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BACKING OFF *BIVENS* AND THE RAMIFICATIONS OF THIS RETREAT FOR THE VINDICATION OF FIRST AMENDMENT RIGHTS†

Joan Steinman*

INTRODUCTION

In 1983 the United States Supreme Court decided two cases that together constitute a significant retrenchment from the Court's previous position in the *Bivens*¹ line of cases. In these two newest cases, *Chappell v. Wallace*² and *Bush v. Lucas*,³ the Supreme Court substantially raised the barriers to federal court recognition of certain causes of action for money damages arising directly under the Constitution. The Court did so without acknowledging that this was the purpose or effect of its line of reasoning, and without proffering any cogent explanation or justification for this change in the law. Additionally, the Court wrote opinions in these two cases that provide no guidance to lower federal courts on the critical question of how the constitutional adequacy of congressional remedial schemes is to be judged.

In Part I of this Article, *Chappell* and *Bush* are analyzed against the backdrop of the preceding *Bivens* cases. The analysis explains how these cases presented situations that were similar to one another but unlike any the Supreme Court previously had faced in *Bivens* cases. It demonstrates how the Court departed from the line of analysis that its previous *Bivens* cases had established, in a way that makes it more difficult for at least some plaintiffs seeking vindication of their constitutional rights to succeed in having a money damage remedy implied directly under the Constitution. The Article then argues that this raising of the barriers to recovery under the Constitution was not convinc-

† I would particularly like to thank my colleague, Margaret Stewart, for her substantial assistance in helping me think through parts of this Article. I would also like to thank my colleague, Stuart Deutsch, for his suggestions and Shelby Keisman and Debbie Nutley, students at I.I.T. Chicago-Kent College of Law, for their research assistance in the preparation of this Article.

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

2. 103 S. Ct. 2362 (1983).

3. 103 S. Ct. 2404 (1983).

ingly supported, and enhanced the risk that the constitutional rights of some people, in some circumstances, will be so unenforceable as to violate constitutional minima. In conjunction with this analysis of *Chappell* and *Bush*, the Article explores the constitutional theory that underlies *Bivens* actions. It suggests some specific questions courts ought to address when faced with the issue of whether a legislated remedial scheme should preclude a *Bivens* remedy. In particular, the Article proposes several matters courts ought to examine when judging whether a legislated remedial scheme is constitutionally adequate.

Part II argues in favor of a money damage remedy under the Constitution for violations of first amendment rights. A number of *Bivens* actions brought under the first amendment to the Constitution⁴ are then discussed to illustrate the possible implications of *Chappell* and *Bush*. The discussion shows how these recent Supreme Court decisions increase the risk that first amendment rights will be unenforceable, even unconstitutionally so. Finally, the Article identifies first amendment *Bivens* cases which remain largely unaffected by *Chappell* and *Bush*.

I. THE PROBLEMS WITH *BUSH* AND *CHAPPELL*

To understand how *Chappell v. Wallace* and *Bush v. Lucas* deviated from the Court's previously formulated analysis for determining when a cause of action for money damages should be recognized to arise directly under the Constitution, and, in so deviating, endangered certain constitutional rights, one must first understand the *Bivens* line of cases which came before. A sketch of those cases follows.

A. The Earlier Supreme Court Cases

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*⁵ the Supreme Court was invited to hold that the fourth amendment to the Constitution operates merely to define a defense which federal agents can assert to a state law tort suit.⁶ The Court rejected

4. The shorthand phrase, "first amendment *Bivens* actions," will be used to refer to actions for money damages, alone or in conjunction with other forms of relief, brought directly under the first amendment to the Constitution against federal officials. *Bivens* actions are distinct from statutorily authorized actions for money damages for violation of the first amendment. *E.g.*, Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1976) (authorizing actions to be brought against the United States itself); 42 U.S.C. § 1983 (Supp. V 1981) (authorizing actions to be brought against "persons" including cities, counties and other local government entities and local government officials sued in their official capacities, but excluding states and their agents).

5. 403 U.S. 388 (1971).

6. The proposed defense would have shielded federal agents from state tort liability if the challenged search and seizure was reasonable under fourth amendment standards. 403 U.S. at 390-92, 394.

this restrictive view, emphasizing that the fourth amendment circumscribes federal power regardless of whether a state, through its tort law, would prohibit or penalize the identical act if engaged in by a private citizen.⁷ In support of this conclusion, the Court noted that the interests protected by state laws may not be the same as those protected by the fourth amendment's guarantees, and may even be inconsistent with or hostile to the interests protected by the fourth amendment.⁸ Because the enforcement of a constitutional guarantee is a federal matter, not appropriately left to the states to safeguard, the Court determined that "an independent claim [is] both necessary and sufficient to make out the plaintiff's cause of action."⁹

The Court marshalled several justifications for its decision that money damages are and should be recoverable for injuries caused by a federal violation of the fourth amendment. The Court expressly rejected respondents' formulation of the question presented as whether the availability of money damages is *necessary* to enforce the fourth amendment. It restated the issue as merely whether petitioner, if he could demonstrate the injury alleged, was entitled to redress through a remedial mechanism normally available in the federal courts.¹⁰ The Court noted that damages historically have been the ordinary remedy for an invasion of personal interests in liberty, and relied upon the notion that courts will be alert to adjust their remedies to grant appropriate relief when federally protected rights have been invaded.¹¹ The Court also analogized from the then-accepted principle that federal courts may use any available remedy where legal rights have been invaded and a federal statute provides a general right to sue.¹² Finally, it noted that "we have here no explicit congressional declaration that persons [so] injured . . . may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress,"¹³ and remarked, "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress."¹⁴ The Court suggested that such spe-

7. 403 U.S. at 392-94; *accord* 403 U.S. at 400-02 n.3 (Harlan, J., concurring).

8. 403 U.S. at 394-95.

9. 403 U.S. at 395.

10. 403 U.S. at 397.

11. 403 U.S. at 395-96.

12. 403 U.S. at 392, 396. In recent years the Court has become less willing to imply private causes of action from statutes. *See, e.g.,* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); *see also* Cannon v. University of Chicago, 441 U.S. 677 (1979).

13. 403 U.S. at 397.

14. 403 U.S. at 396.

cial factors may be present when questions of federal fiscal policy are involved.¹⁵ On this analysis, the Court reversed the dismissal of Bivens' complaint for failure to state a claim on which relief could be granted.

In a concurring opinion, Justice Harlan agreed that federal courts do have the power to award money damages for violations of constitutionally protected interests even without congressional action creating a cause of action for damages. He further agreed that damages were appropriate to the vindication of the personal interests protected by the fourth amendment, rejecting the government's position that a damage remedy should be accorded only where it is "indispensable" to vindicate constitutional rights.¹⁶ In arriving at the conclusion that a damage remedy was appropriate to vindicate Bivens' injury, Justice Harlan went beyond the Court's pronouncements to set forth criteria to govern the exercise of a court's power. In this influential part of his concurrence, Justice Harlan observed that a court could take into account all of the policy considerations that a legislature would consider in fashioning a statutory remedy, and more. Thus, the presence or absence of deterrent effects on future official lawlessness would not be determinative.¹⁷ He noted that courts are "capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation"¹⁸ for violation of fourth amendment rights, while opining that this might not be true with respect to other constitutionally protected interests.¹⁹ Justice Harlan also deemed it noteworthy that money damages were the only possible remedy for someone in Bivens' position.²⁰ Last, he met the suggestion that implication of a damages remedy would strain an already over-taxed federal judiciary²¹ by arguing that mere "budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles."²²

15. For discussion of what else the Court may have had in mind, see text at notes 32, 117-22 *infra*.

16. 403 U.S. at 399-411.

17. 403 U.S. at 407-08.

18. 403 U.S. at 409.

19. Justice Harlan here cited his concurring opinion in *Monroe v. Pape*, 365 U.S. 167, 196 n.5 (1961) ("There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools?").

20. 403 U.S. at 409-10.

21. 403 U.S. at 428-29 (Black, J., dissenting); *cf.* 403 U.S. at 430 (Blackmun, J., dissenting) (an "avalanche of new federal cases" will "stultify proper law enforcement").

22. 403 U.S. at 411. The dissenting Justices questioned the efficiency and wisdom of the damage remedy created by the majority, 403 U.S. at 421-22 (Burger, C.J.), 428-30, (Black, J.) and (especially Justice Black) argued that the holding in *Bivens* impinged on legislative and pol-

In the next major case in the *Bivens* line,²³ *Davis v. Passman*,²⁴ the Court held that a cause of action and a damages remedy can be implied directly from the due process clause of the fifth amendment. Ms. Davis had been a deputy administrative assistant to a U.S. Congressman. She claimed that her termination was unconstitutional gender discrimination. Justice Brennan, writing for the majority, began his analysis by stating that the equal protection component of the due process clause conferred on a plaintiff a federal constitutional right to be free from gender discrimination that is not substantially related to the achievement of important governmental objectives.²⁵ Brennan considered separately whether plaintiff had a cause of action to assert that right, and, if so, whether damages would be an appropriate form of relief.

The majority opinion concluded that a litigant has a cause of action if she is "a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court."²⁶ Brennan stressed that the inquiry into whether a particular plaintiff has an implied cause of action under a constitutional provision is "fundamentally different" from the inquiry into whether a plaintiff has an implied cause of action under a statute.²⁷ The decision whether to imply a cause of action from a statute is ultimately a matter of interpreting congressional intent. The decision whether to recognize a private

icy functions that the Constitution vests exclusively in Congress. 403 U.S. at 418, 427-30. This fundamental constitutional issue still may not have been laid to rest to the satisfaction of all the present members of the Court. In the recent decision in *Bush v. Lucas*, 103 S. Ct. 2404 (1983), Justice Stevens, writing for the Court but at this point reflecting a view not his own, observed that if the Court were writing on a clean slate, it might hold that the remedial powers of federal courts do not extend beyond the granting of relief expressly authorized by Congress. 103 S. Ct. at 2408-09. He regarded it as appropriate to spend several pages reviewing cases establishing the courts' independent power to remedy violations of the Constitution. 103 S. Ct. at 2409-12. In 1980, dissenting from the decision in *Carlson v. Green*, 446 U.S. 14, 32-44 (1980), Justice Rehnquist said the Court had taken a "wrong turn" in *Bivens*, and argued at length that the inference of civil damage remedies from any provision of the Constitution is beyond the power of the federal courts. But the turn taken in *Bivens*, whether right or wrong, is now "firmly established" in Supreme Court precedent. 103 S. Ct. at 2409. This Article does not re-examine that turn, but instead assumes the constitutional power of federal courts to recognize damage remedies for the violation of constitutional rights by federal agents, absent congressional authorization of such remedies.

23. Earlier, in *Butz v. Economou*, 438 U.S. 478 (1978), a plaintiff had sued for damages, alleging claims under several provisions of the Constitution, including the due process clause of the fifth amendment and the first amendment. 438 U.S. at 482-83, 483 n.5. The Court decided issues of immunity raised by the case, and disavowed deciding or discussing what personal interests, other than those protected by the fourth amendment, could be vindicated by a suit for damages. 438 U.S. at 485, 486 n.8. However, the case did reaffirm the holding in *Bivens*. 438 U.S. at 504.

24. 442 U.S. 228 (1979).

25. 442 U.S. at 234-35.

26. 442 U.S. at 240 n.18.

27. 442 U.S. at 241.

cause of action under the Constitution is not. Declaring that the judiciary is the primary means through which constitutional rights may be enforced,²⁸ Justice Brennan wrote, "the class of those litigants who allege that their own constitutional rights have been violated, and who . . . have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."²⁹ Because Ms. Davis claimed that her equal protection rights had been violated and that she had no effective means of redress other than the courts, Brennan concluded that she did have a cause of action to seek relief under the fifth amendment.

Next, the Court addressed the propriety of a damages remedy, finding this an easy case. It found that such relief would be judicially manageable, the courts having much experience handling statutory claims for back pay deriving from sex discrimination cases, and the questions of causation and valuation not being difficult.³⁰ It found that no alternative forms of judicial relief, such as reinstatement, were available, as the defendant was no longer a congressman. In a footnote, the Court rejected as inadequate the alternative of a claim under state law.³¹ The Court stated that a suit against a congressman for unconstitutional actions taken in the course of his official conduct does raise special concerns counselling hesitation. However, the Court held that such grounds for hesitation were coextensive with whatever protection the congressman was afforded by the speech or debate clause of the Constitution,³² a question it left for the lower courts' consideration.³³ Further applying the tests suggested by *Bivens*, the Court found there to be no explicit congressional declaration that persons in plaintiff's position could not recover damages.³⁴ It rejected a reading of Section 717 of Title VII of the Civil Rights Act of 1964³⁵ — pro-

28. 442 U.S. at 241.

29. 442 U.S. at 242.

30. 442 U.S. at 245.

31. 442 U.S. at 245-46 n.23.

32. U.S. CONST. art. I, § 6, cl. 1.

33. *Davis*, 442 U.S. at 236 n.11, 246.

34. 442 U.S. at 246-47.

35. 42 U.S.C. § 2000e-16 (1982). The section reads, in pertinent part:

(a) All personnel actions affecting employees . . . in executive agencies . . . in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service . . . shall be made free from any discrimination based on race, color, religion, sex or national origin.

. . . .
(c) [Within prescribed time limits] an employee . . . if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action . . . in which . . . the head of the department, agency or unit, as appropriate, shall be the defendant.

tecting certain classes of federal employees from discrimination — as such an explicit declaration, holding that section 717 left undisturbed the remedies of persons, like Ms. Davis, not covered by the statute.³⁶ Finally, the Court again rejected a feared deluge of claims as a ground for denying the plaintiff a money damage remedy.³⁷ Implicitly, the Court rejected the Fifth Circuit's view that such a remedy should be denied unless it is constitutionally compelled.³⁸

*Carlson v. Green*³⁹ was the third Supreme Court case directly in the *Bivens* line. Plaintiff sued federal prison officials on behalf of the estate of her son, alleging that he had died because of defendants' deliberately indifferent acts and omissions in treating his chronic asthma. She alleged violations of his due process, equal protection and eighth amendment rights.⁴⁰ The Supreme Court held that plaintiff had stated a *Bivens* claim. Neither of the situations postulated in *Bivens* as defeating the right of a victim of constitutional violations to recover damages against a federal official was present here. First, no special factors counselled hesitation. Pointedly contrasting *Davis v. Passman*, the Court observed that defendants did not enjoy a special status in our constitutional scheme which suggested that judicially created remedies against them might be inappropriate. Although requiring them to defend might inhibit their effort to perform their official duties, the qualified immunity accorded by *Butz v. Economou*⁴¹ provided all the protection those defendants ought to have.⁴²

Second, the Court found that Congress had not provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and which it viewed as equally effective.⁴³ The Court rejected the argument that the 1974 amend-

36. 442 U.S. at 247. Justice Powell disagreed with this construction of Title VII, in a dissenting opinion joined by the Chief Justice and Justice Rehnquist. 442 U.S. 251, 254. Citing *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976), where the Court held that § 717 "provides the exclusive judicial remedy for claims of discrimination in federal employment," Powell argued that in exempting its own employees from protection under § 717, Congress made clear its intention that its employees should be denied all judicial relief for claims of employment discrimination. See note 311 *infra*.

37. 442 U.S. at 248.

38. Of the dissents in *Davis*, that written by Justice Powell most directly questioned the logic and precedential basis for some of the broad language in Justice Brennan's majority opinion. 442 U.S. 251, 252. Justice Powell, Chief Justice Burger and Justice Rehnquist also argued that the majority gave too little weight to the needs of congressmen to control their own staffs and to separation of powers concerns. 442 U.S. at 249-51.

39. 446 U.S. 14 (1980).

40. 446 U.S. at 16 & n.1. The equal protection claim was predicated on plaintiff's allegation that defendants' indifference was in part attributable to racial prejudice.

41. 438 U.S. 478 (1978). See note 23 *supra*.

42. *Carlson*, 446 U.S. at 19.

43. 446 U.S. at 18-19.

ments to the Federal Torts Claims Act (FTCA),⁴⁴ creating a cause of action against the United States for certain intentional torts committed by federal law enforcement officers, was thus preemptive of *Bivens* claims, rather than merely complementary.⁴⁵ In support of this conclusion, the Court marshalled legislative history, the congressional practice of explicitly stating when it meant to make an FTCA remedy exclusive, and four factors regarded by the Court as suggesting the greater efficacy of a *Bivens* remedy and thus indicative of Congress' intent that *Bivens* actions against federal officials would survive the 1974 FTCA amendments.⁴⁶ The Court found a *Bivens* action to be more effective than the FTCA remedy first because, being recoverable against individuals, a *Bivens* remedy is a more effective deterrent against unconstitutional behavior, and second because decisions of the Court indicated that punitive damages might be awarded in a *Bivens* suit, but are statutorily prohibited in FTCA actions. This too enhanced the deterrent impact of *Bivens* suits as against FTCA actions.⁴⁷ The Court also attached significance to the right to a jury trial in a *Bivens* action, a right that does not exist in an FTCA suit.⁴⁸ Finally, in concluding that the FTCA is not a sufficient protector of constitutional rights,⁴⁹ the Court commented that an FTCA action exists only if the state in which the alleged misconduct occurred would recognize a claim for that misconduct, whereas the liability of federal officials for violation of constitutional rights should be governed by uniform rules.⁵⁰

Two Justices concurred in the judgment but took issue with the majority's restatement of the principles governing *Bivens* actions. Two other Justices dissented. Those troubled by the Court's language believed that the Court had gone beyond both *Bivens* and *Davis* in indicating that the existence of adequate alternative avenues of redress would not defeat a *Bivens* action unless Congress had "clothed [such

44. 28 U.S.C. § 2680(h) (1982).

45. *Carlson*, 446 U.S. at 19.

46. 446 U.S. at 19-23.

47. 446 U.S. at 21-22.

48. 446 U.S. at 22-23.

49. 446 U.S. at 23.

50. 446 U.S. at 22-23. Relying on this same preference for uniformity as better serving the goals of *Bivens* actions, the Court went on to hold that, pursuant to a federal common law rule of survivorship, the *Bivens* claims survived the death of plaintiff's son. 446 U.S. at 23-25. The Court left the door open, however, to federal law incorporation of state rules, as a matter of convenience, on other survivorship questions that might arise in *Bivens* actions. 446 U.S. at 25 n.11.

alternative avenues] in the prescribed linguistic garb"⁵¹ by explicitly declaring them to be substitutes for *Bivens* actions. Although the Court denied that it was requiring Congress to recite any "magic words"⁵² before an alternative remedial scheme would be deemed preclusive of *Bivens* claims, the concurring and dissenting Justices were troubled by what they perceived as a drastic curtailment of a court's discretion when presented with the question whether to imply a remedy directly from the Constitution.⁵³

The concurring Justices also correctly pointed out that the concept of special factors counselling hesitation provided only a cryptic guide to decision.⁵⁴ The Court had found no special factors to be present in either *Bivens* or *Carlson* and the notion had not been much clarified by the Court's suggestion in *Davis* that "independent status in our constitutional scheme"⁵⁵ might be such a factor because it then had concluded that the immunity created by the speech or debate clause afforded all the protection necessary.⁵⁶ Despite the criticisms of the majority opinion, the Justices concurring in *Carlson* agreed that it was correct to imply a damage remedy on the facts of that case, both because they viewed the FTCA as an inadequate remedy and because Congress appeared not to have intended the FTCA to displace *Bivens* claims.⁵⁷

51. 446 U.S. at 27 (Powell, J., concurring, joined by Stewart, J.). See also 446 U.S. at 30-31 & n.2 (Burger, C. J., dissenting).

52. 446 U.S. at 19 n.5.

53. 446 U.S. at 27-28 (Powell, J., concurring), 30-31 (Burger, C. J., dissenting), 52-53 (Rehnquist, J., dissenting).

54. 446 U.S. at 27 (Powell, J., concurring).

55. 446 U.S. at 19.

56. *Davis*, 442 U.S. at 246. Presumably, the special factors counselling hesitation are not identical to those factors that lead to immunities, or that prong of the *Bivens* test would swallow immunity doctrine and render it superfluous. At most, one can infer from the Court's approach in *Davis* that the factors favoring a constitutional or common law immunity are also relevant to whether a cause of action should be implied. But the *Davis* court preferred to allow those factors to operate by way of defense, rather than have them affect the decision whether to imply the cause of action.

57. 446 U.S. at 28 & n.1. Justices Powell and Stewart noted several factors which they viewed as establishing the inadequacy of the FTCA. They said that the FTCA is not truly a federal remedial scheme at all; it is a waiver of sovereign immunity that permits claimants to recover against the United States when a private person would be liable under the law of the state where the wrong occurred. Thus, as in *Bivens*, a plaintiff denied a constitutional remedy would be left to the vagaries of state law. Second, they commented that the statute is "hedged with protections for the United States." Third, as the Court pointed out, the FTCA allows neither jury trial nor punitive damages. Finally, it disallows recovery when a claim arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such . . . be valid." 28 U.S.C. § 2680(a).

Justice Rehnquist's dissent attacked the concept of *Bivens* actions altogether. 446 U.S. at 31, 32-44, 51, 53-54. So far as this particular case was concerned, he criticized the failure of the Court to provide guidance for deciding when a constitutional provision permits an inference that an individual may recover damages. 446 U.S. at 35. He took issue with the Court's reading of

In 1983, the Court summarized the law to date as follows:

This much is established by our prior cases. The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.⁵⁸

B. *The Constitutional Theory Reflected*

When the Supreme Court decided *Bivens* those Justices who dissented argued that the Court was arrogating to itself a power that it did not constitutionally possess. Judicial recognition of a cause of action for money damages was said to impinge on legislative and policy functions that the Constitution vests exclusively in Congress.⁵⁹ Although some members of the Court maintained that view until at least 1980,⁶⁰ it seems now to be settled that the federal courts do have power to award money damages against federal officials in order to vindicate constitutional rights whether or not Congress has expressly authorized such suits.⁶¹ The courts' power to do so springs from the grant of jurisdiction to the federal courts to decide all cases "aris[ing] under the Constitution, laws, or treaties of the United States."⁶² The Supreme Court exercised this power in *Bivens*, *Davis* and *Carlson*, and it reaffirmed the power in *Chappell v. Wallace*⁶³ and *Bush v. Lucas*,⁶⁴ the two *Bivens* cases it decided, with no dissenters, in 1983.

the legislative history of the FTCA, 446 U.S. at 33 n.2, and he challenged each of the four factors that the Court marshalled to show the greater effectiveness of *Bivens* than of FTCA actions. In brief, Justice Rehnquist questioned the deterrent effect of *Bivens* actions and the availability of punitive damages in *Bivens* actions. He saw no basis for viewing Congress' failure to specify that the FTCA was to substitute for *Bivens* actions as indicating that in Congress' mind the right of a plaintiff to have a jury trial in a *Bivens* case was a reason for *Bivens* actions to survive alongside FTCA actions. Justice Rehnquist also found no significant interest in uniform rules governing the liability of federal officials accused of unconstitutional conduct. 446 U.S. at 44-50.

58. *Bush v. Lucas*, 103 S. Ct. 2404, 2411 (1983).

59. *Bivens*, 403 U.S. at 418 (Burger, C.J. dissenting), 427-30 (Black, J., dissenting).

60. See *Carlson v. Green*, 446 U.S. 14, 34-44 (1980) (Rehnquist, J., dissenting); see also note 22 *supra*.

61. *Bush v. Lucas*, 103 S. Ct. 2404, 2411, quoted in text at note 58 *supra*.

62. 28 U.S.C. § 1331 (1982). See *Bush v. Lucas*, 103 S. Ct. 2404, 2409; *Butz v. Economou*, 438 U.S. 478, 486, 504 (1978).

63. 103 S. Ct. 2362, 2364 (1983).

64. 103 S. Ct. 2404, 2409-11 (1983).

