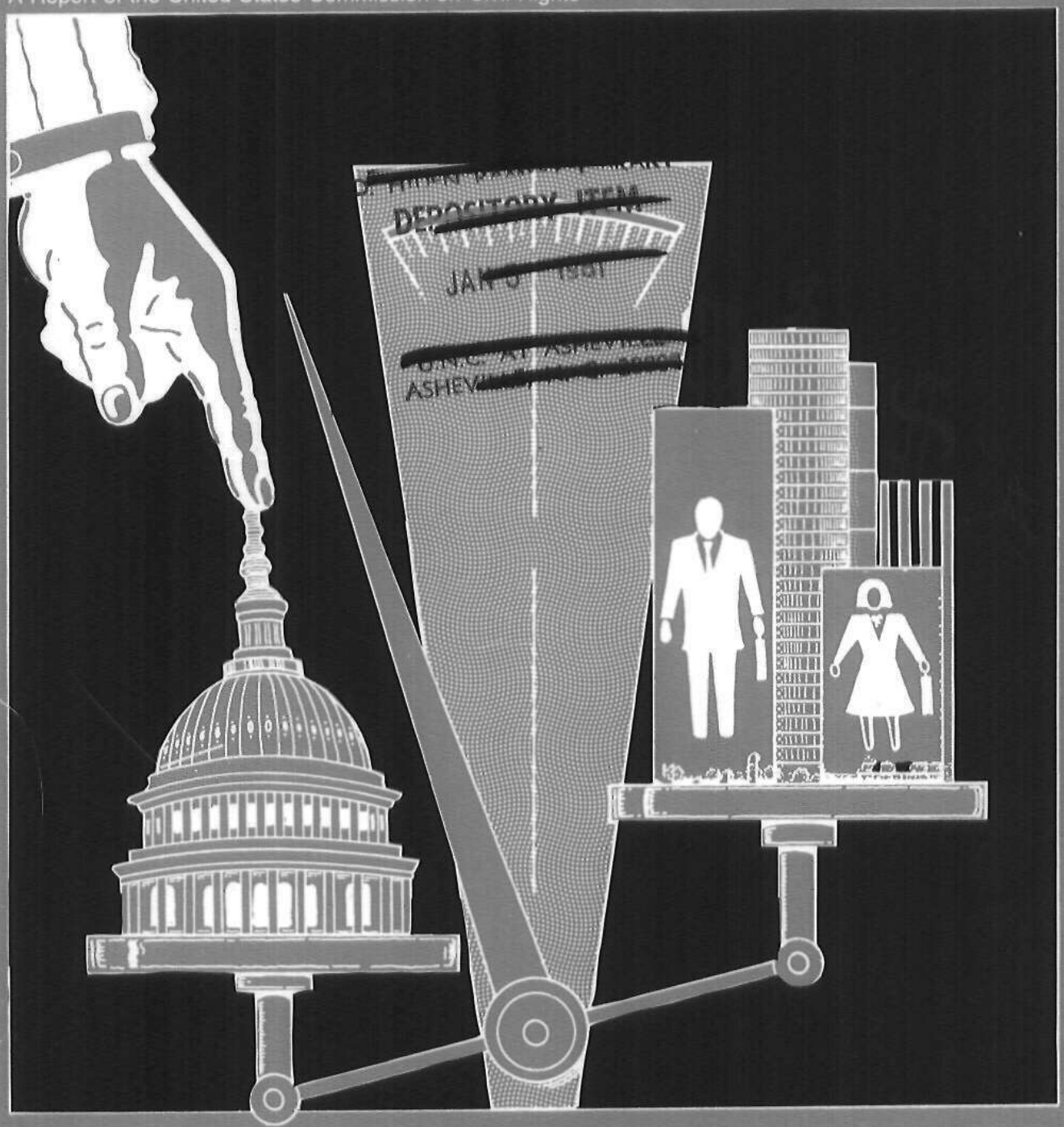
Extending Equal Employment Opportunity Law to Congress

A Report of the United States Commission on Civil Rights

June 1980



U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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June 1980

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LETTER OF TRANSMITTAL

U.S. Commission on Civil Rights
Washington, D.C.
June 1980

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The U.S. Commission on Civil Rights presents to you this report pursuant to Public Law 85-315, as amended.

This legal study analyzes the constitutional issues that are raised by extending equal employment opportunity laws to legislative branch employees. It results from a request from Congress to which the Commission agreed in September 1979.

We have concluded in this report that the Constitution does not preclude Congress from enacting an equal employment opportunity law covering legislative branch employees based on Title VII of the Civil Rights Act of 1964.

We urge your consideration of the analysis presented and ask for your timely action in ensuring implementation of the recommendations made.

Respectfully,
FOR THE COMMISSIONERS

ARTHUR S. FLEMMING

ACKNOWLEDGMENTS

This report was produced under the general supervision of Jack P. Hartog, Assistant General Counsel, and was written by the following attorneys in the Office of the General Counsel: Christopher G. Bell, Phyllis K. Fong, Anne H. Meadows, and Stephen P. O'Rourke. Additional research was performed by Mark Darrell, Gregory Ford, Marc Kranson, and Manuel Romero. The following staff members provided support in preparing the report: Lorraine W. Jackson, Brenda Blount, Stephanie Campbell, Ana Dew, Treola J. Grooms, Mary Grose, Connie Lee, DeBorah Marks, and Gwen Morris. The Commission wishes to thank Professor Robert Cover for his critical review of a draft of this report.

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Introduction

In the fall of 1979, Congress asked the U.S. Commission on Civil Rights to conduct a study analyzing the legal issues that could arise from eliminating the present exemption of Congress from Federal equal employment opportunity laws.[1] In response to this request, this report examines whether Congress may constitutionally choose to bring itself within the scope of Title VII of the Civil Rights Act of 1964.[2] Title VII sets forth this Nation's basic law banning discrimination in employment on the basis of race, color, religion, sex, and national origin.

When enacted, Title VII was limited to the private sector, covering most private employers, labor organizations, and employment agencies.[3] In 1972 Congress extended Title VII to include nearly all State and local government employers[4] and the Federal executive branch.[5] Legislative and judicial branch employees, however, are generally not covered by Title VII unless they are in the competitive service.[6] There are, in addition, several limited categories of employers and employees who are specifically exempted.[7]

Title VII establishes various methods of administrative enforcement of its substantive provisions, principally by the Equal Employment Opportunity Commission,[8] and provides for judicial review and enforcement of all aspects of compliance with Title VII law.[9] Because the executive and judicial branches enforce Title VII, significant constitutional separation of powers issues are raised by measures that would subject congressional employment practices to Title VII procedures. This concern over executive or judicial interference with congressional employment relations is particularly acute with respect to those principal congressional staff members who provide direct and personal assistance in the formulation of legislative policy to Members or to committees. This report, therefore, will concentrate on the issue of whether constitutional provisions designed to protect the legislative branch from undue intrusion into its legitimate legislative activi-

[1] This request came during the course of the Commission's authorization process for the fiscal year of 1980. An amendment was first offered by Senator Patrick Leahy to the Senate authorization bill for the Commission, S.721, providing that:

> No later than April 1, 1980 the Commission shall study and report to the Congress and the President the legal questions involved in eliminating the legislative branch's exemption from the Civil Rights Act and the Commission shall further in its report recommend the various means to resolve each question.

The Chairman of the Commission subsequently agreed that the Commission would conduct such a study, and this commitment was confirmed in a letter dated Sept. 25, 1979, to the Chairman from Senator Birch Bayh and Representative Donald Edwards. Due to this agreement, Senator Leahy's amendment was dropped and is not part of the Commission's authorization act. Civil Rights Commission Authorization Act of 1979, Pub. L. No. 96-81, 96th Cong., 1st Sess. (1979).

[2] 42 U.S.C. §§2000e-2000e-17 (1976).

[3] 42 U.S.C. §2000e(a), (b), (c), and (d) (1976).

[4] 42 U.S.C. §2000e(a), (b), and (h) (1976).

[5] 42 U.S.C. §2000e-16 (1976). The coverage of White House employees is discussed in the text accompanying notes 6 and 7 in chapter 3.

[6] 42 U.S.C. §2000e-16(a) (1976). The precise scope of this section is unclear; some employees within some congressional service agencies may be covered by Title VII. See discussion in chapter 1, note 20, and chapter 3, note 5.

[7] The following are specifically exempted from the coverage of Title VII: Indian tribes (42 U.S.C. §2000e(b)); bona fide tax-exempt, private membership clubs *(id.)*; employers with less than 15 employees *(id.)*; State or local elected officials, their personal staffs, policy level appointees, and immediate legal advisers (42 U.S.C. §2000e(f)); employers of aliens whose employment is outside the United States and specified American territories and protectorates (42 U.S.C. §2000e-1); religious organizations who employ individuals to perform work connected with the carrying out of their activities *(id.)*.

[8] *See* 42 U.S.C. §2000e-5. The Department of Justice, for example, is empowered to sue State and local governmental agencies and private employers who resist the full enjoyment of Title VII rights. 42 U.S.C. §2000e-5(f), 2000e-6.

[9] *See* 42 U.S.C. §2000e-5(f), (g), §2000e-6(b).

ties by the executive or judicial branches of government prohibit external enforcement of antidiscrimination requirements with respect to congressional employees.

To provide the factual setting for this discussion, chapter 1 distinguishes the various employing units within Congress, explains existing congressional rules prohibiting employment discrimination, and discusses the Supreme Court's recent decision in *Davis v. Passman,* [10] which gives congressional employees the right to sue for damages for unconstitutional employment discrimination.

Chapter 2 then addresses the constitutional separation of powers issues that should be considered if equal employment opportunity laws are extended to Congress. The chapter first discusses the speech or debate clause protections that shield individual Members of Congress and then discusses the broader issues of coordinate branch integrity that are embodied in the separation of powers doctrine. Chapter 3 examines the particular factual and constitutional considerations with respect to extending equal employment protections to those congressional employees who are most directly involved in the formulation of legislative policy. Chapter 4 then discusses the additional constitutional requirements that must be met if judicial and administrative enforcement of legislative branch equal employment rights is to be provided. Finally, the report sets out its conclusions and recommends an approach that resolves the constitutional issues in this area.

[10] 442 U.S. 228 (1979).

1. Present Congressional Employment Practices

The legislative branch employs approximately 40,000 people. Many work in Members' offices and for congressional committees, but the majority work in service and legislative support units as diverse as the Architect of the Capitol, the Library of Congress, the Government Printing Office, or the Sergeants at Arms of either chamber, which provide services to the Senate and House of Representatives.[1] There are no uniform personnel policies and practices governing their employment. Instead according to a congressional study, the personnel system is "highly fragmented" and "has developed in an ad hoc and unplanned manner." Where personnel policies exist, they are determined by the individual employing units.[2] Attempting to determine with any precision the numbers of persons in different positions is difficult. Staff totals for the Senate, the House, and the miscellaneous offices of Capitol Hill vary according to definition and accounting methods.[3]

Assessments of congressional employment patterns by race and sex in the legislative branch strongly suggest that employment discrimination is a serious problem on Capitol Hill. On the basis of two work force surveys, the House Obey Commission[4] presented data documenting significant underrepresentation and underutilization of women and blacks as employees of the House of Representatives in general and on Member and committee staffs in particular. The higher paying, more responsible or professional positions were held by white males.[5] Even when educational level or job title[6] was the same, a consistent pattern of significant disparities in salary appeared by race and sex.[7] The conclusion that women and blacks are underrepresented and underutilized in legislative branch employment is also supported by numerous private surveys that

[1] C. Brownsen, *Congressional Staff Directory,* Preface (21st ed. 1979) (hereafter cited as *Congressional Staff Directory).*

[2] House Commission on Administrative Review, Administrative Reorganization and Legislative Management, H.R. Doc. No. 95-232, 95th Cong., 1st Sess. 81 (1977) (hereafter cited as Obey Commission Report).

[3] *Congressional Staff Directory, supra* note 1, states that:

> For February 1979, the Secretary of the Senate listed 6,308 Senate employees: 1,276 committee employees and 5,032 others.
> For the same period, the Clerk of the House reported there were 1,994 committee employees, 6,847 employees of the Members in their Washington or District offices (clerk hire), and 1,910 other employees for a total of 10,751.
> For the month of November, 1978, the U.S. Civil Service Commission supplies the following figures:
> U.S. Senate—6,540
> U.S. House of Representatives—11,384
> Commission on Security and Cooperation—13
> U.S. Congress (total)—17,937
>
> Architect of the Capitol—2,239
> Botanic Garden—57
> Congressional Budget Office—203
> Copyright Royalty Tribunal—10
> Cost Accounting Standards Board—32
> General Accounting Office—5,382
> Government Printing Office—7,375
> Library of Congress—5,180
> Office of Technology Assessment—150
> U.S. Tax Clerk—197

Representative Morris Udall, in remarks to the House, stated that there are presently over 14,000 employees of Congress, a figure that does not include employees of such support agencies as the General Accounting Office, which, Representative Udall stated, has 5,275 employees, the Library of Congress with 4,200 employees, and the Congressional Research Service with 860 employees. 126 Cong. Rec. E2526 (daily ed. May 21, 1980) (remarks of Rep. Udall).

[4] *See* note 2, *supra.* See also Senate Comm. on Governmental Affairs, Lee Metcalf Fair Employment Relations Resolution, S. Rep. No. 95-729, 95th Cong., 2d Sess. 15 (1978) (hereafter cited as Fair Employment Relations).

[5] *Id.* at 94-95, 104.

[6] *Id.* at 89.

[7] *Id.* at 96-97, 106.

have been conducted and reported in the past several years.[8]

Congressional Employers

Members of Congress are authorized, within certain limitations, to hire personal staff employees and to set salaries and conditions of employment as they see fit.[9] Recruitment is informal in both House and Senate, especially for professional staff, and is based largely on a "grapevine" system of insiders.[10] Few offices have salary structures tied to job descriptions, and leave policies and work schedules vary from office to office.[11] Members may fire employees at any time, with or without cause.[12]

As in Members' offices, personnel practices in congressional committees vary. House and Senate rules provide that professional and clerical committee staff be appointed by majority vote of the committee, with provisions to ensure staff for committee Members of the minority party and for subcommittee chairmen and ranking minority Members. Maximum levels for salaries are established, and committee chairmen have the authority to set all staff salaries, although in practice the employing Member determines the salaries of his or her staff.[13] Most committees have no formal job descriptions or salary structures, and conditions of employment change from committee to committee. Recruitment, while sometimes more formal than in Members' offices because of the need for subject-matter experts, is generally inhouse and ad hoc. Evaluations are usually informal and are controlled by the senior committee Members.[14] The employment of committee staff may be terminated at the discretion of committee and subcommittee chairmen and ranking minority Members, subject to majority vote of committee Members, or in the case of minority staff, of minority committee Members.[15]

There are two types of units that provide support services to Congress. The first is made up of the offices of congressional officers,[16] such as the Clerk of the House and the Secretary of the Senate; and the second type includes statutorily created congressional agencies, such as the Congressional Budget Office and the General Accounting Office.[17] Congressional officers are elected by majority vote in the House and in the Senate.[18] The chief administrators of the agencies are appointed in a variety of ways. Some are appointed by the President, either with or without the advice and consent of the Senate. Others are appointed by oversight committees of Congress or by the Speaker of the House and the President *pro tempore* of the Senate.[19]

Compared to Member and committee staffs, service and legislative units tend to be more bureaucratic and hierarchical. Operated independently from one another, these numerous units vary in size and complexity. In the House alone, for example, there are more than 40 service and legislative support units.[20] To further complicate matters, those who have nominal jurisdiction over a unit or set of units

[8] For example, a survey conducted by the *National Journal* "shows that the professional staffs of Congressional committees are dominated by white males, with only 27 percent women and 5 percent members of minority groups." Daniel Rapoport, "'The Imperial Congress' Living Above the Law," *National Journal,* vol. 22 (June 2, 1979), p. 913. Similar statistics indicating racial discrimination were published in a 1977 Cox newspaper article. Of the 340 employees earning more than $30,000 a year on 22 standing House committees, only 15 were black, and 10 of those committees employed no black professionals. Alexander, "Discrimination in Hiring and Pay Starts at the Top. . .on Capitol Hill," *reprinted in* Handling of Discrimination Complaints in the Senate: Hearings Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. (1977). The Ad Hoc Committee of Black Senate Legislative Staff estimated that of the approximately 1,100 professional staff employed by Senators and Senate committees, less than 30 were black. *Id.* at 34 (testimony of Alan G. Boyd and Loftus C. Carson III). In its 1974 study, *Sexists in the Senate? A Study of Differences in Salary by Sex,* the Capitol Hill Women's Political Caucus found that the median salary for women was $10,026 and for men $17,650. At salary levels above $18,000 a year, the median salary for women was $22,687, while for men it was $28,091. An update of this survey in 1977 indicated that there was little if any improvement in the differentials. *Id.* at 44–71.

[9] Obey Commission Report, *supra* note 2, at 82.

[10] *Id.* at 90–91; Fair Employment Relations, *supra* note 4.

[11] Obey Commission Report, *supra* note 2, at 82, 95.

[12] 2 U.S.C. §92 (1976); Obey Commission Report, *supra* note 2, at 97; Fair Employment Relations, *supra* note 4, at 20.

[13] Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 95–403, 96th Cong., 1st Sess. §735 (1979) (hereafter cited as Rules of the House); Senate Comm. on Rules and Administration, Standing Rules for Conducting Business in the United States Senate, 96th Cong., 1st Sess., Rule XXXI (Comm. Print 1979) (hereafter cited as Senate Rules). Senate Rule XXXI(c) allows minority Members to determine compensation for minority staff.

[14] Obey Commission Report, *supra* note 2, at 102–09.

[15] Rules of the House, *supra* note 8; Senate Rules, *supra* note 8.

[16] House rules provide for the following officers: Clerk, Sergeant-at-Arms, Doorkeeper, Postmaster, and Chaplain. Rules of the House, *supra* note 8, at §635. Senate rules do not list officers, but comparable offices exist. *See, e.g.,* 2 U.S.C. §24, 51, 60–1 (1976).

