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# Whither the Pickering Rights of Federal Employees?

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# Whither the *Pickering* Rights of Federal Employees?

Paul M. Secunda\*

*The importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors, must be self-evident in these times.*<sup>1</sup>

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<sup>1</sup> *Arnett v. Kennedy*, 416 U.S. 134, 228 (1974) (Marshall, J., dissenting).

## INTRODUCTION

Federal employees lack a meaningful remedy for violations of their *Pickering* rights<sup>2</sup> under the First Amendment. Twenty-five years after the U.S. Supreme Court unanimously decided in *Bush v. Lucas*<sup>3</sup> that federal employees could not bring a *Bivens* claim<sup>4</sup> against federal officials for violations of First Amendment free speech rights, the time has come to revisit the logic of that decision.

The predicate behind *Bush* was that federal employees had an effective, alternative remedy for their First Amendment claims under the comprehensive framework of the Civil Service Reform Act of 1978 (CSRA of 1978),<sup>5</sup> and therefore, it was unnecessary to directly imply a cause of action under the Constitution.<sup>6</sup> The *Bush* Court concluded that, "claims [that] arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States," do not give rise to "a new judicial remedy" under the Constitution.<sup>7</sup>

Under the CSRA of 1978 administrative scheme, federal employees must jump through many hoops before being able to have their constitutional claims reviewed by an Article III court. They must first file their initial appeal of an agency decision with an administrative law judge (AJ) designated by the Merit Systems Protection Board (MSPB), next file a petition for review with the MSPB, before finally appealing to the Federal Circuit Court of Appeals.<sup>8</sup> And even when their claim is finally heard by an Article III court, it is heard under a highly deferential standard of review which has historically led to an astronomical affirmance rate of 93%-96%.<sup>9</sup>

Given this convoluted process, perhaps it is not surprising that the MSPB administrative scheme is not vindicating the First Amendment *Pickering* rights of federal employees.<sup>10</sup> But the extent of the problem is truly extraordinary. A first-time

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<sup>2</sup> "*Pickering* rights" refer to public employee First Amendment rights to speech, expression, and association. See *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968) (providing First Amendment speech rights to public employees under framework designed to balance employees' constitutional rights with public employers' efficiency interests).

<sup>3</sup> 462 U.S. 367 (1983).

<sup>4</sup> "*Bivens* claims" are "a judicially created damages remedy designed to vindicate violations of constitutional rights by federal actors." *Hall v. Clinton*, 235 F.3d 202, 204 (4th Cir. 2000) (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395-97 (1971)).

<sup>5</sup> Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.).

<sup>6</sup> The Court also concluded in *Bush* that special factors involving Congress' institutional competence in dealing with federal employment relations counseled hesitation in implying a constitutional judge-made remedy. *Bush*, 462 U.S. at 388-90. For reasons further developed below, I also argue that there are no longer "special factors counseling hesitation" which would prevent implying a *Bivens* right in the federal employment free speech context. See *infra* Part IV.A.

<sup>7</sup> *Bush*, 462 U.S. at 368.

<sup>8</sup> See *infra* Part III.B.

<sup>9</sup> See *infra* Part III.C.

<sup>10</sup> *Developments in the Law--Public Employment*, 97 HARV. L. REV. 1611, 1635-36 (1984) ("Yet although the [MSPB] has assumed the trappings of judicial power, a review of the major dimensions of the Board's

comprehensive analysis of all MSPB Board<sup>11</sup> and Federal Circuit cases involving the First Amendment *Pickering* claims of federal employees leads to a startling discovery: *not a single First Amendment Pickering claim filed by a federal employee against their agency has ever been successful on the merits before either of these adjudicatory bodies.*<sup>12</sup> Additionally, the number of First Amendment appeals even being brought in the first place is notably low.<sup>13</sup> The message that federal employees seem to be receiving is that their First Amendment claims will not be treated seriously. Employees are instead left to bring largely ineffective statutory whistleblowing claims<sup>14</sup> or swallow hard. Such

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jurisprudence--including access to the Board, the standards of review it employs, the remedial powers it wields, and the reviewability of its decisions in the federal courts--reveals a marked disposition to circumscribe the protections afforded federal employees.").

<sup>11</sup> It is most likely true that some First Amendment *Pickering* claims have been successful in front of administrative judges (AJs), designated by the MSPB to hear most initial appeals of federal agency personnel decisions. See *infra* Part III.A. However, these decisions are not reported and have no precedential value. See ROBERT G. VAUGHN, MERIT SYSTEMS PROTECTION BOARD: RIGHTS & REMEDIES § 5.01 at 5-2 (2007). Consequently, it is unclear how successful federal employees have been in these cases overall, but one would think that agencies' would frequently appeal from adverse decisions at the AJ level. One other statistic making it unlikely that there are many of these cases is the fact that 88% of petitions for review from the AJ level to the MSPB are by employees appealing adverse decisions. See *infra* notes x-x and accompanying text.

<sup>12</sup> See *infra* Part III.B, C. Contrariwise, although some commentators have called success rates under similar constitutional claims against state and local officials under Section 1983 "dismal", see Stephen W. Dummer, Comment, *Secure Flight and Data Veillance, A New Type of Civil Liberties Erosion: Stripping Your Rights When You Don't Even Know It*, 75 MISS. L. J. 583, 596 n.63 (2006), there are still plenty of examples of state and local employees prevailing on their First Amendment claims under Section 1983. For instance, in a study of 1980-1981 filings in the Central District of California, the Eastern District of Pennsylvania, and the Northern District of Georgia by Professors Schwab and Eisenberg, the average success rate for all civil rights actions (excluding employment discrimination actions) was 30 percent. Theodore Eisenberg and Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 690-91 (1987).

<sup>13</sup> There are likely thousands of such constitutional tort claims under Section 1983 in any given year. Eisenberg & Schwab, *supra* note 12, at 655 (finding 468 Section 1983 cases in the Central District of California in 1981 alone).

<sup>14</sup> Such federal employees whistleblowing claims are brought under the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 32 (codified at 5 U.S.C. §§1211-1219, 1221, 1222, 3352 (2000)). WPA claims have been highly unsuccessful. See Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1766 (2007) ("Among other signs of failure, only one of the 120 appeals brought by whistleblowers to the Federal Circuit Court of Appeals--the designated recipient--has been successful since 1984."); Jamie Sasser, Comment, *Silenced Citizens: The Post-Garcetti Landscape For Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759, 790 (2007) ("Public sector employees simply cannot rely on whistleblower statutes to save them. From 1999 to 2005, only two out of thirty whistleblower claims prevailed before the Merit Systems Protection Board; from 1995 to 2005, only one out of ninety-six claims prevailed before the Federal Circuit."); Barbara J. Sapin, *Beyond Garcetti, The Limits of Protection Under the Whistleblower Protection Act* in RETALIATION AND WHISTLEBLOWING: PROCEEDINGS OF NEW YORK UNIVERSITY 60TH ANNUAL CONFERENCE ON LABOR \_\_ (Paul M. Secunda ed., forthcoming 2008) (current MSPB Board Member exploring the limits of WPA protection for federal employees); Stephen Barr, *Speaking Up for the Whistle-Blowers*, WASH. POST, Feb. 14, 2007, at D1 ("Although Congress has passed laws to protect federal employees from reprisals when they speak up, whistle-blower advocates contend that the U.S. Court of Appeals for the Federal Circuit, which has sole jurisdiction over federal whistle-blower cases, has interpreted the laws in a way that makes it almost impossible for federal employees to defend themselves."). Cf. William A. Herbert, *Protection for Public Employees Who "Blow the Whistle" Appear to be Inadequate*, NEW YORK BAR JOURNAL, Feb. 2004, 20-29, [http://www.nysba.org/Content/NavigationMenu/Attorney\\_Resources/Bar\\_Journal/Bar\\_Journal\\_](http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Bar_Journal/Bar_Journal_)

a state of affairs "impoverishes the value of constitutional rights and constitutional adjudication,"<sup>15</sup> and indicates that the agency and court entrusted to decide these cases lack the necessary neutral competence.

It is somewhat puzzling that federal employees find themselves in this predicament. At first blush, it would seem that federal employees are endowed with the same free speech protections as state and local public employees under the First Amendment. Under *Pickering v. Bd. of Education*,<sup>16</sup> government workers may not be terminated for criticizing their employers on matters of public concern,<sup>17</sup> unless such expression is uttered pursuant to official duties<sup>18</sup> or substantially interferes with the ability of the government employer to provide an efficient service to the public.<sup>19</sup> Justice Marshall set forth the applicable test in *Pickering*: "The problem in any case is to arrive at a balance between the interests of the [public employee], as citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>20</sup>

In *Pickering* and its progeny there is no exception or special treatment for federal employees.<sup>21</sup> Indeed, the Supreme Court held in *United States v. National Treasury Employees Union (NTEU)*<sup>22</sup> that federal employees could not, pursuant to the logic of *Pickering*,<sup>23</sup> be prohibited from receiving honoraria for engaging in speech of a public concern on matters unrelated to their employment.<sup>24</sup> The Supreme Court recently reaffirmed the validity of its *NTEU* holding in its per curiam decision of *City of San Diego v. Roe*.<sup>25</sup> Moreover, the recent scaling back of *Pickering*'s central holding by *Connick*'s public concern test<sup>26</sup> and *Garcetti v. Ceballos*'s official duties test<sup>27</sup> does not indicate that a distinction should be drawn between the First Amendment rights, whatever their scope, of federal employees and other types of public employees.

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Archive/2004\_Archive/journalfeb04herbert.pdf (analyzing similar inadequacies with New York's public sector statutory whistleblower scheme).

<sup>15</sup> John F. Preis, *Bivens and The State Remedy Mistake*, 40 CONN. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=969246>; see also *Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[U]nless [constitutional] rights are to become merely precatory, litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for . . . protection.").

<sup>16</sup> 391 U.S. 563 (1968).

<sup>17</sup> *Connick v. Myers*, 461 U.S. 138 (1983).

<sup>18</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

<sup>19</sup> *Pickering*, 391 U.S. at 568.

<sup>20</sup> *Id.*

<sup>21</sup> Indeed, the three-judge plurality opinion in *Arnett v. Kennedy* indicates that the *Pickering* balance applies equally to speech claims of federal employees. 416 U.S. 134, 160-61 (1974) (plurality opinion).

<sup>22</sup> 513 U.S. 454 (1995).

<sup>23</sup> *Id.* at 468.

<sup>24</sup> *Id.* at 470.

<sup>25</sup> *City of San Diego v. Roe*, 543 U.S. 77, 81 (2004) (per curiam) (holding that a police officer that sold explicit videos of himself on eBay did not engage in expression on a matter of public concern and did not qualify for First Amendment protection).

<sup>26</sup> 461 U.S. 138 (1983).

<sup>27</sup> 126 S. Ct. 1951 (2006).

Of course, there is a significant procedural difference between how federal and state employees may bring such First Amendment claims. While state and local employees clearly have the procedural vehicle of Section 1983<sup>28</sup> to bring constitutional claims against state and local government employers, federal employees have no such available statutory claim.<sup>29</sup> Nevertheless, there does not appear to be a good argument why federal employees should receive different remedies and procedures for the same unconstitutional conduct that their state and local employee counterparts suffer.<sup>30</sup> Indeed, in a related context, the Court has argued for parallel treatment of state and federal employees who violate the constitutional rights of others, recognizing "sound jurisprudential reasons for parallelism, as different standards of claims against state and federal actors 'would be incongruous and confusing.'"<sup>31</sup>

Consequently, because the administrative scheme set up for federal employee First Amendment speech claims does not provide meaningful remedies, and there is no sound argument why federal employees should have less free speech rights than state and local employees, I argue for a resurrection of an implied *Bivens* right in these cases.<sup>32</sup> Such protections will not only benefit employees, but all citizens who depend on public employees to bring a substantial degree of transparency and accountability to our representative government.<sup>33</sup>

The article proceeds in four parts. Part I lays out the new, post-*Garcetti* five-step analysis for public employee *Pickering* rights. Part II then examines briefly the history of *Bivens* jurisprudence, with emphasis on the Court's conclusion that there is no *Bivens* right for federal employees claiming First Amendment *Pickering* violations as a result of there being effective, alternative remedies for First Amendment claims under the CSRA of 1978. Part III then explores whether federal employees are in fact receiving meaningful redress under the CSRA of 1978 by examining in detail all First Amendment *Pickering* appeals before the MSPB and the Federal Circuit. Because that analysis

<sup>28</sup> Civil Rights Act of 1871, 42 U.S.C. § 1983.

<sup>29</sup> See Martin A. Schwartz, *Claims For Damages For Violations Of State Constitutional Rights-Analysis Of The Recent Court Of Appeals Decision In Brown V. New York; The Resolved And Unresolved Issues*, 14 *TOURO L. REV.* 657, 660 (1998) ("Section 1983 only covers actions under color of *state* law; of course, federal officials act under color of federal law.") (emphasis in original).

<sup>30</sup> Federal employees and state employees apparently have the same Fourth Amendment rights to be free from unreasonable search and seizure in the drug testing context. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (concluding that the immediacy of the government's concern and the minimal nature of the intrusion outweighed the individual's privacy interest and permitted the government to drug test federal customs agents).

<sup>31</sup> *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting) (citing *Butz v. Economou*, 438 U.S. 478, 499 (1978)).

<sup>32</sup> One could argue that because federal courts have traditionally protected individual's constitutional rights, they should be given greater latitude in implying causes of action under the Constitution. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) ("[T]he judiciary has a particular responsibility to assure the vindication of constitutional interests."). But see *Wilkie v. Robbins*, 127 S. Ct. 2588, 2608 (2007) (Thomas, J., concurring) (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring)) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.").

<sup>33</sup> See *supra* note 1 and accompanying text.

clearly establishes a lack of a meaningful remedy, Part IV proposes overturning *Bush* and permitting *Bivens* claims in this context so that employees can adequately vindicate their First Amendment rights. Alternatively, Section 1983 could be amended to additionally cover constitutional violations "under color of federal law."

