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BIVENS ACTIONS FOR FEDERAL EMPLOYEES IN THE AFTERMATH OF *BUSH v. LUCAS*: WHICH REMEDIES FOR WHOM?

Barry F. Smith†

The recognition of the Bivens-style action, or the constitutional tort, has been followed by the Supreme Court's recent assertion that these actions will be unavailable where Congress has established an elaborate remedial scheme that should not be augmented by a judicial remedy. The author of this article posits that this necessary limitation on Bivens actions may produce an ironic result in the area of public personnel. The author reasons that those employees whom Congress has determined warrant no statutory protection may be permitted to pursue more lucrative judicial remedies than those employees whom Congress has sought to protect. The author examines the development of the constitutional tort and explores the possible Bivens actions and defenses that will be available in the public personnel field. When statutory remedies are insufficient to preclude Bivens actions, the author concludes that Congress must act to retain efficiency and fair treatment in the civil service.

I. INTRODUCTION

*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*¹ is a ground-breaking case whose progeny should have been substantially predictable. By recognizing a private cause of action for damages for violation of the fourth amendment prohibition of unreasonable searches and seizures where no other remedies were available, *Bivens* reasonably raised the assumption that causes of action would be recognized for violations of other constitutional rights in instances in which no other effective remedies were available.² This assumption has proved largely

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1. 403 U.S. 388 (1971).

2. Cf. *id.* at 428 (Black, J., dissenting); *id.* at 430 (Blackmun, J., dissenting). These two dissenters expressed concern that the courts would be flooded with lawsuits for vio-

correct, as *Bivens*-style actions have been recognized as a means to redress violations of most of the interests protected by the Bill of Rights.³

The recent cases of *Bush v. Lucas*⁴ and *Chappell v. Wallace*⁵ exemplify a slowing of the expansion of *Bivens*-style actions that perhaps also should have been largely predictable. In refusing to allow private causes of action for damages for non-probationary civil service employees and military personnel, the Supreme Court was guided by the principle developed in previous *Bivens*-style cases that, absent special factors counseling hesitation, a private cause of action for damages is appropriate where there are no effective alternative remedies for the constitutional violation.⁶ The plaintiffs in *Chappell*, as enlisted military personnel, were already covered under the long-established military system of justice; the special nature of the military and its need to maintain discipline counseled against a judicially created remedy.⁷ The plaintiff in *Bush*, a non-probationary civil service employee in the "competitive service," had extensive procedural and substantive rights granted under a comprehensive statutory scheme developed over years of careful attention to the interests of federal employees in protecting their jobs and the interests of the public in maintaining a disciplined and efficient work force.⁸ The results in these two cases, thus considered, were quite reasonable.

Further reflection upon the implications of *Bush*, however, raises unsettling questions about *Bivens* actions in the area of public personnel. Many federal employees are not provided statutory remedies for adverse personnel actions because Congress has determined that their positions do not warrant such protection. To allow those employees to pursue the more lucrative *Bivens*-style remedies, as *Bush* seems to imply they can, is ironic in view of the treatment they received in the statutory scheme. Yet, it is arguable that those holding such unprotected positions are exactly the individuals for whom *Bivens* actions are necessary.

Bush thus raises fundamental questions about the interaction of statutory and judicially created remedies for violations of constitutional rights. Can the silence of Congress be interpreted as a decision that no

lations of fourth amendment interests similar to that in *Bivens*. Chief Justice Burger's dissent was concerned with the need for Congress to create a remedy for fourth amendment violations in view of the "failure" of the exclusionary rule formulated in *Weeks v. United States*, 232 U.S. 383 (1914), and made applicable to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). See *Bivens*, 403 U.S. at 412, 416, 422 (Burger, C.J., dissenting).

3. For a discussion of the constitutional causes of action for damages allowed in the wake of *Bivens*, see *infra* text accompanying notes 16-52.
4. 103 S. Ct. 2404 (1983).
5. 103 S. Ct. 2362 (1983).
6. See *Davis v. Passman*, 442 U.S. 228, 229 (1979). In *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court stated that to preclude a *Bivens*-style remedy, the alternative remedy must be "explicitly declared" by Congress "to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Id.* at 18-19 (emphasis in original).
7. *Chappell*, 103 S. Ct. at 2365-67.
8. *Bush*, 103 S. Ct. at 2416-17.

remedy is appropriate? How far can Congress go to preclude the creation of judicial remedies?

This article analyzes the various *Bivens*-style actions available in the area of public personnel administration and considers whether the current statutory remedies, in the wake of the *Bush* decision, are sufficient to effectuate employee rights and thereby preclude *Bivens* actions. Where those statutory remedies are not so sufficient, it is suggested that Congress would be wise to act in order to protect those supervisors subject to personal liability and to promote more efficient personnel administration. First, it will be helpful to have in mind the basic principles of this complex area of law.

II. PRIVATE CAUSES OF ACTION FOR THE INFRINGEMENT OF THE CONSTITUTION: A NEW REMEDY FOR OLD RIGHTS

The growth in the types of private causes of action implied from the Constitution in the decade since *Bivens* was decided has been spectacular. The United States Supreme Court has recognized causes of action implied from the fourth,⁹ fifth,¹⁰ and eighth¹¹ amendments, and lower courts have recognized causes of action implied from the first,¹² sixth,¹³ and fourteenth¹⁴ amendments.¹⁵ Continued expansion of the causes of action allowed very likely will continue absent action by the Supreme Court or Congress, and, notwithstanding the *Bush* and *Chappell* cases, the area of public personnel administration is fertile ground in which much of that expansion may occur.

A. Growth of the "Common Law" of Constitutional Torts

*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*¹⁶ answered the question not addressed by its predecessor case, *Bell v.*

9. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

10. *Davis v. Passman*, 442 U.S. 228 (1979).

11. *Carlson v. Green*, 446 U.S. 14 (1980).

12. *See, e.g., Kuczo v. Western Conn. Broadcasting Co.*, 424 F. Supp. 1325 (D. Conn. 1976), *rev'd on other grounds*, 566 F.2d 384 (2d Cir. 1977).

13. *See, e.g., Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976).

14. *See, e.g., Gentile v. Wallen*, 562 F.2d 193 (2d Cir. 1977). Since the case of *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), which held that municipalities fall within the definition of "person" in 42 U.S.C. § 1983 (1982) and are thus subject to liability under that statute for violations of constitutional rights of "persons," courts have generally refused to imply causes of action against municipalities under the fourteenth amendment. *See Annot.*, 64 L. ED. 2d 872, 892 § 10 (1981).

15. For a collection of *Bivens*-style cases and an overview of their holdings, see Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977); *Annot.*, 64 L. ED. 2d 872 (1981).

16. 403 U.S. 388 (1971).

Hood,¹⁷ twenty-five years earlier. *Bell* had held that the plaintiffs' complaint for damages against members of the FBI for alleged violations of their fourth and fifth amendment rights stated a claim arising under "the Constitution or laws of the United States"¹⁸ for purposes of federal jurisdiction; *Bell* did not decide, however, whether the complaint stated a claim upon which relief could be granted. Although the district court decided upon remand of the *Bell* case that such a claim was not stated,¹⁹ *Bivens* had the final word in ruling that, in some cases at least, private suits for damages against federal officials for violations of fourth amendment rights may be maintained.²⁰

Bivens brought his suit after the defendants entered his apartment one morning under claim of federal authority, arrested him for alleged violations of narcotics laws, manacled him in front of his wife and children, searched the entire apartment, and took him to a federal courthouse where he was questioned, booked, and subjected to a strip search. Seeking \$15,000 in damages from each defendant, Bivens alleged in his complaint that the arrest was illegal, which the Court read to mean without probable cause as required by the fourth amendment.²¹

In upholding Bivens's complaint, the five-justice majority first rejected the view that Bivens's remedy should be one created under state law.²² The court further noted that state laws on trespass and invasion of privacy operate differently from, and may be inconsistent with, the fourth amendment prohibition of unreasonable searches and seizures.²³ The fourth amendment issue in the case thus was viewed as more than a mere limitation to the agents' defense to a state law claim; rather, it provided a basis for an "independent claim both necessary and sufficient to make out the plaintiff's cause of action."²⁴ Finally, the Court noted that the damages remedy has historically been regarded as the ordinary remedy for the invasion of personal interests in liberty, and that there were no special considerations that should cause the Court hesitation, in the absence of congressional action, to declare Bivens's right to recover money damages upon establishing that his injuries were caused by a fourth amendment violation.²⁵

Mr. Justice Harlan, concurring in the judgment, provided a most

17. 327 U.S. 678 (1946).

18. *Id.* at 684-85 (applying 28 U.S.C. § 41(1) (1940) (current version at 28 U.S.C. § 1331(a) (1982))).

19. *Bell v. Hood*, 71 F. Supp. 813, 820 (S.D. Cal. 1947).

20. For a probing analysis and critique of the decision by the district court in the *Bell* case on remand, see Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968). The Katz article was cited by both the majority and concurring opinions in *Bivens*, 403 U.S. at 396, 400, 407.

21. *Bivens*, 403 U.S. at 389-90 n.1.

22. *Id.* at 394.

23. *Id.* at 394-95.

24. *Id.* at 395.

25. *Id.* at 395-97.

interesting analysis of the case. He, too, concluded that a private cause of action for damages for the vindication of the violation of fourth amendment rights was proper, but his reasoning was somewhat different. For him, there was no question that the interest Bivens sought to protect was a federal right; the issue was one of separation of powers — whether the power to authorize damages is reserved solely to Congress, or whether the judiciary may authorize damage suits by implication.²⁶

Justice Harlan noted that the Court had previously authorized damage suits for statutory violations when it deemed it necessary to effectuate congressional policy, and added that the fact that an interest is protected by the Constitution rather than a statute or the common law should not render the federal courts powerless to authorize damage actions.²⁷ He was also influenced by the fact that Congress's grant of equitable remedial powers to the federal judiciary²⁸ resulted in a determination that the scope of equitable remedial jurisdiction should be coextensive with the scope of historical equitable jurisdiction. By the same token, he noted, the general grant of jurisdiction to the federal courts²⁹ should be sufficient to empower them to grant traditional remedies at law.³⁰

Justice Harlan supported his analysis with a practical point: without a cause of action for damages, Bivens would have no remedy at all.³¹ Equitable relief would have been ineffective to remedy Bivens's past injury, the government was immune from suit by Bivens,³² and the exclusionary rule, the usual application of the protection of the fourth amendment, could not help Bivens if charges were not pressed against him.³³

For all their eloquence, the opinions of the majority and Justice Harlan gave little guidance as to where the Court ultimately might draw the line restricting the authorization of constitutional torts. Justice Harlan did note, however, that the violation of constitutional interests other than those protected by the fourth amendment may not necessarily

26. *Id.* at 400-02 (Harlan, J., concurring).