[17] *See, e.g.,* 2 U.S.C. §601(a)(1) (1976) (establishing the Congressional Budget Office); 31 U.S.C. §41 (1976) (establishing the General Accounting Office).

[18] Rules of the House, *supra* note 8, §636.

[19] *See, e.g.,* 44 U.S.C. §301 (1976), which provides that the President shall appoint the Public Printer, with the advice and consent of the Senate, to administer the Government Printing Office; 40 U.S.C. §162 (1976), which provides for the appointment by the President, without a requirement that it be made with the advice and consent of the Senate, of the Architect of the Capitol; 40 U.S.C. §216 (1976), which provides for a Superintendent of the Botanic Garden to be under the direction of the Joint Committee on the Library; and 2 U.S.C. §601(a)(2) (1976), which provides that the Director of the Congressional Budget Office be appointed by the Speaker of the House and the President *pro tempore* of the Senate, after considering the recommendations of the House and Senate Budget Committees.

[20] Obey Commission Report, *supra* note 2, at 84.

do not necessarily have complete control over its operation.[21] Nonetheless, personnel policies tend to be relatively formal within many of the units.

Each officer of Congress has authority to determine job qualifications, supervise, remove, or otherwise discipline his or her staff.[22] The authorizing statutes for other service units usually set out their personnel policies. Recruitment and hiring policies vary according to the function of the service unit. Some positions are filled through the patronage system, while for others there are formal recruiting procedures based on established job qualifications.[23]

Congressional Equal Employment Opportunity Rules

Title VII of the Civil Rights Act of 1964 protects employees in the legislative and judicial branches who are in the "competitive service,"[24] or who work in the Library of Congress[25] or the General Accounting Office,[26] as well as employees in the executive branch, from discrimination based on race, color, religion, sex, or national origin. Although Title VII thus applies to approximately half of the employees of legislative branch service and support units because they are specifically covered by statute or have positions in the competitive service, Title VII does not cover employees of congressional committees or Members' staffs.[27]

Both the House and Senate have enacted rules of conduct that prohibit discriminatory employment practices, but these rules do not have the force of law.[28] Rule XLIII, Clause 9, of the House Code of Official Conduct bars Members, officers, and employees from discriminating on the basis of race, color, sex, or national origin against staff or job applicants.[29] The House Commission on Administrative Review, commonly known as the Obey Commission, found in 1977 that no Member had ever been charged with violation of the rule. The Commission's report speculated that this reflected a lack of discrimination in the majority of House offices, but noted that it would be "very difficult for any non-Member—in this case an employee alleging that his or her rights under this rule have been violated by a Member—to bring a case" before the appropriate committee for review.[30] The rule may be invoked only by a Member or by an individual who first has submitted his or her complaint to at least three House Members who have refused in writing to transmit the complaint to the House Committee on Standards of Official Conduct. The Committee, after notice and a hearing on the complaint, may recommend, by majority vote, referral to the full House for appropriate action.[31]

Rule L of the Senate's Code of Official Conduct prohibits discriminatory employment practices by Senators, officers, or employees based on race, color, religion, sex, national origin, age, or state of physical handicap.[32] The rule was adopted overwhelmingly as part of an ethics resolution and went

[21] House Commission on Administrative Review, Final Report, H.R. Doc. No. 95-272, 95th Cong., 1st Sess. 104 (1977).

[22] 2 U.S.C. §60-1 (1976); Rules of the House, *supra* note 8, §636.

[23] Obey Commission Report, *supra* note 2, at 110.

[24] 42 U.S.C. §2000e-16 (1976). The "competitive service" includes most civil service positions in the executive branch and those civil service positions not in the executive branch that are specifically included by statute, as well as statutorily included positions in the District of Columbia government. 5 U.S.C. §2102 (1976). The question of whether a particular congressional support unit is covered by Title VII requires determining whether its positions are in the competitive service.

Employees of the Commission on Security and Cooperation (with a few exceptions), Botanic Garden, Congressional Budget Office, Copyright Royalty Tribunal, and Office of Technology Assessment, and approximately half of the employees of the U.S. Tax Court, are not in the competitive service and not covered by Title VII. *See* Memorandum, "Legislative Branch Employees in the Competitive Service" (June 20, 1980), Office of the General Counsel, U.S. Commission on Civil Rights (on file at the Office of the General Counsel) (hereafter cited as Staff Memorandum).

Whether some or all Government Printing Office employees are in the competitive service and therefore covered by Title VII is unclear. Although the recent decision in Thompson v. Boyle, 21 FEP Cases 57 (D.D.C. 1980), applied Title VII law to some GPO employees, GPO stipulated for the purposes of that case alone that it did not dispute that it has positions in the competitive service. See Staff Memorandum, *supra*. The question has not yet been resolved, as provisions in the Kiess Act, 44 U.S.C. §305 (1976), indicate that GPO employees may not be in the competitive service.

[25] Congress exempted the Library of Congress from Civil Service Commission enforcement of the antidiscrimination provision and vested that authority in the Librarian of Congress (42 U.S.C. §2000e-16 (b) (1976)), apparently because questions were raised concerning the propriety of delegating to the executive branch oversight of an arm of Congress. See 118 Cong. Rec. 4921 (1972).

[26] Confusion has surrounded Title VII's applicability to the General Accounting Office, but the issue has been resolved by enactment of the General Accounting Office Personnel Act of 1980, Pub. L. No. 96-191, 94 Stat. 27 (to be codified in scattered sections of 5, 31 U.S.C.). See chapter 4 for a discussion of the act's provisions.

[27] *See* Staff Memorandum, *supra* note 24.

[28] To have such force, congressional enactments must be sent to and approved by the President; violators of congressional rules, however, may be reprimanded, disciplined, or expelled from Congress. *See* discussion of congressional rules in chapter 4, *infra;* Comment, *The Last Plantation: Will Employment Reform Come to Capitol Hill?* 28 Cath. U. L. Rev. 271, 284 n.78 (1979) (hereafter cited as "The Last Plantation").

[29] Clause 9 of Rule XLIII. Rules of the House, *supra* note 13, §939 provides as follows:

> 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).

[30] Obey Commission Report, *supra* note 2, at 99.

[31] Congressional Research Service, Library of Congress, *Equal Employment Opportunity and the United States Congress* 11 (1978) (hereafter cited as *Equal Employment Opportunity and Congress).*

[32] Senate Rules, *supra* note 13, Rule L (50) provides as follows:

into effect on January 3, 1979. The Senate Committee on Governmental Affairs found, nonetheless, that the rule would not be "an effective deterrent to employment discrimination" unless procedures to resolve complaints were set up.[33] To date, no such procedures have been established.

The Senate also has a Standing Order providing for the appointment of Senate pages, elevator operators, Post Office employees, and Capitol policemen without discrimination on the basis of sex. An exception is made in the case of pages, however. Until a planned dormitory is constructed to house them, women cannot be pages unless their sponsoring Senators pledge in writing to be responsible for their transportation to and from the Senate and to guarantee their "safety, well-being, and strict supervision" while they are in their local residences.[34]

Other House and Senate rules specify that professional committee staff shall be hired "solely on the basis of fitness to perform the duties of their respective positions,"[35] and a number of committees have undertaken affirmative action in their recruitment.[36]

Enforcement, however, remains the chief obstacle to overcoming such discrimination as may exist on Capitol Hill. Grievance procedures are largely informal and usually handled internally within a given committee or administrative unit.

In the House, interested Members have informally banded together to form a Fair Employment Practices Committee, which exists outside the formal rules of the House and is available to those who wish to make use of its processes. A panel of three Members and three staff persons hears grievances and counsels employees or applicants who claim they have been discriminated against on the basis of race, color, religion, sex, national origin, age, parental or marital status, or handicap. The effectiveness of the Committee is limited because it can only hear grievances against Members who have signed a nondiscrimination pledge and agreed to participate. Furthermore, Members may reject the Committee's disposition of complaints against them.[37]

Several other attempts have been made to create enforcement mechanisms that would provide a means to eliminate employment discrimination in Congress. For example, the Obey Commission recommended redesigning the rarely used Congressional Placement Office, requiring it to establish affirmative action plans and to set up grievance procedures. The Commission also recommended the creation of a fair employment practices panel,[38] but its recommendations were not adopted.[39] Resolutions were introduced to implement Rule XLIII and Rule L in the House and Senate, respectively, but neither was enacted.[40] Finally, a bill currently pending in the Senate would eliminate the exemption of Congress from six Federal labor and privacy statutes, including Title VII of the Civil Rights Act of 1964.[41]

Davis v. Passman[42]

Lacking effective antidiscrimination provisions by congressional rule or statute, congressional employees complaining of employment discrimination have turned to the courts. From February to July 1974, Shirley Davis was a deputy administrative assistant to then Congressman Otto E. Passman of Louisiana. She was terminated by the Representative because "it was essential that the understudy to my administrative assistant be a man."[43] Davis filed suit, *Davis v. Passman,* alleging that her termination on the basis of her sex was a violation of the equal protection component of the due process clause of the fifth amendment.

> No Member, officer, or employee of the Senate shall, with respect to employment by the [Senate] or any office thereof—
> (a) fail or refuse to hire an individual;
> (b) discharge an individual; or
> (c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment
> on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.

[33] Fair Employment Relations, *supra* note 4, at 5.

[34] Senate Manual, S. Doc. No. 95-1, 95th Cong., 1st Sess. §79.7 (1977).

[35] Rules of the House, *supra* note 13, §733(d); Senate Rules, *supra* note 13, Rule XXXI, cl. 1 (a).

[36] Obey Commission Report, *supra* note 2, at 104.

[37] *Equal Employment Opportunity and Congress, supra* note 31, at 12-13. *See also,* Handling of Discrimination Complaints in the Senate: Hearing Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess., 29-31 (1977) (statement of Rep. Charles Rose).

[38] Obey Commission Report, *supra* note 2, at 114-19.

[39] See "The Last Plantation," *supra* note 28, at 284 n. 77.

[40] H.R. Res. 292, 96th Cong., 1st Sess., 125 Cong. Rec. H3906 (daily ed. May 30, 1979); S. Res. 431, 95th Cong., 2d Sess., 124 Cong. Rec. §S5018 (daily ed. Apr. 7, 1978).

[41] S. 1112, 96th Cong., 1st Sess., 125 Cong. Rec., S5658-64 (daily ed. May 10, 1979). S. 1112 would amend the Civil Rights Act of 1964, §717, 42 U.S.C. §2000e-16 (1976); National Labor Relations Act, §§2(2), 7, 29 U.S.C. §§152(2), 157 (1976); Fair Labor Standards Act, §3(e)(2)(A)(iii), 29 U.S.C. §203(e)(2)(A)(iii) (1976); Occupational Safety and Health Act of 1970, §§3(5), 3(6), 29 U.S.C. §§652(5), 652(6) (1976); 5 U.S.C. §552(c) (1976); Social Security Act, §210(a)(6), 42 U.S.C. §410(a)(6) (1976); I.R.C. §3121(b)(6).

[42] 442 U.S. 228 (1979).

[43] *Id.* at 230-231 n.3 (quoting letter from Otto Passman to Shirley Davis).

After extensive lower court litigation[44] the Supreme Court, in a narrow five-to-four decision[45] that left many important questions unanswered, ruled that a cause of action for damages might be pursued against a Member of Congress directly based on the due process clause of the fifth amendment of the Constitution by a congressional employee alleging unconstitutional employment discrimination.[46]

The Court first held that the due process clause of the fifth amendment confers "a Federal constitutional right to be free from gender discrimination" so long as such discrimination is not "substantially related" to the achievement of "important governmental objectives."[47] The Court then held that inasmuch as determining if a constitutional violation occurred falls within "the traditional role of the courts to interpret the law,"[48] "litigants who allege that their own constitutional rights have been violated and at the same time have no effective means other than the judiciary to enforce those rights" are appropriate parties to invoke the jurisdiction of the judiciary.[49] Relying on the earlier case of *Bivens v. Six Unknown Federal Narcotics Agents,* [50] which permitted a cause of action for damages directly under the fourth amendment, the Court established a *Bivens-* type right to sue for aggrieved legislative branch employees.

Congressman Passman had argued that the case was nonjusticiable because the respect due the legislative branch by the judiciary under the doctrine of separation of powers prohibited the courts from hearing the case.[51] The Supreme Court disagreed. It ruled that the requirements of the speech or debate clause of Article I, §6, fully expressed the limits of such separation of powers concerns.[52] To the extent that such speech or debate immunity exists, legislators would have absolute immunity from such lawsuits.[53] The Court, however, then refrained from considering the application of the speech or debate clause.

Davis v. Passman, even assuming that the speech or debate clause poses no barrier, leaves many other unanswered questions. These questions could easily be resolved by a statute that extended the protection of Title VII to congressional employees. In the absence of such a statute, however, the answers to these questions will have to await further expensive and time-consuming constitutional litigation.

For instance, *Davis v. Passman* did not consider whether Members of Congress have either absolute or qualified judicially created immunity from suit for employment decisions taken in the scope of their

[44] The district court dismissed Davis' complaint on the grounds that the conduct complained of was not unconstitutional and that she had no private right of action directly under the fifth amendment. Davis v. Passman, 544 F.2d 865, 868 (5th Cir. 1977). A panel of the Fifth Circuit Court of Appeals reversed the district court, holding that the allegations in Davis' complaint stated a cause of action for damages for unconstitutional sex discrimination and that the claim could be brought directly under the fifth amendment of the Constitution. *Id.* at 868. The panel concluded that the speech or debate clause would not protect Representative Passman from liability if Davis proved the truth of her allegations, reasoning that staff dismissals were not integral to the legislative process, but at best merely tangential. *Id.* at 868–74, 881–82. The court of appeals, sitting *en banc,* reversed the panel decision and found that Davis had no cause of action under the fifth amendment and, therefore, did not reach the merits of the case or discuss the applicability of the speech or debate clause. 571 F.2d 793 (5th Cir. 1978) *(en banc).*

[45] Justice Brennan wrote the opinion of the Court in which Justices White, Marshall, Blackmun, and Stevens joined. Chief Justice Burger and Justices Stewart and Powell each wrote dissenting opinions, all joined by Justice Rehnquist. The Chief Justice and Justice Powell also joined in each other's opinions.

[46] 442 U.S. at 244.

[47] *Id.* at 234–35. The Court expressed no view as to whether such requirements were met in the case before it. *Id.* at 235 n.9.

[48] *Id.* at 236 n.11, quoting from Baker v. Carr, 369 U.S. 186, 217 (1962). "[I]n the absence of 'a textually demonstrable commitment of [an] issue to a coordinate political branch' we presume that justiciable constitutional rights are to be enforced through the courts." *Id.* at 242, quoting in part from Baker v. Carr, 369 U.S. at 217. See note 44, *supra,* and accompanying text.

[49] 442 U.S. at 242–44. The Court explained in some detail Ms. Davis' claim that congressional rules are ineffective remedies to vindicate her rights. *Id.* at 243 n.21.

[50] 403 U.S. 388 (1971). Ms. Davis was forced to rely directly on the Constitution because no statute exists under which she could press her claim. It should be noted that under limited circumstances, a legislative branch employee may bring a civil action under the 1866 Civil Rights Act, 42 U.S.C. §1981 (1976). Section 1981 was unavailable to Ms. Davis because by its terms it does not extend to claims of discrimination based on sex. The 1866 Civil Rights Act was enacted under Congress' authority to enforce the 13th amendment and generally prohibits discrimination on the basis of race, alienage, and national origin. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Guerra v. Manchester Terminal Corp., 498 F.2d 641, 653–54 (5th Cir. 1974); Cubas v. Rapid American Corp., 420 F. Supp. 663 (E.D. Pa. 1976). Some courts have found that section 1981 protects Federal employees from such discrimination in the making and enforcement of employment contracts with the Federal Government. Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974); Penn v. Schlesinger, 490 F.2d 700, 701–02 (5th Cir. 1974), *rev'd on other grounds,* 497 F.2d 970 (1974) (*en banc). But see* Cozad v. Johnson, 397 F. Supp. 1235 (W.D. Okla. 1975).
Remedies available in section 1981 actions are generally broader than those available in constitutional litigation, however, as plaintiffs may recover both equitable relief (back pay, reinstatement, and decrees for affirmative action) and legal relief (compensatory and punitive damages), as well as attorney's fees. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94–559, §1, 90 Stat. 2641 (codified at 42 U.S.C. §1988 (1976)). Sovereign immunity, however, will generally bar back pay and compensatory damage awards against the United States. Penn v. Schlesinger, 490 F.2d 700, 704–05 (5th Cir. 1973), *rev'd on other grounds,* 497 F.2d 970 (1973) (*en banc)* ; 28 U.S.C. §2412 (1976). Sovereign immunity will also bar attorney's fee awards against the United States. Andrellis v. United States, 609 F.2d 514 (D.C. Cir. 1979), *petition for cert. pending,* No. 79-1542; Shannon v. Dep't of Housing and Urban Development, 577 F.2d 854, 855–56 (3d Cir.), *cert. denied,* 439 U.S. 1002 (1978). These issues are discussed further in the text accompanying notes 54–58, *infra.*

[51] 442 U.S. at 235 n.11.

[52] *Id.* at 236 n.11.

[53] The doctrine of separation of powers and the speech or debate clause are discussed at length in the next chapter.

official duties similar to the immunities enjoyed by executive branch officials.[54] If the good faith immunity defense is available to defendants whose personnel actions are attacked as unconstitutional, and the recent case of *Carlson v. Green* suggests that it is,[55] it will constitute a burden on congressional victims of employment discrimination not imposed on employees who can vindicate their rights under Title VII.

