Michigan Law Review

Volume 90 | Issue 8

1992

Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?

Elizabeth A. Wells
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Labor and Employment Law Commons, Legal Remedies Commons, and the Supreme Court of the United States Commons

Recommended Citation

Elizabeth A. Wells, *Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?*, 90 MICH. L. REV. 2612 (1992).
Available at: https://repository.law.umich.edu/mlr/vol90/iss8/9

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?

Elizabeth A. Wells

The current structure of the civil service denies many federal employees the right to protest disciplinary action by a supervisor before an independent board of review. Under the remedial scheme established by Congress, these individuals possess only the right to petition for a hearing; an employee using this procedure has no guarantee that the board will even investigate her case. The restrictions apply even to those instances where a civil servant claims the disciplinary action violated her constitutional rights. For federal employees denied the right to independent review, access to judicial remedies in federal district court appears necessary to protect their rights adequately. Recent court decisions, however, have foreclosed this avenue.

In *Bush v. Lucas,*[1] the Supreme Court held that a federal employee had no judicial damages remedy for First Amendment violations by a superior. Following doctrine set forth in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,*[2] the Court ruled that the comprehensive procedural and substantive provisions created by Congress to govern the civil service precluded such a remedy.[3] Thus, Congress had the power to obviate money damages for constitutional deprivations, and had chosen to preclude such relief in this particular instance. In so holding, the *Bush* Court indicated that the available statutory remedies were "constitutionally adequate"[4] to redress the alleged violation. The Court did not mention, however, how extensive statutory relief must be in order to satisfy the Constitution, or even whether any remedy was constitutionally required. *Bush v. Lucas* merely held that the civil service remedial scheme preempted judicial action in the immediate case.[5]

Several years later, *Schweiker v. Chilicky*[6] attempted to answer the questions left open in *Bush,* suggesting that the adequacy or complete-

1. 462 U.S. 367 (1983).

2. 403 U.S. 388 (1971).

3. *Bush,* 462 U.S. at 368.

4. 462 U.S. at 378 n.14. The Court also described such remedies as *meaningful.* 462 U.S. at 368, 386. Others have used these two words interchangeably with the term *effective. See, e.g.,* McCollum v. Bolger, 794 F.2d 602, 606 (11th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987) (using *effective* instead of *meaningful* in discussing *Bush*'s description of the remedies); Note, Bivens *Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action,* 101 HARV. L. REV. 1251, 1255 (1988). This Note will do so as well.

5. *See infra* notes 31-37 and accompanying text.

6. 487 U.S. 412 (1988).

ness of alternative remedies was irrelevant.[7] Noting that Congress is the body charged with evaluating the competing concerns[8] — balancing individual rights of public employees against the efficient operation of the civil service — the Court found that congressional legislation preempted a judicial damages remedy, despite the failure of Congress to provide "complete relief."[9] Left unanswered in both *Chilicky* and *Bush* was whether these or other remedial procedures also preempt judicial power to provide *equitable relief* for constitutional violations.

An examination of lower court decisions exploring this question reveals a division of authority.[10] Courts declining to create a constitutional remedy typically read *Bush* and *Chilicky* broadly, interpreting these decisions to foreclose the creation of *any* judicial remedy where Congress has established a comprehensive remedial system.[11] Courts recognizing the capacity of the judiciary to furnish a remedy rest their decisions on the traditional power of the courts to grant injunctive relief where demanded by equitable principles.[12] In every case, the crucial question has been "Has Congress chosen to preempt judicial relief?" A justifiably better query might be "*Can* Congress preempt all judicial remedies for constitutional deprivations?" The answer to this question requires balancing "the interests of the [federal employee], as a citizen, [with] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[13]

---

7. *See* 487 U.S. at 425, 429.

8. 487 U.S. at 429. The Court apparently derived this power from the Constitution. It cited Dandridge v. Williams, 397 U.S. 471, 487 (1970), a case which held that the Constitution does not empower the Court to second-guess certain determinations by state officials.

9. 487 U.S. at 425. The Court did note that the available remedies and safeguards were "meaningful," 487 U.S. at 425, but subsequent lower court decisions interpreting *Chilicky* suggest this finding was irrelevant. *See, e.g.*, Saul v. United States, 928 F.2d 829, 837 (9th Cir. 1991) ("[T]he key consideration is not whether a complete statutory remedy exists for the constitutional violation charged."); Spagnola v. Mathis, 859 F.2d 223, 227 (D.C. Cir. 1988) (en banc) (*Spagnola II*) (arguing that in *Chilicky* the Court made clear that "it is the comprehensiveness of the statutory scheme involved, *not* the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention") (emphasis added).

10. *Compare Spagnola II*, 859 F.2d at 229-30 (permitting action for civil servants' constitutional claims for equitable relief) *and* Perry v. Thomas, 849 F.2d 484, 484-85 (11th Cir. 1988) (same) *with Saul*, 928 F.2d at 843 (denying equitable cause of action) *and* Lombardi v. Small Business Admin., 889 F.2d 959, 961-62 (10th Cir. 1989) (same) *and* Pinar v. Dole, 747 F.2d 899, 909-12 (4th Cir. 1984) (same), *cert. denied*, 471 U.S. 1016 (1985). The Fourth Circuit expressed concern with its decision in *Pinar* in Bryant v. Cheney, 924 F.2d 525 (4th Cir. 1991), but declined to reconsider the decision at that time. *See infra* note 74. Courts agree that federal courts should not have jurisdiction over nonconstitutional claims arising within the civil service. *See, e.g.*, Carducci v. Regan, 714 F.2d 171, 174 (D.C. Cir. 1983).

11. *See, e.g.*, *Saul*, 928 F.2d at 835-40, 843. *But cf. Pinar*, 747 F.2d at 912 (permitting preclusion of judicially created remedies where "the available statutory remedies are constitutionally adequate to provide relief").

12. *Spagnola II*, 859 F.2d at 229-30; *Perry*, 849 F.2d at 484-85.

13. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). Pickering addressed the rights of state employees, but the test adopted by the court is highly relevant in the federal context as well. Recent Supreme Court decisions suggest that the task of striking this balance is best left to

This Note argues that the federal courts retain power to furnish equitable relief for constitutional violations to ensure adequate protection of federal employees' rights. Statutory procedures and remedies available under the Civil Service Reform Act of 1978 (CSRA)[14] and related legislation should preempt judicially created equitable relief only where the government or federal agency affirmatively demonstrates that these procedures are constitutionally sufficient. Part I canvasses the current lower court response to the question of preclusion and notes the various routes taken by the courts in inferring congressional intent to preempt. This Part discusses varying interpretations of the Civil Service Reform Act, the comprehensive legislation which some courts have recently held evinces Congress' intent to preclude judicially created remedies. Part II charts the organization and procedural scheme of the civil service under the Act, calling attention to weaknesses in the statute which have hindered achievement of its objectives. Finally, Part III focuses on the judiciary's role in safeguarding constitutional guarantees. The discussion highlights the traditional role injunctive relief has played in implementing constitutional protections. This Note concludes that judicially created equitable relief for constitutional deprivations promotes efficient operation of the civil service and, more importantly, ensures adequate protection of federal employees' constitutional rights.

I. The Current State of the Law

Civil servants who allege that a supervisor has wrongly disciplined them have several methods to contest the adverse action. Intra-agency review procedures[15] and an external appeals body, the Merit Systems Protection Board,[16] handle many allegations of improper discipline. Specific classes of federal employees may also employ further mechanisms to protest adverse actions, such as union grievance procedures or petitions alleging unfair labor practices.[17]

Several categories of federal employees, however, have no right to external review of a federal agency's disciplinary action.[18] For example, a probationary employee who claims she was terminated for attending a political demonstration which did not interfere with her

Congress. *See Schweiker,* 487 U.S. at 423-25; *Bush,* 462 U.S. at 389. Where a case involves constitutional rights, however, courts themselves may have to weigh the competing concerns and provide relief where necessary. *See infra* notes 169-96 and accompanying text.

14. Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5, 10, 15, 28, 31, 38, 39, and 42 U.S.C. (1988)).

15. Federal agencies established such internal administrative appeals systems pursuant to Exec. Order No. 10,987, 3 C.F.R. 519 (Comp. 1959-1963) (revoked by Exec. Order No. 11,787, 3 C.F.R. 876 (Comp. 1971-1975)). Most such internal procedures remain.

16. *See infra* text accompanying notes 103-22.

17. *See infra* note 109.

18. *See infra* notes 110-16 and accompanying text.

work has no guarantee that someone outside the particular agency will review the adverse action. Similarly, a civil servant who alleges he was denied a promotion for refusing to sign a petition at work has no right to independent review.[19] Such employees, perceiving the civil service remedial scheme to be unfair and ineffective, may elect to contest the disciplinary action through a civil suit in federal district court. Without court intervention in these cases, the employees' First Amendment rights to freedom of assembly and speech may go undefended.

Despite gaps in employee protection under the civil service remedial scheme and the fact that a suit in federal court is the only method of independent review for many employees, numerous courts have interpreted the remedial system to preclude judicial remedies for constitutional deprivations. This Part discusses the response of the courts to the question of preclusion. Section I.A examines the Supreme Court's decision in *Bush* that denied civil servants who allege constitutional violations by their superiors a judicial damages remedy. Following this decision, courts have refused to provide judicial remedies where Congress demonstrates intent to preclude. Section I.B discusses how courts have interpreted the Civil Service Reform Act to evince congressional intent to preempt judicial relief.

A. *Preclusion of a Judicial Damages Remedy*

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics[20] created a judicial damages remedy for deprivations of constitutional rights by federal officials. There, the Supreme Court held that a violation of the Fourth Amendment's command against unreasonable searches and seizures by a federal agent acting under color of federal authority gave rise to a federal cause of action for damages.[21] As the Supreme Court later clarified, the right to bring suit existed "despite the absence of a statute conferring such a right."[22] Subsequent Supreme Court decisions have extended the *Bivens* holding to remedy violations by federal officials of Eighth Amendment rights[23]

19. *See infra* notes 128-53 and accompanying text; *accord* Spagnola v. Mathis *(Spagnola I)*, 809 F.2d 16, 17-18 (D.C. Cir. 1986) (en banc) (employee plaintiff claimed he was denied a promotion for criticizing mismanagement within federal agency), *revd. on other grounds on rehg.*, 859 F.2d 223 (D.C. Cir. 1988).

20. 403 U.S. 388 (1971).

21. 403 U.S. at 389. The suit stemmed from Bivens' arrest for alleged narcotics violations. Narcotics officers entered plaintiff's home violently, placed him under arrest, and searched his apartment. The officers then took plaintiff to a federal courthouse where he was interrogated and stripsearched before being released. 403 U.S. at 389. No charges were filed. Bivens brought suit in federal district court, alleging that the agents had acted without a warrant in arresting him and searching his apartment, that unreasonable force was employed in making the arrest, and that the arrest had been without probable cause. 403 U.S. at 389.

22. Carlson v. Green, 446 U.S. 14, 18 (1980).

23. *Carlson*, 446 U.S. at 17.

and due process guarantees under the Fifth Amendment.[24]

The basis for the *Bivens* cause of action was fairly simple: rights require remedies. Writing for the majority, Justice Brennan noted, "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[25] When the government invades constitutional rights, "federal courts may use any available remedy to make good the wrong done."[26]

Central to the decision was the absence of two elements which the Court indicated would preempt judicial recognition of a federal cause of action. First, no "special factors counselling hesitation in the absence of affirmative action by Congress" existed.[27] Second, the Court found lacking an "explicit congressional declaration that persons injured by a federal officer's violation of [constitutional rights] may not recover money damages but must instead be remitted to another remedy, equally effective in the view of Congress."[28] Thus, under the principles of *Bivens*, the Supreme Court has specified two instances which defeat a constitutional cause of action: (1) where the defendant demonstrates the presence of "special factors," suggesting the court should decline to intervene even though Congress has not taken af-

24. Davis v. Passman, 442 U.S. 228 (1979). Lower federal courts have further recognized *Bivens* suits for violations of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.1.2, at 456 & nn.31-36 (1989) (collecting cases). Even if a *Bivens* cause of action for money damages is recognized, sovereign immunity may operate as a defense. *Id.* § 9.1.1, at 452. Most civil service officials cannot claim they are absolutely immune from suit; rather, they likely can assert "qualified immunity." *See id.* §§ 8.6.2.-6.3. To successfully argue qualified immunity, federal officials must demonstrate they acted in good faith. The Supreme Court has held that an officer acts in good faith when she does not negligently violate the Constitution or statutory law. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Sovereign immunity is not a defense where the suit is for *injunctive* remedies. *See infra* note 168; *see also* CHEMERINSKY, *supra,* § 8.6.2, at 409, 411.