On the three occasions that the Court exercised its power to create a cause of action for money damages directly under the Constitution, it may or may not have believed that that particular remedy was "indispensable" in the sense that no other remedial scheme could possibly prevent the substantive constitutional guarantee in question from becoming meaningless to the plaintiff, a "mere form of words."⁶⁵ Some commentators have read the holding and outcome in *Bivens* itself as being constitutionally required in this sense of giving the plaintiff what the Constitution minimally required.⁶⁶ Other commentators disagree, viewing *Bivens* as constitutional common law,⁶⁷ law which goes beyond the minimum requirements of the Constitution to carry out the purposes and policies of the fourth amendment.⁶⁸

Whichever of these two approaches the Court viewed itself as taking in the three *Bivens* cases decided in favor of plaintiffs, what is important for present purposes is the realization that there *can* be occasions when a money damage remedy against an offending official

65. This phrase is from *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The notion of indispensability used in the text is from Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1548-49 (1972).

66. See, e.g., Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135-38 (1978). Schrock and Welsh argue that the Court decided that, for persons circumstanced as was Mr. Bivens, a cause of action for money damages derives from the fourth amendment itself. They find support in language of both Justice Brennan, writing for the Court, and Justice Harlan, concurring, indicating that the Court had to use the money damage remedy or be derelict in fulfilling its fourth amendment duties. See *Bivens*, 403 U.S. at 395-97, 407-08 & n.8. Among the most important passages they cite is that in which Justice Harlan said, "[T]oday's decision has little, if indeed any, bearing on the question whether a federal court may properly devise remedies — other than traditionally available forms of judicial relief — for the purpose of enforcing substantive social policies embodied in constitutional or statutory policies," and in which he characterized as a separate question whether a court had power to create prophylactic measures. *Bivens*, 403 U.S. at 408 n.8. Schrock and Welsh understand Justice Harlan to be speaking of judge-made prophylactic measures which are not required by the Constitution.

67. See, e.g., Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23-24 (1975) (Monaghan relies on the Court's rejection of the question posed in *Bivens* as whether the availability of money damages is "necessary" to enforce the fourth amendment, *Bivens*, 403 U.S. at 397, and on the analogy to the common law process of articulating the remedial implications of federal statutory rights); Note, *The Limit of Implied Constitutional Damages Actions: New Boundaries for Bivens*, 55 N.Y.U. L. REV. 1238, 1244 n.50, 1245 n.51 (1980).

68. In *Davis v. Passman*, 442 U.S. 228, 234 (1979), the Court characterized *Bivens* as holding that a damages remedy was "an appropriate form of redress." The Court similarly held in *Davis* that damages were "an appropriate form of remedy." 442 U.S. at 234, 245. It went on to say that "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." 442 U.S. at 248. This language suggests that the Court viewed the damage remedy it was affording plaintiff as not indispensable, but as subject to modification by Congress, within limits — thus what Monaghan, *supra* note 67, calls constitutional common law. The decision in *Carlson v. Green*, 446 U.S. 14, 18-19 (1980), bolsters this conclusion in taking the position, and reading *Bivens* as establishing, that a cause of action for money damages will not be recognized when Congress has provided an alternative remedy which it declares to be a substitute for recovery directly under the Constitution and which it views as equally effective. See also *Nixon v. Fitzgerald*, 457 U.S. 731, 789-90 (1982) (White, J., dissenting) ("Congress retains the power to restrict exposure to liability. . . ." However, Justice White also indicates that legislatively prescribed remedies must be "adequate.").

is constitutionally required, is indispensable because no other remedial scheme does or could prevent the substantive constitutional guarantee in question from becoming an empty form of words to the plaintiff.⁶⁹

69. In some instances, if not all, a money damage remedy against a unit of government rather than against an official sued in his individual capacity would also suffice.

There was before the 98th Congress, and there is before the 99th Congress, a proposal to substitute the United States for the individual official as the defendant in constitutional tort cases. See S. 775 and S. 829, 98th Cong., 1st Sess. (1983); S. 492, 99th Cong., 1st Sess. (1985). The bill leaves open the question of the extent to which federal law recognizes claims for money damages arising under the Constitution, for it provides, in pertinent part: "The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the extent recognized or provided by applicable Federal law . . ." S. 775, § 3 (emphasis added). The quoted language would appear in 28 U.S.C. § 2674 in a new subsection (b)(1). The bill would also provide subject matter jurisdiction in the U.S. district courts over

civil actions on claims against the United States, for money damages, sounding in tort arising under the Constitution of the United States for injury or loss of property, or personal injury or death, caused by an act or omission of any employee of the Government while acting within the scope of his office or employment, *such liability to be determined in accordance with applicable Federal law.*

S.775 § 1 (proposed 28 U.S.C. § 1346(b)(2) (emphasis added)). By so providing, the bill, in effect, incorporates the court-made law scrutinized in this Article, dictating the circumstances under which first amendment violations are compensable through money damages.

This proposed legislation reflects recent scholarly commentary that has raised serious questions about actions for money damages which lie against federal officials for their alleged constitutional torts. Professor Peter Schuck, for example, has described serious shortcomings of our present remedial schemes in fulfilling the goals of public tort law, identified as compensating victims, deterring wrongdoing without unduly undermining vigorous decisionmaking, exemplifying society's moral principles, and placing remedial decisions in the hands of the institutions which can most competently and most legitimately make those decisions. P. SCHUCK, *SUING GOVERNMENT* 16-25 (1983). His analysis leads him to advocate substitution of remedies against the government for remedies against individual officials as one component of a better response. *Id.* at 109-11. See also Madden, Allard & Remes, *Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469 (1983).

There seems to be little doubt that the present system is seriously flawed. It is not the mission of this Article to advocate maintenance of actions against officials in their individual capacities, as preferable to a money damage remedy against some agency of the government itself; there are pros and cons to both approaches and inescapable uncertainty as to the real effects the one has and the other would have. Professor Schuck's advocacy of remedies against the government which would replace monetary liability of individual government officials is predicated in part upon his concern that the present system seriously jeopardizes vigorous decisionmaking. Yet, as he acknowledges, "systematic" evidence does not exist as to how public officials actually perceive and evaluate the risk of being sued and the costs associated with that risk, P. SCHUCK, *supra*, at 69-71. Shifting liability to the government, or some unit thereof, might well increase the chances of actual recovery by a plaintiff who won a judgment, as the United States is much less likely to be judgment-proof than is an individual. But it is by no means certain that the goal of deterring violations of constitutional rights would be better served by such a shift. The notion that deterrence would be promoted by the shift to government liability is counterintuitive. See, e.g., *Carlson v. Green*, 446 U.S. 14, 21 (1980). Moreover, many factors other than a government unit's vulnerability to money judgments for the unconstitutional activities of its agents affect how well the unit will train its personnel to respect the constitutional rights of its own members and of the public it serves. See, e.g., P. SCHUCK, *supra*, at 105-08. And there are influences on individual agents other than the values inculcated by the agencies that employ them. Nor is it certain that vigorous decisionmaking, of a desirable sort, would be enhanced by a shift of liability to the government. A government agency's self-protective tendencies could cause it to inculcate a cautiousness that would be worse than the individually evolved self-protective tendencies which concern Schuck. New or different sanctions available against individual officials could keep them timid. Even if decisionmaking were to be invigorated by a shift to government liability, that might well occur only at the cost of increased and increasingly serious violations of constitutional

This is important because when a money damage remedy is constitutionally required, Congress is without power to revise or replace that remedy.⁷⁰ A remedy that is merely constitutional common law can be altered by Congress,⁷¹ given congressional power to legislate in the area,⁷² but a remedy that is constitutionally indispensable cannot properly be tampered with by Congress.⁷³ It would seem to follow that when Congress has afforded some avenue of redress for a constitutional violation and the courts are asked to recognize a cause of action under the Constitution, it is incumbent upon the courts to determine whether the requested *Bivens* remedy is constitutionally required or whether, to the contrary, it is not so required because the congressional remedy that has been afforded is constitutionally adequate.

What, then, must a court decide in determining whether a legislative remedial scheme should preclude a *Bivens* action in a particular case? First, the court should decide whether the statutory scheme was intended by Congress to be exclusive and to substitute for a *Bivens* action which previously was recognized or which otherwise might be recognized in the future.⁷⁴ If the court concludes that the legislated remedies were not intended to be exclusive, then a *Bivens* remedy properly can be afforded,⁷⁵ other things being equal,⁷⁶ even if the legis-

rights. Still another factor is that the shift to government liability would frustrate whatever desire victims have for personalized retribution.

70. Dellinger, *supra* note 65, at 1548-49.

71. Dellinger, *supra* note 65, at 1547-48; Monaghan, *supra* note 67, at 28-29.

72. Dellinger locates the sources of congressional power to legislate remedies for cases arising under the Bill of Rights in three places, some or all of which may be applicable in a given case: first, in a relevant enumerated congressional power; second, by inference from the judiciary clauses of articles I and III, conferring on Congress the power to constitute and create courts inferior to the Supreme Court; and third, as necessary and proper, U.S. CONST. art. I, § 8, cl. 18, for the execution of the judicial power over cases arising under the Constitution, and for implementation of congressional powers under articles I and III. Dellinger, *supra* note 65, at 1546-47.

73. Dellinger is worth quoting. He says, Congress['] . . . authority to displace or modify a remedy independently created by the Court to implement constitutional provisions would depend upon the relationship of the remedy created to its substantive constitutional predicate. . . . [E]ven where the Court concludes that a particular remedy is "part and parcel" of the underlying constitutional right, Congress is not necessarily barred from substituting an alternative remedial scheme, provided it affords comparable vindication of the constitutional provision involved. On the other hand, if there were ever a case in which it could be established that a particular remedy was "indispensable" in the sense that no other remedial scheme could possibly prevent the substantive constitutional requirements from becoming a "mere form of words," then, and only then, would Congress be wholly without power to revise or replace that remedy. Dellinger, *supra* note 65, at 1547-49 (footnotes omitted).

74. *Carlson*, 446 U.S. at 18-19.

75. *Carlson*, 446 U.S. at 19-20.

76. "Other things being equal," in this context, means that special factors counselling hesitation do not exist and that the court, as a common law tribunal, is capable of making the types of judgments necessary to accord meaningful compensation. Depending upon how complete and

lated remedies meet constitutional minima. If, however, the court concludes that the legislated remedies were intended by Congress to be exclusive and to substitute for and preclude a *Bivens* remedy, then the court should determine whether the congressional scheme would afford the plaintiff constitutionally adequate relief.⁷⁷

In determining whether the congressionally afforded relief is constitutionally adequate, the court should be careful to judge adequacy *for the plaintiff*. "[T]he fact that persons in other situations may have access to remedies that will vindicate their rights under the constitutional provision in question should not preclude the judicial creation of remedies for a particular plaintiff who is without effective means of redress."⁷⁸ Focusing on the situation of the individual plaintiff also has the salutary effect of requiring the court to assure itself that one in plaintiff's position was intended to be covered by the exclusive statute in question. If he was not, one need no longer be concerned with the legislated remedy.

If plaintiff was intended to be covered by the statute in question, but is denied all relief under the statute, then the court should independently determine whether such treatment is constitutional. An individual might be able to plead all the elements of a *Bivens* action but not be able to meet substantive elements of, or to defeat merely statutory defenses to, the statutory cause of action. For him the statutory remedy is no remedy at all. The court should not assume that the statutory remedy is constitutionally adequate just because it was intended by Congress to afford the exclusive remedy for violations of the constitutional rights of some class of persons. To merely assume the constitutional adequacy of an "exclusive" statutory remedy is to permit Congress to deny an individual *all* remedy because he fails to state a statutory claim or cannot meet mere statutory defenses. That would amount to allowing Congress to define what constitutes a violation of particular guarantees in the Bill of Rights, when the function of defin-

satisfactory the legislative remedy is, a court could properly decide not to imply a *Bivens* remedy, however.

77. The courts should not defer to a congressional determination of constitutional adequacy. Instead, the courts should make their own determination of whether the remedy considered by Congress to be equally effective is in fact constitutionally adequate as applied to the particular plaintiff before the court. See text at notes 80-85 *infra*. The concurring Justices in *Carlson*, 446 U.S. at 28, took just this approach, arguing that an "implied remedy is plainly appropriate" because the FTCA "simply is not an adequate remedy." (Justice Brennan, writing for the Court, concluded that Congress did not intend the FTCA to substitute for a *Bivens* remedy, 446 U.S. at 19-20, and thus was not faced with the question of whether the remedies provided were constitutionally adequate. Justice Brennan did demonstrate, however, that the FTCA "is not a sufficient protector of the citizens' constitutional rights," 446 U.S. at 23, to shore up his conclusion that Congress intended the FTCA to complement the *Bivens* remedy, not replace it.)

78. Dellinger, *supra* note 65, at 1551.

ing constitutional violations is properly the Court's under *Marbury v. Madison*.⁷⁹ Since a court should not defer to Congress' definition of a violation of constitutional rights, it should independently determine whether one left without a statutory remedy has stated a claim under the Constitution. If he has, the court should afford a suitable *Bivens* remedy.

If plaintiff is afforded a remedy under the legislative scheme, then the court should independently determine whether the remedy adequately vindicates plaintiff's constitutional rights. One aspect of the analysis should focus on whether the legislative remedy speaks to the violation suffered. If an individual's constitutional rights have been violated, the relief afforded should contain retrospective relief. Similarly, if an individual's constitutional rights have not yet been violated, but the risk to him is sufficiently great that he meets the requirements of standing, a case or controversy, and the like,⁸⁰ the relief afforded should take the form of prospective relief. A legislated remedy not "facing in the right direction" would be constitutionally inadequate.⁸¹ The hardest case is posed by the person whose constitutional rights have been violated and who has grounds for fearing future violations. Would a purely prospective remedy be constitutionally adequate for him? It seems not. Although one could say that such a remedy would not render the constitutional right in question a "mere form of words" for the plaintiff, it would afford no remedy at all for the constitutional violations already suffered. As to those violations of his rights, prospective relief is no relief at all. Hence, to be constitutionally adequate, a remedy for this plaintiff would have to include both retrospective and prospective components.

The court also should consider whether the plaintiff was permitted meaningful access to the legislative remedies. In speaking of "meaningful access" I do not refer to the question of whether the plaintiff has stated a claim for relief under the statute, nor to the adequacy of the legislated remedy *per se*. I refer to the procedural prerequisites to re-

79. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

80. The Court has said that "[T]o entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action" *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam), quoted with approval in *Laird v. Tatum*, 408 U.S. 1, 13 (1972). The Court there added, "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm" 408 U.S. at 13-14.

81. In a case where it was unclear whether Congress intended its remedial scheme to be exclusive, a finding that the remedy afforded plaintiff fails to "face in the right direction" would be evidence that Congress did not intend its remedy to preclude implication of a *Bivens* action.

covery under the statute. Unreasonable procedural hurdles or breakdowns in the statutory procedural system due to human frailties can prevent an aggrieved person from attaining a statutory remedy. These obstacles could be attacked as violations of the aggrieved party's right to procedural due process. Alternatively, such procedural obstacles might be regarded as bearing upon the adequacy of the statutory remedy on the theory that, absent meaningful access, the legislated remedies cannot be adequate, no matter how satisfactory they would be if available.⁸²

To say that a remedy must "face in the right direction" and be meaningfully accessible to plaintiff does not say much, of course. Assuming it does so, what more is required? Another facet of the analysis is that the court must appraise whether the legislated remedy actually available to the plaintiff is meaningful. In doing this, the notion that the constitutional guarantee must not be a "mere form of words" takes center stage. Under the test suggested in *Bivens* and pronounced in *Carlson*,⁸³ a legislative remedial scheme will preclude implication of a *Bivens* remedy if Congress viewed its remedy as equally effective as a *Bivens* remedy and explicitly declared its remedy to be a substitute therefor. Since a *Bivens* remedy adequately vindicates plaintiff's constitutional rights, a legislative scheme which is equally effective would meet constitutional minima as well. The question, if the court in fact views the legislative remedial scheme as less effective,⁸⁴ is how much less will suffice. At a minimum, the remedy afforded should be truly compensatory; mere symbolic relief is inadequate.

If Congress has chosen to make its remedy exclusive, and it has afforded an adequate remedy, the court ordinarily should abide by Congress' decision. Such a legislative decision meets the minimum that the Constitution requires. Arguably, deference is appropriate when Congress has performed the legislative function of choosing among rational alternative remedial schemes⁸⁵ which "face in the right direction," are truly compensatory, and present no undue procedural hurdles.

This discussion of the constitutional theory which does, or should,

82. Like a finding that plaintiff's statutory remedy fails to "face in the right direction," the absence of meaningful access may be cited among the reasons for concluding that a statutory remedy was not intended to be exclusive. At this point in the text, however, it is assumed that the legislated remedy was intended to be exclusive.

83. 446 U.S. at 18-19.

84. See note 77 *supra*.

85. The choice among federal remedial schemes is typically a legislative function. See, e.g., *Bivens*, 403 U.S. at 397, 407; *Carlson*, 446 U.S. at 27-28 (Powell, J., concurring), 34-44 (Rehnquist, J., dissenting).

support *Bivens* actions will be drawn upon in the succeeding pages, where *Chappell v. Wallace* and *Bush v. Lucas* are critiqued. In addition, it is hoped that what was said here will provide some useful guidance to the courts.

C. Chappell and Bush

On June 13, 1983, the Court decided both *Chappell v. Wallace*⁸⁶ and *Bush v. Lucas*.⁸⁷ The question framed by the Court in *Chappell* was whether enlisted military personnel may sue to recover damages from superior officers for injuries sustained as a result of violations of constitutional rights suffered in the course of military service.⁸⁸ Plaintiffs had alleged several forms of racial discrimination: failures to assign them desirable duties, threats, low performance evaluations, and unusually severe punishments. Finding that special factors counselled hesitation, the Court members unanimously decided not to allow a *Bivens* remedy. The Court focused on two factors. It relied in part upon the peculiar relationship of a soldier to his superiors, including "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, [which] would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command."⁸⁹

86. 103 S. Ct. 2362 (1983).

87. 103 S. Ct. 2404 (1983).

88. 103 S. Ct. at 2363-64.

89. 103 S. Ct. at 2367. In this aspect of its reasoning the Court relied heavily upon *Feres v. United States*, 340 U.S. 135 (1950), for "guidance." In *Feres* the Supreme Court held that the government is not liable under the FTCA for injuries to servicemen when the injuries arise out of, or occur in the course of, activity incident to service. 340 U.S. at 146. In so holding, the Court was purportedly implementing congressional intent. The Court has said that the *Feres* doctrine rests upon the special relationship of the soldier to his superiors and the effects of maintenance of such suits on discipline, see *United States v. Brown*, 348 U.S. 110, 112 (1954); *United States v. Muniz*, 374 U.S. 150 (1963), the existence of a no-fault compensation scheme pursuant to the Veterans Benefits Act, see *Feres*, 340 U.S. at 144-45; *Stencel Aero Engg. Corp. v. United States*, 431 U.S. 666, 671 (1977), and the impropriety of subjecting military personnel to variations in state law when seeking relief. See *Feres*, 340 U.S. at 143.

Chappell took a position similar to, but not quite as straightforward as, that of the lower courts which had held that the *Feres* doctrine itself immunizes from *Bivens* actions military and civilian government employees sued in their individual capacities for injuries incident to military service. See, e.g., *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975); *Bailey v. De Quevado*, 375 F.2d 72 (3d Cir. 1967); *Sigler v. LeVan*, 485 F. Supp. 185, 190-92 (D. Md. 1980); *Nagy v. United States*, 471 F. Supp. 383, 384 (D.D.C. 1979) (an alternative ground of the decision was 10 U.S.C. § 1089, which makes a suit under the FTCA the sole remedy for personal injury caused by the negligent or wrongful act or omission of military medical personnel, expressly exclusive of any civil action against such medical personnel).

In a scathing dissent in *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981), see text at notes 174-89 *infra*, Judges Gibbons and Sloviter forcefully attacked the argument that military necessity demands that a *Bivens* remedy be denied to servicemen. They contrasted the line of cases beginning with *Feres*, which construed the scope of the waiver of sovereign immunity in the FTCA, with the line of cases determining the immunity from liability enjoyed by government

It concluded, "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment."⁹⁰

If the Court's decision had rested on this ground alone, one could agree or disagree with it,⁹¹ but it would not represent a deviation from the type of analysis prescribed by prior cases. It appears, however, that the Court did not believe that the unique disciplinary structure of the military alone would suffice to defeat plaintiffs' action. The Court relied on a second factor counselling hesitation: the Constitution's grant to Congress of plenary and exclusive authority over the military, in-

officials engaged in intentional misconduct. The judges made the point that the latter, not the former, line of cases is the relevant one, 663 F.2d at 1252, and demonstrated that past cases afforded military officers the same degree of immunity as enjoyed by civilian defendants. As the immunity for civilians changed from nearly absolute to qualified, *compare* *Barr v. Matteo*, 360 U.S. 564 (1959), *with* *Doe v. McMillan*, 412 U.S. 306 (1973), and *Butz v. Economou*, 438 U.S. 478 (1978), it similarly changed for military defendants, *compare* *Howard v. Lyons*, 360 U.S. 593 (1959), *with* *Scheuer v. Rhodes*, 416 U.S. 232 (1974). *Jaffee*, 663 F.2d at 1252-55. Judges Gibbons and Sloviter further showed that civilian courts have held military officers accountable for their conduct in actions for money damages. *E.g.*, *Bates v. Clark*, 95 U.S. 204 (1877); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). Thus, to the extent a court relies on "the necessity for aggressive exercise of military decisionmaking as a reason for its holding, it has strayed far outside the limits of traditional American thinking about the appropriate role of the military in our government." 663 F.2d at 1256.

The two judges went on to explode the conclusion that a *Bivens* cause of action must be denied to encourage unquestioned obedience by military inferiors. They showed that military officers have been held liable in the civil courts for intentional torts, *e.g.*, *Dinsman v. Wilkes*, 53 U.S. (12 How.) 389 (1851), without military discipline apparently suffering any significant harm. They also noted that "[t]he policy of American military law is not to encourage blind obedience by discouraging complaints of official misconduct." 663 F.2d at 1259. The Uniform Code of Military Justice and its predecessors encourage such complaints, 10 U.S.C. §§ 938, 939, and the results of such complaints are judicially reviewable. 663 F.2d at 1260 (citing cases). The dissenters concluded that "it requires a considerable judicial impudence to announce that permitting complaints in a court of law would be injurious to the discipline of the armed services." 663 F.2d at 1260. The dissenters went on to note that Congress has never conferred absolute immunity on military officers, as an additional ground in opposition to the effect of the majority's decision in *Jaffee*, and equally pertinent to the Supreme Court's later decision in *Chappell*. In their view, the decision not to allow a *Bivens* action was a major assault upon military accountability to civil government. "Rather than a 'special factor counselling hesitation,' the military status of the victims and the perpetrators is a special factor calling for vigilance." 663 F.2d at 1262.

Judge Adams, concurring in part and dissenting in part in *Jaffee*, also was critical of the majority's use of the considerations underlying *Feres* immunity in deciding whether "special factors" foreclosed plaintiffs' suit. In remarks equally applicable to the Supreme Court's tack in *Chappell*, he argued that under the analysis in *Davis v. Passman*, 442 U.S. 228 (1979), the court should have held that plaintiff could assert a cause of action under the Constitution, and then considered whether the immunity of the government established in *Feres* should be extended to shield individual military and civilian defendants from suits alleging intentional misconduct. 663 F.2d at 1241-42. In *Davis* the Court allowed the *Bivens* claim, subject to any immunity which might be furnished by the speech or debate clause, rather than rely on that potential immunity as a special factor leading to rejection of the *Bivens* cause of action.

90. 103 S. Ct. at 2365.