I. THE FIRST AMENDMENT *PICKERING* RIGHTS OF PUBLIC EMPLOYEES: THE FREE SPEECH FIVE-STEP

All public employees, whether state or federal, enjoy some measure of First Amendment protection. Ever since the 1968 case of *Pickering v. Bd. of Education*,<sup>34</sup> government acting in its employment capacity has not been able to condition employment on workers forfeiting their constitutional rights.<sup>35</sup> Instead, the U.S. Supreme Court has implicitly asked whether the restrictions placed by government employers on their employees are reasonable under all the circumstances.<sup>36</sup>

The reasonableness of a public employer's response to public employee speech involves a complicated five-step analysis. The first step, after the recent case of *Garcetti v. Ceballos*,<sup>37</sup> is to ask whether the employee is speaking pursuant to official duties.<sup>38</sup> In determining what the employee's official duties are, "the inquiry is a practical one" and should focus on "the duties an employee actually is expected to perform."<sup>39</sup> If employees are engaged in such official duty speech at work, the Court has held that they are not speaking as citizens and thus enjoy no First Amendment protection for their speech.<sup>40</sup> Although litigation post-*Garcetti* is still in its nascent stages, it appears that much of the litigation surrounding *Garcetti* will focus on a practical assessment of what the official duties of the public employee are, with employers seeking broad definitions and employees more narrow ones.<sup>41</sup> The only things that is apparently clear concerning the

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<sup>34</sup> 391 U.S. 563 (1968).

<sup>35</sup> *Id.* at 568.

<sup>36</sup> See Jonathan C. Medow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. PA. L. REV. 775, 816 (1982) ("Implicit in *Pickering* seems to be a determination that 'reasonableness' is the standard by which to judge the conditioning of public sector employment on a relinquishment of some measure of first amendment rights.").

<sup>37</sup> 126 S. Ct. 1951 (2006).

<sup>38</sup> *Id.* at 1960 ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

<sup>39</sup> *Id.* at 1962.

<sup>40</sup> *Id.* Interestingly, this holding that government workers cannot act as employees and citizens at the same time controverts a previous statement of the Court that a teacher making a presentation before a board of education "spoke both as an employee and a citizen exercising First Amendment rights." *City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 176 n.11 (1976).

<sup>41</sup> See, e.g., *Morales v. Jones*, 06-1643, 2007 WL 2033754, at \*5 (7th Cir. Jul. 17, 2007) (citing *Haynes v. City of Circleville, Ohio*, 474 F.3d 357 (6th Cir. 2007); *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007); *Green v. Bd. of County Comm'rs*, 05-6297, 2007 WL 4210 (10th Cir. Jan. 2, 2007); *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006); *Battle v. Bd. of Regents for the State of Ga.*, 468 F.3d 755 (11th Cir. 2006); *Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006)) (reviewing cases post-*Garcetti* which have examined the scope of an employee's duties from a practical perspective). For a trenchant criticism of this approach, see Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1193-94 (2007) ("Although the

job-relatedness of speech is that public employee speech that is off-duty and has absolutely nothing to do with work (anti-*Garcetti* speech) does not come under the *Pickering* framework at all and, under the *NTEU* line of cases,<sup>42</sup> is protected much like normal citizen speech.<sup>43</sup>

Second, if the employee can show that he or she is not speaking pursuant to official duties, the next hoop that must be jumped through concerns whether the employee is speaking out on a matter of public concern. Under *Connick v. Myers*,<sup>44</sup> courts are directed to look at the surrounding content, form, and context of the speech to see if the speech involves a matter of public concern.<sup>45</sup> This type of speech "typically [includes] matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment."<sup>46</sup> Sometimes the question is asked whether the speech addresses a "matter of political, social, or other concern to the community,"<sup>47</sup> or is worthy of legitimate news interest.<sup>48</sup> If it is determined that the speech merely involved purely private interest, like a employment dispute with one's supervisors, then there is no First Amendment protection for the speech because it does not implicate the core concerns of the First Amendment.<sup>49</sup>

Third, if the speech is on a matter of public concern not connected to a public employee's official duties, a court then undertakes the *Pickering* balance of interests. Under this balancing test, first developed in the public school teacher case of *Pickering v.*

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result may be predictable in cases in which it is undisputed that the speech was made pursuant to the employee's official duties, the Court has merely shifted the uncertainty to the scope of the underlying categorization. Rather than the relatively stable balancing process that had become familiar in these cases, the lower courts are now confronted with an inexact classification prerequisite that is already generating unpredictable results.").

<sup>42</sup> *United States v. National Treasury Employees Union (NTEU)*, 513 U.S. 454, 465, 475 (1995).

<sup>43</sup> "When government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification 'far stronger than mere speculation' in regulating it." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam) (quoting *NTEU*, 513 U.S. at 465, 475). See also Cynthia L. Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 U.C.L.A. L. REV. (forthcoming 2007) ("*City of San Diego*, and its reading of *NTEU*, appear to place an outer limit on the additional power of the government over the speech of its employees. While that outer limit is a bit further from the workplace than one might have expected, at some point along the spectrum of work-relatedness, the public employee apparently escapes the *Connick-Pickering* niche and recovers her freedom as a citizen vis-à-vis the government."). Professor Estlund also provides a very helpful diagram outlining the contours of public employee speech post-*Garcetti*. *Id.* at \_.

<sup>44</sup> 461 U.S. 138 (1983).

<sup>45</sup> *Id.* at 147-48.

<sup>46</sup> *City of San Diego*, 543 U.S. at 80.

<sup>47</sup> *Connick*, 461 U.S. at 146-47.

<sup>48</sup> *City of San Diego*, 543 U.S. at 83-84. The Court itself has recognized, however, that, "the boundaries of the public concern test are not well defined." *Id.* at 84. Past cases provide the best indication about whether speech is on a matter of public concern.

<sup>49</sup> *Connick*, 461 U.S. at 147. Nevertheless, the speech does not have to be publicly disseminated. Private conversations on matters of public concern may be protected under the First Amendment. See *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979) (private conversation between school teacher and principal on racial discrimination at the school was on a matter of public concern); *Rankin v. McPherson*, 483 U.S. 378 (1987) (recognizing that private, negative comments about the President can touch on matters of public concern).



*Bd. of Education*,<sup>50</sup> a court weighs the First Amendment interests of the employee as a citizen against the government interest in running an efficient government service for the public.<sup>51</sup> Here, much emphasis is placed on whether the employee's speech causes a substantial disruption in the workplace.<sup>52</sup> Substantial disruption, in turn, is measured based on such things as "the impact of the speech on working relationships, the harm caused by the speech, the public's interest in the speech, and the employee's relationship to that issue."<sup>53</sup> Paradoxically, this substantial disruption standard appears to constitutionalize the heckler's veto and makes most vulnerable that speech which is the most unpopular and warrants the most protection under the First Amendment.<sup>54</sup> If the balance under *Pickering* favors the government, the public employee has no First Amendment rights in the speech.

Fourth, if the *Pickering* balance favors the employee, the employee is then considered to have engaged in protected speech. Next, under the evidentiary framework established in *Mount Healthy City School District v. Doyle*,<sup>55</sup> the plaintiff must prove by the preponderance of the evidence that engaging in the protected speech was a substantial or motivating factor for the adverse employment action the employee suffered.<sup>56</sup>

Fifth, and finally, if the employee shows that the protected speech was a substantial or motivating factor for the adverse employment decision, the Government then has the burden of persuasion to show that it would have made the same decision even in the absence of the protected employee speech.<sup>57</sup> If the public employer is successful in meeting this burden, there is again no liability. This is because "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."<sup>58</sup> Only if the employee can survive this fifth and last obstacle may liability be imposed against the public employer and the responsible agents of the employer.<sup>59</sup>

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<sup>50</sup> 391 U.S. 563 (1968).

<sup>51</sup> *Id.* at 571-72.

<sup>52</sup> Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1018 (2005).

<sup>53</sup> Rhodes, *supra* note 41, at 1177.

<sup>54</sup> Kozel, *supra* note 52, at 1018.

<sup>55</sup> 429 U.S. 274 (1977).

<sup>56</sup> *Id.* at 287.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 285-86.

<sup>59</sup> But even then, state employers may be able to avail themselves of sovereign immunity under the 11th Amendment and responsible agents of the employers may be able to avoid individual damages liability if they show they are eligible for qualified immunity, though they might still be subject to injunctive relief. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6.3, at 529 (4th ed. 2003) ("Qualified immunity exists only as to suits for damages, not as to suits for injunctive relief."). Qualified immunity is applicable if a reasonable person would not have known that his or her conduct violated clearly established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). See also *infra* Part III.A.

## II. SECTION 1983 AND THE *BIVENS* DOCTRINE

As complicated as the framework is in public employee free speech cases, the Court in all of these cases consistently used the term "public employee" to refer to the First Amendment rights of the employees in question. No distinction was made between whether the employee was a state or federal employee. Nevertheless, even though the rights should be the same, the process by which those rights are vindicated, the remedies which are available, and against whom, all turn out to be different for federal and state employees.

### A. THE SECTION 1983 DISTINCTION

Plaintiffs brought most of the public employment free speech cases discussed in the previous section pursuant to the Civil Rights Act of 1871, now referred to by its place in the U.S. Code, Section 1983.<sup>60</sup> To make out a Section 1983 claim, a plaintiff must show that there was a deprivation of a federally guaranteed right and that the defendant was acting "under color of" state law.<sup>61</sup> Section 1983 is not substantive; it merely provides a procedural vehicle for plaintiffs to bring constitutional claims against state and local officials.<sup>62</sup> The purpose of such claims is to "vindicate constitutional rights and deter violations through suits brought by injured persons to stop government illegality and to obtain damages for injuries already suffered."<sup>63</sup>

Sections 1983 claims can be brought directly in federal court<sup>64</sup> against institutions acting under color of state law or individuals acting in their official or individual capacities.<sup>65</sup> However, there is no respondeat superior liability under Section 1983.<sup>66</sup> Consequently, institutional claims are limited to situations where a plaintiff proves a causal link between the institutional policy or custom of the state actor and the plaintiff's

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<sup>60</sup> 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.").

<sup>61</sup> *Id.* As far what constitutes action under state law in the public employment context, the critical inquiry is "whether the public employee was acting pursuant to the power he/she possessed by state authority or acting only as a private individual." *Edwards v. Wallace Community College*, 49 F.3d 1517, 1523 (11th Cir. 1995) (citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961)). Generally, this is not an issue in employment cases, as "state employment is generally sufficient to render the defendant a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n. 18 (1982).

<sup>62</sup> See Paul M. Secunda, *At the Crossroads of Title IX and a New "IDEA": Why Bullying Not Be "A Normal Part of Growing Up" for Special Education Children*, 12 DUKE J. GENDER L. & POL'Y 1, 21-22 (2005) (citing *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979)).

<sup>63</sup> Michael L. Wells, *Section 1983, The First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 943 (2001).

<sup>64</sup> There is no requirement of exhaustion of state judicial remedies under Section 1983. See *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974).

<sup>65</sup> *Monnell v. Dept. of Sch. Services*, 436 U.S. 658, 690 (1978). Actions against individuals in their official capacities are handled under the same standards that apply to actions against institutions. See *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (citing *Monell*, 436 U.S. at 690 n.55).

<sup>66</sup> *Monell*, 436 U.S. at 691-693.

injury.<sup>67</sup> Even then, sovereign immunity under the Eleventh Amendment will in most situations bar plaintiffs from collecting money damage claims against state institutions.<sup>68</sup> Although this makes it difficult to recover damages against state employers for constitutional violations, local government employers generally do not fall under the Eleventh Amendment and may still be sued for monetary relief.<sup>69</sup>

On the other hand, individual defendants in Section 1983 cases may assert a qualified immunity defense to damage claims.<sup>70</sup> Under this theory, individual state and local officials are only liable if a reasonable official would have known that he or she was violating a constitutional standard that was “clearly established at the time” of the action.<sup>71</sup> Even if qualified immunity is available, however, a Section 1983 plaintiff can still receive injunctive relief against the targeted state or local official.<sup>72</sup> Prevailing plaintiffs may also be entitled to attorneys' fees under Section 1988.<sup>73</sup>

A similar statute to Section 1983 to bring actions for constitutional violations against federal employees and their agencies does not exist.<sup>74</sup> This is somewhat surprising given that the Court has “recognized sound jurisprudential reasons for

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<sup>67</sup> *Id.* at 694.

<sup>68</sup> *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989) (“Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity . . . or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity.”) (citations omitted).

<sup>69</sup> *Monnell*, 436 U.S. at 690 & n.54 (holding that a municipality is a “person” under § 1983 and therefore, local government units which are not considered part of the State are not able to take advantage of Eleventh Amendment immunity). Local governments are not entitled to a qualified immunity defense when damages are sought against them, *see Owen v. City of Independence*, 445 U.S. 622, 638 (1980), but may not be sued for punitive damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-70 (1981). Punitive damages are also very hard to recover in the First Amendment retaliation context against individual defendants. *See Wells*, *supra* note 63, at 974-975 (“Punitive damages are rarely available in First Amendment retaliation cases, for they may be awarded only where the defendant's conduct was highly improper.”).

<sup>70</sup> *See Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974).

<sup>71</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

<sup>72</sup> “Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’” *Will*, 491 U.S. at 71 n.10 (citing *Graham*, 473 U.S. at 167 n.14; *Ex parte Young*, 209 U.S. 123, 159-160 (1908)).

<sup>73</sup> Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988. The Eleventh Amendment does not bar recovery of attorney's fees from the state itself. *Hutto v. Finney*, 437 U.S. 678, 692 (1978). However, a state is not liable for attorney's fees where the plaintiff sues the individual officer in his or her individual capacity. *Graham*, 473 U.S. at 167-68.

<sup>74</sup> *See supra* note 29. However, tort claims against federal employees may be brought against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680. Under the FTCA, “[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.” *Id.* § 2674. The FTCA is the exclusive remedy in such cases, *see United States v. Smith*, 499 U.S. 160, 165-69 (1991), and government liability provided in the Act is limited by many exceptions. *See Lawrence Rosenthal, A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 804 (2007) (reviewing limitations).

parallelism, as different standards of claims against state and federal actors 'would be incongruous and confusing.'" <sup>75</sup> Yet, the Court has never expressly held that federal employees must have the same rights against their supervisors and their agencies as their state counterparts. <sup>76</sup> Rather, the Court has judicially created a damages remedy against federal officials who violate individuals' constitutional rights. It is to an explication of this *Bivens* doctrine that this article now turns.

## B. IMPLYING ACTIONS FOR MONEY DAMAGES FOR CONSTITUTIONAL VIOLATIONS BY FEDERAL AGENTS

Prior to 1971, a cause of action for money damages against federal agents who violated individual's constitutional rights did not exist. <sup>77</sup> In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, <sup>78</sup> the U.S. Supreme Court for the first time implied a cause of action for money damages against federal officers <sup>79</sup> who violated the constitutional rights of individuals. *Bivens* involved the arrest and search of a man carried out by the Federal Bureau of Narcotics. <sup>80</sup> The man sued the individual federal officers involved in the incident, alleging that the arrest and search were carried out in violation of the Fourth Amendment's command against unreasonable search and seizures <sup>81</sup> and that the unlawful conduct caused him humiliation, embarrassment, and mental suffering. <sup>82</sup>

The Court started from the premise that, "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." <sup>83</sup> It then continued by holding that the plaintiff should also have a claim for money damages against federal agents who violated his Fourth Amendment rights. <sup>84</sup> In this manner, the Court sought to subject federal officials to the same type of constraints state officials are under when dealing with the fundamental rights of United States citizens, <sup>85</sup> and to deter individual federal officers from acting unconstitutionally. <sup>86</sup>

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<sup>75</sup> *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting) (citing *Butz v. Economou*, 438 U.S. 478, 499 (1978)).