27. *Id.* at 402-03.

28. *Id.* at 404 (discussing Act of May 8, 1792, § 2, 1 Stat. 276).

29. *Bivens*, 403 U.S. at 405 (discussing 28 U.S.C. § 1331(a) (1970)). As amended in 1980, section 1331 now states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1982).

30. *Bivens*, 403 U.S. at 405.

31. *Id.* at 409-10.

32. *Id.* at 410. The Federal Tort Claims Act ("FTCA") was amended in 1974 to allow lawsuits against the federal government for intentional torts committed by federal law enforcement officers, *see* 28 U.S.C. § 2680(h) (1982), but the legislative history indicates that the new FTCA provision was not meant to preclude future *Bivens*-style actions against those officials. *See* *Carlson v. Green*, 446 U.S. 14, 19-20 (1980).

33. For an interesting analysis of the use of the Constitution as a device for authorizing "affirmative" causes of action rather than just as a means of "nullification," *see* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

be the sort in which courts can determine causation and injury.³⁴

Eight years after *Bivens*, however, in *Davis v. Passman*,³⁵ the Court upheld a private cause of action based on a violation of the fifth amendment's equal protection component, where a former congressman had fired his deputy administrative assistant because the congressman deemed it essential that that employee be male.³⁶ Even though the majority and concurring opinions in *Bivens* had relied on a previous holding that implied a private cause of action for damages from a statute,³⁷ the *Davis* Court rejected the lower court's use of the criteria announced in *Cort v. Ash*³⁸ for implying private causes of action for damages from statutes.³⁹ *Davis* held that the lower court had erred in denying Davis's cause of action simply because Congress had not created a damages remedy for litigants in her situation and in concluding that it was improper to create such a remedy when it was not compelled by the Constitution.⁴⁰ *Davis* made it clear that the analysis required to imply causes of action from constitutional provisions is unique — it is solely concerned with how to effectuate constitutional rights.

With little discussion of how *Bivens* guided its result, the *Davis* Court held:

At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those 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 the protection of their justiciable constitutional rights.⁴¹

Davis thus established a presumption of entitlement to a damages remedy in court when a constitutional right has been violated and no remedy exists in a "coordinate political department" (such as an admin-

34. 403 U.S. at 409 n.9.

35. 442 U.S. 228 (1979).

36. *Id.* at 248-49.

37. 403 U.S. at 397, *passim* (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), in which the Court implied a private cause of action for a shareholder damaged as a result of a false and misleading proxy statement issued in violation of section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1982)).

38. 422 U.S. 66, 78 (1975).

39. *Davis*, 442 U.S. at 240-41. The Court set forth that "the question of who may enforce a *statutory* right is fundamentally different than the question of who may enforce a right that is protected by the Constitution." *Id.* at 241 (emphasis in original).

40. *Id.* at 245-48.

41. *Id.* at 242 (emphasis added).

istrative agency). The Court indicated that the plaintiff bears the burden of showing that he has "no effective means other than the judiciary" to enforce the constitutional rights in question.⁴²

A year later, however, in *Carlson v. Green*,⁴³ the Court indicated that a different approach was appropriate. In considering whether to allow a *Bivens*-style action for an eighth amendment violation (in that case, rendering incompetent medical attention to a prisoner, thereby causing his death), the Court set forth two situations in which a *Bivens* cause of action may be defeated: when defendants "demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress,'"⁴⁴ and second, "when the defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as *equally effective*."⁴⁵

The language concerning the lack of "special factors counselling hesitation in the absence of affirmative action by Congress" was used in *Bivens* in a general sense to support its analysis in taking the novel step of implying a private cause of action from the Constitution.⁴⁶ *Davis* construed the language as a criterion held by *Bivens* for implying a private cause of action "in appropriate circumstances," or, apparently, when an award of damages is necessary to effectuate the violated constitutional right and when it is judicially manageable to do so.⁴⁷

The language concerning an "equally effective" alternative remedy supplied by Congress was used in *Bivens* to refute the defendant official's contention that the issue was whether an award of money damages was necessary to enforce the fourth amendment.⁴⁸ *Bivens* did not discuss explicit alternative remedies as a means for a defendant official to defeat a cause of action.

As a result of *Carlson*, the plaintiff's burden of pleading a cause of action and proving a *prima facie* case became simpler. *Carlson* set forth that the plaintiff must allege only the circumstances under which a constitutional right has been violated; it is the defendant's burden to establish⁴⁹ that there are "special factors counselling hesitation" or that Congress has provided a remedy "explicitly declared to be a substitute

42. *Id.* It should be noted, however, that the claim in *Davis* was upheld even though the plaintiff did not plead that she had "no effective means other than the judiciary" to obtain a remedy and even though the defendant had filed a motion to dismiss for failure to state a claim upon which relief can be granted. *See id.* at 232.

43. 446 U.S. 14 (1980).

44. *Id.* at 18 (citing *Bivens*, 403 U.S. at 396, and *Davis*, 442 U.S. at 245).

45. 446 U.S. at 18-19 (citing *Bivens*, 403 U.S. at 396, and *Davis*, 442 U.S. at 245-47) (emphasis added).

46. *See Bivens*, 403 U.S. at 396.

47. *See Davis*, 442 U.S. at 245.

48. *See Bivens*, 403 U.S. at 397.

49. Under the Federal Rules of Civil Procedure, the defendant would need to raise his defense as a legal issue under a FED. R. CIV. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, *Davis v. Passman*, 442 U.S. 228

for recovery under the Constitution and viewed as equally effective."⁵⁰ As will be seen in the discussion of *Bush v. Lucas*⁵¹ below, the requirement that defendants must raise these legal defenses remains important, but the effect of *Carlson* has been substantially softened.⁵²

B. *The Potential for Congressional Action*

Once *Bivens* had opened the door, there was little, either in the Constitution or in statutory enactments, to ward off expansion of the personal liability of public officials for violating various provisions of the Constitution. *Bivens* declared that "constitutional tort" suits were properly within the province of the federal courts, and ever since, all determination of the limitations and powers in this area of law has come from the judiciary. The result has been the rapid creation of a body of "federal common law"⁵³ of constitutional torts, completely unchecked by Congress, and unguided by a system of clear, consistent principles of law developed over time.

Article III of the Constitution declares that the judicial power of the federal courts "shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States"⁵⁴ A *Bivens*-style lawsuit, "almost paradigmatically," is a case "arising under" the Constitution.⁵⁵ Once the Supreme Court had recognized it as such, it would only be through some appropriate exercise of the legislative power by Congress that the Court would be restricted in its authority to extend or narrow the scope of such suits. The source of this legislative power is presumably in the Article I and III grants of power to create lower federal courts⁵⁶ and to make all laws that are "necessary and proper" for doing so.⁵⁷ Although the extent of the power of Congress to limit the courts' authority to decide certain cases is still a controversial issue,⁵⁸ the Court has recognized this congressional power in at least procedural ar-

(1979), or more likely, under a FED. R. CIV. P. 56 motion for summary judgment, *Bush v. Lucas*, 103 S. Ct. 2404 (1983).

50. 446 U.S. at 18, 19.

51. 103 S. Ct. 2404 (1983).

52. See *infra* text accompanying notes 87-93.

53. Although in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Court remarked that "[t]here is no federal general common law," *id.* at 78, later case law has shown that there may be a federal common law developed in specific areas. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (concluding that section 301(a) of the Labor-Management Relations Act of 1947 empowered the judiciary to fashion a federal substantive law of collective bargaining agreements). *Lincoln Mills* was cited by Justice Harlan in his *Bivens* concurring opinion. 403 U.S. at 403 (Harlan, J., concurring).

54. U.S. CONST. art. III, § 2.

55. *Dellinger*, *supra* note 33, at 1541.

56. U.S. CONST. art. I, § 8; *id.* art. III, § 1.

57. U.S. CONST. art. I, § 8.

58. See Hilts, *AMA Decides to Oppose Bill Defining Human Life as Starting at Conception*, Wash. Post, June 8, 1981, at A4, col. 5, concerning one group's reaction to the movement in Congress to limit the power of federal courts to hear challenges to

eas.⁵⁹ Furthermore, given the language in *Bivens* and its progeny indicating that *Bivens*-style actions serve to fill a remedial void left by Congress's inaction,⁶⁰ the Supreme Court probably would welcome any efforts by Congress to provide alternative remedies for constitutional violations.

As shown in the following discussion of *Bush*, the requirements in *Carlson* that the congressional remedy be "explicitly declared to be a substitute for recovery directly under the Constitution"⁶¹ and be viewed as "equally effective"⁶² were short-lived. The Court showed in *Bush* that the important factor is not the explicit declaration of Congress, but rather the goal Congress addressed in establishing the "elaborate remedial system" giving the plaintiff his administrative remedy.⁶³ Where a basic congressional policy, rather than a specific congressional statement, indicates that the statutory remedy is deemed complete, the Court will not initiate an additional remedy. As will be argued, the current remedial scheme, presumably considered "complete" by Congress, has significant weaknesses that practically invite a multitude of *Bivens*-style actions to be filed. If so, new legislation is in order.

abortion laws in the wake of *Roe v. Wade*, 410 U.S. 113 (1973), by declaring in legislation when "life," for purposes of the fifth and fourteenth amendments, begins.

59. See, e.g., *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937) (upholding the constitutionality of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982)). "In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish." 300 U.S. at 240.

60. See, e.g., *Bivens*, 403 U.S. at 397 ("[w]e have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment . . . [are] remitted to another remedy, equally effective in the view of Congress."); *Davis v. Passman*, 442 U.S. 228, 246-47 (1979) ("[t]here is in this case 'no explicit congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury") (citing *Bivens*, 403 U.S. at 397) (emphasis in original); *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (a *Bivens*-style action may be defeated "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective" (emphasis in original) (citing *Bivens*, 403 U.S. at 397)).

It is unusual that *Carlson* required that congressional intent to create an alternative remedy be explicit, either in the text of the remedial statute in question or in its legislative history. Congress conceivably could intend a remedy to be alternative, rather than supplementary, to a *Bivens*-style action, and yet not be explicit about its purpose. *Carlson* probably did not have to go as far as it did on this point, considering the clarity of intent expressed in the legislative history of the FTCA amendment in question. See *Carlson*, 446 U.S. at 19-20, 25-29 (Powell, J., concurring); cf. *Bush v. Lucas*, 103 S. Ct. 2404, 2410-11 (1983) (discussed *infra* text accompanying notes 87-94).

61. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

62. *Id.* at 19.

63. *Bush v. Lucas*, 103 S. Ct. 2404, 2416 (1983).

III. *BIVENS*-STYLE ACTIONS FOR PUBLIC PERSONNEL: THE CONTEXT OF *BUSH V. LUCAS*

A. *The Modern Civil Service*

Administrative efficiency, a goal of large bureaucratic institutions such as the United States government, often fosters neglect of the "human element" that is essential to the very efficiency those institutions seek. Ignoring that human element in the lower echelon, a large bureaucracy evolves in its higher levels, which comprises the only positions of true power in the present-day political and technological systems.⁶⁴

It is unfair, however, to over-generalize about the motives of those "functionaries" and experts who assume positions of power. They can be pawns of the bureaucratic structure they administer just as much as those who work under them. A number of factions can depend on the "functionaries" to do their jobs well, and can create significant pressure upon them to perform efficiently in their assigned roles.⁶⁵ This is certainly true of personnel administrators in the federal government today. Government simply cannot function without adequate performance from its personnel. Regulated industry in the private sector, members of the taxpaying public, superior and coordinate agencies, and other governmental employees all suffer when the ineffectiveness of a personnel administrator causes poor employee performance.

To say that the personnel officer has the power of termination to solve problems in employee performance is too simplistic. If government had the absolute power of termination, it would face the additional problem of attracting competent personnel. Furthermore, federal employees have amassed a variety of procedural and substantive protections, the satisfaction of which requires experienced and careful handling. A federal personnel officer is thus forced to maintain a most delicate balance between public needs and demands for effective performance by the government on one hand, and legally protected interests of employees on the other.

The vast majority of federal employees, as well as many in state, county, and city governments, are within the "competitive" civil service.⁶⁶ Under this system, employees who have completed a year of probationary service are generally protected from discharge, except "for

64. See R. HUMMEL, *THE BUREAUCRATIC EXPERIENCE* 190 (1982).

65. It has been argued that the modern "bureaucratic manager," wielding scientific-like skill in the performance of his managerial tasks, is but a mythological character created out of a technological society's misguided faith in the amoral scientific approach. See A. MACINTYRE, *AFTER VIRTUE* 28-29 (1984). Under this view, it would seem that those attempting to obtain the impossible objectives of this character role are subject to much frustration and criticism. If they are also expected to conform with scientific-like accuracy to the requirements of the Constitution, they are subject to substantial liability in *Bivens*-style actions. Under *Bush v. Lucas*, 103 S. Ct. 2404 (1983), little relief from such liability should be anticipated. See *infra* text accompanying notes 95-114.

66. See Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*,

such cause as will promote the efficiency of the service."⁶⁷ The Civil Service Reform Act of 1978⁶⁸ retained this language, which originated in the Lloyd-LaFollette Act of 1912.⁶⁹ The principles in this language are thus firmly embedded in the law and administration of the United States civil service.⁷⁰

B. Bivens Actions After *Bush v. Lucas*

1. Factual Background and Holding

The petitioner in *Bush v. Lucas*,⁷¹ an aerospace engineer at NASA's George C. Marshall Space Flight Center in Alabama, had been demoted, he alleged, in retaliation for several public statements he had made concerning his work and the work of the employing agency.⁷² He appealed his demotion to the Civil Service Commission's Federal Employee Appeals Authority, which upheld the agency's action. Two years later, he was granted review by the Commission's Appeals Review Board. The Board balanced, on the one hand, the evidence tending to show that Bush's motive may have been one of personal gain and that his statements caused some disruption of the agency's function with, on the other hand, the idea that society and the individual both have an interest in free speech, including a right to disclose information concerning the efficient operation of an important governmental agency. Finding that Bush's statements, although somewhat exaggerated, did not merit his dismissal for his exercise of free speech, the Board recommended that Bush be restored to his former position and receive a back pay award.⁷³

Before the Board reached its decision, Bush filed a lawsuit against his supervisor in state court for damages, and alleged in a *Bivens*-style cause of action that his first amendment right of free speech had been violated.⁷⁴ After the case was removed to federal district court, sum-

124 U. PA. L. REV. 942, 945 (1976) (citing Merrill, *Procedures for Adverse Actions Against Federal Employers*, 59 VA. L. REV. 196 (1973)).

67. 5 U.S.C. § 7513(a) (1982).

68. Pub. L. No. 95-454, 92 Stat. 1111, 1136 (1978) (codified at 5 U.S.C. §§ 1101-8913 (1982)).

69. Pub. L. No. 62-336, 37 Stat. 539, 555 (1912) (codified at 5 U.S.C. §§ 5595, 7101, 7102, 7501 (1982)).

70. For a detailed history of the United States civil service, see Frug, *supra* note 66, at 947-77; see also *Bush v. Lucas*, 103 S. Ct. 2404, 2412-15 (1983).

71. 103 S. Ct. 2404 (1983).

72. *Id.* at 2406-07. The petitioner had made several public statements, some in televised interviews, that he did not have enough meaningful work, that his job was "a travesty and worthless," and that taxpayers' money was being spent fraudulently and wastefully by his employing agency. *Id.* at 2406. He made these statements during the processing of his administrative appeals from reassignments made as part of a facility reorganization. *Id.*

73. *Id.* at 2407.

74. *Id.* The report of the case by the court of appeals shows that the defamation claim was based on the defendant's response to a television reporter about the statement concerning not having enough meaningful work. He replied: "I have had [Bush's] statement investigated and I can say unequivocally that such a statement has no

mary judgment was rendered on behalf of the defendant supervisor. According to the court, there was no entitlement to a constitutional remedy because of the administrative procedure provided in the Civil Service Commission's regulations.⁷⁵

A unanimous Supreme Court opinion, authored by Mr. Justice Stevens, began by assuming that Bush's first amendment rights were violated by the demotion, that his administrative remedies were not as complete as a damages remedy provided in a *Bivens*-style action, and that his administrative remedies did not fully compensate him "for the harm he suffered."⁷⁶ The issue, however, was "not what remedy the court should provide for a wrong that would otherwise go unredressed," but rather "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue."⁷⁷

The Court discussed in detail the administrative remedies provided by Civil Service Commission regulations for employees in the federal competitive service.⁷⁸ These included the right to a trial-type hearing before the Federal Employee Appeals Authority, whose decisions were reviewable by a federal district court or the Court of Claims, and the right to request the Civil Service Commission's Appeals Review Board to reopen an adverse decision by the Federal Employee Appeals Authority.⁷⁹ The Court then acknowledged the financial, time, and energy costs

basis in fact." *Bush v. Lucas*, 598 F.2d 958, 959 (5th Cir. 1979), *vacated*, 103 S. Ct. 2404 (1983).

75. *Bush*, 103 S. Ct. at 2408.

76. *Id.* The Court noted that Bush claimed damages for "emotional and dignitary harms" and attorney's fees that were not compensated for by the administrative remedy. *Id.* at n.9.

77. *Id.* at 2416.

78. *Id.* at 2415-16.

79. *Id.* (citing 5 C.F.R. §§ 752.203, 772.101, 772.307(c), 772.310 (1975)). Bush, as a non-probationary employee in the federal competitive service, was initially entitled to 30 days written notice of the proposed adverse action, stating the reasons for that proposed action. He then had the right to review the materials the agency relied upon in making the charge, to answer the charge with a statement and affidavits, and to appear at an oral non-evidentiary proceeding before an agency official. 103 S. Ct. at 2415-16 (citing 5 C.F.R. § 752.202(a), (b) (1975)). The final agency decision had to be made by an official of higher rank than the one proposing the action. 103 S. Ct. at 2416 (citing 5 C.F.R. § 752.202(f) (1975)); *see generally* Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196 (1973). The notice and answer provisions remain substantially the same under the Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101-8913 (1982). *See* 5 U.S.C. §§ 7511-13 (1982); 5 C.F.R. §§ 752.301-401 (1984).

One significant difference under the prior law was that it allowed an emergency suspension of an employee during the processing of the termination when retention of the employee could be "injurious" to himself, his fellow workers, or the general public, or could result in damage to government property. 5 C.F.R. § 752.404(b)(3) (1975). In *Cuellar v. United States Postal Service*, XI Fed. Merit Sys. Rep. 242 (MSPB Nov. 13, 1981), the Merit Systems Protection Board held that this regulation was invalid and inconsistent with the power given to the Office of Personnel

to the government and to managerial personnel associated with the review of disciplinary decisions in the administrative process and concluded, apparently on the basis of logic rather than on evidence in the record, that "it is quite probable that if management personnel face the added risk of personal liability for decisions that they believe to be a correct response to improper criticism of the agency, they would be deterred from imposing discipline in future cases."⁸⁰

The Court ultimately deferred to the congressional solution. It acknowledged that Congress has "considerable familiarity" with balancing the need for governmental efficiency with employees' rights, as well as having access to fact-finding procedures not available to the courts.⁸¹ Further, the Court stressed that Congress also has a "special interest" in keeping informed about the efficiency and morale of the executive branch, and that Congress is capable of making an "evenhanded assessment of the desirability of creating a new remedy for federal employees who have been demoted or discharged for expressing controversial views."⁸² The Court concluded that Congress was "in a better position

Management to issue regulations, as it conflicted with 5 U.S.C. § 7513 of the new Act. The new Act allows a shortened notice period when "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed," *id.*, but does not provide for emergency suspensions. It may be noted that the first extensive use of the shortened notice provision was by the Federal Aviation Administration during the processing of the terminations of 11,500 air traffic controllers accused of engaging in the August, 1981 strike. See General Notice 1/129, sent from FAA national and regional offices to local air traffic control facilities, August 5, 1981.

A different procedure is established under the 1978 Act for the appeals of adverse actions (defined in 5 U.S.C. § 7512 (1982) as removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs up to 30 days). An appeal from the agency's action is heard initially by a presiding official of the MSPB in a hearing in which the employing agency assumes the burden of proving by a preponderance of the evidence that its action was proper. 5 U.S.C. § 7701(c)(1) (1982); 5 C.F.R. § 1201.56(a)(ii) (1984). The new law sets forth three affirmative defenses which, if proved, entitle the appellant to prevail even if the agency carries its burden of proof: (1) where "harmful error in the application of the agency's procedures" in taking the adverse action is shown; (2) where it is shown that the action was based on a "prohibited personnel practice," as defined in 5 U.S.C. § 2302(b) (1982) (such as discriminating on the basis of sex, age, or racial status; coercing political activity; or taking action which constitutes a reprisal against a "whistleblower," someone who discloses mismanagement and violation of the law in his agency); and (3) where it is shown that the action was "not in accordance with law." 5 U.S.C. § 7701(c)(2) (1982).

