Erosion of Official Immunity of Personnel Supervisors in the Public Sector

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Introduction

The last five years have witnessed substantial erosion of the absolute immunity traditionally enjoyed by federal employees acting within the scope of their employment. Even members of Congress, who enjoy absolute constitutional immunity under the speech or debate clause,[1] have seen the gradual diminution of that basic constitutional privilege in recent years.[2]

On June 29, 1978, the United States Supreme Court decided *Butz v. Economou*,[3] a case involving the scope of immunity and personal liability of federal employees who commit torts which violate the constitutional rights of others. The case will have far-reaching implications. Public sector employees have traditionally enjoyed the protections of absolute immunity for conduct falling within the scope of their official duties, particularly conduct involving the exercise of administrative discretion.[4] *Economou* sub-

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1. U.S. CONST. art. I, § 6, cl. 1, which states in pertinent part: "The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." *See* Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972).

2. Hutchinson v. Proxmire, 443 U.S. 111 (1979). *Cf.* United States v. Helstoski, 442 U.S. 477 (1979).

3. 438 U.S. 478 (1978).

4. *See* Barr v. Matteo, 360 U.S. 564 (1959). Administrative discretion necessarily includes adverse personnel actions of agency heads and their designees including *operating*

stantially erodes this protection. In a five-to-four decision, the Supreme Court held that federal officials who discharge their duties in ways which knowingly violate the Constitution, or who act in a manner that transgresses a clearly established constitutional right, are entitled to only qualified immunity in a civil suit for damages arising from the unconstitutional action.[5] The Court, however, did

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officials and supervisors. Section 01.3, Exec. Order No. 9,830, 12 Fed. Reg. 1259 (1947) provides:

> Agency responsibilities for personnel management.
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> (a) The head of each agency, in accordance with applicable statutes, Executive orders, and rules, shall be responsible for personnel management in his agency. To assist and advise him in carrying out this responsibility he shall maintain or establish such office or division of personnel as may be required. He shall designate a director of personnel or other similarly responsible official to be in charge of such office or division. Such director or other official shall represent the head of the agency in personnel matters, subject to his instructions.
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> (b) The head of each agency shall provide for the cooperation of his agency with the Civil Service Commission in the conduct of personnel matters.
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> (c) Authority for the conduct of personnel matters within each agency should be delegated to the extent compatible with provisions of law and with economical and efficient administration to those officials responsible for planning, directing, and supervising the work of others. The exercise of such delegated authority shall be subject to policies, rules, regulations and standards established by the head of the agency, and shall be subject to appropriate review and inspection.
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> (d) The head of each agency shall remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service.

Section 1-1 of the Federal Personnel Manual, Dec. 21, 1976, provides:

> a. General. Section 01.3(d) of Executive Order 9830 places a positive responsibility on the head of each agency "to remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service." Thus, the agency is both empowered and obligated to act when it determines that action is in order.
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> b. Delegation of authority. Although the basic authority and responsibility to take action in the circumstances described in paragraph a above are placed by law and Executive order in the head of the agency, they are generally delegated down the line to specific operating officials and supervisors.
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> c. Compliance with job protection procedures. Strict adherence to any applicable job protection procedures, whether required by the Civil Service regulations or by the agency's regulations, is an essential phase of the agency's responsibility. In addition, any adverse action taken must be based on good cause, be consistent with other such actions taken by the agency, and be fair and equitable.

5. 438 U.S. at 507 (citing Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974)) which provides the applicable standard of qualified immunity established for federal officers in *Economou:* "[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time

not do away with absolute immunity altogether. It recognized certain "exceptional situations" in which absolute immunity from suit would be available to federal officers.[6] It did so because it felt that immunity is "essential for the conduct of public business" in certain circumstances.[7] Accordingly, the Court identified officials whose special functions required a full exemption from liability as including judges,[8] federal prosecutors,[9] jurors and witnesses,[10] and their administrative agency counterparts.[11] Administrative law judges and agency attorneys who perform functions analogous to those of a prosecutor were also included.[12] Nevertheless, although absolute immunity for federal officials was not eliminated, as a result of *Economou,* it was weakened significantly.

Traditional immunity doctrines were not addressed in *Economou;* only the recently evolved concept of "constitutional tort" was considered by the Court.[13] Traditional theories therefore, continue to apply in purely common-law tort actions where a constitutional tort cannot be implied.[14] The significance of this concept is that many common-law torts have constitutional law analogs which provide greater opportunity for vindicating constitutional rights than is permitted by the limited rule of *Bivens v. Six Unknown Named Agents.*[15] The Court, no doubt mindful of the increase in litigation this might cause, suggested that federal courts be "alert to the possibilities of artful pleading" and that they dismiss complaints which fail to state a "compensable claim for relief under

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of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 438 U.S. at 497-98.

6. 438 U.S at 507.

7. *Id.*

8. *Id.* at 508-09 (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872)).

9. *Id.* (citing Yaselli v. Goff, 12 F.2d 396, 404, *aff'd per curiam,* 275 U.S. 503 (1927)).

10. *Id.* at 512.

11. *Id.* at 512-16.

12. *Id.* at 513-14, 516-17.

13. *Id.* at 494-95.

14. *See* Barr v. Matteo, 360 U.S. 564 (1959), which is the seminal case regarding absolute immunity of federal officials.

15. 403 U.S. 388 (1971). *Bivens* established that federal employees could be sued as individuals for the violation of the constitutional rights of others. It also established that a damage remedy was available in such cases. *See* notes 20-30 and accompanying text *infra.* For a comprehensive discussion of the impact of *Bivens,* see Lehmann, Bivens *and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials,* 4 HASTINGS CONST. L.Q. 531 (1977).

the Federal Constitution."[16] These words of advice, however, remain ill-defined and probably will be the subject of future litigation.

This article will identify the areas in which the public personnel manager can injure the constitutional interests of employees and will analyze the impact of *Economou* and the availability of a new remedy for constitutional transgressions committed by supervisors in the federal government. Much of the discussion is applicable to state and local officials through the Civil Rights Act of 1964, 42 U.S.C. § 1983.

I. The Legal Basis for Employee Causes of Action

Nearly ninety years ago, Justice Holmes wrote that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[17] The view that public employment is a privilege revocable for any reasonable justification has given way over the years to constitutionally based protections for public employees which have been established by statutory and decisional law.[18] In the wake of *Economou,* supervisors and administrators in the federal service will need to become even more mindful of their employees' constitutional rights than they have been in the past. Failure to do so may make them personally liable to an employee for monetary damages.

Suits for money damages brought directly against public employees in their individual capacities have become an increasingly common means of overcoming the barrier of sovereign immunity in today's litigious society.[19] *Economou* has given great impetus to that tendency.

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16. 438 U.S. at 507.

17. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

18. For a recent survey of the law in this area, and a discussion of the death and rebirth of the right-privilege distinction, see Note, *The Resurrection of the Right-Privilege Distinction? A Critical Look at* Maher v. Roe *and* Bordenkircher v. Hayes, 7 HASTINGS CONST. L.Q. 165 (1979).

19. The extent of litigation brought against the United States is described in *Amendments to the Federal Tort Claims Act: Joint Hearing on S. 2117 Before the Subcomm. on Citizens and Shareholders Rights & Remedies and the Subcomm. on Administrative Practice & Procedure of the Comm. on the Judiciary,* 95th Cong., 2d Sess. (1978). *See also* STAFF REPORT TO THE SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, JUSTICE DEPARTMENT RETENTION OF PRIVATE LEGAL COUNSEL TO REPRESENT FEDERAL EMPLOYEES IN CIVIL LAWSUITS, 95th Cong., 2d Sess. (1978).

The seminal case upon which *Economou* is based is *Bivens v. Six Unknown Named Agents*.[20] The constitutional tort actions in *Bivens* were originally based on violations of the Fourth Amendment and were brought under the federal question subject-matter jurisdiction of the United States District Court.[21] In creating what has come to be known as a "constitutional tort," the Court in *Bivens* held that the violation of the Fourth Amendment "by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."[22]

In so holding, the Court relied on *Bell v. Hood*[23] for the proposition that "where 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."[24] *Bivens* addressed only Fourth Amendment violations, however, so that lower courts were left to interpret for themselves the effect of *Biv-*

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

21. 28 U.S.C. § 1331(a) (1976) provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Federal employees may be sued in state courts for constitutional as well as common law torts such as assault, battery, false imprisonment, libel, slander, misrepresentation and deceit. The Department of Justice may, and usually does, remove to federal court any action in state court against a federal employee which arises out of an act done under color of his federal office. *See* 28 U.S.C. § 1442(a) (1976) ("[a] civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office").

The "amount in controversy" requirement is generally not difficult to satisfy. "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction." St. Paul Mercury Indemn. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938), *quoted in* Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 276 (1977).

In suits originally brought in state court, the requirements of 28 U.S.C. § 1331(a) need not be satisfied because upon removal, the jurisdiction of the federal court is derivative. By filing first in state court, a plaintiff is able to circumvent the "amount in controversy" requirement and litigate constitutional or common-law tort damage issues which may be of a value less than $10,000. *See, e.g.*, Minnesota v. United States, 305 U.S. 382, 389 (1939); Gleason v. United States, 485 F.2d 171 (3d Cir. 1972).

22. 403 U.S. at 389.

23. 327 U.S. 678 (1946).

24. 403 U.S. at 392 (quoting Bell v. Hood, 327 U.S. at 684).

ens, in light of *Bell v. Hood,* on other constitutional rights. Although some federal courts refused to extend the constitutional tort theory to cases not directly involving the Fourth Amendment,[25] many did apply the *Bivens* doctrine, not only to Fourth Amendment violations but to violations of other constitutional guarantees as well.[26] Currently, the constitutional tort doctrine has been expanded and applied by the circuit courts in cases involving the First, Fifth, Sixth, Eighth, Ninth, Thirteenth and Fourteenth Amendments.[27]

In *Economou,* the Supreme Court addressed the question which had been considered by the courts of appeals of every circuit in the wake of *Bivens:* Are public officials subject to constitutional restraints? The Court answered this question directly: "[I]t cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution."[28] In light of *Economou,* it thus appears that the *Bivens* doctrine provides a remedy for all constitutional violations and that the federal courts will no longer recognize immunity in any case where a state official could be sued under the Civil Rights Acts of 1866 or 1871.[29] The Court explained in *Economou* that there is no basis for according federal officials a higher degree of immunity from liability when they are sued for a constitutional infringement under *Bivens* than is accorded state officials when they are sued for an identical violation under section 1983. The responsibilities and standard of care are essentially the same for both groups of employees. The Court concluded that federal officials should enjoy no greater protection when they violate federal constitutional rules than that enjoyed by state officers.[30] Thus, the exposure to civil liability for federal employees is considerably broadened by the *Economou* decision.

Substantive and procedural rights benefiting federal employees are to be found in federal case law and various statutes and

25. *See* Lehmann, *supra* note 15, at 566 nn. 226 & 227 (for cases avoiding extension).

26. *Id.* at 567 n.229.

27. *See* note 25 *supra.*

28. 438 U.S. at 495.

29. 42 U.S.C. §§ 1981, 1983, 1985 (1976). These provisions provide a substantive cause of action—and perhaps more important, a federal forum—for the redress of constitutional violations.

30. 438 U.S. at 504.

regulations. These include the Civil Service Reform Act of 1978,[31] the Age Discrimination in Employment Act,[32] and the Equal Employment Opportunities Act of 1972.[33] Federal government supervisors taking action adverse to their employees' interests therefore disregard pertinent cases, statutes and regulations at their peril, since deprivations of rights found in the law and regulations may give rise to an action for damages under the Fifth Amendment and other constitutional provisions.

Within the last decade, the Federal Constitution has been construed to offer minimum protections to certain classes of public employees. These constitutional protections can now be enforced by *Bivens-Economou* suits by employees against supervisors or administrators in the federal government. Before turning to a discussion of *Economou,* it is appropriate to identify the constitutional protections enjoyed by government employees which, if violated, could give rise to constitutional tort liability. This analysis is offered to provide a framework in which to consider the true impact of *Economou.*

II. Employee Rights Under the Constitution—An Overview

A. Property and Liberty Rights

The Fifth and Fourteenth Amendments provide that no person shall be deprived of liberty or property without due process of law and are recognized as providing minimum employment protection for certain public employees. The due process clauses of these amendments protect the liberty and property interests of employees who are affected by the adverse actions of their government supervisors and give rise to procedural protections when those rights are violated. *Butz v. Economou*[34] extends this basic protection by giving rise to the personal liability of supervisors in certain cases. Although the likelihood of success for such plaintiffs is not great, after *Economou* the possibility of constitutional tort actions against supervisors for wrongful discharge now exists.

31. 5 U.S.C. § 2301 (Supp. III 1979).
32. 29 U.S.C. § 633(a) (1976).
33. 42 U.S.C. § 2000(e) (1976).
34. 438 U.S. 478 (1978).

Tenure rights are one example of property rights protected by the due process clause. Where such property rights are violated by a dismissal, the employee has a constitutional right to question the grounds of the action taken against him. This concept of a "property interest in re-employment," or tenure, was discussed in 1972 in two companion cases involving college professors: *Board of Regents v. Roth*[35] and *Perry v. Sindermann.*[36] In *Roth,* the Court held that a non-tenured employee serving under his first one-year contract does not have a "property interest" in renewal for a second year and therefore has no right to notice or a hearing, and may be denied the opportunity to challenge his employer's reasons for terminating his employment. The Court recognized that property interests may take many forms, but that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it."[37] The Court found that Mr. Roth's contract did not give rise to any such expectation regarding his continued employment. In *Perry v. Sindermann,* the Court thoroughly analyzed the plaintiff's claim of entitlement by reviewing his employment history. The Court looked closely at the tenure program, the rules, regulations and the eleven-year history of annual renewals of the plaintiff's employment contract. The Court even assessed the subjective understandings of other employees. The majority noted:

> A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in reemployment. . . . Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, . . . so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure.[38]

Having found such tenure rights, the Court in *Perry v. Sindermann* held that the respondent was entitled to a hearing in

35. 408 U.S. 564 (1972).
36. 408 U.S. 593 (1972).
37. 408 U.S. 564, 577.
38. 408 U.S. 593, 601-02 (citation omitted).

which he could challenge the sufficiency of the grounds for his nonretention.[39]

Tenure rights in the federal service are defined by statute.[40] An agency may take adverse action against an employee who has completed one year of continuous employment and is not serving a probationary trial period "only for such cause as will promote the efficiency of the service."[41] Where adverse action is limited to suspension for fourteen days, such employees have a statutory right to written notice stating specific reasons for the proposed action.[42] They also may retain an attorney or other representation, may comment orally or in writing, and must be permitted the opportunity to furnish affidavits and documents prior to any decision.[43] Employees also are entitled to a specific statement of reasons for the agency's final decision.[44] Similar rights on a specified timetable are provided where removal, suspension for more than fourteen days, reduction in grade or pay, or forced furlough is sought,[45] although the statute specifically excludes certain employees and actions.[46]

In a three-justice plurality opinion, in *Arnett v. Kennedy*,[47] the Supreme Court upheld a federal statutory scheme which provides for specific due process rights that fall short of the constitutional standard. The Court reasoned that where federal employees' property rights are limited by the same law under which those

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39. *Id.* at 603.

