

ORIGINAL

In the

Supreme Court of the United States

SHIRLEY DAVIS,

Petitioner,

Vs

OTTO E. PASSMAN,

Respondent.

No. 78-5072

Washington, D. C.
February 27, 1979

Pages 1 thru 34

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v.

OTTO E. PASSMAN,

Respondent.

No. 78-5072

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Tuesday, February 27, 1979

The above-entitled matter came on for argument at
10:10 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

SANA F. SHTASEL, Esq., 888 Sixteenth Street, N.W.,
Washington, D. C. 20006, for the Petitioner.

A. RICHARD GEAR, Esq., Post Office Drawer 3008,
Monroe, Louisiana 71201, for the Respondent.

I N D E X

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A. RICHARD GEAR, Esq., on behalf of the Respondent	22

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Shirley Davis against Passman, No.
4 78-5072.

5 Ms. Shtasel, you may proceed whenever you are ready.

6 ORAL ARGUMENT OF SANA F. SHTASEL ON

7 BEHALF OF THE PETITIONER

8 MS. SHTASEL: Thank you, Mr. Chief Justice, and
9 may it please the Court: My name is Sana Shtasel, appearing
10 for the petitioner in the case this morning.

11 The case before you today arises on writ of
12 certiorari from the United States Court of Appeals for the
13 Fifth Circuit. The basic question is whether a cause of
14 action for money damages may be implied under the Fifth
15 Amendment to address sex discrimination in Federal employment.
16 If that question is answered in the affirmative, this Court
17 then must determine whether respondent is nonetheless
18 absolutely immune from suit by virtue of the Speech or Debate
19 Clause of the Constitution.

20 The facts of this case are simple and stark.
21 Petitioner was employed by respondent, then a United States
22 Congressman, for a 6-months period in 1974. Despite the fact
23 that petitioner was an able, energetic, and extremely
24 capable secretary, as attested to by the respondent in his
25 letter of dismissal, which appears in the appendix in this

1 case at pages 6 and 7, respondent dismissed petitioner solely,
2 explicitly, and expressly because he wanted a man rather
3 than a woman to fill that position.

4 QUESTION: As a secretary? So he has described
5 her.

6 MS. SHTASEL: The title of the position, Mr.
7 Justice Blackmun, was deputy administrative assistant. But
8 it is the functions of the job that are in question here, and
9 no one has ever contended that the petitioner did anything
10 other than secretarial function. That is exactly how her
11 job was described in the letter terminating her employment,
12 which is the only thing we have on the record in this case.

13 Petitioner therefore brought suit alleging --

14 QUESTION: Do you think it would make a difference
15 if her tasks were secretarial exclusively or administrative
16 assistant at least in part?

17 MS. SHTASEL: It might make a difference, Mr.
18 Justice, when we get to the question of the operation of the
19 Speech or Debate Clause. It should not make a difference as
20 to whether the petitioner has a cause of action under the
21 Fifth Amendment. Whether, however, her job functions would
22 be so integral to the Congressman's legislative functions
23 that the employment relationship should nonetheless be
24 covered with absolute immunity is a question which must be
25 addressed there.

1 Our position, however, is that there is no way
2 that the Speech or Debate Clause can apply to a low-level,
3 non-policy-making, clerical employee. I might say that this
4 case arises on 12(b)(6) motion to dismiss, so that our
5 contentions here in the procedural posture of this case
6 must be taken to be the ones applicable.

7 QUESTION: What was her salary? Is that in the
8 record?

9 MS. SHTASEL: That is in the record, Mr. Justice
10 White. Her salary was \$18,000 a year.

11 QUESTION: That sounds like something other than
12 a low-level clerical employee, doesn't it?

13 MS. SHTASEL: It sounds like it, your Honor, but
14 when one consults the report of the clerk of the House for
15 that period and time, it's quite clear that some 75 other
16 Representatives had secretaries, personal secretaries,
17 executive secretaries all making that kind of salary and,
18 indeed, there are other cases where Members employed persons
19 called secretaries who made more than the administrative
20 assistant that they also employed.

21 QUESTION: When was this? 197 --

22 MS. SHTASEL: Four.

23 QUESTION: -- 4.

24 MS. SHTASEL: She was employed from February
25 through July in 1974.

1 QUESTION: Her salary may be fixed by each
2 individual Member of the House and Senate without any
3 standards, is that not so?

4 MS. SHTASEL: That is true, Mr. Chief Justice.

5 QUESTION: In some cases they level it off and
6 divide the work among several people, and in other cases they
7 have a very high-salaried secretary; is that true?

8 MS. SHTASEL: My understanding is that they are
9 allotted a maximum of 18 slots, which can be filled at their
10 discretion and with salaries at their discretion.