<sup>76</sup> *Id.*

<sup>77</sup> There have been unsuccessful Congressional attempts to legislate constitutional tort claims against the United States. *See, e.g.*, S. 1775, 97th Cong., 1st Sess. (1981). Rather than codify *Bivens* claims against individual federal agents, this law would have amended the Federal Torts Claims Act to expand federal government liability for the constitutional torts committed by its agents. *Id.*

<sup>78</sup> 403 U.S. 388 (1971).

<sup>79</sup> However, "[s]overeign immunity bars an action seeking to recover damages from the federal government itself for a constitutional tort." Rosenthal, *supra* note 74, at 815 (citing *FDIC v. Meyer*, 510 U.S. 471, 477 (1994)).

<sup>80</sup> *Bivens*, 403 U.S. at 389. The Federal Bureau of Narcotics was a predecessor agency of the Drug Enforcement Agency.

<sup>81</sup> U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

<sup>82</sup> *Bivens*, 403 U.S. at 389-90.

<sup>83</sup> *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

<sup>84</sup> *Bivens*, 403 U.S. at 397.

<sup>85</sup> *Wilkie v. Robbins*, 127 S. Ct. 2588, 2618 (2007) (Ginsburg, concurring in part and dissenting in part) ("Thirty-six years ago, the Court created the *Bivens* remedy. In doing so, it assured that federal officials

Nevertheless, the Court limited this newly-minted *Bivens* right for future claims through use of a two step analysis. Under the first step, "there is the question whether any alternative, existing process for the interests amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."<sup>87</sup> In other words, where Congress had already provided an adequate remedial scheme for constitutional violations, it is unnecessary for the Court to craft a judge-made remedy.<sup>88</sup> But even if no such alternative exists, a court must apply the second step of the analysis and undertake a "remedial determination that is appropriate for a common-law tribunal, paying particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation."<sup>89</sup>

Although Justice Brennan's opinion for the Court in *Bivens* is fairly straightforward, Justice Harlan's concurrence adds some important insights into the analysis. Most specifically, on the question of "whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands."<sup>90</sup> In other words, Harlan did not believe that existence of a damage remedy for constitutional violations should depend on Congressional legislative grace. Instead, he concluded that, "if a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, . . . then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law."<sup>91</sup>

On another significant point, Justice Harlan appeared to be responding to a suggestion that Chief Justice Burger made in dissent that constitutional violations by federal officers should be decided by quasi-judicial or administrative agencies created by

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would be subject to the same constraints as state officials in dealing with the fundamental rights of the people who dwell in this land."); *see also id.* ("The *Bivens* analog to § 1983 . . . is hardly an obscure part of the Court's jurisprudence.").

<sup>86</sup> *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001). *But see Bivens*, 403 U.S. at 407-8 (Harlan, J., concurring) ("I agree with the Court that the appropriateness of according *Bivens* compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct.").

<sup>87</sup> *Wilkie*, 127 S. Ct. at 2598 (citing *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). Somewhat confusingly, this was the second step of the analysis set out in *Carlson v. Green*, 446 U.S. 14, 18-19 (1980), and the second step, involving "special factors counseling hesitation," was the first. *Id.* at 18. The majority opinion by Justice Souter in *Wilkie* gives no indication why the order of the analysis was reversed.

<sup>88</sup> *Bivens*, 403 U.S. at 397 ("For we have no congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agent, but must instead be remitted to another remedy, equally effective in the view of Congress."); *see also id.* at 410 (Harlan, J., concurring) ("For people in *Bivens*' shoes, it is damages or nothing.").

<sup>89</sup> *Wilkie*, 127 S. Ct. at 2598 (citing *Bush*, 462 U.S. at 378). This "special factors counseling hesitation" language derives from *Bivens* where the Court noted that a damage action was appropriate because the case involved "no special factors counseling hesitation in the absence of affirmative action of Congress." *Bivens*, 403 U.S. at 396.

<sup>90</sup> *Bivens*, 403 U.S. at 401 (Harlan, J., concurring).

<sup>91</sup> *Id.* at 405. *See also Bush v. Lucas*, 462 U.S. 367, 378 (1983) ("The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation.").

Congress.<sup>92</sup> Apparently disagreeing with Burger's suggestion, Harlan wrote that, "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment."<sup>93</sup> Harlan thought this was so especially where "the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities."<sup>94</sup> Nonetheless, he did maintain that the court should consider policy considerations for and against adopting such an implied constitutional right much in the way that the legislature does.<sup>95</sup> Weighing the relevant policy considerations in *Bivens*, Justice Harlan concluded that there was not any substantial governmental policy which would be interfered with by recognizing a non-statutory damage remedy against federal officials allegedly responsible for a Fourth Amendment violation.<sup>96</sup>

After *Bivens*, the Court extended its reasoning to two additional contexts: employment discrimination suits against Congressional members for violations of the equal protection component of the Fifth Amendment's Due Process Clause,<sup>97</sup> and cruel and unusual punishment actions by prisoners under the Eighth Amendment against federal prison officials.<sup>98</sup> But since 1980, although *Bivens* has not been overruled,<sup>99</sup> it has not been applied to any new types of cases.<sup>100</sup> The Court just this last Term stated that, "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified."<sup>101</sup> Even more to the point, the Court stated in its 2001 *Malesko* decision that a *Bivens* remedy would be limited to instances where there was either no other cause of action against individual officers alleged to have acted unconstitutionally or where a plaintiff lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct.<sup>102</sup> Based on this restrictive approach towards such claims, the Court has failed to find *Bivens* remedies for claims involving: harm to military personnel through service activity,<sup>103</sup> wrongful denials of Social Security benefits,<sup>104</sup> and retaliation against the exercise of ownership rights under the Fifth Amendment's Takings Clause.<sup>105</sup>

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<sup>92</sup> *Id.* at 422 (Burger, C.J., dissenting).

<sup>93</sup> *Id.* at 407 (Harlan, J., concurring).

<sup>94</sup> *Id.* See also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980).

<sup>95</sup> *Bivens*, 403 U.S. at 407 (Harlan, J., concurring).

<sup>96</sup> *Id.* at 408-09.

<sup>97</sup> *Davis v. Passman*, 442 U.S. 228 (1979).

<sup>98</sup> *Carlson v. Green*, 446 U.S. 14 (1980).

<sup>99</sup> At least two current Justices, Scalia and Thomas, would like to see *Bivens* and its progeny limited "to the precise circumstances that they involved." See *Wilkie v. Robbins*, 127 S. Ct. 2588, 2608 (2007) (Thomas, J., concurring) (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

<sup>100</sup> *Malesko*, 534 U.S. at 68 ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."). See also Ryan D. Newman, *From Bivens to Malesko and Beyond: Implied Constitutional Remedies and the Separation of Powers*, Note, 85 TEX. L. REV. 471, 474 (2006) ("Although *Bivens* remains good law, in practice it seems a dead letter.").

<sup>101</sup> *Wilkie*, 127 S. Ct. at 2597.

<sup>102</sup> *Malesko*, 534 U.S. at 70.

<sup>103</sup> *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983).

The refusal of the current conservative Court to apply *Bivens* to other scenarios that appear to fall under its logic has led Justice Ginsburg to urge Congress "to codify and further define the *Bivens* remedy."<sup>106</sup> Whether that might be the most appropriate course will be examined after reviewing the current state of federal employees' First Amendment rights under *Bivens*.

### C. APPLICATION OF BIVENS TO FEDERAL EMPLOYMENT: *BUSH V. LUCAS*

Given the focus of this paper on the First Amendment rights of federal employees, the most significant finding that the Court has made with regard to the scope of the *Bivens* remedy is the one it made in the decision of *Bush v. Lucas*.<sup>107</sup> *Bush* involved the demotion of a federal employee for allegedly making protected First Amendment statements critical of his federal agency.<sup>108</sup> Although he appealed the adverse personnel decision to the Civil Service Commission and was reinstated with retroactive seniority and full back pay,<sup>109</sup> under the administrative scheme he was not able to receive compensatory damages for emotional distress, punitive damages, or attorneys' fees against the individual federal official.<sup>110</sup> There was therefore some issue over whether the administrative remedy adequately deterred unconstitutional conduct against the federal employee by his federal supervisor.<sup>111</sup>

Although the Court assumed that the administrative remedies did not provide complete relief for the plaintiff which would have been as effective as the *Bivens* damages remedy,<sup>112</sup> the Court nevertheless unanimously<sup>113</sup> concluded that there did not exist a *Bivens* remedy under the First Amendment "arising out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States."<sup>114</sup> More specifically, under the first step of the *Bivens* analysis, the Court found that there is existed an effective

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<sup>104</sup> *Schweiker v. Chilicky*, 487 U.S. 412 (1988). Based on the language of the *Bivens* decision itself, and in order to further the deterrent functions of such individual damage actions, the Court has also held that *Bivens* actions may only be brought against individuals, not against federal agencies, *FDIC v. Meyer*, 510 U.S. 471 (1994), or against private prisons acting on behalf of the State. *Correctional Services Corp. v. Malesko*, 534 U.S. 61.

<sup>105</sup> *Wilkie*, 127 S. Ct. at 2604-05.

<sup>106</sup> *Id.* at 2618 (Ginsburg, concurring in part and dissenting in part).

<sup>107</sup> 462 U.S. 367 (1983).

<sup>108</sup> *Id.* at 371.

<sup>109</sup> His first appeal was denied by the Federal Employee Appeals Authority, the predecessor to the Merit Systems Protection Board (MSPB), but was later upheld by Civil Service Commission's Appeal Review Board which applied the balancing of interests test under *Pickering*. *Id.* at 370-71. The Board awarded Bush reinstatement and \$30,000 in back pay. *Id.* at 386 n.29.

<sup>110</sup> *Id.* at 371-372 & nn. 8-9.

<sup>111</sup> *Id.* at 372 n.8.

<sup>112</sup> *Id.* at 388 ("existing remedies do not provide complete relief to the plaintiff").

<sup>113</sup> Justices Marshall and Blackmun concurred to register their belief that a similar case might come out differently if there were not a comprehensive scheme to provide full compensation for a constitutional violation that was substantially as effective as a damage action under the constitution. *Id.* at 390 (Marshall, J., concurring).

<sup>114</sup> *Id.* at 368.

alternative remedy under the Civil Service Commission regulations.<sup>115</sup> The Court defined its mission as making a "policy judgment . . . informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights."<sup>116</sup> Under this test, these civil service regulations were found to be "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations,"<sup>117</sup> and it was unnecessary to "interfere with Congress' carefully calibrated system."<sup>118</sup>

Even Justice Brennan, the author of the original *Bivens* decision, agreed with the outcome in *Bush*, writing in a later case that, "I agree that in appropriate circumstances we should defer to a congressional decision to substitute alternative relief for a judicially created remedy."<sup>119</sup> Brennan believed a substitute alternative remedy under the CSRA of 1978 was an appropriate circumstance because Congress developed the scheme over nearly a hundred years and "'constitutional challenges . . . are fully cognizable' and prevailing employees are entitled not only to full backpay, but to receive promotions, seniority, pay raises, and accumulated leave."<sup>120</sup>

Furthermore, the Court found special factors counseling hesitation under the second part of the *Bivens* analysis. In particular, the *Bush* Court "recognized Congress' institutional competence in crafting appropriate relief for aggrieved federal employees as a 'special factor counseling hesitation in the creation of a new remedy.'"<sup>121</sup> In this regard, the Court observed that Congress could more expertly evaluate the effect of a new litigation right for federal employees than could the Court.<sup>122</sup> It was not for the Court to decide whether it would be good policy to permit a federal employee to recover damages against government officials in these circumstances where Congress had already carried out the necessary balancing of employee rights and government efficiency interests.<sup>123</sup> Indeed, recognizing a cause of action for constitutional violations in the federal employment relations "could upset Congress' careful structuring of federal employment relations."<sup>124</sup>

Consequently, since 1983, federal employees have had to vindicate their First Amendment rights under an administrative scheme that provides less than complete

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<sup>115</sup> *Id.* at 388.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* This elaborate scheme was established by a series of federal civil service laws including: the Pendleton Act of 1883, 22 Stat. 403; the Lloyd-LaFollette Act of 1912, 37 Stat. 539; the Veterans Preference Act of 1944, 58 Stat. 390; the Back Pay Act of 1948, 62 Stat. 354; the Backpay Act of 1966, 81 Stat. 203; and the Civil Service Reform Act of 1978, 92 Stat. 1134.

<sup>118</sup> *Wilkie v. Robbins*, 127 S. Ct. 2588, 2612 (Ginsburg, concurring in part and dissenting in part).

<sup>119</sup> *Schweiker v. Chilicky*, 487 U.S. 412, 431 (1988) (Brennan, J., dissenting).

<sup>120</sup> *Id.* (quoting *Bush*, 462 U.S. at 386, 388).

<sup>121</sup> *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (citing *Bush*, 462 U.S. at 380).

<sup>122</sup> *Bush*, 462 U.S. at 389.

<sup>123</sup> *Id.*

<sup>124</sup> *Schweiker*, 487 U.S. at 441 (Brennan, J., dissenting).



relief.<sup>125</sup> This is not to say that they do not have the ability to have their First Amendment claims analyzed under the *Pickering* framework for public employee free speech claims.<sup>126</sup> They do. The difference is that the framework will be initially applied by an administrative judge (AJ) appointed by the Merit Systems Protection Board (MSPB).<sup>127</sup> Also, even if liability is found, the damages will be limited to equitable relief and back pay. The federal employee will not be eligible for compensatory or punitive damages, and attorney's fees are awarded on a more discretionary basis.<sup>128</sup> Moreover, the deterrence function of the *Bivens* remedy is diminished because there is no individual liability against the federal officials responsible for the First Amendment deprivation. All this seems to suggest that the current remedies available to federal employees hardly act as a substitute remedy for a *Bivens* type claim in the First Amendment federal employment relations context.