40. 5 U.S.C. § 3301 (1970). *See* Exec. Order No. 10,880, 25 Fed. Reg. 5131 (1960), *reprinted in* 5 U.S.C. § 3301.

41. 5 U.S.C. § 7513(a) (1976 & Supp. III 1980).

5 U.S.C. § 7512 (1976 & Supp. III 1980) states that an adverse action includes: (1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less, but exempts suspension of removal action deemed necessary in the interest of national security by the head of an agency. Section 7503 sets forth procedures for suspension of 14 days or less. Section 7513 sets forth procedures, distinct from those of § 7503, for removal, suspensions of longer duration, reduction in grade or pay, or furlough.

42. 5 U.S.C. § 7503(b)(1) (1976 & Supp. III 1980).

43. *Id.* at § 7503(b)(2) & (3).

44. *Id.* at § 7503(b)(4).

45. *Id.* at § 7513.

46. *Id.* at §§ 7511-12. Suspension or removal deemed in the interest of national security by an agency head, pursuant to 5 U.S.C. § 7532, reductions in grade of a supervisor or manager who has not completed the probationary period under 5 U.S.C. § 3321, reductions-in-grade of probationary supervisors, reductions-in-grade or removal under 5 U.S.C. § 4303 (1978), and action initiated under 5 U.S.C. §§ 1206 or 7521.

47. 416 U.S. 134 (1974).

rights are created, the employee is constitutionally limited in seeking a remedy. For example, where tenure rights are created by a statute which establishes limited employee due process procedures, not encompassing the right to a full hearing, employees will not be allowed to attack the constitutionality of procedures prescribed by the Act from which the tenure benefits are derived. Employees "must take the bitter with the sweet."[48] In such cases it is left to the legislative branch to define the appropriate procedures. However, the applicable government agency must be careful to comply with the legislative scheme when taking adverse action against an employee. To deviate from the scheme may constitute a deprivation of a constitutionally protected property interest.[49]

Probationers and untenured employees have substantially fewer rights than tenured employees.[50] This is because probationers do not have a "legitimate claim of entitlement" to their position. Thus, they do not possess a property interest and enjoy no constitutionally protected right to due process when adverse actions are taken,[51] unless a liberty interest is implicated by the manner in which they are dismissed.

The extent of an employee's liberty interest was described in *Wisconsin v. Constantineau*:[52] "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[53] For a probationer, such a hearing will not result in reinstatement, but only provides the employee with an opportunity to clear his name. Where adverse action is taken against an employee, however, and the nature of the action affects his good

48. *Id.* at 154. The court has continued to diminish the due process rights afforded to public employees. *See* Bishop v. Wood, 426 U.S. 341 (1976); Note, *supra* note 18.

49. *See* Hortonville Joint-School Dist. v. Hortonville Educ. Ass'n., 426 U.S. 482 (1976); Vitarelli v. Seaton, 359 U.S. 535 (1959) (an agency must follow its own regulations); Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976). In Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972) the court held that where an agency does grant a full hearing, it is of a quasi-judicial character, and due process requires that it be open to the press and public.

50. *Compare* 5 C.F.R. §§ 752.201-.203 (1980) *with* §§ 752.301-.406 (1980).

51. Board of Regents v. Roth, 408 U.S. 564 (1972); *see* Sampson v. Murray, 415 U.S. 61 (1974); Jenkins v. United States Post Office, 475 F.2d 1256 (9th Cir. 1973); 5 U.S.C. § 7511 (Supp. III 1980) (defining employees covered by the Civil Service Reform Act, *supra* note 31, which excludes probationary employees from adverse action protections).

52. 400 U.S. 433 (1971).

53. *Id.* at 437. *See* Board of Regents v. Roth, 408 U.S. at 573 (making it clear that this concept applies to public employees).

name, reputation, honor or integrity, supervisors may be liable for injuring the employee's constitutionally protected interest. Undue deprivation of such a liberty interest may give rise to a *Bivens-Economou* suit brought directly under the Constitution as an analog to the common-law tort of defamation. Publicizing the grounds for discharge may have the necessary stigmatizing effect.[54] A person is not deprived of liberty if he remains free to seek another job and there is no public disclosure of the reasons for the discharge.[55] When his reputation and ability to seek further employment are affected, however, a liberty interest is implicated because the attendant stigma forecloses the freedom to take advantage of other employment opportunities.[56] *Churchwell v. United States*[57] presented such a case.

In *Churchwell*, a probationary registered nurse was discharged without a pretermination hearing for " 'conduct on the job, and irregularities in the inventory of controlled drugs, occurring during [her] tour of duty as charge nurse.' "[58] A Standard Form 50 was placed in her personnel file stating that she was discharged " 'for not meeting the standards set forth for a professional nurse.' " Under governing regulations, this form was available to subsequent employers for their review. The court determined that a stigma had attached.[59]

A probationer deprived of a hearing will not be entitled to reinstatement, although a court may order the removal from his personnel file of any stigmatizing material.[60] Furthermore, in any suit alleging a deprivation of liberty due to stigma, the employee must allege that the stigmatizing material in the file is untrue.[61]

Many questions remain concerning the definition of stigma and the defenses available to allegations of an *Economou* constitutional tort for the deprivation of an employee's liberty interest. It

54. Arnett v. Kennedy, 416 U.S. 134, 157 (1974).

55. Bishop v. Wood, 426 U.S. 341, 348 (1976).

56. 408 U.S. at 573; *see also* Codd v. Velger, 429 U.S. 624 (1977); Paul v. Davis, 424 U.S. 693 (1976). *Paul v. Davis* makes it clear that stigma alone is insufficient. Courts will require that real and measurable injury be demonstrated.

57. 545 F.2d 59 (8th Cir. 1976).

58. *Id.* at 60 (quoting letter of termination dated May 5, 1975).

59. *Id.* at 62-63. *See also* Missouri *ex rel.* Gore v. Wochner, 620 F.2d 183 (8th Cir. 1980).

60. Casey v. Roudebush, 395 F. Supp. 60 (D. Md. 1975).

61. *Id.* at 63.

appears that where untrue statements by a supervisor result in the employee's discharge, reduction of employment opportunities, or injury to the employee's reputation, a damage action against the supervisor may lie.[62] It seems equally clear, however, that a liberty interest will not be found and that the affected employee will not be entitled to a hearing or to a cause of action for a constitutional tort in the following cases: (1) where the reasons for dismissal are accurate and not disputed by the employee; (2) where the reasons for dismissal (whether accurate or not) are not disclosed outside the employing agency; or (3) where the reasons for dismissal may damage the employee's reputation, but not to the extent of foreclosing other employment opportunities.

B. First Amendment Free Speech Protections

In order to ensure basic efficiency in public service, broader limitations than those which affect the general public may be placed on public employees' First Amendment rights. The seminal case on this issue is *Pickering v. Board of Education.*[63] The Court in *Pickering* noted that "[t]he problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[64] In upholding Pickering's right to free speech, the Supreme Court declined to lay down a general standard; it simply stated that all speech is to be balanced on a case-by-case basis against the employer's interest in maintaining the efficiency of the service. In *Pickering,* it could neither be shown nor presumed that Pickering's public statements, which were critical of school board fiscal policy, in any way impeded the teachers' proper job performance or interfered with the general operation of the schools. The Court held that school fund-

62. *See* Churchwell v. United States, 545 F.2d 59 (8th Cir. 1976); Velger v. Cawley, 525 F.2d 334 (2d Cir. 1975), *rev'd on other grounds sub nom.* Codd v. Velger, 429 U.S. 624 (1977); United States v. Briggs, 514 F.2d 794 (5th Cir. 1975); Rolles v. Civil Serv. Comm'n, 512 F.2d 1319 (D.C. Cir. 1975); Wellner v. Minnesota State Junior College, 487 F.2d 153 (8th Cir. 1973); McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973); Giordano v. Roudebush, 448 F. Supp. 899 (S.D. Iowa 1977); Casey v. Roudebush, 395 F. Supp. 60 (D. Md. 1975); Lindsay v. Kissinger, 367 F. Supp. 949 (D.D.C. 1973). Regarding stigma, *see also* Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977).

63. 391 U.S. 563 (1968).

64. *Id.* at 568.

ing is a matter of legitimate public concern and that open debate is vital to informed decisionmaking by the electorate. But the Court noted that false statements, made knowingly and recklessly, are a disservice to public debate and can adversely affect the decision-making process.[65]

The Court in *Pickering* identified certain factors involving significant governmental interests sufficient to overcome the ordinary presumption favoring an employee's First Amendment right to criticize his employer, supervisor or fellow employee. These factors include: (1) the need for maintaining discipline and harmony in the agency;[66] (2) the need for confidentiality of agency affairs;[67] (3) the need to protect the overall operation of the employer;[68] (4) the need to insure that the employee's ability to perform duties has not been diminished as a result of the employee's having made unfounded statements;[69] and (5) the need to maintain close, personal working relationships requiring personal loyalty and confidence.[70] Some lower courts have held that public statements concerning matters not of public concern, recurring disputes with superiors, and extremely disrespectful and grossly offensive remarks are beyond constitutional protection.[71]

In *Arnett v. Kennedy,*[72] a government employee was discharged for publicly accusing his superior of bribery. The Supreme Court determined that the subordinate's public criticism seriously undermined the effectiveness of the working relationship and "improperly" damaged and impaired the reputation and efficiency of the employing agency. Consequently, the Court held that the employee's discharge could not be constitutionally prohibited, and stated:

> The phrase "such cause as will promote the efficiency of the ser-

65. Knowingly false statements and false statements made with reckless disregard of the truth have been denied constitutional protection. Garrison v. Louisiana, 379 U.S. 64, 75 (1964). However, the Court declined to consider whether such statements are protected if they have no harmful effects. 391 U.S. at 574 n.6.

66. 391 U.S. at 569-70 n.3.

67. *Id.* at 570.

68. *Id.* at 573.

69. *Id.* at 572-73.

70. *Id.* at 570.

71. *See, e.g.,* Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), *cert. denied,* 411 U.S. 972 (1975); Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir. 1973); Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).

72. 416 U.S. 134 (1974).

> vice" as a standard of employee job protection is without doubt intended to authorize dismissal for speech as well as other conduct. . . . [I]n certain situations the discharge of a Government employee may be based on his speech without offending guarantees of the First Amendment.[73]

The Court in *Arnett* cited with approval the District of Columbia Circuit opinion in *Meehan v. Macy*,[74] which stated:

> [I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes "catchall" clauses prohibiting employee "misconduct," "immorality," or "conduct unbecoming." We think it is inherent in the employment relationship as a matter of common sense if not [of] common law that [a government] employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory [cartoons]. . . . [Dismissal in such circumstances neither] comes as an unfair surprise [nor] is so unexpected and uncertain as to chill . . . freedom to engage in appropriate speech.[75]

The existence of a special superior-subordinate relationship may constitute a significant factor in the balancing of interests. In *Sprague v. Fitzpatrick*,[76] an assistant district attorney publicly disputed the truth of statements made to the press by the district attorney. The court, applying the *Pickering* balancing test, found that the crucial variant in this case was the hierarchical proximity of the criticizing employee to the person criticized as well as the close working relationship, mutual confidence and cooperation which were necessary for the smooth operation of the District Attorney's office.[77] The court distinguished *Pickering*, in which the teacher's statements were in no way directed toward any person with whom he would normally come into contact in the course of his daily work.[78] *Sprague v. Fitzpatrick* suggests that the closer the proximity of persons affected by the speech in issue, the greater the chances that harmonious relationships with superiors

73. 416 U.S. at 160 (citations omitted).
74. 392 F.2d 822 (D.C. Cir.), *remanded*, 425 F.2d 469 (1968), *aff'd en banc*, 425 F.2d 472 (1969).
75. 392 F.2d at 835.
76. 546 F.2d 560 (3d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977).
77. 546 F.2d at 565-66.
78. *Id.* at 565.

and co-workers will be affected. "If the arousal of public controversy exacerbates the disruption of public service, then it weighs against, not for, First Amendment protection in the *Pickering* balance."[79] Where a person's role as a direct administrative and policymaking subordinate of the person criticized is involved, courts will find that the efficiency of the service is affected.

As a general rule, when the employment relationship is seriously undermined by what a subordinate says, First Amendment protections will not apply, and adverse action may be taken against that employee. As previously noted, however, adverse impact on the superior-subordinate relationship is not the sole criterion to be weighed in the *Pickering* balance. In *Sprague,* the court also considered the impact of public criticism, since the content of speech certainly becomes more significant when it is made publicly rather than within the agency.[80] Such public speech may lead to public debate, embroil an agency in controversy, result in dissension and inefficiency, and cause unwarranted difficulties in the work place. But while public speech may be reasonably limited, at least one case suggests that entirely different considerations might apply to intra-agency speech.

In *Ring v. Schlesinger,*[81] the United States Court of Appeals for the District of Columbia Circuit discussed *Roth, Sindermann, Arnett,* and *Pickering.* That case involved a teacher who sent a memorandum entitled "Richard Bushman's incompetency and lack of ethics as principal of George Cannon School" to four high-level administrators within the agency. Since no public statement was made and dissemination was internally limited, the court of appeals suggested that any adverse effect on the agency's efficiency would be limited[82] and remanded the case, directing the district court to apply the appropriate balancing test.[83]

A contrary result was reached by the Fifth Circuit, however, in *Ayers v. Western Line Consolidated School District.*[84] In that

79. *Id.* at 566.