An employee may appeal the presiding official's decision to the Board by filing a petition for review within 30 days. 5 U.S.C. § 7701(e)(1)(A) (1982). Judicial review of the Board's decisions, available only to an "employee or applicant for employment adversely affected or aggrieved" by such a decision, is available in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(a)(1), (b)(1) (1982).

80. 103 S. Ct. at 2417.

81. *Id.*

82. *Id.* It is interesting to note the care the Court took to emphasize Congress's protection for a limited group of adverse actions — those brought against "federal employees who have been demoted or discharged for expressing controversial views." *Id.*

to decide whether or not the public interest would be served by creating [a new substantive legal liability]."⁸³

A concurring opinion filed by Justice Marshall, joined in by Justice Blackmun, emphasized that the case would be a different one "if Congress had not created a comprehensive scheme that was specifically designed to provide full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights . . . and that affords a remedy that is substantially as effective as a damage action."⁸⁴ In arguing that the administrative remedies were "substantially" as effective as an individual damages remedy, the concurring opinion noted the administrative advantages of placing the burden of proof on the agency rather than on the employee, removing the obstacle of qualified immunity that would exist in a civil suit,⁸⁵ and providing a speedier and less costly forum.⁸⁶

2. Immediate Implications of *Bush*

a. *A Softening of Carlson*

Bush implicitly departed from the seemingly unequivocal stance the Court took in *Carlson v. Green*⁸⁷ concerning the circumstances that would "defeat" a *Bivens*-style cause of action.⁸⁸ Without the benefit of supporting authority and rationale, the *Bush* Court stated:

This much is established by our prior cases. The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.⁸⁹

This hardly seems necessary, as the "comprehensive scheme" established by Congress covered more than just "whistleblowers." As will be seen, the important limitation on the holding in *Bush* is the status of the employee, and not the type of conduct that resulted in the adverse action. See *infra* text accompanying notes 95-114.

83. 103 S. Ct. at 2417.

84. *Id.* at 2417-18 (Marshall and Blackmun, JJ., concurring).

85. *Id.* at 2418 (citing *Butz v. Economou*, 438 U.S. 478 (1978)).

86. 103 S. Ct. at 2418. The concurring opinion also argued that these advantages were not "clearly outweighed" by the disadvantages of no option for a jury trial and only limited judicial review rather than a full trial in federal court. *Id.*

87. 446 U.S. 14 (1980).

88. See *supra* text accompanying notes 50-52.

89. 103 S. Ct. at 2411.

In acknowledging that Congress can "indicate its intent . . . even by the statutory remedy itself,"⁹⁰ the Court turned away from the *Carlson* language emphasizing "explicit" congressional deliberations that certain statutory remedies were intended to be exclusive and were viewed as "equally effective" as constitutional remedies.

The *Bush* Court further departed from the *Carlson* language by noting that "Congress has not resolved the question presented by this case by expressly denying petitioner the judicial remedy he seeks or by providing him with an equally effective substitute."⁹¹ The disjunctive "or" was not used in *Carlson*, and its use in *Bush* only emasculates the effect of *Carlson's* emphasis on "explicitly declared" alternative remedies.⁹²

The Court then turned to the "catch-all" category of "special factors counselling hesitation" and found such factors in abundance. In view of the "comprehensive procedural and substantive provisions giving meaningful remedies against the United States,"⁹³ and in view of its opinion that "Congress is in a better position to decide whether or not the public interest would be served" by allowing Bush's cause of action,⁹⁴ the Court upheld summary judgment for the defendant official. Its detailed discussion of the history of the federal civil service and its analysis of the administrative remedies available to Bush gave the Court ample cause to "hesitate" before allowing a judicial remedy.

Bush is therefore significant as an illustration of how the Court interprets the concept of "special factors counselling hesitation." Most significant, however, is not how *Bush* altered the impact of *Carlson* or defined the "special factors" concept, but how it clouded the picture for those cases involving federal employees *not* covered by a "comprehensive" administrative remedial scheme. *Bush*, it turns out, is a case pregnant with repercussions.

b. Little Impact on Other Employee Classifications

As previously mentioned,⁹⁵ federal employees within the federal "competitive service" are subject to "adverse actions"⁹⁶ only for "such cause as will promote the efficiency of the service."⁹⁷ Subchapter II of Title 5, Chapter 75, of the United States Code⁹⁸ and the regulations promulgated thereunder⁹⁹ currently set forth the procedures agencies

90. *Id.*

91. *Id.* (emphasis added).

92. See *Carlson*, 446 U.S. at 31 (Burger, CJ., dissenting) ("I cannot escape the conclusion that in future cases the Court will be obliged to retreat from the language of today's decision.").

93. 103 S. Ct. at 2406.

94. *Id.* at 2417.

95. See *supra* text accompanying notes 66-69.

96. As defined in 5 U.S.C. § 7512 (1982); see *supra* note 79.

97. 5 U.S.C. § 7513 (1982).

98. *Id.* §§ 7511-14 (1982).

99. 5 C.F.R. §§ 752.301-.406 (1984).

must follow in effecting adverse actions for employees in the competitive service. Chapter 77¹⁰⁰ sets forth the procedures for appealing an agency's decision to the Merit Systems Protection Board and, ultimately, to the United States Court of Appeals for the Federal Circuit.¹⁰¹

Bush, as a non-probationary employee in the competitive service,¹⁰² was entitled to the administrative remedies then in effect for those employees subject to adverse actions. The scope of coverage of those remedies, of course, was determinative in his case, as the Supreme Court was guided by the comprehensive remedial scheme with which he was provided. Therefore, had he been a probationary employee (essentially, someone in the competitive service for less than one year)¹⁰³ or a member of the excepted service,¹⁰⁴ he would not have had access to the administrative remedial process,¹⁰⁵ and the outcome of his case likely would have been different.

Numerous positions in the civil service are excepted from the competitive service and, therefore, are not protected by the "efficiency of the service" standard or by the elaborate remedial provisions applying to ad-

100. 5 U.S.C. §§ 7701-03 (1982).

101. For further details on these procedures, see *supra* note 79.

102. For the relevant statutory definitions, see *infra* notes 103 and 104.

103. An "employee" entitled to the statutory adverse action procedures is defined in 5 U.S.C. § 7511(a)(1) (1982) as follows:

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions

"Preference eligible," as defined in 5 U.S.C. § 2108(3) (1983), includes veterans and certain relatives of veterans.

104. 5 U.S.C. § 2102 (1982) states:

(a) The "competitive service" consists of—

(1) all civil service positions in the executive branch, except—

(A) positions which are specifically excepted from the competitive service by or under statute;

(B) positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs; and

(C) positions in the Senior Executive Service

5 U.S.C. § 2103(a) (1982) defines the "excepted service" as "those civil service positions which are not in the competitive service or the Senior Executive Service." The regulations promulgated by the Office of Personnel Management further define the "excepted service" and establish three schedules of excepted positions. 5 C.F.R. §§ 213.3101-3202 (1984).

105. See *Stern v. Department of the Army*, 699 F.2d 1312 (Fed. Cir. 1983) (upholding the dismissal of the petitioner's appeal before the Merit Systems Protection Board for lack of jurisdiction where the petitioner was a civilian employee under a temporary appointment of less than one year and was not a preference eligible), *cert. denied*, 103 S. Ct. 3095 (1983); see also *Piskadlo v. Veterans Admin.*, 668 F.2d 82 (1st Cir. 1982) (MSPB had no jurisdiction over appeal of discharge of probationary employee).

verse actions in the competitive service. These positions include attorneys and law clerk trainees,¹⁰⁶ as well as numerous other positions "not of a confidential or policy-determining character" for which it is impractical to hold examinations or open competitions, or to apply the usual competitive procedures.¹⁰⁷ Furthermore, employees such as non-preference eligible Postal Service employees and, of course, probationary employees in the competitive service are similarly unprotected.¹⁰⁸

None of these positions falls under the *Bush* analysis of being part of the "elaborate remedial system" protecting discharged or demoted employees, and it would seem that employees in these positions are therefore free to pursue *Bivens*-style remedies whenever applicable. The difficulty with this view is that Congress did not ignore these positions; it simply determined that they were not the sort of positions warranting the protection of the competitive service. If Congress determined these positions warranted less protection, it is anomalous, to say the least, that employees in these positions are entitled to pursue *Bivens* actions, which provide potentially greater remedial protection, while employees in the competitive service, where Congress has determined that greater protection is warranted, are limited to the pursuit of the applicable administrative remedies.¹⁰⁹

106. 5 C.F.R. § 213.3102(d), (e) (1984).

107. *Id.* §§ 213.3101, 213.3201 (1984). Also in the excepted service are positions "which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials." See *supra* note 104.

108. See 5 U.S.C. § 7511(a)(1) (1982) (quoted *supra* note 103). Preference eligible non-probationary Postal Service employees may use the administrative remedies for adverse actions. *Id.* They are thus subject to the same analysis as was *Bush* in attempting to sustain a *Bivens*-style action. Even non-preference eligibles in the Postal Service are protected under a "just cause" provision in their collective bargaining agreement. In addition, the elaborate grievance and arbitration procedures set forth in their agreements effectively provide them the same protection as preference eligibles. See, e.g., Agreement Between U.S. Postal Service and American Postal Workers Union, AFL-CIO, Articles 15, 16 (July 21, 1981-July 20, 1984).

109. For an example of a post-*Bush* case denying a *Bivens*-style action brought by a probationer because of this anomaly, see *Francisco v. Schmidt*, 575 F. Supp. 1200, 1202-03 (E.D. Wis. 1983). In *Francisco*, the United States District Court for the District of Wisconsin held that it would not allow a probationary employee to pursue a *Bivens* action based on an alleged first amendment violation because:

the fact that the federal employer-employee relationship is involved is a special factor that counsels hesitation, and this is so notwithstanding Congress's decision to exclude probationary employees from its remedial scheme. The Supreme Court has determined that Congress is in a superior position for balancing the competing policy considerations in the context of federal employment disputes. It stands to reason that Congress's decision to exclude probationary employees from the statutory remedial scheme reflects an assessment of those considerations as they pertain to employees who have not fully demonstrated their competence or ability to interact with their co-workers and superiors.