25. *Bivens,* 403 U.S. at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). *Bell* involved a claim highly similar to that in *Bivens.* Bell had brought suit in federal district court to recover damages for violations of his Fourth and Fifth Amendment rights by FBI agents, alleging illegal arrest, false imprisonment, and illegal search and seizure of property. The Court's opinion recognized that federal courts had jurisdiction to hear such claims, as they arose under the Constitution, 327 U.S. at 681-82, but declined to decide whether a cause of action for damages premised on constitutional provisions existed. 327 U.S. at 683-85.

26. 403 U.S. at 396 (quoting *Bell,* 327 U.S. at 684).

27. 403 U.S. at 396. Such special factors included "federal fiscal policy," at issue in United States v. Standard Oil Co., 332 U.S. 301 (1947). There, the Court denied recovery for the government when a soldier was injured through defendant's negligence, finding that it was for Congress, not the judiciary, to make new laws concerning the right of the government to recover for the loss of a soldier's services. 332 U.S. at 314; *see also Bivens,* 403 U.S. at 396. The special nature of the military has also served as a factor counseling hesitation. *See, e.g.,* United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983).

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

firmative action,[29] or (2) where the "defendant[ ] show[s] 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."[30]

Bush v. Lucas[31] applied this analysis to the civil service arena. In *Bush*, the plaintiff's supervisors at a NASA facility had demoted him for publicly criticizing the agency. While his administrative appeal of that disciplinary action was pending, Bush brought suit in federal court for defamation and violation of his First Amendment rights.[32] The Supreme Court found Bush to be without a judicial damages remedy for constitutional deprivations by a superior.[33] In effect, the implied cause of action was defeated "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States."[34] In so holding, the Court explicitly assumed that a constitutional deprivation had occurred, and that available civil service remedies were less effective than a judicial damages remedy. The Court further noted that the statutory relief did not fully compensate the injured employee.[35] The question for the Court was "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."[36] Noting that Congress was better positioned to evaluate the impact of such new litigation on the efficiency of the civil service, the Court declined to authorize a cause of action.[37]

The reasoning behind this decision is somewhat clouded. Finding that the remedial provisions of the civil service did not "substitute" for a *Bivens* action, the Court declined to hold that this case fell under the alternative remedy exception.[38] Rather, the majority premised its denial of a damage remedy on the "special factors" exception.[39] The Court did not explain what constituted these "special factors,"[40] but

29. *See* 403 U.S. at 396; *see also* Carlson v. Green, 446 U.S. 14, 18 (1980); Davis v. Passman, 442 U.S. 228, 245 (1979).

30. *Carlson*, 446 U.S. at 18-19; *see Davis*, 442 U.S. at 246-47; *Bivens*, 403 U.S. at 397.

31. 462 U.S. 367 (1983).

32. 462 U.S. at 369-71. Subsequent to filing, the Civil Service Commission's Appeal Review Board (which handled such appeals prior to the passage of the CSRA) found that NASA's actions were not justified. NASA eventually reinstated Bush and agreed to provide backpay. 462 U.S. at 369-71.

33. 462 U.S. at 368.

34. 462 U.S. at 368.

35. 462 U.S. at 372.

36. 462 U.S. at 388.

37. 462 U.S. at 389-90.

38. 462 U.S. at 378.

39. *See* 462 U.S. at 385-88; Note, *supra* note 4, at 1255.

40. Note, *supra* note 4, at 1256 & n.29.

apparently the very existence of constitutionally adequate alternative remedies was conclusive.[41] Congress was not required to expressly declare that the administrative alternative effectively substituted for a *Bivens* suit. In the Court's view, the statutory remedies themselves constituted "special factors counselling hesitation" under *Bivens*.[42] In reaching this conclusion, the *Bush* Court apparently lifted the "special factor" exception out of its context. The exception impliedly applies only "in the absence of affirmative action by Congress." Here, in creating alternative remedies for certain classes of federal employees, Congress has clearly taken "affirmative action."[43]

B. *Congressional Intent*

Much of the case law addressing the availability of judicial remedies for federal employees has focused on congressional intent. At issue is whether Congress, in legislating the civil service remedial scheme, intended to preclude a federal cause of action. This section examines the various approaches taken by the circuit courts in discerning congressional intent under the rationales of *Bivens* and *Bush.*

The Supreme Court has required "clear and convincing evidence" of legislative intent to preempt judicial review before restricting court access to aggrieved parties.[44] The Court recently reaffirmed this mandate, noting that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."[45] This heightened evidentiary burden stems from the Court's desire to avoid the "serious constitutional question" that would arise if a tribunal interpreted a federal statute to foreclose judicial remedies for constitutional deprivations.[46] Adhering to this tradition, *Bivens* required that Congress *explicitly* declare an alternative remedy to be a substitute and view such statutory relief to be as effective as a judicial remedy.[47] *Bush v. Lucas* suggested a lesser standard: "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 courts' power should not be exercised."[48]

---

41. 462 U.S. at 385-88.

42. *Bivens,* 403 U.S. at 396; *see also* Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1339 (9th Cir. 1987), *cert. denied,* 112 S.Ct. 1514 (1992); Note, *supra* note 4, at 1256.

43. With this holding, the *Bush* Court also effectively blurred the line between the two exceptions set forth in *Bivens,* holding that an "alternative remedy" could be a "special factor." *See* CHEMERINSKY, *supra* note 24, § 9.1.3, at 458; Note, *supra* note 4, at 1256; *supra* notes 27-30 and accompanying text.

44. Abbot Lab. v. Gardner, 387 U.S. 136, 141 (1967) (quoting Rusk v. Cort, 369 U.S. 367, 380 (1962)), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

45. Webster v. Doe, 486 U.S. 592, 603 (1988) (citing Weinberger v. Salfi, 422 U.S. 749 (1975) and Johnson v. Robison, 415 U.S. 361 (1974)).

46. 486 U.S. at 603 (quoting Weinberger v. Salfi, 422 U.S. 749, 762 (1975)).

47. *Bivens,* 403 U.S. at 397; *see* Carlson v. Green, 446 U.S. 14, 18-19 (1980).

48. *Bush,* 462 U.S. at 378.

Responding to this apparently conflicting precedent, courts have adopted three distinct tests for "clear" evidence of congressional intent to preempt judicial relief. This section discusses each of these tests. Section I.B.1 addresses the first test, adopted by courts which, following *Bivens,* require an explicit statement from Congress before they will refuse the cause of action. Other courts have extended the *Bush* rationale to preclude claims for equitable relief in addition to damage remedies. These tribunals rest their conclusions on propositions examined separately in sections I.B.2 and I.B.3. Section I.B.2 canvasses the jurisdictions which find an alternative remedy preempts judicial remedies where it provides meaningful relief. Thus, the second test for "clear" evidence of congressional intent to preclude is met where the relief is "meaningful." The third standard, discussed in section I.B.3, is based on the second rationale for the *Bush* decision. This rationale for *Bush* asserts that these remedies are preempted because Congress, not the courts, has the responsibility to weigh the competing concerns and furnish appropriate relief.[49]

1. *The Explicit Statement Requirement*

Traditionally, courts have required an explicit statement of Congress' intent to preempt judicial intervention before declining to remedy constitutional violations.[50] Courts normally adopt such an approach when constitutional rights are at stake,[51] or when seeking to avoid addressing constitutional questions.[52] Early decisions under the Civil Service Reform Act adhered to this view.[53] Under this theory, mere failure to act or specifically speak to the issue was not enough, for "silence is far from 'the clearly discernible will of Congress.' "[54] Effectively, courts subscribing to this approach do not view creation of

---

49. This schism stems from the fact that the *Bush* decision effectively rests on two foundations. Note, *supra* note 4, at 1256. First, the Court found that the decision whether to grant jurisdiction was best left to Congress, which was in a better position to discern if "the public interest would be served" by such action. 462 U.S. at 390; *see also supra* text accompanying note 37. Second, the Court found that the alternative civil service remedies were "clearly constitutionally adequate." 462 U.S. at 378 n.14; *see also supra* text accompanying notes 40-43. However, the Court explicitly left open the question whether the Constitution requires a "meaningful" remedy. 462 U.S. at 378 n.14.

50. *See* Carlson v. Green, 446 U.S. 14, 19-20 (1980); Davis v. Passman, 442 U.S. 228, 246-47 (1979); *Bivens,* 403 U.S. at 397.

51. *See, e.g.,* Kent v. Dulles, 357 U.S. 116, 129 (1958) (requiring Congress to state clearly intent to give Secretary of State full discretion to withhold passports, as right to travel is protected by Constitution).

52. *See, e.g., Kent,* 357 U.S. at 129-30 (not reaching question whether Congress could delegate such discretion constitutionally).

53. *See, e.g.,* Cutts v. Fowler, 692 F.2d 138, 140 (D.C. Cir. 1982); Borrell v. United States Intl. Communications Agency, 682 F.2d 981, 989 (D.C. Cir. 1982); Sonntag v. Dooley, 650 F.2d 904, 907 (7th Cir. 1981).

54. *Davis,* 442 U.S. at 247 (quoting Davis v. Passman, 571 F.2d 793, 800 (4th Cir. 1978)); *see also Carlson,* 446 U.S. at 20 (noting that "Congress follows the practice of explicitly stating when it means to make the [Federal Tort Claims Act] an exclusive remedy"). *But cf. Borrell,* 682 F.2d

a statutory remedy as necessarily displacing judicial remedies for constitutional deprivations. Congress must explicitly state its intent to foreclose relief otherwise available in federal district court.[55] Such a statement does not require the recitation of any "magic words," but merely a clear indication by Congress that it intends the statutory remedy to *replace rather than complement* the judicial remedy.[56]

When the claim is for equitable relief, courts more stringently emphasize the explicit statement requirement. Following *Bush v. Lucas,*[57] the Court of Appeals for the District of Columbia conceded en banc in *Spagnola v. Mathis (Spagnola II)*[58] that the remedial procedures created by the CSRA preempted a *Bivens* suit.[59] The court insisted, however, that federal courts retained the power to remedy constitutional deprivations with injunctions. "[T]ime and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights."[60] *Spagnola II* resolved two conflicting decisions which separate panels of the Circuit had issued on the same day in 1986: *Spagnola v. Mathis (Spagnola I)*[61] and *Hubbard v. EPA.*[62] Both cases involved federal employees who claimed they were denied employment opportunities in violation of their First Amendment rights because they "blew the whistle" on improper activity within the federal government. Spagnola asserted he was refused a promotion due to his criticism of agency mismanagement,[63] while Hubbard, a detective with the District of Columbia Police Department, claimed he was

---

at 989-90 (implying that an adequate substitute for a judicial remedy might constitute a statement from Congress of intent to preclude); *infra* notes 68-78 and accompanying text.

55. *See Cutts,* 692 F.2d at 140; *cf. Borrell,* 682 F.2d at 989-91 (inferring that Congress intended for the CSRA to provide additional remedies for the protection of federal whistleblowers, not the sole remedy).

56. *Carlson,* 446 U.S. at 19 n.5. *Davis* suggests that "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department" should exist, otherwise the court will presume power to enforce constitutional rights. *Davis,* 442 U.S. at 242 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

57. 462 U.S. 367 (1983).