80. *Id.* at 565. *See* Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 922 (1970) (civilian employee of the United States Air Force who taught basic English to foreign military officers was dismissed after making statements in the classroom critical of the United States).

81. 502 F.2d 479 (D.C. Cir. 1974).

82. *Id.* at 489.

83. *Id.* at 490.

84. 555 F.2d 1309 (5th Cir. 1977), *vacated & remanded sub nom.* Givhan v. Western

case, a vocal teacher persisted in taking lists of requests, or demands, to the principal. Included were requests that certain "choice" jobs be given to blacks, that the school administration and staff be better integrated, and that certain black workers be assigned semi-clerical rather than janitorial work. The principal recommended against rehiring the teacher "because of her 'arrogance and antagonistic and hostile relationship,' manifested in . . . her 'unreasonable demands.' "[85]

After analyzing *Pickering, Sindermann* and *Mt. Healthy City School District Board of Education v. Doyle,*[86] the Fifth Circuit announced that "[t]he three leading Supreme Court cases on teacher dismissals and freedom of speech illustrate the importance of protecting the right of *public* expression."[87] The court concluded that "[t]he strong implication of these cases is that private expression by a public employee is not constitutionally protected" and that "no one has a right to press even 'good' ideas on an unwilling recipient."[88] For this reason, the court held that the teacher had not engaged in constitutionally protected speech, and that "[n]either a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views."[89]

On certiorari, the United States Supreme Court vacated and remanded.[90] In a unanimous opinion delivered by Justice Rehnquist, the Court expressly rejected the circuit court's reasoning, stating:

> This Court's decisions in *Pickering, Perry* and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact.[91]

Line Consol. School Dist., 439 U.S. 410 (1979).

85. 555 F.2d at 1314.

86. 429 U.S. 274 (1977).

87. 555 F.2d at 1317 (emphasis added).

88. *Id.* at 1318-19 (footnote & citations omitted). *See also* City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).

89. 555 F.2d at 1319.

90. Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).

91. *Id.* at 414.

In cases where First Amendment rights are involved, the employee must first establish that "his constitutionally protected conduct played a 'substantial' role in the employer's decision not to rehire him."[92] The burden then shifts to the employer to establish by a preponderance of the evidence that it would have reached the same decision even without consideration of the protected expression.[93]

An employee may establish that adverse action taken against the employee by an agency was based on the exercise of free speech and may sue the charging supervisor in a personal capacity. As will be discussed later, however, the likelihood of recovery may be remote. Courts may be more likely to order reinstatement and back pay or find a valid qualified immunity. Litigation nevertheless may be avoided through awareness of the constitutional parameters of free speech protection.[94] The alert supervisor will clearly establish in the record either that the basis for his decision does not involve the exercise of protected free speech or that speech was not a substantial factor and that the supervisor relied on factors wholly independent of statements the employee may have made.[95]

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92. *Id.* at 416.

93. *Id.;* Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977).

94. A related First Amendment question—whistle-blowing to Congress—is recognized in 5 U.S.C. § 7211 (1978), which provides that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

Where an employee has testified before Congress or communicated with his representative, alert supervisors will be mindful of this provision. In any First Amendment case, however, if there is a separate and wholly independent basis for adverse action, the fact of the employee's speech should not deter the employer from good faith action against the employee. In *Mt. Healthy City School Dist. v. Doyle,* the Court noted that "[a] borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." 429 U.S. at 286. The Court in *Mt. Healthy* went on to consider the issue of results flowing from a constitutional violation by analogizing to the law of confessions, taint and dissipation discussion in Parker v. North Carolina, 397 U.S. 790 (1970); Wong Sun v. United States, 371 U.S. 471 (1963); Lyons v. Oklahoma, 322 U.S. 596 (1944); Nardone v. United States, 308 U.S. 338 (1939).

95. 429 U.S. at 285-86.

C. Fourth Amendment Protections

The Fourth Amendment provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[96] This protection applies to areas in which a person has a reasonable expectation of freedom from governmental intrusion and has been extended to office spaces, desks and other areas used by employees. In *Mancusi v. DeForte*,[97] the Supreme Court recognized that a person has standing to object to a search of his office as well as his home. The Court determined that had DeForte occupied a private office, seizure of records from a desk or filing cabinet in that office without either a warrant or his consent would violate the Fourth Amendment.[98] The Court further concluded that a reasonable expectation of privacy exists even in an office shared with fellow employees.[99] In *Villano v. United States*,[100] an employee's desk, of which he had neither ownership nor exclusive possession, was searched over his objection. The Tenth Circuit held that the desk was protected by the Fourth Amendment.[101] In *United States v. Blok*,[102] the District of Columbia Court of Appeals extended the Fourth Amendment protection to a desk in a government office which was assigned for the exclusive use of a single employee, holding that the search was unlawful with neither consent nor a warrant.[103]

Zones of privacy are not limited to desks. The same rationale may be extended to coats on hangers, lockers used exclusively by a single employee, attaché cases, wastebaskets, and similarly private areas.[104] It is important to note that a claim of Fourth Amendment

96. U.S. CONST. amend. IV.

97. 392 U.S. 364 (1968).

98. *Id.* at 369.

99. *Id.* It is settled that a person has standing to object to a search of his private office. *See, e.g.*, Goldman v. United States, 316 U.S. 129 (1942); United States v. Lefkowitz, 285 U.S. 452 (1932); Gouled v. United States, 255 U.S. 298 (1921); *but see* Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963).

100. 310 F.2d 680 (10th Cir. 1962).

101. *Id.* at 683.

102. 188 F.2d 1019 (D.C. Cir. 1951).

103. *Id.* at 1020-21.

104. *See, e.g.*, United States v. Bunkers, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975) (search of a locker); Nixon v. Sampson, 398 F. Supp. 107, 156 (D.D.C. 1975) (reasonable expectation of privacy discussed); United States v. Kahan, 350 F. Supp. 784 (S.D.N.Y. 1972) (wastebasket).

protection turns not upon any property right in the desk, locker or area searched, but rather upon the reasonable expectation of privacy or freedom from governmental intrusion.[105] This "reasonable expectation" has been defined by the Ninth Circuit: "The protection of the Fourth Amendment no longer depends upon 'constitutionally protected' places. Instead, we must consider 'first that a person [has] exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[106] *United States v. Bunkers*[107] recognizes that zones of privacy may be limited by agency regulations or union agreements.[108] Because the Postal Manual provided that Bunkers' locker was "subject to search" and because her union agreement recognized that searches could be conducted, the court concluded that Bunkers' locker was not protected by the Fourth Amendment and that a warrantless search was neither unreasonable nor unlawful.[109]

Fourth Amendment problems, then, generally arise when a search is conducted of a person or his property where a zone of privacy exists, but certain common situations do not involve a "search." What a person leaves in "plain view" or otherwise "knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection."[110] Furthermore, when an authorized inventory or inspection is conducted, a search does not technically occur.[111] The lack of law enforcement or police purpose in an inspection effort also bears upon whether a search

105. Mancusi v. DeForte, 392 U.S. 364, 368 (1968); *See* Katz v. United States, 389 U.S. 347, 352 (1967).

106. United States v. Bunkers, 521 F.2d 1217, 1219 (9th Cir. 1975) (quoting United States v. Hitchcock, 467 F.2d 1107, 1108 (9th Cir. 1972)).

107. 521 F.2d 1217 (9th Cir.), *cert. denied,* 423 U.S. 989 (1975).

108. *Id.* at 1221. Part 643 of the Postal Manual provided that the locker in question, which was furnished incident to employment by the Postal Service, was "to be used for [her] convenience and . . . [was] subject to search by supervisors and postal inspectors." The union agreement with the Postal Service recognized but restricted locker searches by providing that "[e]xcept in matters where there is reasonable cause to suspect criminal activity, a steward or an employee shall be given the opportunity to be present in any inspection of employees' lockers." *Id.* at 1219.

109. *Id.* at 1219-20.

110. Katz v. United States, 389 U.S. 347, 351 (1967).

111. *Cf.* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (opinion by Stewart, J.) (search and seizure of car); Harris v. United States, 390 U.S. 234 (1968) (seizure of car registration).

has occurred.[112] In *United States v. Kahan,*[113] a New York District Court discussed whether a criminal investigator's rummaging through an Immigration and Naturalization Service employee's wastebasket constituted a search. The court determined:

> This is not a case where an office supervisor or fellow employee in a government office is looking for some needed document or record and inadvertently happens upon incriminating evidence in the desk or wastebasket of another employee. Nor is it a situation where a supervisor is inspecting the area used by a subordinate in order to examine his work or to evaluate his performance on the job. There is no doubt that the government should be able to manage its agencies and offices effectively and without undue restrictions on the supervision of its employees. What would be normal in the supervision and control of employees in a private business should be allowable in government offices as well. Thus, to assure efficiency and honesty, government supervisors have authority to oversee the work of their employees.[114]

The court went on to distinguish specifically focused investigations of criminal activity from employer supervision or inspection activities. It explained that when a government supervisor begins an investigation of an employee because he suspects criminal conduct, he abandons his role as manager and becomes a criminal investigator for the government. Here the supervisor is no longer acting "to preserve efficiency in the office," but rather is preparing "a criminal prosecution against the employee."[115] The court held that such searches and seizures by supervisors or other government agents fall within the Fourth Amendment and that a search warrant must be obtained before they may be conducted.[116]

Inadvertent discoveries made while looking for government papers or property may not transgress the Fourth Amendment. Furthermore, a supervisor's authority to search a government desk or look through government or jointly used property is not generally considered to be a search of the employee's effects.[117] In addition, if the property and effects belong to the Government exclu-

112. *See* Wyman v. James, 400 U.S. 309 (1971) (permitting welfare caseworker to visit home without conducting a search of constitutional proportions).

113. 350 F. Supp. 784 (S.D.N.Y. 1972).

114. *Id.* at 791 (dictum).

115. *Id.*

116. *Id.*

117. United States v. Collins, 349 F.2d 863 (2d Cir. 1965); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951).

sively, the employee enjoys no Fourth Amendment protection against search and seizure.

A search that reveals inculpatory contraband, material or information can lead to adverse action and possibly to criminal prosecution. In criminal proceedings, the exclusionary rule may protect the employee where the supervisor improperly conducts an investigatory search. The exclusionary rule has no application, however, in intra-agency disciplinary proceedings, and it is entirely possible that an invasion of the employee's Fourth Amendment rights can still lead to his discharge. *Bivens* establishes that the courts may be willing to imply a constitutional tort remedy where no other remedy exists.[118] The law as it related to *Economou* is unsettled. The courts either can award damages for the invasion of privacy or, if criminal conduct is involved and the exclusionary rule is applicable, can refuse to imply a *Bivens* action since the employee is not without any recognized remedy. Where a supervisor invades a constitutionally protected area and fails to discover contraband or other evidence, however, the supervisor could be held liable in a *Bivens* action for money damages.

D. Fifth Amendment Protections

1. *The Privilege Against Self-Incrimination*

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."[119] This Amendment also protects the witness if he is called to testify against himself in a civil or criminal proceeding where his answers might incriminate him in future criminal proceedings.[120] Although it is unlikely that a Fifth Amendment *Bivens-Economou* suit against a superior based on intra-agency interview procedures

118. In *Kahan,* the court noted that whether an employee could claim Fourth Amendment protection in a government office had been less clear than the private office situation, but found that public employees are entitled to the benefits of the Constitution, just like anyone else. The court relied on several Fifth Amendment cases which it believed to imply that the public employee retains the Fourth Amendment protection while employed in a government office. 350 F. Supp. at 794. *See* Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280, 284 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967).

119. U.S. CONST. amend. V.

120. Lefkowitz v. Turley, 414 U.S. 70 (1973); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

would be successful,[121] the basic protections are nevertheless relevant to employer and employee conduct.

Although the government has a strong legitimate interest in maintaining the integrity of its civil service, public employees do not lose their constitutional privilege against self-incrimination by virtue of having accepted public employment. An agency may grant its employee immunity from prosecution where there is a public interest sufficient to secure an accounting of the public trust. Having acquired immunity, the employee must answer potentially incriminating questions concerning his official duties, and such "criminally immune" public employees may be constitutionally discharged for refusing to answer questions. Although they may not be prosecuted for their answers once immunity has been granted, they may be discharged as a result of them.[122]

Gardner v. Broderick[123] stated that without a grant of immunity, an employee may not be constitutionally discharged for refusing to waive his Fifth Amendment rights. In the companion case of *Uniformed Sanitation Men v. Commissioner,*[124] public employees were officially interrogated and were advised that refusal to sign waivers of immunity would lead to their dismissal. The Court found this procedure unconstitutional because the state had presented the employees with "a choice between surrendering their constitutional rights or their jobs."[125] *Garrity v. New Jersey,*[126] likewise held that a statement obtained involuntarily under threat of adverse action is inadmissable in any criminal proceeding. Thus, if threats are employed or if the interview is coercive, the employee will have a *de facto* grant of immunity, as was implied in *Garrity.* The same result obtains when the employer fails to warn an em-

121. Garrity v. New Jersey, 385 U.S. 493 (1967). *Garrity* relied on dictum in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892): "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms that are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control." *Id.* at 220, 29 N.E. at 517.

122. Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968).

123. 392 U.S. 273 (1968).

124. 392 U.S. 280 (1968).

125. *Id.* at 284.

126. 385 U.S. 493 (1967).

ployee of the consequences of his statements or of his Fifth Amendment privilege.[127] It is axiomatic that an employee who, after being warned of his jeopardy, cooperates in an investigation or interview and speaks voluntarily may be discharged for any misconduct he reveals.[128]

Supervisors and agency investigators must comply with the federal regulatory scheme that parallels the state and municipal regulations involved in *Garrity, Sanitation Men* and the *Lefkowitz* cases and requires the employee to answer questions only in certain circumstances. Agencies of the federal government are free to promulgate their own regulations defining offenses and providing sanctions. Under authority granted by Executive Order,[129] for example, the Navy Department has promulgated regulations creating specific offenses.[130] "[F]alse testimony or refusal to testify in an inquiry, investigation or other official proceeding"[131] is punishable with sanctions ranging from reprimand to removal. "Falsification, misstatement or concealment of material fact in connection with any official record" carries the same punishment.[132]

The likelihood of success in a *Bivens-Economou* suit for violation of an an employee's constitutional rights under such circumstances is unclear. It would seem that a damages claim would lie, for example, where a supervisor who is required to advise an employee of the possible consequences of his answers or his right to remain silent fails to do so. If the employee admits facts that lead to his discharge, however, the discharge will probably be permitted to stand even though a *de facto* grant of immunity from prosecution is created by the supervisor's conduct. No case has interpreted the Fifth Amendment as barring adverse administrative action taken as a result of information obtained in violation of that Amendment. We are unaware of authority which would require reinstatement in such a situation. Even so the courts may prohibit a constitutional tort recovery on the ground that the employee already possesses a "remedy" in the form of *de facto* immunity, which is comparable to the exclusionary rule. This factor is dis-

127. *Id. See* Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973).