11 QUESTION: Well, they are allotted 18 positions and
12 X thousands of dollars, and they may spread the salaries as
13 they wish, is that not so?

14 MS. SHTASEL: That is correct.

15 Petitioner, following her termination, brought suit
16 alleging that she had been a victim of sex discrimination
17 in violation of the Fifth Amendment, premising jurisdiction
18 upon 28 U.S.C. Section 1331(a).

19 The district court dismissed this case, holding that
20 plaintiff had no private cause of action. A panel of the
21 Fifth Circuit of Appeals reversed on that issue and then
22 proceeded to canvass all the related constitutional issues.
23 It held, as had the district court, that no immunity doctrine
24 would bar this suit.

25 Rehearing en banc was held to assess whether the

1 doctrines of legislative immunity and political question,
2 which I might add had been raised for the first time by the
3 panel, were applicable to this case. The en banc court,
4 however, did not decide that question. Rather, it decided
5 an issue that had not been briefed before the panel, had
6 been conceded by respondent at the panel, and had neither
7 been raised by the respondent on rehearing nor briefed by him
8 in that proceeding.

9 The court held that an implied cause of action
10 does not arise under the Fifth Amendment to the United
11 States Constitution, and accordingly that petitioner should
12 have no remedy whatever to vindicate her fundamental
13 constitutional rights.

14 The validity of that decision is the first
15 question for this Court's determination today.

16 For the reasons stated in our briefs to this
17 Court, this case is controlled by Bivens v. Six Unknown Named
18 Agents of the Federal Bureau of Narcotics. In Bivens this
19 Court held, first, that the petitioner had a private cause
20 of action for damages arising directly under the Fourth
21 Amendment; second, that the Federal right was independent
22 from any State rights that might be implicated; and, third,
23 that money damages were a remedial mechanism normally available
24 in the Federal courts.

25 In the seven and a half years since Bivens was

1 decided, nine courts of Appeals and countless district courts
2 have applied Bivens to constitutional amendments other than
3 the fourth and to Federal officials other than narcotics
4 agents.

5 QUESTION: Counsel, some of us were in dissent
6 on Bivens. Do you think that blocks us in and makes us
7 necessarily unsympathetic to your posture here?

8 MS. SHTASEL: Mr. Justice Blackmun, I would be
9 delighted if the dissenters in Bivens were persuaded that a
10 cause of action should be applied under the facts of this
11 case. I think that the rationale of the Bivens majority and
12 the rationale of the courts that have applied Bivens in the
13 succeeding years is sufficient to suggest that we can apply
14 a cause of action under Bivens here. Indeed, as well, there
15 are other factors in this case which make it perhaps a
16 stronger case than Bivens for the implication of a cause of
17 action for money damages under the Constitution.

18 QUESTION: We do try to be individually consistent.
19 What I am asking is, is there any escape for those of us who
20 were in dissent in Bivens?

21 MS. SHTASEL: I would suggest one, Mr. Justice
22 Blackmun. One of the concerns was that Congress had not
23 expressly spoken on the question in the Fourth Amendment case.
24 In this case Congress has affirmatively declared in 5 U.S.C.
25 7151 that employees of Members of Congress are not to be

1 discriminated against. Accordingly, to the extent that this
2 Court needs to look or wants to look to congressional
3 declaration in the area, it is apparent.

4 As a second possibility, Mr. Justice, there was
5 some concern by the Bivens dissenters that the Federal
6 courts would be subjected to an avalanche of cases. Indeed,
7 there have been almost eight years of Federal litigation in
8 this area and no court other than the en banc court below
9 has suggested that there is a problem of judicial unmanage-
10 ability in this area.

11 QUESTION: Yes, but you just made reference to a
12 number of cases in this area where the courts had gone in
13 your favor. So there is some litigation.

14 MS. SHTASEL: There is extensive litigation in
15 the area.

16 QUESTION: Doesn't some of your answer to Mr.
17 Justice Blackmun cut the other way in the sense that although
18 the statute is on the books, the general kind of hortatory
19 statute, Congress has quite carefully considered whether it
20 wanted to make its Members subject to, say, title 7 the way
21 Executive Branch members are, or whether it wanted to subject
22 its Members to any particular strictures in their hiring and
23 firing, and they simply have not done it. They have
24 considered it and rejected it.

25 MS. SHTASEL: Our argument, Mr. Justice Rehnquist,

1 is that Congress cannot mandate no remedy for violations of
2 constitutional rights. And indeed, in this case, it has
3 never suggested that there should be no judicial remedy for
4 this kind of violation. Indeed, it has not brought
5 congressional employees under the ambit of title 7 and it
6 could certainly enact legislation which would so provide and,
7 indeed, even protect its own Members from the possibility of
8 personal liability, which has been done in other contexts.