58. 859 F.2d 223 (D.C. Cir. 1988) (en banc).

59. 859 F.2d at 226-29.

60. 859 F.2d at 229-30; *see also* Perry v. Thomas, 849 F.2d 484 (11th Cir. 1988) (holding that the CSRA does not deprive federal courts of their traditional injunctive powers to protect constitutional rights). *But see* Arakawa v. Reagan, 666 F. Supp. 254, 259 n.8 (noting that reading *Bush* to preclude only actions for damages was far too narrow; such a conclusion does not square with the reasoning behind *Bush,* which was "deference to the legislature's choice of a remedial scheme").

61. 809 F.2d 16 (D.C. Cir. 1986). *Spagnola I* held that federal employees retained the right to *Bivens* damages after *Bush* when available civil service procedures were inadequate to redress the constitutional violation. 809 F.2d at 19-28.

62. 809 F.2d 1 (D.C. Cir. 1986). *Hubbard* found that *Bush* precluded a damage action, despite the fact that Hubbard had access to the same civil service remedies as did Spagnola. 809 F.2d at 8-11.

63. *Spagnola I,* 809 F.2d at 17-18.

denied a position with the EPA because he had made statements to the press about an investigation into narcotics use by members of Congress.[64] The CSRA did not guarantee either individual an independent hearing or judicial review of the employment decisions. The court eventually held that despite the fact plaintiffs could not assert a *Bivens* claim for damages after *Bush,* they retained the right to seek injunctive relief.[65] Although the Circuit provided no further discussion on this issue at the time, support had appeared two years earlier in *Hubbard:*

> The court's power to impose equitable remedies against agencies is broader than its power to impose legal remedies against individuals. *Bivens* actions are a recent judicial creation and comparatively easy for Congress to preempt. The court's power to enjoin unconstitutional acts by the government, however, is inherent in the Constitution itself. Although Congress may limit this power, CSRA did not *explicitly* limit our jurisdiction to enjoin unconstitutional personnel actions by federal agencies.[66]

Thus, courts requiring an explicit statement by Congress before they will decline the constitutional cause of action for equitable relief have not found such language within the CSRA.[67] Provision of alternative relief precludes a judicial damage remedy, but not injunctive relief.

2. *Existence of Meaningful Remedies*

Courts have also inferred congressional intent to obviate judicial action from the completeness of the statutory remedies themselves. Interpreting the decision in *Bush v. Lucas* to rest on the constitutional adequacy of the available remedies,[68] forums adopting this method have required that statutory relief be *meaningful* in the particular instance to preempt judicially created remedies. In effect, provision of effective remedies evinces congressional intent to forestall judicial intervention.

The existence of effective procedures was conclusive in *Pinar v. Dole.*[69] There, the Fourth Circuit refused a *Bivens* suit, finding the plaintiff "was afforded constitutionally adequate procedures to protect

---

64. *Hubbard,* 809 F.2d at 2-3.

65. *Spagnola II,* 859 F.2d at 229-30.

66. 809 F.2d at 11 n.15 (emphasis added) (citations omitted). The use of the word "jurisdiction" represents the confusion on this issue that has plagued many courts. *See, e.g.,* Lombardi v. Small Business Admin., 889 F.2d 959, 960 (10th Cir. 1989) (upholding dismissal of *Bivens* action for "lack of subject matter jurisdiction"). Federal courts clearly have jurisdiction to hear constitutional claims under 28 U.S.C. § 1331 (1988); the question is whether they have the power to remedy a constitutional deprivation.

67. *See Spagnola II,* 859 F.2d at 229-30; Perry v. Thomas, 849 F.2d 484, 484-85 (11th Cir. 1988).

68. *See supra* note 41 and accompanying text; *see also Bush,* 462 U.S. at 390 (Marshall, J., concurring) ("[A] different case would be presented 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.").

69. 747 F.2d 899 (4th Cir. 1984), *cert. denied,* 471 U.S. 1016 (1985).

his first amendment rights."[70] Pinar was a Federal Aviation Administration police officer employed at Washington's National Airport. He brought suit contending that several personnel actions taken against him, including a brief suspension and termination of a temporary promotion, violated his First Amendment rights because they were in part due to his criticism of a superior.[71] The court found that the FAA's internal grievance procedures and the limited remedies under the CSRA afforded Pinar "comprehensive and constitutionally adequate" relief.[72] The court concluded that "where the personnel actions are so minor in nature and where the available statutory remedies are constitutionally adequate to provide relief, Congress intended that judicially created remedies in district court not be made available."[73] The decision held that "judicially created remedies" included equitable relief.[74]

Central to such preclusion is that statutory procedures at least provide *some* remedy.[75] Courts apparently view the existence of a remedy as indicative of congressional intent to regulate that aspect of the government/employee relationship, and thus to preclude judicial intervention.[76] This requirement of a statutory remedy derives from a literal interpretation of the second *Bivens* exception: no judicial damages remedy remains where " 'an alternative remedy which [Congress] explicitly declared to be a *substitute* for recovery directly under the

70. 747 F.2d at 908.

71. 747 F.2d at 902-03.

72. 747 F.2d at 905.

73. 747 F.2d at 912; *see also* Carlson v. Green, 446 U.S. 14, 30 (1980) (Burger, C.J., dissenting) (opposing a *Bivens* remedy because the Federal Tort Claims Act provides "adequate" relief); National Treasury Employees Union v. Reagan, 651 F. Supp. 1199 (E.D. La. 1987) (holding that the CSRA does not preempt judicial remedies for constitutional deprivations where it does not provide adequate relief).

74. *Pinar*, 747 F.2d at 909-12. In Bryant v. Cheney, 924 F.2d 525 (4th Cir. 1991), the Fourth Circuit expressed some difficulty with *Pinar* following the Supreme Court's ruling in Webster v. Doe, 486 U.S. 592 (1988). *Webster* required clear congressional intent to preclude judicial remedies for constitutional deprivations. 486 U.S. at 603; *see supra* text accompanying notes 44-47. The facts of *Bryant* are worth noting simply because they are so humorous. Bryant, a civilian employed by the Army News Service, sought declaratory and injunctive relief for critical evaluations by his supervisors. He claimed a 1985 job performance evaluation, rating his performance "unsatisfactory," was in retaliation for "his attempts to expose an alleged government coverup of visits by unidentified flying objects (UFOs)." 924 F.2d at 526. Bryant had filed a "Writ of Habeas Corpus Extraterrestrial" in 1983 to compel the Air Force to produce the bodies of space creatures he claimed the military had recovered from crashed UFOs. That suit was eventually dismissed. 924 F.2d at 526. Although finding that *Webster* was not controlling, the Court of Appeals noted that "the Supreme Court at least suggest[s] that *Webster's* admonitions might have relevance. On remand, the district court held that the CSRA contains no clear language expressing congressional intent to preclude judicial review of equitable constitutional claims by federal employees arising from adverse personnel actions." 924 F.2d at 528. Despite the clear conflict with *Pinar*, the *Bryant* court declined to address the continuing vitality of *Pinar* at the time. 924 F.2d at 528.

75. *See* Carroll v. United States, 721 F.2d 155, 156 (1983) (availability and exercise of administrative remedies precludes federal court jurisdiction), *cert. denied*, 467 U.S. 1241 (1984).

76. *See* Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1339 (9th Cir. 1987), *cert. denied*, 112 S. Ct. 1513 (1992).

Constitution and viewed as equally effective' "[77] exists. Thus, statutory relief is necessary to trigger preemption.[78]

3. *Presence of a Comprehensive Remedial Scheme*

A third and final test for preemption utilizes the second of the two bases for the decision in *Bush.* The Supreme Court adopted this approach in *Schweiker v. Chilicky.*[79] *Chilicky* "viewed *Bush* as resting on the premise that Congress was better positioned to decide whether a new damages remedy would serve the public interest."[80] The Court found that the legislature intended to preclude a *Bivens* cause of action not because the congressional remedial scheme was constitutionally adequate,[81] but because the extensive provisions of the statute indicated Congress had balanced the conflicting interests and had determined appropriate relief accordingly. "[I]t is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention."[82] The Court noted that, "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* reme-

---

77. Sonntag v. Dooley, 650 F.2d 904, 907 (7th Cir. 1981) (quoting Carlson v. Green, 446 U.S. 14, 18-19 (1980)); *see supra* notes 28 and 30 and accompanying text.

78. *See, e.g., Schowengerdt,* 823 F.2d at 1339; Kotarski v. Cooper *(Kotarski I),* 799 F.2d 1342, 1348-49 (9th Cir. 1986), *revd.,* 866 F.2d 311 (9th Cir. 1989); *Sonntag,* 650 F.2d at 907. Following this reasoning, one court has ruled that the CSRA does not preclude judicial remedies where the constitutional deprivation entailed a denial of access to civil service remedial procedures. Rauccio v. Frank, 750 F. Supp. 566, 571, 572-73 (D. Conn. 1990).

79. 487 U.S. 412 (1988).

80. Saul v. United States, 928 F.2d 829, 837 (9th Cir. 1991) (citing *Chilicky,* 487 U.S. at 426-27). The facts of *Chilicky* did not occur in the context of the civil service. Rather, plaintiffs were Social Security recipients whose benefits were terminated in 1981 and 1982 pursuant to the "continuing disability review" program (CDR). The Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 311(a), 94 Stat. 441, 460 (codified as amended at 42 U.S.C. § 421(i) (1988)) established the program, which required review of disability determinations at least every three years. *See Chilicky,* 487 U.S. at 415. The CDR program was revamped in 1983, when Congress discovered that vast numbers of qualified Social Security beneficiaries were suffering after improper termination of their benefits. *See* Act of Jan. 12, 1983, Pub. L. No. 97-455, § 2, 96 Stat. 2497, 2498-99 (codified as amended at 42 U.S.C.A. § 423(g) (1991)); *see also Chilicky,* 487 U.S. at 415. The plaintiffs' benefits were eventually reinstated, but only after several months delay and hardship. Plaintiff Chilicky, for example, "was in the hospital recovering from open-heart surgery when he was informed that his condition was no longer disabling." *Chilicky,* 487 U.S. at 418. The plaintiffs subsequently sued, contending that the improper procedures followed in terminating their benefits violated their constitutional right to due process. Although the Court noted that the plaintiffs had received nearly all back benefits to which they were entitled, 487 U.S. at 417, it concluded that the elaborate appeals procedures of the Social Security Administration, not the completeness of the relief, precluded a *Bivens* claim. 487 U.S. at 424-27.

81. The Court did find the statutory remedies to be "meaningful" in this particular case, however. *Chilicky,* 487 U.S. at 425; *see supra* notes 6-9 and accompanying text; *see also infra* text accompanying note 167.

82. *Spagnola II,* 859 F.2d at 227 (interpreting *Chilicky*).

dies."[83] Thus, the mere presence of a comprehensive remedial scheme may indicate congressional intent to preempt judicial action, even if the scheme provides no remedy in a particular instance.[84] *Chilicky* effectively held that the concept of "special factors" enumerated in *Bush*[85] requires judicial deference whenever evidence demonstrates that congressional inaction has been deliberate.[86]

Two circuits have extended this argument to preclude constitutional claims for equitable relief as well. In *Saul v. United States,*[87] the Ninth Circuit held that the "CSRA's elaborate remedies show that judicial interference in federal employment is disfavored, whether the employee requests damages or injunctive relief."[88] Saul, a claims representative for the Social Security Administration, asserted that his supervisors had seized and opened his personal mail, violating his constitutional rights and invading his privacy. Due to the relative insignificance of the injury involved, the CSRA afforded Saul only limited remedies. The court held irrelevant the question of the adequacy of relief, however; preemption occurred even where the Act provided no remedy whatsoever.[89] Similarly, the Tenth Circuit has held that the absence of statutory relief does not necessarily imply that the court should grant damages or injunctive relief.[90] Under this view, the comprehensiveness of the remedial system alone indicates congressional intent to preclude federal court relief.