128. Womer v. Hampton, 496 F.2d 99 (5th Cir. 1974).

129. Exec. Order No. 9,830, 12 Fed. Reg. 1259 (1947).

130. *Dep't of Navy Adverse Actions,* CIVILIAN PERSONNEL INSTRUCTIONS 752, app. B-7 (Oct. 20, 1980).

131. *Id.*

132. *Id.*

cussed at length by Chief Justice Burger in his dissent in *Bivens*.[133]

2. *Fifth Amendment Equal Protection*

Sex discrimination by the federal government violates the Fifth Amendment.[134] Although it is clear that gender-based classifications must withstand equal protection scrutiny, only intermediate scrutiny will be employed by the Supreme Court.[135] Similarly, gender-based retaliation cases also may give rise to constitutional tort liability.[136] This question was recently presented in *Davis v. Passman*,[137] wherein the Fifth Circuit Court of Appeals declined to imply a remedy,[138] but the Supreme Court granted certiorari[139] and reversed on June 5, 1979.[140]

In *Davis*, the Supreme Court held that a cause of action and a damage remedy may be implied directly under the equal protection component of the due process clause of the Fifth Amendment to redress sex discrimination in federal employment.[141] The plaintiff in *Davis* was a congressional employee unprotected by Title VII. That there was no remedy available to redress the sex discrimination was an important factor in the Court's decision.[142] The scope of employee remedies available when Title VII is applicable

133. 403 U.S. at 414-22 (Burger, C.J., dissenting).

134. Vance v. Bradley, 440 U.S. 93, 95 n.1 (1979); Hampton v. Wong, 426 U.S. 88, 100 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

135. "To withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'" Califano v. Webster, 430 U.S. 313, 316-17 (1977) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

136. Davis v. Passman, 442 U.S. 228 (1979). *Cf.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (where a female government employee's job was abolished because she refused her male supervisor's sexual advances, the appropriate remedy was in the Equal Employment Opportunity Act of 1972, the Civil Rights Act of 1964, and 42 U.S.C. § 2000(e)).

137. 571 F.2d 793 (5th Cir. 1978), *rev'd*, 442 U.S. 228 (1979).

138. 571 F.2d at 800.

139. 439 U.S. 925 (1978).

140. 442 U.S. 228 (1979).

141. *Id.* at 244.

142. *Id.* at 245. The Court noted that equitable relief in the form of reinstatement could not be ordered because Passman was no longer in Congress; nor was the petitioner's claim actionable under state law, "since it involves the application of the Fifth Amendment to a federal officer in the course of his federal duties." *Id.* at 246 n.23. These factors compelled the conclusion that the federal court was the most appropriate forum. *Davis* is discussed in notes 195-206 and accompanying text *infra*.

will be explored in the next section.

III. The Implication of Constitutional Torts in Title VII Cases

A. The Implication of a Constitutional Tort Cause of Action

After *Brown v. General Services Administration*,[143] most courts were reluctant to imply a constitutional tort where a Title VII remedy existed. But in *Broshnahan v. Eckerd*,[144] an employee brought a Title VII employment discrimination claim against the General Services Administration and against agency officials who were sued in their individual capacities for alleged violations of plaintiff's constitutional rights. The several named defendants allegedly had been responsible for plaintiff's wrongful discharge from the General Services Administration. The government, relying on *Brown v. General Services Administration*,[145] filed a motion to dismiss contending that the damage action brought against individual defendants was precluded by the existence of Title VII remedies. The court distinguished *Brown v. General Services Administration* on the ground that the plaintiff in that case had not filed his complaint in a timely fashion, and suggested the "delicate balance of administrative and judicial remedies in Title VII,"[146] a factor relied on by the Supreme Court as a basis of decision in *Brown v. General Services Administration*, would not be upset by a suit brought under section 1985(3) of Title 42 of the United States Code, and the Constitution. This is so, the court reasoned, because "[t]he damage action seeks special remedies, not merely equitable relief from employment discrimination, and is not foreclosed by the enactment of the 1972 amendments to Title VII."[147]

Similarly, the district court in *Founding Church of Scientology, Inc. v. FBI*[148] held that where only injunctive relief is sought against named federal employees, Title VII is the exclusive

143. 425 U.S. 820 (1976) (holding that § 717 of the Civil Rights Act of 1964 is the exclusive remedy available to a federal employee complaining of employment discrimination).

144. 435 F. Supp. 26 (D.D.C. 1977).

145. 425 U.S. 820 (1976).

146. 435 F. Supp. at 28.

147. *Id.*

148. 459 F. Supp. 748 (D.D.C. 1978).

remedy for religious discrimination.[149]

Whether or not to imply a constitutional cause of action where a Title VII remedy is available was also addressed in *Neely v. Blumenthal*[150] and *Davis v. Passman.*[151] In the *Neely* opinion, handed down just seven days after the *Economou* decision was released,[152] Judge John J. Sirica declined to imply a remedy for discrimination under the Fifth Amendment for an employee covered by Title VII.[153] In *Davis*, the Supreme Court held that a congressional employee, not covered by Title VII, stated a cause of action for damages under the Fifth Amendment when she alleged that she was discharged because of her sex.[154]

When assessing whether to imply a constitutional remedy where a statutory remedy exists, the courts have relied on *Bivens* to the extent that it implied a remedy only because no other remedy was available to the plaintiff. Webster Bivens had brought an action for damages against federal narcotics agents who allegedly used unreasonable force both in searching his apartment and in arresting him without either a warrant or probable cause. The Supreme Court held that federal courts have the power to award damages for violations of constitutionally protected interests. In deciding if an award of compensatory damages was "necessary" or "appropriate" to the vindication of Bivens' interest, Justice Harlan noted that some form of damages was the only possible remedy for someone in Bivens' position, that no adequate remedy existed under state law, that a suit against the United States for acts of its agents was barred by sovereign immunity, that injunctive relief was not appropriate, and that "[f]or people in Bivens' shoes, it is damages or nothing."[155]

Bivens' suit for damages from federal narcotics agents for the violation of his Fourth Amendment rights was allowed by the Supreme Court.

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should

149. *Id.* at 759.
150. 458 F. Supp. 945 (D.D.C. 1978).
151. 442 U.S. 228 (1979).
152. *Neely* was decided on July 6, 1978, and did not consider *Economou.*
153. 458 F. Supp. at 960.
154. 442 U.S. at 244.
155. 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

> hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. . . . Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[156]

The Court noted that there had been no explicit congressional declaration that persons injured by federal officers were barred from recovering damages.[157] Relying on *Marbury v. Madison,* the Court added that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[158]

Having concluded that a remedy must be afforded those wronged by federal officials who transgress constitutional bounds, the Court considered whether a remedy could be created judicially. The United States Circuit Court of Appeals for the Second Circuit had essentially reasoned that

> (1) the framers of the Fourth Amendment did not appear to contemplate a "wholly new federal cause of action founded directly on the Fourth Amendment," . . . and (2) while the federal courts had power under a general grant of jurisdiction to imply a federal remedy for the enforcement of a constitutional right, they should do so only when the absence of alternative remedies renders the constitutional command a "mere 'form of words.'"[159]

The Supreme Court disagreed:

> The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. *Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional*

156. 403 U.S. at 395-96 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
157. 403 U.S. at 397.
158. *Id.* (citations omitted).
159. *Id.* at 399 (Harlan J., concurring) (citations omitted).

policy underpinning the substantive provisions of the statute.[160]

The Court seemed to suggest that, absent congressional restrictions, the scope of equitable remedial discretion and inherent equitable power is very broad.[161]

In *Economou,* the Court referred to the *Bivens* decision in its discussion of whether a remedy could be implied.[162] Several points made by the Court are instructive:

> The presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question of whether to infer a right of action for damages for a particular violation of the Constitution. In *Bivens* the Court noted the "absence of affirmative action by Congress" and therefore looked for "special factors counselling hesitation." Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim.[163]

From the Court's discussion in *Bivens* and *Economou* emerges an extremely broad equitable power in the courts to grant redress of monetary damages against responsible officials under the general federal question jurisdiction of the district court. Significantly, neither *Bivens* nor *Economou* involved claims for relief which were also subject to comprehensive legislation such as Title VII. For actions under the Civil Rights Acts,[164] individual officials would clearly be amenable to suits for damages after *Economou* because, as indicated above, *Economou* points out that federal officials are subject to restraints imposed by the Federal Constitution. As a threshold matter, the courts must consider whether the statutory remedy is intended to be exclusive and whether it is appropriate to imply a *Bivens-Economou* remedy under the Constitution. The court must then determine: (1) whether damages are " 'necessary' or 'appropriate' for the vindication of plaintiff's interest;" (2)

160. *Id.* at 402 (emphasis added).

161. *Id.* at 404. The Court also noted, however, that "the federal judiciary is not empowered to grant equitable relief in the absence of Congressional action extending jurisdiction over the subject matter of the suit." *Id.*

162. 438 U.S. at 504.

163. *Id.* at 503 (quoting Bivens v. Six Unknown Named Agents, 403 U.S. at 396-97, 409).

164. Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981, 1983, 1985 (1976).

whether there exist "special factors counselling hesitation;" (3) whether the type of injury involved is normally compensable in damages, and (4) whether the courts are qualified to handle the plaintiff's claim.

A recent case sheds some light on the Court's willingness to permit a constitutional tort action against a government official even when another remedy is available. In *Carlson v. Green*,[165] the United States Supreme Court held that a *Bivens* remedy is available to a plaintiff even though an alternative remedy exists under the Federal Tort Claims Act.[166] In *Green*, the administratrix of an estate brought suit against the director of the Federal Bureau of Prisons, alleging that the decedent, while a prisoner in an Indiana federal prison, suffered fatal injuries due to the respondent's failure to provide medical care in violation of decedent's Eighth Amendment rights. The district court dismissed the suit, claiming lack of subject-matter jurisdiction, and the Court of Appeals for the Seventh Circuit reversed.[167]

The Supreme Court adopted the reasoning of the Seventh Circuit[168] and embellished upon it.[169] The Court first restated the holding in *Bivens* that "the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[170] Such a claim for relief may be defeated where (1) "special factors counselling hesitation" are present,[171] or where (2) an alternative remedy is present which "Congress has . . . declared to be a *substitute* for recovery directly under the constitution and viewed as equally effective."[172] The Court, noting that neither situation was evident in the case, allowed the recovery of damages against the federal official for the constitutional violation.[173]

165. 446 U.S. 14 (1980).

166. *Id.* at 20.

167. 581 F.2d 669 (7th Cir. 1978).

168. 446 U.S. at 24.

169. The primary issue adjudicated—whether a *Bivens* action can be maintained notwithstanding the availability of a FTCA remedy—was first presented in the petition for certiorari. 446 U.S. at 17 n.2.

170. *Id.* at 18.

171. *Id.* (quoting Bivens v. Six Unknown Named Agents, 403 U.S. at 396).

172. 446 U.S. at 18-19 (emphasis in original).

173. *Id.* at 25. *Cf.* Robertson v. Wegmann, 436 U.S. 584 (1978); Torres v. Taylor, 456 F. Supp. 951 (S.D.N.Y. 1978); Hernandez v. Lattimore, 454 F. Supp. 763 (S.D.N.Y. 1978), *rev'd*, 612 F.2d 61 (2d Cir. 1979).

B. Title VII as an Exclusive Remedy

Broshnahan v. Eckerd[174] stands alone among a number of United States District Court holdings which reach a contrary result on the question of whether the district court has jurisdiction to entertain a constitutional tort suit in conjunction with or instead of a Title VII claim.[175] The leading case on the point, distinguished in *Broshnahan,* is *Brown v. General Services Administration.*[176]

Clarence Brown, a black employee of the General Services Administration, filed suit alleging employment discrimination violative of Title VII and section 1981.[177] The district court dismissed the complaint, and its decision was affirmed by the Second Circuit, which held that section 717 of Title VII of the Civil Rights Act of 1964, was the exclusive remedy for federal employment discrimination. The circuit court also held that the complaint had not been timely filed.[178]

The Supreme Court affirmed,[179] noting that the legislative debates and the structure of the 1972 amendment extending Title VII to federal employees indicated that "the congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination."[180] The Court distinguished private employee remedies under Title VII, which are not exclusive, since sovereign immunity is not an issue and since the legislative history of the 1964 Act

174. 435 F. Supp. 26 (D.D.C. 1977). *See* notes 144-48 and accompanying text *supra.*

175. *See, e.g.,* James v. Rumsfeld, 580 F.2d 224 (6th Cir. 1978); Scott v. Perry, 569 F.2d 1064 (9th Cir. 1978); Swain v. Hoffman, 547 F.2d 921 (5th Cir. 1977); Gissen v. Tackman, 537 F.2d 784 (3d Cir. 1976); Stith v. Barnwell, 447 F. Supp. 970 (M.D.N.C. 1978); Neely v. Blumenthal, 458 F. Supp. 945 (D.D.C. 1978); Carter v. Marshall, 457 F. Supp. 38 (D.D.C. 1978); Berio v. EEOC, 446 F. Supp. 171 (D.D.C. 1978); Tapp v. United States, No. 77-1296 (D.D.C. filed Dec. 9, 1977) (unpublished opinion); Beckwith v. Hampton, 430 F. Supp. 183 (D.D.C. 1977); Dual v. Roudebush, No. 76-005 (D.D.C. filed Feb. 9, 1977) (unpublished opinion); Royal v. Bergland, 428 F. Supp. 75 (D.D.C. 1977); Marynowych v. Boorstin, No. 76-1480 (D.D.C. filed Feb. 8, 1977) (unpublished opinion); Beeman v. Middendorf, 425 F. Supp. 713 (D.D.C. 1977); Johnson v. Hoffman, 424 F. Supp. 490 (D.D.C. 1977); Pace v. Mathews, No. 76-99 (D.D.C. filed July 22, 1976) (unpublished opinion); Tufts v. United States Postal Service, 431 F. Supp. 484 (N.D. Ohio 1976); Gaballah v. Roudebush, 421 F. Supp. 475 (N.D. Ill. 1976); Allen v. Crosby, 416 F. Supp. 1092 (E.D. Pa. 1976).