91. See note 89 *supra*.

cluding military discipline and justice.⁹² Because Congress had established a comprehensive internal system of justice to regulate military matters, which provides for the review and remedy of complaints of the kind plaintiffs asserted, the Court concluded that it would be "plainly inconsistent with Congress' authority in this field" for the civilian courts to recognize a *Bivens* cause of action.⁹³

The Court's treatment of this second factor is troubling in several respects. First, the Court did not examine whether the military justice system provided an *adequate* alternative avenue of relief to persons in plaintiffs' position. The Court pointed⁹⁴ to article 138 of the Uniform Code of Military Justice (UCMJ), which allows a member of the armed forces who believes himself wronged by his commanding officer to complain to a superior, with the intended consequence that the officer exercising court-martial jurisdiction shall investigate the complaint and "take proper measures for redressing the wrong."⁹⁵ It made no comment upon the efficacy of this procedure as it operates in theory or in practice, however. Certainly, one can imagine that camaraderie among superior officers and other institutional forces could prevent appropriate follow-up of many meritorious complaints. The failure properly to process an aggrieved soldier's complaint may constitute a deprivation of meaningful access to legislative remedies that renders a plaintiff's statutory remedies constitutionally inadequate or amounts to a denial of procedural due process.⁹⁶ Even if a culpable superior officer were court-martialed and punished as a result of an article 138 complaint, that would provide little relief to the victim of the unconstitutional conduct. The superior officer's punishment would be a symbolic vindication, but it would not compensate the plaintiff for the harm he had suffered. Hence, punishment of the superior would not be a constitutionally adequate remedy.⁹⁷ Finally, noth-

92. 103 S. Ct. at 2365-66. See U.S. CONST. art. I, § 8, cl. 12-17.

93. 103 S. Ct. at 2367.

94. 103 S. Ct. at 2366.

95. 10 U.S.C. § 938 (1982).

96. See text at note 82 *supra*.

97. The Court pointed to one other intramilitary procedure whereby plaintiffs might have obtained some relief. 103 S. Ct. at 2367. The Board for the Correction of Naval Records, composed of civilians appointed by the Secretary of the Navy, is authorized to correct a military record if necessary "to correct an error or remove an injustice." 10 U.S.C. § 1552(a) (1982). The Board is also empowered to order retroactive back pay and retroactive promotions. 10 U.S.C. § 1552(c) (1982). Again, the Court made no effort to evaluate whether this procedure provided an adequate remedy for any, much less all, of the aspects of racial discrimination which plaintiffs alleged. Plaintiffs had alleged discrimination in the duties assigned them, and in threats and punishments administered to them, in addition to alleging discrimination in performance evaluations and promotions. Even if the civilian board could have heard plaintiffs' challenges to the latter, it does not appear that the board had power to remedy the former alleged violations of plaintiffs' constitutional rights.

ing in article 138 entitles a member of the military to monetary compensation for the violation of his constitutional rights. Indeed, Congress has not in any statute provided a damage remedy to military personnel whose constitutional rights have been violated by superior officers. The Court made no attempt to explain why this deficiency is not of constitutional dimensions.

Clearly the court was unconcerned with the adequacy of the remedies Congress had provided to persons in plaintiffs' position. Yet, this should have been a critical issue. If the constitutional guarantees against racial discrimination are to have more than mythical significance to these plaintiffs and others similarly situated there must be ways in which they can enforce their right not to be discriminated against. Had Congress provided no mechanisms whatever by which aggrieved servicemen could assert their grievances and obtain some form of relief, one would think the Court would have been compelled to hold that what Congress had done was constitutionally inadequate because the right to be free of unconstitutional discrimination would have been rendered meaningless to servicemen. The provision of some limited mechanisms for voicing grievances and for a military response can be constitutionally inadequate as well. Perhaps the military remedies available in *Chappell* were adequate avenues of redress for plaintiff's claims, but the Court never explained why this was so, nor even found that it was so. In light of the Court's discussion in *Carlson v. Green*⁹⁸ of the relative "ineffectiveness" and the "insufficiency" of the FTCA, it is not at all obvious why the remedies afforded under the UCMJ were constitutionally adequate in the Court's view. Indeed, for all its opinion reflects, the Court may have been operating upon the erroneous assumption that it had no duty to find that the UCMJ remedies were, or were not, adequate, because of Congress' special authority over military affairs. However, the fact that the Constitution grants Congress plenary authority over the military is no substitute for such an analysis. Although the body of the Constitution contains a textually demonstrable commitment of the military to the legislative branch, the rights established by the amendments to the Constitution are limitations on what the Congress can do in regulating the military, as well as on what the military can do in regulating itself. It is the duty of the judicial branch particularly to ensure that the rights guaranteed in the amendments retain at least a minimum of significance.⁹⁹ Consequently, the Court was in error in failing to evaluate the consti-

98. 446 U.S. at 20-23. See text at notes 46-50 *supra*.

99. *Davis v. Passman*, 442 U.S. 228, 241-42 (1979); *Zwickler v. Koota*, 389 U.S. 241, 247 (1967).

tutional adequacy of the remedial schemes available to the plaintiffs in *Chappell*.

The deference paid to Congress was particularly misplaced because the Court was confronted in *Chappell* with a situation in which there was not even any contention that Congress had explicitly declared that internal military procedures were as effective as, and intended to substitute for, *Bivens* actions. Under *Carlson*, the existence of an alternative remedial scheme will defeat implication of a *Bivens* cause of action only if Congress has made such an explicit declaration.¹⁰⁰ Even if Congress had made such a declaration, the Court would have had a duty to pass on the constitutional adequacy of the remedies afforded.¹⁰¹ By failing to provide the federal courts with any guidance as to how to appraise the constitutional adequacy of a statutory scheme that could be used for the redress of constitutional violations, indeed by failing to acknowledge the necessity for the undertaking, while simultaneously dispensing with *Carlson*'s prerequisites for finding that congressional action precludes implication of a *Bivens* action, the Court increased the risks of under-enforcement of constitutional rights. The Court itself should be watching the store by verifying the constitutional adequacy of congressional remedies. If the Court is not going to do this and is instead going to defer to Congress' judgment, it should, at least, make clear the need for Congress itself to consider the constitutional adequacy of the remedies it legislates. The Court in *Chappell* did just the opposite in dispensing with the need for Congress to indicate any judgment concerning the constitutional adequacy of the legislated remedy.

A second very disturbing aspect of *Chappell* is that because the Court was unable to rest upon the "alternative remedial scheme" bar to a *Bivens* action, it cast the military's internal system of justice as a special factor counselling hesitation which, *taken together* with the unique disciplinary structure of the military,¹⁰² established the impropriety of providing enlisted personnel a *Bivens* remedy against their superior officers. But the Court in *Bivens* and *Carlson* had indicated that there were two *distinct* situations in which a constitutionally based cause of action for money damages would not be recognized: where Congress had directed that the injured party must rely on another, equally effective, remedy¹⁰³ and where "special factors coun-

100. *Carlson*, 446 U.S. at 18-19.

101. See note 77 *supra*.

102. *Chappell*, 103 S. Ct. at 2367.

103. *Bivens*, 403 U.S. at 397; *Carlson*, 446 U.S. at 18-19.

self[led] hesitation *in the absence of affirmative action by Congress.*"¹⁰⁴

Although it is unclear what special factors counsel hesitation, it should at least be clear that the existence of a legislative remedial scheme is not one such factor — for the existence of such legislation is the subject of the one other situation expressly postulated as defeating the implication of a *Bivens* remedy. In *Carlson*, the Court had specified just what sort of congressional action would defeat a *Bivens* claim. Not any relevant legislation would do, only legislation providing a cause of action that is explicitly declared to be a substitute for, and in Congress' view is as effective as, a *Bivens* remedy. In *Chappell*, the Court retreated from the promise of *Bivens* and its progeny by failing to require of Congress what it had repeatedly indicated it would require before a *Bivens* claim would be defeated on the basis of congressional action. The Court utterly failed to acknowledge or defend this retreat. Here, for the first time, the Court was faced with a congressional remedial scheme covering the plaintiff which could be read to reflect an intent to preclude the plaintiff from having a cause of action for money damages under the Constitution or otherwise. Faced with such a statutory scheme, rather than with total congressional silence (as in *Bivens*), with a statute not covering the plaintiff (as in *Davis*),¹⁰⁵ or with a statute intended to be complementary to other remedies (such as the FTCA in *Carlson*), the Court must have believed that the test it had created for determining when congressional action would defeat a *Bivens* claim was too demanding. By not acknowledging the retreat it was beating, the Court avoided justifying its departure from the pre-ordained test. But the departure exists, and it requires justification. Without it, the new "special factors" analysis is unacceptable. The requirement of a congressional directive that an injured party be remitted to a statutory remedy of equal efficacy before the Court will decline to imply a *Bivens* cause of action is meaningless if less suffices to pass the alternative test of special factors counselling hesitation.

A related problem with *Chappell*'s analysis is that it takes facts (the unique disciplinary structure of the military) which apparently are insufficient to defeat a *Bivens* claim as a special factor counselling hesitation, and other facts (the remedies available to service people) which are insufficient to defeat a *Bivens* claim under the "alternative remedial scheme" bar, and by combining them derives a basis for holding it inappropriate for the Court to provide a *Bivens* remedy.

104. *Bivens*, 403 U.S. at 396; *Carlson*, 446 U.S. at 18 (emphasis added).

105. In *Davis*, the statute protecting federal employees did not cover those in plaintiff's job category. The Court refused to conclude by negative implication that Congress intended that those in plaintiff's position be denied all judicial remedies. 442 U.S. at 247.

Nowhere is it explained why the whole should be more than the sum of its parts. The Court's attenuation and melding of the two situations which *Bivens* held would defeat implication of a cause of action from the Constitution can only bode ill for future applicants for an implied constitutional remedy who have any alternative routes to relief, whether or not they are as effective as a *Bivens* action.¹⁰⁶

It is, of course, possible that the dangers posed by the Court's mode of analysis in *Chappell* will not be realized. The question presented in *Chappell* was unique; the situations are few in which Congress has plenary and exclusive authority¹⁰⁷ upon which the Court will not want to impinge, and the relationship between soldier and superior is *sui generis*. However, the Court's contemporaneous decision of *Bush v. Lucas*¹⁰⁸ suggests that the fears created by *Chappell* are well-founded.

In *Bush*, the Court reaffirmed the power of the federal courts to award damages to victims of constitutional violations in order to vindicate constitutional rights,¹⁰⁹ but it also emphasized that that power is to be exercised in light of a broad range of policy considerations, including relevant policy determinations made by the Congress,¹¹⁰ and

106. It could be argued, contrary to the last few paragraphs, that the special factors notion was applied properly in *Chappell*. The Court in *Davis v. Passman* had already indicated that one special concern counselling hesitation in implying a *Bivens* remedy would be interference with the legislative branch of the government. In *Davis*, the immunity afforded to congressmen by the speech and debate clause was enough to convince the Court that the counsel to hesitate before allowing a *Bivens* action did not have to be heeded; there was more than one way to avoid undue interference with the legislative branch. Arguably, the Constitution's textual commitment of the military to Congress raised a similar issue of separation of powers, which again counselled the judiciary to hesitate before affording a *Bivens* remedy, and here no alternative tack existed for avoiding undue infringement upon congressional turf; there was nothing to analogize to the speech and debate immunity. Hence, the Court could reason that it ought to refuse to complement the remedies available through the military justice system, not because Congress had declared that system to be exclusive and as effective as *Bivens* claims, but because Congress' military justice system was made exclusive by the Constitution's commitment of military affairs to Congress.

Two things should be noted about this argument. One is that, even if it is correct, the Court ought to have verified that the congressional remedies were constitutionally adequate. What was said earlier in this regard remains intact. See text of notes 69-74 *supra*. Second, the Court need not have accepted the fact that military affairs are generally within Congress' bailiwick as a substitute for the manifested congressional intent to deny a *Bivens* action to an injured party which the Court previously had required. A Court more concerned with the vindication of constitutional rights could have afforded a *Bivens* remedy to Chappell, while reaffirming its complete willingness to respect a manifested intention by Congress that the legislative remedy be exclusive and preclusive, so long as the congressional remedy fulfilled constitutional minima. The Court did not do that in *Chappell*, probably at least in part because the Court was also very reluctant to tamper with the special relationship between soldiers and their superiors.

107. Congress also has plenary authority to govern the territories of the United States, for example. U.S. CONST. art. IV, § 3, cl. 2.

108. 103 S. Ct. 2404 (1983).

109. 103 S. Ct. at 2409.

110. 103 S. Ct. at 2409.

paying "particular heed" to any special factors counselling hesitation.¹¹¹ Plaintiff Bush, an aerospace engineer employed by the National Aeronautics and Space Administration (NASA), sought money damages from the director of the facility where he worked, alleging that he had been demoted and his salary decreased in retaliation for his exercise of first amendment rights.¹¹² The Court assumed for purposes of its decision that petitioner's first amendment rights had been violated.¹¹³ The Court further found it undisputed that Congress had neither expressly authorized the requested remedy nor expressly precluded the creation of such a remedy by declaring that existing statutes provide the exclusive mode of redress.¹¹⁴ The Court also assumed that the civil service remedies available to the petitioner were not as effective as a *Bivens* remedy¹¹⁵ and did not fully compensate him for the harm he had suffered.¹¹⁶ The Court nonetheless ruled against Bush. By close analogy to *Chappell*, the Court held that there were special factors counselling hesitation because Congress' expertise and interest in federal personnel policy¹¹⁷ and in civil service remedies, in particular, called for deference from the courts, especially where the remedies available were "comprehensive" and "meaningful."¹¹⁸ The Court did not find that the special relationship between the federal government and its civil service employees¹¹⁹ constituted an indepen-

111. 103 S. Ct. at 2411.

112. 103 S. Ct. at 2406-07.

113. 103 S. Ct. at 2408. The Court opined, however, that competent decision makers could reasonably disagree about that. 103 S. Ct. at 2408 n.7.

114. 103 S. Ct. at 2408.

115. 103 S. Ct. at 2408. In particular, Bush contended that, unlike a damages action against Lucas, statutory civil service remedies against the government do not provide for punitive damages or a jury trial and do not adequately deter the unconstitutional exercise of authority by supervisors. 103 S. Ct. at 2408 n.8.

116. The uncompensated harms Bush pointed to were emotional and dignitary harms and his attorney's fees. 103 S. Ct. at 2408 n.9.

117. 103 S. Ct. at 2412, 2417.

118. 103 S. Ct. at 2415.

119. The United States Court of Appeals for the Fifth Circuit had relied on that relationship as a special factor counselling hesitation. The Fifth Circuit emphasized that the role of the government as an employer toward its employees is fundamentally different from its role as sovereign over private citizens. This special relationship, it said, affects not only the substantive rights of public employees but also the ways in which aggrieved employees can assert and redress their grievances. At the substantive level, the government, as employer, has an interest in promoting the public services it performs through its employees which must be balanced against the interests of its employees, as citizens, in commenting upon matters of public concern. At the procedural, remedial level, the court held that implying a *Bivens* remedy would tend to interfere with and undermine the traditional control of the government over its personnel affairs in that it might encourage employees to bypass statutory and administrative remedies, thereby depriving the government of the opportunity to resolve problems within the framework painstakingly worked out by Congress. This, in turn, would provide a disincentive for Congress to continue improving the mechanisms by which an employee can protect his rights. *Bush v. Lucas*, 647 F.2d 573, 576-77 (5th Cir. 1981).

dent special factor counselling hesitation. The importance of the government-employee relation permeates its opinion, however. The Court commented that "the ultimate question on the merits in this case may appropriately be characterized as one of 'federal personnel policy.'" ¹²⁰ In an attempt to clarify the concept of special factors, the Court discussed the two cases *Bivens* had cited as examples. ¹²¹ It cast both as cases in which Congress' special role — in maintaining federal fiscal policy — had provided reason for the Court to defer to congressional judgment. ¹²² In characterizing these cases as involving congressional role rather than as involving federal fiscal policy, the Court emphasized a different aspect of the cases than *Bivens* had. This new depiction made it appropriate for the Court to focus on whether there were reasons for allowing Congress alone to prescribe the scope of relief available to federal civil servants whose first amendment rights had been violated by their supervisors.

The Court described at length the evolution of civil service protections of civil servants' first amendment rights and the development of remedies enacted by Congress. It observed that Bush's first amendment claims were "fully cognizable" within the system and that the statutory scheme provided meaningful remedies: Bush ultimately had received retroactive reinstatement and \$30,000 in back pay. ¹²³ The Court characterized the question presented as "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." ¹²⁴ Unlike the situation posed in *Bivens* and *Davis*, where the question was authorization of a damage remedy for a wrong that otherwise would go unredressed, and unlike the situation in *Carlson* where the statutory remedy was intended to complement the *Bivens* remedy, the Court was faced here with a congressionally enacted remedial scheme which was "elaborate," "comprehensive," afforded "meaningful" remedies, and was designed to provide what Congress regarded as full compensation. ¹²⁵ At the same time, that scheme was

120. 103 S. Ct. at 2412.

121. The two cases were *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), and *United States v. Gilman*, 347 U.S. 507 (1954).

122. 103 S. Ct. at 2412. The Court in *Bush* did not emphasize that in both instances the effect of its refusal to intervene was that the government was denied a damages remedy which it sought, rather than an individual being denied a damage remedy against the government or government agents.

123. 103 S. Ct. at 2415 & n.29. The administrative proceedings involving Bush are described in 103 S. Ct. at 2407, and the regulations applicable to him are detailed in 103 S. Ct. at 2415-16.

124. 103 S. Ct. at 2416.

125. 103 S. Ct. at 2417 (Marshall, J., concurring).

not as effective as a *Bivens* claim, did not fully compensate the plaintiff, and had not been declared by Congress to provide the exclusive mode of redress.¹²⁶ Here, as in *Chappell*, the Court declined to exercise its power to recognize a money damage remedy under the Constitution on the ground that Congress should decide whether such a remedy should be provided. While the Court announced that “[t]he policy judgment [posed to the Court] should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees’ First Amendment rights,”¹²⁷ the Court really made only a feint at reaching the necessary policy judgment.¹²⁸ Having found it probable that a *Bivens* remedy would deter management personnel from imposing discipline for what they believed to be improper criticisms of the government,¹²⁹ the Court just threw the problem to Congress. “In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service.”¹³⁰

The decision in *Bush* is troubling in a number of aspects. First, as in *Chappell*, the Court failed to require that the statutory remedial scheme be equally effective in the view of Congress, much less that Congress declare it a substitute for a *Bivens* remedy, before relying on the existence of the scheme to defeat implication of a *Bivens* action. After *Bush*, a less effective remedy will suffice if the Court can find some reason to defer to Congress, as the Court considers such a reason to be a special factor counselling hesitation. Moreover, it appears that the Court may find such a reason whenever Congress has enacted a “comprehensive” legislative scheme that provides “meaningful” remedies. Yet, if that suffices why would the Court in *Bivens* and in *Carlson* have held that a legislative remedial scheme will bar implication of a *Bivens* action only if Congress explicitly declares its scheme to be a substitute for a *Bivens* action, and views it as equally effective? As previously noted, that would be a superfluous standard if something less constitutes a special factor counselling hesitation, the alternative bar to implication of a *Bivens* action. Moreover, the argument that separation of powers calls for “hesitation” is here far weaker than it was in *Chappell*. The Constitution contains no textual commitment of

126. 103 S. Ct. at 2408.

127. 103 S. Ct. at 2416.

128. See 103 S. Ct. at 2417.

129. 103 S. Ct. at 2417.

130. 103 S. Ct. at 2417.

federal personnel policy to Congress, and Congress is not exclusively concerned with federal personnel policy. Its legislation governs the rights of employees of the executive and judicial branches as well. Constitutional rights would be more secure if the Court had adhered to its earlier position that congressional action will defeat a *Bivens* claim only if Congress has expressed its determination to foreclose the damages claim and has furnished another remedy, equally effective in its view.

Second, (as was also true in *Chappell*), the Court failed to explain why it considered plaintiff's statutory remedies to be constitutionally adequate, yet it largely relied on the existence of those remedies in deciding against affording Bush a *Bivens* claim. The Court did bother to find that the "existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate."¹³¹ Its finding appears in a footnote and consists of nothing but this conclusory statement. Perhaps it is "clear" that the first amendment rights here violated were sufficiently vindicated by this statutory scheme and that nothing more was required. But the lower federal courts and the legal community generally deserve some articulation of the Court's standards of adequacy to guide their decisions. This is particularly true in light of the Court's finding in *Carlson* that the FTCA was not an "adequate" remedy and the bases for that conclusion.¹³² Bush contended that the statutory civil service remedies against the government did not provide for punitive damages or for jury trial and did not adequately deter the unconstitutional exercise of authority by supervisors. These same factors were among those upon which the Court and concurrences relied in *Carlson* in holding the FTCA to be neither as effective as a *Bivens* remedy nor a sufficient protector of constitutional rights. Yet the Court in *Bush* did not explain what, in its view, distinguished the two statutory schemes or justified its conclusion that the civil service remedies were "clearly constitutionally adequate."

Third, *Bush* is troublesome because the Court seems to have abdicated its responsibility to decide whether a remedy should be implied from the first amendment under the circumstances presented. It said that that decision should be made in light of a broad range of policy considerations and any special factors counselling hesitation. But in the very course of deciding *whether* Congress' role in federal personnel matters constituted such a "special factor," the Court seemed, uncon-

131. 103 S. Ct. at 2411 n.14.

132. See text at notes 46-50 and note 77 *supra*.

sciously, to shift its attention to whether a damage remedy should exist. It decided that Congress was better able than a court to decide that question. If so here, why not always, given Congress' ubiquitous ability to inform itself through fact-finding procedures not available to the courts? What has become of the once clearly discernible message of the Constitution that the judiciary should be the primary means through which constitutional rights are enforced?¹³³ In its ostensibly "conservative" desire to defer to Congress on all remedial matters, the Court abdicated its responsibility.

The Court's deferential stance seriously increases the risk that constitutional rights will be less enforceable than the Constitution requires. By failing to provide guidance to the lower courts on the appropriate standard for judging the constitutional adequacy of statutory remedial schemes, indeed, by failing even to address the adequacy of the statutory scheme in *Chappell*, the Court has signalled the lower courts that they need not consider whether legislated alternatives to *Bivens* remedies meet constitutional minima.¹³⁴ The danger thus

133. *Davis v. Passman*, 442 U.S. 228, 241-42 (1979).

134. In other contexts, the Supreme Court has considered the adequacy of available remedies in order to determine whether a particular cause of action may be asserted. For example, in *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court held that the negligent deprivation of plaintiff's property by a state official did not constitute a violation of procedural due process actionable under 42 U.S.C. § 1983 in part because there was an adequate state remedy available to plaintiff. The Court went on to find that the state had provided plaintiff with adequate means to receive redress for the deprivation he had suffered. 451 U.S. at 543. The argument was made that the state statutory law did not adequately protect plaintiff's interests because it provided only for an action against the state and not against its individual employees, did not provide for punitive damages, and afforded no right to trial by jury. 451 U.S. at 543-44. The Court responded that "[a]lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process." 451 U.S. at 544. Justice Marshall, concurring in part and dissenting in part, would have held the state law remedy inadequate, not because of any shortcomings in the tort claims procedure, but because prison officials had failed to inform plaintiff, whose access to information about his legal rights was necessarily limited by his confinement, of the remedies available under state law. 451 U.S. at 555-56.

In subsequent cases the Court shed additional light on the adequacy of state remedies as a matter of procedural due process. For example, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court held a post-deprivation hearing to be constitutionally inadequate when the only available process was an independent tort action. "Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole: the Illinois Court of Claims Act does not provide for reinstatement . . . and even a successful suit will not vindicate entirely Logan's right to be free from discriminatory treatment." 455 U.S. at 436-37. An intentional deprivation of property was held not to violate the due process clause in *Hudson v. Palmer*, 104 S. Ct. 3194, 3197 n.1, 3204 (1984), because post-deprivation state court actions for conversion or detainment were adequate. *See also McDonald v. City of West Branch*, 104 S. Ct. 1799 (1984) (in § 1983 actions, federal courts should afford neither *res judicata* nor collateral estoppel effect to awards in arbitration proceedings brought pursuant to a collective bargaining agreement because arbitration is not an adequate substitute for judicial proceedings in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard); *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S.

posed to constitutional rights is heightened still further by the Court's new willingness to defer to alternative statutory remedies that are neither explicitly declared to be substitutes for, nor are in Congress' view as effective as, *Bivens* actions. First the Court abdicated its responsibility to ensure that legislated remedial schemes meet constitutional minima, then the Court invited Congress as well not to consider the adequacy of its legislation. Precisely the opposite should occur: to the extent that the Court defers to Congress' judgment that a remedy is constitutionally adequate, the Court should emphasize the need for Congress to address the adequacy of its legislated remedies.