Decisions refusing to inquire into the effectiveness of statutory remedies rely on one of two assumptions. First, some courts assume that the Constitution does not demand a remedy for every violation of a right. Other courts, alternatively, perceive *any* remedy to be constitutionally adequate, even if not available to particular categories of employees.[91] These suppositions, however, "ignore or undervalue constitutional reasons for inquiring into effectiveness."[92] They also

83. *Chilicky,* 487 U.S. at 423.

84. *See* 487 U.S at 425-29; Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989) *(Kotarski II).*

85. *See supra* text accompanying notes 38-43.

86. 487 U.S. at 423; Saul v. United States, 928 F.2d 829, 837 (9th Cir. 1991); *cf. Saul,* 928 F.2d at 837 (noting that no *Bivens* action was permitted in *Kotarski II* because Congress' failure to provide a remedy in that case was not inadvertent); Barhorst v. Marsh, 765 F. Supp. 995, 998 (E.D. Mo. 1991) ("Congress' explicit reference to constitutional rights in the CSRA and its provision of a limited remedy in the form of an OSC investigation demonstrate that the omission of a damages remedy for plaintiff's alleged constitutional wrong was not 'inadvertent.' ").

87. 928 F.2d 829 (9th Cir. 1991).

88. 928 F.2d at 843.

89. *See* 928 F.2d at 839-40, 843 ("The CSRA precludes Saul from seeking injunctive relief for his asserted constitutional injury just as it precludes him from bringing a *Bivens* action for damages.").

90. Lombardi v. Small Business Admin., 889 F.2d 959 (10th Cir. 1989).

91. Note, *supra* note 4, at 1257.

92. *Id.; see infra* sections III.A and III.B.

disregard a long-standing practice within the judiciary of enjoining unconstitutional conduct by government officials.[93] Courts which require an explicit statement from Congress or the provision of a meaningful remedy before finding congressional intent to preempt at least ensure that federal employees are not deprived of constitutional protection except by congressional design. Simply put, legislative inaction should not constitute sufficient evidence of congressional intent to deny federal employees effective relief.

This conclusion applies forcefully to the Civil Service Reform Act. As the next Part notes, Congress intended that this legislation provide *greater* protections for civil servants, not deprive them of all remedies. Failure of the Reform Act's remedial scheme has frustrated this intent. The judiciary should not further deprive federal employees of effective constitutional protection absent a more explicit congressional indication.

II. Overview of the Civil Service Reform Act

The Civil Service Reform Act of 1978[94] significantly restructured the federal civil service, affecting nearly three million employees.[95] This Part considers the merits of the CSRA. Section II.A examines the intended goals of the Act and the organizational framework employed to effect these goals. Section II.B describes the remedial procedures established to protect employee rights. Finally, section II.C discusses the many problems which prevent this remedial scheme from fully guaranteeing the constitutional rights of civil servants. This Part concludes that injunctive relief remains necessary to protect many federal employees.

A. *Purposes and Organization*

With the Civil Service Reform Act, Congress aimed to improve the operating efficiency of federal agencies. Congress passed the CSRA partly in response to a growing consensus among Americans that the civil service was fundamentally inefficient, plagued by ineffective employees, and hindered by mismanagement and flagrant waste.[96] By its

93. *See infra* text accompanying note 183.

94. Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5, 10, 15, 28, 31, 38, 39, and 42 U.S.C. (1988)).

95. This is according to official statistics at the time. *U.S. Employee Roll Excludes Millions*, N.Y. Times, Dec. 24, 1978, at 18. The civil service has since grown to over 3 million employees. Office of Personnel Management, Federal Civilian Workforce Statistics: Employment and Trends as of Jan. 1992 (1992).

96. *See Hearings on H.R. 11,280 Before the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. 199 (1978) [hereinafter *Hearings on H.R. 11,280*] (statement of James M. Mitchell, Panel Chairman, National Academy of Public Administration); Andrew Baran, *Federal Employment — The Civil Service Reform Act of 1978 — Removing Incompetents and Protecting "Whistle Blowers,"* 26 Wayne L. Rev. 97 (1979); Patricia W. Ingraham, *The Civil Service Reform Act of 1978: Its Design and Legislative History*, *in* Legislating Bureaucratic

terms, the Act sought to "provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service."[97]

Congress endeavored to effect this purpose in two ways: first, by facilitating the firing of incompetent employees, and second, by providing greater protection for employees who speak out against wrongdoing or waste within their agencies.[98] Achieving these goals simultaneously required a "delicate balance between the legitimate rights of employees and the inherent responsibilities of managers — underpinned in every instance by a commitment to the principles of merit in public employment."[99] At no time did supporters of the legislation assert that governmental efficiency required a weakening of federal employees' rights. Proponents believed that strengthening protections for qualified, competent employees would improve the efficiency of the civil service.[100]

The Civil Service Reform Act created two independent agencies to administer the civil service.[101] Under this regime, the Office of Personnel Management (OPM) manages the civil service,[102] while the Merit Systems Protection Board (MSPB) maintains the merit sys-

---

CHANGE: THE CIVIL SERVICE REFORM ACT OF 1978, at 14 (Patricia W. Ingraham & Carolyn Ban eds., 1984).

97. Civil Service Reform Act of 1978, § 3, 92 Stat. 1111, 1112 (codified at 5 U.S.C. § 1101 (1988)).

98. Benjamin C. Indig, Comment, *The Rights of Probationary Federal Employee Whistleblowers Since the Enactment of the Civil Service Reform Act of 1978,* 11 FORDHAM URB. L.J. 567, 567 (1983). Employees who disclose instances of fraud or inefficiency within government, protected under 5 U.S.C.A. § 1213 (West. Supp. 1992), are often referred to as "whistleblowers." *See* Baran, *supra* note 96, at 98; Ingraham, *supra* note 96, at 18. In first proposing the legislation, the Carter administration intended to protect whistleblowers and expedite the firing of incompetents. *See* Civil Service Reform: Message From the President of the United States Transmitting a Draft of Proposed Legislation to Reform the Civil Service Laws, H.R. Doc. No. 95-269, 95th Cong., 2d Sess. 2-4 (1978); Baran, *supra* note 96, at 97-98; Ingraham, *supra* note 96, at 16-17; *cf. Hearings on H.R. 11,280, supra* note 96, at 3 (statement of Hon. James T. McIntyre, Director, Office of Management and Budget). Campaigning for the presidency in 1976, Carter stressed the case of A. Ernest Fitzgerald, a former Air Force efficiency expert who was fired by the Pentagon when he publicly disclosed some $2 billion in cost overruns. "I intend to seek strong legislation to protect our Federal employees . . . if they find out and report waste or dishonesty," Carter pledged. Richard D. Lyons, *Carter Plans Proposal to Protect "Whistle-Blowers" in Government,* N.Y. TIMES, Feb. 16, 1978, at A18.

99. *Hearings on H.R. 11,280, supra* note 96, at 7 (statement of Hon. James T. McIntyre, Director, Office of Management and Budget).

100. *Id.* at 29 (statement of Alan K. Campbell, Chairman, U.S. Civil Service Commission on Civil Service Reform and Reorganization) ("The protection of whistleblowers is, in our judgment, essential to the improvement of the public service."); *Id.* at 200 (statement of James M. Mitchell, Panel Chairman, National Academy of Public Administration) ("Protection is needed to insure the rights of individual employees and the integrity of the system.").

101. Many commentators perceived the assignment of all functions to one agency, the Civil Service Commission, as a significant problem of the old civil service system. S. REP. No. 969, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2727; Baran, *supra* note 96, at 106 n.81; Indig, *supra* note 98, at 569; *see also* Martin Tolchin, *Carter Seeks Change in Civil Service Law to Reward Efficiency,* N.Y. TIMES, Mar. 3, 1978 at A1, A10.

102. 5 U.S.C. §§ 1101-05 (1988).

tem.[103] The MSPB serves a quasi-judicial function, adjudicating disputes between federal workers and their agencies. The Board defines its duties as "protecting the integrity of Federal merit systems against prohibited personnel practices, ensuring adequate protection for employees against abuses by agency management, and requiring Federal executive branch agencies to make employment decisions based on individual merit."[104] Within the MSPB, the Office of Special Counsel (OSC) acts as prosecutor, investigating allegations of "prohibited personnel practices" and recommending action where it deems necessary.[105]

B. *Remedial Procedures*

An agency may take action against an employee "only for such cause as will promote the efficiency of the service."[106] Measures range from a letter of warning to demotion or outright dismissal.[107] An employee facing such adverse action has two primary methods of appeal to the Board: a "chapter 77" appeal,[108] or a petition to the Special Counsel, requesting that the OSC take corrective action.[109]

Chapter 77 appeals are the most common method by which agency-employee disputes reach the MSPB. Typically, the federal worker, having exhausted intra-agency administrative procedures, requests review of the resulting disciplinary action by the Board. Only certain employees, however, have this right to a hearing.[110] Many

103. 5 U.S.C.A. §§ 1201-05 (West Supp. 1992). The Board is comprised of three members appointed by the President with Senate approval. There are no requirements for the office, other than that appointees "demonstrate[ ] ability, background, training, or experience" making them "especially qualified to carry out the functions of the Board." 5 U.S.C.A. § 1201 (West Supp. 1992). Members serve for one seven-year term. 5 U.S.C.A. § 1202(a) (West Supp. 1992).

104. U.S. MERIT SYSTEMS PROTECTION BOARD, STUDY OF CASES DECIDED BY THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD, FISCAL YEAR 1990, at 1 (1991) [hereinafter MSPB STUDY].

105. 5 U.S.C.A. § 1212 (West Supp. 1992). The Special Counsel is an attorney appointed by the president with the advice and consent of the Senate. A Special Counsel serves for one term of five years. 5 U.S.C.A. § 1211 (West Supp. 1992).

106. 5 U.S.C. § 7513(a) (1988). Generally, 30 days written notice of the proposed action is required. *See* 5 U.S.C. §§ 4303(b)(1)(A), 7513(b)(1) (1988).

107. *See* 5 U.S.C.A. § 7512 (West Supp. 1992) (listing more extreme disciplinary actions covered by CSRA).

108. 5 U.S.C. § 7701(a) (1988).

109. 5 U.S.C.A. § 1212 (West Supp. 1992). Federal employees subject to a collective bargaining agreement can also appeal through grievance resolution procedures required under 5 U.S.C. § 7121(a)(1) (1988). *See* Saul v. United States, 928 F.2d 829, 834-35 (9th Cir. 1991). Furthermore, any employee can file an unfair labor practice charge with the Federal Labor Relations Authority, which has the power to enjoin the adverse action if it determines that such action constitutes an unfair labor practice. 5 U.S.C. § 7118 (1988). Discussion of these remedial procedures is outside the scope of this note. For further description, see Keefe v. Library of Congress, 588 F. Supp. 778 (D.D.C. 1984), *affd. in part and revd. in part,* 777 F.2d 1573 (1985).

110. 5 U.S.C. § 7701(a) (1988) grants this right only to those federal workers who are "preference eligibles," as defined by 5 U.S.C. § 2108(3) (1988) (mostly veterans), or members of the competitive service under 5 U.S.C. § 2102 (1988).

workers, such as probationers,[111] excepted employees,[112] job applicants,[113] and employees alleging "prohibited personnel practices" that are too minor to fall within the statutory provisions,[114] have no such entitlement. For these employees, the Office of the Special Counsel provides the only means of redress. While courts have noted that withholding this right to direct appeal stems from a congressional desire to remove incompetent workers,[115] this denial also may lessen protections for qualified employees.[116]

The second method by which an employee can appeal to the Merit Systems Protection Board is to petition the OSC to take "corrective action."[117] For probationers, applicants, and other excepted civil servants,[118] such a petition is their only mode of appeal.[119] Upon receiv-

---

111. Piskadlo v. Veterans' Admin., 668 F.2d 82, 84 (1st Cir. 1982). 5 U.S.C. § 3321(a) (1988) allows the executive branch to hire employees on a probationary basis. This provision permits federal agencies to ensure employees are competent before appointment to the competitive service or a managerial position becomes final.