176. 425 U.S. 820 (1976).

177. 42 U.S.C. § 1981 (1976).

178. 507 F.2d 1300 (2d Cir. 1974).

179. 425 U.S. 820 (1976).

180. *Id.* at 829.

" 'manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' "[181]

The United States Court of Appeals for the Third Circuit decided *Gissen v. Tackman*[182] a month after *Brown v. General Services Administration* was handed down and held *Brown* to be controlling.[183] In *Gissen*, a former employee of the Department of Housing and Urban Development asserted a claim alleging that his superiors discriminated against him on the basis of his race and religion in violation of the Fifth Amendment. The court, following *Brown*, dismissed plaintiff's Fifth Amendment claims and held that Title VII provided the *exclusive* remedy available to an individual federal employee complaining of job related discrimination.[184] The court quoted from *Brown:*

> The legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy. And the case law suggests that that conclusion was entirely reasonable.
>
> . . . [T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.[185]

In the wake of *Brown*, most courts have accepted its applicability without analysis. Judge Flannery was the first judge of the United States District Court for the District of Columbia to discuss the issue in more than a summary fashion. In *Berio v. EEOC*,[186] the plaintiff asserted claims under Title VII and the due process clause of the Fifth Amendment. She sued her supervisor, a branch chief, in both his individual and his official capacity, for alleged discrimination due to her national origin and in retaliation for her opposition to the defendant's discriminatory practices. The supervisor's motion to dismiss the allegations against him was predicated on *Brown*. The plaintiff sought to distinguish *Brown* on the ground that she, unlike Brown, had complied with the jurisdic-

181. *Id.* at 833 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974)).

182. 537 F.2d 784 (3d Cir. 1976). *Brown v. G.S.A.* was decided June 1, 1976; *Gissen* on July 2, 1976.

183. 537 F.2d at 785.

184. *Id.* at 786.

185. *Id.* (citing Brown v. G.S.A., 425 U.S. at 828).

186. 446 F. Supp. 171 (D.D.C. 1978).

tional prerequisites of Title VII[187] and that the defendant in this case was being sued in his individual capacity.[188] She relied on *Broshnahan v. Eckerd.*[189] Judge Flannery found that the procedural posture of the case did not alter the holding of *Brown* that a federal employee's Title VII remedy is exclusive and pre-emptive.[190] With regard to plaintiff's second ground for distinguishing *Brown,* the court took exception to the statement in *Broshnahan* that "the ability to sue individual defendants for actions that might constitute federal employment discrimination would not disrupt the statutory scheme of Title VII"[191] and found that in *Brown* the Supreme Court had not distinguished between instances where federal employees sued federal officials in their official capacity and those where the officials were sued as individuals.[192] The court relied on the same passage from *Brown* as that quoted in *Gissen.*[193] It opined that, given the scope and specificity of the congressional scheme and the Supreme Court's holding in *Brown,* the plaintiff was precluded from pursuing her claims against her supervisor in his individual capacity under both the Fifth Amendment and section 1981.[194]

C. *Davis v. Passman*

Davis v. Passman[195] is distinguishable from the foregoing line of cases in that the plaintiff, Ms. Davis, was an employee of Congress and thus was excluded from the protection of Title VII as amended in 1972.[196] Ms. Davis challenged her sex-based dismissal on Fifth Amendment due process grounds. The Fifth Circuit Court of Appeals found that while the Fifth Amendment right to due process conferred a right upon Davis, the injury she alleged did not

187. *Id.* at 173.

188. *Id.*

189. 435 F. Supp. 26 (D.D.C. 1977).

190. 446 F. Supp. at 173.

191. *Id.* at 173.

192. *Id.*

193. *Id.* at 173 (quoting Brown v. G.S.A., 425 U.S. at 828, and Gissen v. Tackman, 537 F.2d at 786). *See* notes 180 & 185 and accompanying text *supra.*

194. 446 F. Supp. at 174.

195. 442 U.S. 228 (1979).

196. In 1972, Congress added section 717 to Title VII, prohibiting discrimination in most areas of federal employment except Congress itself. 42 U.S.C. § 2000e-16(a) (1976). *See* Morton v. Mancari, 417 U.S. 535, 546-47 (1974). *See also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1066-82 (1976).

reach the level of the injury inflicted by the unreasonable search in *Bivens*.[197] The court also stated that the Fifth Amendment did not exist to protect her tenure as a personal aide who served at the will of Congressman Passman.[198] After examining Title VII and the Civil Service regulations, the court concluded that implying a cause of action would have the anomalous result of granting non-competitive service employees a remedy far more extensive than that enjoyed by employees in the competitive service. It therefore declined to imply a remedy under the Constitution.[199] The court of appeals expressly rejected Davis' argument because it "would project the penumbra of federal court constitutional due process jurisdiction over every legally cognizable tortious injury" inflicted under color of federal law.[200]

The Supreme Court reversed,[201] holding that a damage remedy could be implied directly under the due process clause of the Fifth Amendment.[202] The Court found that the exclusion by Congress of its own employees from the protection of Title VII was not in itself evidence of a congressional intent to foreclose alternate remedies which might be available to federal employees.[203] Rejecting *Cort v. Ash*,[204] the majority stated that the criteria used in implying a remedy from the Constitution was different from that used in implying a statutory cause of action.[205] Relying in part on *Bivens*, the Court held that a damage remedy under the Constitution may be appropriate where no other remedies are available and where Congress has not explicitly foreclosed such a remedy by statute.[206]

D. *Neely v. Blumenthal*

One case which provides a thorough treatment of this issue, in a case involving an employee *covered by Title VII*, is *Neely v. Blu-*

197. 571 F.2d 793 (5th Cir. 1977), *rev'd*, 442 U.S. 228 (1979).
198. 571 F.2d at 797-98.
199. *Id.*
200. *Id.* at 799.
201. 442 U.S. 228 (1979).
202. *Id.* at 248-49. The Court expressed no view as to whether the defendant member of Congress would be protected by the speech or debate clause. *Id.* at 235 n.11.
203. *Id.* at 247.
204. 422 U.S. 66 (1975).
205. 442 U.S. at 241.
206. *Id.* at 245-47.

menthal.[207] Judge John J. Sirica, in a scholarly decision handed down July 6, 1978, framed the issue as "whether *Brown,* in addition to *pre-empting* non-Title VII employment discrimination claims brought against federal employers in their official capacities, also *extinguishes* ancillary damage claims that are based on *Bivens* . . . theories and are directed at federal officers in their individual capacities."[208] The court found that while Title VII does not bar related damage claims brought against individual officers, no damage action need be implied where Title VII served to vindicate the same rights sought to be protected by the damage claim.[209]

Neely, a security guard at the Bureau of Engraving and Printing was discharged for cause; the stated reason was repeated acts of misconduct in the course of employment. The plaintiff had been a vocal advocate of changing Bureau operations to improve opportunities for predominantly black, lower-grade employees. Neely contested the adverse action as racially tainted and, in his complaint, alleged infringement of his constitutional right of free speech. He sought to recover monetary damages from two agency officers who played a part in his removal. The allegations against them in their individual capacity were based on a *Bivens* theory. The individual defendants moved to dismiss the suit against them based on *Brown v. General Services Administration.*[210] Judge Sirica reached the same result as did Judge Flannery in *Berio v. EEOC,*[211] but as in *Broshnahan,*[212] he held that *Brown v. General Services Administration* was distinguishable and not dispositive. The court suggested that the defendants had read *Brown* too "expansively" in arguing "that if an employment practice is susceptible to being challenged as discriminatory under Title VII, it can only be challenged under Title VII and on no other basis regardless of the theory underlying the alternative claim, and irrespective of the kinds of remedies being sought."[213] After concluding that *Brown* did not foreclose a *Bivens* claim, the court decided that a *Bivens* action need not be implied.[214]

207. 458 F. Supp. 945 (D.D.C. 1978).
208. *Id.* at 947 (emphasis in original).
209. *Id.*
210. 425 U.S. 820 (1976).
211. 446 F. Supp. 171 (D.D.C. 1978).
212. 435 F. Supp. 26 (D.D.C. 1977).
213. 458 F. Supp. at 949.
214. *Id.* at 960.

In considering *Brown v. General Services Administration*, the court recognized that while Title VII affords numerous remedies for the redress of federal employment discrimination, it does not permit the recovery of damages.[215] The court compared the federal and private sectors in pointing out that Title VII is not an obstacle to suits in the private sector based on other anti-discrimination provisions, but rather is co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866.[216] By contrast, in the federal sector, Title VII injunctive remedies are exclusive only because *Brown* held that the Equal Employment Opportunity Act of 1972 pre-empted all other statutory bases for relief against the federal government.[217] The court viewed actions brought directly against discriminating officials in their individual capacities as one means by which plaintiffs have challenged the disparity of remedies,[218] but pointed out that such causes of action generally have been caught up in the pre-emptive sweep of *Brown's* exclusivity rule and have been dismissed as redressable under Title VII.[219] The court noted that the results reached in *Stith v. Barnwell*,[220] *Dual v. Roudebush*[221] and *Carter v. Marshall*[222] regarding the exclusivity of Title VII "made eminently good sense" but were not controlled by the holding in *Brown*.[223]

215. *Id.*

216. *Id.* at 950. The court cited 42 U.S.C. § 1981 and Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

217. 458 F. Supp. at 950. The pre-empted alternatives include claims based on the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970); the Mandamus Act, 28 U.S.C. § 1361 (1970); the Tucker Act, 28 U.S.C. § 1346 (1970); and the Administrative Procedure Act, 5 U.S.C. § 702 (1970). *See* Brown v. G.S.A., 425 U.S. at 828-29 n.10 (discussion of pre-empted remedies).

218. 458 F. Supp. at 951 (citing as basis for these actions 42 U.S.C. § 1985 (1980) which prohibits conspiracies to deny equal protection of the law or equal privileges or immunities under the law).

219. 458 F. Supp. at 951.

220. 447 F. Supp. 970 (M.D.N.C. 1978).

221. No. 76-0005 (D.D.C. filed Feb. 9, 1977) (unpublished opinion).

222. 457 F. Supp. 38 (D.D.C. 1978).

223. 458 F. Supp. at 952. The court opined that "[t]here is little reason to stretch marginally applicable statutory, common law and constitutional theories of individual recovery to cover discrimination in federal employment when Title VII furnishes an explicit method of redress against the federal government, . . . especially . . . when consideration is given to the fact that the broad array of injunctive remedies provided in Title VII are in all but exceptional cases adequate to make aggrieved parties whole." *Id.* The court also noted "that in federal sector employment Title VII prefaces resort to the courts with specific administrative procedures that could be deliberately bypassed if suits for damages against individual officers were sanctioned based on grounds independent of Title VII." *Id.*

> The reason is that *Brown* did not address the question of Title VII's preemptive effect on discrimination suits brought against individual officers for damages. This point is confirmed by a review of both the facts and the reasoning developed in the *Brown* case. A review of the facts in *Brown* reveals that plaintiff, . . . did not attempt to redress his claim of discrimination through a damage action directed at the discriminating officials in their individual capacities. . . . *Brown* therefore does not settle the point that Title VII preempts individual damage actions because the issue was never presented.[224]

Brown was also distinguished because the decision was based on sovereign immunity. The court pointed out that while this doctrine protects the federal government from suits which mandate governmental action or deplete public funds, it did not extend to protect government officers from personal liability arising out of their official activities:[225]

> Sovereign immunity and the various officer immunities offer separate protections that protect separate interests. Research discloses no case that has held that the two kinds of immunities are integrated in such a way that, if the government consents to suit, parallel remedies against individual officers for the same conduct are of necessity extinguished.[226]

The court concluded that "since nothing in Title VII reveals an intent to disturb the avenues of relief against discriminating offi-

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These procedures were reviewed by the court. "In addition, it should be noted that if Title VII claimants were permitted to join Title VII and constitutional tort claims in a single action, a number of problems would inevitably arise in connection with the processing of discrimination suits. First, Title VII suits are non-jury matters, while jury demands are proper in *Bivens* actions. Thus, to the extent that a complainant's statutory and constitutional actions arise out of the same transactions, permitting joinder of the two kinds of actions would pose the prospect of converting every Title VII suit into a jury action. . . . This court's experience with Title VII cases makes clear that Title VII actions are particularly well-suited for disposition by the court because litigants, in the interest of expediting their cases, frequently will allow the court to consider as evidence all or part of the earlier developed administrative record. This practice is unlikely if Title VII cases were made jury matters by the addition of constitutional claims.

"Moreover, Title VII requires that statutorily-based suits be expedited and tried within 120 days, . . . while no such requirement applies to constitutional tort actions." *Id.* at 952 n.10.

Given this, the result might well be that compliance with section 2000e-5(5) will require the Court to bifurcate the proceedings into two trials with an apparent waste of judicial resources. *Id.*

224. *Id.* at 952 (citations omitted).

225. *Id.* at 952-53.