II. RAMIFICATIONS FOR FIRST AMENDMENT *BIVENS* ACTIONS

Having criticized the Supreme Court's two latest *Bivens* cases in Part I above, the Article in this section explains why a *Bivens* action ordinarily should lie for violation of the first amendment to the Constitution and illustrates the implications of *Bush* and *Chappell* for such actions. First amendment *Bivens* cases were chosen as the focus of discussion because of the particular significance of the guarantees of freedom of speech, press and religion, and because of the author's particular interest in nontraditional uses of the first amendment.¹³⁵

A. *The Case for First Amendment Bivens Actions Generally*

The first amendment to the Constitution mandates that the freedom of speech, of the press and of the people peaceably to assemble and to petition the government for a redress of grievances not be

100 (1981) (doctrine of equitable restraint bars taxpayers' actions in federal court, under 42 U.S.C. § 1983, challenging the constitutionality of state tax laws; taxpayers must seek protection of their federal rights by state remedies, provided those remedies are plain, adequate, and complete).

The principle of adequacy to be derived from these cases taken together is not evident, however, and the relevance of these cases to the constitutional adequacy of congressional remedial schemes said to supplant *Bivens* actions is unclear. None of the foregoing cases was cited in *Bush* or *Chappell*. *Parratt*, *Logan*, and *Hudson* all had to do with whether the existence of a post-deprivation hearing satisfied due process or whether only a pre-deprivation hearing would do, a question quite unlike that presented in *Bush*, *Chappell* and the other *Bivens* actions discussed later in this Article. Indeed, it is generally held that *Parratt* is not applicable to violations of substantive constitutional rights, such as the first amendment. See, e.g., *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 871-72 (7th Cir. 1983) (fourth amendment claim); *Palmer v. Hudson*, 697 F.2d 1220, 1225 (4th Cir. 1983) (fourth amendment claim), *affid. in part, revd. in part*, 104 S. Ct. 3194 (1984). Similarly, the comity issue presented in *McNary* is plainly distinguishable from the adequacy issue that arises in *Bivens* actions. In light of the Supreme Court's failure to invoke any of the foregoing cases and their facial differences from *Bivens* actions, no effort will be made here to reconcile the § 1983 actions with each other or with the Court's statements on adequacy in *Carlson v. Green*. If and when the Court grapples with the question of adequacy in the *Bivens* context, perhaps it will advert to these § 1983 cases.

135. See Steinman, *Privacy of Association: A Burgeoning Privilege in Civil Discovery*, 17 HARV. C.R.-C.L. L. REV. 355 (1982).

abridged by the federal government, and that Congress make no law prohibiting the free exercise of religion or respecting an establishment of religion.¹³⁶ The amendment thus creates duties in the government, and bestows correlative rights upon the people of the United States. For this amendment to be more than a mere exhortation, some remedy or remedies must be available should government agents violate its strictures or threaten to do so. Saying this does not imply that the remedy afforded always must include money damages payable by wrongdoing officials. Declaratory judgments establishing the rights of people and the obligations of the government and injunctive relief prohibiting or requiring specified governmental action — the most common tools for enforcing first amendment rights — have unquestionably put teeth into the first amendment for many people in many circumstances.

Nonetheless, these traditional judicial responses to violations of first amendment rights often are insufficient to remedy the harm done. Rarely, if ever, will declaratory or injunctive relief for the future make up for a past injury. If a victim has the right to be made whole,¹³⁷ the Constitution *requires* not only a prospective remedy but coercive relief,¹³⁸ a money damage remedy. Thus, as the Supreme Court has recognized,¹³⁹ a monetary award is necessary to make the victim whole when the violation lies in a subsequent punishment or retaliation for the past exercise of first amendment rights.¹⁴⁰ Similarly, when first amendment rights are violated by suppression, a private damages action often affords the only practicable means of redressing the wrong done.¹⁴¹ Governmental action which stifles speech until after the most propitious moments have slipped into history inflicts injuries that no later opportunities for the speech can cure.¹⁴² Only money damages can provide some recompense. An award of money damages also

136. U.S. CONST. amend. I.

137. *Nixon v. Fitzgerald*, 457 U.S. 731, 783 (1982) (White, J., dissenting) ("To the extent that the Court denies an otherwise appropriate remedy, it denies the victim the right to be made whole and, therefore, denies him 'the protection of the laws.'").

138. See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 548 (1970).

139. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."); *Butz v. Economou*, 438 U.S. 478, 506 (1978) ("an action for damages against the responsible official can be an important means of vindicating constitutional guarantees").

140. While money awarded under the rubric of back pay is, for some purposes, characterized as restitutionary or equitable relief and not technically speaking money damages recoverable at law, see, e.g., *Curtis v. Loether*, 415 U.S. 189, 196-97 (1974), it constitutes backward-looking, compensatory relief rather than solely forward-looking, injury-detering declaratory or injunctive relief, and is encompassed within the awards advocated in this Article.

141. *Butler v. United States*, 365 F. Supp. 1035, 1040 (D. Hawaii 1973).

142. See text at notes 342-45 *infra*.

serves as a forceful statement of the society's fundamental public values and may deter similar governmental wrongdoing in the future.

As the Court pointed out in *Bivens*, compensatory damages are a remedial mechanism normally available in the federal courts.¹⁴³ They historically have been the ordinary remedy to redress an invasion of personal interests in liberty. Certainly, first amendment liberty interests are no less important than the fourth amendment liberty interests that *Bivens* held to support a money damage remedy.¹⁴⁴ They even share common roots in safeguarding privacy, conscience and human dignity.¹⁴⁵ Recognition of a *Bivens* remedy to safeguard the freedoms of speech and association and the freedom to exercise religious beliefs is comfortably within common law tradition. As Professor Peter Schuck of the Yale Law School recently wrote,

This compensation principle seems to the classical and contemporary mind alike so manifestly fair, so palpably just that it borders on the self-evident and axiomatic. . . . To say that government should pay its way and bear the costs of its transgressions is like saying that people should tell the truth, earn their keep, and pay their debts.¹⁴⁶

The courts unquestionably act within their legitimate institutional role in awarding damages to redress violations of constitutional rights.¹⁴⁷ Money damages are the courts' stock-in-trade. As some of the cases discussed below will demonstrate, the courts are clearly competent to place a dollar value on first amendment injuries. Moreover, the courts are, and are intended by the Constitution to be, the branch of government primarily responsible for enforcing the duties imposed by the Bill of Rights upon the government.¹⁴⁸ As Justice Harlan said, concurring in *Bivens*, "[T]he judiciary has a particular responsibility to

143. 403 U.S. at 395.

144. The decisions are legion in which the Supreme Court had recognized that first amendment rights are fundamental components of liberty, essential to the preservation of democracy. See, e.g., *First Natl. Bank v. Bellotti*, 435 U.S. 765, 780 (1978); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963); *Palko v. Connecticut*, 302 U.S. 319, 324-27 (1937); *Whitney v. California*, 274 U.S. 357, 373, 375-78 (1927) (Brandeis, J., concurring).

145. *Butler v. United States*, 365 F. Supp. 1035, 1039-40 & n.8 (D. Hawaii 1973). See *Stanford v. Texas*, 379 U.S. 476, 484-85 (1965) (quoting approvingly *Frank v. Maryland*, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting)) ("These three amendments [the first, fourth, and fifth] are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'").

146. P. SCHUCK, *supra* note 69, at 112.

147. A credible and fair legal system should stand ready to remedy every significant invasion of rights; citizens injured by officials who violate established legal standards should be made whole. Errant officials should be obliged to pay for their transgressions, encouraging them to be more law-abiding, careful, and solicitous of the public they serve. Courts should enforce these obligations.

Id. at 1.

148. See *Davis v. Passman*, 442 U.S. 228, 241-42 (1979); *Zwickler v. Koota*, 389 U.S. 241, 247 (1967).

assure the vindication of constitutional interests . . . [T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities. . . ."¹⁴⁹ These principles apply with particular force to the vindication of first amendment rights because the first amendment is particularly aimed at protecting the politically unpopular.¹⁵⁰ The special sensitivity of the federal courts to first amendment rights makes them best suited to vindicate those interests.¹⁵¹ The vindication of first amendment rights should be left neither to Congress nor to the vagaries of state law.¹⁵²

Of the *Bivens*-type cases that have been decided by the Supreme Court, four have arisen, in whole or in part, under the first amendment. While the Court has not in any of them recognized an implied right of action for damages for violation of the first amendment, the Court has not indicated that it would not do so, in a proper case. Indeed, by proceeding to the question whether special factors counselled against recognition of just such a cause of action in *Bush v. Lucas*,¹⁵³ and by proceeding to the issue of immunities in *Butz v. Economou*,¹⁵⁴ *Harlow v. Fitzgerald*¹⁵⁵ and *Nixon v. Fitzgerald*,¹⁵⁶ the Court has implied that there may be occasions when it would be appropriate to recognize a *Bivens* action to remedy first amendment violations.

The foregoing is not intended to suggest that in all circumstances,

149. *Bivens*, 403 U.S. at 407 (Harlan, J., concurring).

150. *Butler v. United States*, 365 F. Supp. at 1041.

151. Monaghan, *supra* note 138, at 551.

152. Damages are, of course, recoverable under 42 U.S.C. § 1983 for the deprivation of first amendment rights by persons acting under color of state law. *See, e.g., Berdin v. Duggan*, 701 F.2d 909 (11th Cir.), *cert. denied*, 104 S. Ct. 239 (1983) (alleging retaliatory discharge); *Brown v. Bullard Indep. School Dist.*, 640 F.2d 651 (5th Cir. 1981), *cert. denied*, 454 U.S. 828 (1983) (alleging retaliatory refusal to renew contract); *Brule v. Southworth*, 611 F.2d 406 (1st Cir. 1979) (alleging retaliatory suspension of prison employees); *McDonald v. Hall*, 610 F.2d 16 (1st Cir. 1979) (alleging retaliatory transfer of prisoner); *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979) (alleging retaliatory transfer of jailhouse lawyer). Federal officials should be held no less accountable than their state counterparts. *See Butz v. Economou*, 438 U.S. 478, 504 (1978) ("The § 1983 action was provided to vindicate federal constitutional rights. . . . To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.").

153. 103 S. Ct. 2404, 2409-12 (1983).

154. 438 U.S. 478 (1978). *See* note 23 *supra*.

155. 457 U.S. 800 (1982).

156. 457 U.S. 731 (1982). The district courts in *Harlow* and *Nixon* had upheld the legal sufficiency of first amendment *Bivens* claims. The Supreme Court took jurisdiction in each instance only to resolve questions of immunity, under the collateral order doctrine. *Harlow*, 457 U.S. at 820 n.36. In *Harlow*, the Court said that the legal sufficiency of plaintiff's first amendment *Bivens* action was therefore not properly presented for decision. 457 U.S. at 805 n.10. In *Nixon*, the Court assumed, for purposes of its opinion, that private causes of action may be inferred under the first amendment. 457 U.S. at 748 n.27.

without exception, a money damage remedy arising directly under the Constitution should be afforded if someone's first amendment rights have been violated and he properly requests such a remedy. There may be exceptional occasions when "special factors" will counsel against the allowance of such a remedy or "exclusive" remedies created by Congress will so adequately compensate the victim of a constitutional tort and attest to our commitment to first amendment values that no additional judicially created remedy will be necessary or appropriate. But in many instances the Courts should recognize a first amendment *Bivens* claim. In the pages that follow, the Article evaluates the lower federal courts' handling of first amendment *Bivens* cases and illustrates the implications of the Supreme Court's recent retreat in *Chappell v. Wallace* and *Bush v. Lucas*.

B. *First Amendment Cases in the Lower Federal Courts*

Under *Chappell* and *Bush*, the presence of broad remedial legislation will have a significant effect on the outcome of first amendment *Bivens* cases. In Part 1 below, the Article discusses purported first amendment *Bivens* actions based on violations which, like that alleged in *Chappell*, arose in a military context, or, like that in *Bush*, arose in the context of federal employment. It is in such cases that *Chappell* and *Bush* are likely to have the greatest impact. The Article explores recent cases whose outcomes have been affected, and some earlier decisions upon which doubt has been cast, by *Chappell* and *Bush*. It demonstrates how these two cases increase the risk that the first amendment rights of servicemen and federal employees will be insufficiently protected.

In Part 2 below, attention shifts to proposed first amendment *Bivens* cases brought by members of the public whose claims had nothing to do with military service or federal employment. These claims arose out of government conduct that was not the subject of remedial federal legislation. Congress had been silent. The Article explains why the Supreme Court's reasoning in *Chappell* and *Bush* should have little impact in these cases. It then assesses the lower courts' decisions in the light of the Supreme Court's earlier *Bivens* decisions and this Article's argument in favor of first amendment *Bivens* claims.

1. *When Congress Has Spoken*

a. *Alleged violations of the rights of military personnel.* Over the years, several *Bivens* actions have been brought against individual commanding officers and civilians whose decisions allegedly violated the constitutional rights of servicemen and their spouses. *Mollnow v.*

Carlton,¹⁵⁷ decided in September, 1983, by the Court of Appeals for the Ninth Circuit (whose opinion in *Chappell* had been reversed), is a prime example of the detrimental effect of *Chappell* on the ability of military personnel to maintain a suit to recover damages from superior officers for violations of first amendment rights. Mollnow was an officer and pilot in the U.S. Air Force and Air Force Reserve. He alleged a conspiracy to have him removed from flight duty and ultimately from the service because of allegedly accurate reports he had submitted concerning unsafe conditions and policies in the operation of heavy aircraft. He claimed that his reports had been suppressed and that he had been imprisoned in a psychiatric ward to prevent him from testifying about a crash which, he said, occurred precisely as he had predicted. Mollnow argued that the court had to look to the adequacy of the remedy available to him under the Uniform Code of Military Justice (UCMJ) before dismissing his *Bivens* claim, and that there was, in fact, no adequate statutory remedy for him, in part because his access to UCMJ remedies had been blocked. The court held that neither inadequacy of the remedies available to the plaintiff under the UCMJ nor the refusal by Mollnow's commanding officers to act on his grievances, which allegedly had prevented him from seeking redress under the UCMJ, sufficed to distinguish *Chappell*. Reading *Chappell* to impose a per se prohibition on *Bivens* actions by servicemen against their superiors, the Ninth Circuit affirmed the dismissal of Mollnow's complaint.¹⁵⁸

If one assumes the factual allegations of Mollnow's complaint to be true, as one must for purposes of deciding whether he has stated a constitutional claim for which a damage remedy ought to be provided, and if one further assumes that Mollnow's first amendment rights were violated, then the decision of the Ninth Circuit has rendered the constitutional guarantee of free speech a meaningless form of words for Mollnow. If his allegations are true, the reports for which he was punished were of considerable public interest. The actions alleged to have been taken against Mollnow, in retaliation for his reports and to suppress his further speech, were severe. The inaction of Mollnow's superior officers was alleged to have prevented him from obtaining any redress through intra-service procedures. The Ninth Circuit's denial

157. 716 F.2d 627 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1595 (1984).

158. 716 F.2d at 629-30. Under article 138 of the UCMJ, 10 U.S.C. § 938, Mollnow was entitled to confront his commanding officer with his complaints. If he was refused redress, he could then forward a "Complaint of Wrongs" to any superior commissioned officer who, in turn, would notify the appropriate officials to investigate the propriety of a court martial. Mollnow alleged that he made repeated "Complaint[s] of Wrongs," and that all were ignored by every officer up through the chain of command.

of relief, upon a finding of "no room in *Chappell* to consider the adequacy of the intraservice remedy,"¹⁵⁹ is an abdication of judicial responsibility to safeguard first amendment rights. However sufficient military justice may be in theory or for other servicemen and women, *Mollnow* appears to be a case where the denial of meaningful access rendered plaintiff's statutory remedy constitutionally inadequate.¹⁶⁰ If so, *Mollnow* was entitled to a direct action under the Constitution, unless special factors not considered by the Ninth Circuit would dictate otherwise. The court of appeals was correct to see in *Chappell* no indication that an inquiry into the minimal adequacy of the system of military justice was necessary. The Supreme Court, by its failure to make clear the necessity for such an inquiry, invited decisions such as this, to the harm of military personnel like *Mollnow*.¹⁶¹

A second case relying upon *Chappell* to deny recovery is *Gaspard v. United States*.¹⁶² The suit was brought by men who, under military orders, took part in atmospheric atomic weapons tests during the 1950's, and claimed to have developed serious, painful illnesses as a result of their exposure to radiation. One of the plaintiffs had died, allegedly from the exposure. In addition to suing under the FTCA and filing claims with the Veterans Administration, they alleged violations of their constitutional rights under several amendments, including the first.¹⁶³

After denying their FTCA claims on the basis of the *Feres* doctrine,¹⁶⁴ the Fifth Circuit Court of Appeals upheld the dismissal of their *Bivens* claims. It relied upon *Chappell* in reasoning that because constitutional claims of armed forces personnel are meant to be covered by the Veterans' Benefits Act (VBA),¹⁶⁵ a money damages rem-

159. 716 F.2d at 630.

160. See *Clemente v. United States*, 568 F. Supp. 1150, 1164-71 (C.D. Cal. 1983) (plaintiff entitled to recover both compensatory and punitive damages in a *Bivens* action because her due process rights were violated when the Air Force ignored some of her administrative claims and disposed of her discrimination claim in a grossly inadequate and highly superficial manner, all in disregard of Air Force procedures).

161. See also *Grace v. United States Pub. Health Serv.*, 714 F.2d 129 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 1414 (1984) (*Chappell* bars physician's *Bivens* claim for wrongful termination from residency program. See 52 U.S.L.W. 3628 (Feb. 28, 1984).); *Benvenuti v. Department of Defense*, 587 F. Supp. 348, 353 (D.D.C. 1984) (*Chappell* bars junior officer's *Bivens* action alleging a due process violation in conjunction with what plaintiff characterized as "involuntary commitments"); *Penagaricano v. Llenza*, 571 F. Supp. 888, 892 (D.P.R. 1983) (dismissing a first amendment *Bivens* action alleging a conspiracy to separate plaintiff from his position in the Puerto Rico National Guard on account of his political ideas, in part in reliance upon *Chappell*).

162. 713 F.2d 1097 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2354 (1984).

163. 713 F.2d at 1100 & n.6.

164. 340 U.S. 135 (1950). See note 89 *supra*.

165. Under the Veterans' Benefits Act, 38 U.S.C. §§ 101-5228 (1982), a soldier injured incident to military service is assured free medical care, and receives limited income if he is disabled

edy directly under the Constitution is unavailable.¹⁶⁶ The court either ignored the question whether the remedy made available by the VBA was minimally adequate to redress the alleged constitutional violations or it assumed without analysis that the VBA afforded a constitutionally adequate remedy to servicemen generally, and to plaintiffs in particular. As cases discussed below show, this is a matter not free of doubt.¹⁶⁷ Perhaps the court regarded its view that the VBA remedies were meant to be exclusive¹⁶⁸ as tantamount to a determination of constitutional adequacy. There is no warrant for such an assumption, however.¹⁶⁹ Because of the failure to think through the matter of constitutional adequacy, here, as in *Chappell*, plaintiffs' constitutional rights were insufficiently protected.

Gaspard also alleged that he was entitled to a *Bivens* action, even if the VBA is generally an adequate remedy, because the Veterans Administration (VA) refused to certify his particular injury as service-related and therefore refused to grant him a service-related pension.¹⁷⁰ The court's conclusion that denial of the VA pension did not provide a ground for affording a *Bivens* remedy was justified by its finding that Gaspard's alleged injuries could be remedied adequately through the available statutory scheme if he could prove that his disabilities were service-related.¹⁷¹ However, its language, "We consider the congressionally-authorized military compensation system to be comprehensive and conclusive even when individual claimants may fall between the cracks of the implementing regulations,"¹⁷² is overbroad. For one who falls between the cracks because he cannot prove elements of the statutory cause which are *not* necessary to a cause of action under the Constitution, the legislative scheme furnishes no remedy, and the fail-

after discharge and limited income for his family if he dies as a result of his injury. The Act provides special supplementary payments for loss of use of a limb or an eye, and for other serious military injuries. Its specific provisions include: §§ 301-362: compensation for service-connected disability or death; §§ 401-423: dependency and indemnity compensation for service-connected deaths; §§ 501-562: pensions for nonservice-connected disability or death; §§ 601-664: hospital, domiciliary, nursing home, and medical care; §§ 701-788: life insurance. The court in *Gaspard* did not specify precisely what VBA benefits plaintiffs sought.

166. *Gaspard*, 713 F.2d at 1103.

167. See *Jaffee v. United States*, 663 F.2d 1226, 1236 n.11 (3d Cir. 1981) (en banc), *cert. denied*, 456 U.S. 972 (1982); *Stanley v. United States*, 574 F. Supp. 474, 487-88 (S.D. Fla. 1983), *scrivener's errors corrected by subsequent order* at 587 F. Supp. 1071 (S.D. Fla. 1984).

168. *Gaspard*, 713 F.2d at 1102, 1105.

169. See note 191 and text at notes 204-06, *infra*.

170. 713 F.2d at 1104-05.

171. The court noted that a wrongful denial of VA pensions that rose to the level of a constitutional violation could support a separate *Bivens* theory. Such a claim was not before the court, however. 713 F.2d at 1105 nn.18-19.

172. 713 F.2d at 1105 (citation omitted).

ure to recognize a direct action under the Constitution can leave its guarantees a "mere form of words."¹⁷³

A very similar case was presented to the Third Circuit Court of Appeals in 1981, and was resolved in the same way as *Gaspard*, in a decision which foreshadowed *Chappell* to a remarkable degree. In *Jaffee v. United States*¹⁷⁴ the Third Circuit en banc denied a former soldier and his wife a *Bivens* cause of action against former commanding officers and civilian members of the Defense Department and the Atomic Energy Commission. Defendants were accused of having knowingly, deliberately and recklessly disregarded their knowledge that they were exposing plaintiff and other soldiers to grave risk of injury and death in ordering them to stand in a field without any protection against radiation while a nuclear device was exploded a short distance away. Jaffee sued seeking compensatory and punitive damages for violation of his constitutional rights under several amendments, including the first.¹⁷⁵

The Third Circuit viewed its task as that of divining what the Supreme Court would do with the case.¹⁷⁶ It correctly foresaw that the Court would apply the reasoning behind the military immunity doctrine created by *Feres v. United States*¹⁷⁷ to the question whether a cause of action to redress allegedly unconstitutional military acts should be implied under the Constitution against individual government officials.¹⁷⁸ The court found that special factors would counsel hesitation, in the eyes of the Supreme Court, because of the deleterious effects that the Court perceives service related lawsuits to have on military performance.¹⁷⁹ It found that permitting suits for intentional torts would likely undermine military discipline as much as allowing suits for the negligent conduct from which the Supreme Court had

173. See text at note 79 *supra*.

174. 663 F.2d 1226, 1228, 1238 (3d Cir. 1981) (en banc), *cert. denied*, 456 U.S. 972 (1982).

175. 663 F.2d at 1229. He also alleged violations of his fourth, fifth, eighth and ninth amendment rights.

176. 663 F.2d at 1228, 1230. This approach is highly questionable and was criticized both by concurring judges and by the dissenters as neither sound policy nor sound jurisprudence. They argued that it was the court's responsibility to arrive at an independent decision based on reasoned analysis of legal precepts and precedents. 663 F.2d at 1240 (Hunter, III, J. concurring), 1267 (Gibbons, J., dissenting). See Note, *Interstate Commerce — State Franchise Tax on Foreign Corporation Engaged Solely in Interstate Commerce*, 44 COLUM. L. REV. 565, 569-70 (1944).

177. 340 U.S. 135 (1950).

178. The Supreme Court fulfilled this prediction in *Chappell v. Wallace*, 103 S. Ct. 2362 (1983).

179. *Jaffee*, 663 F.2d at 1232, 1234-36. These include ill effects on the willingness of military personnel to follow directions of their superiors, and ill effects on the willingness of military decision makers to act as quickly and forcefully as necessary if they know that they subsequently may be called into a civilian court to answer for their actions.

immunized military personnel in *Feres* and elsewhere,¹⁸⁰ and that the type of military activity which could give rise to a claim of intentional tort is particularly dependent on the exercise of discretionary military judgment. It found that no distinction between battlefield and non-battlefield decisions was appropriate.¹⁸¹ The court relied, moreover, on the assumption (made by the Court in *Carlson v. Green*) that suits against individuals have "far greater potential for chilling responsible decision-making than those against the government."¹⁸² For these reasons the Third Circuit believed that the Supreme Court would hold special factors to counsel against recognition of a *Bivens* remedy for Jaffee or his wife.