In addition, the Court expressly limited its holding and analysis to the appropriateness of a damage remedy[56] and did not discuss the possibility that equitable remedies, such as reinstatement, might also be appropriate in constitutional litigation.[57] Generally, the Federal courts have been extremely reluctant, in the few cases where the issue has been squarely presented, to order coercive remedies or issue equitable decrees in cases involving Federal personnel matters where authority to do so has not been statutorily provided, in part because of the potentially disruptive effect such decrees could cause.[58]

There are, moreover, additional problems that will confront legislative branch employees who seek to bring a *Davis-* type action.[59] In some circumstances, a suit will not survive because complete and adequate relief would require the joining of an indispensible party such as a congressional committee Member who is absolutely immune from suit.[60] In other circumstances, the doctrine of sovereign immunity may bar effective relief even though the plaintiff can show that a Federal official has acted unconstitutionally or that his or her actions exceeded the scope of his or her authority.[61] Seeking damage relief against persons in their individual capacity, on the other hand, raises other problems, as not all congressional employers have the financial means to pay large judgments.[62] Finally, attorney's fees are not provided the successful constitutional plaintiff unless authorized by statute,[63] as they are the Title VII plaintiff.[64]

Adequate, efficient, and inexpensive resolution of employment discrimination claims by legislative

[54] Qualified "good faith" immunity protects defendant government officers (in varying scope dependent upon their responsibilities) who act in good faith that is reasonable in light of all the circumstances existing at the time of the violation, Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974), unless either the plaintiff has, at the time of the violation, a "clearly established" constitutional right and the official knows or should know that his or her action will violate that right, or the official acts, with malicious intent, to cause a constitutional deprivation or other injury. Procunier v. Navarette, 434 U.S. 555, 562 (1978), quoting Wood v. Strickland, 420 U.S. 308, 322 (1975). The doctrine of qualified immunity, which was originally available only to State officials sued for constitutional violations under 42 U.S.C. §1983, has recently been extended to apply to Federal executive officials exercising similar discretionary functions under color of Federal law. Butz v. Economou, 438 U.S. 478 (1978). The recent opinion in Owen v. Town of Independence, 100 S. Ct. 1398 (1980), holds that the qualified good faith immunity defense is not available to a municipality sued under 42 U.S.C. §1983. The Court stated, however, that suit against government officers sued in their individual capacity differs significantly from a suit in which liability lies directly against the governmental entity. *Id.* at 1409 n.18.

[55] 100 S. Ct. 1468 (1980). The qualified immunity afforded Federal executive officials "provides adequate protection" against the possibility that defending against constitutional claims might inhibit the efforts of officials to perform their duties. *Id.* at 1472 (1980).

[56] The Court noted that respondent Passman was no longer a Congressman, that no other alternative relief was available, and that a damage remedy was not prohibited by Congress. 442 U.S. at 245–47.

[57] *Id.* at 245.

[58] The Supreme Court, in reviewing a temporary injunction barring discharge of probationary executive branch employees, has noted:

> The District Court, exercising its equitable powers, is bound to give serious weight to the obviously disruptive effect which the grant of the temporary relief awarded here was likely to have on the administrative process. When we couple with this consideration the historical denial of all equitable relief by the Federal courts in cases such as White v. Berry, the well-established rule that the government has traditionally been granted the widest latitude in the dispatch of its own internal affairs, and the traditional unwillingness of courts of equity to enforce contracts for personal service either at the behest of the employer or the employee, we think that the Court of Appeals was quite wrong in routinely applying to this case the traditional standards governing more orthodox "stays."

Sampson v. Murray, 415 U.S. 61, 83–84 (1973) (citations omitted).
This latitude the courts grant the executive branch in personnel matters is likely to be extended to the legislative branch also.

[59] The attorney who represented the plaintiff in *Davis v. Passman* testified, at a Senate subcommittee hearing which was considering extending Title VII protections to congressional employees, as to her belief that a *Davis v. Passman, Bivens-* type suit was an inadequate remedy for vindicating employment discrimination rights. To Eliminate Congressional and Federal Double Standards: Hearings on S. 1112 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess. 34–37 (1979) (statement of Sana F. Shtasel).

[60] *See* Fed. R. Civ. P. 19(b). Failure to join as a defendant one who is necessary and indispensable for obtaining complete and comprehensive relief may lead to dismissal of the lawsuit. This presents unique difficulties to many employees of Congress who may have otherwise meritorious complaints of employment discrimination because responsibility for hiring and firing committee staff, or staff on certain services units of either or both Houses of Congress, is accomplished by means of a vote of a committee. As discussed in chapter 2, congressional committee Members are absolutely immune, under the speech or debate clause, for legislative acts such as voting on committee resolutions, and employees will be limited to actions for damages against those agents who, in their individual capacities, have the duty of executing the committee resolution.

[61] Generally, the doctrine of sovereign immunity states that the United States and its officers cannot be sued without their consent. A suit is considered to be against the sovereign when "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or restrain the government from acting or compel it to act." Dugan v. Rank, 372 U.S. 609, 620 (1963). Two recognized exceptions to this general rule have been carved out by the Supreme Court, however, to allow suits against officers who have acted beyond their statutory powers, and suits against officers who have acted within their authority but unconstitutionally. *Id.* at 621–22. Even where these exceptions apply, though, sovereign immunity may limit the kinds of relief a court may grant. "[I]f the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property," it will be precluded. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 691 n.11 (1949).

[62] Even if the defendant has sizable personal assets that can theoretically be used to satisfy a judgment, the prospects of recovery are diminished because the wages of Federal employees may not ordinarily be garnished. See 64 Cornell L. Rev. 667–68.

[63] Alyeska Pipeline Co. v. Wilderness Society, 42 U.S. 240 (1975).

[64] 42 U.S.C. §2000e–5(k) (1976).

branch employees requires appropriate congressional action.[65] Thus, the next question that must be addressed is whether any constitutional considerations exist which would bar Congress, as a matter of law, from extending protections against unlawful employment discrimination to its employees.

[65] If such a statute is enacted explicitly providing exclusive, effective, and comprehensive relief for claims of employment discrimination, it would be held by the Supreme Court to be an exclusive remedy. *See* Carlson v. Green, 100 S. Ct. 1398 (1980); Brown v. Adm'r of Gen. Servs., 425 U.S. 820 (1975).

2. Separation of Powers Doctrine and Congressional Employment Practices

The Constitution accords Congress certain powers and its Members certain privileges in order that the elected representatives of the people may go about their public business without distraction from vexatious lawsuits and without the coercive control and oversight of Presidents and the courts. These laudable aims have recently come into conflict with other provisions of the Constitution, specifically the right under the fifth amendment to be free from unconstitutional employment discrimination, and the national policy, as embodied in civil rights laws, to eliminate employment discrimination. Resolution of the conflict between these competing policies turns upon the constitutional doctrine of separation of powers.

The separation of powers doctrine is not codified in any one clause of the Constitution as a prohibition on actions, an affirmative grant of authority, or a specifically conferred right. It is, instead, the underlying principle of the American form of constitutional government and as such is supported by numerous provisions in the Constitution granting certain powers of government to each branch while protecting each branch in the exercise of its powers. Thus, the Constitution specifically provides Congress with the power to regulate its own proceedings,[1] appoint its own officers,[2] and discipline its own Members[3] without assistance or interference from the other two branches. This is not to imply that the Constitution requires that the three branches operate as hermetically sealed compartments. To the contrary, there is a system of "checks and balances" established to preserve the powers, and the exercise of these powers, of each branch of government from domination by another branch. As will be discussed in more detail later, the three branches are intended to interact in exercising their respective powers and are permitted to seek the assistance of another branch in performing their constitutionally assigned functions.

Where Congress by legislation seeks the assistance of the executive and judicial branches in providing employees of the legislative branch with equal employment opportunity, questions of constitutional dimension should be considered. The separation of powers doctrine serves to protect Congress as an institution not only from gaining too much power over the other branches, but also from losing too much power to them. If the authority given to the other branches by such equal employment opportunity legislation were so sweeping that it would "unduly disrupt" the constitutional functions of the Congress as an institution, such legislation could not stand.[4]

Yet the Framers of the Constitution were not satisfied that the integrity of the legislative process was ensured merely by establishing a tripartite government. They provided specific privileges to individual Members of Congress so that they might not, one by one, fall prey to control by the President or the courts and thereby weaken the integrity of the legislative process. Members are generally protected

[1] U.S. Const. art. I, §5, cl. 2.
[2] *Id.* §2, cl. 6; §3, cl. 5.
[3] *Id.* §5, cl. 2.

[4] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 441–46 (1977). *See also* Buckley v. Valeo, 424 U.S. 1, 119–24 (1976).

from arrest while attending or traveling to and from sessions.[5] They are also specifically shielded from questioning "in any other Place" for "any Speech or Debate in either House,"[6] an immunity that is of particular significance to this report.

The Supreme Court in *Davis v. Passman* held that the scope of the separation of powers doctrine as a defense to prohibit judicial review of congressional employment practices violating constitutional rights is equal to but not greater than the protections provided to legislators by the speech or debate clause of the Constitution.[7] Because the Supreme Court expressly declined to decide whether the speech or debate clause protected the employment decision challenged in *Davis,*[8] it is necessary to trace the history and review judicial interpretations of the speech or debate clause to determine whether it shields congressional employment practices from review by the courts.

The Court in *Davis* was not, however, faced with a statutory scheme, such as Title VII, that specifically grants the judiciary and an administrative agency headed by Presidential appointees broad remedial powers to eliminate employment discrimination in the legislative branch. Presented with such a case, it is by no means clear that the Supreme Court would not reconsider its equation of the speech or debate clause with the separation of powers doctrine. Therefore, after examining whether the speech or debate clause prohibits external review of congressional personnel actions, this chapter will examine what factors the Supreme Court would likely consider in deciding whether a comprehensive, statutory, equal employment opportunity scheme such as Title VII would "unduly disrupt" the constitutional functioning of the legislative branch.

Speech or Debate Clause

The speech or debate clause[9] has been held by the Supreme Court to protect all "legitimate legislative activity."[10] Within this scope, it operates as an absolute bar to outside inquiry[11] and is designed to preserve the independence of the legislative process by providing for the independence of the individual legislators[12] when performing legislative acts.[13]

Although several Supreme Court cases construing the speech or debate clause have recently been decided[14] and the clause has been the subject of copious scholarly debate and criticism,[15] the scope of the immunity conferred by the clause is still not clear, and it is only with the advent of the *Davis v. Passman* case that the question of its application to congressional employment practices has come to the forefront.[16] Any discussion of this issue must be preceded by a brief discussion of the clause's history to define to the extent possible its perimeters as envisioned by the Framers because judicial interpretations of the clause rely heavily on its history.[17]

The speech or debate clause has its origins in the long struggle for supremacy between the Tudor and Stuart monarchs and the British Parliament. The British monarchs found that the civil or criminal arrest and imprisonment of hostile members of

[5] U.S. Const. art. I, §6, cl. 1.
[6] *Id.*
[7] Davis v. Passman, 442 U.S. 228, 235–36 n.11 (1979).
[8] *Id.*
[9] U.S. Const. art. I, §6, cl. 1 provides: "[F]or any Speech or Debate in either House, they [Members] shall not be questioned in any other Place."
[10] Doe v. McMillan, 412 U.S. 306, 324 (1973).
[11] Davis v. Passman, 442 U.S. 228, 235 n.11 (1979).
[12] *E.g.,* Doe v. McMillan, 412 U.S. 306, 324 (1973).
[13] In United States v. Helstoski, 99 S. Ct. 2432 (1979), the Court acknowledged that in some instances the rights of individual Senators or Representatives may be different from the rights of their respective Houses for the purposes of the speech or debate clause, but the Court declined to decide whether passage of a criminal bribery statute was an exercise of Congress' power to regulate its Members in abrogation of their individual speech or debate clause privilege, or whether Congress, in fact, has constitutional authority as an institution to waive individual Members' privileges under the clause.
[14] Hutchinson v. Proxmire, 99 S. Ct. 2675 (1979); United States v. Helstoski, 99 S. Ct. 2432 (1979); Davis v. Passman, 442 U.S. 228 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); United States v. Brewster, 408 U.S. 501 (1972); Gravel v. United States, 408 U.S. 606 (1972). Other Supreme Court decisions construing the speech or debate clause include Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880).
[15] *E.g.,* Bolton, Vanderstar, and Baldwin, *The Legislator's Shield: Speech or Debate Clause Protection Against State Interrogation,* 62 Marq. L. Rev. 351 (1979); Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or a Haven for Corruption,* 57 N.C. L. Rev. 197 (1979); Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Co-equality,* 8 Suffolk L. Rev. 1019 (1974); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present, and Future as a Bar to Criminal Prosecutions in the Courts,* 2 Suffolk L. Rev. 1 (1968); Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers,* 86 Harv. L. Rev. 1113 (1973); Suarez, *Congressional Immunity: A Criticism of Existing Distinctions and a Proposal for a New Definitional Approach,* 20 Vill. L. Rev. 97 (1974); Veder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings,* 10 Colum. L. Rev. 131 (1910); Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning, and Scope,* 99 U. Pa. L. Rev. 960 (1951); Note, *Unenforced Congressional Subpoenas: Judicial Action and Congressional Immunity,* 59 Iowa L. Rev. 581 (1973–73); 9 Seton Hall L. Rev. 861 (1978); 41 Mo. L. Rev. 108 (1976); 46 Miss. L. J. 1112 (1975); 11 Duq. L. Rev. 677 (1973); 42 U. Cin. L. Rev. 780 (1973); 26 Vand. L. Rev. 327 (1973); 1970 Wis. L. Rev. 1216 (1970).
[16] 442 U.S. 228 (1979).
[17] *See, e.g.,* United States v. Johnson, 383 U.S. 169, 177–83 (1966).

Parliament were effective means of silencing those who would enhance parliamentary authority.[18] The struggle culminated in 1689 with the promulgation by a victorious Parliament[19] of a bill of rights containing the following provision: "that the freedom of speech and debate, and proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."[20] The provision was incorporated almost verbatim in both the Articles of Confederation and in the U.S. Constitution without debate and with little discussion.[21]

English case law is not, however, particularly useful in construing the extent of the speech or debate privilege because the Supreme Court has ruled that the purpose of the privilege in the American constitutional structure is to provide for the independence of a coordinate branch of government rather than, as in England, to ensure the supremacy of Parliament.[22]

Reflecting the checkered history of British parliamentary privileges, the Supreme Court of the United States has attempted to strike a balance between legislative independence and the preservation of individual rights.[23] "The fundamental purpose of the clause," noted the Court, "was to free 'the legislator from executive and judicial oversight that realistically threatens to control his conduct *as a legislator*'."[24] This includes protection from private civil suits that, like actions instituted by the executive, "[create] a distraction and [force] Members to divert their time, energy and attention from their legislative tasks to defend the litigation."[25] But it is only their conduct as legislators,[26] their performance of "legislative acts," that is protected.[27]

In its most recent exposition on the clause, the Supreme Court in *Hutchinson v. Proxmire* said:

> The authors of our Constitution were well aware of both the need for the privilege *and the abuses that could flow from [too] sweeping safeguards.* In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, *but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.*[28]

The Supreme Court has struggled each time it has considered the issue of legislative immunity for speech or debate[29] to define that which "is necessary to preserve the integrity of the legislative process." It initially defined legislative activities broadly as including "things generally done in a session of the House by one of its members in relation to the business before it,"[30] but in 1972 the Court handed down its decision in *Gravel v. United States*[31] that considerably narrowed the scope of the clause:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. . .[T]he courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."[32]

Thus, beyond literal speech or debate in the halls of Congress, the clause protects only "deliberative and communicative processes" that are an integral

[18] United States v. Johnson, 383 U.S. 169, 178 (1966); Joint Comm. on Congressional Operations, The Constitutional Immunity of Members of Congress, S. Rep. No. 93-896, 93d Cong., 2d Sess. 5-6 (1974) (hereafter cited as "Constitutional Immunity"); Reinstein and Silverglate, *supra* note 15, at 1122-30.

[19] Reinstein and Silverglate, *supra* note 15, at 1133.

[20] "Constitutional Immunity," *supra* note 18, at 6. *See also* Reinstein and Silverglate, *supra* note 15, at 1133.

[21] Reinstein and Silverglate, *supra* note 15, at 1136.

[22] Hutchinson v. Proxmire, 99 S. Ct. 2675, 2683-4 (1979), citing United States v. Brewster, 408 U.S. 501, 508 (1972). The *Brewster* court was also of the opinion that the American legislative experience "does not reflect a catalog of abuses at the hands of the Executive that gave rise to the privilege in England." *Id.* at 508.

[23] *See, e.g.,* Davis v. Passman, 442 U.S. 228, 246 (1979).

[24] United States v. Helstoski, 99 S. Ct. 2432, 2441 (1979) (emphasis added), quoting Gravel v. United States, 408 U.S. 606, 618 (1972).

[25] Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975).

[26] Doe v. McMillan, 412 U.S. 306, 324 (1973).

[27] Gravel v. United States, 408 U.S. 606 (1972).

[28] 99 S. Ct. 2675, 2684 (1979) (emphasis in the original), quoting United States v. Brewster, 408 U.S. 501, 517 (1972).

[29] See note 14, *supra.*

[30] Kilbourn v. Thompson, 103 U.S. 168, 204 (1880). The scope of the clause has also been described as encompassing conduct within the "sphere of legitimate legislative activity." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975).

[31] 408 U.S. 606 (1972).