9 QUESTION: Well, that proposition may be entirely
10 sound, but it doesn't seem to me that it really makes your
11 case a stronger one than Bivens, as you suggested to Mr.
12 Justice Blackmun.

13 MS. SHTASEL: In Bivens there was no congressional
14 policy stated in the area. In this case at the most we have
15 a congressional hortatory statute which declares what the
16 policy of the United States is to be.

17 Moving along, I would suggest that the court below
18 does stand alone in the face of this authority, and in doing
19 so, in refusing to imply a constitutional cause of action,
20 the en banc court did erroneously look to the criteria
21 enumerated in Cort v. Ash for implication of remedies from
22 Federal statutes. The respondent reaches the same result by
23 a different route. He uses the proviso of Bivens that special
24 factors might counsel hesitation in the absence of affirmative
25 action by Congress and argues that some seven special factors

1 counsel hesitation here.

2 Each of the court criteria and each of the special
3 factors relied upon by the respondent are addressed in our
4 brief. None of them, either alone or in combination,
5 justifies dismissal of petitioner's complaint in this case.
6 We would suggest that the respondent is correct to the
7 extent that he acknowledges that it is Bivens that controls
8 this case.

9 As I just mentioned in response to Mr. Justice
10 Rehnquist, we think the court below erred in relying on
11 Cort v. Ash because those criteria are irrelevant when a
12 constitutional right rather than a right created by a
13 Federal statute is at issue.

14 For the reasons we have outlined, however, at
15 pages 26 to 36 of our opening brief, application of the
16 Cort criteria would require recognition of a private cause
17 of action nonetheless on the facts of this case.

18 QUESTION: Your reliance is on the equal protec-
19 tion component of the Fifth Amendment?

20 MS. SHTASEL: That is correct, Mr. Justice White.

21 QUESTION: Exclusively?

22 MS. SHTASEL: Yes, sir.

23 QUESTION: Is it your view that the Equal Protec-
24 tion Clause even of the Fourteenth Amendment confers personal
25 rights? Doesn't it just have to do with classifications?

1 MS. SHTASEL: I don't think that the analysis
2 would be different under the Fourth Amendment as under the
3 Fifth Amendment in the implication of cause of action.

4 QUESTION: Well, they are really provisions of
5 the Constitution -- the First, the Fourth and the Sixth,
6 among others -- that specifically and explicitly confer
7 personal protections, freedoms, and sometimes rights -- free
8 press, free speech, free exercise of religion. The Equal
9 Protection Clause of the Fourteenth Amendment, however, just
10 has to do with classifications, doesn't it?

11 MS. SHTASEL: That is true, Mr. Justice White, but
12 many classifications, or at least several, have been deemed
13 by this Court to rise to the level of being constitutionally
14 safeguarded and thus subject to equal protection scrutiny.

15 QUESTION: They are invalid if they are
16 invidiously discriminatory classifications. But there is
17 nothing in the Equal Protection Clause that confers personal
18 rights by contrast to those provisions of the Constitution
19 examples of which I gave you.

20 MS. SHTASEL: The courts have held, however, and
21 indeed this is the constitutional jurisprudence which has
22 come down from Marbury v. Madison, that when constitutional
23 rights are invaded as opposed to other kinds of rights --

24 QUESTION: Whose constitutional rights? The
25 Equal Protection Clause just requires a State in the

1 Fourth Amendment, or insofar as it is a component of the
2 Fifth Amendment requires the Federal Government, to grant
3 everybody equal protection of the laws. It doesn't confer
4 on individuals personal rights, does it?

5 MS. SHTASEL: I believe the very purpose of the
6 Bill of Rights --

7 QUESTION: We have a personal right of the
8 exercise of free speech against governmental interference,
9 or one has a personal right if brought to trial in a criminal
10 court to assistance of counsel, and so on. Everybody, each
11 individual, has that personal right. But what is there in
12 the Equal Protection Clause that confers any such comparable
13 personal rights?

14 MS. SHTASEL: Indeed, you are going to the heart
15 of the case, Mr. Justice Stewart, in suggesting that
16 constitutional rights must be implied, or remedies for them,
17 from the Constitution because without that implication of
18 a cause of action, those rights would be reduced to meaning-
19 less rhetoric. There would be no enforcement mechanism for
20 ensuring those guarantees.

21 QUESTION: May I ask you a question? Would your
22 Bivens analysis be applicable to key staff personnel at the
23 White House?

24 MS. SHTASEL: Again, I think the answer, Mr.
25 Justice Powell, is yes as regards the cause of action aspect

1 of the case before you this morning. If there were to be any
2 bar to trial on the merits, it would have to come under any
3 official immunity which might be invoked under the rules
4 governing immunity in that area, which are somewhat different
5 from those at this point in time governing the operation of
6 the Speech or Debate Clause in the legislative context.