In a manner which further foreshadowed the Supreme Court's approach in *Chappell*, the court went on to conclude that although the VBA did not provide as effective a remedy as recovery directly under the Constitution,¹⁸³ and although Congress had not declared the Act to be an equally effective substitute,¹⁸⁴ the Act nonetheless reinforced the decision not to recognize a *Bivens* cause of action. While the Act would not in itself preclude a cause of action for money damages under the Constitution, it joined with the concerns about the effect of lawsuits on the military to counsel against creation of such a cause of action, as the choice for Jaffee was not "damages or nothing."¹⁸⁵

Finally, the court rejected the argument that the civilian defendants from the Department of Defense and the Atomic Energy Commission should not benefit from the concerns expressed in *Feres*. In the court's view, the same policy considerations were implicated whether injurious decisions were made by military officials or by civilian officials who oversee military operations.¹⁸⁶ Thus, no *Bivens* claim

180. 663 F.2d at 1234-35. The court also relied here upon *Stencel Aero Engg. v. United States*, 431 U.S. 666 (1977).

181. 663 F.2d at 1236-37.

182. 663 F.2d at 1234.

183. The court noted that veterans' benefits clearly would not fully compensate Jaffee for his losses and that deterrence of similar future behavior by federal employees "would occur only if the government punished wrongdoers through administrative or criminal sanctions." 663 F.2d at 1236 n.11.

184. The court observed, however, that the Supreme Court had interpreted the VBA administrative remedy to be "exclusive" in a different context. 663 F.2d at 1237 (citing *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464-65 (1980) (per curiam)). And it read Congress' silence, in the face of the Court's invitation to Congress to amend the FTCA if it disagreed with *Feres*, as indicative of congressional intent that the government be free from tort liability for service connected injuries. 663 F.2d at 1237. The court further seemed to assume that congressional intent on whether injured servicemen ought to be able to sue the United States is equivalent to congressional intent on whether servicemen ought to be able to sue their commanding officers in tort. This is a questionable assumption.

185. 663 F.2d at 1236-37.

186. 663 F.2d at 1238.

was allowed against the civilians either.

As already noted, *Jaffee* anticipated *Chappell*. It correctly predicted the Supreme Court's analysis. Consequently many of the criticisms which this Article levelled against *Chappell* apply to *Jaffee*. In short, the decision is troublesome for its attenuation and melding of the two tests which the Court previously had developed for determining whether a *Bivens* claim would be implied,¹⁸⁷ and for its lack of concern with affording the plaintiff a constitutionally adequate remedy. With respect to the court's reliance on the *Feres* doctrine, two dissenting judges argued strenuously against the notion that military necessity demanded that the *Bivens* action be rejected. They reviewed case law to show that the court's decision was instead a radical break with the traditions of holding the military accountable to civil government, of denying absolute immunity to military officers, and of encouraging members of the armed forces to complain of misconduct by their commanding officers.¹⁸⁸ The dissenters also decried the majority's use of the policy favoring aggressiveness in military decisionmaking to bar actions by civilians for intentional torts committed by the military;¹⁸⁹ here Mrs. Jaffee's claims,¹⁹⁰ predicated on the violation of her husband's constitutional rights, were dismissed as well.¹⁹¹

A recent district court decision, *Stanley v. United States*,¹⁹² has shown a way in which *Chappell* can be read not to impose a per se

187. See text at notes 102-06 *supra*.

188. 663 F.2d at 1247-68 (Gibbons, J., and Sloviter, J., dissenting). See note 89 *supra*.

189. 663 F.2d at 1250 (Gibbons, J., and Sloviter, J., dissenting).

190. Mrs. Gaspard's claims were likewise dismissed as requiring an impermissible inquiry into military affairs. *Gaspard v. United States*, 713 F.2d at 1104.

191. The dissent also attacked the concurring judges' reasoning that the denial of a *Bivens* cause of action was defensible on the ground that Congress viewed the compensation system provided by the VBA as an adequate remedy. The dissent showed that the concurring judges had misread both legislative history and case law. Congress intended the VBA statutory program to provide reasonable and adequate compensation to disabled veterans facing rising inflation, but Congress never even considered the statute in the context of disabled veterans who claimed that their injuries were the product of unconstitutional conduct by their superior officers. 663 F.2d at 1263. Similarly, the dictum the concurrences relied on, in which the Supreme Court stated that it understood that Congress intended the VBA to be the sole remedy for service connected injuries, *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 (1980) (*per curiam*), was uttered in the context of rejecting a claim against the United States by an alleged tortfeasor who sought indemnity. The Supreme Court's opinion clearly assumed that servicemen could sue third parties despite service and veteran benefit programs. Thus, the Court's opinion supported, rather than undermined, the precedential basis for a *Bivens* action against commanding officers. 663 F.2d at 1264. The critical point is this: If the dissenters are correct that Congress never intended the VBA to be veterans' exclusive remedy, and never intended the Act to preclude veterans from suing persons other than the United States, then the court was free to afford a *Bivens* remedy even if the VBA renders the Bill of Rights something more than a "mere form of words."

192. 574 F. Supp. 474 (S.D. Fla. 1983), *scrivener's errors corrected by subsequent order* at 587 F. Supp. 1071 (S.D. Fla. 1984).

prohibition on *Bivens* actions by servicemen against their superiors. *Stanley* is worth contrasting with *Mollnow*, *Gaspard*, and *Jaffee* for although it was brought under the fifth amendment, its reasoning and analysis would be equally appropriate in a first amendment *Bivens* case.

While in the Army, plaintiff Stanley participated in a program the purported purpose of which was to develop and test methods of defense against chemical warfare attacks.¹⁹³ Stanley alleged that the military surreptitiously administered LSD to him, and that the LSD caused a wide range of injuries, from alterations in his behavioral and emotional state to the consequent impairment of his performance of military duties and the dissolution of his marriage.¹⁹⁴ The court identified the fifth amendment right to be free to decide for oneself whether to submit to drug therapy as the source of his *Bivens* action,¹⁹⁵ although plaintiff's first amendment rights were implicated as well.¹⁹⁶ Distinguishing *Chappell*, the *Stanley* court reaffirmed its earlier decision¹⁹⁷ that the plaintiff had a viable *Bivens* action against individual agents and officers of the United States who had participated in the LSD experiment. The *Stanley* court did not read *Chappell* to hold the Constitution's textual commitment of the military to Congress to be a matter of separation of powers that was itself a special factor counseling hesitation. It relied upon the Court's (obscure but) explicit refusal to hold that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service,¹⁹⁸ and upon the Court's having "found it necessary" to determine whether special factors counselling hesitation were present on the particular facts of *Chappell*. Those two aspects of *Chappell* led the *Stanley* court to conclude that *Chappell* did not impose a per se prohibition on *Bivens* actions by servicemen against their superiors, but rather barred only those actions "in which a member of the military brings suit against a superior officer for wrongs which involve direct

193. 574 F. Supp. at 476 & n.1.

194. 574 F. Supp. at 476 & n.2.

195. 574 F. Supp. at 476 n.1.

196. See, e.g., *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976) (first amendment may be violated by the involuntary administration of psychotherapeutic substances to inmates); see also *Rogers v. Okin*, 478 F. Supp. 1342, 1366-67 (D.Mass. 1979), *aff'd. in part, rev'd. in part*, 634 F.2d 650, 653 (1st Cir. 1980), *rev'd. on other grounds sub nom. Mills v. Rogers*, 457 U.S. 291 (1982) (district court found first amendment concerns implicated when patients alleged forcible administration of antipsychotic drugs; court of appeals relied upon the due process clause of the fourteenth amendment, and did not examine the district court's reliance on the first amendment. See *Mills v. Rogers*, 457 U.S. at 294 n.3, 295-96 n.6.).

197. *Stanley v. United States*, 549 F. Supp. 327 (S.D. Fla. 1982).

198. *Chappell*, 103 S. Ct. at 2367.

orders in the performance of military duty and the discipline and order necessary thereto.”¹⁹⁹ Stanley had not been ordered or obligated to participate in the program giving rise to his complaint. He had volunteered, in service to his country, so his case did not require the court to inquire into the propriety of military orders.²⁰⁰ Consequently, neither *Chappell* nor the *Feres* doctrine dictated denial of a *Bivens* action to Stanley, and both *Gaspard* and *Jaffee* were distinguishable. Special factors counselling hesitation were thus found not to be present.²⁰¹

After noting the existence of ample common law and statutory authority to support judicial review of Stanley’s constitutional claim,²⁰² and after remarking upon the obligation of the military to operate within the confines of the Bill of Rights, the court went on to decide that Stanley’s *Bivens* action was not precluded by a legislative remedy. Consistent with its view that Congress’ authority over the military did not constitute a special factor counselling hesitation, the court looked for an alternative legislated remedy explicitly declared to be a substitute for recovery under the Constitution and equally effective in the view of Congress, using the literal *Carlson* test. The court first found that an award of retroactive back pay and promotions, theoretically available from a civilian board empowered to correct military records, would be “meaningless” for Stanley. He did not claim that the Army had cheated him of either money or a promotion. He alleged that the Army had caused him mental illness and physical pain, and knowingly deprived him of the ability to enjoy his life.²⁰³ The court also held that the VBA did not pass either prong of the *Carlson* test for concluding that a statutory remedy precludes implication of a *Bivens* remedy. Neither the statutory language of the VBA nor its legislative history explicitly declares that the VBA is to substitute for a *Bivens* action.²⁰⁴ At most, the court found, Congress intended the Act to provide relief

199. *Stanley*, 574 F. Supp. at 479.

200. 574 F. Supp. at 479, 481.

201. *Cf. Bishop v. United States*, 574 F. Supp. 66, 68 (D.D.C. 1983) (rejecting *Bivens* claims, predicated upon the first, fifth and other amendments to the Constitution, by a former soldier who had voluntarily participated in drug experiments conducted by the Army; without discussion, the court found that *Chappell* barred the action).

202. *Stanley*, 574 F. Supp. 474, 479, 481-82 & 481 nn.13-16.

203. 574 F. Supp. at 485. The court went too far here because Stanley had alleged that the LSD administered to him had impaired his military performance, prompting a reduction in his service rank. However, the court was correct that back pay and promotions are not a constitutionally adequate remedy for the serious mental illness and physical pain that Stanley claimed to have suffered. Moreover, there is no reason to believe that the civilian boards ever were intended as a mechanism for redress of the kinds of wrongs Stanley alleged.

204. 574 F. Supp. at 486 & n.29, 487 & n.32.

for the impaired earning capacity of disabled veterans.²⁰⁵ The court further opined that the VBA is less effective than a *Bivens* action because it might not enable the plaintiff to be made whole and because it is less likely to deter future abuses of power by individual officers.²⁰⁶

It remains to be seen whether the Supreme Court will accept the narrow reading of *Chappell* and the view of the VBA embraced by the *Stanley* court. Certainly, the disclaimer in *Chappell*, where the Court said that it was not holding military personnel barred from all redress in civilian courts for constitutional wrongs suffered during military service, was cryptic. How large an opening that remark was intended to leave is unclear.²⁰⁷ Whether the Supreme Court ultimately ratifies the *Stanley* court's views or rejects them, the district court performed a valuable service in issuing a closely reasoned opinion which reached a result the court believed was necessary to "meet the needs of men and match their ethical sensibilities."²⁰⁸

b. *Retaliatory discharges.* Another group of *Bivens* actions brought in the lower federal courts involves adverse actions taken by superiors in the employment context, allegedly in retaliation for the exercise of first amendment rights. Retaliatory transfers and discharges are the acts typically charged, although retaliatory refusals to promote or to rehire also appear.

In the earliest of these cases one finds some predictable conservatism by judges who had no desire to be the first to expand the availability of a money damage remedy for constitutional violations beyond the fourth amendment context of *Bivens*.²⁰⁹ In 1975, in *Yiamouyian-*

205. 574 F. Supp. at 486 n.29 (quoting S. REP. NO. 94-1226, 94th Cong., 2d Sess. 39, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2537, 2565).

206. 574 F. Supp. at 487-88. Cf. *Presson v. Slayden*, 570 F. Supp. 842 (N.D. Ga. 1983) (dismissing for failure to state a claim a pre-*Chappell* allegation that army defendants contributed to forced administration of mind-altering drugs to punish and deter plaintiff's "whistleblower" activities); *Nagy v. United States*, 471 F. Supp. 383 (D.D.C. 1979) (rejecting fifth amendment *Bivens* claim based upon participation in army LSD experiments without informed consent and upon inadequate follow-up); *Misko v. United States*, 453 F. Supp. 513 (D.D.C. 1978) (rejecting a fifth amendment *Bivens* claim based upon army psychiatrists having administered drugs against plaintiff's will and without medical justification).

207. Of the cases the Supreme Court cited in support of its remark, one presented a challenge to the validity of Air Force regulations as violative of the first amendment, *Brown v. Glines*, 444 U.S. 348 (1980); another was a habeas corpus review of a court-martial, *Parker v. Levy*, 417 U.S. 733 (1974); and the third involved a servicewoman's petition for declaratory and injunctive relief, *Frontiero v. Richardson*, 411 U.S. 677 (1973). None was an action for money damages.

208. *Stanley*, 574 F. Supp. at 488 (quoting A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 110 (1976)).

209. Thus, in *Moore v. Schlesinger*, 384 F. Supp. 163 (D. Colo. 1974), the district court rejected the efforts of a U.S. Air Force Captain to recover money damages from superior officers who he alleged had removed him from a teaching position at the Air Force Academy and re-assigned him to a base in Nebraska in retaliation for his letter writing to members of Congress. It held the *Bivens* doctrine inapplicable and limited to fourth amendment violations. 384 F. Supp.

nis v. Chemical Abstracts Service,²¹⁰ the Sixth Circuit became the first court of appeals to opine that an employee's claim of retaliatory discharge could, theoretically, give rise to a first amendment claim for damages. Plaintiff ultimately lost, however, for inability to establish governmental action.²¹¹ In 1980, in *Hanson v. Hoffmann*,²¹² the District of Columbia Circuit also approved the cause of action. However, the court found it necessary to remand the case to provide plaintiff, who had not explicitly relied on a first amendment theory, an opportunity to make out such a claim.²¹³

The only extended treatment of the availability of a first amendment Bivens action in the employment context — outside the realms where the Civil Service Reform Act²¹⁴ or Title VII of the Civil Rights Act of 1964²¹⁵ are applicable — is the en banc decision of the Court of Appeals for the Seventh Circuit in *Egger v. Phillips*.²¹⁶ *Egger* was decided just eleven days before the Supreme Court decided *Chappell and Bush*. A former Special Agent of the Federal Bureau of Investigation (FBI), Egger, sued his former supervisor, Phillips, alleging that Phil-

at 165. The military context was not relied upon. In *Holodnak v. Avco Corp.*, 514 F.2d 285, 292-93 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975), the Court of Appeals for the Second Circuit avoided the question of whether a first amendment violation entitled the plaintiff to recover punitive damages by concluding that such damages were inappropriate under the circumstances presented. The district court had already avoided the question of whether plaintiff was entitled to compensatory damages under Bivens, by holding the defendant liable on other grounds. *Holodnak v. Avco Corp.*, 381 F. Supp. 191, 204 n.12 (D. Conn. 1974). See 51 N.Y.U. L. REV. 311 (1976); see also *Wahba v. New York Univ.*, 492 F.2d 96, 103-04 (2d Cir.) (possibility of a first amendment Bivens action left open; professor lost action for retaliatory dismissal for lack of sufficient government involvement with defendant), *cert. denied*, 419 U.S. 874 (1974); *Greenya v. George Washington Univ.*, 512 F.2d 556, 562-63 n.13 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975) (same question left open).

210. 521 F.2d 1392, 1393 (6th Cir. 1975).

211. *Yiamouyiannis v. Chemical Abstracts Serv.*, 578 F.2d 164 (6th Cir.), *cert. denied*, 439 U.S. 983 (1978).

212. 628 F.2d 42, 53 n.12 (D.C. Cir. 1980).

213. 628 F.2d at 43, 48, 52-53. Plaintiff had cast her action as one for gender discrimination. 628 F.2d 43. However, part of her claim was that she had been dismissed because of repeated, legitimate, inquiries she had made to her superiors about how a maternity leave policy would be applied to her and whether it would have discriminatory effects. 648 F.2d at 43, 48-49. In the court's view, requests to clarify ambiguous policies might warrant first amendment protection, 648 F.2d at 51, and the right to explore and discuss constitutional rights springs, in part, from the right of free speech. 648 F.2d at 49. Consequently, the dismissal of plaintiff's claim was reversed, and plaintiff was given the opportunity to make out a first amendment claim on remand, including the chance to develop the facts to show that her requests to clarify the maternity leave policy fell within the protection of the fifth and first amendments. 648 F.2d at 53. The District of Columbia District Court had earlier held that an employee discharged in retaliation for the exercise of first amendment rights could recover damages under that amendment. *Harper v. Blumenthal*, 478 F. Supp. 176, 180 n.3 (D.D.C. 1979). *Harper* relied upon *Dellums v. Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977); See text at notes 337-41 *infra*.

214. 5 U.S.C. §§ 1101-1308 (1976).

215. 42 U.S.C. §§ 2000e-2000e16 (1982).

216. 710 F.2d 292 (7th Cir.), *cert. denied*, 104 S. Ct. 284 (1983).

lips recommended plaintiff's transfer from Indianapolis to Chicago and took other administrative actions adversely affecting Egger's employment with the FBI, all in retaliation for plaintiff's efforts to expose alleged corruption in the Indianapolis office.²¹⁷ The district court denied defendant's motion to dismiss the complaint for failure to state a claim upon which relief could be granted, but granted his motion for summary judgment.²¹⁸ A panel of the court of appeals reversed the grant of summary judgment as to the first amendment claim.²¹⁹ However, upon rehearing en banc, the judgment of the district court was affirmed.²²⁰

In arriving at its ultimate conclusion, the court considered first the defendant's contention that FBI agents should be precluded from bringing damage actions against their superiors for constitutional violations arising in the scope of their employment, if not absolutely, at least with respect to inter-office transfer decisions.²²¹ The court applied the two-pronged *Carlson* test²²² as to when a *Bivens* action would be defeated. It found neither a special factor counselling hesitation²²³ nor any explicit congressional declaration remitting injured persons to another remedy.²²⁴ In particular, the court held that FBI agents do not enjoy such an independent status in our constitutional scheme that a judicially created money-damage remedy would be inappropriate.²²⁵ The court also turned aside defendant's argument that FBI agents' exemption from civil service protections²²⁶ constitutes a special factor counselling hesitation.²²⁷ The argument apparently was that if Congress has not provided certain protections for federal employees, the inference should be drawn that *no* protection should be given them by the courts. The court responded that the absence of a civil service

217. 710 F.2d at 294.

218. 710 F.2d at 294-95.

219. *Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 284 (1983). The panel affirmed the summary judgment as to plaintiff's other claims. 669 F.2d at 504-05.

220. 710 F.2d 292.

221. 710 F.2d at 297, 299.

222. *See* text at notes 41-50 *supra*.

223. 710 F.2d at 297-300.

224. 710 F.2d at 297.

225. 710 F.2d at 297.

226. Under 28 U.S.C. § 536 (1976), all positions in the FBI are excepted from the competitive service, and FBI agents occupy positions in the excepted service. One of the consequences of this exception is that FBI agents do not enjoy the protections afforded by the Civil Service Reform Act of 1978, or by Civil Service Commission Regulations and Executive Orders to employees in the competitive service. Many of these protections are described in *Bush v. Lucas*, 103 S. Ct. 2404, 2415-16 (1983).

227. 710 F.2d at 297.

remedy favored recognition of a *Bivens* claim; not the opposite.²²⁸ For Egger, as for Bivens, it was damages or nothing.²²⁹

While it may be that to the extent Congress has declared certain employment practices unlawful which are also unconstitutional and provide [sic] federal employees with adequate remedies for such violations, a *Bivens* action should not be entertained, the constitutional rights of federal employees in the workplace which are not protected by statute properly form the basis of a *Bivens* action. The contrary conclusion would relegate federal civil servants to a second class status in relation to their state counterparts, and create a double standard between federal and state actors which the Supreme Court has condemned.²³⁰

The court also pointed out that the exemption of FBI agents from civil service protections was "a far cry" from the explicit congressional declaration necessary to preclude a *Bivens* action.²³¹

The court proceeded to reject the contention that *Bivens* claims predicated upon inter-office transfers should be precluded because of the importance to the FBI of having flexibility in ascertaining its manpower needs.²³² Even in personnel matters and even for FBI officials, discretion is limited by constitutional constraints, and is thus subject to judicial scrutiny.²³³ Finally, the court torpedoed defendant's argument that the contractual relationship between the FBI and its agents is a special factor counselling hesitation in recognizing a *Bivens* action. FBI agents agree to be transferred anywhere the needs of the service demand, but they do not agree to be transferred in violation of their constitutional rights,²³⁴ and they do not relinquish their first amendment rights by becoming FBI employees.²³⁵ Having concluded that Egger could bring a *Bivens* action,²³⁶ the court went on to determine whether Egger's first amendment rights had been violated, and

228. 710 F.2d at 297.

229. 710 F.2d at 298.

230. 710 F.2d at 298 (citations omitted). 5 U.S.C. § 2303 (Supp. II 1978) prohibits FBI employees from taking personnel action against other FBI employees as a reprisal for disclosure to the Attorney General of information regarding conduct which the employee reasonably believed evidenced mismanagement, gross waste of funds, abuse of authority, a substantial and specific danger to public health or safety or a violation of a law, rule, or regulation. This statute did not apply to Egger's situation, however.

231. 710 F.2d at 298. Title VII of the Civil Rights Act of 1964 does apply to employees of the FBI. 42 U.S.C. § 2000e-16 (1982). However, Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. It therefore had no bearing upon Egger's claims.

232. 710 F.2d at 299.

233. 710 F.2d at 299.

234. 710 F.2d at 300.

235. 710 F.2d at 312.

236. Only four judges concurred in Parts III and V of the en banc decision, the parts this Article has dwelled upon. The remaining four judges of the court found it unnecessary to resolve the issues discussed therein. 710 F.2d at 294 n.*.

whether Phillips was protected by a qualified immunity.²³⁷

Egger's thoughtful decision to allow a *Bivens* action for retaliatory transfer in an FBI employment context was consistent with then existing Supreme Court precedent. While the court criticized²³⁸ aspects of the Fifth Circuit's opinion in *Bush v. Lucas*,²³⁹ it appears that neither the Supreme Court's later affirmance of *Bush* nor its decision in *Chappell* renders *Egger* incorrect.²⁴⁰ There are similarities, but many differences, between the relationship of an FBI agent to his superiors and the relation of a soldier to his commanding officers. While judicial decisions have, on occasion, reflected a view that law enforcement agencies, somewhat like the military, have a need to maintain a high degree of esprit de corps, confidentiality, efficiency, discipline and supervision,²⁴¹ they have declined to find that police have the same interest as the military in instant, unquestioning obedience,²⁴² and have refused to water down the constitutional rights of law enforcement officers by analogy to the watered down rights of military personnel.²⁴³ Even if one assumes *arguendo* that the FBI has a unique disciplinary structure analogous to that of the military, however, *Chappell* would not mandate a result different from that reached by the Seventh Circuit in *Egger*. Unlike the situation in *Chappell*, the Constitution does not grant to Congress plenary and exclusive authority over the FBI,²⁴⁴ and Congress has not established a comprehensive

237. The court found against *Egger* in both respects. Upon application of a balancing test, the court held that his freedom of speech had not been abridged, 710 F.2d at 320-23, and that Phillips was protected by the qualified immunity defense because he could not reasonably have been expected to know that his actions would violate *Egger's* right of free speech. 710 F.2d at 315.

238. *Egger*, 710 F.2d at 298 & n.5.

239. 647 F.2d 573 (5th Cir. 1981).

240. Some courts have expressed doubt as to the vitality of *Egger*. See, e.g., *Francisco v. Schmidt*, 575 F. Supp. 1200, 1203 (E.D. Wis. 1983); *Langster v. Heckler*, No. 80 C 6393 (N.D. Ill. Aug. 8, 1983).