Under the CSRA, probationers are entitled to review by the MSPB in just three cases. First, a probationary worker can appeal directly to the Board alleging discrimination covered by one of the statutes specified in 5 U.S.C. § 7702(a)(1)(B) (1988), such as the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1988), prohibiting discrimination on the basis of race, color, religion, sex, or national origin; the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d) (1988), prohibiting discrimination on the basis of sex; the Rehabilitation Act of 1973, 29 U.S.C. § 791 (1988), prohibiting discrimination on the basis of handicapped condition; and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633(a) (1988); or the probationer can appeal alleging discrimination based on partisan political reasons or marital status. 5 C.F.R. § 315.806(b) (1992); *see Piskadlo,* 668 F.2d at 84.

Second, a probationer can appeal where termination was for conditions arising before appointment and the employee alleges that procedural requirements were not met. 5 C.F.R. §§ 315.805-.806 (1992). Finally, all employees, including probationers, who allege reprisal for "whistleblowing" may appeal directly to the Board after other remedies are exhausted. *See infra* note 119.

112. *See* 5 U.S.C.A. § 7511(a)(1)(c) (West Supp. 1992). Excepted service employees are all civil service workers who are not in the competitive service. 5 U.S.C. § 2103 (1988). This category initially included attorneys, teachers, scientists, and chaplains. Addressing problems with OSC procedures, *see infra* text accompanying note 150, Congress extended many of these employees the right to a hearing before the MSPB under the Civil Service Due Process Amendments, Pub. L. No. 101-376, § 2, 104 Stat. 461, 462 (1990) (codified at 5 U.S.C.A. § 7511 (West Supp. 1992)). *See* MSPB STUDY, *supra* note 104, at 8.

113. *See* 5 U.S.C.A. § 7511(a)(1) (West Supp. 1992) (excluding applicants from definition of "employee").

114. For the employee to have a right to a Board hearing, the action must be a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of 30 days or less. *See* 5 U.S.C.A. § 7512 (West Supp. 1992). Thus, an employee alleging improper failure to promote or termination of a temporary promotion has no right to MSPB review. *See Spagnola II,* 859 F.2d at 225 (failure to promote); Pinar v. Dole, 747 F.2d 899, 905 (4th Cir. 1984) (termination of temporary promotion), *cert. denied,* 471 U.S. 1018 (1985). Any federal employee, regardless of statutory classification, who alleges the adverse action was taken because that employee "blew the whistle" on improper activity may be entitled to Board review. *See infra* note 119.

115. *Piskadlo,* 668 F.2d at 83 n.1.

116. *See notes infra* section II.C.

117. 5 U.S.C.A. § 1214 (West Supp. 1992).

118. *See supra* notes 110-14 and accompanying text.

119. If such an employee specifically alleges the adverse action was a reprisal for whistleblowing, the employee has the option to request a hearing before the MSPB under the

ing a petition, the Special Counsel must investigate the allegation "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken."[120] A prohibited personnel practice is an action affecting an employee's position or pay, among other measures, premised on discriminatory intent or similar improper motive.[121] If the OSC concludes that reasonable grounds are present, the Special Counsel reports the situation to the Board and may recommend corrective action. If the agency fails to follow the recommended action, the MSPB may order the agency to do so.[122]

An employee may appeal a final decision by the Board to the U.S. Court of Appeals for the Federal Circuit.[123] At no other time do the courts play a role in the CSRA's remedial scheme. Unless an employee's case gets to the Merit Systems Protection Board — through a chapter 77 appeal or by a finding of "reasonable grounds" by the OSC — the CSRA provides the employee no hearing on the allegations in federal court.

C. *Failure of the Remedial Scheme To Provide Sufficient Protections*

Congress aimed to improve the efficiency of the civil service by providing increased protections for competent federal employees, including whistleblowers.[124] This strategy reveals that the legislature recognized that employee disclosures of fraud and mismanagement within federal agencies were powerful weapons for curbing inefficiency in government, but that the current safeguards afforded employees were not sufficient to encourage these disclosures.[125] Thus, "Congress intended the CSRA to provide *additional,* not decreased, protection for federal employees who blow the whistle on illegal or improper government conduct."[126] Because Congress passed the CSRA seven years after the *Bivens* decision, it may have assumed that judicial remedies would remain available to federal employees and designed the statu-

Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at scattered sections of 5 U.S.C.A. (West Supp. 1992)). This hearing is available, however, only after OSC procedures are exhausted and the Office closes the case. *See* Whistleblower Protection Act of 1989, *supra,* at sec. 3(a)(13), 103 Stat. at 24-25 (codified at 5 U.S.C.A. § 1214 (a)(3) (West Supp. 1992)).

120. 5 U.S.C.A. § 1214(a)(1)(A) (West Supp. 1992). The OSC can also make such an investigation in the absence of a petition alleging the prohibited conduct.

121. 5 U.S.C.A. § 2302 (West Supp. 1992).

122. 5 U.S.C.A. § 1214(b)(2)(A)-(B) (West Supp. 1992).

123. 5 U.S.C.A. § 7703(a) (West Supp. 1992).

124. *See supra* notes 96-100 and accompanying text.

125. *See* Thomas M. Devine & Donald G. Aplin, *Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection,* 4 ANTIOCH L.J. 5, 12-14 (1986).

126. Borrell v. United States Intl. Communications Agency, 682 F.2d 981, 990 (D.C. Cir. 1982); *see also* Devine & Aplin, *supra* note 125, at 16-17.

tory relief with that assumption in mind.[127]

The gap between legislative intent and reality under the Reform Act has widened since the statute's implementation. Many classes of federal employees subjected to prohibited personnel practices have been refused judicial remedies[128] as well as statutory relief.[129] Furthermore, although whistleblowers are guaranteed an eventual hearing before the Merit Systems Protection Board under the Whistleblower Protection Act of 1989,[130] the detailed procedural requirements dramatically increase the length of time a bona fide whistleblower must wait before relief is rendered. Most commentators attach primary responsibility for this failure to protect employee rights swiftly and efficiently to the Office of the Special Counsel.[131] Statistics gathered since the passage of the CSRA support this conclusion. In the early 1980s, a survey by the Merit Systems Protection Board reported that nearly half of all federal employees claimed they had recently observed waste or fraud within their agencies,[132] yet seventy percent of these individuals kept this knowledge to themselves.[133] This unwillingness of substantial numbers of employees to expose improper and illegal behavior may result from the Special Counsel's poor record of protecting federal employees.[134] For example, in 1990 the Special Counsel afforded an actual investigation to only *seventeen percent* of employees who pe-

---

127. *See* Note, *supra* note 4, at 1266; *see also* Devine & Aplin, *supra* note 125, at 63 (quoting an amicus curiae brief submitted in the *Bush* case by several primary sponsors of the CSRA: "The express reliance by the Court below, in denying a *Bivens* remedy, on the availability of alternative civil service remedies was in error .... [C]ongressional intent is clearly to the contrary, and supports the implication of a *Bivens* remedy."). Passage of the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, and the Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990), demonstrates Congress' unhappiness with the remedies available under the CSRA. *See infra* text accompanying note 151.

128. "[A]n unintended side effect of the legislation is the judicial interpretation that the Act largely precludes the constitutional remedies that were available to federal employees before its passage." Devine & Aplin, *supra* note 125, at 57. Testimony before Congress evinces a similar theme. *See, e.g., Civil Service Reform Oversight, 1980 — Whistleblower: Hearings Before the Subcomm. on the Civil Service of the House Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. (1980) [hereinafter *1980 Hearings*].

129. *See supra* notes 110-16 and accompanying text.

130. *See supra* note 119.

131. *See* Devine & Aplin, *supra* note 125, at 24-25; Indig, *supra* note 98, at 577-79; Note, *supra* note 4, at 1262-65.

132. *Role of Whistleblowers in Administrative Proceedings: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 2 (1983) [hereinafter *1983 Hearing*] (statement of Senator Howell Heflin).

133. *Whistleblower Protection Act of 1986: Hearings on H.R. 4033 Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service*, 99th Cong., 2d Sess. 117 (1986) [hereinafter *Hearings on H.R. 4033*] (statement of Thomas Devine, Legal Director, Government Accountability Project).

134. " 'There has been a significant increase in the fear of reprisal as the reason given for not having reported fraud, waste, and abuse.' " *Id.* at 116 (statement of Thomas Devine, Legal Director, Government Accountability Project) (quoting a MSPB press release from Jan. 16, 1985 that reported 37% fear reprisal for whistleblowing compared with 20% in 1980); *see also* Devine & Aplin, *supra* note 125, at 25.

titioned for assistance.[135] Although these figures are not conclusive, they suggest that the Office of the Special Counsel has failed in its mission to investigate vigorously allegations of prohibited personnel practices and protect federal employee rights.[136]

Two weaknesses of the OSC under the Civil Service Reform Act of 1978 explain this failure. First, the Act requires the OSC to request corrective action from the Board if there are "reasonable grounds" to believe a prohibited personnel practice has occurred.[137] The Special Counsel, however, often does not bring the appeal "unless it believes the Act's goal of achieving a 'fair, efficient, and lawfully conducted Civil Service' requires it."[138] The Special Counsel's decision whether to proceed with a petition for corrective action thus often rests not on the interests of the employee, as required by the CSRA, but on the OSC's perception of the interest of the entire civil service system.[139] This approach contradicts the self-expressed purpose of the Merit Systems Protection Board to promote the integrity of Federal merit systems and protect federal employees from abuses.[140] Efficiency becomes the test for the OSC, not protection of employee rights. Although overall efficiency of the system may improve with thorough vindication of employee rights, the Special Counsel may not perceive this benefit in every case.

Second, the CSRA provides the Office of the Special Counsel with no standards of accountability for the conduct of investigations.[141] Although the Act requires that the Office "receive and investigate allegations of prohibited personnel practices,"[142] the statute provides no

135. Out of 1623 complaints filed with the OSC in 1990, only 284 received investigation, either as whistleblower complaints under the Whistleblower Protection Act of 1989 or via regular Office procedures. U.S. OFFICE OF THE SPECIAL COUNSEL, A REPORT TO CONGRESS FROM THE U.S. OFFICE OF SPECIAL COUNSEL, FISCAL YEAR 1990, at 5 (1991) [hereinafter OSC REPORT]. In recent years, only eight percent of petitioners received an investigation. Devine & Aplin, *supra* note 125, at 29-30; *see also Whistleblower Protection Act of 1987: Hearings on S. 508 Before the Subcomm. on Federal Services, Post Office, and Civil Service of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 4 (1987) [hereinafter *Hearings on S. 508*] (testimony of Senator Carl Levin) (92% do not receive an in-depth investigation).

136. *See* Devine & Aplin, *supra* note 125, at 30-33.

137. 5 U.S.C.A. § 1214(a)(1)(A) (West Supp. 1992).

138. Indig, *supra* note 98, at 576 (quoting Frazier v. Merit Sys. Protection Bd., 672 F.2d 150, 162 (D.C. Cir. 1982)).

139. *Frazier*, 672 F.2d at 162 (noting that the OSC is not a "public defender" for federal employees); *see also Hearings on S.508, supra* note 135, at 4 (testimony of Senator Carl Levin) (noting that K. William O'Connor, when Special Counsel, continually emphasized that he had no duty to protect individual employees, but rather his sole obligation was to the "merit system"); Note, *supra* note 4, at 1264 ("The Office is concerned not only with remedying violations of the Constitution, but with handling all of the problems, statutory and regulatory, that attend a civil service system. . . . When such considerations influence the Office to decide not to pursue a case, . . . resort to the OSC has not guaranteed any relief.").

140. *See supra* note 104 and accompanying text.