7 QUESTION: You think if Jody Powell were relieved
8 he would have a cause of action against the President?

9 MS. SHTASEL: I am frank to say that if he were
10 relieved for reasons which were invidiously discriminatory,
11 then the answer would have to be yes.

12 QUESTION: If the President had written him that
13 he preferred to have a talented woman in his position and
14 complimented him warmly as Congressman Passman did, that
15 would be fairly analogous, wouldn't it?

16 MS. SHTASEL: Yes, sir. And I think the cause of
17 action that we are asking for this morning would be the same.

18 QUESTION: How about Pacific Tel. & Tel. where
19 the provision in the Constitution guaranteeing to each State
20 a republican form of government was held to be not
21 judicially enforceable. That certainly is an example of a
22 constitutional provision which this Court has said it is in
23 the Constitution but there just isn't any private right of
24 action. Pacific Tel. & Tel. v. Fuller, you know, a long time
25 ago.

1 MS. SHTASEL: Mr. Justice Rehnquist, I apologize.
2 I missed the first sentence of your question.

3 QUESTION: You were saying that you can't have a
4 right without a remedy and that sort of thing. How about
5 the case of Pacific Telephone and Telegraph v., I think it
6 was, Fuller, decided in about 1910, where this Court said that
7 although the Constitution does say every State shall be
8 guaranteed a republican form of government, nonetheless the
9 people in Oregon who were challenging the referendum were
10 told that provision simply isn't judicially enforceable?

11 MS. SHTASEL: Mr. Justice Rehnquist, I confess
12 it's not a case that I am familiar with and can't speculate
13 upon on those facts. But I would suggest that in the context
14 of a Bill of Rights guarantee, that Bivens would be the law
15 of the case at this moment in time.

16 QUESTION: Certainly Bivens is a lot later than
17 that one.

18 QUESTION: Ms. Shtasel, let me ask you a
19 hypothetical. It's a variation of Mr. Justice Powell's
20 question. I don't know how many legislative assistants the
21 President has, but let's assume he has five of them and they
22 are all men and he calls one of the five in and says, "Now,
23 you are doing splendid work. I have no complaints at all.
24 But in this modern day we have got to have a woman, at least
25 one woman, in the legislative relations with Congress.

1 Therefore, sorry, but I have to replace you with a woman."

2 Cause of action?

3 MS. SHTASEL: I think in that context, Mr. Chief
4 Justice, other kinds of balancing factors come into play.
5 What you are talking about there are political concerns which
6 might govern action in this area because indeed elective
7 representatives have historical and constitutional functions
8 to represent certain constituencies and to represent certain
9 positions. In that context we are not talking about a case of
10 invidious discrimination, nor are we talking about a case
11 where performance or job-relatedness is the issue. That is
12 quite different from a case where, based on nothing more,
13 a Member of Congress explicitly stated that only a man could
14 fill a position that without question has very typically been
15 held by women.

16 QUESTION: Counsel, you could say, I suppose, that
17 there would be a Fifth Amendment cause of action and still
18 say that a cause of action hasn't been stated and even if
19 one has been stated you might lose the case. You don't need
20 to answer the Chief Justice that just because the President
21 might win the case that there wouldn't be a cause of action
22 available under the Fifth Amendment.

23 MS. SHTASEL: To be sure, Mr. Justice White, what
24 we are talking about at that point is trial issues and proof
25 issues rather than a statement of a cause of action in the

1 Federal court system.

2 QUESTION: My question was exclusively would there
3 be a cause of action, not whether he might win or lose it.

4 MS. SHTASEL: In that context, Mr. Chief Justice,
5 I have to answer yes.

6 QUESTION: May I ask another question? What does
7 title 7 provide with respect to staff personnel in the
8 White House?

9 MS. SHTASEL: Under title 7 members of the
10 Executive Branch staff are covered. It is the judicial and
11 legislative staffs which are not in the competitive service
12 which are exempted from the operation of title 7.

13 QUESTION: No exceptions with respect to White
14 House personnel?

15 MS. SHTASEL: Not on its face, Mr. Justice Powell.

16 QUESTION: No separation of powers problem?

17 MS. SHTASEL: Congress in its wisdom did not exempt
18 those particular staff people.

19 QUESTION: Yes.

20 QUESTION: Well, the President presumably signed
21 the bill.

22 Is title 7 applied to the Executive Branch
23 applicable only to the competitive service, or is it applied
24 to anyone who gets a paycheck from the Federal Government?

25 MS. SHTASEL: Title 7 in the Executive Branch

1 context applies to members of the civil service, which have
2 been defined under the appropriate statute to mean appointees
3 of the Executive, Legislative, and Judicial Branches. It
4 is then when one looks to the definition of the competitive
5 service that one finds the restriction which applies to the
6 Legislative Branch.