Id. The court was less concerned with the issue of "what remedy [it] should provide for a wrong that would otherwise go unredressed," see *Bush*, 103 S. Ct. at 2416, than with the implications of Congress's decision in the "elaborate remedial system"

It is no answer to assert, as did Justice Marshall in his concurring opinion in *Bush v. Lucas*,¹¹⁰ that the administrative remedies are "in many respects preferable" to a *Bivens*-style action.¹¹¹ Neither the Court's opinion nor the concurring opinion challenged the proposition that a *Bivens*-style action, which has the potential for a jury trial, compensatory and punitive damages, and recovery for emotional distress, offers a more complete remedy than do the administrative remedial procedures. Quite clearly, the administrative remedy, although more expedient, is limited.

It seems appropriate, however, to speculate that *Bush* will have little practical effect on the choice of remedies by employees seeking to vindicate their rights. Most employees subject to an adverse action would probably prefer to appeal through the Merit Systems Protection Board procedures¹¹² rather than to sue under a *Bivens*-style theory. Employees not eligible for a Merit Systems Protection Board proceeding will have to sue. As the following discussion indicates, there are few legal impediments to such suits when the facts present a constitutional violation. Given the variety of classifications of federal employees,¹¹³ it appears that *Bush*, in addressing only the right of a non-probationary employee in the competitive service to bring suit, left an incomplete analytical picture.¹¹⁴ As discussed in the following material, there is a great variety of *Bivens*-style actions, each with different implications on the functioning of government, that can be brought in the area of public personnel. Only through a holistic analysis of all these actions and their implications could the Court issue a decision to complete the analytical picture left by *Bush*. It is not likely that cases will present themselves to the Court in such a manner. This, therefore, is an area crying out for congressional attention.

C. Potential *Bivens*-Style Actions in the Public Personnel Field

1. First Amendment Violations

First amendment violations by personnel officers, as illustrated by negative implication in *Bush*, may provide a fertile ground for future *Bivens*-style actions. Such violations occur in a variety of ways, including the termination of employees after a change of presidential administrations¹¹⁵ and the suspension or termination of employees critical of their

it constructed to give less protection to probationary employees. Other courts, including the Supreme Court, see *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977), are likely to be more protective of first amendment interests, in spite of congressional protections for whistleblowers. See *infra* text accompanying notes 200-14, 222-25.

110. 103 S. Ct. at 2417 (Marshall, J., concurring).

111. *Id.* at 2418.

112. See *supra* note 79.

113. See *supra* notes 104, 108.

114. *But see supra* note 109.

115. See, e.g., *Branti v. Finkel*, 445 U.S. 507 (1980) (new public defender taking office

supervisors.¹¹⁶ Meeting the first requirement of establishing a *Bivens* action under the *Carlson* test — showing a constitutional violation (here, of the first amendment) — should be relatively easy. The Supreme Court has ruled that in order to meet his initial burden of proof, an employee claiming that his discharge resulted from protected first amendment activity need only show that the complained-of conduct was a “substantial” or “motivating” factor in the discharge.¹¹⁷ An employee so discharged is entitled to reinstatement even if he is not tenured.¹¹⁸ Mere reinstatement, however, would not likely make an employee whole following a discharge or suspension for protected first amendment activity. Because of the *Carlson* concern that alternative remedies be “sufficient protector[s] of the citizens’ constitutional rights”¹¹⁹ before a *Bivens*-style cause of action should be precluded, it is highly likely that a *Bivens* action will be a favorable remedy in this area.

2. Fourteenth Amendment Violations

Initially, fourteenth amendment violations had been a major source of *Bivens*-style litigation against local officials, and it appeared that such actions were going to be as widespread as in the federal sector. The Supreme Court halted that trend in 1978 with its decision in *Monell v. Department of Social Services*.¹²⁰ *Monell* held that the word “person” in 42 U.S.C. § 1983, which gives a federal cause of action to those whose constitutional rights have been violated by any “person” under “color” of state law, includes within its scope municipalities.¹²¹ This decision gave plaintiffs injured by unconstitutional acts of municipal employees a direct cause of action against the municipalities, so long as the suits were not based on respondeat superior theories.¹²² Many cases have since held that *Bivens*-style actions against municipal officials are precluded when section 1983 suits are thus available.¹²³ In accord with the eleventh amendment, *Monell* did not extend its interpretation of section 1983 to

after election could not dismiss assistants because of their party affiliation when there was no demonstration that party affiliation was an appropriate requirement for effective performance).

116. See, e.g., *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979) (suspension of employee for complaining of “AMWAY ring” being run by supervisor at office was improper). “Whistleblowers” are given protection by the office of the Special Counsel of the Merit Systems Protection Board under the Civil Service Reform Act of 1978. See 5 U.S.C. § 1206 (1982); see also *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (school teacher could not be terminated for having written partially erroneous letter to local newspaper criticizing school board’s actions).

117. *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

118. *Id.* at 283-84.

119. *Carlson v. Green*, 446 U.S. at 14, 23 (1980).

120. 436 U.S. 658 (1978).

121. *Id.* at 690.

122. *Id.* at 691.

123. See, e.g., *Cale v. City of Covington*, 586 F.2d 311, 317 (4th Cir. 1978); *Mahone v. Waddle*, 564 F.2d 1018, 1024-25 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978); *Bell v. City of Philadelphia*, 511 F. Supp. 1156, 1160 (E.D. Pa. 1981).

local governmental units considered part of a state.¹²⁴ Thus, no federal cause of action is available against a state or its subdivisions for constitutional violations.

On the federal level, it appears that there are few areas of the Constitution, at least in the Bill of Rights, that do not hold the potential for *Bivens*-style actions. So long as the violation of a constitutional right results in ascertainable damages, the portion of the Constitution violated probably can be the basis for a private cause of action against the culpable federal agent.

3. Fifth Amendment Violations

a. *The Liberty Interest*

In alleging an infringement of a fifth amendment liberty interest through a personnel action, the general rule is that the employee must set forth that the charges against him that are the basis of the personnel action are false¹²⁵ and that they were made public in some form so as to impair his "good name, reputation, honesty, or integrity."¹²⁶ The application of this rule is illustrated in the 1976 case of *Bishop v. Wood*.¹²⁷ In *Bishop*, the Supreme Court held that because the allegedly stigmatizing charges against the plaintiff policeman (that his discharge was based on a failure to follow orders, poor attendance at training sessions, and conduct unsuited to an officer) were communicated orally to him in private, there was no dissemination of the charges sufficient to warrant a finding of an impairment of the plaintiff's reputation.¹²⁸ The Court would not speculate, as did two justices in dissent,¹²⁹ as to whether the plaintiff's former employer might communicate the charges to prospective employers when asked about his record. The Court refused to allow itself to become "the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."¹³⁰

At this juncture, it is important to consider the implications of *Doe v. United States Civil Service Commission*,¹³¹ which, although occurring some four years after *Bishop*, indicated that a strict view of the "publication" requirement in *Bishop* may not always be followed. *Doe* held that a plaintiff stated a cause of action against officials of the Civil Service Commission for damages incurred when the defendants' actions infringed the plaintiff's fifth amendment liberty interest without granting her a hearing,¹³² which the court deemed constitutionally required under the

124. See *Monell*, 436 U.S. at 690 n.54.

125. See *Codd v. Velger*, 429 U.S. 624, 627-28 (1977).

126. See *Bishop v. Wood*, 426 U.S. 341, 348 & n.12 (1976) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

127. 426 U.S. 341 (1976).

128. *Id.* at 348-49.

129. *Id.* at 351-52 (Brennan, J., dissenting).

130. *Id.* at 349 & n.14.

131. 483 F. Supp. 539 (S.D.N.Y. 1980).

132. *Id.* at 575.

circumstances.¹³³

In *Doe*, the plaintiff applied to the President's Commission on White House Fellowships for a White House Fellow position. Upon being selected as one of the finalists for the position openings, she was subjected to a field investigation conducted by a Civil Service Commission bureau. She had authorized the investigation on the appropriate form. The bureau interviewed more than thirty-five people familiar with Doe's character and qualifications, most of whom gave favorable reports. Two of those contacted, however, reported that Doe had engaged in several acts of theft, both during college and at the current time. These sources used language such as "propensity to steal," "kleptomaniac," and "compulsive thief," all of which were placed in Doe's file.¹³⁴

Doe was not offered the fellowship. She obtained her file pursuant to a Privacy Act¹³⁵ request and discovered the statements concerning her alleged thievery. She requested that the statements be deleted from her file for not meeting the accuracy requirements of the Privacy Act,¹³⁶ and supplied several affidavits on her behalf refuting the incidents alleged by the two sources. The Civil Service Commission rejected the request, but included the affidavits in her file.¹³⁷ In a suit filed in federal district court against the Civil Service Commission, Doe alleged, among other things, that the conduct complained of violated her right to privacy and due process under the first, fourth, fifth, and ninth amendments.¹³⁸ She alleged that her liberty interest under the fifth amendment was violated because of the way the government action "operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity."¹³⁹

The court noted that to state properly a claim of an infringement of a fifth amendment liberty interest, a plaintiff must allege that the charges made against her were false, and that the charges were disclosed in such a manner that impaired the plaintiff's interest in her "good name, reputation, honor, or integrity."¹⁴⁰ The court ruled that both elements were properly alleged.¹⁴¹

133. *Id.*

134. *Id.* at 547.

135. 5 U.S.C. § 552a (1982).

136. *Id.* § 552a(e)(5).

137. *Doe*, 483 F. Supp. at 548.

138. *Id.* at 549.

139. *Id.* at 569 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898 (1961), and citing *Paul v. Davis*, 424 U.S. 693, 705 (1976) (emphasis added in *Paul*, here deleted)).

140. *Doe*, 483 F. Supp. at 568 (quoting *Bishop v. Wood*, 426 U.S. 341, 348 (1976)).

141. *Doe*, 483 F. Supp. at 570-71. The court noted that because the body receiving the information on Doe was composed of "influential citizens" from around the country, and because the file information could be used again if Doe reapplied for the fellowship or for other federal service, the derogatory charges were not merely told orally to Doe. *Id.*

Agreeing with the Tenth Circuit,¹⁴² the *Doe* court stated that when the circumstances of preservation of the allegedly false information create "a great potential for damaging disclosure," the reviewing court should "relax the rigid publication requirement."¹⁴³ This apparent discrepancy with the *Bishop* holding comports with good fifth amendment due process jurisprudence, where the usual remedy sought for a liberty infringement is "an opportunity to refute the charge."¹⁴⁴ The equity powers of the federal judiciary have always been broadly interpreted,¹⁴⁵ and where employment files contain false information presenting a threat to a former employee's employment prospects, a federal court may well be within its authority in ordering a hearing to give the former employee a chance to clear his name and to avoid a threatened liberty infringement.