[32] *Id.* at 625, quoting United States v. Doe, 455 F.2d 753, 760 (1st Cir. 1972). This definition has since been quoted with approval by the Court in Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975), and in Hutchinson v. Proxmire, 99 S. Ct. 2675, 2684 (1979). In *Gravel* the Supreme Court held that the speech or debate clause did not immunize either Senator or aide if they violated a criminal statute in preparing for or in implementing a protected legislative act. 408 U.S. at 621. On the other hand, the Court determined that the immunity of congressional aides is coextensive with that of their congressional employers. *Id.* at 622.

part of either "consideration and passage or rejection of proposed legislation," or "other matters which the Constitution places within the jurisdiction of either House."[33] This is a fairly restrictive definition of legislative activities. As the Court reiterated in its most recent pronouncement on the subject, its prior decisions:

> had carefully distinguished between what is only "related to the due functioning of the legislative process," and what constitutes the legislative process entitled to immunity under the Clause: [O]nly "acts generally done in the course of the process of enacting legislation were protected. . . .In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process."[34]

Protected activities include speeches on the floor of Congress, votes,[35] compiling and voting for publication of committee reports circulated within Congress,[36] conduct in committee investigations and proceedings,[37] and the issuance of subpenas in the aid of lawful committee investigations.[38] Many of the activities that the Court has determined *not* to be shielded by the speech or debate clause are otherwise indisputably legitimate activities of the typical Member. For example, press releases,[39] constituent newsletters,[40] and telephone calls to Federal agencies by which Members seek to influence the conduct of those agencies[41] are not protected. Furthermore, while committee chairmen are protected when they acquire information for an investigatory hearing by subpena,[42] they may be questioned if they acquire information informally from third parties.[43] Members or their aides are also subject to suit or questioning where they arrange for private publication of congressional committee records,[44] and public officials may be liable if they distribute to persons not in Congress committee reports printed by the government that are already a matter of public record.[45]

These decisions of the Supreme Court have quite obviously limited the definition of "legislative acts." Moreover, even when conduct falls within this narrow definition of legislative activities, judicial review is not precluded if the implementation or execution of the otherwise immune legislative act is carried out by a nonimmune congressional employee. The clause literally forbids the questioning of only Senators or Representatives as to legislative acts. Thus, resolutions of the House finding a private citizen in contempt,[46] or excluding a Member-elect from his seat,[47] or a committee vote to refer a report containing libelous material to be printed and distributed to the public,[48] or a staff member's decision to seize subpenaed documents[49] have all been held to be reviewable by the courts if executed or implemented by someone not entitled to immunity under the speech or debate clause.[50] A "pure" speech or

[33] Suarez, *supra* note 15, at 118 n.161. The Court has also made a distinction between "legislative" acts and "political" acts. In a case handed down on the same day as its decision in *Gravel,* the Court in United States v. Brewster, 408 U.S. 501 (1972), explained the dichotomy:

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. . . .They are performed in part because they have come to be expected by constituents, and in part because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases.

Id. at 512. This distinction between "political" and "legislative" activities has been criticized by some commentators. See, for example, Suarez, *supra* note 15, at 126–31. But the Court quoted this language with approval when it held that issuance of defamatory congressional press releases and newsletters were not legislative acts shielded by the clause. Hutchinson v. Proxmire, 99 S. Ct. 2675, 2686–87 (1979).

[34] Hutchinson v. Proxmire, 99 S. Ct. at 2686, quoting United States v. Brewster, 408 U.S. 501, 513–515 (1972). While this language refers to other than housekeeping functions of Congress, the same restrictive principle (that relationship to the legislative process alone is not enough) will apply to internal operational functions.

[35] United States v. Helstoski, 99 S. Ct. 2432, 2439 (1979). *See also* United States v. Johnson, 383 U.S. 169 (1966). The Supreme Court has also held that the speech or debate clause does not protect Members of Congress who accept a bribe in violation of 18 U.S.C. §201 (1976) where such conduct represents a promise by a Member to perform an act in the future. Prosecution may be had so long as reference is not made to a legislative act or the motivation for a legislative act, such as voting. United States v. Helstoski, 99 S. Ct. 2432, 2439–40 (1979); United States v. Brewster, 408 U.S. 501, 512 (1972); United States v. Johnson, 383 U.S. 169, 184 (1966).

[36] Doe v. McMillan, 412 U.S. 306 (1973).

[37] *Id.;* Kilbourn v. Thompson, 103 U.S. 168 (1880). *See also* Ray v. Proxmire, 581 F.2d 998 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 933 (1978).

[38] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Dombrowski v. Eastland, 387 U.S. 81 (1967) (per curiam); *cf.* Tenney v. Brandhove, 341 U.S. 367 (1951) (investigational subpenas issued by a State legislative committee protected by speech or debate clause).

[39] Hutchinson v. Proxmire, 99 S. Ct. 2675, 2687 (1979).

[40] *Id.*

[41] *Id.* at 2681 n.10, citing United States v. Johnson, 383 U.S. 169, 172 (1966); United States v. Brewster, 408 U.S. 501, 512 (1972).

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

[43] Gravel v. United States, 408 U.S. 606 (1972).

[44] *Id.*

[45] Doe v. McMillan, 412 U.S. 306 (1973).

[46] Kilbourn v. Thompson, 103 U.S. 168 (1880).

[47] Powell v. McCormack, 395 U.S. 486 (1969).

[48] Doe v. McMillan, 412 U.S. 306 (1973).

[49] Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam). *But cf.* McSurely v. McClellan, 553 F.2d 1277, 1288 n.36 (D.C. Cir. 1976), *cert. dismissed,* 438 U.S. 189 (1978) (suggesting that availability of immunity depends on the nature of the act involved rather than on the status of the actor).

[50] The Supreme Court has never explained when or under what circumstances legislative branch employees will be accorded speech or debate

debate clause case naming only Members of Congress and immune congressional employees as defendants may completely bar all judicial review of protected legislative activity[51] unless judicial review occurs in the context of an appeal from a conviction for contempt of Congress[52] or by an action for declaratory judgment against the U.S. attorney or the Attorney General if they must act to execute a congressional resolution.[53]

Thus, the first prong of the *Gravel* test for protected "legislative activities" amounts to a prohibition against requiring Members of Congress to defend their individual conduct when they are acting as legislators in the usual processing of bills: consideration of bills in committee hearings, the writing and distribution to other Members of committee reports, debates in committee and on the floor of Congress, and voting.

Congressional regulation of its own personnel practices[54] would fall within the second prong of the *Gravel* test as "other matters which the Constitution places within the jurisdiction of either House."[55]

To date, the Supreme Court has not specifically applied the *Gravel* test to a case involving the authority of Congress to regulate the conduct of its Members. But the Court has construed the clause narrowly in favor of allowing Federal prosecution of Members for bribery[56] and in allowing judicial review of the congressional exclusion of Representative Adam Clayton Powell. *Powell v. McCormack* [57] involved a claim of congressional privilege to exclude a Member-elect under Congress' power to judge the qualifications of its Members or to punish them by expulsion free from judicial review.

Representative-elect Adam Clayton Powell (and voters from his congressional district) sued the Speaker of the House, five Members, the Clerk of the House, the Sergeant-at-Arms, and the Doorkeeper for a declaratory judgment that a House resolution excluding him from his seat was unconstitutional.

Brushing aside the difficult separation of powers question,[58] the Supreme Court concluded that the Members themselves were immune from suit by reason of the speech or debate clause, but that judicial review was not precluded because of the presence of the defendant congressional employees. The Court reasoned that the "purpose of the protection afforded the legislators is not to forestall judicial review of legislative action but 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."[59] Therefore, judicial review may be had as long as the burden of defending the congressional action is borne by nonimmune congressional employees.[60]

The decision in *Powell* is consistent with earlier and later decisions of the Court in favor of judicial review of legislative action[61] even when the Constitution grants the legislative branch exclusive authority to judge the qualifications of its Members or expel them.[62] Nor does the power of Congress to punish its Members for disorderly behavior automatically shield from prosecution all acts done by a Member.[63] For criminal acts beyond the scope of the

clause immunity. See Suarez, *supra* note 15, at 123–26. On the other hand, its decision in *Gravel* indicates that top aides, as "alter egos" to Members, may have immunity for their legislative acts. See note 32, *supra*.

[51] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); 46 Miss. L. J. 1112, 1112–18 (1975).

[52] *Id.* at 1120.

[53] *Id.* at 1121–22.

[54] This has been accomplished by both rule and statute. See chapter 1, *supra*.

[55] Baker v. Carr, 369 U.S. 186, 217 (1962) (defining "political question" cases in the context of the separation of powers doctrine). *See also* text accompanying note 33, *supra*.

[56] See text accompanying note 35, *supra*.

[57] 395 U.S. 486 (1969). *Gravel* was decided 3 years later.

[58] *Powell* holds that the question is whether the issue is barred from judicial review because of the political question doctrine. It concludes that the powers committed to the legislative branch to judge the qualifications of its Members and expel a Member upon a two-thirds vote are limited by the explicit terms of the Constitution. *Id.* at 548. In art. I, §2, the Constitution sets forth the standing qualifications for Members of Congress; they are the only yardstick either House may use in judging its Members' qualifications. Similarly, the Court concluded that the Constitution granted to Congress only the power to expel, not exclude. *Id.* Actions taken in contravention of these constitutional prescriptions are not actions committed to the legislative branch exclusively. The Supreme Court has the power to construe and delineate claims of express and inherent constitutional authority asserted by the other branches of the Federal Government. United States v. Nixon, 418 U.S. 683, 703–05 (1974); Davis v. Passman, 442 U.S. 228, 235 n.11 (1979).

[59] Powell v. McCormack, 395 U.S. 486, 505 (1969).

[60] See text accompanying notes 46–51, *supra*.

[61] See text accompanying notes 39–45, *supra*.

[62] *Cf.* Roudebush v. Hartke, 405 U.S. 15 (1972) (art. I, §5 of the U.S. Constitution does not preclude a State from ordering a recount of the votes cast in an election to select a U.S. Senator).

[63] *E.g.*, United States v. Helstoski, 99 S. Ct. 2432 (1979) (prosecution for bribery); United States v. Brewster, 408 U.S. 501 (1972) (prosecution for bribery); Williamson v. United States, 207 U.S. 425 (1907) (prosecution for subornation of perjury).

If it could be shown that concurrent Federal prosecution of the criminal misconduct of a Member of Congress would impair or interfere with concurrent congressional proceedings against the Member, it is arguable that the separation of powers doctrine would bar such prosecution. *Cf.* Roudebush v. Hartke, 405 U.S. 15 (1972), in which a successful senatorial candidate sought to enjoin a State recount commission from proceeding with the recount of votes in a senatorial election on the grounds that the U.S. Constitution, art. I, §5, made the U.S. Senate the sole judge of the elections and qualifications of its Members. The Supreme Court held, however, that the State recount was a valid exercise of its powers to set the times, places, and manner of elections pursuant to art. I, §4, of the

speech or debate clause, Congress' power to discipline its Members is merely concurrent with that of the courts, not exclusive. The speech or debate clause only bars prosecution of Members for criminal conduct[64] that falls within the definition of a legislative act or the motivation for a legislative act.[65]

The only published decision[66] of a Federal court construing the applicability of the speech or debate clause to congressional employment practices, however,[67] is the panel decision of the U.S. Court of Appeals for the Fifth Circuit in *Davis v. Passman.* [68] The panel, in holding that the allegations in Davis' complaint stated a right to sue for damages for unconstitutional sex discrimination, concluded that the speech or debate clause would not protect Representative Passman from liability if Davis proved the truth of her allegations.[69] The court, reasoning that staff dismissals were not integral to the legislative process but at best merely tangential,[70] stated:

> The business of Congress is to legislate; Congressmen and [aides] are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity," they enjoy no special immunity. . . .[71]

The court concluded that staff dismissals were too remote from the core of legislating, which was "legislative policy-formulation." Although it conceded that the fear of burdensome though ultimately unfounded litigation might deter some Members from dismissing high-ranking aides, thus affecting the Members' "deliberative role," the court added that its provision for a qualified good faith immunity and the availability of summary judgment procedures would result in a "very low likelihood of recovery," leaving Members liable for only the most "egregious" employment practices and thereby rendering the impact on the legislative process "extremely remote."[72] Nor was the court persuaded that subjecting Members of Congress to suit for unconstitutional employment practices per se violated the purpose of the speech or debate clause, one of the purposes of which is to protect Members from "vexatious litigation."[73]

However, Judge Oliver Gasch's unpublished Memorandum Order in *Parker v. Allen* [74] demonstrates that the speech or debate clause has serious implications for other congressional employees who are not employed on the personal staffs of Members of Congress. Both House and Senate rules provide for the hiring of committee staff to be accomplished by committee vote. In addition, committees having oversight of legislative branch units providing certain administrative services to the Congress may have authority to order dismissal or approve the hiring of unit employees. The speech or debate clause limits congressional liability for unconstitu-

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Constitution because it did not usurp the Senate's power or impair its ability to make a final and independent judgment as to which candidate would be seated. See discussion of Burton v. United States, *infra.*

[64] Neither criminal nor unconstitutional conduct is per se beyond speech or debate clause protection. In Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), the Court stated: "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Id.* at 510, quoting Doe v. McMillan, 412 U.S. at 312–13 (citation omitted). *See also* Kaye, *Congressional Papers, Judicial Subpoenas, & the Constitution,* 24 U.C.L.A. L. Rev. 523, 567 n.191 (1977); 25 U.C.L.A. L. Rev. 796, 809 n.78, 810 nn. 79, 81 (1978).

[65] The motivation or purpose for an act may, of course, be inquired into where nonlegislative acts are involved. *E.g.,* Hoellen v. Annunzio, 468 F.2d 522, 526–27 (7th Cir. 1972), *cert. denied,* 412 U.S. 953 (1973). The case involved a suit by a candidate against an incumbent Congressman alleging misuse of the franking privilege accorded Members by 39 U.S.C. §3210–16 (1976). The court of appeals, then Judge Stevens, permitted examination of the disputed mailing and its circumstances in order to determine whether the mailing fell within the act's definition of "official business."
Purpose or intent is also relevant in construing legislation, United States v. Lovett, 328 U.S. 303 (1946), or congressional rules, United States v. Smith, 286 U.S. 6 (1932). It follows that so long as a Member of Congress is not required to explain his or her individual vote, judicial review of the effect of collective individual legislative acts such as committee votes or a resolution or statute may include an inquiry into the intent or purpose of the action through the examination of congressional debates, committee reports, and the like. *See* 286 U.S. 6.

[66] A former employee of Representative Shirley Chisholm has a civil action pending alleging unconstitutional employment discrimination on the basis of sex. Lewis v. Chisholm, No. 78–0196 (D.D.C., filed Feb. 3, 1978). In addition, the question has reportedly been raised in the House by Representative Charles H. Wilson in seeking to bar judicial enforcement of a grand jury subpena for his personnel records. See *Washington Post,* Feb. 9, 1980, sec. A, at 1, col. 1.

[67] In Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973), a female law student sued members of the South Carolina Senate for delaying her temporary assignment as a page on the basis of her sex pursuant to a Senate resolution. The court of appeals affirmed the district court's dismissal of the case against the legislators because of their immunity under the speech or debate clause, but held the policy violative of the equal protection clause of the 14th amendment and enjoined the Clerk of the Senate from enforcing it in the future.

[68] 544 F.2d 865 (5th Cir. 1977), *rev'd on rehearing on other grounds,* 571 F.2d 793 (5th Cir. 1978) (en banc), *rev'd,* 442 U.S. 228 (1979). The Supreme Court refused to decide whether the speech or debate clause would bar a suit for damages based on the allegations of unconstitutional employment discrimination against an individual Member of Congress. 442 U.S. at 235 n.11. For a discussion of the facts of the case, see chapter 1 of this report.

[69] 544 F.2d at 881–82.

[70] *Id.* at 880.

[71] *Id.,* quoting Doe v. McMillan, 412 U.S. 306, 324 (1973) (citation omitted).

[72] *Id.* at 880 n.25.

[73] A promise by a Member to vote or to introduce particular legislation in exchange for a bribe, however, has been held not to be protected legislative activity within the speech or debate clause.

[74] No. 74–1846 (D.D.C. June 16, 1975).

tional employment discrimination decisions taken by committee vote. The Supreme Court has always protected individual legislators from having to account for the way they voted even where the Court has found the resolution or other legislative action to be unconstitutional or otherwise actionable.[75] It follows that an employee affected by committee vote would have little, if any, chance for success in an action against the individual committee Members and immune committee staff.[76]

However, judicial review of committee employment decisions is available when the decision is implemented or executed by nonimmune congressional employees[77] or by individual Members themselves.[78]

Judicial review was predicated on this rationale in *Parker v. Allen.* [79] Parker was headwaiter of the Senate Restaurant when he was fired by the Architect of the Capitol on September 19, 1974, pursuant to the unanimous vote of the Subcommittee on the Restaurant of the Senate Committee on Rules and Administration.[80] Parker filed suit in the U.S. District Court for the District of Columbia against nine Senators,[81] the Architect of the Capitol, and the United States, alleging that his dismissal violated his fifth amendment right to procedural due process and breached certain alleged contract rights.[82]

All defendants moved to dismiss the complaint or, in the alternative, for summary judgment on several grounds, one of which being that Parker's suit was barred by the speech or debate clause.[83] Judge Gasch, in dismissing the suit against the Senators, remarked:

> The Restaurant is obviously considered a part of the internal "housekeeping" facilities of the Senate. The Court regards it as obvious that the Senate has inherent power, under the Constitution, to make internal arrangements for its own necessities. The Restaurant clearly serves such a need. Administration of the Restaurant, while it may not attain to the magnitude of some Congressional duties, is clearly an activity which is within "the legislative sphere." Plaintiff here can point to nothing done by the defendant Senators except a determination of this matter by vote in a Senate subcommittee. It follows that the sole basis for plaintiff's complaint against the defendant Senators are activities which are privileged under the Speech or Debate Clause.[84]

The execution of the committee vote, the actual dismissal of Parker by the Architect of the Capitol, was not considered by the court to have been protected legislative activity[85] even though the decision was arrived at and rendered through protected legislative acts. Parker's firing, therefore, was held to be judicially reviewable because the Architect of the Capitol was not accorded legislative immunity.[86]

It is the character and nature of the personnel action itself that must be *integral* to the "deliberative and communicative process." Arguably, the accep-

[75] *E.g.,* Doe v. McMillan, 412 U.S. 306 (1973); Powell v. McCormack, 395 U.S. 486 (1969); Kilbourn v. Thompson, 103 U.S. 168 (1880).

[76] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam); Kilbourn v. Thompson, 103 U.S. 168 (1880).

