

ARTICLES

A CLOSER LOOK AT *WATERS v. CHURCHILL* AND *UNITED STATES v. NATIONAL TREASURY EMPLOYEES UNION*: CONSTITUTIONAL TENSIONS BETWEEN THE GOVERNMENT AS EMPLOYER AND THE CITIZEN AS FEDERAL EMPLOYEE

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INTRODUCTION

*United States v. National Treasury Employees Union (NTEU)*¹ and *Waters v. Churchill*² are the United States Supreme Court's two most recent encounters with the conflicts that arise when the Government seeks to regulate the speech of its employees. Employees faced with this prospect often interpose the First Amendment,³ either as a sword to assert their rights to be able to engage in certain, future conduct (e.g., *NTEU*),⁴ or as a shield to protect against the Government disciplining them after having engaged in such conduct (e.g., *Waters*).⁵

NTEU and *Waters* highlight the tension that exists between a public employee's First Amendment free speech rights and the public employer's ability to limit those rights.⁶ *NTEU* involved two public sector unions that challenged the constitutionality of a ban imposed in the Ethics Reform Act of 1989⁷ on federal employees accepting honoraria for writing and speaking activities.⁸ *Waters* involved an employee at a non-federal public hospital in Illinois who sued after

1. 115 S. Ct. 1003 (1995). Justice Stevens wrote for a five-member majority. Justice O'Connor filed a separate opinion, concurring in the judgment in part and dissenting in part. Chief Justice Rehnquist wrote a dissenting opinion in which Justices Scalia and Thomas joined.

2. 114 S. Ct. 1878 (1994). *Waters* is a plurality decision. Justice O'Connor, author of the plurality decision and joined by the Chief Justice and Justices Souter and Ginsburg, issued the Court's decision. Justice Scalia, joined by Justices Kennedy and Thomas, concurred in the judgment only, not the opinion. Justice Stevens dissented, joined by Justice Blackmun. Justice Souter joined Justice O'Connor in her plurality opinion, but added an interesting separate concurring opinion in which he argued, *inter alia*, that Justice O'Connor's plurality opinion should be read as a majority opinion. *Id.* at 1893 (Stevens, J., concurring).

3. U.S. CONST. amend. I.

4. See *United States v. National Treasury Employees Union (NTEU)*, 115 S. Ct. 1003, 1020 (1995). Justice O'Connor characterized this as "*ex ante*" prohibition of speech, involving the Government's attempt to regulate employee speech *before* it occurs. *Id.*

5. In *NTEU*, Justice O'Connor characterized this as "*ex post*" punishment, meaning the Government's attempt to sanction speech *after* it has occurred, which the Government considers to have hampered its ability to operate efficiently. *Id.* at 1020. "*Ex post*" punishment acts like a deterrent. The Government hopes that by punishing such conduct, it will not recur, either by the same employee or other employees emboldened by the first employee's actions.

6. For purposes of this Article, a federal employee is one who has been appointed to a position in the U.S. Government. See U.S. CONST. art. II, § 2, cl. 2 (authorizing President to appoint high-level civilian officials in government "with the Advice and Consent of the Senate," and in which "the Congress may by Law vest the Appointment of such inferior Officers . . . in the President alone . . . or in the Heads of Departments"). Congress has granted this constitutional appointment authority to the President in 3 U.S.C. § 301 (1994) and 5 U.S.C. §§ 1104, 3101 (1994), for most categories of federal employees. Appointment authorities are scattered throughout the U.S. Code for various other types of federal appointees. These, however, are beyond the scope of this Article.

7. Pub. L. No. 101-194, 103 Stat. 1716 (codified at 5 U.S.C. § 5318 (1994)). The statute is a substantial revision to the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified at 5 U.S.C. §§ 701-709 (1994)).

8. *NTEU*, 115 S. Ct. at 1010.

having been fired for engaging in what she believed to be protected speech.⁹

This Article reviews both *NTEU* and *Waters* in the context of prior decisions of the U.S. Court of Appeals for the Federal Circuit, the principal court tasked with developing a uniform body of case law governing federal employees.¹⁰ This necessarily involves also reviewing decisions of the U.S. Merit Systems Protection Board (MSPB),¹¹ the principal administrative body tasked with adjudicating federal employee appeals of agency personnel actions that fall within its jurisdiction.¹² Employees who are disciplined with a penalty sufficiently severe to trigger MSPB jurisdiction and who wish to appeal the discipline, must first seek Board review, then may appeal to the Federal Circuit.

Although neither *Waters* nor *NTEU* are Federal Circuit or MSPB cases,¹³ the Supreme Court's rulings and reasoning about the law

9. *Waters v. Churchill*, 114 S. Ct. 1878, 1880 (1994).

10. The U.S. Court of Appeals for the Federal Circuit is a creation of the Federal Court Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 32 (codified at 28 U.S.C. § 1295 (1994)). The Federal Circuit was created to ensure uniformity of decisions in cases involving federal employees. Prior to its creation, case law developed in each of the federal circuit courts of appeal. See *Bush v. Lucas*, 462 U.S. 367, 387 (1983) (describing various avenues of appeal available in the past for federal employees).

11. The U.S. Merit Systems Protection Board (MSPB) was created by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1121 (codified at 5 U.S.C. §§ 1201-1222 (1994)). With the passage of the Federal Courts Improvement Act of 1982, the Federal Circuit became the exclusive jurisdiction for appeals from final orders or final decisions of the MSPB. Pub. L. No. 97-164, § 127(a), 96 Stat. 25, 37-38 (codified at 28 U.S.C. § 1295(a)(9) (1994) and 5 U.S.C. § 7703 (1994)).

12. 5 C.F.R. § 1200.1 (1995). The MSPB exercises both original and appellate jurisdiction. It has original jurisdiction over actions brought by the Special Counsel (allegations of prohibited personnel practices, whistleblower reprisal, and Hatch Act violations) and certain actions concerning members of the Senior Executive Service and Administrative Law Judges. 5 C.F.R. § 1201.2 (1995). In addition, pursuant to 5 C.F.R. § 1201.3 (1995), the MSPB has appellate jurisdiction that encompasses 21 separate personnel actions, a number of which are based on express statutory provisions. See 5 U.S.C. § 4303 (1994) (covering reductions in grade or removals for unacceptable performance); *id.* §§ 7512, 7513 (covering removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote efficiency of government service); *id.* §§ 7541-7543 (covering removal, or suspension for more than 14 days, of career appointee in Senior Executive Service); *id.* § 3595 (covering reduction in force of career appointee in Senior Executive Service); *id.* § 5335(c) (covering reconsideration decisions sustaining a denial of within-grade step increase in pay for general schedule employees); *id.* §§ 8347(d)(1)-(2), 8461(e)(1) (discussing authority and administration of Office of Personnel Management and appeals to MSPB); 5 U.S.C. § 3592(a)(3) (1994) (covering removal of career appointee from Senior Executive Service for failure to be recertified); 38 U.S.C. § 2014(b)(1)(D) (1988) (covering certain terminations of employees during probationary periods); Pub. L. No. 103-236, § 181(a)(2), 108 Stat. 382 (1994) (to be codified at 22 U.S.C. § 4011) (covering reduction-in-force actions affecting career candidate appointee in Foreign Service).

13. Neither *NTEU* nor *Waters* could have arisen in the Federal Circuit given the context in which they occurred. If *Waters* involved a federal employee that was fired, however, the MSPB would have had jurisdiction pursuant to 5 U.S.C. § 7512 (1994), which covers removal for cause to promote efficiency of governmental service. See *infra* notes 32-42 (discussing *NTEU* and

governing public employees in these cases also govern the Federal Circuit and the MSPB. The Federal Circuit lacks jurisdiction to hear cases, such as *NTEU*, which involve constitutional challenges to statutes. The Federal Circuit's jurisdiction over federal employee cases is governed by the Federal Courts Improvement Act of 1982,¹⁴ which limits the Federal Circuit to only those cases that can be appealed from the MSPB. The MSPB, in turn, as an administrative agency, is without jurisdictional authority to determine the constitutionality of federal statutes, although it does have authority to adjudicate a constitutional challenge to an agency's application of a statute.¹⁵

This Article first reviews the historical source of the Federal Government's authority over its employees, and the change in "status" that renders public employees more susceptible to government authority than their private sector counterparts or than private citizens. The Article next reviews what might seem to be anomalous historical developments—a steady expansion of certain federal employee workplace rights, at the same time as the Government exercises its authority, as an employer, to impose limits on the *ex ante* speech of its employees. The next section uses the plurality decision in *Waters* as a basis for discussing what *ex post* sanctions the Government can or cannot impose against its employees for workplace conduct involving speech. The Article concludes with a review of decisions issued by the Federal Circuit and the MSPB, placing these decisions in the context of *NTEU* and *Waters*. Neither *Waters* nor *NTEU* requires the MSPB or the Federal Circuit to reevaluate their earlier decisions. Nonetheless, *Waters* will have an impact on the judicial thought process of both the MSPB and the Federal Circuit because it lays out an analytical framework for a trier of fact to use when evaluating a disciplinary action against a public employee;

Waters.

14. Pub. L. No. 97-164, 96 Stat. 37 (1982) (codified at 28 U.S.C. § 1295 (1994)).

15. See *Stephen v. Department of Air Force*, 47 M.S.P.R. 672, 684 (1991) (holding that MSPB can adjudicate constitutional matters related to agency application of statute); *Bayly v. Office of Personnel Management*, 42 M.S.P.R. 524, 525 (1990) (allowing MSPB to adjudicate constitutional challenges to agency's application of statute); *May v. Office of Personnel Management*, 38 M.S.P.R. 534, 538 (1988) (stating that although MSPB is without authority to determine constitutionality of statutes, MSPB has authority to adjudicate constitutional challenge to agency's application of statute). Although the MSPB, and hence the Federal Circuit, cannot consider a direct attack on the constitutionality of a statute, such as was involved in *NTEU*, both adjudicatory bodies could consider the constitutionality of the statute when the agency attempts to sanction an employee for violating such statute.

NTEU, on the other hand, will have less of an impact because it involves the underlying constitutionality of a statute.¹⁶

NTEU has spawned a major decision in the U.S. Court of Appeals for the District of Columbia Circuit, *Sanjour v. Environmental Protection Agency*.¹⁷ In an en banc decision using an *NTEU* analysis, the D.C. Circuit has ruled the honorarium ban of the Ethics in Government Act unconstitutional.¹⁸ This decision is significant because it addresses directly what the Court in *NTEU* did not.¹⁹ In *NTEU*, the conduct the Government sought to regulate was speaking or writing off-duty on topics unrelated to the jobs of the federal employees.²⁰ In *Sanjour*, however, using *NTEU* as a springboard, the D.C. Circuit confronted the issue of the government's ability to regulate the off-duty speech of its employees on subjects directly related to their on-duty positions.²¹

When the Supreme Court reviews questions of public employment law such as these, monumental constitutional principles that are already in tension are brought into direct conflict, much like two continental plates grinding against one another beneath the earth's surface. This is not unlike the tension between coordinate branches of government, most particularly when Congress and the Court clash over major social issues, where the events that these collisions produce may be cataclysmic.²² Earthquakes may be spawned in the form of

16. See *infra* notes 81-143 (discussing due process rights of federal employees and forums to which federal employees have access to initiate complaints).

17. 56 F.3d 85 (D.C. Cir. 1995).

18. *Sanjour v. Environmental Protection Agency*, 56 F.3d 85, 99 (D.C. Cir. 1995).

19. See *infra* Part III.A.3 (discussing first application of *NTEU*).

20. See *infra* Part III.A.2.

21. *Sanjour*, 56 F.3d at 96-97.

22. The essence of this constitutional continental drift is the Tenth Amendment. It establishes the interrelationship between the rights granted by the citizens to the federal sovereign, those reserved to the states, and those reserved to the people. To draw an analogy, one could look upon each of these as continental plates. The events which are the subject of this Article are those in which the sovereign, exercising rights granted to it under the constitution, collide with the reserved rights of citizens (as enumerated in the Bill of Rights) when the sovereign is acting in its capacity as an employer and the citizens have changed their status with respect to the sovereign by becoming its employees. Thus, when the sovereign seeks to regulate the conduct of its employees to engage in political activities or to accept honoraria for speaking engagements, the authority of the sovereign to determine how best to govern is thrown into direct conflict with First Amendment rights of its citizens, albeit employees. In 1989, the Supreme Court issued five monumental employment law decisions involving discrimination. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-78 (1989) (narrowing scope of claims that could be brought under 42 U.S.C. § 1981 to enforce private employment contracts involving complaints of discrimination); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 910-12 (1989) (strictly enforcing limitations period against complainants who alleged discriminatory impact under seniority systems adopted while they were employees); *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (holding that white fire fighters were not bound by consent decree in discrimination case in which they were not parties); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 658-61 (1989) (shifting burden to plaintiffs in disparate impact cases to show that

legislation.²³ Aftershocks may occur in the form of more litigation.²⁴ The most recent volcanic eruption of significant note involved the air traffic controllers' strike in 1981.²⁵ It is significant because the judicial review of the fallout from the strike fell almost exclusively to the Federal Circuit via appeals from MSPB decisions by employees on adverse personnel actions, many of which involved free speech.²⁶

At least one threshold observation is appropriate. In the last twenty years, the development of federal employment law has shifted from relative dormancy to a period of relatively vigorous seismic activity. The relatively dormant period occurred during the first half of the twentieth century between the 1912 passage of the Lloyd-LaFollette Act²⁷ and the 1972 amendments to the Civil Rights Act of 1964,²⁸

each challenged practice contained disparate impact); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (permitting employer to escape liability in adverse employment action discrimination case if employer could show by preponderance of evidence that nondiscriminatory motives would have resulted in adverse action).

23. In 1991, Congress responded to the Court's 1989 decisions, *supra* note 22, by enacting the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981(a) note, 52 U.S.C. § 2000(e) note (Supp. V 1993)), which legislatively overruled the five 1989 decisions. In this massive response, Congress also legislatively overruled two more Court decisions. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991) (restricting extraterritorial effect of U.S. discrimination laws); *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 86 (1991) (limiting recovery of expert witness fees as part of court costs or attorneys' fees in employment discrimination lawsuits).

24. In addition to legislatively overruling these Court decisions, *supra* note 22, the Civil Rights Act of 1991, 42 U.S.C. § 1981(a) note, 42 U.S.C. § 2000(e) note (Supp. V 1993), created important new substantive and procedural rights for employees, such as the right to compensatory damages and the right to a jury trial in employment discrimination cases, which ultimately lead to further litigation. For example, the Court reviewed the retroactivity of § 101 and § 102, which concerned the compensatory damage and jury trial provisions of the Civil Rights Act of 1991. See *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1517-18 (1994) (holding that § 101, which concerns making and enforcing employment contracts, was not retroactive); *Landgraf v. USI Film Prods., Inc.*, 114 S. Ct. 1483, 1488 (1994) (ruling that compensatory damage and jury trial provisions of § 102 were not retroactive).

25. See *infra* notes 165-80 and 537-78 and accompanying text (discussing litigation resulting from 1981 air traffic controllers strike).

26. See *Anderson v. Department of Transp. (FAA)*, 735 F.2d 537, 539 (Fed. Cir. 1984) (explaining circumstances of Professional Air Traffic Controllers Organization (PATCO) strike). Federal employees are prohibited by law from striking. 5 U.S.C. § 7311(3) (1994). Furthermore, it is a criminal offense for a federal employee to engage in a strike. 18 U.S.C. § 1918 (1994). More than 1200 controllers complied with a demand by President Reagan that they return to work but approximately 11,500 continued to strike. President's Statement Concerning Air Traffic Controllers' Strike, 17 WEEKLY COMP. PRES. DOC. 845 (Aug. 3, 1981). The strikers were subsequently removed from federal service and many appealed. See *Schapansky v. Department of Transp. (FAA)*, 735 F.2d 477 (Fed. Cir. 1984) (analyzing appeal of air traffic controller). While no Supreme Court decision led directly to the strike, a line of historic Court precedents, defining the Government's authority when it acts in its capacity as an employer, buttressed the statutory prohibitions against striking. See *infra* notes 151-80 and accompanying text (discussing prohibitions against striking placed on federal employees).

27. Ch. 389, § 6, 37 Stat. 555 (1912) (current version at 5 U.S.C. §§ 7101-7102 (1994)).

28. 42 U.S.C. § 2000e (1988).

followed by passage of the Civil Service Reform Act of 1978.²⁹ Including the 1972 amendments, no fewer than eight major statutes affecting rights of federal employees,³⁰ and a number of minor statutes,³¹ have become law since the 1972 amendments to the Civil Rights Act of 1964. Recent political events, highlighted by near unanimous clamor of the legislative and executive branches for a smaller federal workforce that works more efficiently, yet costs less, indicate that the activity is not yet over. The increased legislative activity, as well as landmark cases such as *Waters* and *NTEU*, highlight the continuing importance of federal employment issues.