226. *Id.* at 954.

cials in their personal capacities, *Brown's* preemption rule stands circumscribed to the extent of cutting off only *official* remedies for federal employment discrimination."[227] The court went on to hold that there was nothing in the facts or rationale of *Bivens* that justified implying a remedy under the Constitution:[228]

> There must be a persuasive reason for a court to imply a remedy not authorized by Congress and in this instance, in light of the availability, *and efficacy,* of Title VII's comprehensive remedies, that reason is lacking. Were this a case where plaintiff's first amendment claims were *unrelated* to his Title VII claims in the sense that different conduct was being challenged and different interests asserted, a different result might well obtain. . . . Such, however, is not the case here. Where, as in this case, plaintiff's first amendment claim challenges conduct outlawed by Title VII and attempts to vindicate rights of expression also protected by the statute, and where, as here, Title VII's remedial measures promise to be effective in redressing the asserted wrongs, there is simply no sound reason for treating the claims separately by implying a damage cause of action not authorized by Congress.[229]

In support of that holding, the court analyzed *Bivens* and distinguished factors on which the Supreme Court had relied in that case from those present in *Neely.* Unlike the situation which confronted Bivens, Neely would not be relegated to pursuing claims based on hostile state law theories:[230] His rights were protected by Title VII, which provides an adequate remedy for vindicating First Amendment interests,[231] there was no necessity for implying a damage remedy in the sense that a "damage or nothing" situation was presented,[232] and Title VII's full range of remedies was well suited for making Neely whole.[233] The court also suggested that, unlike *Bivens* and *Dellums v. Powell,*[234] *Neely* did not present violations of "basic constitutional rights in their most pristine and classic form."[235] The court noted that the plaintiff could obtain an

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227. *Id.* at 954-55 (emphasis added).
228. *Id.* at 960 (emphasis in original).
229. *Id.*
230. *Id.* at 956.
231. *Id.*
232. *Id.* at 957.
233. *Id.*
234. 566 F.2d 167 (D.C. Cir. 1977).
235. 458 F. Supp. at 959 (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963) *quoted in* Dellums v. Powell, 566 F. Supp. at 194-95). The court refers to these "core constitutional protections" in *Neely.* 458 F. Supp. at 960.

injunction, reinstatement and back pay from the government, as appropriate, and that "plaintiff has [no] right to insist that his recovery come out of the pocketbooks of his superiors rather than out of government funds."[236]

The court also pointed out that "the implication of damage liability in the absence of legislative direction involves a determination that is based largely on discretionary considerations."[237] One such important consideration, identified in *Bivens,* was "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted."[238] The court found that such relief was neither necessary nor appropriate.[239]

Economou and *Davis* rest on the irrefutable notion that federal officials are subject to the restraints imposed by the Federal Constitution. Nonetheless, the approach of *Neely* in refusing to imply a remedy is sound.

Regarding the basis for suits brought under the Constitution against individuals, *Bivens* actions had been recognized by every court of appeals when the Supreme Court accepted the constitutional tort doctrine in *Economou. Economou* establishes that only certain officials may interpose an immunity defense on motion for summary judgment or motion to dismiss; all other officials must establish a valid qualified-immunity defense in the course of a trial on the merits. *Neely* raises substantial questions concerning whether the distinction drawn in *Economou* between types of officials is an issue which need be reached in Title VII cases. Judge Sirica would simply decline to imply a remedy by recognizing that Title VII remedies were adequate.

The court also points out that plaintiffs have no right to demand relief from the individual employee's pocketbook. This is certainly consistent with concerns of Congress, made evident as it considered amendments to the Federal Tort Claims Act, which would remove the possibility of liability for a civil judgment resulting from the way a government employee performs his job.[240]

Neely clearly defines several factors which are likely to govern

236. *Id.* at 957.
237. *Id.* at 959.
238. *Id.* (quoting Bivens v. Six Unknown Named Agents, 403 U.S. at 407).
239. 458 F. Supp. at 960.
240. *See* notes 356-63 and accompanying text *infra.*

future constitutional tort litigation brought in conjunction with, or in lieu of, Title VII suits. Prior to *Neely* a number of federal courts had decided not to imply a cause of action, reasoning that *Brown v. General Services Administration* precluded it. *Neely* and *Davis* are persuasive authority for the point that, in appropriate cases, such a remedy would be permissible. If the reasoning of the court in *Neely* is accepted, the practical effect of the case will be that Title VII constitutional tort suits against federal officials will be barred for reasons suggested by *Bivens* rather than *Brown* in cases where the plaintiff is protected by Title VII.[241] It seems clear that *Bivens* and *Economou,* neither of which are Title VII cases, must be examined and applied to any case to which Title VII pertains when allegations of Fifth Amendment violations are made against officials in their individual capacities. Further, those who do not now enjoy Title VII protection will be able to obtain redress for discriminatory conduct by bringing a *Bivens-Economou* suit against the offending officials personally, as in *Davis v. Passman.* These changes constitute a substantial departure from prior practice in the federal courts.

IV. The Doctrine of Immunity

Absolute immunity for officials of the executive branch of the federal government was first established in *Spalding v. Vilas*[242] by the Supreme Court in 1896. The Court reasoned in *Spalding* that federal officials should be entitled to perform their assigned duties without being subjected to damage suits based on their conduct. The Court expressed the rationale for the immunity defense as follows:

> In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper affairs as entrusted to the executive branch of the government, if he

241. *See* Founding Church of Scientology, Inc. v. FBI, 459 F. Supp. 748 (D.D.C. 1978).

242. 161 U.S. 483 (1896). The immunity doctrine for federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 856-66 (1824).

were subjected to any such restraint.[243]

A conditional immunity was extended to federal officials of lower rank in *Barr v. Matteo*.[244] The immunity granted in *Barr* applies only to actions having a policymaking or judgmental element, and immunity from liability exists only for the exercise of "discretionary," not "ministerial," functions. *Barr* also requires that the allegedly wrongful acts be "within the outer perimeter of the official's duties."[245] The Court recognized that a federal official must be able to perform his duties fully and without hesitation:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[246]

The Court sought to reconcile its policy of protecting individual citizens "from pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government"[247] with that of protecting "the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits."[248]

In refining the immunity doctrine, the Court recognized that instances of injustice or seemingly harsh application of the rule may occur, but deferred to the advice of Judge Learned Hand:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for

243. 161 U.S. at 498-99.

244. 360 U.S. 564 (1959).

245. *Id.* at 571; *see* Owen v. City of Independence, 421 F. Supp. 1110, 1121 (W.D. Mo. 1976), *aff'd*, 589 F.2d 335 (8th Cir. 1978), *rev'd*, 445 U.S. 622 (1980) (discussion of good faith defense). For a discussion of scope of duty, see Barr v. Matteo, 360 U.S. at 573; Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1345 (2d Cir. 1972); Ove Gustafsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962); Gregoire v. Biddle, 171 F.2d 579, 581 (2d Cir. 1949).

246. Barr v. Matteo, 360 U.S. at 571. In Scheuer v. Rhodes, 416 U.S. 232 (1974), the rationale was restated once again: "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by the legal obligation of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 240.

247. 360 U.S. at 565.

248. *Id.*

> any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public offenders who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[249]

In *Barr,* the Court noted that the degree of immunity need not be the same for all officials or for all purposes.[250] Some officials require a full exemption from liability because of the nature of their duties. Such is the case in section 1983 actions against judges[251] and state prosecutors.[252] Police, however, have been afforded a more limited protection,[253] and the degree of their immunity has been tied to their scope of authority.[254] Other officials who enjoy only a qualified immunity include prison officials and of-

249. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *quoted with approval in* Barr v. Matteo, 360 U.S. at 571.

250. 360 U.S. at 573. *See also* Tenny v. Brandhove, 341 U.S. 367, 378 (1950).

251. Supreme Court of Va. v. Consumers Union, 446 U.S. 719 (1980); Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). *Cf.* Dennis v. Sparks, 447 U.S. 934 (1980) (private individuals who bribe judge are not shielded by judge's absolute immunity).

252. Imbler v. Pachtman, 424 U.S. 409 (1976). *Cf.* Ferri v. Ackerman, 444 U.S. 193 (1979) (defense attorneys appointed by federal court do not enjoy federally created immunity).

253. Pierson v. Ray, 386 U.S. 547 (1967).

254. Wheeldin v. Wheeler, 373 U.S. 647 (1963).

ficers,[255] state hospital superintendents,[256] and local school board members.[257]

By contrast, municipal employees have seen their immunity abrogated by recent decisions of the Court. In *Monell v. Department of Social Services,*[258] the Supreme Court overruled, in part, *Monroe v. Pape*[259] and held that local governing bodies and local officials can be sued directly under section 1983 for monetary, declaratory and injunctive relief.[260] The Court, however, reserved judgment on the issue of the scope of official immunity available to municipalities sued under section 1983.[261]

That issue was squarely addressed by the Court in *Owen v. City of Independence.*[262] There the Court held that "municipalities have no immunity from damages liability flowing from their constitutional violations . . . under section 1983."[263]

In *Economou,* the Supreme Court rejected the government's contention that the defendant executive branch officials were absolutely immune from liability for damages[264] and held that there could be no absolute immunity for violations of the Federal Constitution.[265] In its analysis, the Court looked back to the earliest immunity cases, in which federal officials who acted outside their statutory authority had been held liable for their acts, and were protected only if their actions were authorized by controlling federal law.[266] The Court concluded that an unconstitutional act, even if authorized by statute, was nonetheless viewed as unauthorized "in contemplation of law," and thus there could be no immunity

255. Procunier v. Navarette, 434 U.S. 555 (1978).
256. O'Connor v. Donaldson, 422 U.S. 563 (1975).
257. Wood v. Strickland, 420 U.S. 308 (1975).
258. 436 U.S. 658 (1978).
259. 365 U.S. 167 (1961).
260. 436 U.S. at 663.
261. *Id.* at 701.
262. 445 U.S. 622 (1980).
263. *Id.* at 657.
264. The government had argued that the defendants were absolutely immune, and that such immunity would be a valid defense even if they had infringed on citizens' constitutional rights in the course of enforcing the law, and even if the violations were knowing and deliberate.
265. 438 U.S. 478 (1978).
266. *Id.* at 490-91 (citing Belknap v. Schild, 161 U.S. 10, 19 (1896); Cunningham v. Macon & B.R.R. Co., 109 U.S. 446, 452 (1883); Bates v. Clark, 95 U.S. 204 (1877); Little v. Barreme, 6 U.S. (2 Cranch) 157 (1804).

defense.[267] The Court distinguished the *Spalding v. Vilas* line of cases, pointing out that they did not purport to immunize officials who ignored limitations imposed on their authority.[268] It suggested that *Spalding* implies that an official who fails to observe obvious statutory or constitutional limitations on his powers should not be excused from liability.[269] In reference to *Barr v. Matteo,* the Court said:

> [W]e are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution. Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.
>
> The liability of officials who have exceeded constitutional limits was not confronted in either *Barr* or *Spalding.* Neither of those cases supports the Government's position.[270]

Footnote 22 makes clear that the Court was considering only constitutional torts, thus preserving, at least for the present, the vitality of *Barr v. Matteo* immunity in suits for common-law torts.[271]

In reaching its holding, the Court addressed certain situations wherein constitutional rights are more likely to be abused, referring specifically to "such important personal interests as liberty, property, and free speech."[272] The majority noted that "an action for damages against the responsible official can be an important means of vindicating constitutional guarantees."[273]

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." . . . In light

267. 438 U.S. at 490-91 (citing Virginia Coupon Cases, 114 U.S. 269, 285-92 (1885); United States v. Lee, 106 U.S. 196, 218-223 (1882)).

268. *Id.* at 492-93.

269. *Id.* at 493-94.

270. *Id.* at 495.

271. *Id.* at 495 n.22.

272. *Id.* at 505.

273. *Id.* at 506.

> of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.[274]

The Court specifically recognized that "in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer,* subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business."[275]

In *Scheuer v. Rhodes,*[276] the Supreme Court considered the question of a state official's immunity for "the purposes of 42 U.S.C. § 1983,"[277] a context which the Court was careful to distinguish from that of federal officials in *Barr v. Matteo.*[278] *Scheuer* therefore had no impact on the rule of *Barr v. Matteo*; the Court in *Scheuer* held that state officials are only entitled to the protection of a qualified immunity:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[279]

This was as far as the Court in *Scheuer* was willing to go. It reasoned that if it were to hold state officials absolutely immune from suit under section 1983, the statute "would be drained of meaning."[280]

Prior to *Butz v. Economou,* it could have been successfully argued that federal officials were absolutely immune from suit under

274. *Id.* (citation omitted).

275. *Id.* at 507.

276. 416 U.S. 232 (1974). This is perhaps the most significant case leading to *Butz v. Economou* and the erosion, *sub silento,* of the immunity doctrine. The holding of this case was expressly limited to consideration of immunity of state officials in the context of a 42 U.S.C. § 1983 suit.

277. 416 U.S. at 243.

278. *Id.* at 247.

279. *Id.* at 247-48.

280. *Id.* at 248.

Barr v. Matteo and *Spalding v. Vilas* because Congress had not created a cause of action against federal officials as it had done against state officials in section 1983. In considering the immunity of federal officials, the Supreme Court looked to lower court *Bivens*-type cases[281] and found that "with impressive unanimity, the federal courts of appeals have concluded that federal officials should receive no greater degree of protection from *constitutional* claims than their counterparts in state government."[282] This notion was recognized by the Second Circuit when it considered *Economou.* The Second Circuit held that "it would be 'incongruous and confusing, to say the least, to develop different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution.' "[283] The Supreme Court looked to the reasoning of the Ninth Circuit and to similar conclusions of other courts concerning the disparate immunity accorded state and federal officials:

> [Defendants] offer no significant reason for distinguishing, as far as the immunity doctrine is concerned, between litigation under § 1983 against state officers and actions against federal officers alleging violation of constitutional rights under the general federal question statute. In contrast, the practical advantage of having just one federal immunity doctrine for suits arising under federal law is self-evident. Further, the rights at stake in a suit brought directly under the Bill of Rights are no less worthy of full protection than the constitutional and statutory rights protected by § 1983.[284]

The Court went on to agree with the conclusions reached by other courts that,

> in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as

281. In *Bivens,* the Supreme Court reserved the question of whether government officials were immune from liability by virtue of their position. The Second Circuit held that qualified immunity sufficiently protected federal law enforcement officers in that case. *See* Butz v. Economou, 438 U.S. at 486. For a more comprehensive analysis of cases, see Lehmann, *supra* note 15.

282. 438 U.S. at 498 (emphasis in original).

283. *Id.* at 499 (quoting Economou v. United States Dep't of Agric., 535 F.2d 688 (2d Cir. 1976) (quoting Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1346-47 (2d Cir. 1972)).

284. 438 U.S. at 499-500 (emphasis in original)(quoting Mark v. Groff, 521 F.2d 1376, 1380 (9th Cir. 1975)).

> authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. . . . Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers.[285]

The Court in *Scheuer* concluded that section 1983 "would be drained of meaning" if state officials were permitted to interpose an absolute-immunity defense.[286] This rationale had first been recognized in *Bivens,* which applied only to Fourth Amendment violations by federal police officials. Although the Court had been careful to distinguish immunity for state officials from that of federal officials when it considered *Scheuer v. Rhodes,* it rejected that distinction when it was proffered by the government in *Butz v. Economou.* Rather, the Court developed a circular rationale: "[T]he cause of action recognized in *Bivens v. Six Unknown Named Agents* would similarly be 'drained of meaning' if federal officials were entitled to absolute immunity for their consitutional transgressions."[287] To base its holding in *Economou* on its decision in *Bivens* is to overrule by implication the distinction between state and federal officials which the Court had previously been careful to preserve, and which was clearly recognized by Congress. Further, the foundation of the *Economou* decision is rooted in the section 1983 anomaly addressed in *Bivens,* which was created by congressional action for state officials and congressional inaction for federal officials.[288]

V. The Application of *Butz v. Economou*

As stated earlier, *Scheuer v. Rhodes* involved a suit brought against state officials under section 1983. Prior to *Economou,* the Supreme Court had scrupulously distinguished the *Scheuer* line of cases as inapplicable to immunity questions for federal officials.[289] The holding in *Economou* clearly applies *Scheuer v. Rhodes* and

285. 438 U.S. at 500-01 (emphasis in original).

286. 416 U.S. at 248.

287. 438 U.S. at 501 (citation omitted).

288. Had Congress intended that such suits could be brought, provision could easily have been made in 42 U.S.C. The rationale of the Court is weak unless the ruling in *Scheuer* is expanded or *Barr* is overruled.

In *Bivens,* the Court was concerned with draining § 1983 of meaning. In *Economou,* the Court expressed its fear that *Bivens* would be drained of meaning but, in so concluding, does not discuss the rule of *Scheuer.*

289. 416 U.S. at 243.

other section 1983 cases to suits brought against federal officials under the Federal Constitution, unless absolute immunity is deemed essential for the conduct of public business.

Subsequent to *Bivens*, numerous lower federal courts have decided cases involving alleged constitutional torts. A substantial body of case law has developed regarding the procedural and substantive aspects involved in litigation of this type. Issues involving the statute of limitations, amount-in-controversy, standards for judging the sufficiency of pleadings, injunctive relief, the doctrine of respondeat superior, the extension of *Bivens* to other constitutional provisions, and problems of good faith and scope of duty have been developed elsewhere and will not be dealt with here.[290] Each of these issues is controversial and problematic, however, and differences naturally exist in the manner in which the various circuits resolve them. In *Economou*, the Supreme Court discussed broad policy considerations but failed to explain with care or precision the principles which are to govern litigation against federal officials. Some of these issues will be resolved by applying case law developed in section 1983 litigation. Many will be resolved of necessity on a case-by-case basis. In many instances, different rules will prevail among the circuits.[291] A careful reading of *Scheuer v. Rhodes* in conjunction with *Butz v. Economou* reveals several fundamental principles that will control emerging constitutional tort litigation.

The qualified immunity established in *Scheuer v. Rhodes* is controlling in federal constitutional tort suits. Although the Supreme Court had provided a definition of qualified immunity in *Scheuer*,[292] the impact of the substitution of qualified immunity for absolute immunity was noted by the dissent in *Economou*:

> Putting to one side the illogic and impracticability of distinguishing between constitutional and common-law claims for purposes of immunity, which will be discussed shortly, this sort of immu-

290. *See* Lehmann, *supra* note 15, at 544-92.

291. This problem was also recognized by Justice Stevens, dissenting in *Procunier v. Navarette*: "I have no quarrel with the extension of a qualified immunity defense to all state agents. A public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability. But when the Court makes the qualified immunity available to all potential defendants, it is especially important that the contours of this affirmative defense be explained with care and precision." 434 U.S. 555, 569 (1978).

292. *See* note 279 and accompanying text *supra;* Lehmann, *supra* note 15, at 587-91.

> nity analysis badly misses the mark. It amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all: The "immunity" disappears at the very moment when it is needed.[293]

The dissent went on to explain that the critical inquiry in applying immunity should not turn on whether or not a constitutional tort was committed.[294] The critical inquiry focuses on whether the action was taken in the discharge of official duties.[295]

In *Bivens,* the Second Circuit established a simple test for determining whether an official commits an actionable constitutional tort. Under *Bivens,* no actionable wrong exists either if the official's act was within the scope of his duties as an official traditionally granted immunity or if the function involved a discretionary act. If the official cannot establish that he qualifies under either the "scope of duties" or "discretionary act" standards (which would qualify him for absolute immunity), the official may still avoid liability by proving both that actions were taken in a good-faith belief that the conduct was lawful and that this belief was reasonable.[296] *Economou* eliminates the possibility of a dismissal based upon simple affidavits establishing a "scope of duties" or "discretionary act" defense. Rather, as a general rule, federal officials must now defend on the merits by proving their good faith and reasonable belief.[297] It is this result which is criticized by Justice Rehnquist in his dissent.[298]

Barr v. Matteo controls in suits for common-law torts which are not brought directly under the Constitution, and federal officials will, as before, be held absolutely immune for acts within the "outer perimeter of their duties."[299] The Court reasoned that an immunity defense is inapplicable to unconstitutional acts, however.[300] Thus, *Barr's* immunity doctrine applies to tortious but not constitutional conduct, while the *Economou* qualified-immunity rule applies only where a constitutional tort is alleged.

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293. 438 U.S. at 520 (Rehnquist, J., dissenting).
294. *Id.*
295. *Id.*
296. *See* Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1342-48 (2d Cir. 1972).
297. *See* Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289, 292 (D.C. Cir. 1977)(*en banc*).
298. 438 U.S. at 518-23.
299. *Id.* at 489-90.
300. *Id.* at 490-91, 495 n.22.

In *Evans v. Wright,*[301] a case considered after *Butz v. Economou,* employees of the Department of Health, Education and Welfare were sued for tortious interference with the contractual relations of a medical-equipment supplier. The Fifth Circuit considered the applicability of *Economou* but applied *Barr v. Matteo* and held that where a suit is for ordinary tort claims, the official immunity doctrine continues to apply.[302]

As stated in the introduction, the common-law constitutional tort distinction is at least a semi-hollow one. Many common-law torts have constitutional tort analogs that can be asserted to pierce the shield of immunity and proceed through discovery to trial on the merits. Judge Merritt's dissent in *Granger v. Marek,*[303] another case decided after *Economou,* cuts to the heart of the difficulty raised by the common-law constitutional tort distinction:

> Though the Court's holding in *Economou* is clearly limited to constitutional claims as distinguished from state tort claims, the reasoning of the opinion leads me to the conclusion that the choice between absolute immunity and qualified immunity for public officers should turn on the role and function of the official and not on whether the alleged wrong sounds in tort or under the Constitution. When framing a complaint against a public officer, an assault, a trespass, a false imprisonment or false arrest, a libel, as well as various invasions of privacy and interferences with contractual relationships, can be characterized just as easily as a constitutional wrong as a tort. Making immunity turn on a distinction between common law torts and constitutional wrongs simply encourages pleaders to wrap familiar common law concepts in a new vernacular of constitutional deprivation.[304]

In *Economou,* the Supreme Court established the proposition that "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss."[305] Similarly, the Court stated that firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by friv-

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301. 582 F.2d 20 (5th Cir. 1978).
302. *Id.* at 21.
303. 583 F.2d 781, 786 (6th Cir. 1978).
304. *Id.* (Merritt, J., dissenting).
305. 438 U.S. at 507-08.

olous lawsuits."[306] This seems to imply that the Court intended that constitutional tort cases be scrutinized by wary federal courts and that constitutional remedies not be implied in most cases. Notwithstanding the admonitions of the Supreme Court, however, at least one court that has considered the immunity of federal officials since *Butz* has raised the existence of a constitutional cause of action *sua sponte*.[307] When the Court's language in *Economou* is compared with the Federal Rules of Civil Procedure and the law developed thereunder, the likelihood of an evolving restrictive standard seems remote. For example, in the context of Rule 12(b)(6), a claim may be dismissed if it is obviously without merit or is wholly frivolous.[308] A similar test must be overcome by an official who seeks summary judgment. Under Rule 56,

> [t]he movant . . . must carry the burden of demonstrating the absence of any genuine issue as to any material fact, and the party opposing the motion is entitled to all favorable inferences deducible from the parties' evidentiary representations. The court's function is not to resolve any such issue, but only to ascertain whether any exists, and all doubts in that regard must be resolved against summary judgment.[309]

These rules appear to contradict the Court's assurance in *Economou* that many constitutional tort allegations will be disposed of on the pleadings.[310]

In an apparent effort to create a loophole through which lower courts may confer absolute immunity in exceptional cases, the Supreme Court enunciated an exception to the general rule of *Economou*. Absolute immunity will continue to be a viable defense in those exceptional situations where it is demonstrated that such immunity is "essential for the conduct of the public business."[311] Two post-*Bivens* cases illustrate how this exception might be applied.

In *Tigue v. Swaim*,[312] a military officer sued his commander,

306. *Id.* at 508.

307. Tigue v. Swaim, 585 F.2d 909, 914 (8th Cir. 1978).

308. FED. R. CIV. P. 12(b)(6); Hagans v. Lavine, 415 U.S. 528, 537-38 (1974).

309. Bouchard v. Washington, 514 F.2d 824, 827 (D.C. Cir. 1975) (footnotes omitted).

310. *See also* Tabaclera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 1968), *cert. denied*, 393 U.S. 924 (1968) (holding that on motion for summary judgment facts will be viewed in a light most favorable to the non-moving party); Payne v. District of Columbia, 559 F.2d 809 (D.C. Cir. 1977) (discussing the standard for determining whether constitutional claims are made solely for the purpose of obtaining jurisdiction).

311. 438 U.S. at 507.

312. 585 F.2d 909 (8th Cir. 1978).

accusing the superior officer of libel and false imprisonment. The district court applied the *Barr v. Matteo* doctrine of absolute immunity since common-law torts were alleged.[313] The Eighth Circuit adopted the commander's assertion that federal officials sued for common-law torts such as false imprisonment and libel are entitled to absolute immunity,[314] but found that the complaint alleged facts sufficient to establish unlawful deprivation of liberty without due process of law.[315] On its own motion, the Court concluded that the complaint was not limited to common-law violations, but that it also embodied constitutional allegations.[316] The court then applied *Economou:*

> In our view, we have no other alternative under *Butz v. Economou* than to hold that military officers during peacetime are not automatically clothed with absolute immunity in every situation. *Butz* demands a particularized inquiry into the functions an official performs and the circumstances under which they are performed prior to the granting of absolute immunity. . . . Whether they are so entitled depends on an analysis of the functions they perform, their immunity under common law and the interests sought to be protected.[317]

The court took notice of the parties' duties, which included dealing with nuclear weapons and the national security interests involved, and found that the commander was engaged in a special function entitling him to absolute immunity.[318]

In *Granger v. Marek,*[319] originally a state court action, a tax preparer alleged the common law tort of intentional infliction of mental and physical distress against several agents of the Internal Revenue Service. The case was removed to federal court under Title 28 of the United States Code, section 1442(a)(1). The complaint alleged that the agents sought out plaintiff's clients and advised them (1) that they would be audited solely for doing business with plaintiff; (2) that plaintiff's competitors charged less and should be employed instead of the plaintiff; and (3) that the plaintiff was

313. *Id.* at 910.
314. *Id.* at 914.
315. *Id.* at 913.
316. *Id.*
317. *Id.* at 913-14.
318. *Id.* at 914. *Cf.* Jaffee v. United States, 592 F.2d 712 (3d Cir.), *cert. denied,* 441 U.S. 961 (1980); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979).
319. 583 F.2d 781 (6th Cir. 1978).

suspected of criminal activity. The agents allegedly had threatened to put the plaintiff out of business. The district court held that the agents were immune from suit because they had acted within the scope of their official duties as federal officers.[320] On appeal, the Sixth Circuit affirmed.[321] The court considered *Butz v. Economou* and analyzed the case under criteria that *Economou* had held applicable previously only in suits brought directly under the Constitution. Rather than following *Barr v. Matteo,* the court relied on *Scheuer v. Rhodes* but defined the scope of immunity in accordance with guidelines established in *Economou.*[322] The court quoted, and explicitly approved, the district court's finding that agents of the Internal Revenue Service were government officials entitled to immunity. "The implicit nature of the duties performed by the . . . investigatory agents of the IRS makes them particularly susceptible to suit by those who may be investigated. Tax collectors, and those who assist them, have never been the objects of over-affection by the American Public."[323] Both courts concluded that these agents, by virtue of their duties, are in a class that should be afforded the same absolute immunity as that extended to judges and prosecutors. The courts did not explore whether the agents had acted in good faith.[324]

Unfortunately, the Supreme Court did not specify criteria for testing the qualification, "essential to the public business."[325] In light of the principle cases cited in *Economou,*[326] however, several considerations applicable to many federal officials, including personnel managers, may bring such officials within this exception: (1) qualified immunity invariably leads to suits which would consume time and energies that would otherwise be devoted to government service;[327] (2) permitting suit would undermine agency administra-

320. *Id.* at 782.

321. *Id.*

322. *Id.* at 783-84.

323. *Id.* at 784.

324. The district court considered scope of authority, but did not discuss good faith. The court of appeals did not rely on the *Scheuer* tests. *Id.* at 784-85. *Cf.* Dema v. Feddor, 470 F. Supp. 152 (N.D. Ill. 1979).

325. *See, e.g.,* Laing v. United States, 423 U.S. 161, 209-10 n.14 (1976) (Blackmun, J., dissenting).

326. Imbler v. Pachtman, 424 U.S. 409 (1976); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); Barr v. Matteo, 360 U.S. 564 (1959).

327. *See, e.g.,* Barr v. Matteo, 360 U.S. at 571-76; Spalding v. Vilas, 161 U.S. at 498; Butz v. Economou, 438 U.S. at 517-30 (Rehnquist, J., concurring in part and dissenting in

tive processes and procedures of the Civil Service Reform Act, or a similar statutory or regulatory scheme;[328] (3) established remedies short of litigation are less deleterious to morale and discipline among federal employees; (4) the government employee plaintiff is distinguishable from the private citizen plaintiff in the context of constitutional litigation;[329] (5) supervisors must be free to exercise discretion and independent judgment in managing agency affairs;[330] (6) supervisors who take adverse action against an employee may be likened to prosecutors;[331] (7) many rights are already fully protected by internal agency review and appeals to the Civil Service Commission;[332] (8) the courtroom may be a less effective means to test employer misconduct if others are available;[333] (9) qualified immunity would unduly inhibit established and effective personnel management mechanisms and would impair the manager's ability to deal with employees with necessary candor and decisiveness and would have a chilling effect on the exercise of crucial managerial prerogatives; and (10) the rights asserted by the employee are circumscribed by management necessities and the imperative of maintaining an orderly and efficient public

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part).

