Court has broadly construed the speech or debate clause to effectuate its purposes.[63] United States Congressmen are insulated by the clause from judicial inquiry into their votes[64] and speeches[65] in Congress. In addition, immunity has been extended beyond "pure" speech or debate to actions taken in the course of legislative investigations[66] including the issuance of subpoenas.[67] The Court recently held, in *United States v. Helstoski*,[68] that references to past legislative acts are not admissable evidence in a bribery trial of a Congressman, even if the evidence is not offered to prove the legislative act itself.[69]

However, the Court has made it equally clear that the protection of the speech or debate clause is not all-encompassing.[70] It does not

60. 99 S. Ct. at 2272 n.11.

61. This is pointed out by Justice Stewart in his dissent. He cites Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975) and Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) for the proposition that the speech or debate clause, if applicable, shields legislators from the "burden of defending themselves." 99 S. Ct. 2264, 2280 (1979) (Stewart, J. dissenting).

62. The majority acknowledges that since the speech or debate clause shields legislators from mounting a defense, "[d]efenses based upon the Clause should thus ordinarily be given priority, ..." 99 S. Ct. 2264, 2272, n.11 (1979). However, without explanation the Court concludes that the burdens on the litigators will be decreased if the cause of action issue is resolved first. *Id.*

This position is difficult to understand because whether Davis has a cause of action or not will become irrelevant if the speech or debate clause is applicable.

63. Doe v. McMillan, 412 U.S. 306, 311 (1973); Gravel v. United States, 408 U.S. 606, 624 (1972); United States v. Johnson, 383 U.S. 169, 180 (1966).

64. Doe v. McMillan, 412 U.S. 306 (1973); Kilbourn v. Thompson, 103 U.S. 168 (1881).

65. United States v. Johnson, 383 U.S. 169 (1966).

66. Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); Dombrowski v. Eastland, 387 U.S. 82 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951).

67. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

68. 99 S. Ct. 2432 (1979).

69. *Id.*

70. Gravel v. United States, 408 U.S. 606, 624-25 (1972).

shield Congressmen who have disseminated committee materials to the public.[71] Nor does it immunize the conduct of Senators who have exchanged votes for bribes.[72]

Passman's Claim

Passman contends that congressional employment decisions are exempt from judicial inquiry by virtue of the speech or debate clause.[73] He claims that the work of the congressional staff is an integral part of the legislative function[74] and that judicial intervention into congressional employment practices would result in the judiciary dictating to legislators about the inner workings of their offices.[75]

In his dissenting opinion in *Davis,* Chief Justice Burger agreed with Passman, but framed the issue as one of separation of powers rather than speech or debate.[76] Accepting the premise that members of Congress need complete loyalty from their employees,[77] the Chief Justice stated that this need for loyalty justified employment decisions based on racial, ethnic, religious or gender considerations.[78]

Resolution on Remand

On remand, *Elrod v. Burns*[79] should be persuasive precedent on the validity of Passman's speech or debate clause defense. There, the Court rejected the contention that the need for political loyalty justified patronage dismissals.[80] The *Elrod* Court noted earlier decisions which prohibited the government from denying employment

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71. *Id.;* Doe v. McMillan, 412 U.S. 306 (1973).

Last Term, in Hutchinson v. Proxmire, 99 S. Ct. 2675 (1979), the Court reiterated that the speech or debate clause does not insulate Congressmen from liability arising from the republication of statements. Senator Proxmire distribued a press release naming the plaintiff's research project as the recipient of his "Golden Fleece of the Month Award" for wasteful government spending.

72. U.S. v. Brewster, 408 U.S. 501 (1972). *But see* U.S. v. Helstoski, 99 S. Ct. 2432, 2444 (Stevens, J., dissenting) (decision will hamper legislative bribery convictions).

In his article, *The Gravel and Brewster Cases: An Assault on Congressional Independence,* 59 VA. L. REV. 175 (1973), Senator Ervin expressed concern that the *Gravel* and *Brewster* decisions would lead to the "intimidation of the Congress by the other two branches of government."

73. Respondent's Brief at 23-24.

74. *Id.*

75. *Id.* at 22.

76. 99 S. Ct. at 2279. (Burger C.J., dissenting) *See also* note 43 *supra* and accompanying text.

77. 99 S. Ct. at 2279.

78. *Id.*

79. 427 U.S. 347 (1976).

80. *Id.*

because of a previous political affiliation[81] or because the employees failed to continue support of the favored political party.[82] The only exception established by *Elrod* is that policymaking employees can be dismissed for political reasons.[83]

In addition, although the Supreme Court has recognized the important function that lower level congressional aides play in the legislative process,[84] dismissal of such an aide should not be considered official legislative conduct which falls within the protection of the speech or debate clause.[85] The purpose of the clause is to preserve legislative independence,[86] and as the Fifth Circuit panel in *Davis* noted, "(t)he fear of judicial inquiry into dismissal decisions cannot possibly affect a legislator's decisions on matters pending before Congress."[87] Thus, requiring Congress to adhere to constitutional standards in employment decisions does not diminish the independence which the speech or debate clause seeks to ensure. This is especially true in light of the fact that Congressmen are required by oath to "defend the Constitution."[88]

The Impact of Davis

Although the *Davis* decision expands the use of *Bivens* actions from fourth amendment claims to equal protection violations, it should not flood the federal courts with inappropriate cases.[89] The Court in *Davis,* like the *Bivens* Court, made it clear that the injury alleged must be of constitutional dimensions.[90] Coupled with the requirement that no alternative remedy be available,[91] this consid-

81. *Id.* at 357-358, *citing* Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952); United Public Workers v. Mitchell, 330 U.S. 75 (1947).