7 QUESTION: But the competitive service, I would
8 assume, probably doesn't cover top White House employees nor
9 the Secretary of the Treasury or people like that.

10 MS. SHTASEL: They are not expressly exempted
11 from the operation of the competitive service.

12 QUESTION: Senior employees of the Executive Branch
13 are expressly exempted, aren't they? Is the military
14 exempted?

15 MS. SHTASEL: The military is not exempted.

16 QUESTION: Is a captain, an officer, an employee?
17 He is certainly not. He is an officer. He is no employee.

18 MS. SHTASEL: He is appointed, however.

19 QUESTION: He is not an employee. He is the
20 opposite of an employee. He can be removed tomorrow morning
21 if they don't want to do it this afternoon.

22 QUESTION: He serves at the pleasure of the
23 President, I think, as all Presidential appointees.

24 MS. SHTASEL: In that case, Mr. Chief Justice,
25 the question might be resolved by operation of separation of

1 powers doctrine which would confer a textual commitment to
2 another branch of the Federal Government. That is not the
3 case here where there is no such textual commitment to another
4 branch of the Government, nor are there any other of the
5 political question-separation of powers kinds of formulations
6 which can be brought to bear in the instant situation.

7 I think it appropriate to turn to the question of
8 Speech or Debate immunity at this point in time. Petitioner
9 argues that the absolute immunity conferred by that clause
10 does not protect the respondent here.

11 QUESTION: This was not decided by the en banc
12 court, was it?

13 MS. SHTASEL: No, sir, it was not. It was only
14 decided by the panel.

15 This Court has interpreted the parameters of the
16 clause on nine separate occasions. All of these are discussed
17 in our brief. I think it appropriate to suggest that the
18 Court has with undeviating consistency articulated principles
19 which have not waivered almost over 100 years. These are
20 several: First, that the clause has finite limits; second,
21 that its scope is to be confined to activities which are
22 within the legitimate legislative sphere; and third, that the
23 Speech or Debate Clause is not a grant of personal prerogative.
24 Instead, its purpose is to ensure the independence of the
25 Legislative Branch and thus, as was discussed a moment ago,

1 it is indeed the ultimate guarantor of separation of powers.

2 The Court has made clear that there are many
3 cases, many activities regularly performed by a Congressman
4 or somehow tangentially related to his performance which are
5 nonetheless outside the scope of the clause. It is our
6 contention that firing a secretary whom no one has ever
7 contended had policy-making or legislative responsibilities
8 is outside the scope of the protection conferred by that
9 clause. To hold otherwise would be to violate the governing
10 principles that I enunciated above.

11 QUESTION: Why would it be any worse to fire a
12 secretary on the basis of sex discrimination than an
13 administrative assistant who had policy-making responsibilities?
14

15 MS. SHTASEL: Mr. Justice Rehnquist, our position
16 is that the Court need not go so far in this particular case.
17 It is our position that under no circumstance can the
18 Speech or Debate Clause protect the low-level employee.
19 There are two --

20 QUESTION: We have to draw a principal distinction.

21 MS. SHTASEL: There are two ways or two means of
22 analysis that I suggest would be appropriate in devising
23 limiting principles for the operation of the clause. One
24 of them would be on the basis of the kind of job functions
25 at issue, and this Court has oftentimes made distinctions

1 based on the nature of job responsibilities.

2 A second analytical framework, indeed, a broader
3 one, which the Court doesn't need to reach today, is to
4 suggest that this kind of invidious discrimination is so
5 egregious that under no circumstance could any employee of
6 a Congressman, and thus the Congressman himself, be protected
7 by virtue of the Speech or Debate Clause for that --

8 QUESTION: He isn't an employee of the Congressman.
9 He is an employee of the Federal Government working in the
10 Congressman's office, correct?

11 MS. SHTASEL: The checks are issued from the House
12 of Representatives treasury, but the statute is clear that
13 the Member of Congress has ultimate hiring and firing
14 responsibilities --

15 QUESTION: As an agent of the Federal Government,
16 correct?

17 MS. SHTASEL: That is correct.

18 QUESTION: Which is the employer.

19 MS. SHTASEL: That's right, which is exactly why
20 this rises to a Fifth Amendment violation.

21 QUESTION: Right. Otherwise you wouldn't have a
22 Fifth Amendment case.

23 MS. SHTASEL: That's correct.

24 QUESTION: Under your second line of analysis,
25 I presume that in my annual search for law clerks, if I were

1 to interview women and find a woman who felt that some of my
2 votes in cases involving women weren't all that satisfactory
3 to her and felt she would have some difficulty working for me
4 for that reason and she could prove that I didn't hire her
5 for that reason, she would have an action against me.