I. SOURCES OF FEDERAL GOVERNMENT AUTHORITY OVER ITS CIVILIAN EMPLOYEES

A. *The Concept of "Status"*

In *Waters*, and to a lesser extent in *NTEU*, the Court anguished over a subtle but fundamental delineation in the role of the federal sovereign—when the Federal Government acts not solely as a sovereign, but as both a sovereign and as an employer. It was this intellectual struggle in *Waters* that caused Justice O'Connor, in her plurality opinion, to ask rhetorically: "What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the

29. Civil Service Reform Act of 1978, 5 U.S.C. § 7201 (1994).

30. These are the aforementioned 1972 amendments to the Civil Service Reform Act of 1978, 5 U.S.C. § 7201 (1994); Civil Rights Act of 1964, 42 U.S.C. § 2000(a)-(7) (1988); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 2 U.S.C. §§ 601, 1201-1224 (1994); 42 U.S.C. §§ 1981 note, 1981a, 1988, 2000e note (1988)); Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201 note, 1206, 1211-1222 (1994)); Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (codified at 5 U.S.C. §§ 3303, 5520a, 7321-7326 (1994)); Office of Special Counsel Reauthorization Act of 1994, Pub. L. No. 103-424, 108 Stat. 4361 (codified at 5 U.S.C. § 5509 note (1994)); Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (codified at 5 U.S.C. §§ 7501 note, 7511, 7701 (1994)); Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344 (codified at 29 U.S.C. § 701 (Supp. V 1993)).

31. See Portability of Benefits for Nonappropriated Fund Employees Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified at 5 U.S.C. § 2101 note (1994)) (making it less onerous for appropriated fund employees to be converted to nonappropriated fund status and vice versa without losing benefits); Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. No. 101-509, 104 Stat. 1427 (codified at 5 U.S.C. §§ 5301-5307 (1994)) (creating locality pay for federal employees); Federal Employees Leave Sharing Amendments of 1993, Pub. L. No. 103-103, 107 Stat. 1022 (codified at 5 U.S.C. §§ 6301 note, 6373 (1994)) (authorizing federal employees to donate annual leave either into leave bank or to particular employee who needs it for medical reasons); Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6 (codified at 5 U.S.C. §§ 6381-6387 (1994); 29 U.S.C. §§ 2611-2619, 2631-2636, 2651-2654 (Supp. V 1993)) (authorizing federal employees to take emergency medical leave for their immediate family under 5 U.S.C. §§ 6381-6387)).

public at large?"³² Noting that the Court has never directly answered that question before, Justice O'Connor pointed to the "practical realities of government employment"³³ for the proposition that the Government has much broader powers when it is acting as an employer than when it is acting as a sovereign. Justice O'Connor noted:

Rather, the extra power the government has in this area comes from the nature of the government's mission as an employer. . . . The key to First Amendment analysis of government employment decisions, then, is this: the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.³⁴

While the Court, prior to *Waters*, may have never directly answered the question Justice O'Connor posed, it has addressed and answered the question before in other contexts, such as engaging in partisan politics. The rationale for the answer to Justice O'Connor's rhetorical question lies in the historical distinction between the terms "appointee" and "employee." For federal employment purposes, "appointee" is a constitutional term of art. It implies a change in "status" of the person receiving a federal appointment.³⁵ That is, a change in the status of the person vis-à-vis the person's relationship with the Federal Government (which becomes that person's employer) and the public the federal employee now serves. We can trace Federal Government authority over the civilians it employs to carry out the business of government not only to specific provisions of the Constitution,³⁶ but also to the Constitution's Preamble, which states that "in Order to . . . insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to

32. *Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994).

33. *Id.* (echoing concern addressed in majority opinion by Justice White 12 years earlier in *Connick v. Myers*, 461 U.S. 138 (1983)). Justice White addressed the balance that must be struck between the primary aim of the First Amendment in "the full protection of speech upon issues of public concern" and "the practical realities involved in the administration of a government office." *Id.* at 154.

34. *Waters*, 114 S. Ct. at 1887-88.

35. See *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983) (finding that federal workers serve by appointment and hence, their rights are matter of legal status even where compacts are made).

36. U.S. CONST. art. II, § 2, cl. 2 (granting appointment powers to President and Congress).

ourselves and our Posterity."³⁷ In essence "we," collectively as citizens, gave over a certain amount of individual rights we otherwise would possess when we agreed among ourselves to establish our constitutional form of government.

In practical terms, it takes people employed by the Government to insure the tranquility, provide the defense, promote the general welfare, etc., for our government. This, then, is the nub of the issue: can "we," collectively as citizens of our government, insist that those who work for the Government accept a little less individual liberty in return for a job working for the Government? It seems so. For the source of the Government's broader powers as an employer, however, one must go back in time, even beyond the "social contract" we call our constitution, to the social philosophers who inspired our nation's founders.³⁸ We, as citizens, relinquish a certain degree of individual freedom for the benefit of having our particular form of government. The Court has recognized this truism: "The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people."³⁹ The citizen who becomes a federal employee, however, gives up even more individual rights. As Justice O'Connor expressed in *Waters*, "When someone who is paid a salary so that she will contribute to an agency's effective operations begins to do or say things that detract from the agency's effective operation, then the government employer must have some power to restrain her."⁴⁰

37. U.S. CONST. pmbl.

38. See JOHN LOCKE, CONCERNING CIVIL GOVERNMENT, Second Essay 47 (Encyclopedia Britannica Great Books ed. 1952) (1690). We, by the very act of consenting to be governed, necessarily give up certain individual freedoms we otherwise could claim. As Locke expressed:

Men, being . . . by nature all free, equal and independent, no one can be put out of his estate and subjected to the political power of another without his own consent, which is done by agreeing with other men to join and unite into a community for their comfortable, safe and peaceable living. . . . And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it.

Id.

More than 70 years later, Rousseau further distilled the concept of the sovereign in the setting of a social compact:

The act of association comprises a mutual undertaking between the public and the individuals, and that each individual, in making a contract, as we may say, with himself, is bound in a double capacity; as a member of the Sovereign he is bound to the individuals, and as a member of the State, to the Sovereign.

JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 392 (Encyclopedia Britannica Great Books ed., 1952) (1792). Hence, the Constitution can be seen as an expression of the bargain that we have struck with our sovereign, the Federal Government.

39. United Pub. Workers v. Mitchell, 330 U.S. 75, 95-96 (1947).

40. *Waters v. Churchill*, 114 S. Ct. 1878, 1887-88 (1994).

As a threshold proposition, then, individuals give up certain rights to live collectively in a governed society. Those individuals who accept employment with the entity created to do the governing give up even further rights. In doing so, they make themselves subject to further controls by the entity created to govern the whole of the citizenry—the sovereign. It is this second submission to authority which effects a change in “status” between themselves and other citizens. This is the concept of status.

B. “Appointment” as Effecting a Change in Status

Civil servants are required to make the Government function properly. As the federal sovereign is not simply another “employer,” so too is the federal employee not just another “employee.” Becoming a federal employee is a legal act. The act of making a private citizen into a federal employee is the exercise of a power of government rooted in the Constitution.⁴¹ The individual is not simply “hired,” but receives an “appointment”⁴² in the federal service and is required to execute an oath of office.⁴³ Having received a federal appointment, the employee’s “status,” vis-à-vis the Federal Government and vis-à-vis those who remain private citizens, changes.

The distinction between the contractual rights that may be created in a private sector employer-employee relationship and the consequence of an appointment in the federal service has long been recognized. In 1850, the Supreme Court commented on the nature of such an appointment:

41. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803) (discussing “constitutional power of appointment”); see also *Keim v. United States*, 177 U.S. 290, 293 (1899) (“The appointment to an official position . . . even if it be simply a clerical [one], is not a mere ministerial act, but one involving the exercise of judgment.”).

42. For an explanation of the process and concept of appointment, see 5 U.S.C. §§ 2105(a), 3101, 3301 (1994). See also *Bevans v. Office of Personnel Management*, 900 F.2d 1558, 1562-64 (Fed. Cir. 1990) (explaining ramifications, effects, and processes of “appointment”); *Watts v. Office of Personnel Management*, 814 F.2d 1576, 1579-82 (Fed. Cir. 1987) (noting impact and outcomes of “appointment”); *Horner v. Acosta*, 803 F.2d 687, 691-93 (Fed. Cir. 1986) (elaborating on consequences and procedural elements of “appointment”). There are three tests for determining when an individual has become a federal employee: (1) the individual must be appointed by a government official with the authority to make an appointment; (2) the individual must be engaged in the performance of a federal function, and (3) the individual must be subject to the supervision of a federal official or employee. 5 U.S.C. § 2105(a) (1994). All three tests must be met for an individual to be considered a federal employee. *Baker v. United States*, 614 F.2d 263, 266 (Ct. Cl. 1980); see also *United States v. Testan*, 424 U.S. 392, 402 (1976) (indicating that no individual is entitled to pay or benefits of government position until he or she is duly appointed to it (citing *United States v. McLean*, 95 U.S. 750 (1878) and *Ganse v. United States*, 376 F.2d 900, 902 (Ct. Cl. 1967))).

43. 5 U.S.C. §§ 3331, 3333 (1994).

[T]he appointment to and the tenure of an office created for the public use . . . do not come within the import of . . . vested, private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good⁴⁴

This provides one possible answer to Justice O'Connor's rhetorical question in *Waters*. Employees who are appointed in the federal service act as agents of the sovereign and thereby accept both the powers and the obligations imposed on the sovereign itself. To enable our government to function properly and to promote the public good, federal employees must be under stricter authority of the sovereign than private citizen. Harkening back to the words of philosopher John Locke and his comments about the "body politic,"⁴⁵ the Supreme Court commented in 1900:

[I]n every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic and for the safety of the individuals of the community.⁴⁶

The "status" of the federal employee as an appointee, the critical aspect that gives the Government greater authority over its employees than over private citizens, has a recognized equivalent in another category of individual in federal service—the soldier. The Court has equated the change in "status" of a private citizen into a member of the military as akin to the change in legal status that occurs when one enters into a marriage.⁴⁷ While unquestionably the Government asserts much greater authority over a member of the military than a civilian employee (the civilian can quit, the member of the military cannot), the concept is the same. For example, a soldier who refuses to do work cannot simply quit and return home, but remains subject to military authority under the Uniform Code of Military Justice (UCMJ).⁴⁸ Thus, the military authorities can apprehend the soldier and subject the soldier to confinement (a deprivation of liberty) until

44. *Butler v. Pennsylvania Canal Comm'n*, 51 U.S. (10 How.) 402, 417 (1850).

45. See *supra* note 38 and accompanying text (explaining that consenting to be governed necessarily results in forfeiture of certain individual liberties).

46. *Taylor & Marshall v. Beckham*, 178 U.S. 548, 576 (1900).

47. See *In re Grimley*, 137 U.S. 147, 151-53 (1890) (stating that enlistment constitutes contract between soldier and government that involves, like marriage, change in status that cannot be terminated at will).

48. 10 U.S.C. § 8 (1994).

the soldier's case is adjudicated in accordance with the UCMJ. Or, if a soldier refuses to go where assigned, military authorities may take the soldier into custody and physically take the soldier where ordered to go. In either circumstance, a civilian employee cannot be subjected to such liberty deprivations. A soldier can be subjugated, at least until the soldier's status as a soldier ends by discharge from the military. The Court noted, however, that the source of the authority over military officers is the same as the source of authority the Government has over officers in the civil service.⁴⁹ The term "officers" in the civil service has been construed broadly. Thus, in *United States v. Hartwell*,⁵⁰ a Treasury clerk in Boston responsible for disbursements, was charged with misappropriating funds and was indicted as an "officer" of the United States.⁵¹ As his defense, he asserted that he was a mere clerk and not an "officer" within the meaning of the law.⁵² The Court found that he was indeed a public officer, occupying a public station conferred by "appointment" to a position in the Government.⁵³

The distinction between private sector employees, governed in an employment relationship flowing from contract law principles, versus the appointment "status" of federal employees, has continued into modern times. In 1975, the U.S. Court of Claims referred to the Court's 1850 *Butler v. Pennsylvania*⁵⁴ opinion, noting: "As early as 1850, the Supreme Court has held that public officers do not have contracts of employment, but are appointed to office. . . . This 'appointment' status has been extended by law to employees of the United States who are subject to laws administered by the Civil Service Commission."⁵⁵

The significance of "status" as a critical factor in the federal employment relationship was summarized in 1978 in the legislative history of the Civil Service Reform Act:

49. See *Blake v. United States*, 103 U.S. 227, 232 (1880). The Court relied on two Attorney General opinions. One was for the proposition that, with respect to official tenure, there is no legal difference between officers in the Army and other officers of the Government. *Military Storekeepers*, 6 Op. Att'y Gen. 4, 5-6 (1853). The other was for the proposition that the power to remove officers in the military flows from the same authority to remove officers in the civil service. *The Claim of Surgeon Du Barry for Back Pay*, 4 Op. Att'y Gen. 603, 611-12 (1847).

50. 73 U.S. (6 Wall.) 385 (1867).

51. *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 386-87 (1867).

52. *Id.*

53. *Id.* at 393.

54. 51 U.S. 10 (How.) 402 (1850).

55. *Hopkins v. United States*, 513 F.2d 1360, 1364 n.5 (Ct. Cl. 1975) (citing *Butler* for proposition that rationale for appointee status centers on government need to maintain control over agents who carry out public duties and terms under which they work).

Public employees occupy a status entirely different from their counterparts in the private sector. Public employees are the agents of government, and in reality, exercise a part of the sovereignty entrusted to government. While serving a mission different from the private employee, the public employee enjoys benefits not necessarily available to the private employee. Governments do not go out of business.⁵⁶

While the difference between "employees" in the private sector sense and "appointees" in the public sector sense sometimes appears overlooked, it is not forgotten. In 1983, both the D.C. Circuit and the Ninth Circuit made it clear that "federal employees serve by appointment, not by contract."⁵⁷ The Ninth Circuit noted that although the distinction between an appointment in the federal service and a contractual employment relationship in the private sector context "may sound dissonant in a regime accustomed to the principle that the employment relationship has its ultimate basis in contract, the distinction nevertheless prevails in government service."⁵⁸ The D.C. Circuit found that because federal employees serve by appointment and their rights in their employment relationship with the sovereign (as an employer) are thus a matter of legal status, the pay and benefits of federal employees must be determined by federal statutes and regulations rather than by reference to contract principles.⁵⁹

Unfortunately, the concepts of "appointment" and "status" reside in an esoteric realm that occasionally escapes the grasp of federal courts who overlook them and end up issuing erroneous decisions. For example, *Spirides v. Reinhardt*⁶⁰ involved a direct relationship between an employee, Mrs. Spirides, and the Government. That is, Mrs. Spirides was physically present in a government office, working

56. 124 CONG. REC. 29,200-02 (1978) (statement of Rep. Rousselot).

57. *Riplinger v. United States*, 695 F.2d 1163, 1164 (9th Cir. 1983); see also *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983) (stating that "federal workers serve by appointment" rather than by private-sector notion of contract).

58. *Riplinger*, 695 F.2d at 1164.

59. *Kizas*, 707 F.2d at 535-37; see also *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 738-41 (1982) (finding that in employment by appointment, employment regulations and statutes do not create implied-in-fact contract); *Chu v. United States*, 773 F.2d 1226, 1228-29 (Fed. Cir. 1985) (finding that medical residency training is incident of employment by appointment, not contract); *Kania v. United States*, 650 F.2d 264, 268 (Ct. Cl. 1981) (noting that it has long been held that rights of civilian and military public employees against government do not turn on legal status even where compacts are made), *cert. denied*, 454 U.S. 895 (1981); *Shaw v. United States*, 640 F.2d 1254, 1260 (Ct. Cl. 1981) (pointing out that public employment does not give rise to contractual relationship in conventional sense); *Bailey v. Marsh*, 655 F. Supp. 1250, 1254 (D. Colo. 1987) (stating that breach of contract claim fails to state claim because federal employment relationship is governed by statute); *Darden v. United States*, 18 Cl. Ct. 855, 859 (1989) (stating that federal employees do not have contractual relationship with Government).

60. 613 F.2d 826 (D.C. Cir. 1979).

directly for a government official. To an outside observer, she appeared to be just another government employee. But that was the crux of the case. Was she really? The issue was whether Mrs. Spirides, who read radio scripts in Greek for Voice of America, was an employee of the government or an independent contractor.⁶¹ Were she found to be a government employee, she would be entitled to claim the protections of Title VII—that is, file a discrimination complaint against the Government as employer. But to be entitled to “status” as an employee, and thus the protections of Title VII, she must first to be shown to have met the technical requirements of 5 U.S.C. § 2105(a).⁶² The court in *Spirides* glossed over the requirements of 5 U.S.C. § 2105(a), and failed to address the importance of whether or not Mrs. Spirides was an “appointee.” Instead, the court focused on whether an individual can be considered separately as an employee for the remedial purposes of the federal discrimination laws under Title VII.⁶³ The question the court asked, in essence, was whether an independent contractor working for the Government was entitled to the protections of Title VII, which Congress enacted for the benefit of federal employees? Could an independent contractor be considered an “employee” for the purposes of Title VII only, but not for other purposes? The court remanded the case to the district court for a determination of whether or not the individual was an employee versus an independent contractor under Title VII with a broad judicial hint that perhaps the district court would be best to consider her an employee for Title VII purposes only.⁶⁴

On remand, the district court displayed little patience for the higher court’s suggestion that an individual could be an employee for Title VII purposes but not for other purposes. The district court had no difficulty in determining that the individual, no matter what the court of appeals thought about the matter, was not an employee for Title VII purposes either.⁶⁵

Comprehension of these subtleties and complexities also eludes federal administrative oversight agencies. For example, as recently as

61. *Spirides v. Reinhardt*, 613 F.2d 826, 827-28 (D.C. Cir. 1979).