141. Devine & Aplin, *supra* note 125, at 21.

142. 5 U.S.C.A. § 1212(a)(2) (West Supp. 1992).

guidelines as to what level of action satisfies the duty to investigate. The Merit Systems Protection Board consistently has declined to supervise the execution of OSC's authority.[143] Similarly, the Reform Act does not obligate the Office to prosecute or seek a stay in any particular case, regardless of the facts.[144] All actions or omissions by the OSC are thus unreviewable,[145] effectively subjecting the Special Counsel to an "honor system."[146]

The extensive discretion afforded the Special Counsel may lead to ineffective protection of the rights of civil servants. As commentators have noted:

> Remedies whose enforcement are at the mercy of a bureaucratic champion's whims inherently provide "soft" rights that are vulnerable to administrative abuse of authority. In the case of the Reform Act, the Office of the Special Counsel, responsible for protecting the civil service rights of federal employees, has disintegrated into an effective weapon against the intended beneficiaries.[147]

This conclusion accurately describes the state of affairs under the administrations of recent Special Counsels, who have shown a lack of concern — and even outright disrespect — for employees who disclose waste and fraud within government.[148] Furthermore, the Civil Service

143. *See* Devine & Aplin, *supra* note 125, at 21 & n.93 (collecting cases).

144. Frazier v. Merit Sys. Protection Bd., 672 F.2d 150, 162 (D.C. Cir. 1982).

145. Wren v. Merit Sys. Protection Bd., 681 F.2d 867, 869 (D.C. Cir. 1982); Indig, *supra* note 98, at 576-78. In *Wren,* the D.C. Circuit found that the Special Counsel had closed the petitioner's case without making even the limited investigation mandated by the CSRA, but that the MSPB lacked jurisdiction to review the closure. 681 F.2d at 874-75.

146. Devine & Aplin, *supra* note 125, at 21.

147. *Id.* at 6 (footnote omitted); *see also* Patricia Schroeder, *Introduction,* 4 ANTIOCH L.J. (1986):

> [N]ot one of the four individuals who has served as Special Counsel has been successful. The first two, who served under the Carter Administration, lost virtually all the cases they brought. The two appointed by President Reagan somehow were unaware of the employee protection nature of the job. One, Alex Kozinski, used his position as Special Counsel as a springboard to become a Federal Court of Appeals judge. The other, K. William O'Connor, thought that he was a prosecutor, out to punish the bad guys. He considered victims of prohibited personnel practices to be mere witnesses.

Id. at 2-3.

148. Note an exchange in 1985 between Representative Schroeder and Special Counsel K. William O'Connor:

> Q: In your statement you say that most managers follow the law.
> A: That is my firm belief.
> Q: And have integrity.
> A: That is my firm belief.
> Q. And that most whistleblowers are malcontents.
> A: That has been my experience.

Whistleblower Protection: Hearings Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, 99th Cong., 1st Sess., 259 (1985). O'Connor also testified that he would not seek corrective action from the MSPB unless there was "a virtual certainty" of success, *Hearings on S. 508, supra* note 135, at 4 (testimony of Senator Carl Levin), despite the fact that the CSRA requires the OSC to petition the Board when there are "reasonable grounds" to believe a prohibited personnel practice has occurred. 5 U.S.C.A. § 1214(a)(1)(A) (West Supp. 1992); *see also 1980 Hearings, supra* note 128, at 116 (statement of David T. Evans, Department of Commerce) (criticizing OSC for acting only after pressure from the media and Congress);

administration has consistently opposed legislation intended to provide greater protections for federal employees.[149] Because the protections of the OSC are wholly discretionary, and subject to serious abuse under certain individuals, the right to petition the Special Counsel cannot adequately remedy violations of federal employees' constitutional rights.[150]

In response to these problems under the original Civil Service Reform Act, Congress enacted additional legislation to improve the safeguards furnished to civil servants.[151] Although these improvements in the available remedial scheme suggest that judicial remedies are no longer so vitally important to guarantee employee rights, they also suggest that Congress never intended that certain employees be deprived of constitutionally adequate remedies. Furthermore, many civil service employees remain unprotected despite this legislation. Probationers, some excepted employees, job applicants, and employees who allege constitutional deprivations that do not fall under the statutory definition of "prohibited personnel practice," still possess no right to a hearing before the MSPB.[152] They continue to find their constitutional rights subject to the discretion of the OSC bureaucracy, whose central concern is often only the "efficiency" of the civil service. Only individuals within these groups who specifically allege reprisal for whistleblowing activities are guaranteed a hearing before the Board, and then only after exhausting available OSC procedures.[153]

The end result of this statutory scheme is that employees' constitutional rights are afforded dramatically different treatment depending

---

Devine & Aplin, *supra* note 125, at 30-33, 39-41, 53-56 (outlining ways in which OSC has frustrated purposes of the CSRA).

149. *See Hearings on H.R. 4033*, *supra* note 133, at 3 (statement of K. William O'Conner, Special Counsel) (opposing amendment which would furnish improved whistleblower protections); *Administrative Due Process for Certain Federal Employees: Hearing on H.R. 917 Before the Subcomm. on the Civil Service of the House Comm. on Post Office and Civil Service*, 99th Cong., 1st Sess. 6 (1985) (statement of Llewellyn M. Fischer, Associate General Counsel of OPM) (objecting to bill that would extend right of direct appeal to the MSPB to certain excepted-service employees).

150. *See* Note, *supra* note 4, at 1263; *see also infra* sections III.A and III.B.

151. *See* Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990) (codified at 5 U.S.C.A. § 7511 (West Supp. 1992)) (extending right of direct appeal to certain excepted-service employees); Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at scattered sections of 5 U.S.C.A. (West Supp. 1992)) (strengthening protections for federal employees by establishing OSC as a separate agency independent of MSPB and allowing petitioners to seek a hearing with the Board directly if the Special Counsel does not take action).

152. The Civil Service Due Process Amendments only extended the right to a Board hearing to 100,000 additional employees. MSPB STUDY, *supra* note 104, at 1; *see also supra* notes 110-16 and accompanying text.

153. These federal employees must allege their disclosure of a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to the public health or safety triggered the adverse action. *See* Whistleblower Protection Act of 1989, sec. 3(a)(11), § 1213(a)(1), 103 Stat. 21. In 1990, the OSC judged that 103 of the 1623 complaints filed met this standard. OSC REPORT, *supra* note 135, at 5.

on the severity and reason for the disciplinary action, the length of employment with the civil service, and the type of job performed. A competitive service employee who claims she was fired for exposing fraud within a federal agency is entitled to a direct hearing before the Merit Systems Protection Board, and can appeal an adverse decision by the Board to the U.S. Court of Appeals for the Federal Circuit. A probationary employee in the same position must first petition the Special Counsel for relief; only after the OSC has closed the case is the probationer entitled to a hearing before the MSPB. A competitive service employee suspended for fifteen days for participation in a political demonstration possesses the right to a direct hearing before the Board and judicial review by the Federal Circuit Court. If that same employee is suspended for only *fourteen* days, no such entitlements exist. The decision whether or not to review the case lies solely with the Special Counsel. Although these bright-line rules specifying when an employee has a right to independent review of disciplinary action are administratively useful, this benefit should not overwhelm the importance of providing adequate protection for federal employees' constitutional rights. The need for injunctive relief remains in many instances.

III. A Constitutional Argument for Equitable Remedies

Federal employees who allege constitutional deprivations in federal court typically point to adverse personnel actions by a superior as the essence of the constitutional violation. Such employees seek relief from the courts because they claim remedies within the mechanism of the civil service are insufficient or lacking altogether. Specifically, they seek relief from unconstitutional conduct by superiors in imposing disciplinary action.[154] The issue is to what extent Congress can preempt

154. The claim that a supervisor infringed a federal employee's constitutional rights and that available procedures did not provide sufficient relief can also take the form of a suit for denial of due process. For example, an employee who alleges she was denied a promotion for attending a political rally could bring a claim contending she was deprived of her First Amendment rights, or she could allege that the adverse action violated her *liberty interest* in freedom of speech and assembly without due process of law. Such claims differ from the case where an employee does not assert that the *personnel action* was unconstitutional, but rather claims that the remedial process itself is constitutionally deficient. This second class of plaintiffs contends that the very process of ascertaining whether a prohibited personnel practice has occurred and providing relief is so ineffective as to constitute a denial of due process. These employees do not premise their constitutional claim on the initial adverse action, but on the subsequent administrative and civil service review. They assert they have a *property interest* in their employment, and are entitled under the Constitution to more effective review procedures before that property right can be taken from them.

Under this second type of due process claim, Congress may preclude judicial action more easily. The Supreme Court has adopted a two-step approach for determining the due process protections to which public employees are entitled when dismissed. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). First, the court looks to the nature of the interest at stake to ascertain if constitutional protection is warranted. *See Roth*, 408 U.S. at 570-71. If the employee's position is uncertain, such as that of a probationer, the employee's interest in the job may not entail a property interest subject to due process protections. Alternatively, the disciplinary action may be so minor that no deprivation of a property interest

judicial relief for violations with an alternate scheme that could yield unremedied constitutional deprivations.

This Part emphasizes the importance of equitable relief to ensure adequate protection of civil servants' constitutional rights. Section III.A explores the possible existence of constitutional minima which necessitate that deprivations of constitutional rights be remedied. This section argues that the judiciary must ensure that any alternative legislative scheme meets these standards. Absent such statutory assurances, courts should enjoin unconstitutional conduct where necessary to meet constitutional minima. Section III.B argues that even if such constitutional requirements do not exist and Congress does have the power to strip federal employees' constitutional rights of *all* meaningful remedies, courts must ensure that Congress intentionally eliminated equitable remedies before finding a statutory scheme to preempt judicial action. Due to continued disagreement over the Civil Service Reform Act's preclusive effect, courts should find the Act to preempt injunctive relief only where statutory remedies provide effective protection. Section III.C concludes by noting the importance of equitable relief in adequately protecting constitutional rights in many cases, and how such protection can benefit the efficiency of the civil service.

A. *Constitutional Requirements*

The extent to which Congress can preempt judicial remedies for constitutional violations hinges substantially on whether the Constitu-

---

occurs, even if the employee does have such an interest in the job. But "[w]hile the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in the result). Thus, the second inquiry entails an evaluation of the procedures necessary to guarantee constitutional due process, Baran, *supra* note 96, at 102, where the civil servant has "a legitimate claim of entitlement" to the government sector job. *Roth,* 408 U.S. at 577. In *Arnett,* six justices agreed that the Constitution provided some protections for federal employees who could be dismissed only for just cause, holding that a full evidentiary hearing was required. 416 U.S. at 163, 170, 178. Of these six, only Justice White required the hearing to occur prior to discipline. 416 U.S. at 185. The evidentiary hearing may thus take place at any time prior to or subsequent to the adverse personnel action.

These decisions recognize congressional power to preempt federal court involvement in due process claims, through the mere provision of an evidentiary hearing, whenever the individual has a *legitimate claim of entitlement.* Review procedures within the agencies and the right to appeal to the MSPB under the Reform Act meet this minimum burden for most civil servants with a justifiably legitimate claim to their jobs.

These procedural due process cases clearly demonstrate, however, that this analysis does not apply where the *disciplinary action itself* is unconstitutional. The requirement that the civil servant have a *legitimate claim* to the job is irrelevant to the determination whether the adverse action itself constitutes a constitutional deprivation.

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .

Perry, 408 U.S. at 597. The question this Part addresses is whether such a deprivation *must* be remedied.

tion *mandates* a remedy for constitutional deprivations. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* held that when government actors violate constitutional rights, "federal courts may use any available remedy to make good the wrong done."[155] The Court recognized a cause of action for money damages as necessary to correct the harm. Some commentators have read this conclusion to be constitutional interpretation; that is, in *Bivens* the Constitution itself required a damage remedy.[156] The opinions of Justices Brennan and Harlan support this theory, by indicating that the Court must provide a damages remedy, "lest it be in dereliction of its fourth amendment duties."[157] Other commentators disagree, labeling the result in *Bivens* as constitutional common law.[158] In the opinion of these common law theorists, *Bivens* went "beyond the minimum requirements of the Constitution to carry out the purposes and policies of the fourth amendment."[159] Thus, Congress can alter the judicially created remedy.[160]

This latter view appears to have carried the day. The majority theory that *Bivens* constituted common law,[161] and thus that the legislature can replace the judicial remedy with another form of relief, prevailed in *Bush v. Lucas.*[162] In that case, the Supreme Court did not require that Congress view the alternative remedial scheme to be equally effective as the judicial remedy.[163] The existence of constitutionally adequate relief[164] defeated the cause of action for damages, despite the Court's assumption that the alternative civil service remedy did not fully compensate the federal employee.[165] Yet the Court did not explain why the statutory remedy was constitutionally adequate, or whether the Constitution implied damage remedies for depri-

155. 403 U.S. 388, 396 (1971) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

156. *See, e.g.,* Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law,* 91 HARV. L. REV. 1117, 1135-36 (1978) (arguing *Bivens* is a constitutional, as opposed to common law, decision because "it prevents the fourth amendment from being rendered a 'mere form of words' *in the relevant sense of that phrase.* . . . [T]he constitutional guarantee embraces a right of action.").

157. *Id.* at 1136.

158. *See, e.g.,* John H.W. Hinchcliff, Note, *The Limits of Implied Constitutional Damages Actions: New Boundaries for* Bivens, 55 N.Y.U. L. REV. 1238, 1244 n.50, 1245 n.51 (1980); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights,* 99 HARV. L. REV. 1128, 1172 (1986); Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law,* 89 HARV. L. REV. 1, 23-24 (1975).

159. Joan Steinman, *Backing Off* Bivens *and the Ramifications of This Retreat for the Vindication of First Amendment Rights,* 83 MICH. L. REV. 269, 279 (1984).

160. *Id.* at 281; Note, *supra* note 4, at 1258.

161. *See* Note, *supra* note 4, at 1258.

162. 462 U.S. 367 (1983); *see* Meltzer, *supra* note 158, at 1172; *accord* Davis v. Passman, 442 U.S. 228, 248 (either a traditional damage remedy or some other constitutionally adequate relief necessary).

163. Steinman, *supra* note 159, at 294.

164. *Bush,* 462 U.S. at 378 n.14.

165. *See supra* text accompanying note 35.

vations of rights.[166] The Supreme Court, however, has denied judicial relief for constitutional violations only where Congress has created an alternative remedy which provides *meaningful* relief. In both *Schweiker* and *Bush,* the Court found available remedies to be adequate.[167] Furthermore, the Court has long recognized the power of the judiciary to enjoin conduct by federal officials which violates the Constitution.[168] A strong argument can thus be made that while Congress may provide exclusive remedies where those remedies are adequate, it may not preclude all relief for constitutional violations. In essence, some relief may be constitutionally required.

Traditionally, protection of individual rights under the Constitution has been primarily the function of the judicial branch, not the legislature.[169] This power arises under Article III, which reads, "The judicial Power shall extend to all Cases arising under this Constitution."[170] The courts, however, have recognized that alternative congressional schemes may preempt common law judicial remedies.[171] In the field of criminal law, for example, the opinion in *Miranda v. Arizona*[172] repeatedly stressed the Court's willingness to accept alternative procedures which would achieve the underlying policies of the constitutional guarantee against self-incrimination.[173] Remedial schemes offered by certain branches of government, therefore, can preclude a federal cause of action if that scheme meets minimum constitutional standards, as both the legislature and judiciary may give constitutional rights substantive protection.[174] It remains the responsibility of the judiciary, however, to ensure that legislated remedies for constitutional deprivations meet these minima.[175]

---

166. *See* Steinman, *supra* note 159, at 295-96.

167. Schweiker v. Chilicky, 487 U.S. 412, 425 (1988); *Bush,* 462 U.S. at 378 n.14; *accord* Davis v. Passman, 442 U.S. 228, 243-44 (1979) (recognizing the cause of action where plaintiff "has no effective means other than the judiciary to vindicate [constitutional] rights").

168. *See, e.g.,* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949). Sovereign immunity does not bar injunctive relief where the government official acts in excess of her legal authority, i.e., unconstitutionally. *See, e.g.,* Schneider v. Smith, 390 U.S. 17 (1968); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); *see also* CHEMERINSKY, *supra* note 24, at 474.

169. Davis v. Passman, 442 U.S. 228, 241-42 (1979); *Bivens,* 403 U.S. at 407 (Harlan, J., concurring); Monaghan, *supra* note 158, at 18; *see also* Steinman, *supra* note 159, at 299 ("The courts unquestionably act within their legitimate institutional role in awarding damages to redress violations of constitutional rights. . . . [T]he courts are, and are intended by the Constitution to be, the branch of government primarily responsible for enforcing the duties imposed by the Bill of Rights upon the government.").

170. U.S. CONST. art. III, § 2; *see* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1541 (1972).

171. *See supra* section I.B.

172. 384 U.S. 436 (1966).

173. *See, e.g.,* 384 U.S. at 467.

174. Dellinger, *supra* note 170, at 1552.

175. Steinman, *supra* note 159, at 339; *see also* Dellinger, *supra* note 170, at 1549 (Court should defer to the legislature's alternative scheme only where "(1) Congress has provided an alternative remedy considered by Congress to be equally effective in enforcing the Constitution,

The question is to what extent must every constitutional deprivation be remedied to sufficiently protect the right. Two approaches to this issue exist. The first theory postulates that every violation requires a remedy. Justice Marshall drew upon this notion in *Marbury v. Madison,*[176] when he noted: "The very essence of civil liberty certainly consists in the right of *every* individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[177] This language closely tracks a basic maxim of law — *ubi jus, ibi remedium:* Where there is a right, there should be a remedy.[178] James Madison reaffirmed this proposition in *The Federalist,*[179] and this thesis formed the bedrock for Marshall's opinion in *Marbury.* "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right," Justice Marshall asserted.[180]

Realist legal thought adopted this approach, arguing that the *existence* of a right turned on the *enforcement* of that right through the provision of necessary relief. "[A] right is best measured by effects in life. Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do."[181] Under this theory, every constitutional deprivation requires relief. Without a remedy, individual rights under the Constitution effectively become meaningless.[182] The longstanding tradition of enjoining unconstitutional conduct exemplifies this view. For many years, federal courts have recognized judicial power to render injunctive relief against federal officials as a necessary component of the judiciary's function.[183] Such relief is essential to protect constitutional rights.

and (2) the Court concludes that in light of the substituted remedy, the displaced remedy is no longer 'necessary' to effectuate the constitutional guarantee"); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III,* 101 HARV. L. REV. 915, 939-42 (1988) (appellate review of the decisions of administrative tribunals by a constitutional court is minimally necessary to protect Article III values). *But see* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362, 1372-73 (1953) ("It's hard . . . to read into Article III any guarantee to a civil litigant of a hearing in a federal constitutional court . . . if Congress chooses to provide some alternative procedure.").

176. 5 U.S. (1 Cranch) 137 (1803).

177. 5 U.S. (1 Cranch) at 163 (emphasis added).

178. Akhil R. Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425, 1485-86 (1987).

179. THE FEDERALIST No. 43, at 274-75 (James Madison) (Clinton Rossiter ed., 1961).

180. *Marbury,* 5 U.S. (1 Cranch) at 163.

181. KARL N. LLEWELLYN, THE BRAMBLE BUSH 83-84 (1960); *cf.* GEORGE C. CHRISTIE, JURISPRUDENCE 790 (1973) (noting that the legal realists criticized the notion of "rights without remedies" as "nonsense").

182. Note, *supra* note 4, at 1259; *see also* Steinman, *supra* note 159, at 298 (discussing First Amendment remedies); Indig, *supra* note 98, at 586 (same).

183. *See, e.g.,* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949) (noting that federal officials may be subject to "suits for specific relief," i.e., can be enjoined); *Ex parte* Young, 209 U.S. 123 (1908) (allowing plaintiffs to sue state officials to enjoin enforcement

The opinions in *Bivens*[184] and its predecessor, *Bell v. Hood,*[185] also support this approach. As the court in *Bell* noted, "[I]t has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[186] The Supreme Court later used this same language in *Bivens,*[187] resting its decision on the notion that either the courts or the legislature must remedy deprivations of rights in order to effect the constitutional guarantee.[188] Because the defendant's unconstitutional conduct in *Bivens* was not ongoing, however, injunctive relief was not a viable solution. The Court thus crafted a new cause of action, a claim for damages, to effect the constitutional guarantee. Effectively, money damages were necessary, "lest [the Court] be in dereliction of its fourth amendment duties."[189]

A second theory rests on a deterrence model: constitutional rights are sufficiently guaranteed where violations are *deterred.* A statutory scheme is constitutionally adequate if it minimizes constitutional deprivations, whether or not the scheme protects the rights of all. Under this view, determining the coverage necessary to deter violations is a policy consideration best left to Congress.[190] The legislature must calculate the level of violations which must be remedied to ensure effective protection of constitutional guarantees. Once Congress provides statutory relief in those cases, however, relief for additional instances of constitutional deprivations becomes redundant. No further deterrence would result from the creation of a judicial remedy.

Criticism of the deterrence rationale in the context of the civil service takes two forms. First, where Congress fails to protect an entire *class* of individuals, it will fail to deter constitutional deprivations for all within that class. Among federal employees, the CSRA denies many groups the right to direct Board review of adverse personnel actions. The Act charges the OSC to remedy cases where these employees have suffered prohibited personnel actions, but the Special Counsel has repeatedly failed to do so.[191] Thus, no realistic mechanism exists to deter violations of these employees' rights. Within these

---

of an unconstitutional state statute, despite the Eleventh Amendment). In fact, Congress recently recognized this tradition, amending the Administrative Procedures Act to provide that suits against federal agencies and employees "seeking relief other than money damages" shall not be dismissed because the United States is a party or even the named defendant. *See* 5 U.S.C. § 702 (1988).

184. *See Bivens,* 403 U.S. at 397 (citing *Marbury,* 5 U.S. (1 Cranch) at 163).

185. 327 U.S. 678 (1946).

186. 327 U.S. at 684 (citing *Marbury,* 5 U.S. (1 Cranch) at 163).

187. 403 U.S. at 392.

188. *See supra* notes 20-30 and accompanying text.

189. Schrock & Walsh, *supra* note 156, at 1136.

190. *See supra* text accompanying notes 79-90.

191. *See supra* text accompanying notes 131-49.

groups, *all* cases of constitutional deprivations slip through the cracks, not just a few.

Second, this theory ignores the fundamental nature of constitutional guarantees.

> Unlike other legal rights created and subject to qualification, modification, and limitation by government, constitutional rights derive from a higher source than government itself. . . . [A]bsent a clear statement by the People in the Constitution itself, the document should not be read to create gaps between right and remedy manipulable by government.[192]

Because constitutional guarantees express ideals fundamental to the American political system, courts should not consider them as mere ordinary factors in balancing policy considerations.[193] Individual rights are so central to a constitutional government that they must be protected in nearly all cases.[194] To ensure adequate protection of federal employee rights, either the courts or the legislature must remedy these deprivations. The judicial tradition of providing injunctive relief where constitutional principles are threatened recognizes the importance of these principles. Neither the Eleventh Amendment[195] nor the doctrine of sovereign immunity[196] have prevented federal courts from enjoining unconstitutional conduct by government officials. Failure to provide necessary protection robs many classes of civil servants of the fundamental guarantees of the Constitution.