The *Doe* court, however, took an extraordinary step. After deciding that such a hearing would be appropriate relief in a more traditional action, it allowed the plaintiff to pursue a *Bivens*-style action,¹⁴⁶ even though the potential injury from the allegedly false information could only occur in a future attempt to secure federal employment. To determine whether a *Bivens*-style action against the governmental officials in their individual capacities was proper, the court looked to language in *Davis v. Passman*.¹⁴⁷ *Doe* was permitted to pursue her cause of action for damages against the individual defendants under the fifth amendment because she had "no other means of securing total monetary relief [if she were to establish] compensable losses."¹⁴⁸ The court reached this conclusion after noting that damages under the Privacy Act, which were also sought by *Doe*, would be limited to her post-effective date injuries, and that sovereign immunity barred recovery from the Civil Service Commission.¹⁴⁹

The *Doe* court also looked to whether an award of damages would be "appropriate" for the violation of fifth amendment rights,¹⁵⁰ a requirement set forth by the *Davis* Court.¹⁵¹ It pointed to language in *Davis* that damages have been regarded as the usual remedy for invasions of

142. *McGhee v. Draper*, 564 F.2d 902 (10th Cir. 1977).

143. *Doe v. United States Civil Serv. Comm'n*, 483 F. Supp. at 571 (quoting *Doe v. Anker*, 451 F. Supp. 241, 252 n.18 (S.D.N.Y. 1978)).

144. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972), quoted in *Codd v. Velger*, 429 U.S. 624, 627 (1977).

145. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring).

146. *Doe*, 483 F. Supp. at 574.

147. 442 U.S. 228, 242 (1979). The *Davis* Court stated that "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 the protection of their justiciable constitutional rights." *Id.*

148. *Doe*, 483 F. Supp. at 574.

149. *Id.*

150. *Id.*

151. *Davis v. Passman*, 442 U.S. at 228, 245 (1979).

personal liberty interests,¹⁵² and noted that in enacting the Privacy Act, Congress authorized damages awards for just the type of conduct alleged by Doe.¹⁵³ Congress must have decided, the court stated, that the proper amount of damages could be calculated in a "judicially manageable" fashion.¹⁵⁴

Furthermore, the court was not convinced that allowing Doe's cause of action for damages against the officials in their individual capacities would "open the floodgates" of litigation. The events in question were not typical, the court noted, and the claim related in part to events occurring before the effective date of the Privacy Act.¹⁵⁵

Davis had indicated that lawsuits against some officials may raise "special concerns counselling hesitation,"¹⁵⁶ such as the suit in that case against a former congressman by an employee he had discharged in violation of her equal protection rights. The *Davis* Court noted, however, that those concerns were coextensive with the protections of the speech or debate clause of the Constitution,¹⁵⁷ and to the extent the congressman was not protected by that clause, he should be as bound by the law as are "ordinary persons."¹⁵⁸ Without deciding the issue, the *Doe* court likewise stated that any special concerns about holding the individual defendants subject to suit were coextensive with the scope of their official immunity.¹⁵⁹ To the extent those officials were not so protected, Doe was allowed to pursue her claims against them.¹⁶⁰

Although preceding *Bush v. Lucas*¹⁶¹ by some three years, *Doe* remains forceful precedent. *Doe*'s detailed treatment of the policy-type concerns of *Bivens* cases is still a persuasive analysis, and since the plaintiff in *Doe* was not a member of the competitive service,¹⁶² the *Bush* holding does not apply to cases with facts similar to *Doe*.

b. *The Property Interest*

The fifth amendment prohibits the deprivation of property without due process of law; yet there is no constitutional definition of property. An independent source of property rights must thus be analyzed to determine the extent of those rights in each case. Property interests have been recognized in a variety of forms, apart from the traditional forms of real estate and chattels normally associated with property interests. The

152. *Doe*, 483 F. Supp. at 574 (citing *Davis*, 442 U.S. at 245).

153. *Doe*, 483 F. Supp. at 575 (quoting 5 U.S.C. § 552a(g)(4)(A)).

154. *Doe*, 483 F. Supp. at 575 (quoting *Davis*, 442 U.S. at 245).

155. *Doe*, 483 F. Supp. at 575.

156. *Davis*, 442 U.S. at 246.

157. U.S. CONST. art. I, § 6, cl. 1.

158. *Davis*, 442 U.S. at 246 (quoting *Gravel v. United States*, 408 U.S. 606, 615 (1972)).

159. *Doe*, 483 F. Supp. at 574-75.

160. *Id.*

161. 103 S. Ct. 2404 (1983).

162. *Doe*, 483 F. Supp. at 546-47. Indeed, she was not an employee at all, but only an applicant for a special employment program. *Id.*

leading case of *Board of Regents of State Colleges v. Roth*¹⁶³ attempted to draw some boundaries around protected property interests in this area of "intangible" property.

To have a property interest in a "benefit," the Court stated, a person must have more than an "abstract need or desire for it" or "more than a unilateral expectation of it"; he must have a "legitimate claim of entitlement to it."¹⁶⁴ The legitimacy of that claim of entitlement is determined by "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."¹⁶⁵

Thus, the plaintiff in *Roth*, who had only a year-to-year contract with a state university system, could not claim an infringement of his fifth amendment property interest, made applicable to the state through the fourteenth amendment, when he was terminated at the end of his contract without a hearing.¹⁶⁶ On the other hand, the plaintiff in a companion case, *Perry v. Sindermann*,¹⁶⁷ did allege a property interest in continued employment where the state college, although having no formal tenure system, allegedly had long followed a clear program of granting permanent tenure to those teachers performing adequately and cooperating with their colleagues.¹⁶⁸

Perry was remanded by the Supreme Court for a finding as to whether the "policies and practices of the institution" had created a property interest the plaintiff could legitimately claim.¹⁶⁹ The apparent open texture of the directive on remand, however, seems to have encouraged the lower courts to find a property interest much more liberally than *Roth* and *Perry* probably intended.

The Seventh Circuit, for example, has held that a departmental handbook that indicated "tenure" was provided for certain groups of employees created a presumption of a contractual tenure system.¹⁷⁰ Also, the District of Columbia Circuit has held that a property interest in retaining employment was created by an employee handbook indicating that satisfactory work would ensure the employee's continued employment, even though the employee of the agency was not in the competitive civil service.¹⁷¹

These cases are clearly at odds with the rule that the federal government cannot be bound by statements made ostensibly on its behalf by

163. 408 U.S. 564 (1972).

164. *Id.* at 577.

165. *Id.*

166. *Id.* at 579.

167. 408 U.S. 593 (1972).

168. *Id.* at 603.

169. *Id.* (quoting *Sinderman v. Perry*, 430 F.2d 939, 943 (5th Cir. 1970)).

170. *Paige v. Harris*, 584 F.2d 178, 182 (7th Cir. 1978) (an action brought by an attorney, a member of the excepted service, against his employer, the Department of Housing and Urban Development).

171. *Ashton v. Civiletti*, 613 F.2d 923, 929-30 (D.C. Cir. 1979) (an action brought by a non-investigatory employee of the FBI).

those not having the authority to do so.¹⁷² If the employee handbooks did not correctly reflect the nature of tenure as created under the civil service laws, their pronouncements could not establish property interests. That the courts referred to above were so quick to recognize property interests reflects a misunderstanding of federal employment that may be widespread in the judiciary.

Operating under this misunderstanding in a more traditional fifth amendment property case will not cause a large amount of harm, considering that the typical remedy will be to order a hearing, either before or after discharge,¹⁷³ along with back pay in appropriate circumstances.¹⁷⁴ The relative ease with which courts have found property interests in these cases, in which the remedies have been somewhat benign, has established precedent that will make it all the easier to recognize *Bivens*-style actions in this area. Once courts find constitutional violations by federal officials, the broad directives of *Carlson*¹⁷⁵ almost ensure that constitutional tort suits against those officials will be upheld, so long as factors "counselling hesitation," such as those in *Bush*, are not present.

D. Defenses to Bivens Actions

Although *Bush* was not concerned with the issue, affirmative defenses arising out of the defendant's status or conduct may be raised in *Bivens*-style cases under appropriate circumstances. These circumstances include official immunity and good faith defenses.

1. Official Immunity

The Supreme Court held in *Butz v. Economou*¹⁷⁶ that the only federal officials enjoying absolute immunity from damages liability are attorneys presenting evidence in adjudicatory hearings, and officials otherwise performing prosecutorial and adjudicatory functions.¹⁷⁷ Other federal

172. *Fiorentino v. United States*, 607 F.2d 963, 967-69 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1083 (1980).

173. *See Arnett v. Kennedy*, 416 U.S. 134 (plurality opinion), *reh'g denied*, 417 U.S. 977 (1974), in which six justices, three in dissenting opinions and three dissenting in part with the plurality, concluded that a discharged non-probationary civil service employee must be granted a trial-type hearing at some stage in the discharge proceedings. These opinions disagreed as to when the hearing should be in order to comport with fifth amendment due process requirements. *See infra* notes 205-14 and accompanying text.

174. The Back Pay Act, 5 U.S.C. § 5596(b)(1) (1982), provides for the payment of back pay to an employee who has lost pay due to "an unjustified or unwarranted personnel action."

175. *See supra* text accompanying notes 43-45.

176. 438 U.S. 478 (1978).

177. *Id.* at 514-17. *Butz* did not mention whether an absolute immunity extends to federal officials performing a rule making function analogous to the article I, § 6, cl. 1 immunity granted to congressmen under the speech or debate clause of the Constitution. One case under 42 U.S.C. § 1983 (1982), *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977), would recognize only a qualified immunity for state officials responsible for the adoption of the rules in an agency procedural manual; *but cf.*

officials, the Court stated, are relegated to a qualified immunity, as their state counterparts had been in actions brought against them pursuant to 42 U.S.C. § 1983.¹⁷⁸ The *Butz* Court allowed the qualified immunity to extend to "mere mistakes in judgment," including those of law or fact,¹⁷⁹ but it refused to adopt a rule under which "executive officers generally may with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule."¹⁸⁰

The *Butz* holding did not, and perhaps could not, provide clear enough guidelines to ensure that frivolous lawsuits will be "quickly terminated by federal courts alert to the possibilities of artful pleading."¹⁸¹ Although *Butz* indicated that immunity questions could be resolved early enough in a proceeding to protect defendant officials from undue harassment in litigation, experience has not borne this out. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹⁸² *Davis v. Passman*,¹⁸³ *Carlson v. Green*,¹⁸⁴ and *Doe v. United States Civil Service Commission*¹⁸⁵ decided only the questions of whether a cause of action existed, leaving the official immunity questions for later resolution. These courts thus indicated that immunity is not so much a bar to suit in these cases as it is an affirmative defense that must be pleaded and proved. Indeed, those immunity cases decided within the context of section 1983¹⁸⁶ actions that were cited and adopted by *Butz* for *Bivens*-style actions against federal officials indicated that intent and conduct are crucial to the determination of the existence of immunity from suit.¹⁸⁷ Thus, factual issues are raised that cannot be disposed of at the pleading stage of litigation.¹⁸⁸

2. Good Faith

The good faith of the officer in performing the conduct at issue in a

Nixon v. Fitzgerald, 457 U.S. 731 (1982) (holding that the President of the United States is absolutely immune from damages for acts within the "outer perimeter" of his official responsibility).