62. *Id.* at 828.

63. *Id.* at 830-32.

64. *Id.* at 832-34.

65. *Spirides v. Reinhardt*, 486 F. Supp. 685, 687 (D.D.C. 1980). The district court noted tersely that, while it deferred to the rationale of the court of appeals, the indicia and the evidence clearly showed that Mrs. Spirides was not an employee for Title VII purposes. *Id.* She received no sick leave, no annual leave, no retirement credits, no hospitalization, no salary deductions for taxes, and no social security deductions (even as deductions were being made from the pay of her husband, who was a government employee). Moreover, her husband’s tax return listed her occupation as “contractor.” *Id.* at 688.

1993, the U.S. Equal Employment Opportunity Commission (EEOC), in *DaVeiga v. Department of Air Force*,⁶⁶ relied on the *Spirides* decision and overlooked the statutory requirements for appointing federal employees. The EEOC focused erroneously on common law factors governing whether an individual is an independent contractor or a federal/public employee. In *DaVeiga*, the EEOC granted reconsideration of an appeal by the former employee of a company that had contracted to operate several dining facilities on a military installation.⁶⁷

The appellant alleged that she was fired from her job with the contractor because of a complaint made against her by a government employee.⁶⁸ The appellant had also filed a separate discrimination complaint over her failure to be hired as a federal employee.⁶⁹ The EEOC erroneously relied on *Spirides*, which involved a fact situation entirely distinct from *DaVeiga*.⁷⁰ *Spirides* dealt with an individual with a direct relationship with the Government, as either an independent contractor or as an employee.⁷¹ *DaVeiga*, on the other hand, and other decisions in which the EEOC had erroneously followed *Spirides*, involved individuals with a critical intervening circumstance, i.e., an employer, between the complaining individual and the Government.⁷² That is, in *Spirides* there was privity between the individual and the Government. In *DaVeiga*, privity was between *DaVeiga* and the contractor, not the Government.

In summary, being "appointed" as a federal employee is a legal act that carries with it corresponding rights and ramifications. Having a contractual relationship with the government does not make an individual an employee. It requires the legal act of appointment.

66. EEOC Req. No. 05930201 (July 13, 1993), 93 F.E.O.R. ¶ 3336.

67. *DaVeiga v. Department of Air Force*, EEOC Req. No. 05930201 (July 13, 1993), 93 F.E.O.R. ¶ 3336.

68. *Id.* The EEOC even took official note that she had filed a private sector EEOC charge with the EEOC's Denver District Office against the contractor over the same issues.

69. *Id.*

70. *Id.*

71. See *supra* notes 61-65 and accompanying text (describing *Spirides* and legal ramifications of distinction between independent contractors and employee).

72. See, e.g., *Puri v. Department of Army*, EEOC Req. No. 05930502 (Mar. 24, 1994), 94 F.E.O.R. ¶ 3339 (involving complaints by individuals with employer intervening between complainant and Government); *Puri v. Department of Army*, EEOC Req. No. 05920107 (Mar. 5, 1992) (same); *Bandali v. Department of Labor*, EEOC Req. No. 05910067 (Apr. 11, 1991) (same); *Shorten v. Agency for Int'l Dev.*, EEOC Req. No. 05901199 (Jan. 3, 1991) (same); *Najera v. Department of Justice*, EEOC Req. No. 05900329 (May 3, 1990) (same). In the most recent *Puri* decision, the EEOC reached the right decision for the wrong reason. It found that the employee was a contractor employee and could not avail himself of the protections of Title VII because of the indicia of "independent contractor" versus "employee" in *Spirides*. See P94 F.E.O.R. ¶ 3339, at XII-503. The case should have been disposed of on the correct basis that the individual had never acquired "status" as a federal employee.

Once appointed, an employee does not have an employment contract with the Government, but a relationship, a "status" that draws its essence from the legal act of appointment.

II. DEFINING THE BOUNDS OF FEDERAL EMPLOYEE PROCEDURAL PROTECTIONS

A. *Legislative Expansion of Federal Employee Workplace Rights*

During the September 1978 floor debates leading to the passage of the Civil Service Reform Act,⁷³ Representative John Rousellot noted that while federal employees have more restrictions than their private sector counterparts, federal employees enjoy benefits not generally available to these private sector employees.⁷⁴

Those benefits, however, in the form of statutory protections not enjoyed by private sector employees, were a long time coming. This was due in part to another attribute of sovereignty that grew out of the historical concept that "the King can do no wrong."⁷⁵ For federal employees, this translates to the principle of sovereign immunity—that the sovereign cannot be sued unless the sovereign consents to be sued. The rule of sovereign immunity was restated in 1976 in *United States v. Testan*,⁷⁶ where the Court acknowledged that it has long been established that the U.S. Government, as sovereign, "is immune from suit, save as it consents to be sued."⁷⁷ A corollary to this principle is that any waiver of sovereign immunity is a limited waiver, absent express congressional intent otherwise.⁷⁸ *Testan* involved a legal action brought by several Department of Defense attorneys who wanted their positions (and as a result, their salaries) upgraded.⁷⁹ Finding that the Federal Government had not extended to these employees the right to make such a claim for relief, the Court reviewed how Congress had granted federal employees limited due process review rights late in the nineteenth century and early in the twentieth century.⁸⁰

73. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified at 5 U.S.C. § 1101 note (1994)).

74. 124 CONG. REC. 29,200-02 (1978) (statement of Rep. Rousellot).

75. See BLACK'S LAW DICTIONARY 1398 (6th ed. 1990) (defining sovereign immunity).

76. 424 U.S. 392 (1976).

77. *United States v. Testan*, 424 U.S. 392, 399 (1976).

78. *Id.* at 399 (citing *United States v. King*, 395 U.S. 1, 4 (1969); *Seriano v. United States*, 352 U.S. 280, 278 (1957)).

79. *Id.* at 392.

80. *Id.* at 397-98. Because employees were unable to fashion a claim for relief on a specific statute waiving sovereign immunity against the United States, employees attempted to fashion arguments based on a contract theory. *Id.* This, in turn, led courts to expound on the

Until late in the nineteenth century, when the Government began granting its employees limited due process review rights, the federal sovereign had quite an arrangement. It could impose requirements or other limitations on those appointed to government service, but could fend off challenges from these same employees on the basis of sovereign immunity.

1. Early statutory expansion of federal employee due process protections

Early in the first century of the Republic, there was no special dispensation from the sovereign (either by legislative or executive fiat) that granted incumbents in federal positions any job protection.⁸¹ In fact, under the "spoils system," federal appointees were terminable at the whim of the executive.⁸² Also, the practice of "rotation" after new elections or on the whim of an elected official were common.⁸³ By the 1840s, the predominant view was that "political obligations of public office holders took precedence over their public obligations" and public employees were expected to "contribute time and money ('assessments') to political campaigns. Under these circumstances, efficiency suffered and the career service was whittled to the bone."⁸⁴ These circumstances led to a series of reform efforts, which ultimately led Congress to enact legislation to return professionalism to the career public service and end the "spoils system."⁸⁵

The Pendleton Act,⁸⁶ passed on June 16, 1883, marked the end of the "spoils system," and the beginning of the merit system, and of the expansion of statutory job protections for federal employees. The Pendleton Act abolished the patronage system of employment and provided for employment on the basis of merit.⁸⁷ It also established the Federal Civil Service Commission and prohibited consideration of partisan political affiliation in the appointment process.⁸⁸ As noted by the Court in *Testan*, the Pendleton Act established that an

"appointment" concept and the special considerations of "status" that it brings to bear. *Id.*

81. See ARI HOOGENBOOM, *OUTLAWING THE SPOILS—A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT 1864-1883*, at 4-6 (1968).

82. *Id.*

83. *Id.*

84. *Id.* at 8.

85. *Id.* at 9-12.

86. Pendleton Act, ch. 27, § 2(2)1, 22 Stat. 403 (1883).

87. *Id.*; see also *Bush v. Lucas*, 462 U.S. 367, 381-82 (1983) (explaining provisions of Pendleton Act).

88. Pendleton Act, ch. 27, § 2(2) 1, 22 Stat. 403 (1883).

employee remained entitled to emoluments of his position until he became disqualified.⁸⁹

Although the Pendleton Act provided some limited protections primarily aimed at entry into the federal service, it provided little protection for employees who claimed that they were subjected to alleged unwarranted personnel actions while on the job. Such personnel actions, the *Testan* court noted, were simply an exercise in legislative discretion: "For many years federal personnel actions were viewed as entirely discretionary and therefore not subject to judicial review, and in the absence of a statute eliminating that discretion, courts refused to intervene where an employee claimed that he had been wrongfully discharged."⁹⁰ For example, in *Keim v. United States*,⁹¹ a Navy veteran, who was removed from his position on grounds of inefficiency, sought legal redress.⁹² By denying the veteran's claim, the Court conveyed a strong message as to the agency's broad discretion in matters involving removal from the federal service and of the requirement for express congressional action providing a right or a remedy for the employee. The Court found that, in the absence of some specific provision to the contrary, the power of removal from a federal position was incident to the power of appointment.⁹³ The Court concluded that there were certain matters that had been left to the province of those who had supervisory authority, and "until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by th[e]se administrative officers."⁹⁴

The unilateral power of federal employers over federal employees was greatly diminished by Congress in 1912. Congress acted in response to issuances of two successive Executive Orders, one by President Roosevelt in 1906 and the other by President Taft in 1909, which imposed "gag orders" on federal employees from communicating with members of Congress unless they had their supervisors'

89. See *United States v. Testan*, 424 U.S. 392, 402 (1976) (citing *United States v. Wickersham*, 201 U.S. 390 (1906)).

90. *Id.* at 406.

91. 177 U.S. 290 (1900).

92. *Keim v. United States*, 177 U.S. 290 (1900).

93. *Id.* at 293.

94. *Id.* at 296.

approval.⁹⁵ Politically motivated removals were the source of this congressional act.⁹⁶

These federal employer abuses spurred "special and direct legislation," as characterized by the Court in *Keim*.⁹⁷ The Lloyd-LaFollette Act of 1912 (Act)⁹⁸ was enacted specifically "to protect employees against oppression and in the right of free speech and the right to consult their representatives."⁹⁹ Several members of Congress, who supported this legislation, believed that the Executive Orders violated the First Amendment rights of federal employees.¹⁰⁰ The Act was passed as section 6 of a postal appropriation statute in 1912.¹⁰¹ It provided that no person in the classified civil service could be removed "except for such cause as will promote the efficiency of said service."¹⁰² The Act further granted employees the right to receive notice of the proposed punitive action in writing, and the right to a reasonable time to provide an answer to the charges in writing.¹⁰³

A thirty-two-year-period of relative quiet in legislative activity followed the passage of the Lloyd-LaFollette Act. The next significant statute passed was the Veterans' Preference Act of 1944,¹⁰⁴ which granted a preference in hiring to military veterans and granted an enhanced retention standing to qualifying veterans already on the rolls.¹⁰⁵ The Veteran's Preference Act also was significant in that it extended the procedural and substantive protections of the 1912 Lloyd-LaFollette Act to adverse actions other than removals and added a right to respond orally and to appeal to the Civil Service Commission.¹⁰⁶ In *Bush v. Lucas*,¹⁰⁷ the Supreme Court undertook an extensive review of the development of due process protections for

95. See *Bush v. Lucas*, 462 U.S. 367, 382-383 (1983) (providing historical review of developments leading to passage of Civil Service Reform Act in reviewing whether federal employees have cause of action for damages separate from relief provided under federal civil service statutes granting various remedies to federal employees).

96. *Id.*

97. *Keim v. United States*, 177 U.S. 290, 296 (1900).

98. Ch. 389, § 6, 37 Stat. 539, 555 (1912) (codified at 5 U.S.C. §§ 7101-7102 (1994)).

99. *Bush*, 462 U.S. at 382 (quoting H.R. REP. NO. 388, 62d Cong., 2d Sess. 7 (1912)).

100. *Id.* at 383 n.20.

101. *Id.* at 383.

102. *Id.* (quoting Lloyd-LaFollette Act of 1912, ch. 389, § 6, 37 Stat. 539, 555 (codified at 5 U.S.C. §§ 7101-7102 (1994))).

103. *Id.* at 384.

104. Veterans' Preference Act of 1944, 58 Stat. 390 (codified in scattered sections of 5 U.S.C.).

105. *Id.*

106. *Id.*; see also *Bush v. Lucas*, 462 U.S. 365, 385-86 n.25 (1983) (explaining protections provided in Veterans' Preference Act of 1944).

107. 462 U.S. 365 (1983).

federal employees in the context of a federal employee who unsuccessfully sought to have the Court recognize a new nonstatutory damage remedy.¹⁰⁸ The employee claimed that he had been defamed and subjected to a retaliatory demotion. The Court declined to grant the remedy, commenting that "[d]uring the past century . . . the job security of federal employees has steadily increased."¹⁰⁹

2. *Recent statutory expansion of federal employee due process rights*

The dramatic expansion of statutory due process rights for civilian employees began with the 1972 amendments to the Civil Rights Act of 1964.¹¹⁰ The amendments codified the right of federal employees to file complaints alleging unlawful discrimination in employment related matters.¹¹¹ The amendments also authorized federal employees who exhausted administrative remedies to initiate a *de novo* judicial action in federal district court.¹¹² The 1972 expansion of equal employment opportunity rights to federal employees was followed by the Civil Service Reform Act of 1978 (CSRA).¹¹³ The CSRA implemented a massive revamping of the civil service system. It redistributed various functions that formerly had been performed by the Civil Service Commission to several new agencies.¹¹⁴ In addition, the CSRA retained and expanded on the Lloyd-LaFollette

108. *Bush*, 462 U.S. at 388-89.

109. *Id.* at 382.

110. 42 U.S.C. § 2000(d) (1988 & Supp. V 1993).

111. *Id.* § 2000e-16.

112. *Id.*

113. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C.). The original stated intent of the Civil Service Reform Act was to make it easier to hire and fire federal employees. See S. REP. NO. 95-969, 95th Cong., 2d Sess. 4 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2726 (reporting legislative history of CSRA). In practice this has not happened, but provisions of the Act have become bulwarks of due process protection for civilian employees. The CSRA retained the Lloyd-LaFollette Act's "efficiency of [the] service" standard for taking adverse action against employees. Lloyd-LaFollette Act of 1912, ch. 389, § 6, 37 Stat. 539, 555 (current version at 5 U.S.C. §§ 7101-7102 (1994)). The CSRA provided a statutory basis for performance-based actions, codified at 5 U.S.C. § 2301 (1994).

114. Civil Service Reform Act of 1978, 92 Stat. at 1111. Former adjudicatory functions of the old Civil Service Commission were divided into several new agencies. Appeals from actions taken to promote the efficiency of the service and for unacceptable performance were vested in a new adjudicatory agency, the U.S. Merit Systems Protection Board (MSPB). *Id.* An Office of Special Counsel (OSC) was created as a part of the MSPB to investigate employee complaints of prohibited personnel practices and reprisal against employees for having made whistleblower disclosures. Pub. L. No. 95-454, 92 Stat. 1121-22 (codified at 5 U.S.C. § 1105 (1994)). Oversight and adjudicatory review authority over federal sector labor relations matters was vested in a new agency, the Federal Labor Relations Authority (FLRA). Pub. L. No. 95-454, 92 Stat. 1196 (codified at 5 U.S.C. § 7104 (1994)). Oversight and general authority over the federal civilian personnel system was transferred from the former Civil Service Commission (CSC) to a successor agency, the Office of Personnel Management (OPM). 92 Stat. 1119 (codified at 5 U.S.C. §§ 1101-1105 (1994)).

Act's and the Veterans' Preference Act's procedural due process for federal employees in adverse personnel actions.¹¹⁵ The CSRA also provided a statutory basis for federal labor management relations, extending by statute the right of federal employees to engage in collective bargaining.¹¹⁶

Although the CSRA created an Office of Special Counsel to handle whistleblower complaints, Congress responded to continuing complaints, from employees and organizations representing employees, that reprisals remained common against employees who made disclosures of fraud, waste, and abuse in government operations. Congress addressed these concerns specifically in the Whistleblower Protection Act of 1989,¹¹⁷ which marked the next significant expansion of the due process rights of federal employees.¹¹⁸

The congressional pace since 1991 has been rapid-fire. First came the passage of the Civil Rights Act of 1991.¹¹⁹ This legislation

115. See *supra* note 181.

116. See 5 U.S.C. §§ 7701-7135 (1994). While the focus of this Article is on individual rights, the collective rights granted employees in the Civil Service Reform Act's (CSRA) Title VII represent a wholesale expansion of due process rights for federal employees who are covered under collective bargaining agreements (CBAs). In addition to recognizing by statute the right of employees to bargain collectively, Title VII established a separate and elaborate regulatory scheme for resolving employee workplace grievances and bargaining issues. See S. REP. NO. 95-969, 95th Cong., 2d Sess. 4 (1978), reprinted in 1978 U.S.C.A.N. 2723, 2821-37. This legislation created the FLRA, see 92 Stat. at 1196, and the Federal Services Impasses Panel (FSIP), 92 Stat. at 1208-09, and permits federal agencies and unions to use the Federal Mediation and Conciliation Service to assist in resolving workplace disputes. See 92 Stat. at 1215.

117. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at 5 U.S.C. §§ 1201 note, 1205, 1211-22 (1994)). For an excellent discussion of the history and development of the Office of Special Counsel and the development of whistleblower rights for federal employees, see Bruce D. Fong, *Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s*, 40 AM. U. L. REV. 1015 (1991). The Whistleblower Protection Act (WPA) took the Office of Special Counsel out of the MSPB and vested it with independent investigatory authority over complaints of prohibited personnel practices and whistleblower reprisal by federal employees. See 103 Stat. at 19-21. The WPA provided additional protections for employees making such complaints and made it more difficult for agencies to deny that reprisal had been a factor in personnel actions taken against employees once the Office of Special Counsel had made threshold findings. See *id.*

118. Under the CSRA, the Office of Special Counsel was established as an investigatory and prosecutorial arm of the MSPB to investigate complaints by federal employees of prohibited personnel practices and complaints by employees that they had been subjected to reprisal for having disclosed gross fraud, waste and abuse (whistleblowing). See 92 Stat. at 1125-31. It also was given jurisdiction over enforcement of the Hatch Act. See *id.* at 1128. The WPA retained responsibilities for the Office of Special Counsel but established it as an independent agency to strengthen its authority and role. See 103 Stat. at 19-21. The WPA also altered the nature of the statutory burdens on employees and agencies, making it easier for employees to make a claim that whistleblower reprisal had occurred and imposing a higher burden on management to prove that a particular personnel action taken against an employee was not in reprisal for having made protected disclosures of fraud, waste and abuse. See *id.*

119. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §§ 1202-1224, 42 U.S.C. §§ 1981 note, 1981a, 1988, 2000e note (Supp. V 1993)). In terms of substantive due process rights for federal employees, the Civil Rights Act of 1991 (CRA) legislatively overruled *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), making it easier

permits federal employees who prevail in employment discrimination cases to be awarded up to \$300,000 in compensatory damages.¹²⁰ It also permits employees, if they pursue judicial action after exhausting administrative remedies, to receive a jury trial in federal district court.¹²¹ The EEOC has since determined that the compensatory damage provisions are available for federal employees in its administrative proceedings, in addition to proceedings in federal courts.¹²² The MSPB has also extended the compensatory damage provisions to discrimination cases coming before it on appeal.¹²³ The next statute affecting federal employees did not expand the existing body of due process rights to employees who already had them, but instead extended existing rights to federal employees who formerly had extremely limited appeal rights to the MSPB, and hence to the Federal Circuit—employees in the “excepted service.”¹²⁴ The Civil Service Due Process Amendments of 1990¹²⁵ expanded due process protections in adverse actions to federal employees appointed in the excepted service.¹²⁶ Additionally, the Rehabilitation Act Amendments of 1992¹²⁷ apply certain provisions of the Americans

for complainants, including federal sector complainants, in disparate impact discrimination cases to establish statistically that systemic discrimination has occurred, and requiring defendants, including the Government, to establish a defense of business necessity to avoid liability.

120. Civil Rights Act of 1991, 105 Stat. at 1071. Section 102 of the CRA added provisions that authorize the awarding of compensatory damages against public sector employers in cases where intentional discrimination is found. Private sector employers are subject to both compensatory and punitive damages for intentional discrimination. *Id.* The CRA caps damage awards depending on the number of employees of each employer, as respondents with more than 500 employees are subject to a maximum \$300,000 per complainant. *Id.*, 105 Stat. at 1073. For purposes of applying the caps to federal agencies, the EEOC has determined that “agency” equates to “employer,” meaning that for most federal agencies, the \$300,000 cap applies. See Enforcement Guidance: Compensatory & Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992). The provisions on caps are codified at 42 U.S.C. § 1981(a) (Supp. V 1993).

121. Civil Rights Act of 1991, 105 Stat. at 1072-73.

122. See *Jackson v. United States Postal Serv.*, EEOC Appeal No. 01923399, Nov. 12, 1992, 93 F.E.O.R. ¶ 3362, *req. for reconsid. den.*, EEOC Req. No. 05930306, Feb. 1, 1993, 94 F.E.O.R. ¶ 3333.

123. See *Hocker v. Department of Transp. (FAA)*, 63 M.S.P.R. 497 (1994).

124. See 5 U.S.C. § 2103 (1994). “Excepted service” positions are defined as “civil service positions which are not in the competitive service or the Senior Executive Service.” *Id.*; see also 5 C.F.R. § 213 (1995) (dividing excepted service positions into three excepted service schedules, with each schedule based upon whether position is of confidential and policy determining character).

125. Pub. L. No. 101-376, 104 Stat. 461 (1990) (codified at 5 U.S.C. §§ 7501 note, 7511, 7701 (1994)).

126. *Id.* The Act granted appeal rights to the MSPB to excepted service employees provided that they have completed a two-year probationary period. *Id.* Previously, only those excepted service employees who were veterans were granted appeal rights in adverse actions to the MSPB.

127. Pub. L. No. 102-569, 106 Stat. 4344 (1992) (codified at 29 U.S.C. § 701 (Supp. V 1993)).

With Disabilities Act¹²⁸ to the federal sector,¹²⁹ thereby expanding the category of individuals able to assert claims of disability discrimination.¹³⁰

The most recent expansion of federal employee statutory due process rights occurred in a statute with the nondescriptive title of the Office of Special Counsel Reauthorization Act (Special Counsel Act).¹³¹ The title is nondescriptive because it is much more than a reauthorization statute. Like the Civil Service Due Process Amendments of 1990,¹³² the Special Counsel Act increases the coverage of federal workers entitled to due process rights.¹³³ Now, employees of the Veterans' Administration in excepted service health care positions not formerly covered under Title 5 merit systems laws are granted statutory protections, including MSPB appeal rights in adverse actions.¹³⁴ Additionally, whistleblower protection rights have been extended to employees of certain government corporations, such as the Resolution Trust Corporation¹³⁵ and the Thrift Depositor Protection Oversight Board.¹³⁶ This legislation, however, also expands substantive due process rights for federal employees by adding two new definitions of personnel actions to those that can be the subject of a whistleblower reprisal claim.¹³⁷ Thus, an employee whose supervisor refers him for psychiatric testing or examination, or subjects the employee to "any other significant change in duties, responsibilities or working conditions"¹³⁸ can claim that these actions are in reprisal for having engaged in protected activity.¹³⁹ "Protected activity" means that the employee has made lawful

128. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (Supp. V 1993)). This legislation is applicable to private sector, not public sector, employees. *Id.*

129. The Rehabilitation Act Amendments of 1992 amended the Rehabilitation Act to make provisions of Title I and §§ 501-504 and § 510 (as such sections relate to employment) of the Americans With Disabilities Act applicable to the federal sector.

130. See, e.g., *Gholston v. Department of Army*, EEOC Appeal No. 01941795 (July 5, 1994) in which a federal employee discrimination complaint was found to have been improperly dismissed by the agency. The employee claimed that he had been subjected to discrimination based on his association with a non-employee, his wife, who suffered from a disability. *Id.* The EEOC found that Title I of the Americans With Disabilities Act, made applicable to the federal sector in the Rehabilitation Act Amendments of 1992, authorized the discrimination complaint on this basis. *Id.*

131. Pub. L. No. 103-424, § 7, 108 Stat. 4361 (codified at 5 U.S.C. § 5509 note (1994)).

132. Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (codified at 5 U.S.C. § 7511 (1994)).

133. Office of Special Counsel Reauthorization Act, Pub. L. No. 103-424, § 7, 108 Stat. 4361 (codified at 5 U.S.C. § 5509 note (1994)).

134. See § 7, 108 Stat. at 4364 (codified at 5 U.S.C. § 2105(f) (1994)).

135. See § 11, 108 Stat. at 4366 (codified at 12 U.S.C. § 1441a note (1994)).

136. *Id.*

137. See § 5(a), 108 Stat. at 4363 (codified at 5 U.S.C. § 2302(a)(2)(A) (1994)).

138. *Id.*

139. *Id.*

disclosure of suspected fraud, waste, or abuse by government personnel.

It is also necessary to consider the impact of an October 1, 1993 Executive Order¹⁴⁰ granting federal sector unions expanded authority to engage in collective bargaining.¹⁴¹ The Executive Order requires that federal management engage in collective bargaining with unions representing federal sector employees over subjects that were formerly permissive subjects of bargaining.¹⁴² In a strict sense, the terms of the Executive Order do not expand individual due process rights for federal employees, but the order does constitute a collective expansion of the authority of federal employees. Formerly, management could dictate a policy by declaring a permissive subject non-negotiable and an employee who violated the policy could be subjected to possible sanctions.¹⁴³

The substantial expansion of federal sector employee due process rights and protections since 1972 is remarkable. Prior to that time, the principal administrative forum for federal employee complaints was the Civil Service Commission. Today, no fewer than five administrative adjudicatory agencies have the authority to grant or pursue relief for employees—the Office of Personnel Management (OPM), the Federal Labor Relations Authority (FLRA), the Merit Systems Protection Board (MSPB), the Equal Employment Opportunity Commission (EEOC), and the Office of Special Counsel (OSC). The range of rights and categories of employees covered by these rights has expanded in kind.

B. *Legislative Restriction of Federal Employee Rights*

In a lengthy and reasoned discussion of the Government's constitutional authority to regulate *ex ante* the conduct of its employees, the

140. Exec. Order No. 12,871, 3 C.F.R. 655 (1993), *reprinted in* 5 U.S.C. § 7101 (1994).

141. *Id.* Section 2(d) directs agency managers to negotiate with unions over subjects of bargaining covered in 5 U.S.C. § 7106(b)(1). See 5 U.S.C. § 7106(b)(1) (1994) (describing bargaining subjects such as numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, or technology, methods and means of performing work).

142. See Exec. Order No. 12,871, 3 C.F.R. 655 (1993), *reprinted in* 5 U.S.C. § 7101 (1994).

143. In *AFGE v. Department of Air Force*, 37 F.L.R.A. 197 (1990), the Air Force advised the union that it planned to install new security gates along the base's flightline to upgrade security in light of potential terrorist attacks. *Id.* at 201. The union proposed that any employees who were late to work for a tour of duty be insulated from discipline if the tardiness was due to a malfunction of the new gates; and if they were held beyond their tour of duty by a gate malfunction, that they get overtime pay. *Id.* at 204. The FLRA held that the agency could not be made to bargain over the first part of the proposal (discipline for being tardy to a tour of duty), but that the second provision regarding overtime pay was negotiable under a separate provision of federal law. *Id.* at 205. The Executive Order could have caused the FLRA to take a different approach to the *Robins Air Force Base* case, which might have affected the outcome.

Supreme Court in 1946 declared the 1940 Hatch Act¹⁴⁴ constitutional.¹⁴⁵ The Hatch Act regulates participation by federal and state employees in the partisan political process, and alternatively imposes restrictions on any person from attempting to inject partisan politics into the federal civil service system. The Hatch Act's prohibition on active involvement in the partisan political process led several Executive Branch employees and a public employee union to attack the Act's scope as unconstitutional soon after its 1940 passage.¹⁴⁶ In *United Public Workers v. Mitchell*,¹⁴⁷ the Court recognized that essential First Amendment rights "in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery."¹⁴⁸ To achieve this "order," the Court recognized Congress' power, "within reasonable limits," to regulate the conduct of its employees.¹⁴⁹ Justice O'Connor elaborated on this notion in *Waters*, wryly observing that when an employee accepts a government paycheck to assist in an agency's effective operations, this act carries with it the power of the Government to impose restraints on employee conduct.¹⁵⁰ The power of the Government to impose restraints on employee conduct has its greatest impact on federal employees in the following areas: (1) restrictions on participation in strikes against federal employers; (2) restrictions on engaging in certain partisan political activities and prohibitions concerning acceptance of gifts; and (3) restrictions on engaging in outside employment or related activities that could create an appearance of impropriety to the general public.¹⁵¹ Prior to reviewing how the Court has addressed regulation of *ex ante* conduct of federal employees, a review of these restrictions is helpful.

1. *Restrictions on right to strike*

One of the more dramatic restraints imposed by the Government on its workforce is the prohibition against striking.¹⁵² Congress, in

144. Act of July 19, 1940, ch. 640, 54 Stat. 767 (1940) (current version at 18 U.S.C. § 595 (1994)).

145. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94-104 (1946).

146. *See infra* note 281.

147. 330 U.S. 75 (1946).

148. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95 (1946).

149. *Id.* at 96.

150. *Waters v. Churchill*, 114 S. Ct. 1878, 1888-89 (1994).

151. *See infra* Part II.B.1-3.

152. The Government has had a long history of regulating the conduct of its employees *vis-à-vis* organizations which might promote strikes against the Government. *See* Lloyd-LaFollette Act of 1912, ch. 389, § 6, 37 Stat. 539, 555 (permitting postal employees to join in any organization not affiliated with outside organizations that impose obligations or duties upon them to engage in strikes or assist in strikes against the United States).

imposing limitations on who may work for the Federal Government,¹⁵³ has provided that an individual may not accept or hold a federal position if the individual "participates in a strike, or asserts the right to strike against the Government of the United States."¹⁵⁴ This regulation is buttressed by the "appointment affidavit" that new federal employees are required by law to execute in which the employee must agree not to violate the no-strike statutory provision.¹⁵⁵ The law affirmatively states that the employee's execution of the affidavit constitutes prima facie evidence that the employee does not or will not violate the no-strike provision.¹⁵⁶ An equivalent provision exists in the federal criminal statutes, providing that whoever participates in a strike or asserts the right to strike in violation of 5 U.S.C. § 7311, "shall be fined not more than \$1,000 or imprisoned not more than one year and a day, or both."¹⁵⁷

The statutory prohibitions on striking by federal employees have not gone unchallenged.¹⁵⁸ The provision that subjects employees to sanctions if they "assert a right to strike" as opposed to actually participating in a strike has been held unconstitutional due to vagueness.¹⁵⁹ In *United Federation of Postal Clerks v. Blount*,¹⁶⁰ the union attacked this provision directly, contending that federal employees had a constitutional right to strike.¹⁶¹ The action was brought by a public employee labor organization which was the executive bargaining representative of approximately 305,000 U.S. postal clerks.¹⁶² The plaintiffs sought declaratory and injunctive

153. See, e.g., 5 U.S.C. § 3103 (1994) (imposing limitation on individuals employed at seat of government); *id.* § 3110 (placing limitations on hiring of relatives of those already employed by Federal Government); *id.* § 3106 (placing restrictions on employment of attorneys); *id.* § 3326 (imposing restrictions on employment of retired military with Department of Defense); *id.* § 3301 (permitting President to prescribe other limitations by regulation which best promote efficiency of civil service).

154. *Id.* § 7311(3).

155. *Id.* § 3333(a).

156. *Id.*

157. 18 U.S.C. § 1918 (1994).

158. See *National Ass'n of Letter Carriers v. Blount*, 305 F. Supp. 546, 550 (D.D.C. 1969) (holding that statute prohibiting federal employees from striking violated First Amendment), *appeal dismissed*, 400 U.S. 801 (1970). But see *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 884 (D.D.C. 1970), *aff'd*, 404 U.S. 802 (1971) (ruling that statutory provisions do not violate constitutional rights of federal employees).

159. *Letter Carriers*, 305 F. Supp. at 550. A union representing 6000 collective bargaining units comprised of postal employees sought a declaratory judgment that the statute was unconstitutional. *Id.* at 547. The court found that only the provision pertaining to asserting the right to strike was vague and held that it was severable from the remainder of the statute. *Id.* at 556.

160. 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).

161. *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 881 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).

162. *Id.*

relief to invalidate the no-strike statute and the criminal penalties accompanying it.¹⁶³ The district court rejected their attack, holding that there is no constitutional right to strike in either the public or the private sector and that the Federal Government, "whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect the public health and safety, or for other reasons,"¹⁶⁴ could prohibit its employees from striking. The court traced various legislative enactments over the years prohibiting strikes by government employees, including provisions in various appropriations acts prohibiting agencies from using government funds to pay the salaries of those who engaged in strikes.¹⁶⁵

The greatest source of litigation spawned by the no-strike statute came from the 1981 strike by air traffic controllers who were members of the Professional Air Traffic Controller's Organization (PATCO). On August 3, 1981, after months of unsuccessful negotiations, more than 13,000 PATCO members nationwide commenced a strike against the Federal Aviation Administration (FAA).¹⁶⁶ The strike began at seven a.m.¹⁶⁷ The Government responded by sending telegrams to those employees who failed to report for work, advising them that the strike was illegal and that they risked disciplinary action and possible criminal penalties if they participated in it.¹⁶⁸ Employees were also advised to report as scheduled for duty unless they were directed otherwise by their managers.¹⁶⁹ The telegrams were followed by a public announcement made by President Reagan at eleven a.m. advising those who failed to report to work that they would be given a forty-eight-hour grace period, but if they did not return to work within that time, they would be deemed to have forfeited their job and would be removed from federal employment.¹⁷⁰ Thereafter, the FAA issued notices of proposed removal to each controller who failed to report for duty on the first shift to which the controller was to have reported after the August 5, 1981, eleven a.m. deadline.¹⁷¹

163. *Id.* at 880.