B. *Necessity of Meaningful Relief Under the CSRA*

Perhaps the individual guarantees of the Constitution do not require effective protection, thus permitting Congress to obviate *all* judicial remedies, including equitable relief, without providing meaningful alternatives. The courts, however, should not infer such preclusion lightly. "Even if the Constitution does not require effective remedies for violations of constitutional rights, and even if Congress may strip constitutional rights of all meaningful remedies, courts should at least ensure that such was Congress' intent before finding legislation to

---

192. Amar, *supra* note 178, at 1491 n.262.

193. Note, *supra* note 4, at 1260.

194. Amar notes the weakness behind the argument that governments might simply be unable to afford the cost of full remedies for constitutional violations:

> [D]iscretionary expenditures surely must take a back seat to [relief] mandated by constitutional principles . . . . To argue that government "cannot afford" to guarantee full remedies is to argue that the regime of rights that the framers embedded in the Constitution is simply unworkable. This is an argument that should be required to bear a very heavy burden of proof.

Amar, *supra* note 178, at 1491 n.262.

195. *See Ex parte* Young, 209 U.S. 123 (1908). The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

196. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949).

[preempt judicial remedies]."[197] As intent is so difficult to gauge,[198] courts may employ two methods to ensure that constitutional guarantees are not deprived of meaningful protection except by congressional design. First, courts may demand that congressional intent to preempt traditional judicial remedies be expressed clearly and explicitly in the text of the statute itself.[199] In the present case, no such statement exists. Courts have not found the Civil Service Reform Act to explicitly preclude equitable remedies.[200] The federal judiciary can interpret this silence on the preemption question to sanction equitable relief where necessary.

Second, courts may require the statute to provide meaningful remedies. The judiciary could view ineffective statutory relief as a congressional invitation to create a federal cause of action and enjoin unconstitutional conduct where necessary.[201] Such an approach would prevent courts from denying adequate constitutional protection to certain groups merely because Congress failed to include such classes within the legislative scheme. In determining if the afforded relief suffices, "the fact that persons in other situations may have access to remedies that will vindicate their rights under the constitutional provision in question should not preclude the judicial creation of remedies for a particular plaintiff who is without effective means of redress."[202] The federal courts should thus not consider the availability of statutory remedies for many classes of federal employees to preempt judicially created equitable relief for those groups denied such mechanisms.

If the statute does not afford the plaintiff a remedy, the court should determine independently whether injunctive relief is necessary to effect the constitutional guarantee. Courts should not assume that the legislative scheme is constitutionally adequate for all individuals, for

> [t]o merely assume the constitutional adequacy of an "exclusive" statutory remedy is to permit Congress to deny an individual *all* remedy because he fails to state a statutory claim or cannot meet mere statutory defenses. That would amount to allowing Congress to define what constitutes a violation of particular guarantees in the Bill of Rights, when the function of defining constitutional violations is properly the Court's

197. Note, *supra* note 4, at 1260.

198. *See supra* section I.B.

199. *See supra* section I.B.1.

200. *See Spagnola II*, 859 F.2d at 229-30; Perry v. Thomas, 849 F.2d 484, 484-85 (11th Cir. 1988); Hubbard v. E.P.A., 809 F.2d 1, 11 n.15 (D.C. Cir. 1986). Courts finding preemption premise their conclusions on the effectiveness of the available remedies, *see supra* section I.B.2, or the comprehensiveness of the statutory scheme. *See supra* section I.B.3.

201. Note, *supra* note 4, at 1260-61; *see also* Steinman, *supra* note 159, at 283 n.81; *supra* section I.B.2.

202. Dellinger, *supra* note 170, at 1551.

under *Marbury v. Madison.*[203]

Essentially, denying federal courts the power to review the sufficiency of legislative schemes would subvert a central function of the judiciary under the separation of powers doctrine: to serve as a check on other branches of government.[204]

If the statute provides relief for the plaintiff, the court should assess the sufficiency of protection. Of central concern is that the statute afford more than just symbolic relief; the remedy must be truly compensatory to ensure that the constitutional guarantee is not rendered a "mere form of words."[205] An important factor is whether the plaintiff was permitted meaningful access to the legislative remedies.[206]

> Unreasonable procedural hurdles or breakdowns in the statutory procedural system due to human frailties can prevent an aggrieved person from attaining a statutory remedy. . . . [S]uch procedural obstacles might be regarded as bearing upon the adequacy of the statutory remedy on the theory that, absent meaningful access, the legislated remedies cannot be adequate, no matter how satisfactory they would be if available.[207]

The failure of the Office of the Special Counsel to investigate allegations of prohibited personnel practices vigorously and to protect federal employee rights[208] operates as a "procedural obstacle," rendering inadequate the remedies theoretically available to probationers and similarly situated federal employees.[209] In such cases, judicial intervention may be warranted. If the court determines that an exclusive statutory remedy sufficiently protects constitutional rights, however, the court should refrain from interfering. Such a legislative provision furnishes the minimum protection that the Constitution requires.

C. *A Role for Judicially Created Equitable Remedies*

The Civil Service Reform Act does not clearly and explicitly preempt equitable relief for deprivations of federal employees' constitutional rights.[210] Courts which infer legislative intent to preclude premise their decisions on the effectiveness of available remedies[211] or the comprehensive nature of the remedial scheme.[212] The latter

203. Steinman, *supra* note 159, at 282-83.

204. Fallon, *supra* note 175, at 975-76.

205. Steinman, *supra* note 159, at 284.

206. *See id.* at 283.

207. *Id.* at 284.

208. *See supra* section II.C.

209. *See* Steinman, *supra* note 159, at 284.

210. *See supra* text accompanying notes 57-67. Nor do two new acts which modify the CSRA, the Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990) (codified at 5 U.S.C.A. § 7511 (West Supp. 1992)), and the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at scattered sections of 5 U.S.C.A. (West. Supp. 1992)), appear to contain an explicit declaration of preemption.

211. *See supra* section I.B.2.

212. *See supra* section I.B.3.

group, by focusing only on the completeness of the statutory plan and not the adequacy of provided relief, risks exposing many federal employees to unremedied constitutional deprivations.

Courts that decline to examine the effectiveness of statutory remedies typically rely on two arguments, both based on congressional intent. Some courts assert that judicial recognition of an equitable cause of action "would be an attempt to improve on Congress' judgment."[213] Others reason that a grant of judicial protection would upset the delicate balance Congress struck in designing the civil service.[214] Both arguments rely on the unproven assumptions that Congress intended federal employees to have access *only* to CSRA remedies and that Congress weighed and balanced the competing concerns and afforded constitutional rights the sole protection they deserved.[215] Congress' only express purpose in enacting the CSRA, however, was to provide the nation with an effective, high quality civil service system;[216] attempts by these courts to infer other intentions are problematic. Legislative intent is an amorphous concept, capable of manipulation to yield nearly any desired conclusion.[217] Courts should not sacrifice the constitutional rights of civil servants through a speculative interpretation of the CSRA. Congress *may* have the power to withdraw judicial relief where its purpose to do so is clear, but not where it expresses no view on the issue.[218] Courts should decline a cause of action only where Congress views the alternative remedy as equally effective in enforcing the Constitution, and the displaced judicial remedy is no longer necessary to effect the constitutional guarantee.[219] Under *Bivens* and its successors, the federal government or agency involved should have the burden of proving the alternative remedial scheme is constitutionally sufficient in the instant case.[220]

Lower courts agree that *Bush v. Lucas* and *Schweiker v. Chilicky*

213. Note, *supra* note 4, at 1266.

214. *See id.*

215. *Id.* In fact, an amicus curiae brief submitted in the *Bush* case by several primary sponsors of the CSRA explicitly states that Congress did not intend to preclude *Bivens* remedies by enacting the legislation. *See* Devine & Aplin, *supra* note 125, at 63. There exists no way of ascertaining if this reflects the intent of all members of Congress.

216. 5 U.S.C. § 1101 (1988).

217. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,* 3 VAND. L. REV. 395 (1950).

218. Note, *supra* note 4, at 1260-61.

219. Dellinger, *supra* note 170, at 1549.

220. The constitutional cause of action is defeated where the "defendant[ ] show[s] 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." Carlson v. Green, 446 U.S. 14, 18 (1980); *see* Davis v. Passman, 442 U.S. 228, 246-47 (1979); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971). Clearly, the federal agency or government will be the defendant where a federal employee alleges a constitutional deprivation.

preclude a *Bivens* claim for damages by a federal employee.[221] They disagree, however, on whether these decisions also preempt injunctive relief.[222] The importance of traditional equitable principles to the protection of constitutional guarantees militates against preclusion.

> The courts' power to impose equitable remedies against agencies is broader than its power to impose legal remedies against individuals. *Bivens* actions are a recent judicial creation and comparatively easy for Congress to preempt. The court's power to enjoin unconstitutional acts by the government, however, is inherent in the Constitution itself.[223]

In fact, *Bush* and *Schweiker* may be wholly inapplicable to situations where equitable remedies are sought. Both cases addressed the availability of money damages, a form of relief which *Bivens* itself recognized as subject to congressional discretion.[224] No mention was made of the traditional power of the federal judiciary to enjoin unconstitutional conduct by government officials.[225] Injunctive relief likely remains a viable solution for federal employees who have seen their constitutional rights trampled. Reinstatement, orders to promote, and expungement of unfavorable evaluations are positive methods courts can use to restore and protect constitutional guarantees.[226] Where statutory remedies are inadequate, as they currently are under the CSRA,[227] such judicial methods are vitally important.

Judicial provision of a cause of action for civil servants who are insufficiently protected by statutory remedies may also improve the overall efficiency of the civil service. Employee reluctance to disclose waste and fraud[228] may be costing U.S. taxpayers millions of dollars.[229] If federal employees, regardless of their classification under the CSRA, are guaranteed that their constitutional right to free speech will protect them, individuals may be more likely to "blow the whistle" on improper and illegal behavior within government. Such exposures can lead to effective streamlining of the civil service system. The Whistleblower Protection Act recognized this benefit by guaranteeing Board review for whistleblowers; however, procedural obstacles prevent the Act from providing swift and efficient redress for constitutional violations.[230] Judicial intervention could improve the remedial

---

221. *See, e.g., Spagnola II,* 859 F.2d at 226-29.

222. *See supra* note 10.

223. Hubbard v. EPA, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986); *see also Bivens,* 403 U.S. at 404 (Harlan, J., concurring).

224. *See supra* notes 27-30 and accompanying text.

225. *See Hubbard,* 809 F.2d at 11 n.15.

226. Of course, personal conflicts in the workplace, especially following a lawsuit, may render such relief ineffective. Courts are able to evaluate the mitigating factors, however, and suggest a workable solution.

227. *See supra* section II.C.

228. *See supra* notes 132-34 and accompanying text.

229. *1983 Hearing, supra* note 132, at 3 (statement of Senator Howell Heflin).

230. *See supra* note 119.

process by enjoining an adverse action at least until the Board has a chance to review the case.

Equitable relief through the courts may also improve operating efficiency by providing increased protections to nonwhistleblowers. Federal agencies make considerable investments when they search for, hire, and train employees — investments which may be lost when employees are fired, denied promotions, or adversely criticized for reasons unrelated to ability. Effective protection of employee constitutional rights protects these investments by supporting the merit system. Furthermore, it may make the federal government more attractive as an employer, enticing better workers into the fold.

CONCLUSION

Adequate protection of the constitutional rights of federal employees requires that courts have the power to furnish injunctive relief where necessary. Deficiencies in the current civil service remedial scheme render statutory remedies ineffective or nonexistent in many situations, leaving specific classes of federal employees without constitutional protections. Courts must be willing to step in to provide the necessary relief. The judiciary, therefore, should interpret the Civil Service Reform Act to preempt judicially created equitable remedies only where the government or agency demonstrates that the statutory remedial scheme is constitutionally sufficient in the immediate case. In most cases, this test will be met. But where constitutional safeguards are left to the discretion of individuals committed to the efficiency of the civil service and not to the protection of employee rights, the grant of discretion may be abused. In these cases, civil servants must be able to seek equitable relief through the federal courts, or their constitutional rights may be rendered meaningless.