6 MS. SHTASEL: I think not, Mr. Justice Rehnquist.
7 I think that what you are suggesting falls in the nature of
8 selection criteria for the job. It does not fall into the
9 category of discrimination based upon sex. That is the
10 distinction we have to make for these purposes.

11 I note that my time has expired, Mr. Chief Justice.
12 I am prepared to submit this case.

13 MR. CHIEF JUSTICE BURGER: Mr. Gear.

14 ORAL ARGUMENT OF A. RICHARD GEAR ON

15 BEHALF OF THE RESPONDENT

16 MR. GEAR: Mr. Chief Justice, and may it please
17 the Court: We submit that a Bivens cause of action should
18 not be implied from the Fifth Amendment, but that it should be
19 limited to a Fourth Amendment search and seizure situation
20 or physical intrusion situations. These arrest and detention
21 or search and seizure situations are situations where the
22 power of government and its police power is clearly an abuse
23 upon the private citizen. In an employment situation such as
24 we have here it is more like an act between two private
25 citizens rather than an act that has a graver effect upon the

1 citizen because it is a power of government.

2 We submit further that in this case there are
3 special factors which counsel hesitation in creating a cause
4 of action. The first of those special factors is that we
5 believe a flood of new cases will overly burden the
6 judiciary because the Fifth Amendment Due Process Clause is
7 broad and apparently is getting broader. The Court is
8 familiar that civil rights filings have risen from around
9 296 in 1961 to over 13,000 in 1977. They dropped a couple
10 percent in 1978.

11 QUESTION: How is that phrased to find in those
12 statistics, civil rights filings?

13 MR. GEAR: It apparently covers employment cases.
14 It does not cover prisoner cases, I understand. It does
15 cover employment cases.

16 QUESTION: Under statutes like the Civil Rights
17 Act of 1964?

18 MR. GEAR: Yes, sir.

19 QUESTION: It is not surprising that there are more
20 such cases after the passage of that Act than there were
21 before.

22 MR. GEAR: I agree with you, sir. That is
23 correct.

24 QUESTION: And it's true what we taught in law
25 school is that in filing a lawsuit the important thing is to

1 win it.

2 MR.GEAR: That's true, sir. But we feel that if
3 cause of action is -- excuse me, sir?

4 QUESTION: Isn't this precisely one of the
5 arguments that Mr. Justice Black and Mr. Justice Blackmun
6 made in dissent in Bivens?

7 MR. GEAR: That is correct, your Honor. And we
8 feel that the flood of new lawsuits upon Federal officials
9 will inhibit Federal action and will also inhibit Federal
10 employment.

11 QUESTION: Outside of this case, how many others
12 do you have in this flood you are talking about?

13 MR. GEAR: Well, sir, every circuit court has
14 considered the Bivens type cases, and they are moving up to
15 you, sir.

16 QUESTION: The Eleventh Circuit Court has 11. How
17 many more?

18 MR. GEAR: I don't know the exact number, sir.

19 QUESTION: I didn't think you did.

20 MR. GEAR: We are concerned that Federal employment
21 and Federal positions will be inhibited by the fear of
22 personal judgments, because the ordinary Federal official,
23 the Federal employee, can't handle the personal judgment.
24 He is going to be bankrupt. We will have officers of the
25 court satisfying judgments off the home of a Federal

1 official who has been the victim of some Fifth Amendment
2 cause of action.

3 QUESTION: Mr. Gear, would the same argument
4 apply to enforcing section 1983 against State officials?

5 MR. GEAR: I think so, sir, yes. Yes. Of course,
6 in this case Congress, we believe, has clearly not intended
7 to create a cause of action in the Federal court system
8 against itself. Congress did exempt itself and the
9 Judiciary for the personal staff employees of Congressmen
10 and of the Judiciary when it passed the Civil Rights Act
11 amendments in 1972.

12 QUESTION: The petitioner in this case is not an
13 employee of former Congressman Passman. She was an employee
14 of the Federal Government.

15 MR. GEAR: That, of course, is the Fifth Amendment
16 connection in the case, that she is an employee of the
17 Federal Government.

18 QUESTION: Exactly right. Why wasn't this suit
19 properly brought against the United States?

20 MR. GEAR: I don't know. You will have to ask the
21 plaintiff on that, sir. I really don't know. This is one
22 reason we feel that the exemption to the Civil Rights Act is
23 very important because under the Civil Rights Act Federal
24 employees who have causes of action are permitted to sue the
25 particular individual involved. They sue the Government.

1 There is no question about personal liability, as I understand
2 it, for Federal employees who are covered by the Civil
3 Right Act.

4 The House of Representatives had no policy against
5 any kind of discrimination until it passed clause 9 of its
6 House Rule XLIII in January of 1975, six months after the
7 discharge of Miss Davis, and even then it passed just an
8 internal resolution prohibiting such discrimination.