Nevertheless, the Court's focus in *Bivens* and subsequently in *Bush v. Lucas* appears to be on whether the administrative remedy provides meaningful redress to those federal employees bringing First Amendment claims.<sup>129</sup> It is therefore necessary to examine in some detail the status of First Amendment retaliation claims under the CSRA of 1978.<sup>130</sup> To the extent that federal employees are not receiving similar treatment for their claims from the MSPB or the Federal Circuit, the two adjudicative bodies responsible for handling the appeals of these types of claims, there is an argument that this alternative scheme is not providing a meaningful remedy. Like Justice Marshall, I believe that a case like *Bush v. Lucas* should be decided differently in an environment in which Congress' comprehensive scheme is not providing "full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights. . . and that [does not] afford[] a remedy that is substantially as effective as a damage action."<sup>131</sup> Also, to the extent that the MSPB process is not working the way that it should, it undermines the "special factors counseling hesitation" argument that courts should defer to the institutional competence of Congress to decide these matters of federal employment law.

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<sup>125</sup> Estlund, *supra* note 43, at \_\_ ("[T]he important point [of *Bush*] . . . is the Court's conclusion that the administrative procedures and remedies of the civil service laws afford *sufficient protection* even for speech that is clearly protected by the First Amendment.") (emphasis added).

<sup>126</sup> Indeed, the federal employee in *Bush* was successful after the Civil Service Commission Appeals Review Board applied the *Pickering* balance and found in the employee's favor. *Bush*, 462 U.S. at 370-71.

<sup>127</sup> For more detail about the MSPB and the role it plays under the Civil Service Act of 1978, see generally Part III.A.

<sup>128</sup> 5 U.S.C. §§ 7701(g), 1221(g), 1214(g); 5 C.F.R. §§ 1201.201-1201.203.

<sup>129</sup> *Bush*, 462 U.S. at 386 ("[T]he Government's comprehensive scheme is costly to administer, but it provides *meaningful remedies* for employees who may have been unfairly disciplined for making critical comments about their agencies.") (emphasis added).

<sup>130</sup> Professor Estlund has denominated this question as crucial to whether it makes sense to re-cast public employee First Amendment speech claims into liberty interests due some form of procedural process under the due process clause. See Estlund, *supra* note 43, at \_\_ ("How good will administrative decisionmakers be at weighing free speech concerns against managers' claims of institutional imperative?").

<sup>131</sup> *Bush*, 462 U.S. at 390 (Marshall, J., concurring). See also *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.").

The following section therefore considers how effectively the MSPB and the Federal Circuit have handled First Amendment *Pickering* claims of federal employees and whether federal employees nearly twenty-five years after *Bush* are receiving any semblance of meaningful redress for their constitutional claims.

### III. FEDERAL EMPLOYEE FIRST AMENDMENT CLAIMS AND THE MSPB

#### A. THE HISTORY OF CIVIL SERVICE LAW AND CURRENT CIVIL SERVICE REGULATIONS

As the Court indicated in *Bush v. Lucas*, the federal civil service system in the United States is a product of many incremental legislative steps over 100 years, starting with the enactment of the Pendleton Act in 1883.<sup>132</sup> The Pendleton Act established the Civil Service Commission, which aimed to defeat the spoils system and select federal public employees based on merit by using a competitive examination.<sup>133</sup> Under Section 13, it provided that employees could not be required to make political contributions or be politically influenced at the risk of being terminated.<sup>134</sup> Over the next century, civil service laws were amended to provide federal employees with various employment rights, including just cause protection from termination, and from other adverse employment actions,<sup>135</sup> unless such termination would promote the efficiency of the civil service.<sup>136</sup> Additional laws provided back pay and other make-whole relief for unlawful adverse employment actions.<sup>137</sup> Importantly, Congress decided in the Lloyd-LaFollette Act of 1912 that granting free speech rights to federal employees was not counter to the efficient operation of the civil service.<sup>138</sup>

However, having the Civil Service Commission both prosecute and adjudicate federal employee personnel claims proved unworkable. Consequently, Congress passed the Civil Service Reform Act of 1978 (CSRA 1978),<sup>139</sup> establishing a new adjudicative body, the Merit Systems Protection Board (MSPB), to hear prohibited personnel action claims involving members of the civil service.<sup>140</sup> Further, in 1982, Congress required that all appeals of MSPB decisions would go to the Federal Circuit Court of Appeals.<sup>141</sup>

The CSRA of 1978 set up an elaborate and comprehensive procedural and substantive framework for dealing with federal civil servant's First Amendment claims.<sup>142</sup>

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<sup>132</sup> 22 Stat. 403.

<sup>133</sup> *Bush*, 462 U.S. at 381.

<sup>134</sup> See 5 U.S.C. § 2302(b)(3).

<sup>135</sup> Veterans Preference Act of 1944, 58 Stat. 390.

<sup>136</sup> Lloyd-LaFollette Act of 1912, 37 Stat. 539, 555, §6 ("no person in the classified Civil Service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing . . . "). The purpose of this legislation, in part, was to protect the free speech rights of civil service employees. H.R. REP. NO. 388, 62d Cong., 2s Sess. 7 (1912).

<sup>137</sup> Back Pay Act of 1966, 81 Stat. 203 (1967); Back Pay Act of 1948, 62 Stat. 354.

<sup>138</sup> *Bush*, 462 U.S. at 384.

<sup>139</sup> Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.).

<sup>140</sup> 5 U.S.C. § 7701. The CSA of 1978 also established two other independent agencies: the Office of Personnel Management (OPM) and the Federal Labor Relations Authority (FLRA).

<sup>141</sup> *Id.* § 7703; Federal Court Improvement Act of 1982, 28 U.S.C. § 1295.

<sup>142</sup> *Bush*, 462 U.S. at 385.

Under this framework, substantive provisions prohibit arbitrary actions by federal supervisors and procedural provisions provide administrative remedies for addressing unlawful actions taken against the employee.<sup>143</sup>

Substantively, the CSRA of 1978 established specific "prohibited personnel practices," including unlawfully discriminatory actions, politically coercive actions, and retaliatory actions for whistleblowing.<sup>144</sup> Significantly, for purposes of this article, covered federal civil servants are able to bring First Amendment claims under this scheme for personnel decisions based on the employee's disapproving or controversial comments about the agency.<sup>145</sup>

Procedurally, for an employee to be removed from their position, the burden is on the agency to show that such a removal would promote the efficiency of the service.<sup>146</sup> Before this can happen, however, the agency must give the employee thirty days notice of a proposed adverse employment action and the notice must contain reasons for the actions.<sup>147</sup> The employee, who may be represented by an attorney or another representative, is then given seven days to respond to the proposed action, and before taking final action, the agency must supply reasons for its decision.<sup>148</sup>

The employee may appeal the adverse decision under an applicable, internal grievance procedure or to an AJ designated by the MSPB, but not both.<sup>149</sup> The AJ holds "a trial-type hearing at which the employee c[an] present witnesses, cross-examine the agency's witnesses, and secure the attendance of agency officials."<sup>150</sup> The AJ is then

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<sup>143</sup> *Id.* The administrative scheme does not protect all civil servants. For instance, probationary employees are excluded, 5 U.S.C. § 7511, as are those employees who have been appointed by the President, 5 C.F.R. § 752.401(d)(1), (3), have jobs which have "confidential, policy-determining, policy-making, or policy-advocating character," or are determined by the President to be excluded from coverage for conditions of good administration. 5 U.S.C. § 2302(a)(2)(B)(i), (ii). The law also provides that those suspended for fourteen days or less have no right to appeal a federal agency's decision. *Id.* § 7503.

<sup>144</sup> 5 U.S.C. § 2302(b)(1), (3), (8), (9). Federal employees may also bring claims under the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.). Congress passed the WPA in light of federal government studies in 1980 and 1983 showing that, "[a] large percentage of Federal employees were reluctant to report instances of illegal or wasteful activities they had observed. Further, among those who did report such activities, a significant percentage felt they experienced some form of reprisal as a result." Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L. J. 101, 119 n.71 (1995) (citing U.S. MERIT SYSTEMS PROTECTION BOARD, WHISTLEBLOWING IN THE FEDERAL GOVERNMENT: AN UPDATE i (1993)). It does not appear, however, that the WPA has resolved the problem it was enacted to address. *See supra* note 14.

<sup>145</sup> *Bush*, 462 U.S. at 386 ("Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this [administrative] system.").

<sup>146</sup> 5 U.S.C. § 7513(a); *id.* § 7701(c)(1) (placing the burden on the agency as far as the merits of the case); 5 C.F.R. § 1201.56(a)(1)(ii).

<sup>147</sup> 5 U.S.C. § 7513(b)(1).

<sup>148</sup> *Id.* § 7513(b)(2), (3), (4).

<sup>149</sup> 5 C.F.R. § 752.405(b). There may be reasons to believe that employees fare better under a negotiated grievance process under this scheme. *See infra* note 261. However, the focus of this paper is on the efficacy of the AJ/MSPB system.

<sup>150</sup> *Bush*, 462 U.S. at 387 (citing 5 C.F.R. § 772.307(c)). *See generally* 5 U.S.C. § 7701; 5 C.F.R. Part 1200.

required to issue a written decision.<sup>151</sup> Successful employees are entitled to make-whole relief including reinstatement with back pay, but are not entitled to compensatory or punitive damages.<sup>152</sup> Attorney's fees can be awarded by the Board on a discretionary basis.<sup>153</sup>

If the employee does not win at the AJ/initial appeal level, he or she may file a petition for review (PFR) with the MSPB. Regardless of whether the MSPB accepts review, the employee may appeal further to the Federal Circuit Court of Appeals.<sup>154</sup> However, the employee will not be entitled to the full review of their claims before the Federal Circuit like plaintiffs asserting *Bivens* claims in front of a federal trial court. Instead, the Federal Circuit reviews the MSPB's or AJ's decision under a highly deferential arbitrary and capricious standard.<sup>155</sup>

Overall, this federal civil service administrative scheme has advantages and disadvantages as compared to a direct *Bivens* damage action under the Constitution. Disadvantages include lack of: access to an impartial Article III court (and the politically appointed members of the MSPB in the court's stead), jury trials,<sup>156</sup> the ability to obtain compensatory and punitive damages, full appeal rights in front of the Federal Circuit,<sup>157</sup> and the ability to bring claim against individuals responsible for violation of constitutional rights for money damages (and therefore, there is a loss of significant deterrence interests). Attorney's fees are also more discretionary under the administrative model. On the hand, the administrative process is advantageous to employees as it places the burden of proof on the agency,<sup>158</sup> gives employees due process rights which might provide more effective protection for speech than First Amendment rights alone,<sup>159</sup>

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<sup>151</sup> 5 U.S.C. § 7701(b)(1).

<sup>152</sup> *Id.* § 7701(b).

<sup>153</sup> *Id.* § 7701(g)(1) (adopting for most adverse employment action cases "interest of justice" standard).

<sup>154</sup> 5 U.S.C. § 7703(a)(1), (d).

<sup>155</sup> "The decision of the MSPB must be affirmed unless we find it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence." *Holland v. Dept. of Air Force*, 31 F.3d 1118, 1120 (Fed. Cir. 1994) (citing 5 U.S.C. § 7703(c)).

<sup>156</sup> *See Carlson v. Green*, 446 U.S. 14, 22-23 (1980).

<sup>157</sup> *See Chandler v. Rousebush*, 425 U.S. 840, 851-53 (1976).

<sup>158</sup> *See supra* note 146 and accompanying text.

<sup>159</sup> This is the argument advanced by Professor Estlund. Estlund, *supra* note 144, at 124 ("[T]hose employees who enjoy independent due process rights--who cannot be fired without a good reason or without notice and a hearing--should be expected to enjoy much greater freedom of expression as well."). I wonder, however, whether in a potentially politicized environment like the MSPB whether such procedural rights will really help? Although civil servants have the advantage of putting the burden on agencies to "reasonably investigate and evaluate whatever facts it is relying upon before imposing serious discipline," *id.* at 128-29, the danger is that such investigations will be form over substance where political considerations are involved and another reason why the independent Article III court is necessary. On the other hand, if due process is defined as "the right to notice of the charges and to a hearing before an impartial decisionmaker at which the employer must show just cause for discipline or discharge and the employee may respond," *id.* at 129, I do not believe that federal employees are entitled to an impartial decisionmaker pre-termination under *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985), and the MSPB, as discussed below, seems far from an impartial administrative decisionmaker post-termination. *See infra* Part III.B.

negates the need to argue against qualified immunity in order to obtain damages,<sup>160</sup> and provides a process that is likely to be more accessible, quicker, and cost less money.<sup>161</sup>

To determine whether the advantages of the MSPB process for deciding First Amendment claims of federal employees outweighs the disadvantages or vice versa, it is necessary to consider whether the established alternative remedy to a direct constitutional claim is providing "meaningful redress" to impacted federal employees. In other words, it is necessary to explore how the MSPB and the Federal Circuit have been handling First Amendment retaliation claims of federal employees to determine whether a *Bivens* remedy is necessary in this sub-class of cases.<sup>162</sup> It is to this topic that the next two subsections turn.

#### B. THE MSPB EXPERIENCE HANDLING FIRST AMENDMENT *PICKERING* CLAIMS

The state of protection for civil service federal employees who speak out on controversial issues of public concern has never been good. Indeed, the state of affairs was so bleak that the Congress passed the Whistleblower Protection Act of 1989 (WPA)<sup>163</sup> to give federal employees more protection from retaliation for exercise of First Amendment rights in the workplace in matters of reporting waste, fraud, or abuse.<sup>164</sup> But even after passage of the 1989 law, Professor Estlund was able to conclude based on findings from a 1992 report that:

[M]any employees who observe wrongdoing do not report it, that many of those who do so perceive employer retaliation, albeit of a comparatively mild variety, and that many of those who do not report wrongdoing attribute their unwillingness to speak out to the fear of retaliation.<sup>165</sup>

Indeed, Congress in 2007 is seriously considering the first "enhancement" to the WPA in eighteen years.<sup>166</sup> Currently, however, fear of retaliation in the federal workplace for

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<sup>160</sup> See *Butz v. Economou*, 438 U.S. 478 (1978) (applying Section 1983 qualified immunity standard for state officials to federal officials).

<sup>161</sup> Estlund, *supra* note 144, at 129.

<sup>162</sup> "The question is obviously crucial: If administrative hearings ended up serving as a rubberstamp for managers' decisions, they would not serve the First Amendment values and interests at stake." Estlund, *supra* note 43, at \_\_\_\_.

<sup>163</sup> P. L. No. 101-12, 103 Stat. 32 (codified at 5 U.S.C. §§1211-1219, 1221, 1222, 3352 (2000)).

<sup>164</sup> Estlund, *supra* note 144, at 119 n.71.

<sup>165</sup> *Id.* at 120.