241. E.g., *Vorbeck v. Schnicker*, 660 F.2d 1260, 1263 (8th Cir. 1981) (dictum: police and military must demand a high level of discipline and duty), *cert. denied*, 445 U.S. 921 (1982).

242. E.g., *Kelley v. Johnson*, 425 U.S. 238, 246 (1976) (recognizing a need for discipline, esprit de corps, and uniformity in a police force but disavowing reliance upon a historical or functional view of the police as "para-military"); *Kannisto v. City & County of San Francisco*, 541 F.2d 841, 843 (9th Cir. 1976) (stressing the police department's interest in discipline, morale, and uniformity but acknowledging that it does not have the identical interest in developing "instant unquestioning obedience" as does the military), *cert. denied*, 430 U.S. 931 (1977).

243. E.g., *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("policeman, like teachers and lawyers [and unlike military personnel, see *Brown v. Glines*, 444 U.S. 348 (1980) and *Parker v. Levy*, 417 U.S. 733, 758-61 (1974)], are not relegated to a watered-down version of constitutional rights"); *accord Barrett v. Thomas*, 649 F.2d 1193, 1198-99 n.9 (5th Cir. 1981), *cert. denied*, 451 U.S. 925 (1982); *Hanneman v. Brier*, 528 F.2d 750, 754 (7th Cir. 1976).

244. To the contrary, the FBI is part of the executive branch, organized under the Department of Justice. In many respects, the Director of the FBI has been authorized to exercise the power and authority vested in the Attorney General concerning FBI matters. E.g., 28 C.F.R.

internal system of justice to regulate FBI matters. Consequently, *Chappell*'s deference to congressional authority would not preclude implication of a *Bivens* cause of action for FBI agents.

Similarly, the court's decision in *Bush* should not cast doubt on *Egger*. *Bush* found it appropriate to allow Congress to determine the scope of a supervisor's liability, in light of the elaborate civil service remedial scheme. But there are no special reasons to allow Congress to prescribe the scope of relief available to FBI agents whose first amendment rights allegedly have been violated by their supervisors. Congress has not developed a set of protections and remedies peculiar to federal law enforcement personnel, much less a comprehensive and meaningful set of such remedies. The exemption of FBI agents from civil service protections is, as the Seventh Circuit held, a factor counselling recognition of a *Bivens* action, not a factor counselling hesitation.²⁴⁵ There is no basis for inferring from that exemption a congressional intention to deny to FBI agents all redress for violations of their constitutional rights by their supervisors. Indeed, a denial of all redress would be constitutionally impermissible. As four members of the Supreme Court commented in another case involving a civil servant in the "excepted" service who alleged retaliation for his exercise of first amendment rights, when it comes to protecting civil servants from arbitrary executive action, "the public interest is demonstrably on the side of encouraging less 'vigor' and more 'caution' on the part of decisionmakers."²⁴⁶

Nonetheless, it is noteworthy that the Seventh Circuit decided *Egger* before the Supreme Court issued its opinions in *Bush* and *Chappell*. There is no way to know for certain how differently a Seventh Circuit which had read *Bush* and *Chappell* would have viewed the situation presented by *Egger*. A court prepared to view the FBI as paramilitary or to "lump" FBI agents with other federal employees whose first amendment rights have been violated by their supervisors (as in *Bush*) might have left justice for FBI agents to Congress or to

§ .089a (1984) (authorizing the Director to exercise the Attorney General's authority to certify to Congress certain claims against the FBI for nonnegligent property damage and also delegating limited settlement authority under the FTCA); 28 C.F.R. § 0.137 (1984) (authorizing the Director to exercise the Attorney General's authority to take final action in matters pertaining to the employment, direction, and general administration of personnel in the FBI). It is primarily bodies within the FBI, and its director, who control the internal operations of the Bureau on personnel matters, with occasional involvement of the Department of Justice's Office of Professional Responsibility. The House Judiciary, Intelligence and Appropriations Committees, and their counterparts in the Senate, oversee some aspects of FBI operations, but Congress has not attempted to establish a comprehensive internal system of justice to regulate FBI matters.

245. *Egger*, 710 F.2d at 297-98.

246. *Nixon v. Fitzgerald*, 457 U.S. 731, 788 (1982) (White, J., joined by Justices Brennan, Marshall and Blackmun, dissenting).

the executive branch.²⁴⁷ Absent an intelligent reading of the civil service statutes, such as was displayed in *Egger*, some courts might conclude that the civil service statutes were intended to "cover" FBI agents, though they afford FBI agents no relief for the kind of injury alleged by *Egger*. Absent proper consideration of the constitutional adequacy of such a "remedy," FBI agents could be left without a suit for money damages arising directly under the Constitution as well as without any other avenue of redress to prevent their constitutional rights from becoming a "mere form of words."²⁴⁸

Additional law on first amendment *Bivens* actions for retaliatory job actions has been generated in cases where the Civil Service Reform Act²⁴⁹ or Title VII of the Civil Rights Act of 1964²⁵⁰ were complicating factors. The remainder of this subsection of the Article considers the effect of *Bush* and *Chappell* on Civil Service and Title VII retalia-

247. The recent Supreme Court cases have already begun to spawn such dicta as the following:

The concept of a private right of action has been strictly limited by the . . . Supreme Court in the cases of *Bush v. Lucas* and *Chappell v. Wallace*. In both *Bush* and *Chappell* the Court refused to form a private right of action for federal employees and cautioned against judicial action in expanding available remedies absent congressional mandate.

Vakas v. Rodriguez, 728 F.2d 1293, 1296 (10th Cir. 1984) (citations omitted).

248. Another noteworthy aspect of *Egger* is the court's view that "the fact that this is a First Amendment case is not a factor in the *Bivens* calculus." 710 F.2d at 299-300 n.7. It is true that a court often can apply the tests derived from *Bivens*, *Davis*, *Carlson*, *Chappell* and *Bush* without regard to which constitutional rights allegedly have been violated. However, none of the cases decided by the Supreme Court has disavowed the position taken by Justice Harlan, concurring in *Bivens*, that the courts' capability in making judgments as to causation and the magnitude of injury necessary to accord meaningful compensation is also relevant to a court's decision whether to create a damage remedy to vindicate a particular constitutional interest. *Bivens*, 403 U.S. at 408-09 & 409 n.9 (Harlan, J., concurring). Indeed, the Court has taken to emphasizing Justice Harlan's concurrence. See, e.g., *Bush*, 103 S. Ct. at 2410. If a decision properly can be influenced by those factors, then the specific amendment upon which suit is brought may be relevant to the *Bivens* calculus. While it is true that a decision to create a damage remedy predicated upon the factors of causation and magnitude of injury will presage part of the analysis of the merits of the constitutional claim, there is nothing extraordinary about such redundancy. (Compare common law courts' consideration of their ability to give a remedy for breach of contract in determining whether a contract was formed. RESTATEMENT (SECOND) OF CONTRACTS § 33(1), (2) (1981) ("Certainty (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. (2) The terms. . . are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy"). See generally E. FARNSWORTH, CONTRACTS §§ 3.1, 3.27-3.28 (1982) and, cases there cited (the requirement of definiteness, in order for a contract to be formed, is implicit in the principle that contract law protects the promisee's expectation interest); U.C.C. § 2-204(3) (1978) ("a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy"). Moreover, there are particularly strong reasons for the courts to recognize first amendment *Bivens* actions, as outlined *supra* at notes 136-52. Some of the arguments in favor of first amendment *Bivens* actions may not apply, or may apply with less force, where other rights are involved.

249. 5 U.S.C. §§ 1101-1308 (1982).

250. 42 U.S.C. §§ 2000e-2000e16 (1982).

tory discharge cases.²⁵¹

(i) *Civil Service Reform Act (CSRA) cases.* *Carroll v. United States*²⁵² is one noteworthy decision issued since *Bush v. Lucas* was decided by the Supreme Court. Carroll, a civilian employee at an Air Force base, had sought reemployment. Despite high recommendations for her past performance, she was not hired, although a substantial number of other people were hired. The refusal was allegedly based on her past union membership and on her former position as union steward. Carroll prevailed before an administrative law judge on an unfair labor practice claim that alleged discrimination on the basis of union membership, in violation of an executive order,²⁵³ but on review by the Federal Labor Relations authority, the government was ordered merely to give Carroll "first consideration for appropriate positions that subsequently became available."²⁵⁴ To obtain fuller relief, she filed a *Bivens* action.

The Fifth Circuit initially concluded that the remedy afforded Carroll was constitutionally inadequate. Under the applicable executive order an applicant for employment was entitled neither to retroactive

251. Several cases followed the Fifth Circuit's holding in *Bush v. Lucas*, 647 F.2d 573, 576 (5th Cir. 1981), *aff'd.*, 103 S. Ct. 2404 (1983), that "the unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy." *E.g.*, *Braun v. United States*, 707 F.2d 922, 926 (6th Cir. 1983) (denying *Bivens* remedy to former IRS revenue officer who alleged that IRS officials denied him a promotion and took other adverse job actions in retaliation for his criticism and exposure of waste, mismanagement and abuse of power, because of the availability of alternative remedies and the absence of any affirmative indication by Congress that a *Bivens* remedy was authorized in this situation); *Cazalas v. United States Dept. of Justice*, 569 F. Supp. 213, 227-29 (E.D. La. 1983) (denying *Bivens* remedy to former assistant U.S. Attorney who alleged termination in retaliation for filing a complaint of sex discrimination), *aff'd.*, 731 F.2d 280 (5th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-56); *Gillam v. Roudebush*, 547 F. Supp. 28, 31-32 (N.D. Ill. 1982) (denying *Bivens* remedy where plaintiff alleged he was removed from his VA position in retaliation for filing a grievance); *Avitzur v. Davidson*, 549 F. Supp. 399, 402-03 (N.D.N.Y. 1982) (denying *Bivens* remedy where plaintiff alleged retaliatory disability retirement from civilian employment at an Army arsenal). No attempt will be made here to evaluate whether anything in the Supreme Court's recent decisions would alter the outcomes in these cases, which are already adverse to plaintiffs.

Several cases involving purported *Bivens* claims of a nonfirst amendment variety also followed the court of appeals opinion in *Bush* or reasoned similarly. *E.g.*, *Broadway v. Block*, 694 F.2d 979, 985 (5th Cir. 1982) (alleged violation of due process rights); *Broussard v. United States Postal Serv.*, 674 F.2d 1103, 1112 (5th Cir. 1982) (same); *Bishop v. Tice*, 622 F.2d 349, 357-58 (8th Cir. 1980) (following *Bush* in rejecting the *Bivens* claim based on alleged violation of plaintiff's substantive due process rights, but approving an action for damages for the alleged violation of procedural due process rights); *Fields v. Harris*, 522 F. Supp. 901, 905-06 (W.D. Mo. 1981) (alleged violation of the second and eighth amendments), *aff'd.*, 675 F.2d 219 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 153 (1982); *cf.* *Sonntag v. Dooley*, 650 F.2d 904, 907 (7th Cir. 1981) (in accord with *Bishop v. Tice* in recognizing a *Bivens* claim for procedural due process violations).

252. 721 F.2d 155 (5th Cir. 1983) (*Carroll II*), *cert. denied*, 104 S. Ct. 3511 (1984).

253. *See Carroll v. United States*, 707 F.2d 836 (5th Cir. 1983) (*Carroll I*).

254. 707 F.2d at 837.

placement nor to back pay.²⁵⁵ Consequently, the remedy given Carroll was purely prospective — a fair chance at employment if and when other jobs became available. Consistent with the argument made herein that redress for a violation of first amendment rights must include a retrospective compensatory component,²⁵⁶ the Fifth Circuit found the inadequacy of the “remedy” to be “obvious,”²⁵⁷ as Carroll had been given neither the job she had been illegally denied, nor retroactive compensation.

The court distinguished *Bush* on the ground that the record showed no indication that the executive order that was violated reflected the careful balancing of the employee's rights as a citizen with the government's interests as employer that the civil service statutes reflect.²⁵⁸ Further, it saw nothing in the relationship between the government and those who apply for government jobs to counsel hesitation.²⁵⁹ It concluded, “[t]o uphold the district court's ruling [against plaintiff] would be the *memento mori* of *Bivens/Carlson* in this circuit. We decline the invitation to send forth that signal.”²⁶⁰

This was a good and thoughtful opinion, which made it possible for Carroll to obtain a money damage remedy for the violation of her first amendment rights.²⁶¹ However, the Fifth Circuit reversed itself. On rehearing, the court found that it was unable to make “a principled distinction between an employee [Bush] and a former employee seeking re-employment . . . sufficient to base a holding that the teachings of *Bush v. Lucas* do not control.”²⁶² Thus, it affirmed the district court's dismissal of plaintiff's complaint.

The court was right the first time around. Carroll's *Bivens* action should not be precluded by the mere fact that *some* form of administrative grievance procedure was available to her, whether or not that procedure was part of the elaborate, comprehensive scheme for redressing the grievances of civil servants that the Court emphasized in *Bush*. The available grievance procedure did not provide a meaningful remedy for Carroll. Indeed, because of its failure to afford any retro-

255. 707 F.2d at 837.

256. See text at notes 80-81 *supra*.

257. *Carroll* I, 707 F.2d at 839.

258. 707 F.2d at 839.

259. 707 F.2d at 839.

260. 707 F.2d at 839.

261. It was of limited significance, however, in that the executive order which Carroll alleged had been violated was subsequently replaced by the Civil Service Reform Act of 1978. 707 F.2d at 837. Under *Bush*, someone discriminated against for union activity would not have a *Bivens* claim today, but only the relief made available by Congress.

262. *Carroll* II, 721 F.2d at 156.

spective relief for the first amendment violation she allegedly had suffered, it was constitutionally inadequate, as the Fifth Circuit originally held. Carroll was denied an opportunity to rectify the violation of her first amendment rights because the *Bush* opinion failed to emphasize the need for lower courts to inquire into the adequacy of "exclusive" legislative remedies and to guide them in that assessment.

An equally important court of appeals decision following *Bush* is *Pinar v. Dole*.²⁶³ Pinar, a Federal Aviation Administration (FAA) police officer, sued his superiors for money damages, among other relief, alleging that disciplinary actions taken against him violated his first amendment rights.²⁶⁴ Pinar sought to distinguish *Bush* on the grounds that the statutory remedies available to him were inadequate and constitutionally deficient. For the actions taken against him (a two-day suspension, a letter of reprimand and termination of his temporary promotion), Pinar was limited to filing formal internal agency grievances and complaining to the Special Counsel for the Merit System Protection Board (MSPB).²⁶⁵ The Fourth Circuit found that *Bush* remained apposite despite "[t]he fact that the administrative remedies available to Pinar were less exhaustive than those available to Bush."²⁶⁶ The court further concluded that the remedies available to Pinar were both "comprehensive and constitutionally adequate."²⁶⁷

The court first observed that Pinar did not contend that he had been denied access to the protections afforded by statute to one in his position.²⁶⁸ It then rejected Pinar's contention that "because he was not afforded the exact same statutory remedial procedures available to Bush, the statutory procedures afforded him were inadequate as a matter of due process to redress the alleged violations of his first amendment rights."²⁶⁹ The court reasoned persuasively that less process is due for personnel action that is minor than for that which is serious. Thus, the mere fact that the extensive administrative remedies afforded to Bush upon a demotion were not available to Pinar for a brief suspension and letter of reprimand did not render Pinar's statutory remedies inadequate per se.²⁷⁰

The Fourth Circuit went on to evaluate on their merits the proce-

263. 747 F.2d 899 (4th Cir. 1984).

264. 747 F.2d at 902.

265. 747 F.2d at 905.

266. 747 F.2d at 905.

267. 747 F.2d at 905.

268. 747 F.2d at 906.

269. 747 F.2d at 907.

270. 747 F.2d at 907-08.

dural protections afforded to Pinar. The court detailed the statutory procedures available to Pinar, which included a right to file written evidence, an opportunity to make a personal presentation to an impartial grievance examiner, a right to be represented by counsel, and a right to seek investigation by the MSPB's Special Counsel.²⁷¹ It rightly found the Special Counsel's adverse determination — that there was no basis for concluding that the agency had acted illegally in disciplining Pinar — not sufficient itself to render his remedy inadequate.²⁷² The court also rebutted Pinar's contention that the Special Counsel has absolute discretion to decline to hear a case.²⁷³ The court did not, however, persuasively answer Pinar's related contention that the Special Counsel has absolute discretion to decline to take action in cases it does hear. Pinar had no appeal to the MSPB,²⁷⁴ and, according to the court, judicial scrutiny was "limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry."²⁷⁵ Nonetheless, the court was satisfied that the effectiveness of Pinar's remedy was not undermined by unbridled discretion resting with the Special Counsel. In light of the strength of the first amendment interest Pinar asserted, the rather minor deprivation thereof he claimed, the statutory procedures through which he could challenge unconstitutional conduct, and the strength of the government's interest in maintaining discipline in the workforce,²⁷⁶ the court held the CSRA procedures protecting Pinar's first amendment interests to be constitutionally adequate.²⁷⁷ It thus affirmed the decision to deny him a *Bivens* cause of action.²⁷⁸

Unfortunately, the *Pinar* court failed to distinguish the question whether the statutory *procedures* afforded Pinar were "adequate" and what was "due" him from the question whether the statutory *remedy* afforded him was constitutionally adequate.²⁷⁹ Those questions are not identical; perfectly adequate procedures, fully afforded, might lead

271. 747 F.2d at 905-06 & n.7.

272. 747 F.2d at 906.

273. 747 F.2d at 908.

274. 747 F.2d at 905. *See also* Keeffe v. Library of Congress, 588 F. Supp. 778, 791 (D.D.C. 1984).

275. *Pinar*, 747 F.2d at 906 (citing *Carducci v. Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983)).

276. The court found that to afford Pinar "a full hearing with the right to direct judicial review [of relatively minor personnel actions] would unduly frustrate the government's interest in efficiently administering the federal workforce," and would "put supervisors in the untenable position of having to take proper supervisory actions against federal employees or take no action at all so as to avoid monetary liability." 747 F.2d at 908.

277. 747 F.2d at 908.

278. 747 F.2d at 909.

279. *See* 747 F.2d at 906-08.

only to forms of relief that are constitutionally inadequate. The court's only reference to the relief available to Pinar was a quotation from legislative history, to the effect that a supervisor's taking "action against an employee . . . without having proper regard for the individual's privacy or constitutional rights . . . could result in dismissal, fine, reprimand, or other discipline for the supervisor."²⁸⁰ Since none of those "remedies" would compensate Pinar, there is substantial reason to doubt their constitutional adequacy.²⁸¹ The failure of the Court in *Bush* to elaborate the various aspects of a test for the constitutional adequacy of remedial legislation made this kind of incomplete analysis likely.

Still more about the ramifications of *Bush* can be learned by considering the effect it would have on a case like *Borrell v. United States International Communications Agency*,²⁸² decided in 1981. The court in *Borrell* was confronted with a *Bivens* claim alleging the retaliatory discharge of a probationary employee who had complained to fellow employees about agency practices that she thought constituted violations of law and regulations, mismanagement, gross waste of funds and abuse of authority. The district court had found, without elaboration, that plaintiff's dismissal was not tainted by constitutional impropriety.²⁸³ The District of Columbia Circuit was of the view²⁸⁴ that *Borrell* had a cause of action under the Constitution unless Congress had eliminated that right by enacting the Civil Service Reform Act.²⁸⁵ Relying upon *Carlson v. Green* and *Davis v. Passman*, the court reasoned that "[w]here newly enacted statutory remedies are unavailable to a particular segment of employees, the Supreme Court appears to have imposed a kind of 'clear statement' requirement on Congress, requiring it to indicate explicitly its intent to displace judicially-created remedies for constitutional deprivations."²⁸⁶ The CSRA gave probationary employees the right to petition for an investigation and to seek correction of prohibited personnel practices, but that right only. It afforded no right to participate in proceedings before the MSPB, and no appeal from adverse personnel actions or from administrative decisions not to seek correction of an allegedly prohibited per-

280. 747 F.2d at 906 (quoting S. REP. NO. 95-969, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2745).

281. See text accompanying note 80-81 *supra*.

282. 682 F.2d 981 (D.C. Cir. 1981).

283. 682 F.2d at 989.

284. 682 F.2d at 989.

285. Civil Service Reform Act of 1978, Pub. L. No. 94-12, 92 Stat. 111 (codified in scattered sections of 5 U.S.C.).

286. 682 F.2d at 989.

sonnel practice.²⁸⁷ Consequently, the court concluded that plaintiff's statutory remedies were "not an adequate enough substitute for a prior judicial cause of action so that we can infer . . . a Congressional desire to eliminate the preexisting right."²⁸⁸ The court found further support for this conclusion in legislative history indicating that Congress intended the CSRA to provide "additional, not decreased, protection for federal employees who blow the whistle on illegal or improper government conduct."²⁸⁹ Therefore, the court concluded that plaintiff could assert a *Bivens* claim.²⁹⁰ It remanded to the district court for findings of fact and conclusions of law sufficient to enable the appellate court to review the lower court's holding that plaintiff had failed to prove her claim.²⁹¹

Does this decision survive the Supreme Court's decision in *Bush v. Lucas*? It may not. Although the District of Columbia Circuit insisted that Congress clearly state that it intends its remedies to be exclusive, the Supreme Court found it appropriate to defer to the congressional scheme redressing federal personnel grievances without any clear statement by Congress regarding the intended exclusivity of its remedial scheme. One could distinguish *Borrell* from *Bush* by stressing the absence of comprehensive and meaningful remedies for the probationary employee.²⁹² Such remedies were found to be available to *Bush* and were relied upon by the Court. However, my guess is that the Court would not accept this distinction. The Court could reemphasize the careful attention to conflicting policy considerations, the careful balancing of governmental efficiency and employee rights, that led Congress to provide lesser remedies and procedural safeguards to probationary employees, and could therefore decline to burden managerial personnel with the added risk of personal liability in a *Bivens* action.²⁹³

287. 682 F.2d at 987-88.

288. 682 F.2d at 990.

289. 682 F.2d at 991.

290. Similar issues have arisen in cases involving purported *Bivens* claims under other amendments. See, e.g., *Ray v. Nimmo*, 704 F.2d 1480, 1486 & n.15 (11th Cir. 1983) (remanding, *inter alia*, for a determination whether a person with a "term appointment" was a federal employee within the meaning of *Bush*, claim based on fifth amendment).

291. *Borrell*, 682 F.2d 981, 991-92 (D.C. Cir. 1981).

292. The courts of the District of Columbia have adhered to this view. See *Williams v. Internal Revenue Serv.*, 745 F.2d 702, 705 (D.C. Cir. 1984) (per curiam) (approving *Borrell*); *Krodel v. Young*, 748 F.2d 701, 712 n.6 (D.C. Cir. 1984) (impliedly approving *Borrell*, emphasizing that *Borrell*'s only "statutory remedy was an essentially discretionary and unreviewable petition"); *Keeffe v. Library of Congress*, 588 F. Supp. 778, 786-87 (D.D.C. 1984) (approving *Borrell*).

293. See *United States v. Connolly*, 716 F.2d 882, 886 (Fed. Cir. 1983) (citing S. REP. NO. 969, 95th Cong., 2d Sess. 45 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2723,

On the other hand, if the Court were to agree that the weakness of the procedural safeguards Congress has afforded to probationary employees renders their legislated remedies inadequate, it could rely on the legislative history invoked by the District of Columbia Circuit to conclude that the CSRA remedy was not intended to be exclusive and preclusive of a *Bivens* claim. Alternatively, as noted in Part I, meaningful access to legislated remedies can be viewed as an element of the constitutional adequacy of those remedies.²⁹⁴ The CSRA's failure to afford probationary employees the right to participate in proceedings before the MSPB or the right to appeal from adverse personnel actions could amount to a failure to afford meaningful access to legislated remedies. If it does, courts should follow *Borrell* to allow *Bivens* actions, on the basis of the inadequacy of the congressional scheme.