178. *Butz*, 438 U.S. at 504-07.

179. *Id.* at 507.

180. *Id.*

181. *Id.*

182. 403 U.S. 388, 397-98 (1971).

183. 442 U.S. 226, 249 (1979).

184. 446 U.S. at 14, 19 (1980).

185. 483 F. Supp. at 539, 574-75 (S.D.N.Y. 1980).

186. 42 U.S.C. § 1983 (1982).

187. *See Butz*, 438 U.S. at 486-95.

188. The official immunity question is one that will become increasingly important as more *Bivens*-type actions are brought. Further research in this area would certainly be useful. The following thoughtful articles provide a solid foundation upon which this further research may proceed: Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1390-96 (1981); Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977).

Bivens action will be a defense in most cases.¹⁸⁹ The element of good faith is often considered in conjunction with the scope of the defendant's authority. Even malicious intent will not expose to liability an official who is not violating the Constitution and who is acting within his authority;¹⁹⁰ but good faith is no defense when that authority has been exceeded.¹⁹¹

The good faith issue is one for the finder of fact. When that defense is raised, whether it is denominated a defense or an element of a claim of official immunity, the litigation will probably go to extensive discovery, even though the good faith defense may be valid. In an adverse personnel action, bad feelings between the employee and supervisor may dispose a discharged employee to be dubious of the supervisor's claim of good faith. The result in many cases will be hard-fought litigation and, ultimately, pressure on the defendant to settle a case with a valid defense.

IV. FURTHER REMEDIAL CONSIDERATIONS

The principal impediment left by *Bush* to *Bivens*-style actions will be the status of the plaintiff-employee. According to *Bush*, if the employee enjoys a statutory remedy substantially as complete as the administrative appeal of adverse actions, he must seek redress through that statutory procedure; otherwise, his *Bivens* claim will be allowed.¹⁹² Regardless of the type of constitutional interests involved, the federal judiciary will recognize the right to bring a private action for damages when the statutory remedies are non-existent or, even though available, cross that undefined margin beyond which constitutional rights are inadequately protected.

A. *A Right without a Remedy: A Contradiction of Terms?*

Any *Bivens* case breaking new ground in the public personnel area must weigh carefully the employee's interests at issue and consider the best means of effectuating those interests. While *Bush* rejected the extreme view that the federal judiciary must "fashion an adequate remedy for every wrong that can be proved in a case over which a court has jurisdiction,"¹⁹³ the Court likewise refused to limit the remedial powers

189. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972), *on remand from* 403 U.S. 388 (1971). The good faith of the officer has been held to be a defense in 42 U.S.C. § 1983 (1982) actions. *See, e.g., Pierson v. Ray*, 386 U.S. 547, 557 (1967).

190. *See, e.g., Spalding v. Vilas*, 161 U.S. 483 (1896), *discussed in Butz v. Economou*, 438 U.S. 478, 492-95 (1978).

191. *See, e.g., Bates v. Clark*, 95 U.S. 204 (1877), *cited in Butz v. Economou*, 438 U.S. 478, 490-91 (1978); *Kelley v. Dune*, 344 F.2d 129, 133 (1st Cir. 1965); *Hughes v. Johnson*, 305 F.2d 67, 70 (9th Cir. 1962). For further discussion, see Schroeder, *supra* note 188, at 1386-96.

192. *Bush*, 103 S. Ct. at 2416.

193. *Id.* at 2408.

of federal courts to just that "relief expressly authorized by Congress."¹⁹⁴ The *Bush* Court stated that the federal courts' power to grant relief not expressly authorized by Congress is "firmly established."¹⁹⁵ It stressed that the grant of jurisdiction under 28 U.S.C. § 1331,¹⁹⁶ known as "federal question" jurisdiction, carries with it not only the power to decide whether the allegation of a constitutional infringement states a cause of action,¹⁹⁷ but also the "authority to choose among available judicial remedies in order to vindicate constitutional rights."¹⁹⁸

Having stated this, the Court was committed to considering in detail the administrative remedies available to Bush before it could determine whether his suit could stand. Of course, *Bivens* held that the administrative remedies were sufficient to foreclose a judicial remedy in that case.¹⁹⁹ But does it necessarily follow that in the absence of an administrative remedy, due to a choice by Congress that such relief is inappropriate, a judicial remedy must be created?

194. 103 S. Ct. at 2408. In note 10, the Court cited *Marbury v. Madison*, 1 Cranch 137, 162-63 (1803), which quoted the following from Blackstone:

[i]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded [I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.

3 W. BLACKSTONE COMMENTARIES* 23, 109. See also *Parden v. Terminal Ry.*, 377 U.S. 184, 190 (1964), in which Justice Brennan wrote: "to read a sovereign immunity exception into the [Federal Employers' Liability] Act would result . . . in a right without a remedy We are unwilling to conclude that Congress intended so pointless and frustrating a result" In *Leedom v. Kyne*, 358 U.S. 184, 188-91 (1958), Justice Whittaker, in allowing judicial review of the National Labor Relations Board representation decision, wrote:

Does the law, "apart from the review provisions of the . . . act," afford a remedy? We think the answer surely must be yes. This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the act Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

Here, . . . "absence of jurisdiction of the federal courts" would mean "a sacrifice or obliteration of a right which Congress" has given professional employees, for there is no other means within their control . . . to protect and enforce that right

Where, as here, Congress has given a "right" to the professional employees it must be held that it intended that right to be enforced, and the "courts . . . encounter no difficulty in fulfilling its purpose."

358 U.S. at 188-91.

195. *Bush*, 103 S. Ct. at 2409.

196. 28 U.S.C. § 1331 (1982); see *supra* note 29.

197. *Bush*, 103 S. Ct. at 2409 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

198. *Bush*, 103 S. Ct. at 2409.

199. *Bivens*, 403 U.S. at 397.

It is unlikely that the Supreme Court would accept an explicit statement or implied policy from Congress that a particular classification of federal employees is of such a status that those in that classification are entitled to neither a statutory nor a court-made remedy for personnel actions arguably violating their constitutional rights.²⁰⁰ Although the power of Congress to limit the jurisdiction of the federal judiciary has been recognized in a variety of circumstances,²⁰¹ it is a different matter to preclude all forums, judicial and statutory, from vindicating a constitutional right.²⁰² The Court has applied the "no right without a remedy" rationale in the past,²⁰³ and *Bush* indicates that the Court will not hesitate to do so again in such a situation.²⁰⁴

In *Arnett v. Kennedy*,²⁰⁵ a three-justice plurality indicated that Congress could limit the avenues of redress for a federal employee based upon Congress's definition of the employee's status. The issue was whether the due process rights of the plaintiff, a former non-probationary employee in the competitive service, were violated by the statute and regulations that did not provide for a trial-type hearing until after termination by the employing agency.²⁰⁶ Mr. Justice Rehnquist and two concurring justices focused on the remedial procedures created by the statute creating the property interest. The statute prohibited removal of the plaintiff except for "such cause as will promote the efficiency of the

200. Perhaps this statement is overly broad, as employees holding positions of a confidential or policy-determining nature (such as those in Schedule C of the excepted service, see 5 C.F.R. §§ 213.3301-3302 (1984)) may not be entitled to the same first amendment protections as other employees, because their private political beliefs could interfere with "the effective performance of the public office involved." See *Branti v. Finkel*, 445 U.S. 507, 518 (1979); *Elrod v. Burns*, 427 U.S. 347 (1976). See also *Connick v. Meyers*, 461 U.S. 138 (1983). Indeed, all federal employees are subject to some first amendment restrictions, as in the Hatch Act's prohibition of certain political activities. 5 U.S.C. § 7324 (1982); see *Civil Service Commission v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973). The issue addressed here, however, is whether, insofar as a constitutional interest is enjoyed by employees, Congress may restrict access to remedies for violations of that interest.

201. See, e.g., *United States v. Ramsey*, 539 F. Supp. 1062 (E.D. Tenn. 1982) (finding that 38 U.S.C. § 211 (1982) precluded the defendant from obtaining judicial review of the merits of his Veterans Administration claim. The court indicated it would have reviewed his case had he challenged the constitutionality of the applicable statute). See also *Am. Fed. Gov't Employees v. Nimmo*, 536 F. Supp. 707 (E.D. Va. 1982), modified on appeal, 711 F.2d 28 (4th Cir. 1983).

202. See *Am. Fed. Gov't Employees v. Nimmo*, 536 F. Supp. 707 (E.D. Va. 1982).

203. See *supra* note 194.

204. *Bush*, 103 S. Ct. at 2409. It may be worth noting that this sense of "no right without a remedy" differs from the legal realist approach of Holmes, in which the concept of right and remedy fused only in the sense that the latter defined the former. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). (The realists' "scientific approach" focused on "what judges do, rather than what they say." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 3 (1978)). The *Bivens* line of cases seems to accord an independent existence to the constitutional rights involved, with remedies serving not so much as "to give birth" to rights, but rather to be selected out of an appreciation of "moral-like" qualities of the rights.

205. 416 U.S. 134 (1974) (plurality opinion).

206. *Id.* at 140, 144 n.12, 145 n.14.

service."²⁰⁷ Because, however, the statute gave no right to a pre-termination trial-type hearing,²⁰⁸ "the property interest which [the plaintiff] had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest."²⁰⁹

No other Justice agreed with this view. Two concurring Justices emphasized that the right to procedural due process is guaranteed by the Constitution, not by statute, and thus the right could not be limited by statute;²¹⁰ they concurred in the result, however, after balancing the interests of federal employees in their employment with the government's interest in the expeditious removal of unsatisfactory employees.²¹¹ Mr. Justice White, concurring in part and dissenting in part, found that the pre-termination procedures were constitutionally sufficient, although an evidentiary hearing would be required at some time in the proceedings.²¹² The three dissenters would have held that the Constitution required a trial-type hearing before termination.²¹³

Arnett's rejection of the view that the constitutional right to due process can be "conditioned" by statutory procedures²¹⁴ is significant for present purposes. That rejection, coupled with *Bush's* careful analysis of the adverse action appeal procedures before denying the *Bivens* action in that case, shows the Court's dedication to ensuring that constitutional rights are adequately effected in statutory remedial procedures. Congress may not implicitly or explicitly limit employees' constitutional rights merely by denying them certain statutory remedies.