<sup>166</sup> Government Accountability Project, *House Approves Landmark Whistleblower Legislation* (Mar. 14, 2007), [http://www.whistleblower.org/content/press\\_detail.cfm?press\\_id=831](http://www.whistleblower.org/content/press_detail.cfm?press_id=831) ("The Government Accountability Project (GAP) hailed this evening's House of Representatives floor vote approving H.R. 985, the Whistleblower Protection Enhancement Act, legislation that overhauls federal whistleblower law. The vote was 229-0 by Democrats, and 102-94 among Republicans."). The bill is currently pending in the Senate. The Bill would extend whistleblower protections to national security employees, employees of government contractors, and employees of science-based agencies. House Committee on Oversight and Government Reform, *Whistleblower Protection Enhancement Act of 2007* (Feb. 13, 2007), <http://oversight.house.gov/story.asp?ID=1172>. It would also expand the "scope of disclosures protected under current law . . . [and] clarify[] that 'any' disclosure regarding waste, fraud, or abuse means 'without restriction as to time, place, form, motive, context, or prior disclosure' and includes formal or informal communication."

unwanted speech remains a substantial issue in the federal civil service.<sup>167</sup> Since 1982, these concerns have been raised by federal employees in front of the MSPB either in whistleblowing suits or First Amendment retaliation suits.<sup>168</sup> With this article's focus on the First Amendment, the question remains: how effectively is the MSPB addressing the First Amendment concerns of federal employees?<sup>169</sup>

## 1. The Structure and Characteristics of the MSPB

The answer appears to be based largely on the structure and the characteristics of the MSPB (or Board), which hears appeals of personnel actions brought by over two million covered federal employees.<sup>170</sup> As part of the Executive Branch, the MSPB describes itself as "serv[ing] as an independent, bipartisan guardian of the merit systems under which Federal employees work."<sup>171</sup> Yet, there remains a question of independence, because the members of the Board are political appointees.<sup>172</sup> With its full complement, it

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*Id.* Perhaps most importantly, it would provide an escape-hatch from MSPB/Federal Circuit procedures altogether if the MSPB does not act on a case within 180 days. *Id.* However, unlike the Equal Employment Opportunity Commission (EEOC), the MSPB-designated AJ does hear cases fairly quickly and so this provision might not provide adequate relief from the current system. See Edward H. Passman & Bryan J. Schwartz, *In the Name of Security, Insecurity: The Trend to Diminish Federal Employees' Rights*, 21 LAB. LAW. 57, 62 (2005) ("The MSPB regulations expedite the hearing process for adverse actions and other statutory appeals, strongly encouraging MSPB administrative judges (AJs) to issue initial decisions within 120 days.").

<sup>167</sup> See *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1971 (2006) (Souter, J., dissenting) ("Most significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties [under the WPA], the very speech the majority says will be covered . . ."). See also Estlund, *supra* note 144, at 142 ("[T]he [federal] study injects a strong cautionary note, for it suggests a fairly high level of managerial hostility and employee 'silence' (failure to report perceived wrongdoing) even in the most legally protected environment. ").

<sup>168</sup> "In the context of an adverse action against a public employee, the [whistleblowing] rights under section 2302(b)(8)(A) (prohibition of reprisal) and the First Amendment's right to free speech have been considered coextensive rights." *Fiorillo v. U.S. Dept. of Justice, Bureau of Prisons*, 795 F.2d 1544 (Fed. Cir. 1986) (citing *Gerlach v. Fed. Trade Comm'n*, 9 M.S.P.R. 268 (1981)). This article focuses on the First Amendment, but the impact the federal whistleblower statutes have on this area of the law cannot be ignored. The presence of such whistleblower laws has both given federal employees alternative means to hold their government employers accountable, but has also proven something else: that such laws do not effectively fill the gap left by the lack of First Amendment protection, contrary to Justice Kennedy's assertions in *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

<sup>169</sup> See Estlund, *supra* note 43, at \_\_ ("While the experience of employees with First Amendment claims under the federal civil service laws, where these claims were channeled by *Bush v. Lucas*, would be instructive, it would be difficult to evaluate that experience and to extrapolate to the much larger and more varied universe of state and local employment."). I do not attempt, however, to undertake the difficult extrapolation of the federal experience to state and local employment in this article.

<sup>170</sup> There are approximately three million federal workers in the United States. Two-thirds, or approximately two million are covered by the Civil Service Reform Act of 1978 and the procedures of the MSPB. See William F. West & Robert F. Durant, *Merit, Management, and Neutral Competence: Lessons from the U.S. Merit Systems Protection Board, FY 1988 - FY 1997*, 60 PUB. ADMIN. REV. 111, \_\_ (2000).

<sup>171</sup> MSPB.GOV, *Welcome from Neil A.G. McPhie*, <http://www.mspb.gov/sites/mspb/default.aspx> (last visited Aug. 6, 2007).

<sup>172</sup> In this vein, Tom Devine, legal director for the Government Accountability Project (GAP) in Washington D.C., contends: "These [Board Member positions] are stepping stones for bigger and better things. They know the way to get ahead in the administration is not to support whistle-blowers who

consists of three members,<sup>173</sup> no more than two members from any one party.<sup>174</sup> The Members are Senate-approved and serve overlapping seven-year terms.<sup>175</sup>

The MSPB received over 8,500 appeals of civil service personnel decisions this past year.<sup>176</sup> Of these, about fifty percent in any given year involve adverse employment action claims, involving terminations, suspensions, demotions, failure to promote, etc.<sup>177</sup> The standard in such cases is whether adverse employment actions are supported by such cause as will promote the efficiency of the public service.<sup>178</sup> Most of these appeals are initially heard by AJs designated by the Board at five regional offices throughout the country.<sup>179</sup> Unsuccessful parties before the AJs (mostly employees) may file petitions for review (PFRs) with the Board.<sup>180</sup> In recent years, there has been between 1,000 and 2,000 PFRs, with the large majority (anywhere from 84% to 94%) resulting in the Board not changing the AJ decision.<sup>181</sup> The large percentage of unchanged awards is based on the relatively high standard a PFR must meet in order to be reviewed by the MSPB. Petitions are granted "only when significant new evidence is presented to [the MSPB] that was not available for consideration earlier or when the administrative judge made an

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embarrass presidents." Timothy W. Maier, *Entrapping the whistle-blowers - efforts to stop government corruption*, INSIGHT ON THE NEWS, Feb. 2, 1998, [http://findarticles.com/p/articles/mi\\_m1571/is\\_n4\\_v14/ai\\_20212840](http://findarticles.com/p/articles/mi_m1571/is_n4_v14/ai_20212840).

<sup>173</sup> West & Durant, *supra* note 170, at \_\_\_. The President has the ability to designate the chairperson. *Id.* The current three members of the Board are Chairman Neil A.G. McPhie (Republican), Vice Chairwoman Mary M. Rose (Republican), and Member Barbara J. Sapin (Democrat). MSPB.gov, *Board Members*, <http://www.mspb.gov/sites/mspb/pages/About%20MSPB.aspx> (last visited Aug. 6, 2007). Chairman McPhie and Member Sapin are attorneys, while Vice-Chair Rose is not. *Id.* Vice-Chair Rose has served in many political capacities and was employed by the conservative Heritage Foundation.

<sup>174</sup> West & Durant, *supra* note 170, at \_\_\_. See also Carol Goldberg, *Chambers Termination Upheld - Appeal Planned*, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, Sept. 21, 2006, at [http://www.peer.org/news/news\\_id.php?row\\_id=753](http://www.peer.org/news/news_id.php?row_id=753) (observing that current Board has two Republicans and one Democrat).

<sup>175</sup> 5 U.S.C. §§ 1201-1203. The seven-year term would seem to help insulate the Members from political influence, but the analysis of MSPB First Amendment cases appears to undermine this theory. See *infra* Part III.B.2.

<sup>176</sup> Merit Systems Protection Board, *FY 2006 Performance and Accountability Report (PAR)* 13 (Nov. 16, 2006), <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=277562&version=277871&application=ACROBAT>. By contrast, in the period from 1988-1997, it handled 6500 to 7500 appeals. West & Durant, *supra* note 170, at \_\_\_.

<sup>177</sup> West & Durant, *supra* note 170, at \_\_\_. The other 50% mostly involve reductions-in-force and retiree benefit claims. *Id.*

<sup>178</sup> VAUGHAN, *supra* note 11, at § 12.01, 12-2. This has been the standard since 1912. *Id.*

<sup>179</sup> West & Durant, *supra* note 170, at \_\_\_. The MSPB has the power by statute to delegate cases to AJs. 5 U.S.C. § 1204(g) ("The Board may delegate the performance of any of its administrative functions under this title to any employee of the Board."). Thus, AJs are actually considered to be employees of the MSPB. Decisions from the administrative judges are discretionary and the MSPB does not consider these AJ decisions precedential. VAUGHN, *supra* note 11, § 5.01 at 5-2 & n.6 (citing *Horner v. Burns*, 793 F.2d 196, 201 (Fed. Cir. 1986)).

<sup>180</sup> West & Durant, *supra* note 170, at \_\_\_.

<sup>181</sup> *Id.* at Table 2 (statistics from 1988-1997). Of the remaining PFRs, about 2% are settled, 3-4% are reversed, 7-8% are remanded, and 2% result in mitigated remedies. *Id.*

error interpreting a law or regulation."<sup>182</sup> Nevertheless, even petitions denied review may still be appealed to the Federal Circuit.<sup>183</sup>

Very few of these PFRs granted review by the Board involve First Amendment claims by employees.<sup>184</sup> A query of MSPB decisions involving First Amendment claims on the Westlaw FLB-MSPB database disclosed only seventy-seven decision from 1979 to 2007, averaging less than three per year, a minuscule percentage of the more than 10,000 decisions the MSPB has issued during this same period.<sup>185</sup> Of these First Amendment decisions, only twenty-four involve any mention of the First Amendment balancing analysis under *Pickering*.<sup>186</sup>

Most significantly of all, however, is the fact that all twenty-four remaining decisions either involve a finding of no First Amendment violation<sup>187</sup> or no decision on the First Amendment issue.<sup>188</sup> Two of the most recent of these *Pickering* MSPB cases,

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<sup>182</sup> *Heagans v. Dept. of Defense*, 101 M.S.P.R. 159, 160 (2006) (citing 5 C.F.R. § 1201.115).

<sup>183</sup> 5 U.S.C. § 7703(a)(1), (d).

<sup>184</sup> Indeed, some First Amendment claims were decided against the employee by administrative judges, denied review by the MSPB, and then affirmed on the substance by the Federal Circuit. *See, e.g.*, *Henry v. Dept. of Navy*, 902 F.2d 949, 950 (Fed. Cir. 1990). Yet, another route by which federal employee constitutional claims do not receive the constitutional protection they deserve.

<sup>185</sup> The Westlaw query included the search terms: "'first amendment' and *Pickering* or *Mings* or *Sigman*." *Mings* and *Sigman* are the primary Federal Circuit and MSPB precedent discussing *Pickering* rights. *See Mings v. Dept. of Justice*, 813 F.2d 384, 387 (Fed.Cir.1987); *Sigman v. Dept. of Air Force*, 37 M.S.P.R. 352 (1988). A similar search on the MSPB.gov database disclosed only fifty-nine such decisions. MSPB.gov, *Decisions*, <http://www.mspb.gov/sites/mspb/pages/MSPB%20Decisions.aspx> (advanced search terms were "'First Amendment' or 'first amendment' or '1st Amendment.'"). The reason for the discrepancy appears to be that fifteen cases from 1980-1983 are inexplicably not reported in the MSPB.gov database and a few other cases are counted in Westlaw twice if they were remanded by the Federal Circuit.

<sup>186</sup> Other cases mention the First Amendment for procedural or jurisdictional reasons, *see, e.g.*, *Wright v. Dept. of Army*, 100 M.S.P.R. 274 (2005), and others mention First Amendment claims without deciding them. *See, e.g.*, *Wilson v. Dept. of Justice*, 66 M.S.P.R. 287 (1995). In the latter instance, this approach is followed because if the employee obtains redress under other provisions of the civil service law, the Board finds it unnecessary to examine the constitutional issue. *See infra* note 246 and accompanying text.

<sup>187</sup> *Smith v. Dept. of Transp.*, 104 M.S.P.R. 59 (2007); *Chambers v. Dept. of Interior*, 103 M.S.P.R. 375 (2006); *Heaggans v. Department of Defense*, 101 M.S.P.R. 159 (2006) (PFR denied 2-1, but dissent filed by Chairman McPhie finding employee had suffered no violation of First Amendment rights); *Johnson v. Dept. of Justice*, 65 M.S.P.R. 46 (1994); *Henry v. Dept. of Navy*, 40 M.S.P.R. 482 (1989); *Jackson v. Small Business Admin.*, 40 M.S.R.P. 137 (1989); *Social Security Admin. v. Burris*, 39 M.S.P.R. 51 (1988); *Sigman v. Dept. of Air Force*, 37 M.S.P.R. 352 (1988); *Wenzel v. Dept. of Interior*, 33 M.S.P.R. 344 (1987); *Ledeaux v. Veteran's Admin.*, 29 M.S.P.R. 440 (1985); *Osokow v. Office of Pers. Mgmt.*, 25 M.S.P.R. 319 (1984); *Barnes v. Dept. of Army*, 22 M.S.P.R. 243 (1984); *Brown v. F.A.A.*, 21 M.S.P.R. 572 (1984); *Curry v. Dept. of Navy*, 13 M.S.P.R. 327 (1982); *Wittenberg v. U.S. Postal Serv.*, 12 M.S.P.R. (1981); *Prescott v. Dept. of Hlth. and Human Servs.*, 6 M.S.P.R. 252 (1981); *Quarry v. Gen. Acct. Off.*, 3 M.S.P.R. 200 (1980).

<sup>188</sup> *Wilson v. Dept. of Justice*, 66 M.S.P.R. 287, 297 (1995) ("Because the charge does not set forth actionable misconduct, we need not reach the appellant's claim that his speech was protected by the First Amendment."); *Oliver v. Dept. of Hlth. and Human Servs.*, 34 M.S.P.R. 465 (1987) (decided as whistleblower case); *Thomas v. General Serv. Admin.*, 27 M.S.P.R. 401 (1985) (same); *Farris v. U.S. Postal Serv.*, 14 M.S.P.R. 568 (1983) (although finding some First Amendment protection, deciding case under statutory provisions); *Special Counsel v. Dept. of Defense*, 9 M.S.P.R. 363 (1982) (decided under civil service provisions); *Schofield v. Veterans Admin.*, 7 M.S.P.R. 94 (1981) (passing on "serious constitutional question," and deciding case on statutory grounds).



discussed below, represent the pattern in almost all of the cases decided on the merits: a finding that the employee did not speak out on a matter of public concern under a narrow view of what a public concern is, and then an alternative argument that even if public concern speech is involved, the employee's First Amendment rights are easily outweighed by the countervailing efficiency interests of the employer.<sup>189</sup> In short, outside of *Bush v. Lucas* itself, which was decided by the MSPB's predecessor agency, there has *not been a single First Amendment case* decided on the merits by the MSPB where an employee's First Amendment *Pickering* rights have been upheld.