The concern that *Borrell* does not survive *Bush* is reinforced by a number of recent decisions, in particular by a district court's recent reversal of itself in a case which had been consistent with *Borrell*. In *Francisco v. Schmidt*²⁹⁵ the court had denied defendants' motion for summary judgment on a *Bivens* claim brought by a probationary employee who alleged a retaliatory discharge. Relying upon plaintiff's inability to appeal to the MSPB and upon the absence of any statutory provision for money damages, the court had held that the remedies provided by Congress were of no use to the plaintiff. No special factors counselling hesitation had been advanced by the defendants.²⁹⁶ Despite the court's finding that, as in *Bivens* and *Davis*, it was damages or nothing for the plaintiff,²⁹⁷ it concluded on rehearing that "the rationale of *Bush* extends to actions by probationary federal employees who are excluded from the statutory remedial scheme."²⁹⁸ The court reasoned that the federal employer-employee relationship was a special factor that counselled hesitation, notwithstanding Congress' decision to exclude probationary employees from its remedial scheme. The Supreme Court had determined that Congress is in a superior position to balance the competing policy considerations, and Congress' decision to exclude probationary employees reflects an assessment of those considerations. The court was also concerned that creation of a *Bivens* remedy for probationary employees would be anomalous and

2767) (CSRA deliberately precludes judicial review of adverse decisions as to probationary employees), *cert. denied*, 104 S. Ct. 1414 (1984).

294. See text at note 82 *supra*.

295. 532 F. Supp. 850 (E.D. Wis. 1982).

296. 532 F. Supp. at 853-54.

297. *Francisco v. Schmidt*, 575 F. Supp. 1200, 1202 (E.D. Wis. 1983).

298. 575 F. Supp. at 1202.

contrary to congressional intent in that it would afford them a means of redress potentially more effective than the means available to non-probationary employees.²⁹⁹

This latest decision is certainly understandable. The problem is that it leaves Francisco with a completely unredressed violation of his first amendment rights. For Francisco, the first amendment has been rendered a mere form of words. When Congress enacts an "exclusive" remedial scheme, the courts must verify that it is constitutionally adequate, not just in general, but for the particular plaintiff.³⁰⁰ The statutory remedy was not constitutionally adequate for Francisco if, as the court found, it denied him all relief. Like Ms. Carroll, and Mr. Pinar, Mr. Francisco is suffering the unredressed violation of his first amendment rights because the Supreme Court in *Bush* failed to emphasize that courts must assess the constitutional adequacy of congressional remedial schemes and afford a *Bivens* remedy when the congressional scheme is judged to be constitutionally inadequate.

The *Francisco* court is very probably right that Congress did not intend probationary employees to have more effective means of redress available to them than regular civil service employees enjoy. However, it would appear that the only escape from this anomaly is for Congress to enact constitutionally adequate remedies for probationary employees.³⁰¹ Until that occurs, the Constitution requires that probationary employees be afforded a remedy that will compensate them for the violation of their constitutional rights. If that flies in the face of congressional intent, so be it. The Constitution requires no less.

The rush to follow *Bush* in denying *Bivens* actions is evidenced in other cases as well. Relying on *Bush*, in *Gleason v. Malcom*³⁰² the Court of Appeals for the Eleventh Circuit rejected a first amendment *Bivens* action on the ground that plaintiff could have sought reinstatement and back pay pursuant to the Administrative Procedure Act

299. 575 F. Supp. at 1202-03. See also *Crumpler v. Etter*, 579 F. Supp. 391, 392 (E.D.N.C. 1983) (denying a first amendment *Bivens* action to a temporary limited employee whose administrative remedies for wrongful discharge were discretionary and "considerably more limited" than those available to *Bush*).

300. See text at notes 78-79 *supra*.

301. *Davis v. Passman*, 442 U.S. 228 (1979), had a similarly ironic result.

[*Davis*] grants federal employees in non-competitive positions, whom Congress did not intend to protect, a more direct and forceful remedy than Congress provided for employees in the competitive service whom Congress did intend to protect, since the latter are bound by the ruling that Title VII is the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination. . . ."

P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 190 (2d ed. Supp. 1981) (citation omitted).

302. 718 F.2d 1044 (11th Cir. 1983).

(APA).³⁰³ While characterizing that alternative as "adequate,"³⁰⁴ the court never discussed whether the APA was intended to furnish exclusive remedies or whether it even applied to all the first amendment violations plaintiff alleged. The gaps in the court's reasoning are not excused by the frivolous nature of plaintiff's complaints.³⁰⁵ In *Langster v. Heckler*,³⁰⁶ a district court denied a *Bivens* claim of retaliation because of plaintiff's union activities, when plaintiff could have pursued administrative remedies under an executive order. Emphasizing that the executive order was part of the "elaborate, comprehensive scheme" relied upon in *Bush*, the court denied relief without giving any serious attention to plaintiff's argument that the available remedy was not meaningful because it would neither be rendered by an impartial body nor subject to meaningful judicial review.³⁰⁷

(ii) *Title VII cases*. Title VII prohibits employment discrimination on the basis of race, color, sex, religion or national origin.³⁰⁸ It also expressly prohibits employers from taking adverse action against em-

303. 5 U.S.C. §§ 701-706 (1982).

304. *Gleason*, 718 F.2d at 1048.

305. Plaintiff alleged, for example, "that supervisors and other employees violated her first, fourth and fifth amendment rights by listening to her telephone conversations in an open office, and by making notes of the times she entered and left the office." 718 F.2d at 1046. She had earlier charged that her first amendment rights were violated when "the generals asked her not to call after hours and not to come to their homes . . ." 718 F.2d at 1045. It is not entirely clear from the opinion which "constitutional injuries" remained part of her *Bivens* claim. 718 F.2d at 1046 & n.3.

306. No. 80 C 6393, slip op. (N.D. Ill. Aug. 8, 1983).

307. See also *Krodel v. Young*, 748 F.2d 701, 711-12 & n.6. (D.C. Cir. 1984) (*Bush* precludes federal management analyst from asserting first amendment *Bivens* action alleging refusal to promote, even if his persistent criticisms of the agency employing him were in the public interest); *Hallock v. Moses*, 731 F.2d 754 (11th Cir. 1984) (*Bush* precludes *Bivens* claim alleging harassment and retaliation for filing an employee grievance); *Vest v. United States Dept. of the Interior*, 729 F.2d 1284 (10th Cir. 1984) (*Bush* precludes *Bivens* claim for retaliatory discharge); *Gammal v. Hamrock*, 725 F.2d 664 (1st Cir. 1983) (*Bush* bars *Bivens* action by former federal employee), *cert. denied*, 104 S. Ct. 2657 (1984) (see 52 U.S.L.W. 3766, (Apr. 17, 1984) (No. 83-1420)); *Mason v. Pierce*, No. 83 C 3427, slip op. (N.D. Ill. July 3, 1984) (*Bush* bars federal employee's *Bivens* action alleging discharge in retaliation for protest against race, sex, and age discrimination); *Wilson v. United States*, 585 F. Supp. 202, 208 & n.7 (M.D. Pa. 1984) (*Bush* bars *Bivens* action for retaliatory action by supervisor, even though plaintiff might be time barred from pursuing administrative remedies); *Metz v. McKinley*, 583 F. Supp. 683, 689-90 (S.D. Ga. 1984) (*Bush* bars *Bivens* action alleging retaliatory discharge); *Watson v. United States Dept. of Hous. & Urban Dev.*, 576 F. Supp. 580, 585-86 (N.D. Ill. 1983) (rejecting a *Bivens* claim based on a retaliatory transfer though plaintiff did not have available the same administrative safeguards available to *Bush*); *Walsh v. United States*, No. 81-CV-712, slip op. (N.D.N.Y. Dec. 16, 1983) (*Bush* precludes first amendment *Bivens* action by taxpayer service representative alleging retaliatory failure to promote). But cf. *Keeffe v. Library of Congress*, 588 F. Supp. 778, 791 (D.D.C. 1984) (leaving open the question whether an employee who never had access to the appeals process culminating in the MSPB could assert a *Bivens* action); *Nietert v. Kelley*, 582 F. Supp. 1536, 1537 (D. Colo. 1984) (*Bush* does not preclude *Bivens* action arising out of allegedly improper exclusion from the grounds of the Air Force Academy because relevant regulations do not afford judicial review of the alleged constitutional violations).

308. 42 U.S.C. § 2000e-16 (1982).

ployees for opposing an unlawful employment practice,³⁰⁹ and it has been construed to protect advocacy in the employment context.³¹⁰ The argument has been made that Title VII precludes *Bivens* actions in cases where claims for money damages were predicated upon alleged violations of the first amendment guarantee of free speech. In some of these *Bivens* cases the courts believed that the 1976 Supreme Court opinion in *Brown v. General Services Administration*³¹¹ required them to hold Title VII to be aggrieved employees' exclusive remedy. The cases so holding typically assumed, without analysis, that the Title VII remedies were constitutionally adequate as well. Indeed, they usually showed no sign of recognizing that constitutional adequacy of the remedy was even a relevant question. As repeatedly observed in this Article, the courts are obliged to determine for themselves whether legislated remedies meet the minimum required by the Constitution to make its guarantees meaningful.³¹²

In contrast to the cases which have read Title VII, alone or in conjunction with *Brown*, to be an exclusive remedy, other cases have viewed Title VII as not intended to preclude first amendment *Bivens* claims. In *Neely v. Blumenthal*³¹³ Judge Sirica of the U.S. District Court for the District of Columbia analyzed *Brown* as decided on the basis of sovereign immunity,³¹⁴ a doctrine which curtails the ability of

309. 42 U.S.C. § 2000e-3 (1982).

310. *E.g.*, *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980) (protects statements to the employer pointing out or protesting discriminatory conduct); *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66, 70-71 (S.D.N.Y. 1975) (protects "advising fellow employees of their rights under the law"), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); *Tipler v. E.I. duPont de Nemours & Co.*, 443 F.2d 125 (6th Cir. 1971) (protects running for union office to oppose employer's unlawful discrimination). See generally C. SULLIVAN, M. ZIMMER & R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* § 2.10 at 192 (1980) ("The most obvious reason for separately protecting 'opposition' and participation in EEOC processes is simply to guard against retaliation for vocal protests, even those which might appear to some employers to be 'disloyal' or to have a coercive aspect." (footnotes omitted)).

311. 425 U.S. 820 (1976). In *Brown*, an action against a federal agency and not individuals, the Court held that § 717 of Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment. It based its decision on legislative intent, and on the "balance, completeness, and structural integrity" of the section. 425 U.S. at 832. The result in that case was that plaintiff's complaint against the GSA was time-barred, for he had failed to file within 30 days of final agency action as required by § 717(c). Some courts have read *Brown* to require the rejection of *Bivens* actions against federal officials and employees sued as individuals. *E.g.*, *Kizas v. Webster*, 707 F.2d 524, 542-43 (D.C. Cir. 1983) (Title VII precludes a *Bivens* action based on alleged employment discrimination), *cert. denied*, 104 S. Ct. 709 (1984); *White v. GSA*, 652 F.2d 913, 916-17 (9th Cir. 1981) (Title VII precludes a *Bivens* action based on racial discrimination and on retaliation for filing an Equal Employment Opportunity Commission charge); *Porter v. Adams*, 639 F.2d 273, 278 (5th Cir. 1981) (same); *Gissen v. Tackman*, 537 F.2d 784 (3d Cir. 1976) (same as *Kizas*).

312. See text at notes 69-73 *supra*.

313. 458 F. Supp. 945 (D.D.C. 1978).

314. 458 F. Supp. at 952-54. In determining congressional intent in *Brown*, the Supreme Court discussed the strong influence of Congress' doubt that backpay or other compensatory

claimants to obtain relief against the federal government but speaks not at all to damage actions against officials in their individual capacities. The court opined that "[o]nly when the waivers [of sovereign immunity] reflect an explicit intent to extinguish parallel remedies is the potential for individual liability diminished. . . . [N]othing in Title VII reveals an intent to disturb avenues of relief against discriminating officials in their personal capacities" ³¹⁵

Despite the freedom of action the D.C. court perceived itself to have, it refused to recognize a *Bivens* claim for Neely, who challenged disciplinary actions taken against him as stemming from his active, vocal opposition to employment practices that, in his view, disproportionately affected black workers.³¹⁶ The court relied on several factors: that plaintiff was not relegated to pursuing claims based on hostile state law theories; that Title VII was a more than adequate vehicle for vindicating his first amendment interests, particularly as he had claimed only economic injuries which could be fully redressed by the injunctive, reinstatement and back pay remedies authorized by Title VII; that plaintiff had no right to insist that his recovery come from his superiors rather than out of government funds;³¹⁷ that recognition of a *Bivens* action would allow claimants to bypass the administrative procedures that are a prerequisite to suing the government;³¹⁸ and that, in its view, the wrongs asserted did not involve core constitutional violations.³¹⁹

relief for employment discrimination were available to remedy unconstitutional *agency* action. One of the sources of doubt relied upon by the Court was *Gnotta v. United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970), a case turning on sovereign immunity. The Court also relied upon legislative history concerned with the inability to sue the federal government. *Brown*, 425 U.S. at 826-29.

315. *Neely*, 458 F. Supp. at 954-55 (D.D.C. 1978). In *Brown*, the Supreme Court had found that the congressional intent was *not* to allow a federal government employee to pursue his rights under both Title VII and under other applicable state and federal statutes. 425 U.S. at 833-34. The *Neely* court apparently did not understand this to rebut its argument that *constitutionally* based claims against federal officials sued in their individual capacities survived *Brown*. It is also noteworthy that, in contrast to *Brown*, the Supreme Court has held that "[d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment" an individual employed in the private sector may supplement his Title VII action with an action under 42 U.S.C. § 1981, to recover damages which are not available under Title VII. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975).

316. *Neely*, 458 F. Supp. at 960 (D.D.C. 1978).

317. 458 F. Supp. at 956-57.

318. 458 F. Supp. at 952. The *Neely* court also noted that if claimants were permitted to join Title VII and constitutional tort claims in a single action some inconvenience would result: either Title VII suits would be converted into jury matters and constitutional tort suits expedited (because of the requirement that Title VII actions be tried within 120 days), or the proceedings would be bifurcated with a concomitant waste of judicial resources. 458 F. Supp. at 952 n.10 (D.D.C. 1978).

319. 458 F. Supp. at 960. The *Neely* court, in dicta, distinguished other situations when a *Bivens* claim could properly be implied. It hypothesized a situation in which a plaintiff's first

A similar decision was rendered in *Langster v. Schweiker*.³²⁰ A man who had not been selected for an executive position with the Social Security Administration sued, alleging that a negative evaluation of him was a retaliatory result of his union activities, in violation of both Title VII and the first amendment.³²¹ Following *Neely*, the court held that *Brown* did not bar Langster from proceeding against federal officials in their individual capacities, even insofar as the first amendment claims against those defendants simultaneously stated claims fully remediable by Title VII.³²² Insofar as the first amendment claims charged retaliation stemming from personal dislike of plaintiff because of his advocacy as a union representative, Title VII provided no remedy, for it does not proscribe such conduct, and it was all the more clearly not preemptive.³²³ Having found that Title VII did not preclude plaintiff's *Bivens* action, the court nonetheless concluded that such an action ought not be implied for plaintiff's claims that were also remediable by Title VII. It relied heavily upon the court of appeals decision in *Bush v. Lucas*,³²⁴ in concluding that the federal employment relationship counseled hesitation "particularly when a plaintiff has both a developed administrative remedy and, thereafter, a developed judicial remedy independent of the administrative process, both of which are capable of providing him most, if not all, of the relief he seeks."³²⁵

amendment claims were unrelated to his Title VII claims (as where an employee had been penalized because of his race and because of his advocacy on subjects unrelated to minority rights), and another in which predominantly personal, noneconomic injuries were alleged, so that Title VII's remedies were likely to be ineffective. 458 F. Supp. at 960. Other courts have upheld *Bivens* actions on similar bases. *E.g.*, *Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983) (upholding *Bivens* claim for violation of procedural due process rights as not within Title VII's ambit of exclusivity for claims of sex discrimination though the two claims arose from the same failure to promote plaintiff). *But see* *Nolan v. Cleland*, 686 F.2d 806, 815 (9th Cir. 1982) (contra to *Ray*).

320. 565 F. Supp. 407 (N.D. Ill. 1983).

321. 565 F. Supp. at 410. Langster made other allegations which are not pertinent here.

322. 565 F. Supp. at 414-16.

323. 565 F. Supp. at 413. In reaching this latter conclusion, the court relied upon the fact that to hold otherwise would force plaintiff to choose between two theories — that defendant Caruthers' conduct arose from her animus towards plaintiff's union activities (proscribed by Title VII) or that her conduct derived from personal dislike of plaintiff's protection of contract rights (not proscribed by Title VII) — thus increasing the risk of being denied all relief. It held that neither Title VII nor *Brown* mandated that result. 565 F. Supp. at 414. *See also* *Brosnahan v. Eckerd*, 435 F. Supp. 26, 28 (D.D.C. 1977) (upholding *Bivens* claim, brought together with Title VII claims).

324. 647 F.2d 573 (5th Cir. 1981), *aff'd.*, 103 S. Ct. 2404 (1983).

325. *Langster v. Schweiker*, 565 F. Supp. at 419. It appears that the court allowed the *Bivens* action insofar as plaintiff alleged retaliation stemming from personal dislike, because of his advocacy as a union representative, which was not within Title VII. 565 F. Supp. at 413-14. Another case of the same ilk is *MacAnaw v. Custis*, 29 Empl. Prac. Dec. (CCH) ¶ 32,778 (D. Kan. 1982). The *MacAnaw* court rejected the contention that Title VII barred plaintiff physician's first amendment claim of retaliation for remarks she had made concerning her employer, the VA,

Whether Title VII *should* be read to preclude a money damage remedy for federal employees against government officials sued in their individual capacities is beyond the scope of this Article. One can infer from *Davis v. Passman*,³²⁶ however, that the Court would read *Brown* to foreclose *Bivens* actions to federal employees covered by Title VII who seek to redress the violation of rights guaranteed by the statute, but would not read *Brown* to foreclose *Bivens* actions to those federal employees not covered by the statute nor to those seeking to redress violations beyond its scope. If that is so, the Court would disapprove some of the reasoning in *Neely* and *Langster*, but it would likely approve their results, as the Court would view Title VII as a bar to both *Neely*'s claim and to the claim on which *Langster* lost. Once again, however, it should be said that a conclusion that Title VII was intended to be the exclusive remedy for "covered" federal employees seeking to redress rights guaranteed by the statute ought not to be the last step in analysis. The courts should go on to the question of the adequacy under the Constitution of the remedy afforded to covered employees by Title VII.³²⁷

On the other hand, if the *Neely* and *Langster* courts were correct in determining that Title VII was not meant to exclude employee lawsuits against individuals, so that Title VII did not preclude the *Bivens* actions plaintiffs had pleaded, their results are more questionable. Both courts denied relief. Having concluded, in the language of *Neely*, that "nothing in Title VII reveals an intent to disturb avenues of relief against discriminating officials in their personal capacities . . ."³²⁸ their outcomes cannot rest on the existence of an alternative remedy which Congress intended to substitute for recovery directly under the Constitution. They must rest on special factors counselling hesitation. *Langster* relies, in this regard, upon the federal employment relation-

where she had also filed an administrative complaint charging sex discrimination, and the two claims arose from related events. 29 Empl. Prac. Dec. (CCH) at 25,605. The court concluded that a constitutional tort had been alleged and that no equally effective remedy had been demonstrated for redressing the past violations, although statutory disciplinary proceedings had made unnecessary an injunction against forced transfer of the plaintiff. It further concluded that no special factors counseled hesitation where the administrative machinery for resolving problems arising from the employer-employee relationship was not adapted to the first amendment claims plaintiff was pursuing. Consequently, the court found that plaintiff had successfully alleged a *Bivens* action. 29 Empl. Prac. Dec. at 25,605-07.

326. 442 U.S. 228, 247 n.26 (1979). The Court in *Davis* stated that the remedies provided by § 717 of Title VII are exclusive when those federal employees covered by the statute seek to redress violations of rights guaranteed by the statute. The Court went on to hold that plaintiff, a federal employee not covered by Title VII, could sue directly under the Constitution to redress a violation of her fifth amendment rights. See text at notes 24-38 *supra*.

327. See text at note 77 *supra*.

328. *Neely*, 458 F. Supp. at 954-55.

ship together with the administrative and judicial remedies available to the plaintiff. This merging of the two distinct tests laid down in *Carlson*³²⁹ for determining when the courts should decline to imply a *Bivens* remedy is essentially the approach taken by the Court shortly after *Langster*, in *Chappell and Bush*. The criticisms of this approach made above would also be pertinent here.³³⁰ To the extent that *Neely* is similarly grounded, it is subject to the same criticism.

Insofar as *Neely* rested on the "adequacy" of Title VII to vindicate plaintiff's first amendment interests, *without regard to the employment relationship*, and in the face of a finding that Congress did not intend Title VII to preclude actions against discriminating officials, the decision went beyond anything the Supreme Court has done. The Court never has held that a merely "adequate" congressional remedy precludes a *Bivens* action. Rather, the Court stated in *Bivens*, *Carlson* and *Bush* that legislative remedies will defeat a *Bivens* action only when Congress considers its remedial schemes to be as effective as a *Bivens* remedy, and indicates that its remedial scheme is intended to be a substitute for recovery directly under the Constitution. Insofar as *Neely* rested on the "adequacy" of Title VII remedies available to the plaintiff, without regard to the federal employment relationship as a "special factor" à la *Bush*, it was thus unsupported by precedent.

Several other aspects of the court's reasoning warrant discussion. First, the *Neely* court's view that plaintiff had no right to insist that his recovery come from his superiors rather than from government funds seems to beg the question. If none of the circumstances that the Court has held should defeat a *Bivens* action were present, plaintiff did have a right to assert his claim against his superiors. Also, if, as the court held, Title VII was not intended to preclude a suit against an official in his individual capacity, the court's concern that a *Bivens* suit will enable a federal employee to bypass administrative procedures that are a prerequisite to suing the *government* seems groundless. Finally, the court's reliance on the judgment that the wrongs asserted were not core constitutional violations is troubling. While it is true that the first amendment rights of public employees are circumscribed by the necessities of maintaining orderly and efficient public administration,³³¹ *Neely* alleged a violation of those first amendment rights that he retained. The speech which *Neely* alleged had caused his termination was vocal opposition to employment practices that disproportionately disadvantaged black workers. Such speech does not appear to be re-

329. 446 U.S. 14 (1980).

330. See text at note 106 & text following note 130 *supra*.

331. *Neely*, 458 F. Supp. at 960.

mote from the core of the first amendment. Furthermore, it seems a dangerous precedent for courts to make judgments about the relative value of speech addressed to social or political issues. Unless the federal employment relation properly constituted a special factor counseling hesitation, the *Neely* court ought to have afforded *Neely* a *Bivens* remedy, given its conclusion that Title VII was not intended to disturb other avenues of relief against discriminating officials in their individual capacities.

2. *When Congress Has Been Silent*

In the final category of first amendment *Bivens* cases, the plaintiffs' claims did not arise out of either military service or federal employment. Instead, the claims arose out of government conduct that was not the subject of any remedial federal legislation. As shown below, the Supreme Court's reasoning in *Bush* and *Chappell* should have little impact in these cases, because both *Bush* and *Chappell* involved claims that could be at least partly redressed through elaborate statutory remedial schemes. Lower federal courts should therefore not infer from the Court's denial of a first amendment *Bivens* action to *Bush* that no first amendment *Bivens* action should be afforded to anyone, under any circumstances. To the contrary, as reaffirmed in *Bush*, the federal courts have power to award damages to the victim of a constitutional violation. In the absence of an adequate remedy afforded by Congress, "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation"³³² Many lower courts faced with that determination have concluded that plaintiffs may seek vindication of their first amendment rights through a *Bivens* action.

One group of such *Bivens* cases has been born of action taken by federal officials that interfered with demonstrators so as to allegedly violate their first amendment rights of speech and association or their right to petition the government for redress of grievances. At first, some judges avoided deciding whether demonstrators should be afforded a money damage remedy against federal officials.³³³ Others believed it clear, however, that *Bivens* authorized a cause of action for damages for violation of interests guaranteed by the first amendment.³³⁴ *Butler v. United States*³³⁵ is an early case providing a *Bivens*

332. *Bush v. Lucas*, 103 S. Ct. 2404, 2411 (1983).