82. 427 U.S. at 359, *citing* Perry v. Sindermann, 408 U.S. 593 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

83. 427 U.S. at 367-68. The responsibility of such employees must extend beyond "limited and well-defined objectives" in order to justify their dismissal for political reasons. *Id.* at 368.

84. Gravel v. United States, 408 U.S. 606, 617 (1972); United States v. Brewster, 408 U.S. 501, 515-16 (1972).

85. "That [Congressmen] generally perform certain acts in their official capacity as [Congressmen] does not necessarily make all such acts legislative in nature." 408 U.S. at 625.

86. In Tenney v. Brandhove, 341 U.S. 367, 372-73 (1951), Justice Frankfurter quoted James Wilson's summary of the clause's purpose: "In order to enable and encourage a representative of the public to discharge the public trust with firmness and success, it is indispensibly necessary, that he should enjoy the fullest liberty of speech, and that he should be protected . . . ."

87. 544 F.2d at 880.

88. 5 U.S.C. § 3331 (1971).

89. 99 S. Ct. at 2278.

90. *Id.*

91. *Id.*

eration will limit the number of situations in which plaintiffs can obtain relief in damages for torts involving federal officials. The extension of *Bivens* remedies will act as a "functional equivalent of a federal section 1983, with the important qualification that the *Bivens* action be available only in the absence of adequate alternative remedies."[92]

The *Davis* Court recognized that the speech or debate clause is "a paradigm example of a 'textually demonstrable constitutional commitment of [an] issue to a coordinate political department.' "[93] The Court could thus have denied Davis a cause of action because of a potential conflict between the judicial and legislative branches of government. The Court's refusal to invoke this justification is important because it reaffirms the aggressive role to be played by the Court as protector of individual rights.[94]

However, the *Davis* decision weakens the role that the speech or debate clause will play in the future. By refusing to decide this issue first, the Court has *sub silentio* overruled earlier decisions which insulated legislators from defending a lawsuit if the conduct complained of was shielded by the speech or debate clause.[95] Without that protection, Congressmen may be forced to take time from their legislative duties to defend themselves against unmeritorious suits.[96] Because of the backlog currently facing the federal courts, there could be considerable delay before a court could dispose of a claim that was not colorable.

However, the *Davis* opinion should not significantly erode the general powers of the legislative branch. While the decision does restrict Congress' control over its own workers, it does not diminish Congress' function as the maker of laws. By leaving room for Congress to substitute appropriate remedies, the *Davis* decision leaves the legislative function intact.

Presumably, the remedy available would have to be sufficient to safeguard Davis' rights. If, for instance, Congress would limit relief only to reinstatement, problems would arise where the defendant was no longer a member of Congress. In that situation, the courts should still be free to imply a damages remedy because the available remedy would be clearly inadequate.

92. *Bivens Actions, supra* note 13, at 756.

93. 99 S. Ct. at 2272, n.11, *citing* Baker v. Carr, 369 U.S. 186, 217 (1962).

94. *See* Marbury v. Madison, 1 Cranch 137 (1803).

95. *See* note 6 *supra* and accompanying text.

96. While it would take a considerable amount of litigation to have a noticeable effect on the judicial system, an individual could be heavily burdened by as little as one or two such suits. If the speech or debate clause is not examined as a threshold matter, a legislator might find himself spending his valuable time mounting defenses to frivilous suits filed merely to harass him.

See notes 89 through 92 *infra* and accompanying text for a discussion as to whether *Davis* will flood the courts with litigation.

CONCLUSION

The doctrine of separation of powers is a cornerstone of the Constitution. The doctrine reflects the Framers' fear of vesting absolute power in any single person or department. Thus, a decision such as *Davis* which has the potential of upsetting this delicate balance of power must be carefully scrutinized. Yet the right of Shirley Davis to a means by which to redress unconstitutional gender discrimination is also undeniably important. Individual constitutional guarantees are worth little unless adequate remedies for violation are assured.

Thus, the Court in *Davis v. Passman* was faced with a delicate balancing of interests. The Court correctly determined that in this case the interest of protecting individual liberty outweighs the minimal amount of disservice that may have been done to legislative independence. The *Davis* decision illustrates that in certain situations the judiciary must exercise its judgment in evaluating the behavior of Congress. The Court wisely concluded that Congress' failure to establish a remedial scheme for Davis does not automatically preclude her from asserting her constitutional rights.

On remand the court must realize that the speech or debate clause was enacted to preserve legislative independence. It was not enacted to allow the legislative branch to flaunt the meaning of the Constitution for its own purposes. The *Davis* decision suggests that the Supreme Court accepts this view. Perhaps the case signals a renewed vigor by the Burger Court in protecting individual liberties.

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