## 2. Two Representative *Pickering* MSPB Cases: *Chambers* and *Stone*

Two recent, representative MSPB cases, *Chambers v. Department of the Interior*<sup>190</sup> and *Smith v. Department of Transportation*,<sup>191</sup> amply show how the MSPB has historically dealt with these types of First Amendment claims.

### a. *Chambers v. Department of Interior*

In *Chambers*, Teresa Chambers had been appointed the Chief of the U.S. Park Police in 2002.<sup>192</sup> When Chambers became concerned about how Park Police were being deployed post-9/11 and the lack of budgetary resources, she shared her dissatisfaction with a Washington Post reporter in comments published in December 2003.<sup>193</sup> Almost immediately, she was placed on paid administrative leave and her superiors proposed to remove her from her position because she had discussed security and budgetary matters with third parties and did so without going through her chain of command.<sup>194</sup> She brought whistleblowing and First Amendment retaliation claims under the civil service regulations after her official termination.<sup>195</sup>

The administrative law judge upheld her dismissal finding that she had disclosed sensitive security and budget information, failed to carry out supervisor's instructions, and failed to follow the chain of command.<sup>196</sup> On the First Amendment issue, the AJ held that she did not speak as a citizen and therefore, under *Garcetti v. Ceballos*,<sup>197</sup> had no First Amendment protection.<sup>198</sup>

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<sup>189</sup> The *Chambers* case, discussed in detail in Part III.B.2.a, is an exception because it was decided based on the newly-available ground of official duty speech available since *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). But there is still an argument in the alternative under the *Pickering* balance, and of course, the case comes out in favor of the agency.

<sup>190</sup> 103 M.S.P.R. 375 (2006), *appeal filed* (Fed. Cir. 07-3050) (Nov 30, 2006). The pending appeal is inconsequential to this analysis as it does not relate to the First Amendment claims in *Chambers*.

<sup>191</sup> 106 M.S.P.R. 59 (2007). As of the writing of this article, no appeal has been filed.

<sup>192</sup> *Chambers*, 103 M.S.P.R. at 378.

<sup>193</sup> *Id.* at 380. She made similar comments to a House subcommittee staffer. *Id.*

<sup>194</sup> *Id.* She was officially terminated in July 2004 by the Deputy Secretary of the Interior. *Id.* at 381.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 380.

<sup>197</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)

<sup>198</sup> *Chambers*, 103 M.S.P.R. at 392.

The Board granted the PFR and affirmed the AJ decision.<sup>199</sup> Specifically on the First Amendment claim, the Board recognized that public employees have constitutional rights under *Connick* and *Pickering*, but then stated the applicable Federal Circuit precedent as requiring that, "[e]mployees' free speech rights must be balanced . . . against the need of government agencies to exercise 'wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.'"<sup>200</sup>

Nevertheless, the MSPB decided the case under *Garcetti*, finding that her speech to the reporter was pursuant to her official duties and thus, not protected by the First Amendment.<sup>201</sup> In support of this conclusion, the Board noted that Chambers had contested a gag order that would not allow her to speak to the press under any circumstance because it was her job to speak to the press about agency issues.<sup>202</sup> The Board thus defined the scope of her job duties based on how they believed Chambers perceived them.<sup>203</sup>

As I have argued elsewhere, *Garcetti* is a prime example of poor judicial reasoning and opinion writing that will hopefully go the way of *Bowers v. Hardwick*.<sup>204</sup> Be that as it may, even applying *Garcetti* to the facts of this case, not all public employee speech is created equal<sup>205</sup> and the Board seems to think that whenever a federal employee talks to a newspaper, that employee must be talking in their official capacity. Yet, the Board fails to do the functional analysis of job responsibilities that *Garcetti* requires.<sup>206</sup> Moreover, the Board came to this conclusion even though the Court in *Garcetti* specifically mentioned that a public employee speaking to a reporter on their own time would likely not be speaking pursuant to official duties.<sup>207</sup> It certainly was not Chambers' duty to criticize her employer for its security and budgetary decisions. Indeed, the criticism is most comparable to the *Pickering* case itself where the school teacher wrote a letter to a newspaper criticizing the school district's budgetary decisions.<sup>208</sup> In short, this legal reasoning of the Board majority is highly questionable and suggests a desire on the

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<sup>199</sup> *Id.* at 394.

<sup>200</sup> *Id.* at 391 (citing *Mings v. Dept. of Justice*, 813 F.2d 384, 387 (Fed.Cir.1987)). This version of the *Pickering* balance test is one that has been transformed with the government's finger heavily on the side of the government. See *infra* notes 227-231 and accompanying text.

<sup>201</sup> *Id.* at 392. Member Sapin dissented on the whistleblower claims, but agreed with the majority's First Amendment conclusion. *Id.* at 421 (Sapin, Member, dissenting).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). For a discussion of the multiple problems with *Garcetti*, see Paul M. Secunda, *More Than Employees: Citizens working in government need better constitutional protection from retaliation*, LEGAL TIMES, May 21, 2007.

<sup>205</sup> *Garcetti*, 126 S. Ct. at 1961.

<sup>206</sup> *Id.* at 1961-62 ("The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.").

<sup>207</sup> *Id.* at 1961 ("Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper.").

<sup>208</sup> *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968).

part of some Board members to favor the interests of the federal employer over its employees.<sup>209</sup>

Because the case was filed prior to *Garcetti*, the Board also concluded in the alternative that Chambers would have lost her case under pre-*Garcetti* law.<sup>210</sup> Here, the Board found that although Chambers spoke out on a matter of public concern, she lost out in the *Pickering* balance because police officers, and especially chiefs of police, have less First Amendment protection than other public employees.<sup>211</sup>

This categorical approach to *Pickering* balancing, however, is at odds with the individualized balancing required based on the specific facts of the case.<sup>212</sup> Because of the serious public safety concerns that Chambers had, it is not at all clear that the harm caused to working relationships by her criticisms were outweighed by the benefit to the public interest in safety in having someone with Chamber's knowledge comment on the current state of affairs for the Park Police. All the Board majority states in defense of its position is: "[C]onsistent with the decisions cited above, the agency had an overriding interest in not having the Chief of the Park Police publicly question decisions made by officials who outranked her concerning the functions and budget of the Park Police."<sup>213</sup> Yet, if that was always the case, there would never be any First Amendment rights for public employees who as citizens believe they are uniquely situated to bring concerns about the government to other citizens' attention. Indeed, the Board seems to recognize this itself when it cites a Seventh Circuit case for the proposition that, "[t]he public's interest in learning about 'corruption' or 'wrongdoing' by government officials will usually foreclose discipline against a public employee who reveals such activities, even when the speaker is a law enforcement officer with limited First Amendment rights."<sup>214</sup> But somehow, the Board decision believes danger to public safety is less important than other types of "wrongdoing" or "corruption," and thus the Seventh Circuit precedent

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<sup>209</sup> This hunch is also based on other background evidence. For instance, Vice-Chairman Rose, a Republican appointee, held previous positions as Deputy Associate Director of the Office of Presidential Personnel at the White House under the current President Bush and as a "Visiting Fellow with The Heritage Foundation where she recruited, interviewed and recommended Presidential Appointments to the George W. Bush transition team." MSPB.gov, *About MSPB*, <http://www.mspb.gov/sites/mspb/pages/About%20MSPB.aspx>. The Heritage Foundation is a conservative, generally pro-employer institution in Washington D.C. See The Heritage Foundation, *About Us*, <http://www.heritage.org/about> ("Founded in 1973, The Heritage Foundation is a research and educational institute - a think tank - whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."). Less cynically, this faulty legal analysis may be the result of what happens when members of the Board are not attorneys, like Vice-Chairwoman Rose.

<sup>210</sup> *Chambers*, 103 M.S.P.R. 375, 392-93 (2006). Member Sapin did dissent on this alternative ground, but did not expound on her reasons. *Id.* at 421 (Sapin, Member, dissenting).

<sup>211</sup> *Id.* at 393.

<sup>212</sup> *Brown v. Dept. of Transp., FAA*, 735 F.2d 543, 548 (Fed. Cir. 1984) ("It is the duty of the court to perform a 'particularized balancing' between the competing interests.").

<sup>213</sup> *Chambers*, 130 M.S.P.R. at 393.

<sup>214</sup> *Id.* (citing *McGreal v. Ostrov*, 368 F.3d 657 (7th Cir.2004)).

should not apply.<sup>215</sup> In short, the Board's analysis is lacking, superficial, and inconsistent with the type of competent, legal analysis required in these types of cases.<sup>216</sup>

b. Smith v. Department of Transportation

And there is not much improvement in the Board's handling of *Smith v. Department of Transportation*.<sup>217</sup> *Smith* involves the 30-day suspension of a Department of Transportation employee for using in an allegedly unauthorized manner government documents to support his equal employment opportunity claim revolving around an allegedly racially discriminatory failure to promote.<sup>218</sup> Smith claimed, among other things, that the 30-day suspension violated his First Amendment rights to challenge the allegedly discriminatory promotion decision.<sup>219</sup> Because the AJ sustained Smith's initial appeal on other grounds, there was no need to discuss his First Amendment claims.<sup>220</sup> However, the First Amendment claim became relevant again when the Board overturned some of the AJ's conclusions on the civil service provisions.

Although recognizing the constitutional speech rights of all public employees under the *Pickering* framework, the Board relied on an interpretation by the Federal Circuit which placed a heavy thumb on the scale on the side of the government's interests.<sup>221</sup> Under the *Mings* test, "Employees' free speech rights must be balanced . . . against the need of government agencies to exercise 'wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.'"<sup>222</sup> But the Federal Circuit in *Mings* made a glaring legal mistake by suggesting that this "wide latitude" language concerns the balancing of employee and employer interests under *Pickering*. Instead, the "wide latitude" language concerns the threshold question of whether or not the employee is due some First Amendment protection because they are speaking on a matter of public concern. The full language of the quote from *Connick* is:

When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government

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<sup>215</sup> *Id.*

<sup>216</sup> Adjudicatory agencies like the MSPB need to have credibility with parties on both sides of the dispute. See Paul M. Secunda, *Politics Not As Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51, 54 n.11 (2004) (maintaining in the National Labor Relations Board context that, "Board decisions driven by political considerations negate the Board's claim of superiority in deciding labor disputes based on industrial experience and expertise and compromise its statute as a neutral independent agency.").

<sup>217</sup> 106 M.S.P.R. 59 (2007).

<sup>218</sup> *Id.* at 63. Smith was a "Management & Program Analyst (Labor Relations Program Manager) in the Flight Standards Division of the Federal Aviation Administration's (FAA) Administrative Services Branch in Atlanta." *Id.*

<sup>219</sup> *Id.* at 78.

<sup>220</sup> *Id.*

<sup>221</sup> Member Sapin dissented, but only on the holdings under the civil service provisions. She did not address the First Amendment claims. *Id.* at 90-98.

<sup>222</sup> *Mings v. Dept. of Justice*, 813 F.2d 384, 387 (Fed.Cir.1987) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.<sup>223</sup>

So only when public employee speech is on language *not* on a matter of public concern does the employer have wide latitude to manage their offices, not when the expression is important to public debate. When public concern speech is involved, as the Board in *Smith* eventually assumes for the sake of argument,<sup>224</sup> a much more delicate balance between employee First Amendment interests and governmental efficiency issues must be done.<sup>225</sup> By citing the Federal Circuit in *Mings*, the MSPB therefore compounds the twenty-year mistake by again undertaking the wrong balancing of interests.

The Board also makes two mistakes in discussing whether the filing of an EEO complaint is speech on a matter of public concern. Although the Board correctly recognizes that, "a discussion regarding racial relations or discrimination is a matter of public concern entitled to the full protection of the First Amendment,"<sup>226</sup> it cites to circuit court precedent for the proposition that the complaint has to be public<sup>227</sup> and that the filing of a discrimination claim that is "personal in nature and limited to the complainant's own situation involves a matter of purely private interest."<sup>228</sup>

As to the Board's first point, the Supreme Court clearly held in *Givhan v. Western Line Consolidated School District*<sup>229</sup> that a racial discrimination complaint made in a private conversation could still be on a matter of public concern. This principle was later reaffirmed by the Court in *Rankin v. McPherson*,<sup>230</sup> in which private, negative comments about the assassination attempt on President Resident were found to touch on matters of public concern.<sup>231</sup> Indeed, a closer look at the Eleventh Circuit opinion cited by the *Smith* majority shows that the Eleventh Circuit understood that, "a court cannot determine that an utterance is not a matter of public concern *solely* because the employee does not air the concerns to the public,"<sup>232</sup> though an employee's attempt at public disclosure may be relevant. However, in a situation where the speech concerns claims of racial discrimination, which are "inherently of public concern,"<sup>233</sup> it is not clear how the fact

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<sup>223</sup> *Connick*, 461 U.S. at 146.

<sup>224</sup> *Smith*, 106 M.S.P.R. at 80.

<sup>225</sup> *Brown v. Dept. of Transp., FAA*, 735 F.2d 543, 548 (Fed. Cir. 1984).

<sup>226</sup> *Id.* at 79 (citing *Connick*, 461 U.S. at 148 n. 8 (speech protesting racial discrimination is "inherently of public concern")).

<sup>227</sup> *Id.* (quoting *Watkins v. Bowden*, 105 F.3d 1344, 1353 (11th Cir.1997)) ("In determining whether an employee's speech relates to a matter of public concern or to his own private interest, courts also consider the employee's attempts to make the concern public and the employee's motivation in speaking.").

<sup>228</sup> *Id.* (citing *Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 143 (2d Cir.1993)).

<sup>229</sup> 439 U.S. 410, 415-16 (1979).

<sup>230</sup> 483 U.S. 378 (1987).

<sup>231</sup> *Id.* at 386-87.

<sup>232</sup> *Morgan v. Ford*, 6 F.3d 750, 754 n.5 (11th Cir. 1993). *See also Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3d Cir. 1997) (en banc) ("[I]f the content and circumstances of a private communication are such that the message conveyed would be relevant to the process of self-governance if disseminated to the community, that communication is public concern speech even though it occurred in a private context.").