328. *See, e.g.*, Citizens Savings v. Califano, 480 F. Supp. 843 (D.D.C. 1979); Neely v. Blumenthal, 458 F. Supp. 945 (D.D.C. 1978). As a general rule, statutory remedies will be held exclusive. *See* Brown v. G.S.A., 425 U.S. 820 (1976); United States v. Demko, 385 U.S. 149 (1966).

329. This principle has been judicially recognized. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968) (balancing public employee's right to free speech against the employer's need to promote the efficiency of the service, recognizing that a teacher's status as employee was distinguishable from that of a citizen and that the interests of an employer dealing with its employee differ significantly from its interests in regard to the population in general). Reasonable restrictions on an employee's partisan political activity have been upheld. *See* the Hatch Act, 5 U.S.C. § 7321 (1976). *See also* Broadrick v. Oklahoma, 413 U.S. 601 (1973) (upholding state restrictions on political activity); Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); United Public Workers v. Mitchell, 330 U.S. 75 (1947). Regarding restriction of political affiliations by the government, see Law Students Research Council v. Wadmond, 401 U.S. 154 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

330. *See* note 327 *supra.*

331. *See* Butz v. Economou, 438 U.S. at 509-10.

332. Where an adequate remedy exists, the rationale of *Bivens* does not apply. *See* note 328 *supra. See also* Lehmann, *supra* note 15, at 566-72.

333. The national labor policy has long favored arbitration of disputes as a means of settlement preferable to litigation because of the expertise of the arbitrator to whom considerable deference is given by the courts. *See* The Steelworkers Trilogy of 1960, 363 U.S. 564, 574, 593 (1960).

administration.[334]

Economou further instructed that " 'special factors counselling hesitation' " are to be considered in determining the appropriate level of immunity in each case.[335] The Court restated the "special factors" which were considered in *Bivens*: the presence or absence of congressional authorization for suits against federal officials, the absence of affirmative action by Congress, the type of injury sustained and whether it is normally compensable in damages, and the types of questions raised by the plaintiff's claim and the court's ability to handle them.[336] The Court stated that "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business" is so important that it might also be considered a "special factor counselling hesitation."[337] In discussing the "exceptional situation," the Court seems to be establishing a threshold issue to be considered in each case, in effect whether a constitutional tort remedy should be implied at all, or whether the issue should be permitted to survive a motion to dismiss or motion for summary judgment.

Bivens is the seminal case dealing with implication of a damage remedy directly from the Constitution. In *Bivens,* the Court found that the plaintiff's remedies at state law were inadequate and implied a remedy against the government agents because the case involved "no special factors counselling hesitation in the absence of affirmative action by Congress."[338] Justice Harlan emphasized the necessity of this result in his concurring opinion:

> [I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.[339]

The question, as articulated by Justice Harlan, is "whether com-

334. Neely v. Blumenthal, 458 F. Supp. 945 (D.D.C. 1978).
335. 438 U.S. at 503 (quoting Bivens v. Six Unknown Named Agents, 403 U.S. at 396).
336. 438 U.S. at 503.
337. *Id.* at 507.
338. 403 U.S. at 396.
339. *Id.* at 409-10.

pensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted."[340] In appropriate cases involving federal employees, the basis for implying a constitutional cause of action may be challenged when independent rights and remedies exist under law or agency regulations.[341] Where a full range of remedies is provided, federal employees are not relegated to pursuing claims based on hostile state law theories. Unlike *Bivens*, the "damages or nothing" situations will not occur where other remedies are available. Such a conclusion was reached in *Neely v. Blumenthal*, discussed earlier in the Title VII context.[342]

When a supplemental damage remedy arising directly under the Constitution is sought, the federal courts will generally proceed with caution, carefully assessing the existing remedies, considering any congressional determinations which suggest that a supplemental remedy should not be available, determining whether a judicially created remedy would be inconsistent with an act of Congress,[343] and looking to find other remedies which adequately protect the constitutional right in question.[344] When no other remedy exists, however, the case for implying a *Bivens* remedy becomes most compelling.[345]

Finally, the Supreme Court reiterated that the special functions required of some executive officials justify exceptions to the general rule of qualified immunity. Judges acting in the exercise of their judicial functions;[346] federal prosecutors, advocates, jurors and witnesses in judicial proceedings;[347] federal hearing examiners or administrative law judges performing adjudicatory functions

340. *Id.* at 407.

341. *See, e.g.*, The Civil Service Reform Act and the regulations thereunder, Title VII, The Age Discrimination in Employment Act, and the Equal Employment Opportunities Act, *supra* notes 29-33.

342. *See* notes 207-41 and accompanying text *supra*.

343. The Court in *Bivens* attempted to limit its holding to those situations where Congress had failed to express a contrary intention. 403 U.S. at 397. If a statutory remedy exists, courts will not imply a constitutional one so as to defeat the purpose and intent of the statute. McLaughlin v. Callaway, 382 F. Supp. 885, 893 n.4 (S.D. Ala. 1974) (relating to discrimination in federal employment and holding Title VII exclusive).

344. Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977).

345. "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." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) *quoted in* Bivens v. Six Unknown Named Agents, 403 U.S. at 397. *See also* Davis v. Passman, 442 U.S. 228 (1979).

346. 438 U.S. at 508-09.

347. *Id.* at 509-10.

within a federal agency;[348] and agency officials performing functions analogous to those of a prosecutor, are all entitled to a claim of absolute immunity under *Economou.*[349]

VI. The Future of *Economou* Actions

The extent to which personnel managers will be held liable for constitutional torts committed against their subordinates in the day-to-day administration of personnel matters is unclear. It is doubtful that the courts will place personnel managers within the class of officials who perform "special functions" justifying application of the absolute-immunity rule. Courts may conclude, however, that managing the affairs and supervising the conduct of subordinate federal employees presents an "exceptional situation" where absolute immunity is "essential for the conduct of the public business." The better view might be simply to decline to imply a constitutional remedy, thereby limiting federal employees to remedies created by Congress, the Office of Personnel Management, or the employing agency. In the alternative, managers will be forced to defend suits brought against them in their personal capacity. Where this situation has occurred, it has not gone uncriticized.[350]

In *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution,*[351] the Court of Appeals for the District of Columbia criticized the Second Circuit opinion in *Economou.* This was, of course, before the Supreme Court affirmed the *Economou* holding that federal officials were entitled only to the same qualified immunity applicable to state officials sued pursuant to section 1983. Judge Wilkey, concurring *dubitante,* expressed serious doubts about the validity of *Barr v. Matteo* but left it to the Supreme Court to alter the rule of that case.[352] He went on to set forth his own reasons for concluding that the lower court's decision in *Butz v. Economou* expressed an unwise rule of law: "[I]f the balance struck by *Barr* is deemed unsatisfactory, then the response should be legislative—the waiver of sovereign immunity for inten-

348. *Id.* at 511-13.

349. *Id.* at 515.

350. *Id.* at 517 (Rehnquist, J., dissenting in part and concurring in part); Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289, 293, 300-05 (D.C. Cir. 1977).

351. 566 F.2d 289 (D.C. Cir. 1977).

352. *Id.* at 305.

tional torts."[353] Serious questions exist, however, about Congress' power with respect to constitutional remedies, since the first eight amendments contain no clause granting to Congress the power to implement their substantive provisions by appropriate legislation.[354] In view of the Supreme Court's recognition in both *Bivens* and *Economou* that the result reached in each of those cases would have been different had Congress acted to create an adequate remedy, such congressional action would most likely be upheld.

The early immunity cases established goals that can only be fully realized in the future if Congress acts. The Court could have applied section 1983 to federal officials, but had Congress intended that such suits be brought, the Civil Rights Acts of 1866 and 1871[355] could have been amended. However wise the result of *Economou* may be in view of the passage of time and changes in the scope of governmental affairs and the involvement of the federal government in the lives of Americans, unless the Court is willing to overrule *Barr v. Matteo,* a policy change of this type might better have been left to Congress. If the fact that no person is above the Constitution is indeed a significant aspect of *Economou,* it becomes more difficult to rationalize a different scope of immunity for those who commit common-law torts which have constitutional-law analogs. A legislative response should be encouraged.

Several amendments to the Federal Tort Claims Act,[356] which would have resolved some current immunity issues, were considered during the 95th and 96th Congresses. One such amendment was Senate Bill 2117,[357] drafted by the Attorney General and actively supported by him in congressional hearings. The Attorney General's primary concern grew out of the increasing cost and the difficulties associated with the retention of private attorneys by the Justice Department to represent government employees.[358]

353. *Id.* at 306.

354. *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1546 (1972). *But see* Silver v. Silver, 280 U.S. 117, 122 (1929) (holding that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized in the common law).

355. 42 U.S.C. §§ 1981, 1983, 1985 (1976).

356. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2410-2412, 2671-2680 (1976).

357. 95th Cong., 2d Sess., 123 CONG. REC. 15,284 (1977).

358. *Amendments to the Federal Tort Claims Act: Joint Hearing on S. 2117 Before the Subcomm. on Citizens and Shareholders Rights & Remedies and the Subcomm. on Administrative Practice & Procedure of the Comm. on the Judiciary,* 95th Cong., 2d Sess., 7 (1978); *see also Staff Report to the Subcomm. on Administrative Practice & Procedure of*

Senate Bill 2117 would have redefined the relationship between federal employees, their supervisors and private citizens by removing the onus of personal liability currently on governmental officials acting in the line of duty. The Attorney General set forth the three basic purposes of Senate Bill 2117:

> First, to provide the victims of common law and "constitutional torts" committed by federal employees with a remedy against a financially responsible defendant; second, to protect federal employees from suits for money damages arising out of the performance of their duties; and, third, to eliminate the need for the Department of Justice to hire private attorneys to represent individual federal employees against whom such suits might be brought. The proposed bill would achieve these purposes by expanding the bases upon which the United States can be held liable for the conduct of its employees under the Tort Claims Act and by making suits against the government the exclusive civil remedy in such cases.[359]

Although Senate Bill 2117 provided for an exclusive remedy against the United States in suits based upon acts by federal employees, thus, in effect, granting an absolute statutory immunity from civil suit, it provided for appropriate disciplinary action where an employee's conduct resulted in the payment of damages by the government.

While Senate Bill 2117 was not enacted, it has been modified and reintroduced in various forms.[360] The 96th Congress considered two bills, successors to Senate Bill 2117, which would substantially clarify some of the uncertainty surrounding the issue of federal employee immunity. Senate Bill 695[361] and House Resolution 2659[362] would have amended the Federal Tort Claims Act to make the United States the *exclusive* party against whom civil suit could be brought in cases involving torts allegedly committed by federal employees. They would have permitted only the government to be liable for common law torts committed by employees "within the scope of their employment" and for constitutional torts committed either "within the scope of" or "under color of" federal employ-

the Comm. on the Judiciary, Justice Department Retention of Private Counsel to Represent Federal Employees in Civil Lawsuits, 95th Cong., 2d Sess. (1978).

359. *Id.* at 26 (letter of Attorney General to Vice President Mondale (Sept. 16, 1977)).

360. *See, e.g.,* S. 3314, 95th Cong., 2d Sess., 124 CONG. REC. 11,048 (1978).

361. 96th Cong., 1st Sess., 125 CONG. REC. S. 2919-23 (1979).

362. 96th Cong., 1st Sess., 125 CONG. REC. H 1101 (1979).

ment.[363] Those bills were not enacted and died at the close of the 96th Congress.[364]

The Attorney General's position in seeking to amend the Federal Tort Claims Act found support in *Neely v. Blumenthal*, wherein Judge Sirica noted that a "plaintiff has no right to insist that his recovery come out of the pocketbooks of his superiors rather than out of governmental funds."[365] As Justice Harlan recognized, the real question of concern to potential plaintiffs ought to be whether relief is "necessary or appropriate" to the vindication of the asserted right.[366]

Suits brought against government employees, or against employees and the government jointly, pose difficulties of considerable magnitude. Decisions of personnel managers constantly affect employees; similarly, citizens have reason to demand vindication when the government has wronged them. The rule of *Economou* and the likelihood of subsequent expansion of that rule creates a remedy of colossal unmanageability. Frivolous lawsuits are encouraged by a rule which draws no clear lines regarding which suits should be permitted, or against whom they may be brought. Indeed, it is unmistakably clear that such lines elude definition.

The reasoning of *Neely* is directly applicable to every suit seeking vindication for a constitutional tort brought against a personnel manager under the Federal Constitution. Even though the *Neely* decision was handed down just seven days after *Economou* and did not consider it, the reasoning and result remain valid. The court's reliance on the fact that "[s]ince *Bivens*, the Supreme Court has neither extended nor amplified on its original position regarding the availability of tort remedies to redress invasions of constitutional rights"[367] should not be interpreted as a caveat. In view of the preceeding discussion, the conclusions reached in *Neely*

363. H.R. 2659, 96th Cong., 1st Sess. 3, 125 CONG. REC. H 1101 (1979); S. 695, 96th Cong., 1st Sess. 6, 125 CONG. REC. 2919-23 (1979). *See generally* Comment, *Constitutional Tort Remedies: A Proposed Amendment to the Federal Tort Claims Act*, 12 CONN. L. REV. 492, 530-37 (1980). *See also* Dolan, *Constituional Torts and the Federal Tort Claims Act*, 14 U. RICH. L. REV. 281, 298-309 (1980).

364. 67 A.B.A.J. 160 (1981).

365. 458 F. Supp. 945, 957 (D.D.C. 1978) (recognizing the weighty administrative sanctions which may be taken against federal employees for improper conduct).

366. 403 U.S. at 407. *See also* Dellums v. Powell, 566 F.2d 167, 194-95 (D.C. Cir. 1977) (considering these factors in implying a remedy).

367. 458 F. Supp. at 957-58.

represent what may and should become the controlling principle denying relief to federal employees. Rather than leaving this important issue to the courts to resolve after protracted litigation and confusion among the circuits and in government, Congress should amend the Federal Tort Claims Act to waive sovereign immunity for most common-law torts and all acts which violate constitutional rights of United States citizens, thereby making suits brought against the United States the sole and exclusive remedy for such conduct. Only by such action will the personnel manager in the federal sector be assured that he or she can administer and supervise free from the threat of individual liability for adverse action taken against employees. Any other rule will diminish efficiency, productivity and discipline in the federal work force.