9 So at no time, as I view it, has either House of
10 Congress put before the judiciary a cause of action in a
11 statute permitting the judiciary to consider cases against it
12 on the basis of sex discrimination or Fifth Amendment
13 problems.

14 Both the House and the Senate are --

15 QUESTION: You are suggesting that there never
16 should be a cause of action under the Fifth Amendment until
17 and unless Congress indicates that there should be some
18 kind of a cause of action?

19 MR. GEAR: I am suggesting that there should be
20 no cause of action against Congress until Congress suggests
21 that, sir, because we have separation of power principles
22 involved here, which is another of the special factors we
23 believe should counsel hesitation in this case. We feel that
24 if Congress were going to create a cause of action against
25 itself, it certainly would have done more than has been

1 apparent here in the legislative history.

2 QUESTION: You don't think the clause
3 applies to Congress?

4 MR. GEAR: I don't think so, sir.

5 QUESTION: You don't.

6 MR. GEAR: I don't think so, sir.

7 QUESTION: Does any clause of the Constitution
8 apply to Congress?

9 MR. GEAR: Yes, sir. The Fifth Amendment would
10 apply to Congress insofar as the House can discipline its
11 own Members. I submit that the separation of powers
12 principles would prohibit the Judiciary from applying the
13 Fifth Amendment against Members of Congress in these
14 employment situations. Congress is not immune from its
15 own House discipline, and of course, Members of Congress are
16 not immune from voters deciding that given individuals should
17 be replaced and another given individual should be elected.

18 This moves me really --

19 QUESTION: Why shouldn't the Speech or Debate
20 Clause take care of all your concerns in this regard?

21 MR. GEAR: Your Honor, we believe it does. We
22 believe --

23 QUESTION: I know, but suppose we disagreed with
24 you on that. Of course, there is an area to which the Speech
25 or Debate Clause applies. Whatever area that is, why wouldn't

1 that be an adequate answer to your separation of powers
2 argument?

3 MR. GEAR: Are you saying the Speech or Debate
4 Clause and separation of powers principle are the same
5 basically in this case?

6 QUESTION: The Speech or Debate Clause certainly
7 protects Congress against invasions.

8 MR. GEAR: Exactly right, your Honor. And this,
9 again, is another special factor in this case--which is a
10 most unusual case, I believe--in this case which counsels
11 hesitation in the implication of a Fifth Amendment cause of
12 action, because --

13 QUESTION: Suppose, Counsel, there is a Federal
14 statute that I thought was preventing me from engaging in
15 some activities and the Federal Government was threatening
16 to enforce it against me, at least there was a case of
17 controversy, and I went into a Federal court and filed a
18 complaint asking for a declaratory judgment that the
19 statute was unconstitutional under the Fifth Amendment, either
20 the Due Process Clause or the Equal Protection component.
21 Now, where would I get my cause of action to do that, or would
22 I have one?

23 MR. GEAR: I think you would have a cause of
24 action to do that.

25 QUESTION: Under the Fifth Amendment.

1 MR. GEAR: Yes. To declare a statute unconstitu-
2 tional.

3 QUESTION: But where do I get my cause of action?
4 Isn't that a direct action under the Fifth Amendment?

5 MR. GEAR: Well, I believe it would be, sir. Yes.

6 QUESTION: And you think that one would lie all
7 right?

8 MR. GEAR: I think that one would lie all right,
9 but I think you get into separation of power situations here
10 that even if the Court were to expand Bivens to other Fifth
11 Amendment actions, is what I am saying, that in this case
12 separation of power considerations prohibit the expansion.

13 QUESTION: Yes, but in my example there would be
14 no Federal statute that extended the cause of action to me to
15 sue the Executive Branch, and yet you say I could go into
16 court and have the court enjoin the Executive Branch.

17 MR. GEAR: I may have misunderstood your question,
18 your Honor. But if the classification principle enunciated
19 here is the correct principle involved in the case, there would
20 be no individual action.

21 QUESTION: That is a different point. That's a
22 different point.

23 QUESTION: Who would the defendant be in my brother
24 White's hypothetical case? The Executive, is that what you
25 said?

1 QUESTION: People enforcing the statute.

2 MR. GEAR: Your Honor, I do want to get into the
3 Speech or Debate Clause considerations here if I may.

4 We consider that the legislative personal
5 assistants, the personal staff employees of Members of
6 Congress, and the relationship between Congress and these
7 personal employees are all within the legitimate sphere of
8 legislative activity. The aides of Congressmen and Congress-
9 women assist them in speech-writing, they assist them in
10 preparing for and discussing how to vote, they counsel them
11 on how to vote. They help them introduce material to
12 committee hearings. They do transcripts of committee hearings
13 and they truly are involved in various stages of legislative
14 decision-making.