<sup>233</sup> *Connick v. Myers*, 461 U.S. 138, 148 n. 8 (1983).

that the claims were not publicly aired is dispositive.

Similarly, the Board's cursory conclusion that an EEO complaint is merely personal in nature indicates a foundational misunderstanding of the dual purposes of Title VII of the Civil Rights Act of 1964<sup>234</sup> and similar federal and state antidiscrimination laws. Here, the Board is not alone in its misunderstanding of employment discrimination law, but is joined by the Second and Seventh Circuits in this error.<sup>235</sup> The purpose of employment discrimination laws is both to make the individual whole for unlawful discrimination *and* to vindicate the public interest in eradicating employment discrimination from society as a whole.<sup>236</sup> To say that an EEO complaint only serves one's own purposes is to totally ignore the public interests vindicated by such laws and the complaint filed by Smith.<sup>237</sup> This is not to say that the MSPB necessarily arrived at the wrong legal conclusion, but only that the Board lacks the necessary tools to undertake the sensitive balancing of relevant interests that need to be considered in cases such as this one. As a result, federal employees' First Amendment rights to free speech are unnecessarily sacrificed.

Perhaps, the lack of neutrality and competency on the part of the MSPB would be bearable and less worrisome if there was meaningful judicial review by an Article III court. Unfortunately, as the next section illustrates, that is not the case.

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<sup>234</sup> 42 U.S.C. §§ 2000e-2000e-17.

<sup>235</sup> *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 143 (2d Cir. 1993) (citing *Ezekwo v. NYC Health & Hospitals Corp.*, 940 F.2d 775, 781 (2d Cir. 1991); *Yatvin v. Madison Metro. School Dist.*, 840 F.2d 412, 420 (7th Cir. 1988)). The better view is that espoused by the en banc Third Circuit in *Azzaro*: "In rejecting this notion [that discrimination must be systemic to be of a public concern], we do not suggest that all public employee complaints about sexual harassment are matters of public concern. We do believe, however, that under all of the surrounding circumstances, *Azzaro's* reports address a matter of public concern even though they referred to a single incident." *Azzaro*, 110 F.3d at 980; *see also* *Campbell v. Galloway*, 483 F.3d 258, 269 (4th Cir. 2007) ("Complaints of sexual harassment are not *per se* matters of public concern; whether such complaints are in any given case depends on the content, form and context of the complaint. Applying that standard to this case and viewing the complaints in the light most favorable to *Campbell*, we conclude that *Campbell's* complaints about sexual discrimination do amount to matters of public concern.").

<sup>236</sup> *See* *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771 (1976) ("[T]he denial of seniority relief to victims of illegal racial discrimination in hiring is permissible 'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (emphasis added)); *see also* *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 292 (2002) (recognizing that the EEOC has the statutory authority to vindicate both the private and public interests served by Title VII).

<sup>237</sup> *See Albemarle*, 422 U.S. at 422 (establishing eradication of discrimination throughout the economy as one of the central statutory purposes of Title VII).

C. THE FEDERAL CIRCUIT EXPERIENCE HANDLING FIRST AMENDMENT *PICKERING* CLAIMS

As noted above, the Federal Circuit hears appeals from the MSPB concerning adverse employment decisions.<sup>238</sup> There does not appear to be that much divergence in how First Amendment *Pickering* free speech claims are handled by the MSPB as opposed to how they are treated by the Federal Circuit Court of Appeals. Indeed, in 2006, the MSPB proudly reported that 93% of its decisions were affirmed by the Federal Circuit.<sup>239</sup> The mostly likely reason for this high affirmance rate is because of the highly deferential standard of review in such cases: "The decision of the MSPB must be affirmed unless we find it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence."<sup>240</sup> In other word, this is in no way the type of review a First Amendment claim brought directly to a federal district court would receive if brought under *Bivens* or a Section 1983 federal analogue.<sup>241</sup>

In fact, the First Amendment MSPB cases involving the free speech *Pickering* analysis for federal employees follows this overall pattern to the same degree. Every single Federal Circuit case that decided a First Amendment issue on the merits found in favor of the government agency.<sup>242</sup> This is not surprising from the perspective that, "[t]he opinions of the courts place great emphasis on hierarchy of command in defining government interests, including interests in efficiency."<sup>243</sup> Overall, the last twenty-five years has witnessed the Federal Circuit uphold ten out of ten decisions for federal agency employers on the merits.<sup>244</sup> Every single one of these cases found against the First Amendment rights of public employees or, in the alternative, declared that it did not have jurisdiction over the First Amendment claim or that it was unnecessary to decide the constitutional claim because of the resolution of the civil service statutory cause of action.

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<sup>238</sup> See Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417, 425 n.35 (1990) ("The United States Circuit Court of Appeals for the Federal Circuit exercises exclusive jurisdiction over most appeals of federal employees taken from personnel actions.") (citing 5 U.S.C. § 7703(b)(1), (d); VAUGHN, *supra* note 11, at § 17.02[2], 17-14.1). The MSPB has held this role since 1982. 5 U.S.C. § 7703; Federal Court Improvement Act of 1982, 28 U.S.C. § 1295.

<sup>239</sup> MSPB Performance and Accountability Report (PAR), *supra* note 176, at 11-12.

<sup>240</sup> *Holland v. Dept. of Air Force*, 31 F.3d 1118, 1120 (Fed. Cir. 1994) (citing 5 U.S.C. § 7703(c)).

<sup>241</sup> See Parts II.A & IV.A.

<sup>242</sup> *Kohl v. U.S. Postal Service*, 115 Fed. Appx. 49 (Fed. Cir. 2004); *Guise v. Department of Justice*, 330 F.3d 1376 (Fed. Cir. 2003); *Henry v. Dept. of Navy*, 902 F.2d 949 (Fed. Cir. 1990); *Banks v. Garrett*, 901 F.2d 1084 (Fed. Cir. 1990); *England v. Department of Treasury*, 889 F.2d 1100 (Table) (Fed. Cir. 1989); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Mings v. Dept. of Justice*, 813 F.2d 384 (Fed. Cir. 1987); *Stanek v. Department of Transp.*, 805 F.2d 1572 (Fed. Cir. 1986); *Fiorillo v. U.S. Dept. of Justice, Bureau of Prisons*, 795 F.2d 1544 (Fed. Cir. 1986); *Brown v. Dept. of Transp., FAA*, 735 F.2d 543 (Fed. Cir. 1984). There were an additional eight cases going back to 1969 that discuss First Amendment rights of federal employees, but because these cases were not decided by the Federal Circuit they were not considered in this analysis.

<sup>243</sup> Vaughn, *supra* note 238, at 425 n.35 (discussing cases also outside of the First Amendment).

<sup>244</sup> Neither the *Chambers* nor *Stone* cases, discussed in detail above, are part of this analysis as the *Stone* decision was not appealed and the *Chambers* decision is pending appeal on non-First Amendment issues. See *supra* notes x-x.

Both of these latter two procedural ways for dismissing federal employee First Amendment claims also highlight the shortcomings of the MSPB/Federal Circuit administrative scheme. For instance, if the Federal Circuit overturns the Board and reinstates an employee who has suffered an adverse employment decision based on civil service provisions, the court finds that it need not address the First Amendment claim at all.<sup>245</sup> Although this is consistent with *Ashwander* doctrine of constitutional avoidance,<sup>246</sup> this approach cheapens the value of constitutional rights and the importance of constitutional adjudication.<sup>247</sup>

Perhaps even more problematic is the situation where because the underlying prohibited personnel action does not amount to a covered employment decision under the civil service laws, the Federal Circuit finds the Board did not have proper jurisdiction over the claim and thus, the court cannot hear the claim either.<sup>248</sup> Yet, if the federal employee sought to bring that action in the first place as a *Bivens* type First Amendment claim, it would certainly fail under *Bush v. Lucas*.<sup>249</sup> In other words, in these cases not covered by the jurisdiction of the MSPB, the employee is left with no First Amendment claim at all, let alone a meaningful or effective one.<sup>250</sup>

The high affirmance rate is to be expected for at least one other potential reason. As a general matter, federal courts of appeal usually defer to the expert agencies that have been given broad discretion in interpreting the statutes over which they have authority.<sup>251</sup> Thus, the deferential standard of review cited to above.<sup>252</sup> Yet, the affirmance rate of the MSPB is much higher than the rates for similar agency adjudicatory bodies like the

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<sup>245</sup> See, e.g., *Holland v. Dept. of Air Force*, 31 F.3d 1118, 1122 (Fed. Cir. 1994) (because agency personnel decision was not sustained under civil service provisions, "we do not reach the question whether the cited Air Force regulations, if they supported Holland's demotion based on his statements of belief, would run afoul of the First Amendment.").

<sup>246</sup> See Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1929 n.90 (2007) (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). ("Under the so-called '*Ashwander* doctrine,' the Supreme Court prefers that cases be decided on statutory rather than constitutional grounds when possible.

<sup>247</sup> Preis, *supra* note 15, at \_\_\_\_.

<sup>248</sup> *Manning v. Merit Systems Protection Bd.*, 742 F.2d 1424 (Fed Cir. 1984) (in performance review reprisal cases, upholding basic principle that MSPB jurisdiction extends only to those actions made appealable by law, rule, or regulation and plaintiff's First Amendment claim was not therefore appealable); *Rosano v. Dept. of the Navy*, 699 F.2d 1315, 1318-20 (Fed. Cir. 1983) (same outcome with regard to federal employee health benefits (FEHB) plan claim). This is so even though *Bush v. Lucas* stated, in retrospect misleadingly, that, "[c]onstitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this [regulatory] system." *Bush v. Lucas*, 462 U.S. 367, 386 (1983).

<sup>249</sup> See *supra* Part II.C.

<sup>250</sup> The Federal Circuit's unhelpful response to this state of affairs is that, "we see no support in *Bush* for the contention that there must be an administrative remedy for every constitutional violation alleged by a federal employee." *Manning*, 742 F.2d at 1429. So much for a "comprehensive" administrative scheme.

<sup>251</sup> This is sometimes referred to as "*Chevron* deference." See Patrick M. Garry, *Accommodating The Administrative State: The Interrelationship Between The Chevron And Nondelegation Doctrines*, 38 *ARIZ. ST. L.J.* 921, 941 (2006) ("*Chevron*[, 467 U.S. 837 (1984),] deference means that the courts must sanction any rational interpretation the agency makes. This rule of deference prevails even if a court would have reached a different conclusion had it considered the issue de novo.").

<sup>252</sup> See *supra* note 155 and accompanying text.



National Labor Relations Board, Patent and Trademark Office, or the Immigration and Naturalization Service.<sup>253</sup> Something else is afoot. Although hard to prove, it might have to do with the way MSPB members are appointed and their lack of competence as either non-attorneys or lack of familiarity with the ins-and-outs of the *Pickering* framework.<sup>254</sup> Now, with time comes experience, but the affirmance rate suggests that the Federal Circuit is none too eager to disagree with the MSPB on federal personnel matters. Also there is just not that much experience with such claims, with one Westlaw law inquiry establishing that the Federal Circuit has heard a total of 79 First Amendment cases in its twenty-five year existence,<sup>255</sup> while hearing some 5741 patent cases during that same period.<sup>256</sup>

In all, the Federal Circuit's track record of only finding for agencies on federal employees' First Amendment *Pickering* claims does not inspire confidence, suggests some political bias in the system toward agencies, and highlights the relative lack of experience of the court in these types of constitutional matters. As a result, the only Article III court review that these claims are receiving is not meaningful or effective under any definition.

#### IV. REVITALIZING THE FIRST AMENDMENT *PICKERING* RIGHTS OF FEDERAL EMPLOYEES

The first thing that strikes anybody who studies First Amendment *Pickering* cases of the Federal Circuit and Merit Systems Protection Board is their sheer paucity. Some of this lack of cases is no doubt due to employees bringing similar claims under the Whistleblower Protection Act (WPA), but the comparison between similar claims brought by state employees under Section 1983 tells a whole another story. Whereas there are only twenty-some MSPB decisions and ten Federal Circuit decisions in the last twenty-five years on First Amendment *Pickering* claims, there are literally thousands, if not more, of such state and local First Amendment claims.<sup>257</sup>

The difference cannot all be about the availability of WPA claims for at least two reasons. First, many state and local employees also have whistleblower statutory claims,

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<sup>253</sup> See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1013-22 (1990) (finding that in 1984-85, federal circuit courts affirmed in full 75% of NLRB orders, 83% of Immigration and Naturalization Service orders, 81% of Patent and Trademark Office orders, and 90% of MSPB orders). Since 1985, the affirmance rate for MSPB orders has only increased. See *supra* note 239 and accompanying text.

<sup>254</sup> Alternatively, it might be attributable to the fact that, "[m]any of [the Federal Circuit's] non-precedential opinions are in pro se appeals by federal employees from decisions of the Merit Systems Protection Board. Because these cases are often poorly briefed, it is easy to miss potentially important legal issues." Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks And Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 16 (2007) (citing Robert TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., *Citing Unpublished Opinions in Federal Appeals* 75 app. (2005) (quoting Judge JF-2)).

<sup>255</sup> There were actually 142 results, but the Court of Claims, the Federal Circuit predecessor, heard the other cases prior to 1982.

<sup>256</sup> The queries run in the CTAF (Westlaw Federal Circuit database) were: "'first amendment' % patent! copyright! trademark!" and "patent! and da (after 1982)," respectively.

<sup>257</sup> See *supra* notes 12-13 and accompanying text.

but that does not keep them from also bringing First Amendment claims.<sup>258</sup> Second, the available empirical evidence suggests that federal employees who bring claims under the WPA are highly unsuccessful.<sup>259</sup> So unsuccessful indeed that Congress is currently considering enhancements to employee protections under the WPA.<sup>260</sup>

The better answer appears to be that federal employees are not bringing such claims because there is no reason to think that such claims have any chance. And who can blame federal employees? When every single MSPB and Federal Circuit First Amendment *Pickering* case decided on the merits comes out in favor of the employer, employees and their attorneys are going to learn very quickly that these adjudicators lack the requisite neutral competence and that these types of claims are simply a waste of time.<sup>261</sup> All this leads me in the next two subsections to call for a revitalization of federal employee First Amendment *Pickering* claims either under *Bivens* or an extension of Section 1983 to violations under color of federal law.

#### A. BRING BIVENS BACK FOR FEDERAL EMPLOYEES' FIRST AMENDMENT CLAIMS

The purpose of this section is not to argue that *Bush v. Lucas* was wrongly decided in 1982. Indeed, it would be hard to do that considering that it was a unanimous decision, with the author of *Bivens* himself, Justice Brennan, joining the opinion.<sup>262</sup> Rather than attack the logic of *Bush*, this section argues that its underlying assumptions are no longer valid twenty-five years after it was decided.