[77] In Gravel v. United States, 408 U.S. 606 (1972), Mr. Justice White, writing for the Court, noted: "[N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances." *Id.* at 621. The Court in Eastland v. United States Servicemen's Fund, 421 U.S. 491, 507-08 (1975), quoted this passage, noting that these acts were not essential to legislating and therefore not protected by the speech or debate clause. *But see* 421 U.S. 491, 517 (Marshall, J., concurring).

[78] See text accompanying note 69, *supra.*

[79] No. 74-846, slip op. at 5 (D.D.C. June 16, 1975). The Committee acted pursuant to its authority under 40 U.S.C. §174 (1970).

[80] Senators James Allen, Marlow Cook, and Harrison Williams were members of the Subcommittee on the Restaurant and with Senators Howard Cannon, Claiborne Pell, Hugh Scott, Robert Byrd, Robert Griffin, and Mark Hatfield were at the time members of the Senate Committee on Rules and Administration. *Id.* at 1 n.2.

[81] *Id.* at 7.

[82] *Id.* at 12. The court's reasoning concerning the speech or debate clause is subject to a number of interpretations. On the one hand, the court implies that the subject matter of the committee's action—the provision of administrative services to Congress—renders the committee vote a "legislative activity." On the other hand, the court notes that it is a "legislative activity" because of the subcommittee deliberation and vote. The former argument is not consistent with precedent. The speech or debate clause protects even those legislators whose committee deliberations lack a valid legislative purpose. See Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970).

[83] *Id.* at 7. The inherent constitutional power to which the Court referred is Congress' rulemaking authority pursuant to U.S. Const. art. I, §5, cl. 1. *Id.* at 9 n.19.

[84] *Id.* at 9. The Court cited Eastland v. United States Servicemen's Fund, 425 U.S. 491 (1975); Gravel v. United States, 408 U.S. 606 (1972); Powell v. McCormack, 395 U.S. 386 (1969); Kilbourn v. Thompson, 103 U.S. 168 (1880).

[85] Parker's motion for partial summary judgment was granted as to his claim of denial of procedural due process. The Architect of the Capitol was ordered to provide him the detailed list of charges against him for which he might be terminated and was further ordered to afford Parker an opportunity for a hearing before an impartial examiner empowered to subpena witnesses. Parker was to be accorded the right to subpena witnesses, to confront and cross examine hostile witnesses, to be represented by counsel, and "such other rights as are consistent with traditional notions of due process." The examiner was to render a written decision based upon the evidence before him, stating the reasons for the conclusions reached. Slip op. at 19. The Architect of the Capitol ultimately dismissed the charges against Parker and paid him $15,000 on the condition that he waive his right to a hearing and not seek his old job. 36 Cong. Q. 340, 341 (1978).

[86] *E.g.,* "Constitutional Immunity," *supra* note 18, at 23-30; Suarez, *supra* note 15, at 137.

tance of a monetary bribe for the performance of an official act such as voting is much closer to the legislative core than is the hiring or firing of even personal staff, yet the Supreme Court has consistently held that the speech or debate clause does not bar such bribery prosecutions.

Further, Court decisions restricting the scope of the speech or debate clause to allow the executive or judicial branches to question the flow of information to and from Congress are potentially much more inimical to the "deliberative and communicative" process than questioning personnel decisions made by individual Members or by congressional committees.

While acknowledging the crucial role played by information in the legislative process and the importance and desirability of the informational function, the Supreme Court has not found these rationales sufficient to accord all information-gathering and dissemination activities of the legislative branch immunity from judicial or executive review. Similarly, the acknowledgment by the Supreme Court in *Gravel* of the important role played by staff in assisting the Member in the performance of his or her duties does not make the personnel function itself integral to the legislative process. In summary, Supreme Court precedent establishes that individual personnel decisions are not protected by the speech or debate clause unless made in committee by the vote of committee Members, and even these protected legislative acts are subject to judicial review by an action against those legislative employees implementing the committee decision.

Many commentators have criticized the Supreme Court's narrow construction of the speech or debate clause as fundamentally misunderstanding the role of Congress in our constitutional system. Others have suggested that the Court understands the various functions of the Congress but has concluded that the extraordinary immunity of the speech or debate clause applies only when Congress is legislating in the narrowest sense of the term.[87] Critics of the Court's narrow definition of protected legislative activities point out that such legitimate activities as performing errands for constituents, conferring with government agencies, assisting in securing government contracts, preparing newsletters to constituents, and writing news releases and speeches to be delivered outside Congress are not protected by the speech or debate clause because they are considered "political" or "external" in nature.[88] Even to expand the scope of the clause's applicability to include these informational functions of Congress, however, would not shield unconstitutional employment practices from judicial scrutiny because such practices are not necessary to fulfill Congress' responsibility to inform the public of its legislative activities.

The Undue Disruption Standard

The conclusion that the speech or debate clause does not shield individual congressional employment decisions from judicial or executive review may not be dispositive of the institutional separation of powers concerns of the legislative branch.

While *Davis v. Passman* held that the speech or debate clause is coextensive with the doctrine of separation of powers, it involved only a cause of action for damages against an individual Member. It did not consider equitable remedies, such as reinstatement or other forms of affirmative relief, or call for the involvement of the executive branch in vindicating congressional employees' rights.[89]

A statutory scheme, by rearranging institutional relationships between the coordinate branches, could present separation of powers concerns that are not at issue when claims of unconstitutional activity are made against individual Members of Congress. Moreover, to the extent any such statutory scheme provided for equitable relief, it could present additional separation of powers concerns. Therefore, the equation of the protections of the speech or debate clause and the separation of powers doctrine that *Davis v. Passman* held to be present in the context of individual constitutional litigation may not necessarily be applicable to a broader statutory restructuring of authority among the three branches. The "undue disruption" standard addresses these institutional separation of powers concerns and provides the analytic framework for determining compliance with constitutional requirements. A statutory scheme permitting judicial and executive involvement with legislative branch personnel policies would not violate the Constitution so long as it did

[87] Suarez, *supra* note 15, at 110–23; Reinstein and Silverglate, *supra* note 15, at 1149–72. *See also* note 33, *supra.*

[88] See 46 Geo. Wash. L. Rev. 137, 151 n.123 (1977).

[89] Federal courts have been very reluctant to issue equitable decrees against the Congress, usually under the rationale that the separation of powers doctrine precludes such exercise of judicial power. Yellin v. United States, 374 U.S. 109, 121 (1963) (citing Pauling v. Eastland, 288 F.2d 126 (D.C. Cir.), *cert. denied,* 364 U.S. 900 (1960)). *Cf.* Powell v. McCormack, 395 U.S. 486, 517 (1969). However, in none of these cases did the Court have before it an explicit congressional command to apply equity.

not "unduly disrupt" the constitutional functioning of the legislative branch.

The most recent and leading case on undue disruption generally is *Nixon v. Administrator of General Services,* [90] which establishes the following standard:

> [I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [affected] [b]ranch from accomplishing its constitutionally assigned functions. . . .Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[91]

This standard requires two distinct determinations: the nature and extent of the potential disruption of constitutional functions and whether that degree of potential disruption is outweighed by the achievement of important public policy objectives within Congress' legislative authority.

The essential difference between this institutional separation of powers question and the immunity afforded individual Members under the speech or debate clause is that the question is not readily susceptible to a yes or no answer. What is or is not a "legitimate legislative activity" has been defined by the courts. But because the three branches are not "airtight compartments," some interaction, even some interference, was intended by the Framers:

> In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches the Framers of the Constitution sought to provide a comprehensive system, *but the separate powers were not intended to operate with absolute independence.* [92]

This mutual dependence is evident from the complex weaving of governmental authority embodied in the Constitution. No branch of government may exercise its governmental power without the concurrence of at least one other independent branch. This system of "checks and balances" operates to keep any single branch from dominating the others or acquiring excessive power and thereby provides a measure of political stability. Unlike the English system of parliamentary government in which the legislature is preeminent,[93] the American Constitution creates three coequal, coordinate, and mutually dependent bodies. Thus, legislation must pass through a bicameral legislature and obtain Presidential approval to be enacted as law, but if the President vetoes such legislation Congress can override that veto if two-thirds of its Members so decide.[94] While the President is charged with the responsibility of executing and administering the laws[95] and negotiating treaties with foreign nations,[96] the public officers whom he appoints and the treaties he negotiates with other countries must be approved by the Senate.[97] All laws enforceable by the courts are subject to judicial review,[98] but the judicial branch must rely on the executive branch for the enforcement of its orders,[99] and its jurisdiction to hear cases is in part controlled by Congress.[100] It is this complex interaction between separate but mutually dependent branches, based on the two guiding principles of separation of powers and checks and balances, that is the hallmark of the American system of government.

As a result, preserving the essential independent core of the legislative branch of the government from overly disruptive interference by the other branches requires an analysis which recognizes that the issue is one of degree. Seeking the assistance of the other branches to achieve legitimate objectives within the constitutional jurisdiction of the Congress does not, in and of itself, do violence to the concept of the separation of powers. As the Court recently reiterated, the fact that there is a separation of powers:

[90] 433 U.S. 425 (1977).
[91] *Id.* at 443.
[92] United States v. Nixon, 418 U.S. 683, 707 (1974).
[93] *See* United States v. Brewster, 408 U.S. 501, 508 (1972).
[94] U.S. Const. art. I, §7. A bill also becomes law if it is not returned to Congress by the President in 10 days (Sundays excluded) unless Congress, by adjournment, prevents its return, resulting in a "pocket veto." *Id.*
[95] *Id.* art. II, §3.
[96] *Id.* §2; United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).
[97] U.S. Const. art. II, §2, cl. 2. Constitutional limitations on the powers of the President and the Congress are not always clear. Limits are often established by the political dynamics of the day. In the area of foreign relations, modern Presidents have chosen with increasing frequency to enter into executive agreements with other countries rather than to negotiate treaties that must gain Senate approval in order to take effect. Many of these agreements rest solely upon the President's constitutional prominence in foreign affairs and his authority as Commander-in-Chief. The Constitution of the United States of America—Analysis and Interpretation, S. Doc. No. 92-82, 92d Cong., 2d Sess. 505-07 (1973). Similarly, Congress has increasingly asserted a power of legislative veto over certain executive branch actions, an authority that President Carter has contested as unconstitutional. H. R. Doc. No. 95-357, 95th Cong., 2d Sess. (1978), 124 Cong. Rec. H5879 (daily ed. June 21, 1978).
[98] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[99] Gibbon, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers,* 5 Seton Hall L. Rev. 435, 436 (1974).
[100] U.S. Const. art. III, §2.

> is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.[101]

Comprehensive separation of powers analysis to determine whether extending Title VII to Congress goes beyond the "common sense" bounds of that doctrine is not possible primarily because of the vast range of options Congress has in choosing the extent to which it wishes to enlist the aid of other branches. Congress might provide for administrative enforcement by vesting an appropriate administrative agency with any combination of factfinding, rulemaking, or remedial powers. Congress might alternatively wish to provide for limited judicial review of such agency action or might give the courts authority to hear claims independently of any administrative determination, allowing the courts to use all or a portion of their remedial powers. These few examples demonstrate the wide variety of enforcement schemes available to Congress. In addition, a complete constitutional analysis of the validity of any statutory scheme must await its application in a particular factual context. At this time, therefore, only an examination of facial validity is possible.[102]

The Court in *Nixon* considered several factors in deciding whether an act of Congress unduly encroached upon prerogatives of the executive branch.[103] The first and most important factor as far as congressional employment issues are concerned is whether the affected branch consented to the potential disruption. Consent is relevant on the assumption that no branch of the national government would agree to permit another branch to hobble its constitutional powers. Consent by the affected branch thereby implies that that branch has analyzed its constitutional functions and found that they will be unimpaired by the particular interaction with a coordinate branch at issue. It is in this context that the Court said, "each branch of the government has the duty initially to interpret the Constitution for itself, and. . .its interpretation of its powers is due great respect from the other branches. . . ."[104] In amending Title VII to include coverage for legislative branch employees, Congress would itself be designing the statute to meet its institutional objectives and constitutional prerogatives rather than merely consenting to a set of rules imposed upon it by another branch of the government.

Therefore, given a clear legislative history setting forth the need for congressional action, and establishing the clear intent of Congress to apply specific remedies with the aid of the other two branches, that congressional determination would probably be all but conclusive on the separation of powers issue.

More than the usual deference to a coordinate branch would be involved in such a situation. Undue disruption is primarily a factual question. The Congress is in the best position to answer the factual question as to whether Title VII coverage would impair its legislative policy formulation or other constitutional functions.[105] Secondly, the constitutional grant of authority to regulate its own internal affairs certainly includes within its scope the power to prohibit discriminatory personnel practices. Congress might well determine that effective internal enforcement of those proscriptions is not feasible and that it is necessary to involve the other branches

[101] Buckley v. Valeo, 424 U.S. 1, 122 (1976) (quoting Hampton & Co. v. United States, 276 U.S. 394, 406 (1928)).

[102] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 438-39 (1977).

[103] Former President Nixon challenged the constitutionality of Title I of the Presidential Recording and Materials Preservation Act, Pub. L. No. 93-526, §§101-106, 88 Stat. 1695 (codified at 44 U.S.C. §2107 note (1974)), alleging, among other claims, that the act violated the separation of powers doctrine because the act regulated the custody and screening of presidential documents.

The Court rejected the separation of powers argument, noting that the executive branch had consented to the act's provisions when President Ford signed it and the Solicitor General of the Carter administration supported its constitutionality in court. The materials were committed to the custody of a presidential appointee empowered to promulgate implementing regulations and under whose supervision executive branch employees would screen the materials. The act also expressly provided for limited disclosure of the materials to other branches and the public subject to the assertion of any constitutionally based privileges or legal defense against release. Rather than purporting to abrogate executive privilege, the act incorporated it. In light of the experience under the Freedom of Information Act and other statutes regulating executive branch documents, and considering the important public policies the act promoted, the Court concluded that the act, on its face, did not violate the separation of powers doctrine.

[104] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 442-43 (1977).

[105] Congress can minimize any potential for unwanted disruptive interference by the other branches in its internal affairs by a variety of means. It is Congress' prerogative to set the standards for liability and the limits on external remedial authority. Congress can maintain a significant measure of control over any administrative agency in the legislative branch implementing statutory rules of congressional conduct. See chapter 4, *infra.* As to judicial enforcement, the role of interpreting and enforcing the law is the very role the courts are intended to play in our constitutional scheme. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Of course, if the implementation of an antidiscrimination law proves unduly disruptive to the functioning of Congress, Congress may amend or repeal it.

if its policy of equal employment opportunity is to be implemented.[106]

The Supreme Court reached essentially the same conclusion in upholding the constitutionality of the predecessor to the current conflict of interest provision in the Federal criminal code, 18 U.S.C. §201 (1976). *Burton v. United States* [107] affirmed the conviction of a United States Senator for accepting money in return for efforts to influence the Post Office Department in a mail fraud investigation. The Court rejected the Senator's separation of powers argument with language that, though not conclusive for the present question, is nonetheless of value:

> It is said that the statute interferes, or, by its necessary operation, will interfere, with the legitimate authority of the Senate over its members. . . .In our judgment there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named. While the framers of the Constitution intended that each Department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it. In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several Departments, Congress, having a choice of means, may prescribe such regulations to those ends as its wisdom may suggest, if they be not forbidden by the fundamental law.[108]

It seems only logical that a branch of government seeking aid in regulating its own affairs should be given the widest latitude in its choice of regulatory schemes. Indeed, three of the four dissenting Justices in *Davis v. Passman* indicated that their separation of powers objections to judicial intrusion upon congressional employment practices would evaporate if Congress statutorily authorized judicial review of congressional employment practices.[109]

Just as Congress is the best judge of the potential for disruption to its own functioning, it is also the best judge as to the balance that the *Nixon* decision suggests can be struck between some disruption on the one hand and achievement of an important public purpose on the other. The degree of disruption which is constitutionally tolerable is "augmented by the important interests that the Act seeks to obtain."[110]

Employment discrimination is clearly a matter of great public importance that Congress can address through legislation.[111] The importance of the public policy in favor of equal employment opportunity is not diminished by applying the principle to the employment practices of the national legislature. Some proponents of applying antidiscrimination law to Congress argue that such action will promote public respect for Congress by demonstrating its willingness to live under the laws it applies to the rest of the Nation.[112] Arguably, this would enhance rather than detract from Congress' Article I functioning.

Whether Congress' constitutional functioning is enhanced or disrupted is for Congress to determine initially by choosing or refusing to enact equal employment opportunity legislation applicable to its own employees. "Only when the potential for disruption is present," said the Court in *Nixon,* "must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."[113] It seems highly unlikely that the Supreme Court would strike down, as repugnant to the separation of powers doctrine, a carefully and

[106] See text accompanying notes 29–57 in chapter 4, discussing the appointments clause.

[107] 202 U.S. 344 (1906).

[108] *Id.* at 366–67. In particular, the Court concluded that criminal conviction of the Senator in no way impaired the power of the Senate to independently punish or expel him. *Id.* at 367. Similarly, the ability of Congress to independently punish or expel Members found by a court or agency to have violated equal employment opportunity legislation would not be impaired.

[109] Davis v. Passman, 442 U.S. at 249 (Burger, C.J., dissenting, joined by Powell and Rehnquist, J.J.):

> At this level of government—staff assistants of Members—long accepted concepts of separation of powers dictate, for me, that *until Congress legislates otherwise as to employment standards for its own staffs,* judicial power in this area is circumscribed.

Id. at 250 (emphasis added).

Cf. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 501–02 (1977) (Powell, J., concurring in part and concurring in the judgment).

[110] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 446 (1977).

[111] Sixty-five public laws and Executive orders mandating equal employment opportunity were in effect as of the summer of 1978. General Accounting Office, *A Compilation of Federal Laws and Executive Orders for Nondiscrimination and Equal Opportunity Programs,* HRD 78-138, Aug. 2, 1978, appendix I.

[112] To Eliminate Congressional and Federal Double Standards: Hearings on S. 1112 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess. 2, 3, 4 (1979) (statement of Senator Leahy); *id.* at 8 (statement of Senator Cohen).