333. *E.g.*, *Green v. Laird*, 357 F. Supp. 227, 230 & n.5 (N.D. Ill. 1973).

334. *E.g.*, *Gardels v. Murphy*, 377 F. Supp. 1389, 1392, 1398 (N.D. Ill. 1974) (upholding *Bivens* action against agent of President Nixon's Advance Office alleged to have assaulted demon-

action for would-be demonstrators. In *Butler*, the court held that members of the public who had been prevented from peacefully demonstrating against then President Nixon's Vietnam War policies at an air force base to which the public had been invited, had a claim for money damages for violation of their first amendment rights.³³⁶ Additional support for a *Bivens* action to vindicate first amendment rights allegedly violated in the context of demonstrations is provided by *Delums v. Powell*,³³⁷ decided by the Court of Appeals for the District of Columbia Circuit in 1977. The pertinent allegations were that various officials of the United States and of the District of Columbia had conspired to arrest and detain approximately 2,000 persons who were lawfully protesting the war in Vietnam by making and listening to speeches at the Capitol. Defendants were said to have acted with the purpose of frustrating plaintiffs' first amendment right to protest the war.³³⁸ The court did not expressly inquire into the existence of special factors counselling hesitation or of preemptive action by Congress, presumably because there were no colorable arguments to be addressed. Rather, the focus was the concern of Justice Harlan's concurrence in *Bivens* that courts might not be able to make the necessary judgments concerning causation and the magnitude of injury to accord meaningful compensation for invasion of particular constitutional rights.³³⁹ The court found neither the causation nor magnitude of injury judgments to be particularly troublesome. The court reasoned that the violation of plaintiffs' constitutional rights was "directly at-

strators, ripped signs and banners from them, and intimidated, disrupted and prevented them from expressing their views, while demonstrators supporting the President were left undisturbed); *Sparrow v. Goodman*, 361 F. Supp. 566 (W.D.N.C. 1973), *aff'd. sub nom. Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974) (upholding *Bivens* action against Secret Service agents who had denied admission to a public gathering attended by the President to persons who opposed the war in Vietnam, were critical of the President or his administration's policies, or who otherwise expressed dissent from reigning points of view).

335. 365 F. Supp. 1035 (D. Hawaii 1973).

336. In finding it appropriate to provide plaintiffs with a money damage remedy directly under the Constitution to redress violations of their first amendment rights, the court relied on much of the reasoning outlined in the text at notes 136-52 *supra*. Briefly, the court reasoned that first amendment rights are no less important than the fourth amendment rights at stake in *Bivens*; that it would be "anomalous to conclude that the federal judiciary . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of popular will," 365 F. Supp. at 1041 (quoting Justice Harlan's concurrence in *Bivens*, 403 U.S. at 403-04); that a private damage action is the only practicable means of redressing the wrong alleged once the time for exercising first amendment rights has passed; and, finally, that federal officials should be held as accountable for their actions as those acting under color of state law are held under 42 U.S.C. § 1983.

337. 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

338. 566 F.2d at 173-74.

339. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409 & n.9 (1971) (Harlan, J., concurring).

tributable to the arresting officers”³⁴⁰ and that awarding damages to redress intangible first amendment injuries would be as judicially administrable as awarding damages to redress intangible fourth amendment injuries.³⁴¹

The most important factors contributing to the success enjoyed by the plaintiffs in *Butler* and *Dellums* are the absence of comprehensive legislation regulating demonstrations and providing remedies for the infringement of first amendment rights so as to preclude *Bivens* claims, and the absence of any of the special factors counselling hesitation that the Court has identified. The defendants were officials who do not enjoy such a special status in our constitutional scheme as to make judicial remedies against them inappropriate, and this is not an area in which Congress has any special role, as in *Chappell*, or special expertise, as in *Bush*. Thus, as previously noted, the Supreme Court’s decisions in *Bush* and *Chappell* should not affect cases like *Butler* or *Dellums*.

The plaintiffs’ success in these cases also springs from the fact that the speech involved was political speech, at the very core of the first amendment.³⁴² Further, the defendant government officials were alleged to have prevented or suppressed the plaintiffs’ speech, not “merely” to have punished plaintiffs for their speech, after the fact. The Supreme Court has long viewed prior restraints as a more drastic

340. *Dellums*, 566 F.2d at 194-95. The court also commented upon the familiarity of the courts with first amendment issues from cases in which equitable relief is sought, and upon the proven ability of the courts to deal with problems of causation and to prescribe the elements of the cause of action and defenses thereto in first amendment cases.

341. 566 F.2d at 195-96. The injury to plaintiffs was the loss of an opportunity to express their dissatisfactions with the laws and policies of the United States in a manner that would cause their views to be brought to the attention of a national audience and Congress, and in a manner that would express the passion with which plaintiffs held their views. The court held this intangible injury to be significant and to be sufficiently quantifiable that a properly instructed jury could award monetary recompense. *But cf.* *Saffron v. Wilson*, 481 F. Supp. 228, 246 (D.D.C. 1979), holding that the heads of the U.S. Park Police, of the U.S. Secret Service, and of the D.C. Metropolitan Police Department had violated plaintiff’s constitutional right to engage in expressive conduct on the White House sidewalk on Inaugural Day 1973. Among the court’s reasons for rejecting a damages remedy were the lack of physical mistreatment or real economic loss, leading to absence of a recognized means of quantifying the harm done, and the availability of other forms of relief. 481 F. Supp. at 246.

Even in the view of the *Saffron* court, the difficulty of measuring plaintiff’s damages was not an insurmountable barrier to a monetary remedy. However, because plaintiff was a perennial demonstrator, the court regarded declaratory and equitable relief as more efficacious than money damages, even (somehow) as to the past violations of his first amendment rights. In this aspect of its reasoning the court erred. Even if the deprivation of Saffron’s right to speak was not in the nature of speech postponed being speech denied, he did suffer a violation of his first amendment rights for which exclusively future-oriented relief afforded him no remedy.

342. Political speech and political association are deserving of greater protection than, for example, commercial speech and commercial association. *See Central Hudson Gas v. Public Serv. Commn.*, 447 U.S. 557, 562-63 & n.5 (1980); *Friedman v. Rogers*, 440 U.S. 1, 10-11 n.9 (1979); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 771-72 n.24 (1976).

infringement upon free speech than subsequent punishment.³⁴³ The same concerns that render prior restraints presumptively invalid undoubtedly led to the courts' relative solicitude for political demonstrators who have been thwarted by law enforcement officials purporting to act under the aegis of "time, place and manner" regulations. Furthermore, courts recognize that political speech is topical, and that delay is therefore far less tolerable than when imposed upon nontopical speech. Consequently, thwarted demonstrators who establish that federal action prevented the expression of their views in violation of the first amendment are very attractive candidates for judicial relief. Since the courts have no power to recapture the lost moment for plaintiffs whose speech was interrupted, only money damages³⁴⁴ compensate for the injuries they suffered.³⁴⁵

Another group of cases arising from government conduct that is not the subject of remedial federal legislation involves allegations that first amendment rights were violated when federal agencies having investigative powers abused their authority. Agents of the FBI, Internal Revenue Service, Immigration and Naturalization Service, Federal Election Commission and Federal Trade Commission are among those

343. See *Near v. Minnesota*, 283 U.S. 697 (1931); see also *New York Times v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). One of the primary concerns underlying the heavy presumption against prior restraints is that a prior restraint allows the government to destroy the immediacy of the intended speech. Speech delayed may be speech effectively denied. See *Carroll v. Princess Anne*, 393 U.S. 175, 182 (1968); *Wood v. Georgia*, 370 U.S. 375, 392 (1962); *Pennekamp v. Florida*, 328 U.S. 331, 346-47 (1946); *Bridges v. California*, 314 U.S. 252, 268-69 (1941); *Walker v. City of Birmingham*, 388 U.S. 307, 336 (1967) (Douglas, J., dissenting). When speech is delayed, individual fulfillment suffers and error born of ignorance goes uncorrected. Forbidding prior restraints also ensures that speech *can* be placed before the public, albeit under the threat of possible subsequent punishment. Another concern is that "any system of censorship insufficiently constrained by the safeguards of the judicial process is apt to overreach; censors uncontrolled by courts tend to deny publication to material protected by the first amendment." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 726 (1978). Courts have acted on these concerns by striking down overbroad prohibitions and permit requirements for public demonstrations, e.g., *United States v. Grace*, 461 U.S. 171 (1983); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Kunz v. United States*, 340 U.S. 290 (1951); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Fernandez v. Limmer*, 663 F.2d 619 (5th Cir.), *cert. denied*, 458 U.S. 1124 (1982); *Delums v. Powell*, 566 F.2d 167, 178-81 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), and by permitting criminal defendants to raise the facial invalidity of regulations as a defense. E.g., *Staub v. City of Baxley*, 355 U.S. 313 (1968); *Lovell v. City of Griffin*, 303 U.S. 44, 452-53 (1938).

344. Declaratory or injunctive relief may also be appropriate, to assure that violations of plaintiff's first amendment rights will not recur, but, as noted earlier, see text at note 81 *supra*, these forward looking forms of relief are not a constitutionally adequate remedy for past violations.

345. See also *Logiurato v. ACTION*, 490 F.Supp 84, 93 (D.D.C. 1980), where the court sustained a first amendment *Bivens* claim against a Peace Corps medical officer and the director of a private corporation that trained Peace corps volunteers. Defendants were alleged to have drugged, repatriated and hospitalized plaintiff against his will to preclude him from criticizing the Peace Corps training process.

who have been accused of such wrongdoing. In a number of these cases, the *Bivens* remedy was recognized with little or no discussion in support.³⁴⁶ The more expansive opinions are discussed below.

*Paton v. La Prade*³⁴⁷ was perhaps the first decision by a court of appeals recognizing a *Bivens* action in this context. Paton, a high school student, sued FBI agents. They had obtained Paton's name and address through an allegedly unconstitutional mail cover³⁴⁸ upon the Socialist Workers Party (SWP) headquarters in New York City, to which Paton had written pursuant to a high school course assignment. The FBI agents had investigated her contact with the SWP and had maintained a file on her. News of the investigation had spread through her school, her community and to other parts of the country.³⁴⁹ The court found it both "justifiable and logical"³⁵⁰ to imply a cause of action for damages to redress the infringement that Paton alleged.³⁵¹

This case was rightly decided. No special factors counselled hesi-

346. *E.g.*, *Contemporary Mission, Inc. v. United States Postal Serv.*, 648 F.2d 97 (2d Cir. 1981) (suit for money damages by charitable religious organization against postal officials, alleging interference with constitutional rights); *White v. Boyle*, 538 F.2d 1077, 1079 (4th Cir. 1976) (summary judgment against plaintiff in suit alleging retaliatory IRS investigation; availability of *Bivens* remedy recognized in dicta); *Church of Scientology v. Linberg*, 529 F. Supp. 945 (C.D. Cal. 1981) (*Bivens* action by church members alleging first and fourth amendment violations arising from FBI search and seizure operation); *Grandbouche v. Adams*, 529 F. Supp. 545, 548 (D. Colo. 1982) (recognizing availability of *Bivens* remedy for violations of first amendment rights in a suit involving alleged U.S. government infiltration of association); *Life Science Church v. IRS*, 525 F. Supp. 399, 406-08 (N.D. Cal. 1981) (denying motion to dismiss damage suit based on alleged establishment clause violation; IRS allegedly singled out plaintiff for investigation); *Fry v. Melaragno*, 81-1 U.S. Tax Cas. (CCH) ¶ 9182 at 86,306-07 (S.D. Ohio 1980) (denying motion to dismiss a damage claim based on allegations that IRS investigation of plaintiff's taxes was part of a conspiracy to deprive him of his right to speak freely in the field of tax); *Lowenstein v. Rooney*, 401 F. Supp. 952 (E.D.N.Y. 1975) (suit by former congressional candidate against a Congressman and FBI agents for allegedly illegal investigation of plaintiff's private and political activities and dissemination of information thereby obtained).

347. 524 F.2d 862 (3d Cir. 1975).

348. Pursuant to this "mail cover," each morning a postal employee would record all information appearing on the exterior of letters addressed to the SWP and forward the information to the New York FBI office. 524 F.2d at 865.

349. 524 F.2d at 870.

350. 524 F.2d at 870.

351. The court reasoned that a deprivation of constitutional rights caused by a federal official should be as fully redressable as a deprivation caused by a state official. 524 F.2d at 870. *See* note 152 *supra*. To determine what types of injuries should be compensable, the court looked to standards developed under 42 U.S.C. § 1983. 524 F.2d at 871. The court found Paton's compensable injuries to include the danger posed by her FBI file to her future educational and employment opportunities, adverse affects on her standing in school and in her community, and possible "stigmatization, invasion of privacy, interference with personality development, and interference with her freedom of association through the decision of others to shun her." 524 F.2d at 868, 870-71. The difficulty of quantifying these injuries was held not to bar Paton's lawsuit. 524 F.2d at 871. *See generally*, Comment, *Bringing Suit Against a Federal Officer for Money Damages: Extension of the Bivens Doctrine to the First and Fifth Amendments*, 13 U.S.F. L. REV. 659, 671-77 (1979).

tation. Nor had Congress provided an alternative remedy as effective as a *Bivens* remedy and explicitly declared to be a substitute for a *Bivens* remedy. Indeed, Congress had passed no pertinent remedial legislation at all. Plaintiff had alleged violations of her first amendment rights, and the court was competent to handle the litigation. Nothing in *Bush v. Lucas* or *Chappell v. Wallace* indicates that any different analysis is now appropriate. Finally, any arguments that may exist for denying a *Bivens* claim when the FBI violates the constitutional rights of its own agents³⁵² are inapplicable when FBI agents violate the constitutional rights of independent citizens.

In *Berlin Democratic Club v. Rumsfeld*,³⁵³ decided shortly after *Paton*, the U.S. District Court for the District of Columbia also approved a *Bivens* action for the victims of investigative abuses. The court was faced with a long list of serious allegations by American citizens and organizations residing in West Berlin or in the Federal Republic of Germany against Army officials and uniformed personnel.³⁵⁴ Plaintiffs alleged numerous acts of warrantless electronic surveillance and covert infiltration of their organizations for the purpose of disrupting their activities and provoking illegal acts. They also alleged illegal mail openings and the maintenance and dissemination of "dissidence identification" files, with a range of adverse consequences.³⁵⁵ Faced with these allegations, the court refused to dismiss the *Bivens* claim.³⁵⁶

Berlin Democratic Club should easily survive *Chappell*, even though military officials were defendants in both cases. The Court in *Chappell* found it inappropriate to afford a soldier a *Bivens* action against a superior officer because it feared "disruption of '[t]he peculiar and special relationship of the soldier to his superiors'"³⁵⁷ and because Congress had exercised its plenary constitutional authority over the military to establish "a comprehensive internal system of jus-

352. See *Egger v. Phillips*, 710 F.2d 292 (7th Cir.), cert. denied, 104 S. Ct. 284 (1983), discussed in text following note 216 *supra*.

353. 410 F. Supp. 144, 160-62 (D.D.C. 1976).

354. Plaintiffs included the Berlin Democratic Club (which supported Senator McGovern for president in 1972 and the impeachment proceedings against former President Nixon) and its members, the Lawyers Military Defense Committee and attorneys and consultants to it, and American writers, journalists and ministers. 410 F. Supp. at 147.

355. 410 F. Supp. at 147-48.

356. 410 F. Supp. at 161. The court found the alleged injuries "too great" to go unredressed. The court also reasoned that only money damages could redress the injuries to plaintiffs' first amendment interests, interests which are at least as fundamental as the fourth amendment interests protected in *Bivens*.

357. *Chappell*, 103 S. Ct. at 2367 (quoting *Stencil Aero Engineering Corp. v. United States*, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting)).

tice to regulate military life"³⁵⁸ But the plaintiffs in *Berlin Democratic Club* were civilians, not soldiers. Therefore, the unique disciplinary needs of the military are not implicated in *Berlin Democratic Club* and Congress' plenary authority over the military does not extend to claims by civilians against the military.³⁵⁹ Furthermore, Congress has not enacted any remedial scheme dealing with the kind of constitutional violations by military officials alleged in *Berlin Democratic Club*. Once this military aspect of *Berlin Democratic Club* is disposed of, it becomes easy to say that the court was right to afford plaintiffs the opportunity to recover money damages under *Bivens* and its progeny.³⁶⁰

Courts have also been right to afford prisoners *Bivens* actions for alleged violations of their first amendment rights, notwithstanding the special disciplinary needs in prisons. In this final group of cases where plaintiff's injuries were not redressable by any statutory scheme, courts have recognized *Bivens* actions³⁶¹ in favor of plaintiffs who alleged that they were subjected to disciplinary action in retaliation for initiating a civil rights suit against prison officials,³⁶² that photographs had been kept from them,³⁶³ that their access to the courts had been interfered with,³⁶⁴ that regulations prescribing standards of hair length and facial hair growth were unconstitutional,³⁶⁵ and that their right freely to exercise their religion had been violated by punishments for

358. 103 S. Ct. at 2366.

359. Civilian courts have entertained suits seeking injunctive relief against the military and military officials accused of spying, for example. *E.g.*, *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 551-52 (N.D. Ill. 1982) (agreed order permanently made legally enforceable against the Department of Defense the principle that no information shall be acquired about a person or organization solely because of that person's or organization's lawful exercise of first amendment rights).

360. In so concluding, the author does not intend to be expressing any view as to the correctness of the court's opinion on such matters as justiciability of the claims, personal jurisdiction over the defendants, standing or mootness.

361. The reasons given for recognizing these *Bivens* actions have included the fundamental and preferred status of first amendment guarantees, the logic of *Bivens* applying equally to first as to fourth amendment claims, and the absence of policy reasons to deny such a federal remedy. *See Jihaad v. Carlson*, 410 F. Supp. 1132 (E.D. Mich. 1976), *revd. on other grounds*, 645 F.2d 556, 558 & n.1 (6th Cir. 1981).

362. *Milhouse v. Carlson*, 652 F.2d 371 (3d Cir. 1981).

363. *E.g.*, *Trapnell v. Riggsby*, 622 F.2d 290, 294 (7th Cir. 1980) (recognizing *Bivens* action where plaintiff alleged a first amendment violation in the rejection of certain photographs pursuant to a prison mail regulation).

364. *Johnson v. Aildredge*, 488 F.2d 820, 823 n.1 (3d Cir. 1973) (assuming, without deciding, that plaintiff had stated a *Bivens* claim for interference with his access to the courts), *cert. denied*, 419 U.S. 882 (1974).

365. *Howard v. Warden*, 348 F. Supp. 1204, 1205 (E.D. Va. 1972), *affd. mem. sub nom. Price v. Hogan*, 474 F.2d 1342 (4th Cir. 1973) (companion case dismissed on appeal, 474 F.2d 1341 (4th Cir. 1973)).

refusing to act in a manner inconsistent with their religion.³⁶⁶

In *Gillespie v. Civiletti*,³⁶⁷ a case against U.S. Marshals and various "John Doe" marshals, superintendents and guards, the Court of Appeals for the Ninth Circuit observed that the requirements of *Carlson* for the implication of a *Bivens* remedy had been met.³⁶⁸ The court found that no congressional statute preempted a *Bivens* action or created an equally effective remedy, and that there were no special factors counselling hesitation in the absence of affirmative action by Congress.³⁶⁹ Unlike congressmen, U.S. marshals do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies might be inappropriate, and the qualified immunity afforded U.S. Marshals provides them with adequate protection.³⁷⁰ Consequently, the Ninth Circuit reversed the dismissal of a complaint alleging, among other things, that plaintiff was denied access to a telephone for two and a half months, thus denying him a means to obtain assistance from the courts or an attorney.³⁷¹

Gillespie, and the other cases like it, should not be affected by *Bush* or *Chappell*. Prisoners, like the rest of us, are entitled to a meaningful compensatory remedy when their (limited) first amendment rights are violated. Certainly, nothing in *Bush* or *Chappell* indicates otherwise. While the prison environment requires prison officials to have considerable discretion and an ability to enforce discipline upon prisoners, those factors are adequately reflected in the curtailment of first amendment rights that prisoners suffer.³⁷² As evidenced by the Court's approval of a *Bivens* action against prison officials in *Carlson v. Green*, the lower federal courts have been correct to refuse to hold that these factors constitute, in addition, a special factor counselling that *Bivens* claims not be recognized. If the existence of *Bivens* actions has a "chilling effect" upon acts that violate prisoners' constitutional rights, that

366. *Chapman v. Pickett*, 586 F.2d 22, 26 (7th Cir. 1978) (implicitly recognizing *Bivens* action where plaintiff complained of punitive segregation for his refusal to handle pork, an act prohibited by his religion); *Jihaad v. Carlson*, 410 F. Supp. 1132, 1134-35 (E.D. Mich. 1976) (sustaining complaint that placing inmate in disciplinary segregation for refusing to shave off a beard required by his religious beliefs and giving him only pork sandwiches and oranges to eat while he was so segregated, when his religion proscribed the eating of pork, violated his right freely to exercise his religion), *revd. on other grounds, sub nom. Jihaad v. O'Brien*, 645 F.2d 556 (6th Cir. 1981).

367. 629 F.2d 637 (9th Cir. 1980).

368. 629 F.2d at 639, 642.

369. 629 F.2d at 642.

370. 629 F.2d at 642.

371. 629 F.2d at 642.

372. See *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125-26, 129-33 (1977); *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

ought not to create great concern.³⁷³ In the absence of adequate statutory remedies, the Bill of Rights requires that a money damage remedy under the Constitution be afforded.

CONCLUSION

Civil actions through which federal officials may be held liable for their constitutional transgressions have become an important means of safeguarding and vindicating our constitutional rights. While it had been said since the genesis of *Bivens* actions that in some circumstances the courts ought to refrain from implying such a cause of action arising directly under the Constitution, until the 1983 Term the Supreme Court had never found to be present in a case circumstances that defeated a *Bivens* action. In *Chappell v. Wallace* and *Bush v. Lucas* the Court found such circumstances to be present. As this Article has demonstrated, it did so only by departing from the line of analysis that its previous cases had established and by raising the barriers to recovery of money damages under the Constitution. Most importantly, perhaps, the Court failed in *Chappell* and *Bush* to underscore the need for courts to assess the constitutional adequacy of legislative remedial schemes before relying on those alternative remedies to defeat implication of a *Bivens* action.

This Article argues that it is the responsibility of the judiciary to ensure that legislated remedies for constitutional violations meet constitutional minima. The courts should decide whether a statutory scheme was intended by Congress to substitute for a *Bivens* action. If it was not so intended, then a *Bivens* remedy may be afforded, absent special factors counselling hesitation. If it was so intended, the courts must resolve additional questions. Does the legislated remedy speak to the violation suffered: does it afford retrospective relief for past violations and prospective relief if future violations are sufficiently threatened? Is the legislated remedy adequate for this plaintiff, however useful it may be for persons differently situated? Has the plaintiff meaningful access to the legislated remedies? Are the available remedies truly compensatory, not merely symbolic? Is the *Bivens* remedy indispensable in the sense that no other remedial scheme can prevent the substantive constitutional requirements from becoming a "mere form of words"? The Supreme Court needs to articulate further standards for determining whether congressional remedies are constitutionally adequate.

In its second part, the Article argues generally in favor of the crea-

373. Prison officials would be protected by qualified immunity. See text at notes 41-42 *supra*.

tion of *Bivens* actions to vindicate first amendment rights. It then demonstrates by reference to several recent cases that the Court's decisions in *Chappell* and *Bush* have increased the risk that constitutional rights, and first amendment rights in particular, will be inadequately enforceable. Finally, the Article identifies the kinds of first amendment *Bivens* cases that should remain largely unaffected by *Chappell* and *Bush*. Many of the decided cases are faithful to the analysis previously prescribed by the Supreme Court, and are appropriately solicitous of first amendment interests.

As *Bivens* cases continue to be brought, it is hoped that this Article will help to guide the courts to a proper resolution of the issues posed. Only heightened sensitivity by the judiciary to its responsibility to ensure that legislated remedies are adequate will enable litigants to vindicate their constitutional rights, rather than be left with an empty promise.