Most specifically and to the point, federal employees are not able to receive a meaningful or effective remedy for their First Amendment claims under the Civil Service Reform Act of 1978.<sup>263</sup> Empirical analyses do not lie and the lack of *any* success of such claims at the Board or federal appellate level explains why there is little to no First Amendment activity. It is certainly not because the federal civil service has become

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<sup>258</sup> For example, state and local employees in New York and Pennsylvania may bring state statutory whistleblower claims. See N.Y. CIVIL SERVICE LAW § 75-b (McKinney 2006); 43 PA. CONS. STAT. §§ 1421-1428 (2005).

<sup>259</sup> See *supra* note 14 and accompanying text.

<sup>260</sup> See *supra* note 166 and accompanying text.

<sup>261</sup> Federal employees may instead prefer to proceed under a negotiated grievance procedure rather than proceeding through the MSPB. See Don Cheney, *Postal Employees Should Think Twice Before Appealing Case to MSPB*, POSTALREPORTER.COM BLOG, Feb. 12, 2007, <http://www.postalreporter.com/news/2007/02/12/postal-employees-should-think-twice-before-appealing-case-to-mspb> ("*Kenneth Jones vs. US Postal Service*[, 216 Fed. Appx. 986 (Fed. Cir. 2007),] illustrates why postal employees should think twice before appealing their discipline to the Merit Systems Protection Board. They have a better chance of success in the grievance procedure."). Whether arbitrators will be better able to decide these *Pickering* cases in a neutrally competent way is an interesting question, but beyond the scope of this article.

<sup>262</sup> See *supra* note x and accompanying text.

<sup>263</sup> As argued previously, "meaningful remedies" appears to be the touchstone for determining whether a statutory alternative is constitutionally adequate for vindicating individuals' constitutional rights. See *Bush v. Lucas*, 462 U.S. 367, 386 (1983) ("As the record in this case demonstrates, the Government's comprehensive scheme is costly to administer, but it provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies."); *id.* at 390 (Marshall, J., concurring) ("[A] different case would be presented if Congress had not created a comprehensive scheme . . . that affords a remedy that is substantially as effective as a damage action.").

magically immune from everyday employment disputes. Instead, employees are turning to the equally deficient WPA,<sup>264</sup> swallowing hard and doing nothing,<sup>265</sup> or just leaving the federal service and taking their talents elsewhere.<sup>266</sup>

If the CSRA of 1978 was providing a meaningful, effective remedy for the First Amendment claims of federal employees, there would be every reason to argue that the *Bivens* remedy in this context was not necessary. Unfortunately, that is just not the case. Since the *Bush* case, I have not been able to locate one instance of a *Pickering* analysis being applied by the MSPB or Federal Circuit in which the employee comes out on top.<sup>267</sup> Truly remarkable.

Nor is there reason to believe that there should not be a *Bivens* claim because of "special factors counseling hesitation." When *Bush* was decided, the thought was that Congress had spent a hundred years putting together a comprehensive civil service system which would attract and keep the best and brightest federal employees.<sup>268</sup> It was universally thought that Congress had the institutional competence, nay incentive, to formulate a civil service system which would prevent partisanship and provide the best employees for the national government.<sup>269</sup>

I do not claim here that the CSRA of 1978 has not worked at all. Indeed, outside of the First Amendment context, there is every reason to believe that the system is working as well as one might expect. What I am saying, however, is there is no further reason to defer to the institutional competence of the Congress in not recognizing a direct constitutional remedy for First Amendment free speech claims for federal employees.

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<sup>264</sup> See *supra* note 14 and accompanying text.

<sup>265</sup> This conclusion is supported by analysis of the First Amendment cases that the MSPB has decided. There have only been four such cases in the 1990s and 2000s, illustrating a belief among federal employees and their representatives that they cannot receive meaningful redress from the MSPB for their First Amendment free speech claims. See *supra* note 187 and accompanying text.

<sup>266</sup> Statement of Senator Daniel K. Akaka, SUBCOMMITTEE ON THE OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA, *Building the 21st Century Federal Workforce: Assessing Progress in Human Capital Management* (July 20, 2004), [http://akaka.senate.gov/public/index.cfm?FuseAction=speeches.home&month=7&year=2004&release\\_id=762](http://akaka.senate.gov/public/index.cfm?FuseAction=speeches.home&month=7&year=2004&release_id=762) ("We may be winning the hearts and minds of Americans seeking employment with the federal government, but we are still losing the talent war.").

<sup>267</sup> The concept of the "inexorable zero" in disparate impact law under Title VII of the Civil Rights Act of 1964 comes to mind here. In pattern and practice group employment discrimination cases, courts rely on statistics to determine whether an employer has a standard operating procedure of discriminating against certain protected groups, like minorities. See *Intern. Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). In such cases, when no minorities have been hired at all by the employer, "fine tuning of the statistics [do not] obscure[ ] the glaring absence of minority [employees].... [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero.'" *Id.* at 342 n.23.

<sup>268</sup> See *Bush v. Lucas*, 462 U.S. 367, 389 (1983) ("Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service.").

<sup>269</sup> *Id.* ("Congress has a special interest in informing itself about the efficiency and morale of the Executive Branch. In the past it has demonstrated its awareness that lower-level government employees are a valuable source of information, and that supervisors might improperly attempt to curtail their subordinates' freedom of expression.").

For these claims at least, Congress has shown itself singularly incompetent in trying to protect the constitutional rights of federal employees. Whether this is because the MSPB is not neutral enough,<sup>270</sup> not competent enough,<sup>271</sup> or not tested enough with these types of claims,<sup>272</sup> really at the end of the day does not matter. What matters is that the constitutional rights of federal employees are being ignored and sacrificed at an alarming rate.

The only real solution is to recognize that when it comes to First Amendment federal employee *Pickering* rights, *Bivens* remedies provide the best alternative of all the options. Under *Bivens*, federal employees will be able to take their free speech claims directly to an independent Article III court which has much experience adjudicating such claims under Section 1983.<sup>273</sup> Applying similar standards as under Section 1983, federal court adjudication will assure once again a neutrally competent arbiter of federal employees' constitutional rights. Moreover, such claims, with the ability to hold individual federal supervisors and managers directly liable for damages, may lead to a greater deterrence effect than is currently possible under the existing regime.<sup>274</sup>

There might be some who claim that my proposal does nothing less than open the proverbial "floodgates of litigation." But the second Justice Harlan answered this criticism well in his concurring opinion in *Bivens*:

[T]he question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interests of stockholders defrauded by misleading proxies. Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis [of inundating courts with Fourth Amendment claims], we implicitly express a value judgment on the comparative importance of classes of legally protected interests.<sup>275</sup>

In short, "[t]he 'floodgates' argument . . . has been rehearsed and rejected before."<sup>276</sup> In any event, the statistics of Section 1983 cases just do not bear out that such a flood would

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<sup>270</sup> Compelling evidence of partisan divides in other politically-appointed, adjudicative agencies does appear to exist. See Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 711 (2006) ("The only claim made in this Article is that ideology has been a persistent and, in many instances, a vote-predictive factor when the [National Labor Relations] Board decides certain legal issues.").

<sup>271</sup> See *supra* note 216 and accompanying text.

<sup>272</sup> See *supra* note 186 and accompanying text.

<sup>273</sup> *Wilkie v. Robbins*, 127 S. Ct. 2588, 2615-16 (2007) (Ginsburg, J., concurring in part and dissenting in part) ("Because we have no reason to believe that state employees are any more or less respectful of Fifth Amendment rights than federal agents, § 1983 provides a controlled experiment.").

<sup>274</sup> See Louise Weinberg, *The Monroe Mystery Solved: Beyond The "Unhappy History" Theory Of Civil Rights Litigation*, 1991 B.Y.U. L. REV. 737, 762-63 ("An action against an individual may have greater deterrence value, especially since punitive damages are available under *Bivens*.").

<sup>275</sup> *Wilkie*, 127 S. Ct. at 2613 (Ginsburg, concurring in part and dissenting in part) (quoting *Bivens* 403 U.S. 388, 410-411 (1971) (Harlan, J., concurring) (citation omitted)).

<sup>276</sup> *Id.*

arise from the recognition of a *Bivens* claim in this context.<sup>277</sup> With a much larger number of state and local employees in this country,<sup>278</sup> the federal courts are still more than adequate to handle existing Section 1983 causes of actions.<sup>279</sup> It is hard to believe that another three million federal employees, about one-sixth the size of their state and local counterparts, will cause irreconcilable problems.

In short, it is time to face the fact that the civil service scheme does not adequately vindicate constitutional First Amendment *Pickering* rights of federal employees. It is therefore time to permit *Bivens* claims in this context.

#### B. THE ALTERNATIVE: SECTION 1983 FOR FEDERAL EMPLOYEES

There is, of course, another way to provide more effective constitutional protection for federal employees: Congress could provide a statutory-based, Section 1983-like action to federal employees.<sup>280</sup> All that would take would be for Congress to pass a Civil Rights Act that would either add "under color . . . of any federal or State law" to Section 1983 or propose a new statute with "under color . . . of any State law" substituted with "under color . . . of any federal law."<sup>281</sup> After that, all other principles of municipal liability, including sovereign and qualified immunity, under Section 1983 would apply equally to federal officer's violations of the Constitution.<sup>282</sup> Compensatory and punitive damages would be available against individual federal government officials accused of violations of the constitution.<sup>283</sup>

This legislative approach has the advantage of being less problematic from a separation of powers standpoint and would arguably place the power to create a remedy

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<sup>277</sup> Schwab & Eisenberg, *supra* note 12, at 643 (concluding there has not been an uncontrolled mushrooming of cases in the federal courts under Section 1983).

<sup>278</sup> There are about three million federal employees and eighteen million state and local employees. West & Durant, *supra* note 170, at \_\_; U.S. DEPT. OF COMMERCE, U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 298 (2004-2005) (Table No. 453) (figure from 2002).

<sup>279</sup> Schwab & Eisenberg, *supra* note 12, at 642-43 ("Both national data published by the Administrative Office of the United States Courts and our findings about a key federal district suggest that the image of a civil rights litigation explosion is overstated and borders on myth.").

<sup>280</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 427-28 (1971) (Black, J., dissenting) ("If it wanted to do so, Congress could, of course, create a remedy against federal officials who violate the Fourth Amendment in the performance of their duties."). See also Richard Henry Seamon, *U.S. Torture As A Tort*, 37 RUTGERS L. J. 715, 758-59 (2006) (proposing expansion of Section 1983 to constitutional violations "under color of federal law" to cover torture claims against agents of the federal government).

<sup>281</sup> This approach appears to be similar to what Justice Ginsburg suggests in her *Wilkie* dissent. *Wilkie v. Robbins*, 127 S. Ct. 2588, 2618 (2007) (Ginsburg, concurring in part and dissenting in part) ("If Congress wishes to codify and further define the *Bivens* remedy, it may do so at anytime.").

<sup>282</sup> See *supra* Part II.A. See also *Butz v. Economou*, 438 U.S. 478, 500 (1978) ("[I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983.").

<sup>283</sup> See *supra* note 69 and accompanying text. Damage actions would not be permitted against the United States because the United States has not waived sovereign immunity for constitutional violations. See *supra* note 79.

in the branch of government where it rightfully belongs.<sup>284</sup> It suffers from one glaring shortcoming, however, at least in the broad form proposed.<sup>285</sup> It would not just apply to federal employees and the First Amendment as the proposed *Bivens* solution would, but would apply to all violations of the constitutions by all federal officials. If Congress felt comfortable doing that, it would have done so a long time ago. In the end, it just seems impracticable in the current political environment that Congress would act to codify the *Bivens* remedy.

## CONCLUSION

There has been little controversy over the substitution of the civil service regime for First Amendment litigation as a result of the Supreme Court's decision in *Bush v. Lucas*.<sup>286</sup> But the emperor has no clothes. Not only do federal civil service administrative proceedings not have all the due process and remedial bells and whistles that we have come to expect in litigation before an independent Article III federal court, but federal employees have, by and large, ceased to bring First Amendment claims under this administrative scheme.

Federal employees no longer believe that they can receive substantive justice for their First Amendment *Pickering* rights under the Civil Service Reform of 1978. Indeed, this article's analysis of MSPB and Federal Circuit decisions involving these federal employees' claims has been undertaken to answer one crucial question: are these agencies neutrally competent to protect the First Amendment rights of federal employees?<sup>287</sup> The answer, based on the review of case law above, is a resounding no. Not *a single case*, at the administrative or appellate level, has upheld the First Amendment rights of a federal employee on the merits under the *Pickering* analysis.

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<sup>284</sup> Newman, *supra* note 100, at 472-73 (maintaining that diminished state of *Bivens* jurisprudence points to a trend that reflects the adoption of the same separation of powers concerns of the *Bivens* dissenters). *But see* George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs --Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 294-95 (1989) (maintaining that constitutional nature of *Bivens* should mean less deference to Congress); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1153 (1989) (arguing that implying constitutional damage remedies is an indispensable component of constitutional oversight).

<sup>285</sup> Professor Seamon has explored the possibility of a narrower Section 1983 revision which would apply to actions taken by federal agents under the color of the federal law with regard to torture claims. Seamon, *supra* note 280, at 759 ("A narrower version would create a cause of action against any person acting under color of federal law who "subjects, or causes to be subjected," another person to "torture," a term that would be defined-either in the same statute or by reference to one of the existing statutory definitions of the term."). Similarly, Congress could pass a narrower law which would create a cause of action against federal officials and entities that interfere with the freedom of expression of federal employees. I would think the likelihood of such a bill ever being enacted, however, is very slim.

<sup>286</sup> *But see* Joan Steinman, *Backing Off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 270 (1984) (predicting presciently in 1984 that *Bush* and other *Bivens* cases could "increase the risk that first amendment rights will be under-en-forceable, even unconstitutionally so.").

<sup>287</sup> This is crucial because "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

The solution to this inequitable state of affairs can only be reinvigoration of federal employee's First Amendment free speech rights through overturning the decision in *Bush v. Lucas* and implying a direct *Bivens* remedy. Alternatively, Section 1983 could be expanded by Congress to provide a statutory basis for federal employees to bring constitutional tort claims against federal agents for violating their constitutional rights under color of federal law. Only by taking one of these necessary steps can we be "assured that federal officials w[ill] be subject to the same constraints as state officials in dealing with the fundamental rights of the people who dwell in this land."<sup>288</sup>

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<sup>288</sup> Wilkie v. Robbins, 127 S. Ct. 2588, 2618 (2007) (Ginsburg, concurring in part and dissenting in part).