164. *Id.* at 883.

165. *Id.* at 882.

166. *See* United States v. Greene, 697 F.2d 1229, 1231 (5th Cir.), *cert. denied*, 463 U.S. 1210 (1983).

167. *See* Anderson v. Department of Transp. (FAA), 735 F.2d 537, 539 (Fed. Cir. 1984).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

In the ensuing litigation before the Federal Circuit in which scores of individual cases were appealed from the MSPB and consolidated for hearing and decision, only two reported decisions involved constitutional issues; none of the cases were frontal assaults on the Government's authority to prohibit employees from striking.¹⁷² The Federal Circuit's principal decision on striking that arose from the air traffic controller decisions was *Schapansky v. Department of Transportation (FAA)*.¹⁷³ In response to the appellant's claim that it was improper to discipline him because the FAA had not proven that he had the specific intent to violate the no-strike statute, the court held that proof of general intent was sufficient to establish a violation.¹⁷⁴ The court stated that an employee's unexplained absence during a strike, which was of general knowledge to everyone, was sufficient to establish intent.¹⁷⁵ Other cases dealt with factual issues concerning the strike¹⁷⁶ or procedural issues¹⁷⁷ concerning the discipline imposed on the employees.

Attacks on the criminal no-strike statute also have been unsuccessful. For example, in *United States v. Greene*,¹⁷⁸ three senior officials

172. See *Brown v. Department of Transp. (FAA)*, 735 F.2d 543, 546 (Fed. Cir. 1984) (discussing whether Government's prohibition on striking by federal employees violates First Amendment); *DiMasso v. Department of Transp. (FAA)*, 735 F.2d 526, 527 (Fed. Cir. 1984) (refusing to uphold employee's contention that failure to advise him of his Fifth Amendment right against self-incrimination constituted violation of Fifth Amendment); see also *Moulán v. Department of Transp. (FAA)*, 735 F.2d 524, 525 (Fed. Cir. 1984) (rejecting employee's contention that consolidation of his case with 79 other cases denied him fair opportunity to be heard by MSPB).

173. 735 F.2d 477 (Fed. Cir. 1984).

174. *Schapansky v. Department of Transp. (FAA)*, 735 F.2d 477, 483 (Fed. Cir. 1984).

175. *Id.* at 484.

176. See, e.g., *Letenyei v. Department of Transp. (FAA)*, 735 F.2d 528, 534 (Fed. Cir. 1984) (ruling that provisions of collective bargaining agreement between union and agency prevented agency from canceling employee's leave and ordering him to return to work); *Dorrance v. Department of Transp. (FAA)*, 735 F.2d 516, 520 (Fed. Cir. 1984) (rejecting appellant's claim that unsupported testimony of main witness against him was insufficient to sustain his dismissal); *Johnson v. Department of Transp. (FAA)*, 735 F.2d 510, 515 (Fed. Cir. 1984) (holding that threat of physical harm to federal employee by striking co-workers does not constitute affirmative defense to disciplinary action against him); *Martel v. Department of Transp. (FAA)*, 735 F.2d 504, 509-10 (Fed. Cir. 1984) (holding that appellant's contention that he was intimidated into striking by co-workers is insufficient to overturn his dismissal for striking); *Adams v. Department of Transp. (FAA)*, 735 F.2d 488, 493-94 (Fed. Cir. 1984) (rejecting employees' contention that government officials created so much confusion over presidential deadline that it affected their ability to form intent to strike).

177. See, e.g., *Anderson v. Department of Transp. (FAA)*, 735 F.2d 537, 540 (Fed. Cir. 1984) (refusing to uphold claim that disciplinary action was improper because of denial of opportunity to present oral reply to notice of removal); *Novotny v. Department of Transp. (FAA)*, 735 F.2d 521 (Fed. Cir. 1984) (deciding that agency action was proper despite lack of independent investigation into allegations against employee); *Campbell v. Department of Transp. (FAA)*, 735 F.2d 497, 500 (Fed. Cir. 1984) (deciding that agency does not have to schedule oral reply to notice of removal *sua sponte*, but rather employee must "take initiative to schedule time to exercise right").

178. 697 F.2d 1229 (5th Cir.), *cert. denied*, 463 U.S. 1210 (1983).

of PATCO chapters in the Dallas, Texas area were indicted and convicted of violating 18 U.S.C. § 1918(3) for participating in an illegal strike.¹⁷⁹ They each received jail sentences and fines of \$750, and each appealed the convictions.¹⁸⁰ The court held that the criminal statute was not void for vagueness and stated that the senior officials' arguments on that point were diminished by evidence that they were on notice of the no-strike law.¹⁸¹

2. *Restrictions on political activity*

A second area where Congress restricted the rights of federal employees concerns political activity. The Government's regulation of employee political activity harkens back to earlier congressional efforts to end the political patronage system that existed in the early 1800s. One such effort was the Pendleton Act¹⁸² of 1883, which had dual purposes. Its first purpose centered on the creation of a merit system by which all applicants for federal employment could receive fair and equal treatment.¹⁸³ The second purpose focused on protecting federal employees from political retaliation.¹⁸⁴ Congress accomplished this by codifying the first limits on public employee political activity, one aspect of which was protecting employees from unjustified removals for political purposes.¹⁸⁵ The Pendleton Act, however, also imposed restrictions on public employee conduct by prohibiting public employees from using their official authority or influence to coerce the political action of any person¹⁸⁶ and preventing them from giving political contributions to other government employees.¹⁸⁷ After the passage of the Pendleton Act, the Government regulated employee political conduct through Civil Service Commission rules and Executive Orders.¹⁸⁸

179. *United States v. Greene*, 697 F.2d 1229, 1231 (5th Cir.), *cert. denied*, 463 U.S. 1210 (1983).

180. *Id.*

181. *Id.* at 1233.

182. Pendleton Act, ch. 27, § 13, 22 Stat. 403 (1883).

183. *See* *Bush v. Lucas*, 462 U.S. 367, 381 (1983) (explaining that Pendleton Act "provided for selection of federal civil servants on a merit basis" and that Act proscribed firing federal employees who refused to contribute to political funds).

184. *See id.* at 381-82 (discussing politically motivated removals).

185. *See* Pendleton Act, § 13, 22 Stat. at 407 (prohibiting discharge or demotion of federal employee for giving, withholding, or neglecting to make political contribution for political purposes).

186. *Id.* § 2.

187. *Id.* § 14.

188. *See* *United Pub. Workers v. Mitchell*, 330 U.S. 75, 79-82 (1947) (explaining history of rights and regulations of federal employees during time between Pendleton Act (1883) and Hatch Act (1939)).

The Hatch Act, styled to "prevent pernicious political activities,"¹⁸⁹ marked the next significant step taken by Congress to limit political activity by government employees. The Hatch Act was broad in scope. It regulated not only federal employee conduct, but also certain conduct by "any person."¹⁹⁰ For example, the Hatch Act made it unlawful for any person to intimidate or coerce voters in national elections,¹⁹¹ to promise employment, compensation or any benefit to any person in return for support or opposition to any political party in any election,¹⁹² to engage in discrimination,¹⁹³ or to furnish or disclose lists or names of persons receiving funds for work relief or relief purposes to a political candidate, campaign manager, or other person connected with a political campaign.¹⁹⁴

The operative provisions of the Hatch Act that directly limited the political conduct of federal employees were two-fold. The first provision dealt with the problem of trading official positions for private gain by making it unlawful for any person employed in the executive branch, agency, or department of the Federal Government to use "official authority or position" to influence or interfere in elections.¹⁹⁵ The second provision directly implicated inherent constitutional freedoms by proscribing all officers and employees in the executive branch of the Federal Government from taking "any active part in political management or in political campaigns."¹⁹⁶ Both provisions exempted the President, the Vice President, employees of the President's executive office, cabinet officials, other government officials appointed with the advice and consent of the Senate, and others who were charged with high level foreign and domestic policymaking.¹⁹⁷ The penalty for violating either provi-

189. Act of Aug. 2, 1939 (Hatch Act), ch. 410, 53 Stat. 1147 (1939).

190. See *id.* § 1 (stating that it is unlawful for "any person" to intimidate, threaten, or coerce any other person to vote or not vote for candidates for national political office); *id.* § 2 (stating that it is unlawful for "any person" employed by United States to use official authority to interfere in national election); *id.* § 3 (stating that it is unlawful for "any person" to promise employment or other benefit to "any person" as favor or award for political activity in support of or opposition to any candidate or any political party in any election).

191. *Id.* § 1.

192. *Id.* § 3.

193. *Id.* § 4.

194. *Id.* § 6. The phrase "work relief or relief purposes" referred to persons who might be receiving an early form of public assistance which varied among states and localities, the current equivalent of which would be worker's compensation or unemployment compensation. The concern was that such individuals could be particularly susceptible to pressures to assist in a political campaign.

195. *Id.* § 9.

196. *Id.*

197. *Id.*

sion, by using official position or active participation, was immediate removal from government employment.¹⁹⁸

In 1940, Congress expanded the Hatch Act to prohibit certain state officials and employees from interfering with or attempting to influence national elections,¹⁹⁹ and provided an extensive hearing and appellate process under Civil Service Commission procedures.²⁰⁰ The 1940 amendments added limits to the aggregate amounts of campaign contributions that could be made by "any person,"²⁰¹ extended coverage to District of Columbia employees,²⁰² and authorized the Civil Service Commission to exempt certain municipal and political subdivisions in the immediate vicinity of the District of Columbia from prohibitions of the Act.²⁰³ Other 1940 amendments included prohibitions on contributions by persons or firms having government contracts²⁰⁴ and limitations on receipts and expenditures of political committees.²⁰⁵ Though there were certain minor subsequent amendments, the Hatch Act remained substantially unchanged until 1993.²⁰⁶

The Hatch Act Reform Amendments of 1993²⁰⁷ were an attempt by Congress to grant more freedom to federal employees to participate in the national political process.²⁰⁸ The statute's preamble originally was stated in the negative: "[a]n employee . . . is not obligated, by reason of that employment, to contribute to a political fund or to render political service."²⁰⁹ This changed in 1993 to a more open and expansive statement of purpose, on its face encouraging employee participation in the political process.²¹⁰ This theme

198. *Id.* § 9(b).

199. 1940 Amendments to Hatch Act, ch. 640, § 2, 54 Stat. 767 (1946) (current version at 5 U.S.C. §§ 7324-7327 (1994)).

200. *Id.* § 12(b).

201. *Id.* § 13.

202. *Id.* § 15.

203. *Id.* § 16.

204. *Id.* § 19.

205. *Id.* § 20.

206. See 5 U.S.C. §§ 7321-7326 (1994) (representing latest incarnation of Hatch Act provisions).

207. Pub. L. No. 103-93, 107 Stat. 1001 (1993) (codified as amended at 5 U.S.C. §§ 7321-7326 (1994)). Pursuant to § 13 of the Hatch Act Amendments of 1994, the new provisions took effect February 3, 1994.

208. *Id.* § 2(a).

209. See Pub. L. No. 89-554, 80 Stat. 525 (1966).

210. See Pub. L. No. 103-94, § 2(a), 107 Stat. 1001 (1993) (codified as amended at 5 U.S.C. § 7321 (1994)) (providing that "[e]mployees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or refrain from participating in the political process of the Nation").

continues through the statute, where provisions are stated in the affirmative, followed by any enumerated prohibitions.²¹¹

While Congress attempted to simplify participation by federal employees in the political process, it actually only complicated the system. The former Hatch Act contained no express exclusion from its provisions for particular federal agencies or departments.²¹² The Hatch Act Reform Amendments of 1993, however, contain an extensive list of agencies and departments excluded from the new provisions,²¹³ meaning, in essence, that most federal employees are covered by the new provisions, but employees of agencies excluded from the new provisions remain covered by requirements of the old law.²¹⁴

The Hatch Act Amendments of 1993 also contain a new substantive provision prohibiting political activities while on duty.²¹⁵ For First Amendment purposes, there are provisions which, with a new level of specificity, prohibit employees from engaging in political activity while on duty, while wearing a uniform or other official insignia identifying the office or position of the employee, or while using a government vehicle.²¹⁶ The statute gives the OPM the authority to promulgate regulations implementing these new provisions.²¹⁷ OPM has published interim regulations that impose new First Amendment-related restrictions based on the new statute, curtailing employee freedom of expression permitted under prior regulations.²¹⁸ For example, under OPM's former Hatch Act regulations,²¹⁹ employees were

211. See Pub. L. No. 103-94, 107 Stat. 1002 (codified as amended at 5 U.S.C. § 7323 (1994)) (stating how employees may participate in political management or political campaigns, but then listing exceptions to employee involvement in political activities). The exceptions state that employees may not: (1) use official authority to influence election; (2) solicit, accept or receive political contributions except in certain circumstances; (3) run for nomination/be candidate for partisan political office; and (4) knowingly solicit or discourage political activity. *Id.*

212. Pub. L. No. 89-554, 80 Stat. 525 (1966).

213. Pub. L. No. 103-94, 107 Stat. 1003 (codified as amended at 5 U.S.C. § 7323 (1994)).

214. See OFFICE OF SPECIAL COUNSEL, GUIDELINES FOR FEDERAL EMPLOYEES COVERED UNDER THE NEW HATCH ACT AMENDMENTS (on file with *The American University Law Review*). The Office of Special Counsel lists agencies, or divisions within an agency, that continue to be covered by the old law. These include the Federal Elections Commission, Federal Bureau of Investigation, Secret Service, Central Intelligence Agency, National Security Council, National Security Agency, Defense Intelligence Agency, Merit Systems Protection Board, Office of Special Counsel, Office of Criminal Investigation of the Internal Revenue Service, Office of Investigative Programs of the Customs Service, Office of Law Enforcement of Bureau of Alcohol, Tobacco and Firearms Agency, Criminal Division of the Department of Justice, career members of the Senior Executive Service, Administrative Law Judges, and contract appeals board members. *Id.*

215. Pub. L. No. 103-94, 107 Stat. 1003 (1993) (codified as amended at 5 U.S.C. § 7324 (1994)).

216. *Id.*

217. Pub. L. No. 103-97, § 2, 107 Stat. 1001, 1004 (codified at 5 U.S.C. § 7325 (1994)).

218. 59 Fed. Reg. 48,765 (1994) (codified at 5 C.F.R. §§ 734.301 to .307 (1995)).

219. 5 C.F.R. § 733 (1995).

permitted to display a political picture, sticker, badge, or button.²²⁰ Under the new OPM regulations prohibiting workplace political activity, an employee covered by the Hatch Act amendments cannot display a political picture, sticker, badge, or button in a government office while on duty.²²¹ The OPM regulations specify that a federal employee who drives a privately owned vehicle on official business, and who consequently receives compensation for mileage, may display a political bumper sticker on the automobile, "as long as he covers the bumper sticker while the vehicle is being used for official duties."²²² These new restrictions, however, are only for employees who come under the new Hatch Act amendments, not for employees who remain covered by the old law. The distinction comes from the manner in which Congress exempted certain agencies from provisions of the new law, while not repealing the former law outright, which applied broadly to employees of all agencies.²²³ Potentially, within the same building occupied by different federal agencies, employees of an agency exempt from the new amendments could display a political button while their counterparts in a covered agency could not display one.²²⁴

3. *Restrictions set forth in the Ethics in Government Act*

Congress also limited the activities of federal employees through the Ethics in Government Act of 1978.²²⁵ The Ethics in Government Act concerns employees' conduct in relation to accepting gifts in their capacities as employees from non-federal sources, accepting gifts from other federal employees, owning financial interests that might pose conflicts with their official government duties; restrictions on accepting or engaging in off-duty employment; and restrictions on other activities outside their regular government employment, such

220. *Id.* § 733.111(a)(3).

221. 59 Fed. Reg. 48,765, 48,773 (1994) (codified at 5 C.F.R. § 734.306(a) (1995)).

222. *Id.* at 48,773.

223. Thus, in § 7323(b)(2)(B), Congress exempted employees of the Federal Election Commission, the Federal Bureau of Investigation, the Secret Service, the Central Intelligence Agency, the National Security Council, the National Security Agency, the Defense Intelligence Agency, the Merit Systems Protection Board, the Office of Special Counsel, the Office of Criminal Investigation of the Internal Revenue Service, the Office of Investigative Programs of the Customs Service, and the Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms from the statute. Yet the employees of these agencies remain subject to the provisions of the former law. The Office of Personnel Management has issued a separate new regulation that governs only these agencies, restating the old prohibitions. See 5 C.F.R. § 734(D) (1995).

224. See *supra* note 210 and accompanying text (describing exemptions and restrictions on political expression for government employees).

225. Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at 5 U.S.C. § 101 app. (1994)).

as teaching, speaking, writing, or engaging in fundraising activities.²²⁶

The Ethics in Government Act was an across the board attempt to place employees of all three branches of government under uniform financial disclosure procedures.²²⁷ Titles I, II, and III provided financial disclosure requirements for legislative branch personnel,²²⁸ executive branch personnel,²²⁹ and judicial personnel, respectively.²³⁰ Title IV created the Office of Government Ethics as an entity within the OPM,²³¹ where it remained for several years until it became a separate federal agency.²³²

The Ethics Reform Act of 1989²³³ constituted a wholesale revision of the Ethics in Government Act of 1978. The Ethics Reform Act codified what formerly had been restrictions imposed upon federal employees by regulation. Title II of the Ethics Reform Act of 1989 rewrote the financial disclosure requirements for federal personnel²³⁴ and Title III provided statutory guidance on what federal employees could or could not do with respect to accepting gifts and travel.²³⁵ Post-employment restrictions on executive and legislative branch personnel were strengthened and clarified in Title I of the Act.²³⁶ Title VI of the Ethics Reform Act amended Title V of the Ethics in Government Act to create statutory limitations on outside employment for members of Congress and certain senior level executive branch employees and to impose a bar on the acceptance of honoraria by all federal employees.²³⁷ These limitations have been codified at 5 U.S.C. app. § 501 and were the source of the constitutional attack in *NTEU*.²³⁸ Unlike the Hatch Act and the no-

226. See 5 C.F.R. § 2635 (1995) (noting regulations concerning ethical conduct by executive branch officials).

227. See S. REP. NO. 95-170, 95th Cong., 2d Sess. 21, reprinted in 1978 U.S.C.A.N. 4217, 4237 ("It was the opinion of the majority of witnesses . . . that any requirements for public financial disclosure should apply uniformly across the board to high level officials in the executive, judicial and legislative branches of the government.").

228. See Ethics in Government Act of 1978, Pub. L. No. 95-521, Title 1, 92 Stat. 1824-36 (1978) (codified as amended at 5 U.S.C. § 101 app. (1994)).

229. *Id.* at Title II, 92 Stat. at 1836-50 (1978).

230. *Id.* at Title III, 92 Stat. at 1851-61 (1978).

231. *Id.* at Title IV, 92 Stat. at 1862-64 (1978).

232. Pub. L. No. 100-598, 102 Stat. 3031 (1988) (codified at 5 U.S.C. app. §§ 401-408 (1994)).

233. Pub. L. No. 101-194, 103 Stat. 1716 (1989) (codified at 5 U.S.C. app. §§ 101-505 (1994)).

234. *Id.* at Title II, 103 Stat. at 1724-45 (1989) (codified at 5 U.S.C. app. §§ 101-112 (1994)).

235. *Id.* at Title III, 103 Stat. at 1745-47 (1989) (amending 5 U.S.C. §§ 7351, 7363 (1994) and 31 U.S.C. § 1352 (Supp. V 1993)).

236. *Id.* at Title I, 103 Stat. at 1716-24 (1989) (codified at 5 U.S.C. app. § 101 note (1994)).

237. *Id.*, 103 Stat. at 1760-63 (1989) (codified at 5 U.S.C. app. § 501 (1994)).

238. *United States v. NTEU*, 115 S. Ct. 1003 (1995).

strike statutes, there is no express statutory penalty concerning removal from the federal service.²³⁹ The Ethics Reform Act, however, permits the Attorney General to bring a civil action against a covered individual who violates either the outside employment prohibition or the honoraria prohibition.²⁴⁰ If an action is brought, potential sanctions include a civil penalty not to exceed \$10,000, or the amount of the compensation received, whichever is greater.²⁴¹ Additionally, the Office of Government Ethics has implemented regulations to advise agencies that disciplinary action can be taken in addition to the statutory penalties imposed on employees who violate the Ethics in Government Act, as amended by the Ethics Reform Act.²⁴² The disciplinary penalties include reprimand, suspension, demotion, and removal.²⁴³

C. *Judicial Limiting Factors*

Notwithstanding the extensive legislation Congress has provided for the protection of the rights of federal employees, one cardinal principle of sovereign immunity remains. Before a court can intercede against the sovereign on an employee's behalf, Congress must have authorized such judicial action. A 1976 case illustrates this principle. *United States v. Hopkins*²⁴⁴ involved the widow of a deceased federal employee who claimed, on her husband's behalf, that he had been wrongfully discharged from employment in violation of an implied employment contract.²⁴⁵ The decedent did not fall within the statutory protections for wrongful discharge afforded to appointed employees because of his status as an employee paid from nonappropriated funds.²⁴⁶ The Supreme Court noted that "absent specific command of statute or authorized regulation, an appointed employee subjected to unwarranted personnel action does not have a cause of action against the United States."²⁴⁷

The reluctance of courts to interject into everyday workplace disputes involving federal employees acts as another limiting factor on judicial activity. In *Gnotta v. United States*,²⁴⁸ for example, a disgrun-

239. Pub. L. No. 101-194, 103 Stat. at 1760-63 (codified at 5 U.S.C. app. §§ 501-505 (1994)).

240. *Id.*, 103 Stat. at 1761 (codified at 5 U.S.C. app. § 504(a) (1994)).

241. *Id.*

242. See 5 C.F.R. § 2636.104(b) (1995) (discussing possibility of disciplinary action).

243. *Id.*

244. 427 U.S. 123 (1976).

245. *United States v. Hopkins*, 427 U.S. 123, 124 (1976).

246. *Id.* at 128.

247. *Id.*

248. 415 F.2d 1271 (8th Cir. 1969).

tled employee alleged that he had not received a promotion in eleven years of service due to discrimination based on his national origin.²⁴⁹ The Eighth Circuit conceded that the plaintiff, as a public employee, was "entitled to a distinct measure of due process with respect to his employment."²⁵⁰ The court, however, quoted commentary by Professor Kenneth Culp Davis, to wit: "Do we want courts inquiring into personnel management—salary increases, sick leave, office hours, allocation of parking spaces in the basement of the agency's building?"²⁵¹ When the case involves issues of constitutional proportion, such as First Amendment issues, however, courts are more willing to step into the fray.²⁵²

III. REGULATING FIRST AMENDMENT SPEECH BY PUBLIC EMPLOYEES

In *NTEU*, the Supreme Court recognized the heavy burden of justification placed on public employers in two distinct circumstances: (1) when the Government attempts to restrain employee speech before it has occurred, and (2) when the Government acts to discipline an employee who has engaged in speech-related conduct that the Government believes has impaired its public mission.²⁵³ The Court has stated that a heavier burden on the Government is justified when the Government attempts to regulate public employee speech before or after it occurs, as opposed to when the Government acts to discipline an employee for routine misconduct.²⁵⁴ Thus, it is appropriate to review the Court's pronouncements in both the *ex ante* circumstance, where speech has yet to occur, and the *ex post* circumstance, where discipline is taken against an employee who has engaged in what arguably may be constitutionally protected speech.²⁵⁵

A. *Regulating Ex Ante Speech*

Courts are willing to intervene more readily in *ex ante* circumstances than in cases where an individual employee has been disciplined *ex*

249. *Gnotta v. United States*, 415 F.2d 1271, 1271 (8th Cir. 1969).

250. *Id.* at 1275.

251. *Id.* at 1276 (quoting 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16, at 82 (1958)).

252. See *Connick v. Myers*, 461 U.S. 138, 146 (1983) (stating that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment").

253. *United States v. NTEU*, 115 S. Ct. 1003, 1013 (1995).

254. *Id.*; see also *infra* Part III.A.3 (discussing *Sanjour v. Environmental Protection Agency*, 56 F.3d 85 (D.C. Cir. 1995)).

255. *Id.*; see also *supra* notes 4-5 and accompanying text.

post because of the fundamental constitutional interests involved in regulating conduct before it occurs.²⁵⁶ The Supreme Court has recognized that even though federal employees work for the federal sovereign, they have not given up rights they "otherwise enjoy as citizens to comment on matters of public interest."²⁵⁷ The Court has long held the view that more serious concerns are raised where the Federal Government attempts to subject public employees to "a sweeping statutory impediment to speech,"²⁵⁸ than where the Government is acting as an employer making supervisory decisions that may implicate First Amendment concerns.²⁵⁹

To buttress its position that the Court needs to scrutinize *ex ante* attempts to regulate employee speech, the majority in *NTEU* looked to several of its other decisions not involving employer-employee issues, but rather decisions involving pure First Amendment considerations.²⁶⁰ For example, the majority opinion considered the widespread impact of the honoraria ban that Congress had imposed as having "far more serious concerns than could any single supervisory decision."²⁶¹ To support this proposition, the Court cited *City of Ladue v. Gilleo*,²⁶² in which the Court overturned a city ordinance that prohibited a local resident from displaying a homemade sign in the window of her home.²⁶³ The city's ordinance prohibited all signs on private residences except "for sale" signs, signs warning about safety dangers, and street address signs.²⁶⁴ The Court in *Ladue* was concerned because the city ordinance foreclosed an entire medium of public expression.²⁶⁵

In addition to concern over the widespread impact an all-encompassing honoraria ban has on public employee speech, the Court was also troubled by the chilling effect on employees of barring speech before it occurs.²⁶⁶ When discussing this matter, the Court in *NTEU* made use of a 1931 Supreme Court decision, *Near v. Minnesota ex rel. Olson*.²⁶⁷ In *Near*, local county officials in Minneapolis used a state

256. *NTEU*, 115 S. Ct. at 1013.

257. *Id.* at 1012 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

258. *Id.* at 1013.

259. *Id.* at 1014.

260. *Id.*

261. *Id.*

262. 114 S. Ct. 2038 (1994).

263. *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994) (overturning city's refusal to allow resident to hang sign stating "For Peace in the Gulf").

264. *Id.* at 2040.

265. *Id.* at 2045.

266. *NTEU*, 115 S. Ct. at 1014.

267. 283 U.S. 697 (1931).

law permitting permanent abatement as a public nuisance (in essence, authorizing an injunction to abate the nuisance) of newspapers, magazines, and other periodicals that published "malicious, scandalous and defamatory" information.²⁶⁸ The newspaper in question had published articles critical of local city and county officials, accusing the officials of corruption and of affiliation with gangsters.²⁶⁹ The Court held that the state law was unconstitutional as a prior restraint on free press and an infringement on liberty of the press.²⁷⁰ Equating the infringement of speech on federal employees due to the honoraria ban with a local government's attempt to regulate the speech of its private citizens in a First Amendment *ex ante* context, the Court stated that the Government's burden was greater with respect to the honoraria ban than "with respect to an isolated disciplinary action."²⁷¹

The Court in *NTEU* also noted that in most circumstances it will grant a stronger presumption of validity to Congress' legislative pronouncements than to an individual employer's disciplinary actions.²⁷² The Court, however, had previously indicated that there are circumstances when that might not be the case. In *Turner Broadcasting System, Inc. v. FCC*,²⁷³ Justice Stevens's concurring opinion stated that measures mandated by Congress "that have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech."²⁷⁴ The Court in *NTEU* highlighted this proposition.²⁷⁵ Thus, if the Court determines that a particular congressional mandate has a direct impact on First Amendment rights, the greater deference typically afforded to Congress will not lie. In his dissent, Chief Justice Rehnquist seemed convinced that the majority in *NTEU* had established a new standard under which the Court is to review a state's regulation of content-based speech: the regulation must be necessary to serve a compelling state interest and must be narrowly drawn to accomplish that end.²⁷⁶ Chief Justice Rehnquist stated that this new standard, adopted by the majority in *NTEU*, is a departure from the standard a plurality of the Court announced in *Waters*—that the "government's interest in

268. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 702-03 (1931).

269. *Id.* at 703-04.

270. *Id.* at 723.

271. *NTEU*, 115 S. Ct. at 1014.

272. *Id.*

273. 114 S. Ct. 2445 (1994).

274. *Turner Broadcast Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2473 n.2 (Stevens, J., concurring).

275. *NTEU*, 115 S. Ct. at 1014.

276. *Id.* at 1025 (Rehnquist, C.J., dissenting).

achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."²⁷⁷

1. *Court sanctioned ex ante regulation of employee conduct*

On two occasions the Court has rebuffed attempts by public employees, and the unions representing them, to have *ex ante* rules declared unconstitutional as infringing on their First Amendment rights.²⁷⁸ More recently, in a third decision, the Court agreed with the employees and the unions.²⁷⁹

In *United Public Workers v. Mitchell*,²⁸⁰ several executive branch employees along with the United Public Workers, a public employee union, sought to enjoin the Civil Service Commission from enforcing the Hatch Act provision that forbade employees from participating in political campaigns, and asked for a declaratory judgment that the Hatch Act was unconstitutional.²⁸¹ The appellants wanted to engage in various political activities that were proscribed either by the Hatch Act or the implementing Civil Service regulations, including letter writing, poll watching, canvassing for signatures, and serving as political committee members.²⁸² Only one employee admitted to engaging in such acts, and consequently, the Government notified the employee that it intended to remove him from federal service.²⁸³ The district court held that even though all the appellants had standing to sue, the Hatch Act was valid and dismissed their claims for failure to state a cause of action.²⁸⁴ The Supreme Court disagreed with the district court's ruling that all the appellants had standing and held that an actual interference with their legal rights was required, not merely a hypothetical threat.²⁸⁵ The Court therefore found that only one employee, Mr. Poole, who had actually violated the Hatch Act and whose removal was pending, could maintain the action.²⁸⁶

277. *Id.* (Rehnquist, C.J., dissenting).

278. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 90-98 (1947) (stating that Congress may regulate political conduct of employees within reasonable limits and deferring judgment on specific provisions of Hatch Act because plaintiffs did not allege violations of Hatch Act); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556-57 (1973) (agreeing with *Mitchell* and holding constitutional bans on federal employees' involvement in partisan political activity).

279. *NTEU*, 115 S. Ct. at 1003.

280. 330 U.S. 75 (1947).

281. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 82 (1947).

282. *Id.* at 80-82.

283. *Id.* at 81, 91-92.

284. *Id.* at 84.

285. *Id.* at 89-90.

286. *Id.* at 91.

The Supreme Court stated that the Hatch Act interfered with otherwise constitutionally protected rights.²⁸⁷ The Court, however, noted that in forming our government, the states and the people had granted certain authority to the Federal Government.²⁸⁸ The Court stated that if the authority to enact the Hatch Act fell within that power granted to Congress by the states and the people, then the Court was required to balance the extent of the constitutional guarantee of freedom against "a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government."²⁸⁹

Weighing these factors, the Court found that valid historical experience led Congress to enact the Hatch Act and its predecessor statutory restrictions (the Pendleton Act and the Lloyd-LaFollette Act) regarding public employee political involvement.²⁹⁰ The Court stated that the restrictions were limited—that is, they did not intrude on the right to vote, but only restricted partisan activity that had a potentially adverse effect on government efficiency.²⁹¹ The Court also noted that Congress could reasonably conclude that limiting partisan activity of federal employees would avoid a tendency toward a one-party system²⁹² and would deter the ability of political leaders to build a political machine.²⁹³ The Court was not swayed by the argument that Congress should have narrowed the Hatch Act to impose restrictions only on those federal workers who had contact with the general public,²⁹⁴ or on administrative employees, but not industrial workers.²⁹⁵ The Court concluded:

Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. . . . Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service,

287. *Id.* at 94-95.

288. *Id.* at 95-96.

289. *Id.* at 96.

290. *Id.* at 96-99 (noting that partisan activity by federal personnel threatens good administration and efficiency).

291. *Id.* at 99-100.

292. *Id.* at 100.

293. *Id.* at 101.

294. *Id.* (stating that Congress feared cumulative impact on employee morale of political activity by all employees).

295. *Id.* at 102 (noting that distinction between administrative and industrial employees is mere detail due to Congress' determination that partisan activity by any federal worker is detrimental to government).

legislation to *forestall* such danger and adequate to maintain its usefulness is required.²⁹⁶

Accordingly, the Court upheld the constitutionality of the Hatch Act.²⁹⁷

Twenty-six years later, the *Mitchell* holding was "unhesitatingly" reaffirmed²⁹⁸ when another group of employees and another union, the National Association of Letter Carriers, sought an injunction against enforcement of the Hatch Act, again attacking the constitutionality of the provision prohibiting active involvement in political activities.²⁹⁹

The constitutionality of the prohibition was again presented to the Court after a three-judge panel found the definition of "political activity" to be both vague and overbroad and enjoined its enforcement.³⁰⁰ The district court also found that the *Mitchell* decision had been "so eroded" by subsequent decisions that it could no longer be considered binding.³⁰¹ Interestingly, the Court in *United States Civil Service Commission v. National Association of Letter Carriers*³⁰² could have followed the same approach as in *Mitchell* by declining to rule because none of the appellants, who were government employees, had yet violated the Hatch Act for fear of sanctions.³⁰³ Instead, the Court used *Letter Carriers* to reaffirm the *Mitchell* holding,³⁰⁴ in light of its interceding decision in *Pickering v. Board of Education*.³⁰⁵

In *Pickering*, the Court explained that the Government's interest in regulating the speech of its employees was significantly different than that of regulating the speech of society in general.³⁰⁶ The case involved a high school teacher who wrote a letter to the editor of a local newspaper criticizing the allocation of school funds from tax revenues, and who was disciplined by school officials after the letter was published.³⁰⁷ The difficulty was to strike a "balance between the interests of the (employee), as a citizen, in commenting upon matters of public concern and the interest of the (government), as an

296. *Id.* at 102-03 (emphasis added).

297. *Id.* at 103-04.

298. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973).

299. *Id.* at 551.

300. *Id.* at 553.

301. *Id.* at 553-54.

302. 413 U.S. 548 (1973).

303. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 551-53 (1973).

304. *Id.* at 564.

305. 391 U.S. 563 (1968).

306. *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968).

307. *Id.* at 563.

employer, in promoting the efficiency of the public services it performs through its employees."³⁰⁸

The Court in *Letter Carriers* recognized four important governmental interests that Congress sought to protect by enacting the Hatch Act.³⁰⁹ The first was the Government's interest in the impartial execution of laws;³¹⁰ the second was to prevent an erosion of public confidence by having public employees avoid the appearance of "practicing political justice;"³¹¹ the third was to avoid the creation of a corrupt political machine involving public employees;³¹² and the fourth was the desire to protect employees from political pressures.³¹³ The Court recognized that Congress could, in the future, change its view on these matters, but that the Court was in no position to dispute the approach Congress had taken, nor could it find anything in the Constitution to forbid Congress' approach.³¹⁴

The Court then reviewed both the statute and the regulations issued by the Civil Service Commission to implement the Hatch Act and found that neither was vague nor overbroad.³¹⁵ The Court noted that the regulations were explicit,³¹⁶ that the statutory provisions were limited to and based on the former rule of the Civil Service Commission,³¹⁷ and that, although they were brief, they were "set out in terms that the ordinary person exercising ordinary common sense [could] sufficiently understand and comply with, without sacrifice to the public interest."³¹⁸

A final and fundamentally important due process aspect, recognized by the Court in both *Mitchell* and *Letter Carriers*, is that violation of government *ex ante* prohibitions most certainly could form the basis for an *ex post* sanction against a federal employee.³¹⁹ Thus, in *Mitchell*, the Court stated that the heart of the issue, and the only one it was deciding, was "whether such a breach of the Hatch Act . . . can, without violating the Constitution, be made the basis for disciplinary action."³²⁰

308. *Letter Carriers*, 413 U.S. at 564 (quoting *Pickering*, 391 U.S. at 568).

309. *Id.* at 565-66.

310. *Id.* at 564-65.

311. *Id.* at 565.

312. *Id.*

313. *Id.* at 565-66.

314. *Id.* at 567.

315. *Id.* at 568-81.

316. *Id.* at 575.

317. *Id.* at 576.

318. *Id.* at 579.

319. *Id.* at 555-56.

320. *Id.* at 555 (quoting *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94 (1974)).

2. United States v. NTEU: *the Supreme Court finds one form of ex ante regulation unconstitutional*

Whether the honoraria ban found in Title VI of the Ethics Reform Act of 1989³²¹ could also form the basis for disciplinary action against an employee was an implicit issue for the Court in its *NTEU* decision.³²² The Court in *NTEU* pointed out that in *Pickering* and several other cases, the Court had recognized that Congress could impose restrictions on job-related speech of public employees although such restrictions would be constitutionally impermissible if applied to the public at large.³²³ The Court noted that such cases typically involved disciplinary actions taken in response to employee speech.³²⁴ The Court went on to state that in *Letter Carriers* it had established that the Government must be able to satisfy the *Pickering* balancing test in order to maintain a statutory restriction on employee speech,³²⁵ but that the Court had never determined how the components of a *Pickering* balancing test should be analyzed in the context of a sweeping statutory impediment to employee speech.³²⁶

The Court was convinced that the Government, as an employer, should have a greater burden to bear when justifying adverse employee action with respect to the honoraria ban, than with respect to some other form of isolated disciplinary action.³²⁷ This is because the honoraria ban has such a widespread impact and it restricts speech before it occurs.³²⁸

Like *Mitchell* and *Letter Carriers*, *NTEU* involved a challenge brought by several federal employees and two federal sector unions.³²⁹ The federal employees challenged the constitutionality of certain provisions of the Ethics Reform Act of 1989³³⁰ that imposed limitations on outside employment for members of Congress and certain senior

321. Pub. L. No. 101-194, 103 Stat. 1760-63 (1989) (codified at 5 U.S.C. app. § 501 (1994)).

322. *United States v. NTEU*, 115 S. Ct. 1003 (1995).

323. *Id.* at 1012.

324. *Id.*

325. *Id.*

326. *Id.* at 1013.

327. *Id.*

328. *Id.*

329. *Id.* at 1010. The district court certified the NTEU as the class representative for all executive branch employees below Grade GS-16 who would receive honoraria but for the statutorily imposed ban. *NTEU v. United States*, 788 F. Supp. 4, 5-7 (D.D.C. 1992).

330. Pub. L. No. 101-194, 103 Stat. 1716 (1989) (codified at 5 U.S.C. app. §§ 101-505 (1994)).

level employees and eliminated receipt of honoraria for all federal employees and members of Congress.³³¹

In particular, the Ethics Reform Act of 1989 implemented a cap on the outside income that could be earned annually by members of Congress and non-career civil servants above the grade of GS-16.³³² In addition, the Ethics Reform Act also imposed a prohibition on all individuals, whether they were an employee, an officer, or a member of Congress, from receiving honoraria, as defined in the statute.³³³ Originally, the statute defined an honorarium as a "payment of money or other thing of value for an appearance, speech or article."³³⁴ The definition was amended in 1991 to exclude any series of appearances, speeches, or articles unrelated to the individual's official duties or status.³³⁵

In addition to the intrusion on their ability to engage in certain outside activities and their ability to receive compensation for such activities, the federal employees also had to contend with potential sanctions. The Ethics Reform Act authorized the Attorney General to initiate a civil action in the appropriate district court against any individual thought to be in violation of the statute, in which the court could assess a civil penalty of up to \$10,000, or the amount of the compensation the individual received, whichever was greater.³³⁶ In addition to the possibility of a civil penalty, federal employees faced potential disciplinary action, including removal from federal service.³³⁷

These restrictions and corresponding sanctions combined to lead the federal employees to move for summary judgment, arguing that the honoraria ban was unconstitutional and to seek an injunction against government enforcement of the statute.³³⁸ The district court granted the motion for summary judgment and found the statute unconstitutional, enjoining the Government from enforcing it against any executive branch personnel.³³⁹ Not only did the district court

331. *Id.*, 103 Stat. at 1760-63 (codified at 5 U.S.C. app. § 501 (1994)) (amending Title V of the Ethics in Government Act of 1978, Pub. L. No. 92-521, 92 Stat. 1864-67 (1978)).

332. *Id.* (codified at 5 U.S.C. app. § 501(a) (1994)). The cap on outside earned income is 15% of annual basic rate of pay. *Id.*

333. *Id.* (codified at 5 U.S.C. app. § 501(b) (1994)).

334. *Id.*, 103 Stat. at 1762 (codified at 5 U.S.C. app. § 505(3) (1994)).

335. Congressional Operations Appropriations Act of 1991, Pub. L. No. 102-90, § 314(b), 105 Stat. 450 (codified as amended at 5 U.S.C. app. § 505(3) (1994)).

336. Pub. L. No. 101-194, 103 Stat. 1760, 1761 (codified at 5 U.S.C. app. § 504(a) (1994)).

337. 5 C.F.R. § 2636.104(b) (1995).

338. *NTEU v. United States*, 788 F. Supp. 4, 5 (D.D.C. 1992), *aff'd*, 990 F.2d 1271 (D.C. Cir. 1993), *modified*, 115 S. Ct. 1536 (1995).

339. *Id.* at 13.

find the statute underinclusive because it prohibited some forms of speech but not others, but also it found the statute overinclusive because it restricted too much speech of public employees.³⁴⁰ The court of appeals affirmed.³⁴¹ The court of appeals was concerned that the Government did not establish a connection between any actual or apparent improprieties that were supposed to have occurred with government employment.³⁴² Given the sweeping nature of the prohibitions, the court did not consider that the Government had met its burden of justifying the need for government employees to be singled out specifically.³⁴³ Agreeing with the district court that the statute was unconstitutional, the court of appeals included in those entitled to relief all members of the Senior Executive Service, a class of senior level executive branch employees who had not previously been parties to the litigation.³⁴⁴ The Supreme Court granted certiorari.³⁴⁵

The Supreme Court noted that the case was unique because it did not involve "a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities,"³⁴⁶ but rather involved "a sweeping statutory impediment to speech."³⁴⁷ Of equal importance to the Court was the fact that the broad prohibition on the acceptance of honoraria struck all federal employees, high ranking and low ranking alike, posing a far more significant burden on them than on "the relatively small group of lawmakers whose past receipt of honoraria motivated its enactment."³⁴⁸ The Court expressed concern that denying honoraria to such lower-ranking employees would not only diminish their expressive output but deprive the general public of the benefit of what these individuals might otherwise have written and said.³⁴⁹ Noting that certain great novelists and poets had been Customs Service employees,³⁵⁰ the

340. *Id.* at 9.

341. *NTEU v. United States*, 990 F.2d 1271 (D.C. Cir. 1993), *aff'g* 788 F. Supp. 4 (D.D.C. 1992).

342. *Id.* at 1276.

343. *Id.* at 1277.

344. *Id.* at 1278.

345. 114 S. Ct. 1539 (1994).

346. *United States v. NTEU*, 115 S. Ct. 1003, 1013 (1995).

347. *Id.*

348. *Id.* at 1014.

349. *Id.* at 1014-15. The Court also noted that although the honoraria ban did not prohibit any speech outright or discriminate among speakers based on their viewpoint or the content of their messages, it did impose a significant burden on expressive activity because of its prohibition on compensation. *Id.* This burden had greater impact on low-ranking federal employees than on high ranking government officials and members of Congress. *Id.*

350. *Id.* at 1012.

Court commented that the honoraria ban might deprive the country of future great novelists and poets.³⁵¹

The Government contended that the honoraria ban did not run afoul of the First Amendment because Congress had reacted reasonably in deciding that it would interfere with the efficiency of the federal service to permit federal employees to receive honoraria.³⁵² To support their arguments, the Government cited the Court's 1947 *Mitchell* decision involving the Hatch Act.³⁵³ The Court, however, looked to circumstances underlying its ruling validating the constitutionality of the Hatch Act, noting both the specific policy concerns Congress identified and the fact that the Hatch Act was meant more to protect employees from partisan political activity rather than restrict them from engaging in it.³⁵⁴ It was significant to the Court that while the governmental interest in insuring that federal officials not misuse power by accepting compensation for unofficial writings "is undeniably powerful,"³⁵⁵ the Government was unable to identify any specific instances of misconduct by lower ranking employees.³⁵⁶ All that the Government could muster, the Court stated, was limited evidence of impropriety of members of Congress and high ranking government officials.³⁵⁷

The Court rejected the Government's argument that a broad rule was more readily enforceable and easier to administer than a narrowly tailored rule that required individual nexus determinations.³⁵⁸ A much stronger justification was required, the Court concluded, than the Government's "dubious claim of administrative convenience."³⁵⁹ The Court also accused Congress of ignoring the recommendations of two Presidential Commissions for a definition of honoraria that would close specific loopholes.³⁶⁰ Instead of acting on the Commissions' suggestions to narrow the restrictions, the Court noted that Congress opted to impose broad restrictions on speech-related activities.³⁶¹ On the other hand, the Court mentioned that the

351. *Id.* at 1015. The Court pointed out that the regulations, as drafted by the Office of Government Ethics, would not have prohibited Melville and Hawthorne from writing because of the exclusion for poetry and fiction. *Id.* at 1015 n.16. The Court also pointed out that great artists often write non-fiction as well as fiction and poetry. *Id.*

352. *Id.* at 1015.

353. *Id.*

354. *Id.*

355. *Id.* at 1016.

356. *Id.*

357. *Id.*

358. *Id.* at 1017.

359. *Id.*

360. *Id.*

361. *Id.*

Office of Government Ethics had issued regulations specifically exempting many types of performances and writings that would likely have fallen within the statutory terms "appearance, speech or article."³⁶² To the Court, this further undercut the Government's argument that the efficiency of the federal service was impaired by allowing low level federal employees to receive honoraria for activities not connected with their jobs.³⁶³

The Court turned to a 1994 decision to reemphasize the importance of the burden placed on the Government when the Government creates a limitation on free speech using past harms or possible future harms as a justification. *Turner Broadcasting System v. FCC*³⁶⁴ was a reaction by the cable industry to legislation passed by Congress when several television networks claimed that the cable industry was jeopardizing the operating ability of the networks.³⁶⁵ To counter concerns raised by the networks, Congress had passed legislation requiring cable television operators to carry a certain number of local commercial and public television stations.³⁶⁶ In *Turner*, cable operators attacked the constitutionality of the must-carry provisions.³⁶⁷ The Court recognized the validity of the governmental interest in preserving local broadcasting, but remanded the case for further proof that the regulations would, in fact, achieve the desired goal.³⁶⁸ The Court stated:

When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.³⁶⁹

The Court in *NTEU* applied the logic of its pronouncement in *Turner* to the Government's attempt to ban its employees from accepting honoraria.³⁷⁰ Considering its decisions in *Pickering*³⁷¹

362. *Id.* at 1018.

363. *Id.*

364. 114 S. Ct. 2445 (1994).

365. *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445 (1994).

366. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4, 5, 106 Stat. 1460, 1471-81 (codified at 47 U.S.C. §§ 534, 535 (Supp. V 1993)).

367. See *Turner Broadcasting Sys.*, 114 S. Ct. at 2461 (discussing appellant's argument that regulations are content-based).

368. *Id.* at 2469-72.

369. *Id.* at 2470.

370. See *United States v. NTEU*, 115 S. Ct. 1003, 1017 (1995) (comparing NTEU's situation with situation in *Turner*).

371. 391 U.S. 563 (1968).

and *Waters*,³⁷² the Court concluded that because the "vast majority" of the prohibited speech did not involve government employment and would take place outside the workplace, the Government was unable to justify the honoraria ban on the basis of immediate workplace disruption.³⁷³

The Court thus affirmed the injunction against enforcement of the honoraria ban insofar as the original parties to the litigation were concerned, but it reversed the relief granted by the court of appeals to members of the Senior Executive Service who were not original parties to the lawsuit.³⁷⁴ The Court's decision does not immediately end the issue. The Office of Government Ethics has announced that although the Court overturned the honoraria ban in the statute, employees remain covered by an honoraria ban contained in an Executive Order that was not at issue in the lawsuit.³⁷⁵ The ban is contained in an Executive Order entitled "Principles of Ethical Conduct for Government Officers and Employees."³⁷⁶

The dissent in *NTEU* was written by Chief Justice Rehnquist, with whom Justices Scalia and Thomas joined.³⁷⁷ Chief Justice Rehnquist believed that the majority had understated the importance of the justification for the ban asserted by the Government and had focused on a handful of individual situations to justify its sweeping rejection of the statute.³⁷⁸ According to Chief Justice Rehnquist, the majority had taken a statute that made no attempt to regulate either content or viewpoint and had imposed a standard of review on it that the Court had established only for laws impinging on content-based expression.³⁷⁹ The majority required that the regulation be necessary to serve a compelling state interest and be narrowly drawn to

372. 114 S. Ct. 1878 (1994).

373. *NTEU*, 115 S. Ct. at 1013.

374. *Id.* at 1018-19.

375. Memorandum from Stephen D. Potts, Director, United States Office of Government Ethics, to Designated Agency Officials, *Honoraria* (DO-95-011) (Mar. 3, 1995) [hereinafter Office of Government Ethics Memorandum: *Honoraria*]; see also Christy Harris, *Work-Related Freelance Ban Holds*, *FED. TIMES*, Mar. 20, 1995, at 6 (discussing Office of Government Ethics' response to Court's decision).

376. Exec. Order No. 12,731, § 101, 3 C.F.R. 306 (1991) (amending Exec. Order No. 12,674, 3 C.F.R. 215 (1990)), reprinted, as amended, in 5 U.S.C.A. § 7301 (1994). Specifically, § 101(d) prohibits receipt by employees of gifts or other items of monetary value from those doing business with the Government, regulated by the employee's agency or whose interests may be substantially affected by the employee's performance of duties. Also, § 101(j) prohibits employees from engaging in outside employment or activities that conflict with their official government duties or obligations. *Id.*

377. *NTEU*, 115 S. Ct. at 1024-31 (Rehnquist, C.J., dissenting).

378. *Id.* at 1024 (Rehnquist, C.J., dissenting).

379. *Id.* at 1025 (Rehnquist, C.J., dissenting).

achieve that end.³⁸⁰ The dissent, however, felt that the proper standard had been addressed by the Court in *Waters*.³⁸¹ The dissent agreed that the Government's interest in regulating speech is subordinate to an individual's right of expression, except when the individual is also a government employee, in which case what is a subordinate interest when the individual is not a government employee is elevated to a significant interest.³⁸² Chief Justice Rehnquist felt that substantial weight should have been given to the Government's predictions of harm, which the majority had discounted.³⁸³

Chief Justice Rehnquist challenged the majority for focusing on several isolated examples of the impact on employees and using these limited situations to abolish the entire honoraria ban.³⁸⁴ The dissent disagreed with the majority's view that federal employees below GS-16 would have negligible impact to confer favors.³⁸⁵ Rather, the dissent argued that any category of federal employee below Grade GS-16, including tax examiners, bank examiners, and enforcement officials, could have substantial power to confer favors.³⁸⁶ The dissent was also concerned that the majority ignored the fact that Congress had enacted a broad prophylactic rule in the Ethics Reform Act and jettisoned as inadequate the former system which required case-by-case determinations. These former case-by-case determinations required agency ethics officials to look at a particular fact situation and determine whether it did or did not constitute an ethical violation or a standard of conduct problem.³⁸⁷ Chief Justice Rehnquist found it ironic that the majority was requiring Congress to "resurrect a bureaucracy that it previously felt compelled

380. *Id.* (Rehnquist, C.J., dissenting).