[113] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

deliberately considered scheme of congressional self-regulation that invoked the assistance of the executive branch and the courts in a manner and to an extent that Congress explicitly declared to be necessary and not unduly disruptive of its legislative or other constitutional functions. Thus, while the design of a statutory equal employment opportunity scheme for legislative branch employees may have constitutional implications beyond the speech or debate clause, the choice as a practical matter may be more a question of policy than of law.

3. Covering Key Congressional Aides and Advisors

Based on the speech or debate clause analysis in chapter 2, it appears that all congressional employees under *Davis v. Passman* [1] have at least a cause of action for damages against individual Members for unconstitutional discrimination even if Congress passes no new law. As noted in chapter 1, however, this damage action would be difficult to maintain.

The enactment of a comprehensive congressional equal employment opportunity scheme can overcome these litigation problems. But providing for a greater level of judicial and executive involvement in congressional employment relations than was involved in *Davis* may cause the Supreme Court to limit its holding that the speech or debate clause is coextensive with the separation of powers doctrine. The "undue disruption" standard addresses separation of powers concerns respecting broader issues of coordinate branch integrity and is applicable beyond the scope of speech or debate analysis. Chapter 2 concluded that, as a practical matter, whatever enforcement and remedial authority Congress chooses to give the other branches would answer any separation of powers questions.

The issue then becomes whether all or only some legislative branch employees should be covered by such a statute.

The work performed by the great majority of employees of congressional committees, various service units, and Member staffs, and the employment relations within these congressional operations, differs little from comparable jobs and employment relations in the executive branch, State and local governments, and the private sector, nearly all of which are covered by Title VII.[2] These employees are not as directly and intimately involved in legitimate legislative functions as principal policy-making advisors. Generally they are not selected and hired primarily for their political savvy and know-how, but for certain skills less directly related to the legislative process. They are often hired, not by individual Members themselves or congressional committees, but by top staff assistants or quasi-bureaucratic structures that have responsibility for such hiring. Because many jobs in congressional service units are not closely tied to electoral changes, such employees are more likely to hold their positions for time periods not related to election year results. It is difficult to maintain that allowing executive and judicial enforcement of Title VII rights and remedies with respect to employees not directly and personally involved with the legislative process would unduly encroach upon Congress' constitutional functions.

Moreover, in the Commission's judgment, any disruption of the legislative process that might result from extending Title VII to these employees would be outweighed by the important and valid constitutional and policy objectives served by such a law.

The issue of whether executive or judicial branch enforcement of an equal employment statute would raise separation of powers problems is more acute, however, with regard to positions occupied by principal staff members who directly assist Members in legislative duties. Most Members and congressio-

[1] 442 U.S. 228 (1979).

[2] See discussion of exceptions to Title VII coverage in chapter 1, *supra.*

nal committee staffs have aides and advisors who personally and directly assist Members in legislative policymaking decisions. The work of such principal aides and advisors is often an important contribution to a Member's legislative functioning. Such advisors are intimately involved in legislating, are generally hired and fired by Members themselves, are expected to be sensitive and responsive to political considerations, and are generally employed only for as long as the Member for whom they work is in office. Including such advisors in a statutory employment scheme creates a potential for disruption of the legislative process and has constitutional implications that are not easily resolved.

The Commission has taken the position, and will continue to do so, that equal employment opportunity should be afforded to all persons regardless of their race, color, national origin, gender, religion, handicap, or age.[3] Legislative branch employees, including principal aides and advisors, are no different from other workers in that they, too, have a right to be free from illegal discrimination in their employment.

Because of the potential for encroachment on the functioning of Congress, the question of whether executive or judicial agencies should be given authority to vindicate the rights of these principal advisors is a difficult one. The Commission is sensitive to the close professional rapport and personal respect that generally exists between Members and their principal staff advisors and recognizes it as an aspect of the legislative process that bears directly on the ability of Members to perform their duties and affects the constitutional functioning of Congress. While these legislative advisors do have a right to equal employment opportunity under the Constitution and the rules of both Houses,[4] it is arguable that any involvement by the executive and judicial branches in enforcing these rights might impermissibly disrupt legislative functions. Even the threat of remedial intrusion by the two other branches might be sufficient to disrupt the Article I responsibilities of Congress.

The question that must be answered, then, is whether, and to what extent, involvement by the executive and judiciary in Congress' ability to select its principal policymaking staff members would be unduly disruptive of its constitutional functions. This is a question of fact and of degree—whether such involvement does, in fact, encroach on Congress' functions, and whether such encroachment is sufficiently disruptive to impair these functions. This involvement must then be balanced against the constitutional policy objective of eliminating all employment discrimination.

In determining whether invoking the aid of the other branches in extending Title VII to legislative employees would be impermissibly disruptive, two congressional functions under the Constitution must be considered: Congress' right to regulate its internal affairs and discipline its Members and Congress' responsibility to legislate. As a matter of law, such involvement by the executive and judiciary would not interfere with Congress' ability to regulate its own affairs, as applying Title VII to its own employees would be considered an exercise of Congress' self-disciplinary power and the involvement of the other branches merely an aid to enforcement of congressional will. Congress' right to discipline its Members would not be infringed by extending Title VII. Such a statute would merely provide concurrent jurisdiction and not preempt Congress' disciplinary rights under the Constitution.[5]

The question of whether enforcement of Title VII would encroach upon the legislative function of Congress is inherently a factual determination, and the Commission recognizes that Congress is best able to determine whether, as a matter of fact, its principal staff advisors should be covered by Title VII. In the past Congress has seen fit, albeit without extensive discussion of the issue, to exempt certain employees from Title VII who work in legislative and political institutions comparable to Congress at the State and local level. Section 701(f) exempts the "personal staff" of State and local elected officials.[6]

[3] Congress should keep in mind the distinction between *lawful* employment discrimination on the basis of political ideology and *unlawful* employment discrimination on the basis of race, sex, religion, national origin, or religion. See Branti v. Finkel, 48 U.S.L.W. 4331 (Mar. 31, 1980).

[4] U.S. Const. amend. V; Senate Rule L; Rules of the House, Rule XLIII, cl. 9.

[5] *See* Burton v. United States, 202 U.S. 344, 366–67 (1906).

[6] Section 701(f), 42 U.S.C. §2000e(f) (1976) states:

> (f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any state or political subdivision of any state by the qualified voters thereof, or *any person chosen by such officer to be on such officer's personal staff,* or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to civil service laws of a state government, governmental agency or political subdivision. [emphasis added]

What eventually became section 701(f) was introduced on the Senate floor by Senator Sam Ervin. *See, e.g.,* 118 Cong. Rec 4483 (1972). In response to

The White House Office, which is also comparable to Congress in the sensitivity of its political functions, is neither clearly included nor excluded from Title VII.[7] President Carter, however, has decided that Title VII applies to the White House Office, but does not cover "those positions. . .which are filled by individuals serving as close advisors to the President and Vice President."[8] In both of these instances, however, there is no indication that either Congress or the President considered the competing constitutional and policy considerations discussed in this chapter when reaching their decision.

To the extent that there are constitutional problems with applying Title VII to principal staff aides, however, Congress can work to minimize the problems it identifies. If Congress decides that certain remedies, certain procedures, or certain enforcement agencies[9] are potentially more intrusive than others, it can tailor them as necessary or choose the least disruptive option.[10] Regardless of the type of protection agreed upon, if Congress ultimately decides to grant its policy advisors statutory coverage, its decision would be accorded great deference by the courts in the face of a subsequent challenge based on the separation of powers doctrine.[11] As a practical matter, any congressional determination as to whether or not to cover its principal aides will probably resolve any separation of powers issues; it remains to Congress to decide whether it can resolve those factual problems that it finds. Regardless of what Congress decides as to its principal aides, however, it can and should take legislative action to guarantee equal employment opportunity to that much larger class of congressional employees not intimately involved in the legislative process.

exchanges with Senators Harrison Williams and Jacob Javits, Senator Ervin added the phrase "or any person chosen by such [an elected] officer to be a *personal* assistant" to his amendment (emphasis added). The relevant part of that exchange is as follows:

> Senator Williams: . . .The second degree relates to other people who are covered. That is basically the purpose of the amendment, to exempt from coverage those who are chosen by the Governor or the mayor or the county supervisor, whatever the elected official is, and who are in a close personal relationship and an immediate relationship with him. Those who are his first line of advisers. Is that basically the purpose of the Senator's amendment?
>
> Senator Ervin: . . .I would say to my good friend from New Jersey that that is the purpose of the amendment. I feel that those elected officials who are legal advisers or who are personal assistants or legal advisers, as to how he should exercise his constitutional, legal rights and responsibilities, should also be exempt. That is the purpose of the amendment, yes.
>
> Senator Javits: . . .Mr. President, I trust that it will be satisfactory and I join with the Senator from New Jersey (Mr. Williams) in the proposal. However, I want to be sure that we have no difference of opinion as to what it means. . . .
>
> I have no desire to argue about the fine points of some particular appointment, *but generally speaking we consider a personal assistant as being a secretary or, as I have, an administrative assistant, a legislative aide, and then a mayor may have four assistants.*
>
> So that is what we would understand a personal assistant to be. "A secretary," of course, is an accurate designation. He may have two or three secretaries. Important people have more than one. . . .
>
> So, if we understand each other on that score, this is entirely satisfactory to me. Do I understand correctly, then, that we agree on this?
>
> Senator Ervin: . . .Yes. In other words, I think that the change that has been made makes it clear. I recognize that language sometimes is difficult to write, so that it may properly express ideas intended to be expressed. However, the suggested change would, I think, express our objective in accordance with what the Senator would expect.

118 Cong. Rec. 4492-93 (emphasis added). Senator Ervin's amendment was then adopted by the Senate by a vote of 69-2, 118 Cong. Rec. 4494 (1972) and the bill was forwarded to conference.

The House had voted not to extend Title VII to cover State and local employees. The conference committee, after explaining the Senate's decision to extend Title VII to State and local governments with Senator Ervin's exception to this extension, then modified the exception to its present form as it appears in §701(f). This changed the exception from "personal assistants" to elected officers to "personal staff" of elected officers. Equal Employment Opportunity Act of 1972, Conference Report, S. Rep. No. 92-681, 92d Cong., 2d Sess. 15 (1972). The conference committee stated in relevant part: "It is the intention of the conferees to exempt elected officials and members of their personal staff. . . .It is the conferees' intent that this exemption shall be construed narrowly." *Id.* at 15-16. The exemption explicitly excludes those employees subject to civil service laws.

[7] 42 U.S.C. §2000e(16)(a) (1976).

[8] Letter from Douglas B. Huron, Senior Associate Counsel to the President, to Eileen M. Stein, General Counsel, U.S. Commission on Civil Rights, May 1, 1980.

[9] In weighing the relative merits of purely internal and external enforcement mechanisms, certain constitutional considerations affecting the efficacy of the remedies should be reviewed. See chapter 4, *infra.*

[10] Congress should note that, even if a statute were enacted covering top aides, a qualified good faith immunity based on a constitutional privilege founded on Article I may be available where a Member can show that a particular employment decision was necessary to preserve his or her effective functioning in the legislative process. *Cf.* United States v. Nixon, 418 U.S. 683 (1974) (recognition of a qualified executive privilege which is fundamental to the operation of government); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977) (executive privilege exists for the benefit of the Republic and the incumbent President may assert it within its recognized scope).

[11] See discussion of the undue disruption standard in chapter 2, *supra.*

4. Principal Constitutional Prerequisites to Judicial and Administrative Enforcement

Chapter 2 concluded that the separation of powers issues that arise when extending equal employment opportunity rights to legislative branch employees could most probably be resolved by a deliberately considered scheme which clearly articulated a congressional determination that coordinate branch involvement was required and would not unduly disrupt Congress' constitutional functioning. With the possible exception of top congressional aides and advisors, therefore, the Constitution presents no insurmountable barriers prohibiting Congress from making its employment practices subject to the same equal opportunity obligations as are the practices of other employers. To do so requires only congressional action.

There are, however, diverse methods by which Congress could pursue such a course. The conceivable variety of enforcement schemes that are available to implement any congressional equal employment opportunity plan precludes their presentation in this report.[1] While the choice of method is essentially a question of policy, there are constitutional principles and consequences that are involved and must be considered when deciding which approach to adopt. This chapter discusses those constitutional issues that accompany the key initial decision of whether to provide equal employment opportunity statutorily or by congressional rule. These issues concern constitutional requirements that must be complied with if there is to be judicial or administrative enforcement of whatever rights are created.

Rules and Statutes

Congress may provide for the regulation of its internal affairs, which includes providing equal employment opportunity rights to congressional employees, by either rule or statute. It is this initial decision of whether to require equal employment opportunity by rule or by statute that delimits the principal boundary separating the possible methods by which Congress may create equal employment opportunity rights for its employees.[2]

Article I, §5, cl. 2, of the Constitution provides that: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and with the Concurrence of two-thirds, expel a Member." It was pursuant to this constitutional rulemaking authority that both the House and the Senate adopted the rules prohibiting employment discrimination that currently operate.[3]

[1] Beyond the threshold issue of how to extend equal employment opportunity rights to congressional employees are additional substantive questions concerning the nature and scope of the right to be created and the procedures required to enforce those rights. The ultimate effectiveness of any plan designed to afford protections to congressional employees will, in large part, depend upon the authority of the entity designated to administer the plan and the procedures available for employees and applicants to press their claims in the courts.

[2] This is not to suggest that enacting legislation and creating congressional rules are mutually exclusive. A dual system under which Congress maintains independent authority to punish its Members for discriminatory employment practices and employees can seek relief for the violation of a statute that prohibits the same behavior is permissible.

[3] House Rule XLIII, cl. 9, was adopted by H.R. Res. 5, 94th Cong., 2d Sess. 20 (1975). See Jefferson's Manual & Rules of the House of Representatives, H.R. Doc. No. 95-403, 96th Cong., 1st Sess. §939 (1979) (hereafter cited as "Rules of the House"). Senate Rule L was adopted by S. Res. 110, 95th Cong., 1st Sess., 123 Cong. Rec. S5396 (1979). See chapter 1 for discussion of these rules.

Rules are adopted separately by each House upon the passage of a simple resolution by majority vote.[4] The scope of congressional rules is, therefore, limited to matters exclusively within the jurisdiction of either House.[5] Consequently, legislative branch employees who are not considered employees of the House of Representatives or of the Senate are probably not subject to antidiscrimination rules.[6]

Within this rulemaking framework Congress has the greatest latitude. The Constitution explicitly links Congress' rulemaking power with its power to punish its Members.[7] It is, therefore, possible for Congress to establish by rule internal administrative procedures and mechanisms to enforce its substantive rules:

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house. . . .The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house. . . .[8]

Pursuant to this authority both Houses of Congress have established committees to investigate Member misconduct and make findings and recommendations to their respective Houses.[9] Under this constitutional housekeeping provision, punishment can include either censure or expulsion of a Member.[10] Congress has also recently developed other less harsh measures for disciplining its Members that include fines, loss of committee chairmanships, reprimands, and denial of the right to vote.[11]

Thus, a purely internal regulatory scheme created by the congressional rulemaking power is possible, at least with respect to employees of each House. Nevertheless, a decision to bring congressional employees within the ambit of antidiscrimination protections by rule, as contrasted with adopting such a plan by enacting legislation, is not merely a matter of form but has significant substantive legal consequences as well. These consequences need to be considered from a policy and legal perspective.

The distinction between congressional rules and statutory law is most pronounced with respect to enforcement issues. These enforcement considerations concern, first, the effectiveness of any congressional self-enforcement by rule and, second, the availability of judicial review.

The ability of Congress to maintain an effective internal procedure for adjudicating allegations of discrimination against its Members has been seriously questioned.[12] The history of congressional restraint when policing its own Members portends less than rigorous enforcement of any internally administered and enforced equal employment opportunity program. Congress has only reluctantly and infrequently used its self-disciplinary authority. Over the course of Congress' almost 200-year existence, only 7 Senators, 19 Representatives, and 1 territorial delegate have been formally censured for misconduct and 15 Senators and 3 Representatives expelled.[13] Moreover, this congressional reluctance may well reflect, as the Supreme Court has noted, an inherent institutional disability:

> Congress is ill-equipped to investigate, try and punish its members for the wide range of behavior that is loosely and incidentally related to the legislative process. In this sense, the English analogy. . .[is] inapt. Parliament is itself "The High Court of Parliament"—the

[4] Riddick, Senate Procedure, S. Doc. No. 93-21, 93rd Cong., 1st Sess. 775 (1974) (hereafter cited as "Senate Procedure"); Rules of the House, *supra* note 3, §508.

[5] Senate Procedure, *supra* note 4, at 769; Rules of the House, *supra* note 3, §§686(a) and (b).

[6] Both House Rule XLIII and Senate Rule L, *supra* note 3, use the phrase "Member, officer, or employee" of the House and Senate, respectively. House Rule XLIII, cl. 11, defines the phrase as follows:

> As used in this Code of Official Conduct of the House of Representatives—(a) the terms "Member" and "Member of the House of Representatives" include the Resident Commissioner from Puerto Rico and each Delegate to the House; and (b) the term "officer or employee of the House of Representatives" means any individual whose compensation is disbursed by the Clerk of the House of Representatives.

Rules of the House, *supra* note 3, §939(11). *See also* Senate Comm. on Governmental Affairs, Lee Metcalf Fair Employment Relations Resolution, S. Rep. No. 729, 95th Cong., 2d Sess. 9-10 (1978). Employees of some administrative service units, such as the Congressional Budget Office, are statutorily designated to be considered employees of the House of Representatives for purposes of determining employment rights. 2 U.S.C. §601(b)(1976). *Cf.* 5 U.S.C. §2107 (1976) (statutory definition of a congressional employee).

[7] U.S. Const. art. I, §5, cl.2.

[8] United States v. Ballin, 144 U.S. 1, 5 (1892).

[9] House Committee on Standards of Official Conduct; Senate Select Committee on Ethics.