15 In the Gravel case, the importance of legislative
16 personal staffs was recognized. The Court said that it is
17 impossible for a modern day legislator to perform legis-
18 lative tasks without aides and assistants. They went so far
19 as to say that the day-to-day work of the legislative staff
20 was so critical to the legislative performance that staff
21 members are alter egos of the Members of Congress. In
22 Gravel it was found that the aide even shared the immunity
23 of Senator Gravel.

24 We submit that the personal staffs of Congressmen,
25 really like the personal staffs of the judges, are selected

1 for the purpose of assisting the legislator in performing the
2 legislative task. When the legislator interviews an
3 individual or considers whether to retain an individual for
4 employment, what he is really asking is how can this person
5 help me perform my legislative role? It's a careful decision
6 because the person that is selected to be on the legislative
7 staff may share that legislator's Speech or Debate immunity.
8 That person may be immune as to third persons.

9 Yes, sir.

10 QUESTION: I know it's water over the dam, but it
11 has always worried me. Just frankly, when the Speech or
12 Debate Clause was adopted, how many people do you think our
13 founding fathers intended that to apply to, numerically?

14 MR. GEAR: Numerically, at that time the legisla-
15 tors did not have the immense staffs that they have today.

16 QUESTION: They didn't have any staff, did they?

17 MR. GEAR: I would assume that is correct. They
18 rode on a horse to Congress. But the Constitution does
19 develop --

20 QUESTION: From that day up until now there has
21 been quite a lot of water --

22 MR. GEAR: That's right. But, of course, the aides
23 and the personal assistants of the legislators have themselves
24 been found to share this immunity. So the employees of the
25 Congressmen must be considered in the Speech or Debate Clause

1 situation regardless of what the original make-up and
2 functioning of Congress was at that time anyway.

3 Again, the basic question that a legislator will
4 ask when he hires one of these individuals is how can this
5 person help me perform my legislative function. Therefore,
6 we submit the personal staffs of Congressmen are assembled,
7 they are brought together in a very broad legislative context,
8 which context should be immune. It should be immune from
9 scrutiny by this Court. It is not immune from scrutiny by
10 the Houses themselves, and it is not immune from the voters.

11 I want to examine with you the effects of not
12 conferring Speech or Debate immunity in this case and the
13 effects of not considering the separation of powers. We will
14 have time-consuming, very burdensome lawsuits that will be
15 inflicted on Congressmen. They will be involved in extensive
16 discovery procedures. This case alone is four and a half
17 years old. We feel that if Congressmen are made to answer
18 before the Judiciary for their personnel decisions, it is
19 going to have a chilling effect on their personnel decisions.
20 Congressmen will be forced to retain incompetent aides when
21 they would wish they could get rid of them, but they are
22 scared to for fear of lawsuits.

23 QUESTION: There are some Congressmen here who
24 think otherwise. They filed an amicus brief on the other
25 side.

1 MR. GEAR: That's true, your Honor. But we feel
2 that their interests really are concerned more on the fair
3 employment practices aspects of the societal problems today
4 than they are on the true separation of power problems which
5 I think is the core of this. If you understand me there.

6 If this cause of action is permitted and Speech or
7 Debate Clause immunity doesn't apply, we are going to have
8 lawsuits over Congressmen's refusal to hire, to discharge
9 employees, failure to promote, failure to grant wage increases.
10 There may be hundreds of applicants -- we are not talking about
11 a few discharges out there; we are talking about hundreds of
12 applicants -- who desire to work on the staffs of Congressmen.
13 The employment decisions that will be potentially judiciable
14 and over which causes of actions would be created would be
15 an immense number because this isn't like the Pentagon Papers
16 episode or a criminal situation, they aren't special events.
17 These are everyday employment decisions that occur in
18 Congress. And for this reason we feel that it would be a very
19 improper injection of this Court in the judicial process (sic).
20 It would mean that Members of Congress have to get familiar
21 with statistical experts, industrial psychologists. They will
22 have to worry about class actions. Every Congressman is going
23 to need a personnel expert and a labor lawyer in order to
24 operate. We feel that this would impair the integrity of the
25 legislative process and would be both an unwarranted invasion

1 of the principle of separation of powers and a restrictive
2 view of the Speech or Debate immunity.

3 That's all I have, gentlemen, unless there are
4 questions.

5 Thank you very much.

6 MR. CHIEF JUSTICE BURGER: Very well, Mr. Gear.

7 I think your time has entirely expired, Ms. Shtasel.

8 Thank you, counsel. The case is submitted.

9 (Whereupon, at 10:55 a.m., the oral arguments in
10 the above-entitled matter, were concluded.)

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