207. *Id.* at 140 (citing and quoting 5 U.S.C. § 7501(a) (1970)).

208. A post-termination trial-type hearing before the Civil Service Commission was provided for in the regulations. See *supra* note 206.

209. *Arnett*, 416 U.S. at 155. This statement shows a misunderstanding of the interests involved. The property interest is created by an independent source, such as a statute, while the right to procedural due process is created by the Constitution. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). To say that the property interest is "conditioned" by the statutory procedures ignores the possibility that those procedures conflict with the constitutional requirements of due process.

210. *Arnett*, 416 U.S. at 167 (Powell and Blackmun, JJ., concurring in the result and concurring in part).

211. *Id.* at 167-68.

212. *Id.* at 185, 195-96 (White, J., concurring in part and dissenting in part). Mr. Justice White, however, found the pre-termination opportunity to answer the charges orally or in writing to be constitutionally infirm because the official hearing the response was an employee of the employing agency. Justice White thus would have had the appellee reinstated with back pay. *Id.* at 202.

213. *Id.* at 206 (Marshall, J., dissenting).

214. It may be argued that *Bishop v. Wood*, 426 U.S. 341 (1976), followed the *Arnett* plurality opinion of Justice Rehnquist (thereby overruling the "majority"), because it deferred to an interpretation by the district court of an ordinance that appeared to protect the jobs of "permanent" employees so long as they were not "negligent, inefficient, or unfit to perform" their duties. *Id.* at 344 n.5, 344-47 (quoting Marion, North Carolina Personnel Ordinance, art II, § 6). The district court had found, however, that no property right was created by the ordinance, and the Supreme Court affirmed. *Bishop*, 426 U.S. at 347.

B. Gaps in Current Statutory Remedies

The question raised earlier still remains. Does it make sense to relegate non-probationary employees in the competitive service to their administrative remedies, while employees in the excepted service, accorded less protection in the statutory scheme, are free to pursue more lucrative *Bivens*-style actions? This anomaly created by *Bush* appears unsolvable under the present remedial scheme, and a new revision of the civil service system may be called for.

Since employees in the excepted service, probationers in the competitive service, and non-preference eligibles in the United States Postal Service do not have a property interest in their positions,²¹⁵ the requirements of constitutional due process do not come into play merely by virtue of an adverse action terminating, suspending, or downgrading their positions. To that extent, Congress may effectively legislate limitations on the rights in an area of potential constitutional implications. Where other constitutional interests are involved, however, such as the fifth amendment liberty interest or the first amendment freedom of speech, Congress's role is different. The liberty interest and freedom of speech are naturally enjoyed and do not depend on congressional action for their genesis. Congress is free to establish procedures to remedy their breach, however, and has done so with some procedures available to federal employees in various instances.

As discussed in *Doe v. United States Civil Service Commission*,²¹⁶ the Privacy Act²¹⁷ provides relief for a liberty interest infringement when an agency fails to maintain its records on an individual accurately and fairly.²¹⁸ The individual may bring an action against the agency in federal district court for amendment of the records²¹⁹ and, if the agency's actions were intentional or willful, for actual damages.²²⁰ As some of the injuries of the plaintiff in *Doe* occurred before the effective date of the Privacy Act, the plaintiff was allowed to pursue *Bivens*-style remedies against the individual defendants,²²¹ the implication being that the Privacy Act remedies may have been sufficient to redress the constitutional violation had they been effective at the time of the violation.

A less certain remedy is available in the case of first amendment

215. See *supra* note 103. A possible exception exists in the case of non-preference eligibles in the Postal Service. They, like their preference eligible co-workers, are typically given the protection in a collective bargaining agreement that they be terminated or otherwise disciplined only for "just cause." See *supra* note 108. Arguably, the inclusion of this requirement in the collective bargaining agreement is the grant of a property interest by the government that requires due process protection. Since the agreement also provides a detailed grievance and arbitration procedure, however, it is also arguable that under *Bush*, *Bivens*-style remedies are not available.

216. 483 F. Supp. 539 (S.D.N.Y. 1980).

217. 5 U.S.C. § 552a (1982).

218. *Id.* § 552a(g)(1)(c) (1982).

219. *Id.* § 552a(g)(2) (1982).

220. *Id.* § 552a(g)(4) (1982).

221. *Doe*, 483 F. Supp. at 574-75.

violations; thus, it is the area most ripe for *Bivens*-style actions. The Civil Service Reform Act of 1978 included within its "prohibited personnel practices" a protection against disciplining "whistleblowers," those who make public statements critical of agency practices.²²² The office of the Special Counsel of the Merit Systems Protection Board is empowered to investigate complaints of prohibited personnel practices and to prosecute them in federal district court, but such prosecution is completely discretionary.²²³ While the commission of a prohibited personnel practice is automatic grounds for reinstatement of a non-probationary employee in the competitive service or a preference eligible,²²⁴ it affords those in the excepted service no more than the right to request the special counsel to investigate the matter and to consider bringing an action before the MSPB. Little need be said at this point about the inadequacy of such a remedy to ensure the effectuation of first amendment rights and thereby to preclude the need for *Bivens*-style actions.²²⁵

Another wrinkle in the remedial structure of the Civil Service Reform Act exists in the performance appraisal system it created.²²⁶ Under this system, employees are evaluated yearly in various "critical" and "non-critical" elements of performance applicable to their positions.²²⁷ Removal is justified when the agency can show by "substantial evidence" that there was "unacceptable performance" in a critical element.²²⁸ The appeals procedures available to those undergoing termination or a reduction in grade because of an unacceptable performance appraisal is minimal. While the remedy of reinstatement or upgrading and back pay²²⁹ may be deemed sufficient by many courts to preclude the need for a *Bivens*-style action, the substantial evidence standard can make it difficult for a meritorious employee to rebut the employing agency's case by showing the personnel action was in violation of some constitutional interest (such as a first amendment freedom from retaliation against protected speech).²³⁰ In such a case, the right to pursue a *Bivens*-style remedy may be deemed crucial by a federal court.

V. CONCLUSION

Thus construed, the current structure of statutory remedies leaves

222. See 5 U.S.C. §§ 2301(b)(8)(A), 2302(b)(8) (1982).

223. 5 C.F.R. §§ 1250.1-.3 (1984).

224. See 5 U.S.C. § 7701(c)(2)(B) (1982).

225. See *supra* note 109.

226. 5 U.S.C. §§ 4301-04 (1982).

227. *Id.* § 4302(b)(1) (1982).

228. *Id.* § 7701(c)(1)(A) (1982); 5 C.F.R. § 1201.56(a)(i) (1983).

229. 5 C.F.R. § 1201.111(b)(2) (1984) states that the decisions of Merit Systems Protection Board presiding officials shall include the "appropriate relief."

230. See Passman, '78 Reform Act Eases Firings, 19:44 Federal Times 12 (December 26, 1983) (asserting that the testimony of a supervisor and one other witness concerning unsatisfactory performance is very difficult for an employee to overcome under the "substantial evidence" test) (citing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951)).

supervisors of federal employees exposed to suits for damages in a variety of circumstances. Where the statutory remedies for employees are weakest, an uncalibrated sliding scale used by courts to evaluate remedies will indicate that the need for *Bivens*-style actions is strongest. Also, as *Doe v. United States Civil Service Commission*²³¹ demonstrated, a supervisor's conduct need not be particularly out of line with his usual duties to violate an employee's constitutional rights.

It would seem to be the height of managerial inefficiency to place supervisors in a position where they must fear for their own liability whenever a personnel decision is made. No company in private industry would put its supervisors in such an exposed position. It would be much more effective from a managerial standpoint to ensure that employees' only legal recourse for personnel actions is against the government rather than against their supervisors; supervisors would then be free to act when the merits of the situation call for action. The cost to government of such a remedial system need not be significantly greater, if at all, than the savings through more efficient government.

The appropriate alternative system "should adequately serve tort laws' compensatory, deterrent, and retributive purposes without unduly inhibiting official initiative."²³² Government, the entity with the greater ability to spread the cost of litigation, can most effectively satisfy the compensatory purpose. Furthermore, deterrent and retributive purposes in the personnel field can much more effectively be handled by government than by employees and former employees, with whom supervisors ought to have the best working relationship possible. Administrative systems of discipline and discharge of the offending officials will best be established by Congress, which has the greatest interest in seeing that those systems are kept effective and up-to-date with the functioning of modern civil service.

As one commentator put it, "the emerging coexistence of governmental and officer liability has created a new problem of coordination," with significant need "of integrating governmental and officer liability so as to accommodate the purposes that the law of governmental torts may appropriately be asked to serve."²³³ Congress has grappled with this problem for several years by considering legislation that would provide an action directly against the government, either alternatively or exclusively, for individuals injured by the constitutional torts of federal officials.²³⁴ One recent proposal²³⁵ would have amended the Federal Tort Claims Act to provide for an exclusive remedy against the government for such conduct, as well as allowing the injured parties to participate in

231. 483 F. Supp. 539 (S.D.N.Y. 1980).

232. Bermann, *supra* note 188 at 1202.

233. *See id.* at 1175-76.

234. *See, e.g.*, S. 695, 96th Cong., 1st Sess. (1979); H.R. 2659, 96th Cong., 1st Sess. (1979); H.R. 9219, 95th Cong., 1st Sess. (1977).

235. H.R. 24, 97th Cong., 1st Sess. (1981).

disciplinary proceedings against the offending officials. It would have applied to all government actions, not just personnel actions, which may have contributed to its lack of support.

A statute more limited in scope would have a better chance of passage. As already seen, current statutory remedies are weakest for liberty interest infringements not covered by the Privacy Act, retaliations against whistleblowers in the excepted service, and unacceptable performance appraisals. Other weaknesses may yet be uncovered through further study. A carefully drafted amendment to the Federal Tort Claims Act of the Civil Service Reform Act to provide an exclusive remedy against the government in such situations may be a workable solution to the dilemma.

All of the implications of *Bush* on the kinds of *Bivens*-style actions that will be accepted by the courts can only be revealed on a case-by-case basis. It is already clear, however, that if Congress does not act to complete the remedial scheme begun in 1978 with the Civil Service Reform Act, the goals of the United States civil service of efficiency and fair treatment will be in jeopardy.