[10] U.S. Const. art. I, §5.

[11] *Congressional Quarterly's Guide to Congress*, 681-714 (2d ed. 1976).

[12] *See* To Eliminate Congressional and Federal Double Standards: Hearings on S. 1112 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess. 77 (1979) (testimony of Althea Simmons, director, Washington Bureau of the National Association for the Advancement of Colored People) (hereafter cited as "Senate Hearings").

[13] *Congressional Quarterly's Guide to Congress*, *supra* note 11, at 703.

> highest court in the land—and its judicial tradition better equips it for judicial tasks.[14]

The Court also said that "the independence of individual members might actually be impaired" if Congress "[took] on itself the responsibility to police and prosecute the myriad activities of its Members related to but not directly a part of the legislative function."[15] The Court articulated an important concern when it questioned the assumption that internal congressional self-enforcement of its rules "would be wholly objective and free from consideration of party politics and the passions of the moment."[16]

In addition to the difficulties with internal enforcement, congressional rules cannot be enforced externally by the courts.[17] The restrictions on judicial enforcement of congressional rules are twofold. First, a statute describing the cause of action is required to establish jurisdiction in the Federal courts.[18] Second, even a statute cannot extend the jurisdiction of the courts beyond the limitations on jurisdiction established by the Constitution.[19] The Constitution requires that legislative branch equal employment opportunity protections be statutorily provided if judicial review is to be available. Neither a rule that itself explicitly provides for judicial review nor a separate statute granting jurisdiction to enforce congressional rules would evade constitutional prohibitions.

Federal courts are courts of limited jurisdiction. They may exercise only that judicial power provided by the Constitution in Article III and conferred by Congress.[20] Article III, §2, which provides the scope of jurisdiction Congress may give the courts, states in pertinent part:

> The judicial power shall extend to all cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made. . . .

Congressional rules are not "law" as that term is used in the Constitution and understood by Congress. The Framers of the Constitution used the term "law" to describe the end result of a legislative process whereby a bill must be passed by a majority of the Members of a bicameral legislature and then be presented to the President for approval.

The bill then becomes law if the President approves and signs the bill or, if disapproved, upon

[14] United States v. Brewster, 408 U.S. 501, 518 (1972).

[15] *Id.* at 519.

[16] *Id.* at 519–20.

[17] See notes 18–20 and accompanying text, *infra.* While the courts could not enforce congressional rules, judicial review of allegations that the employment practices of a Member of Congress were unconstitutional would, nevertheless, be available under Davis v. Passman, 442 U.S. 228 (1979). In the recent case of Carlson v. Green, 100 S. Ct. 1468 (1980), the Supreme Court set out the rules that control the continuing availability of a *Bivens*- type action in the presence of possible alternatives. *Carlson* involved a *Bivens*- type action, based on the provision against cruel and unusual punishment contained in the eighth amendment, which would also have been supportable in a suit brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2680(h) (1976). The suit was brought on behalf of the estate of a deceased former Federal prisoner alleging that personal injuries which the prisoner suffered and from which he died resulted from the defendant's deliberate indifference to the prisoner's serious medical needs. The Court in *Carlson* stated that judicially implied causes of action directly under the Constitution survive the availability of alternative legislative means of redress with but two limited exceptions. Litigation by congressional employees patterned after Davis v. Passman would remain available unless either, (1) there exist "special factors counselling hesitation," or (2) Congress were to provide "an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Id.* at 1472. As the Court in Davis v. Passman noted, a suit against a Member of Congress alleging unconstitutional actions undertaken in the course of official conduct "does raise special concerns counselling hesitation," but held that "these concerns are coextensive with the Speech or Debate Clause." 442 U.S. at 246.
Under the second test advanced by *Carlson,* Congress can itself obviate *Davis v. Passman, Bivens*- type actions. The procedure by which Congress could statutorily foreclose *Bivens*- type actions in the congressional employment context remains to be elaborated by cases that implement the holding in *Carlson.* Two conclusions, nevertheless, seem apparent. First, any purely internal scheme established by rule to protect employees of the Congress from discriminatory personnel practices would not foreclose independent judicial consideration of a claim based directly on the Constitution. Secondly, litigation under *Bivens* can only be averted by a statute that is explicitly intended to replace the constitutional remedy and that is equally as effective. It is unclear from *Carlson* whether the determination of the equivalent effectiveness of any alternative is solely a congressional prerogative. The inquiry undertaken by the Court in *Carlson,* however, reveals some of the criteria by which equivalent effectiveness is to be judged. The Court found four factors supporting its view that the FTCA could not be considered as effective an avenue of redress as a constitutional claim. Three of those factors are relevant to any consideration of exclusive remedies in the area of congressional employment. First, the Court found the *personal accountability* of a defendant in a *Bivens*- type action to be a more effective deterrent than the remedy against the sovereign provided by the FTCA. Additionally, the Court found that the unavailability of either *punitive damages* or a *jury trial* in a suit brought under the FTCA made it a less effective method of vindicating constitutional rights and hence not a possible substitute for litigation brought directly under the Constitution. 100 S. Ct. at 1473–74.

[18] Powell v. McCormack, 395 U.S. 486, 512–13 (1969), quoting Baker v. Carr, 369 U.S. 186, 198-99 (1962); Senate Select Committee v. Nixon, 366 F. Supp. 51, 61 (D.D.C. 1973). *Cf.* Pallmore v. United States, 411 U.S. 389 (1973) (statutory grant of jurisdiction to the courts of the District of Columbia); Kline v. Burke Construction Co., 260 U.S. 226 (1922) (rejection of Federal court power to enjoin State court proceedings absent a statute conferring jurisdiction). The present "Federal question" jurisdiction statutes are insufficient to permit judicial review of claims that a congressional rule has been violated. Section 1331 of Title 28 of the U.S. Code in relevant part requires that an action arise under the "Constitution, laws, or treaties of the United States." To be cognizable under section 1343(4), the action must be authorized by "law" and, additionally, must seek relief for the deprivation of rights protected by an "Act of Congress." The essential question, likely to be answered in the negative, would be whether the term "law" contained in those statutes encompasses a resolution adopted by a single House of Congress. See text accompanying notes 19–23, *infra.*

[19] Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

[20] See note 18, *supra.* All other judicial power or jurisdiction is reserved to the States.

consideration and passage by a two-thirds vote of each House of Congress.[21] That the Framers intended this legislative process to be the sole means of creating law is reinforced by Article I, §7, cl. 3, which states:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

This provision of the Constitution has never been construed by the Supreme Court. However, in 1897, the Senate Judiciary Committee construed the word "necessary" as referring "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses; and every resolution not so requiring such concurrent action, to wit, not involving the exercise of legislative powers, need not be presented to the President."[22]

This narrow construction of the legal effect of congressional rules is also supported by congressional precedent. Riddick on *Senate Procedure* states: "In response to a parliamentary inquiry the Chair stated that a Senate resolution has no legal effect but is used in dealing with nonlegislative matters exclusively within the jurisdiction of the Senate."[23]

This is not to say that congressional rules are ignored by the courts. When the jurisdictional basis for decision has been otherwise provided, courts have construed congressional rules and held that congressional action must conform to their dictates. For instance, the Supreme Court has reversed convictions for contempt of Congress when the alleged contempt occurred before congressional committees that failed to follow procedures established by rule and thereby prejudiced the defendant.[24] In no case, however, has a court found jurisdiction to lie solely on the basis of a violation of a rule.[25] Equal employment opportunity rights conferred by congressional rule are, therefore, not likely to be enforceable by the judiciary until they are enacted into statutory law.[26]

Judicial review of a statutory equal employment opportunity scheme could easily be provided without constitutional problems. The only questions

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[21] U.S. Const. art. I, §7. A bill may also become law 10 days after being presented to the President without his signature so long as Congress has not by adjournment prevented its return. If Congress has adjourned, the President by "pocket veto" can prevent its becoming law.

[22] Senate Procedure, *supra* note 4, at 765.

[23] *Id.* at 769. Similarly, Riddick also states:

> Concurrent resolutions are not used for the purpose of enacting legislation and are not binding or of legal effect and are not presented to the President of the United States for his approval, but would be required to be presented to him only if they contained matter which is properly regarded as legislative in character and effect.

Id. at 278. *See also* Rules of the House, *supra* note 3, at §§396–97. Joint resolutions, however, are signed by the President and have the force and effect of law. Senate Procedure, *supra* note 4, at 162–63.

[24] Yellin v. United States, 374 U.S. 109 (1963); Christoffel v. United States, 338 U.S. 84 (1949). *See also* United States v. Smith, 286 U.S. 6 (1932). Congressional requests that the judiciary enforce contempt citations against third parties for actions relating to proceedings held in violation of congressional rules entail different jurisdictional considerations than those raised if the courts were directly requested to enforce congressional compliance with legislative rules. Nevertheless, if in a particular employment discrimination case, jurisdiction is established under *Davis v. Passman*, see note 17, *supra*, courts will likely look to existing rules as expressions of congressional understanding regarding the behavior of its Members. Christoffel v. United States, 338 U.S. at 87–89. *Cf.* Davis v. Passman, *supra* note 17, at 243–44 n.21 (rules acknowledged but reviewed as ineffective.)

[25] In Senate Select Committee v. Nixon, 366 F. Supp. 51 (D.D.C. 1973), the district court held, *inter alia*, that a congressional rule was legally insufficient to provide jurisdiction. *Id.* at 56 n.8. There, the Senate Select Committee sought relief as to the validity of two subpenas issued against the former President and asserted as the basis of jurisdiction 28 U.S.C. §1345, which grants the district courts "jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by an agency or officer thereof expressly authorized to sue by Act of Congress." The court noted the related statutory provision, 28 U.S.C. §516, which establishes the Department of Justice as the representative of the United States in litigation:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party, or is interested and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. §516 (1976).

The Select Committee asserted that it was empowered to bring suit on behalf of the United States as authorized by a resolution of the Senate, which states in relevant part;

> [A]ny committee of the Senate is hereby authorized to bring suit on behalf of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers invested in it or the duties imposed upon it. . . .

S. Res. 262, 70th Cong., 1st Sess. (1928).

The district court rejected the Committee's contention, noting, *inter alia*, that section 516 required exceptions to its operations to be "authorized by law" and stated that "[a]lthough the question has never been specifically litigated, it seems apparent that 'law' in §516 would not include a legislative action of the sort represented by S. Res. 262." The court concluded that "the term law does not normally encompass within its definition [a] resolution. . . ." 366 F. Supp. at 56 n.8. The court's decision was most importantly premised on its finding that the resolution in question was not intended to provide jurisdiction, but rather to grant standing to the committee when jurisdiction was otherwise provided.

[26] Rules issued by executive branch agencies do have the force and effect of law and are enforceable when promulgated pursuant to a specific statutory delegation of legislative authority. Chrysler Corp. v. Brown, 441 U.S. 281, 295–96, 304 (1979).

would concern the scope, timing, and parties able to seek such review.[27]

Appointments Clause Considerations

If a statutory scheme were enacted, the appointments clause of the Constitution[28] would require that any agency responsible for the administration of that law be headed by an official appointed by the President. This requirement is based on the separation of powers doctrine that actions entailing executive power be vested in the executive branch. It need not, however, prevent Congress from placing administrative responsibility in an agency with which it has a structurally and functionally close relationship.

The case of *Buckley v. Valeo* [29] establishes some of the limits of congressional control over an administrative enforcement agency. In *Buckley* the Supreme Court resolved a constitutional challenge to a Federal statutory scheme regulating political campaigns.[30] The challenge included a constitutional attack, based on the appointments clause, on the statutorily prescribed composition of the Federal Elections Commission (FEC).[31]

The appointments clause grants the President the power to nominate and, with the advice and consent of the Senate, to appoint all officers of the United States whose appointments are not otherwise provided for by the Constitution. The appointments clause also permits Congress to vest the appointment of such inferior officers as it thinks proper in the President alone, in the courts, or in the heads of departments.

Any inquiry into the strictures of the appointments clause must of necessity be undertaken in the context of the fundamental principles of our tripartite system.[32] As the Court in *Buckley* stated, "the term 'Officers of the United States' must be construed within the doctrine of separation of powers."[33] While the Constitution contemplates neither a total separation nor a "hermetic" sealing off of the three essential branches, they are and must remain separate and distinct:

> [T]he rule is that. . .Congress should exercise the legislative power, the President. . .the executive power, and the Courts. . .the judicial power. . .[I]t is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power.[34]

Congress can create agencies supportive of itself, the members of which need not be appointed by the President. So long as an agency performs only legislative, and neither executive nor judicial functions, its composition is unaffected by the dictates of the appointments clause. Congress, *Buckley* held, might create and appoint the members to an agency that has "those powers which Congress might delegate to its own committees."[35] Such an agency would operate "in aid of congressional authority to legislate" and, if "sufficiently removed from the administration and enforcement of public law," its administrative directors would not be held "Officers of the United States."[36]

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[27] Permitting individual causes of action, class suits, independent *de novo* judicial review, and additional independent remedies or requiring exhaustion of certain administrative procedures are among various questions concerning the scope and timeliness of judicial review that Congress may wish to address when adopting such a plan. Moreover, even if Congress fails to address such issues statutorily, there exist various judicially created rules that the courts themselves can use to resolve these questions. *See, e.g.,* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Brown v. Gen. Servs. Administration, 425 U.S. 820 (1976); Cort v. Ash, 422 U.S. 66 (1975); Fed. R. Civ. P. 23.

[28] U.S. Const. art II, §2, cl. 2.

[29] 424 U.S. 1 (1976).

[30] The statutes attacked included the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.) *as amended by* the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.); I.R.C. §§6096, 9002-90012, *as amended by* the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§403-406.

[31] The Commission was to have consisted of eight members. Of the six voting members, two each were to be appointed by the Speaker of the House of Representatives and the President *pro tempore* of the Senate upon the recommendation of the majority and minority leaders of the respective Houses. The two remaining voting members were to be Presidential appointees. 424 U.S. at 113. The questioned statute vested the FEC with recordkeeping, disclosure, and investigative functions and also extensive rulemaking and adjudicative powers. The adjudicative and rulemaking functions that the statute attempted to vest in the FEC were similar to those exercised by the Equal Employment Opportunity Commission under its authority to administer Title VII. The FEC was authorized to promulgate regulations, formulate general policy, issue advisory opinions, initiate civil actions, and make findings of violations. *Id.* at 109-13. The Supreme Court permitted the FEC to continue to exercise its investigative and informative functions as they were in support of legislative activity and, therefore, did not require compliance with the appointments clause. *Id.* at 142. The Court denied the FEC its authority to exercise its broad administrative powers. *Id.* at 140.

[32] The Court cited Art. I, §1, which vests legislative power in the Congress; Art. II, §1, which vests the executive power in the President, Art. III, §1, which vests the judicial power in the courts; and the ineligibility and incompatibility clauses in Art. I, §6, as the cognate constitutional expressions of the separation of powers doctrine. 424 U.S. at 124.

[33] 424 U.S. at 119.

[34] *Id.* at 121-22 (quoting from Hampton & Co. v. United States, 276 U.S. 394, 406 (1927)).

[35] 424 U.S. at 137.

[36] *Id.* at 141. The Court stated that "[L]egislative power as distinguished

However, the Court concluded that "any appointee exercising significant authority pursuant to the laws of the United States must be appointed in the manner prescribed."[37] Members of an agency charged with administering and enforcing the laws of the United States are "Officers of the United States," and the appointments clause provides the exclusive method by which officers of the United States may be selected.[38]

The Supreme Court stated that the clause, and in particular the term "Officers of the United States," could not be understood merely as advancing a "frivolous purpose" "dealing with etiquette or protocol" but rather, when examined in the context of related constitutional provisions, was "intended to have substantive meaning."[39]

> That all persons who can be said to hold an office under the government. . .established under the Constitution were intended to be included within the one or the other of. . .[the two] modes of appointment [which the clause sets out] there can be but little doubt.[40]

There are no exceptions to the appointments clause. *Buckley* makes clear that application of the appointments clause is not dependent upon an agency's designated structural placement within any particular branch of government.[41] Rather, application of the clause is solely dependent on a functional analysis of the scope of the agency's operations. In sum, an agency with executive functions and responsibility for administering and enforcing the law is by definition headed by officers of the United States who must be chosen in the prescribed manner.[42]

The appointments clause textually specifies that its requirements apply only to those appointments that are not "otherwise provided for" in the Constitution. The Court, however, limited the applicability of any other possibly relevant constitutional provision, concluding that "there is no [other] provision of the Constitution remotely providing any alternative means for the selection of the members of the Commission or for anybody like them."[43]

The Court also refused to limit the applicability of the appointments clause merely because the substantive area of legislation is one in which Congress is granted explicit and plenary constitutional powers. The legislative authority to regulate elections, although both textually granted to Congress[44] and augmented by the provision that "[each] house shall

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from executive power is the authority to make laws." *Id.* at 139 (quoting from Springer v. Philippine Islands, 277 U.S. 189, 202 (1928)). The Court stated that "powers. . . .[which] are essentially of an investigative and informative nature" and "the power of inquiry—with enforcing powers—[because it is] a necessary and proper attribute" are encompassed within the legislative authority. *Id.* at 137–38 (quoting in part from McGrain v. Daugherty, 217 U.S. 137, 175 (1927)).

For example, the Congressional Budget Office, created by the Congressional Budget and Impoundment Control Act of 1974 (codified at 2 U.S.C. §§602–604 (1976)), is part of the informing machinery of the Congress providing that body, its committees and individual Members, with information pertaining to the budget, appropriations bills, revenues, receipts, and tax expenditures. 2 U.S.C. §602 (1976). The Director of the Congressional Budget Office has authority to secure information directly from agencies and Departments in the executive branch, 2 U.S.C. §601(d) (1976), and from agencies in the legislative branch. 2 U.S.C. §601(e) (1976). Consistent with the fact that the function of the Congressional Budget Office could have been delegated to a committee of either House, its director is not a Presidential appointee. The director is appointed by the Speaker of the House and the President *pro tempore* of the Senate after consideration of the Committees on the Budget from the House and Senate, 2 U.S.C. §601(a)(2)(1976), and may be removed by resolution of either House. 2 U.S.C. §601(a)(4)(1976).

The Office of Technology Assessment, established by the Technology Assessment Act of 1971 (codified at 2 U.S.C. §471 (1976)), provides information concerning "early indications of the probably beneficial and adverse impact of the application of technology and. . .develop(s) other coordinate information which may assist Congress. . . ." 2 U.S.C. §472(6)(1976). Again, because this office only serves to inform and advise the Congress, its director is not an officer of the United States who must be appointed by the President. The director is appointed by a technology assessment board for a term of 6 years unless prematurely removed by that board. 2 U.S.C. §474(a)(1976). The board is composed of the director, six members of the Senate appointed by the President *pro tempore* of the Senate, and six members of the House appointed by the Speaker of the House. 2 U.S.C. §474(a)(1976). The board is specifically authorized to issue subpenas for the attendance of witnesses and the production of documents. 2 U.S.C. §473(a)(1976).

[37] 424 U.S. at 126. The Court found considerable support for its holding in the intent of the Framers both as expressed in the debates during the Constitutional Convention and as evidenced by the evolution of the drafts of the Constitution during the course of that convention. *Id.* at 129–31. As the Court noted, "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the legislative branch of the national government will aggrandize itself at the expense of the other two branches." *Id.* at 129.

[38] *Id.* at 127.

[39] *Id.* at 125, 126.

[40] *Id.* at 125 (quoting from United States v. Germaine, 99 U.S. 508, 510 (1879)).

[41] The Court noted that officers of either chamber of Congress, such as the Clerk of the House, are elected pursuant to internal rules, and are statutorily designated as "Officers of Congress," but explicitly refrained from deciding whether such officers were also "officers of the United States" and thus subject to the requirements of the appointments clause. 42 U.S. at 128. The Court did state that nothing in the clause denies Congress "all power to appoint its own inferior officers to carry out appropriate legislative functions," making clear that applicability of the appointments clause is dependent only upon a functional analysis of the agency under consideration. *Id.*

[42] *Id.* at 140–41.

[43] *Id.* at 127. The Court also noted that the Constitution otherwise provides for the appointed selection of the President *pro tempore* of the Senate, Art. I, §9, cl. 5, and Speaker of House, Art. I, §2, cl. 5, and consequently found no conflict between such congressional power and the requirements of the appointments clause. *Id.* at 127–28. However, the Court refrained from determining whether such congressional officers are "Officers of the United States" whose appointment is otherwise provided for within the meaning of the clause. *Id.* at 128.

[44] U.S. Const. art. I, §4, confers on the Congress authority to regulate "the Times, Places and Manner of holding Elections for Senators and Representatives."

be the judge of the elections, returns, and qualification of its own members,"[45] was held insufficient to remove the selection of FEC membership from the constitutionally mandated process.[46] Similarly, the Court found no restriction of the scope of the appointments clause in either the 12th amendment's grant of "judicial" power to Congress to regulate practices in connection with presidential elections[47] or in the "necessary and proper clause" of Article I.[48]

Congress can, nonetheless, create an administrative agency, appointments to which are consistent with the appointments clause, and still retain considerable control over its operations. The appointments clause does not act to prevent Congress from protecting itself against excessive executive and judicial involvement in affairs intimately related to legislative functions. The possibility of providing equal employment opportunity rights to congressional employees by statute, while limiting executive involvement solely to the extent required by the appointments clause, is a viable option.

The Court referred to the General Accounting Office (GAO) as illustrative of the mandates of the appointments clause.[49] However, GAO is, perhaps, even more illustrative of the degree to which Congress can retain control of an agency administering programs concerning peculiarly legislative branch considerations and still conform to the appointments clause. GAO, created by the Budget and Accounting Act of 1921,[50] is statutorily designated an "agent of the Congress"[51] within the legislative branch, as an agency "independent of the executive departments."[52] Its chief administrative officer, the Comptroller General, is designated an "officer of the legislative branch"[53] and, while appointed by the President with the advice and consent of the Senate,[54] serves a single 15-year term[55] and can be removed prematurely only by impeachment or a joint resolution of Congress.[56] Moreover, the Comptroller General and his deputy are, by statute, directly responsible to Congress in the performance of their duties.[57] This unique close relationship to Congress is necessarily a consequence of GAO's main purpose of ensuring that congressional policy, as evidenced in appropriations bills and other legislation, is effectively implemented and administered by the executive branch.

GAO's independence of the executive branch was further enhanced by the enactment of the General Accounting Office Personnel Act of 1980.[58] The act requires the Comptroller General to establish by regulation an internal personnel system independent from the executive branch civil service system, but grants to GAO employees many of the same personnel rights as are enjoyed by their executive branch counterparts, including the right to be free from unlawful employment discrimination.[59] The self-contained administrative enforcement mecha-

[45] U.S. Const. art. I, §5.
[46] *See* 424 U.S. at 133.
[47] *Id.* at 134. U.S. Const. amend. XII provides that certificates of the votes of the electors be "sealed. . . .[and] directed to the President of the Senate" and that the "President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."
[48] *Id.* at 134–35.
[49] *Id.* at 128 n.165.
[50] 42 Stat. 20 (1921) (codified in scattered sections of 5, 6, 10, 14, 18, 28, 31, 34, 35, 39 U.S.C.). Numerous statutes enacted since 1921 have clarified GAO's functions and increased its program evaluation responsibilites substantially. *See, e.g.,* Government Corporation Control Act of 1945, ch. 557, §2, 59 Stat. 597 (codified at 31 U.S.C. §841 (1976)); Legislative Reorganization Act of 1946, ch. 753, Title II, 60 Stat. 837 (codified at 31 U.S.C. §60 (1976)); Accounting & Auditing Act of 1950, ch. 946, Title I, 64 Stat. 838 (codified at 31 U.S.C. §65 (1976)); Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1167 (codied at 31 U.S.C. §1301 (1976)); General Accounting Office Act of 1974, Pub L. No. 39-604, 88 Stat. 1962) (codified at 31 U.S.C. §53c (1976)); Energy Policy and Conservation Act of 1975, 89 Stat. 874 (codified at 42 U.S.C. §6201 (1976)).
[51] 31 U.S.C. §65(d)(1976).
[52] *Id.* at §41.
[53] *Id.* at §41 n.1. *But see* Brookfield Const. Co. v. Steward, 234 F. Supp. 94, 99–100 (D.D.C. 1964), *aff'd* 339 F.2d 753 (the Comptroller General has the status of a legislative officer and an executive officer).
[54] 31 U.S.C. §42 (1976).
[55] *Id.* at §43.
[56] *Id.* Since 1921 there have been only five Comptrollers General of the United States. F. Mosher, *The GAO: The Quest for Accountability in American Government* 65 (1979).
[57] 31 U.S.C. §§59–60 (1976).
[58] Pub. L. No. 96–191, 94 Stat. 27 (1980) (to be codified in scattered sections of 5, 31 U.S.C.).
[59] Section 3(a)(B) incorporates by reference 5 U.S.C. §2302(b), which includes the following antidiscrimination provisions:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not with respect to such authority—
>
> (1) discriminate for or against any employee or applicant for employment—
>
> (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);
>
> (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);
>
> (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));
>
> (D) on the basis of handicapping conditions, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791);
>
> (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation. . . .

Section 3(g) requires generally that all personnel actions be taken "without regard to race, color, religion, age, sex, national origin, political affiliation, marital status or handicapping condition."

nism for employment rights granted by the act and implementing regulations[60] provides an example of how Congress can comply with the appointments clause without sacrificing needed legislative branch independence.[61]

Generally, the administrative enforcement of Title VII is presently entrusted to the Equal Employment Opportunity Commission (EEOC), the officers of which are selected in conformity with Article II requirements. It would be constitutionally permissible to extend the jurisdiction of the EEOC so as to include congressional employment practices. However, should Congress desire to place the enforcement functions of a congressional equal employment opportunity program in an agency less independent of the Congress than EEOC, it would be equally permissible either to place administrative responsibility in GAO or to create a similar "agent of Congress" and grant to it the responsibility to administer and enforce such legislation.

[60] Administrative enforcement of Title VII rights is not given to the Equal Employment Opportunity Commission. Instead, the act establishes a five-member "General Accounting Office Personnel Appeals Board" appointed by the Comptroller General to make determinations and order corrective action with regard to, *inter alia,* complaints of employment discrimination. Sec. 4(h), 4(i). Appellate judicial review of Board decisions is explicitly provided for in the act. Sec. 4(h), 4(1). Apparently, the provision for appellate judicial review is not intended to eliminate any additional right of *de novo* judicial review granted by applicable antidiscrimination legislation. Sec. 3(g)(3). *De novo* judicial review of a discrimination claim arising under Title VII of the Civil Rights Act of 1964 is probably still available to GAO employees and applicants pursuant to section 717(c) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16(c)).

[61] Two sentences in the House committee report on the bill suggest that one consideration favoring the legislation was that committee's conclusion that the separation of powers doctrine precluded executive branch regulation of an "independent agency in the legislative branch." H.R. Rep. No. 96-494, 96th Cong., 1st Sess. 3-4 (1979). The Senate committee report on the bill makes no mention of the separation of powers doctrine, concluding only that "civil service laws governing such matters as appointments, classifying and grading positions, compensation, adverse action and appeals. . .do not readily accommodate the special needs of the GAO which arise from its unique status and responsibilities as an arm of Congress." S. Rep. No. 96-540, 96th Cong., 1st. Sess. 3, 4 (1979), *reprinted in* [1980] U.S. Code Cong. & Ad. News 344, 345, 346. The principal motivation for the legislation, however, was the need to eliminate an apparent and potential "conflict of interest" between GAO's specific mandate to oversee the operation of the civil service merit system and the regulation of GAO employment practices and personnel by executive branch personnel agencies. S. Rep. No. 96-540, *id.;* H.R. Rep. No. 96-494; *id.* at 2-3.

Conclusions

Title VII of the Civil Rights Act of 1964 defines unlawful employment practices, thereby creating various equal employment opportunity rights and obligations. The act also establishes procedures for enforcing this substantive law through executive and judicial action. Congress has amended Title VII to cover most employers and employees in the private sector, State and local government, and the Federal executive branch. It has not extended such coverage, however, to the staff of Members of Congress, congressional committees, and many legislative support units. As a result, most legislative branch employees lack the equal employment opportunity rights and protections afforded most other employees in the country. The need to cover such employees through legislation based on Title VII is supported by congressional and private surveys that have documented the disproportionately small numbers of minorities and women working at numerous positions in Congress. Both the Senate and House have passed antidiscrimination rules, but neither set of rules provides meaningful enforcement mechanisms.

Davis v. Passman held that any congressional employee may sue a Member of Congress for damages for unconstitutional employment discrimination. Constitutional litigation, however, is inherently difficult, time-consuming, and expensive. The presence of many unresolved problems in this area of law even further limits the effectiveness of constitutional litigation as a method of protecting legislative branch employees from employment discrimination.

One of the issues not resolved in *Davis* is whether the speech or debate clause would bar such litigation. According to the Supreme Court of the United States, the speech or debate clause protects only "legitimate legislative activities" from judicial or executive review. Supreme Court decisions make clear that congressional personnel decisions are not included within this category of activities unless taken by Member vote in committee. Even these votes, however, may be challenged by suits against congressional employees charged with implementing such decisions. Therefore, speech or debate clause immunity would not protect Congress from constitutional litigation challenging its employment practices.

If Congress enacts equal employment opportunity legislation based on Title VII covering legislative branch employees, separation of powers issues beyond speech or dabate may be raised by the nature and extent of judicial and executive involvement in congressional affairs. Such involvement by other branches in congressional personnel decisions would be unconstitutional if it "unduly disrupts" the constitutional functions of Congress. The essential judgment under this standard would be primarily factual in nature. As most congressional employees are not directly and personally involved in the legislative process, any potential disruption that might result from extending legislation based on Title VII to them is outweighed by the important constitutional policy goals served by the law.

Coverage of those principal staff members who are intimately involved in legislative policy formulation creates a greater potential for disruption. If Congress, after weighing the facts, decides to include these employees within a statutory plan

guaranteeing equal employment opportunity and providing effective remedies for victims of employment discrimination, as a practical matter its decision will resolve any separation of powers problems that may exist.

Congress can constitutionally choose among numerous methods for enforcing congressional equal employment opportunity rights. Granting such rights by statute is more likely to ensure that congressional employees are provided effective protections than if such rights were granted by rule. To conform with the requirements of the appointments clause of the Constitution, any agency responsible for the administration and enforcement of such statutorily established equal employment opportunity rights must be headed by an officer, or officers, appointed by the President. However, Congress can, consistent with the appointments clause, place responsibility for such administration and enforcement in an agency over which it has considerable control and protect itself from intrusive external involvement by the executive branch in legislative affairs.

Based on these conclusions, the Commission offers the following recommendations to assist Congress in choosing among the ways it may adhere to constitutional requirements, protect its institutional concerns, and secure equal employment opportunity for congressional employees.

Recommendations

1. Congress should enact a new provision in Title VII of the Civil Rights Act of 1964 to cover employees in the legislative branch modeled on §717 of Title VII.

a. This provision should establish a comprehensive and complementary scheme of administrative and judicial remedies and emphasize assistance for employees and informal conciliation.

b. Congress should designate a legislative agency headed by a Presidential appointee, such as the General Accounting Office, or create a new similarly constituted office, to administer this provision.

c. In carrying out its responsibilities under this new provision, the administering agency should follow judicial interpretations of Title VII, where applicable to the fact situation presented, in order to achieve a consistent and uniform body of equal employment opportunity law for all employers and employees covered by Title VII.

2. The Commission believes that all congressional employees should be guaranteed equal employment opportunities. With respect to positions occupied by the principal staff members who provide direct and personal assistance in the formulation of legislative policy to Members or to committees, however, special rules or procedures may be needed in connection with the implementation of the new provision. Congress should authorize the legislative agency administering the new provision to review these positions and determine whether such special rules or procedures must be developed.

3. The proper party defendant in any proceeding under the new provision should be the individual Member or head of the legislative unit who has control over the terms and conditions of employment at issue. All defendants should be liable only in their official capacity. Where committee authority over personnel practices of committee staff or service unit employees exists, such authority should be delegated to the committee chairman or an appropriate staff member in order to avoid any difficulties that might be posed by speech or debate clause immunity.

Additional Statement by Vice Chairman Stephen Horn

Affirmative Action in Congress

The legislative branch of the American government has various multifaceted operations. First, there are the *nonpolitical service functions* such as those conducted by the employees of the Library of Congress, the General Accounting Office, Congressional Budget Office, Office of Technology Assessment, the Architect of the Capitol, and similar entities. Second, there are the *politically administered housekeeping functions* which include the various administrative services—whether of a computer, custodial, or security nature—responsible either to the Secretary of the Senate; the Clerk, Doorkeeper, or Postmaster of the House; or the Sergeant at Arms of either body. Each of these principal officers is selected by the party in the majority in a particular chamber, but each is also expected to provide services satisfactory to all members. Third, there are the more *politically involved legislative and policy analysis functions*- -carried on by staffs which sometimes serve majority and minority separately and which seek to meet the needs of the members who serve on the various joint, standing, select, and special committees. In my opinion, there is no problem in extending a congressionally administered equal employment opportunity review system to employees who perform those three functions. Such a program must be wholly administered within the legislative branch. In a representative democracy, the legislative branch should never permit any of its personnel to be subjected to control by the executive branch.

But, there is a fourth category of legislative functions which I feel must be handled differently. These are the more *politically oriented constituent service and legislative analysis functions* performed by the congressional office staff whose continued employment depends on the political fortunes of a particular legislator. But there would be a problem if an executive branch-type equal employment opportunity program were extended to those employees.

The relationship between senior congressional office staff and an elected official is a very personal one which by its nature involves not only competency and loyalty, but—among other factors—also involves some compatibility of attitude and values and a relationship to the member and the constituency. The daily actions or inactions of a staff member in relation to an elected official's constituency can affect that official's longevity within a 2-year period in the House of Representatives and within a 6-year period or less in the United States Senate. Congressional offices are busy places where, in general, the staff work long hours under great stress. On Capitol Hill, the 40-hour work weeks enjoyed by most in government and industry are usually a rare minimum rather than the maximum. When the personal chemistry and bonds of loyalty between the elected and the staff fade in a representative government, it is the staff member and not the elected official who leaves. Occasionally a Member of Congress has been challenged—sometimes successfully—in party primaries or in a general election by a former member of the staff. Should there be staff incompetency, an elected official must act rapidly in removing a staff member in order to salvage credibility with a constituency. If that staff member whose competen-

cy has been questioned is also a member of a "protected group" (e.g., female, minority, handicapped, etc.), then there is potential for that employee to inflict an extra amount of political damage on a former employer. Under those circumstances the opportunity for political mischiefmaking is great.

Thus, the remedy is *not* to impose a "civil service" type fair employment regulatory structure on those legislative arenas which remain in direct linkage with a particular constituency. The solution is to provide an outlet for a legitimate grievance and to have that grievance heard and judged by people who understand the political process. A subcommittee of the ethics committees of either House—evenly divided by party—is one possibility. Another possibility is the creation of a special congressional commission composed of retired and respected former Members of Congress who are not still engaged in a professional career. Again, such a group should be evenly divided by party, and perhaps chaired by a member of the party which is not in majority control of the chamber involved. It is also possible that because of the highly "political" nature of senior office staff that they should be exempt from any coverage under an equal employment opportunity statute. That is a question which only the Congress can decide. It is clear that should some remedies be provided, while back pay might be an appropriate one, a remedy such as reinstatement would not be appropriate given the intimate political atmosphere in which an office staff must conduct its work. In brief, to paraphrase the legendary Mr. Dooley, immortalized by Finley Peter Dunne, just as "'politics' ain't beanbag". . .it also "ain't civil service."

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