381. *See id.* (Rehnquist, C.J., dissenting) (quoting *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994)).

382. *Waters*, 114 S. Ct. at 1887.

383. *See NTEU*, 115 S. Ct. at 1027 (Rehnquist, C.J., dissenting) (discussing Government's interest in preventing impropriety and appearance of impropriety).

384. *Id.* at 1027 (Rehnquist, C.J., dissenting).

385. *Id.* at 1028-29 (Rehnquist, C.J., dissenting). There is no longer a "Grade GS-16," although it was discussed in the Court's decision. Positions that were formerly classified as Grade 16 and above were done away with in 1990 in the Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, 104 Stat. 1423 (codified at 5 U.S.C. §§ 5301-5307 (1994)). How to handle Court's references to positions Grade 16 and below was of concern to the Office of Government Ethics (OGE), which advised agency ethics officials in a March 3, 1995, memorandum that it was discussing the matter with the Department of Justice. *See* Office of Government Ethics Memorandum, *Honoraria*, *supra* note 375.

386. *NTEU*, 115 S. Ct. at 1028 (Rehnquist, C.J., dissenting).

387. *Id.* at 1030 (Rehnquist, C.J., dissenting).

to replace and to equip it with resources sufficient to conduct case-by-case determinations.³⁸⁸

Justice O'Connor, while filing a separate concurrence in the judgment, also dissented in part.³⁸⁹ Justice O'Connor adhered to the efficacy of the Court's *Pickering* test, which balances the interests of the employee as a citizen against the interests of the Government as an employer in promoting the efficiency of the public services the Government performs through its employees.³⁹⁰ Justice O'Connor did not agree with the majority's reliance on a "meaningful distinction" between "*ex ante*" speech and "*ex post*" punishments.³⁹¹ Rather, she preferred a case-by-case analysis approach.³⁹² Justice O'Connor stated: "To draw the line based on a distinction between *ex ante* rules and *ex post* punishments, in my view, overgeneralizes and threatens undue interference with 'the government's mission as employer.'"³⁹³ Justice O'Connor concurred in the judgment, however, because application of the *Pickering* balancing test favored the employees.³⁹⁴ She acknowledged that although ordinarily great deference is given to Government predictions of harm used to justify restrictions on public speech, she believed that as the magnitude of the intrusion increased, so too did the burden on the Government to justify the necessity of the intrusion.³⁹⁵ According to Justice O'Connor, the Government had failed to marshal sufficient proof that the intrusion, namely the honoraria ban, was necessary.³⁹⁶ Moreover, certain loopholes Congress had created for a series of speeches or publications substantially weakened its arguments.³⁹⁷

Justice O'Connor dissented, however, with regard to the remedy espoused by the majority. She emphasized that the majority's remedy, overturning the honoraria ban as it related to all speech, should have been restricted solely to speech that bore no relationship to the individual's federal employment.³⁹⁸

388. *Id.* (Rehnquist, C.J., dissenting).

389. *Id.* at 1019-24 (O'Connor, J., concurring in judgment, dissenting in part).

390. *Id.* at 1020 (O'Connor, J., concurring in judgment, dissenting in part) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

391. *Id.* (O'Connor, J., concurring in part, dissenting in part).

392. *Id.* (O'Connor, J., concurring in part, dissenting in part).

393. *Id.* (O'Connor, J., concurring in part, dissenting in part) (quoting *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994)).

394. *Id.* at 1020-22 (O'Connor, J., concurring in part, dissenting in part).

395. *Id.* at 1021 (O'Connor, J., concurring in part, dissenting in part).

396. *Id.* (O'Connor, J., concurring in part, dissenting in part).

397. *Id.* (O'Connor, J., concurring in part, dissenting in part).

398. *Id.* at 1022-23 (O'Connor, J., concurring in part, dissenting in part).

3. *Sanjour v. Environmental Protection Agency: first application of the NTEU standard*

Appropriately, the first case which construed an *ex ante* challenge to the Government's attempt to regulate employee speech arose in the same court in which *NTEU* arose, and arose in the context of the honoraria ban. In *Sanjour v. Environmental Protection Agency*,³⁹⁹ the U.S. Court of Appeals for the District of Columbia Circuit (which had decided *NTEU* en route to the Court) applied the Court's teachings in *NTEU* to the question of governmental attempts to regulate employee speech that directly relates to employee's governmental job. Conversely, *NTEU* addressed Government attempts to regulate employee off-duty speech unrelated to a government position.

The D.C. Circuit granted a request for en banc review of its earlier decision upholding the Government's restriction on acceptance of honoraria connected with an employee's official position, but withheld its disposition of the case pending the Court's issuance of its opinion in *NTEU*.⁴⁰⁰ Based on *NTEU*, the court reversed its earlier decision.⁴⁰¹

a. *Crafting the "Pickering/NTEU" standard*

Sanjour involved two EPA employees who had been invited in 1991 by a North Carolina group known as "NC WARN" to come to North Carolina and talk at a public hearing about concerns over planned construction of a hazardous waste incinerator.⁴⁰² Both employees had subject matter expertise on this topic and had criticized EPA hazardous waste policies in the past.⁴⁰³ The combined effect of regulations and policies promulgated by the Office of Government Ethics, the General Services Administration, and the EPA itself required that before the employees could be reimbursed for travel to North Carolina they had to obtain prior approval from EPA officials.⁴⁰⁴ As a result, both employees turned down the offer and NC WARN subsequently canceled the public hearing.⁴⁰⁵

399. 56 F.3d 85 (D.C. Cir. 1995).

400. *Sanjour v. Environmental Protection Agency*, 56 F.3d 85, 90 n.6 (D.C. Cir. 1995).

401. *Id.* at 99. The case had a long procedural history. See *Sanjour v. Environmental Protection Agency*, 984 F.2d 434 (D.C. Cir. 1993), *aff'g* 786 F. Supp. 1033 (D.D.C. 1992).

402. *Sanjour*, 56 F.3d at 89.

403. *Id.* (explaining that employees had given speeches critical of EPA policies in unofficial capacity for more than decade).

404. *Id.* 88-89.

405. *Id.* at 89.

In October 1991, the employees instituted suit in district court, alleging both constitutional (First Amendment) and statutory violations.⁴⁰⁶ The district court granted summary judgment on all grounds except one that alleged a selective prosecution claim, and the employees appealed.⁴⁰⁷

The D.C. Circuit agreed that the *Pickering* balancing test applied. That is, the court must "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁴⁰⁸

At issue here, however, was not the test to be applied, the court of appeals noted, but rather the manner of its application. The facts in *Pickering* and most of its progeny dealt with after-the-fact circumstances involving discipline of a single employee who raised the First Amendment as an affirmative defense to the action being taken by the government actor. In *Sanjour*, however, government regulations operated to prohibit or substantially restrict "a broad category of [prospective] speech by a large number of potential speakers."⁴⁰⁹

Fortunately, the court noted that the NTEU decision offered "useful guidance" on applying *Pickering* to a case involving prospective speech.⁴¹⁰ The court concluded that a statute or a government regulation infringing on speech that acts as a wholesale deterrent to a broad category of expression, gives rise to far more serious concerns than any single supervisory decision, such as an *ex post* supervisory decision as in *Pickering*.⁴¹¹

The *Pickering*/NTEU test applied in *Sanjour* is: "The government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the government."⁴¹²

b. Applying the Pickering/NTEU standard in Sanjour

Weighing the interest of the government employees and the public against the Government's interest, the D.C. Circuit concluded that the

406. *Id.*

407. *Id.* 89-90.

408. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

409. *Sanjour*, 56 F.3d at 91.

410. *Id.*

411. *Id.* (citing *United States v. NTEU*, 115 S. Ct. 1003, 1014 (1995)).

412. *Id.* (citing *NTEU*, 115 S. Ct. at 1014 (quoting *Pickering*, 391 U.S. at 571)).

balance weighed in favor of employee free speech rights and against the Government's regulations.⁴¹³

The court recognized the government employees' interest in being reimbursed for travel expenses necessary for teaching, speaking or writing relating to their official duties.⁴¹⁴ The court rejected the Government's argument that its regulations did not ban speech outright, but simply removed an incentive, thus constituting only a moderate burden.⁴¹⁵ Citing *NTEU*, the court concluded that this was a substantial burden on employees, and, in fact, acted as a greater impediment than the ban struck down in *NTEU*.⁴¹⁶ The court was swayed also by the interest of unknown present and future government employees and audiences in delivering or receiving speech that otherwise would be suppressed.⁴¹⁷

Against this balance, the Government weighed in with two arguments. Initially the Government argued that the regulations attempted to avoid the appearance of impropriety, and this justified a requirement that employees could accept travel expense reimbursement only for appearances that had been pre-approved.⁴¹⁸ The court countered that the harm which the Government sought to address bore no relation to the distinction between "official" and "unofficial" employee speech, but instead derived from the interest a private source might have in attempting to exert influence over the actions of an employee.⁴¹⁹ Viewed from this perspective, the court noted that the appearance of impropriety would be the same regardless of whether the Government approved or disapproved, and in fact may be exacerbated if the Government put its stamp of approval on a speech when in fact there was an attempt by a private source to influence a government employee.⁴²⁰ The court noted that the Government dropped this approach at oral argument.⁴²¹

The second relevant governmental interest identified by the court was preventing government employees from using their public office for private gain, in essence an argument that permitting employees to receive reimbursement for expenses related to their official duties would amount to allowing them to be compensated twice for the same

413. *Id.* at 93-99.

414. *Id.* at 93.

415. *Id.*

416. *Id.* at 93-94.

417. *Id.* at 94.

418. *Id.*

419. *Id.*

420. *Id.* at 94-95.

421. *Id.* at 94.

work.⁴²² The court answered that the government regulations under review were both too underinclusive and overinclusive to accomplish the goals sought.⁴²³

The court stated that the underinclusiveness of the regulations was their "most troubling feature" because the regulations required only advance official approval but did not regulate the official appearances themselves.⁴²⁴ Similarly, the court found that the regulations were overbroad because they were not narrowly tailored to address the harm that the Government purportedly sought to protect against.⁴²⁵ According to the court, the Government had failed to adequately articulate the genuine harms that the regulations were meant to correct.⁴²⁶

The court expressed grave additional concerns that the practical effect of the regulations would be to stifle anti-government speech, particularly since the applicable regulations permitted official approval only for speech that was "within the mission of the agency."⁴²⁷ It was the unfettered discretion that the Government enjoyed in approving or disapproving speech that led the court to conclude that the regulations were impermissible and justified "an additional thumb on the employees' side of our scales."⁴²⁸

The dissent noted that the result reached by the majority was driven by how the majority characterized the issues involved and that, had they been characterized differently, under a *Pickering* balance, the regulations would have withstood scrutiny.⁴²⁹ The dissent argued that the majority divided up all the factors involved in the case and wound up overlooking the agency's objective as part of the "big picture."⁴³⁰

Now that the D.C. Circuit has provided a *Pickering*/*NTEU* standard for *ex ante* speech, considerations in *ex post* employee speech situa-

422. *Id.* at 94-95.

423. *Id.* at 95-98.

424. *Id.* at 95.

425. *Id.* at 97.

426. *Id.* at 98.

427. *Id.* at 96.

428. *Id.* at 97.

429. *Id.* at 99-100 (Sentelle, J., dissenting).

430. *Id.* at 101-02 (Sentelle, J., dissenting). Judge Sentelle is not alone in his dissent. The Office of Government Ethics has taken the position that *Sanjour* is wrongly decided, but that it did not have the authority to seek further judicial review. Memorandum from Stephen D. Potts, Director, United States Office of Government Ethics, to Designated Agency Ethics Officials, *Sanjour v. Environmental Protection Agency* (DO-95-026) (June 26, 1995). OGE advised federal agency ethics officials that the Department of Justice took the position that because the case was not a class action, it granted relief only to the two named plaintiffs, and the honoraria ban remained in effect for all other federal employees. *Id.*

tions—where the Government, as employer, seeks to impose sanctions on an employee and the employee asserts the First Amendment as a defense to the government action—still remains.

B. Ex Post Sanctions Against Public Employees

Whether the Court carves out new law in future cases, further distinguishing *ex ante* and *ex post* prohibitions, or whether Justice O'Connor convinces her colleagues to adopt a *Pickering* balance using a case-by-case approach, it is clear that whenever the Court does find valid a government *ex ante* rule prohibiting conduct before it occurs, and when a violation occurs, discipline against the offending employee is a likely result.⁴³¹ Where the offending conduct involves speech, however, the Government has another hurdle remaining. Stated another way, the employee still has a shield. The issue then becomes whether the offending speech is protected under the First Amendment.

1. Protecting public employee speech

a. Pickering v. Board of Education: purely public speech

In *Pickering v. Board of Education*,⁴³² the Court confronted the question of whether a well-meaning public employee, concerned over how local tax revenues would be spent at the school where he taught, could be disciplined by his employer, the local public high school.⁴³³ The offending high school teacher had written a letter to the editor of the local newspaper criticizing the allocation of school funds.⁴³⁴ The letter was critical of the division of revenues between the school's educational and athletic programs, and also alleged that the local school superintendent had pressured teachers not to oppose or criticize a school bond issue that subsequently failed.⁴³⁵ The teacher submitted the letter for publication after the bond issue had failed.⁴³⁶ The Court confronted a "bright-line" situation—the

431. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94-95 (1947) (holding that industrial worker could be removed from office under Hatch Act for engaging in political activity).

432. 391 U.S. 563 (1968).

433. See *Pickering v. Board of Educ.*, 391 U.S. 563, 568-75 (1968) (holding that teacher may not be disciplined for making statements on issues of public importance absent proof that statements were false, and were made knowingly or recklessly).

434. *Id.* at 566.

435. *Id.*

436. *Id.*

comment was public and there was no dispute that it concerned a matter of public concern.⁴³⁷

In *Pickering*, the Court struck a balance between a public employee's interest in making public comment on matters of public concern and a public employer's interest in promoting the efficiency of its public services.⁴³⁸ It was clear to the Court that a public employer could not constitutionally compel a public employee to relinquish his or her First Amendment right to comment on matters of public concern otherwise enjoyed by the employee.⁴³⁹ The Court, however, also recognized that the state had an interest in regulating the conduct of its employees in order to accomplish its public mission.⁴⁴⁰ The quandary facing the Court was how to strike an appropriate balance.⁴⁴¹

One issue in *Pickering* was whether the teacher could be held accountable for the correctness or accuracy of his public statements.⁴⁴² The school contended that the teacher had an obligation of loyalty by virtue of his employment with the school to ensure that any public comment was factually accurate.⁴⁴³ It contended that some of the teacher's statements were false and damaged the reputations of the school board and the school superintendent.⁴⁴⁴ The teacher, on the other hand, argued that the statements were not defamatory unless they were made with the knowledge that they were false or with reckless disregard for the accuracy of the statements.⁴⁴⁵

The Court unequivocally rejected any construction of the law that would have allowed the school board to terminate the teacher based on the level of criticism the teacher used in his letter.⁴⁴⁶ The Court also held that, absent proof of false statements knowingly and recklessly made by the teacher, the teacher could not be dismissed by the school board for exercising his right to speak on issues of public

437. *Id.* at 566-67. In *Pickering*, the Court dealt with comments contained in a published letter to the editor, while in *Waters*, comments were overheard in a cafeteria. In *Pickering*, the comments concerned how tax revenues would be spent for public education. In *Waters*, the "public concern" comments (quality of hospital care given) were intermingled with and virtually indistinguishable from the employee's personal workplace complaints. In this sense, then, *Pickering* provided a "bright-line" scenario which the Court did not have the luxury of in *Waters*.

438. *Id.* at 568.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 568-69.

443. *Id.*

444. *Id.* at 570.

445. *Id.* at 569 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

446. *Id.* at 570.

importance.⁴⁴⁷ The Court placed great weight on the public's interest in having free and unhindered debate on matters of public importance.⁴⁴⁸ Accordingly, the "core value"⁴⁴⁹ of the First Amendment overrode the interest of the school in sanctioning the employee.⁴⁵⁰

A final aspect of importance in *Pickering* was that the teacher did not comment on matters regarding his own employment relationship with his employer.⁴⁵¹ The Court also noted that the teacher's employment relationship with the school board and with the superintendent was "not the kind of close working relationship for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."⁴⁵² Finally, there was the source of the teacher's information. It did not come from internal school documents, but to get the information he used, the teacher borrowed copies of back issues from the local newspaper spanning a ten-month period.⁴⁵³

b. Connick v. Myers: attributes of both public and private comment

The issue confronting the Court in *Connick v. Myers*⁴⁵⁴ was whether the employee's statements dealt with matters of public concern or whether the statements were within the context of her employment.⁴⁵⁵ The case grew out of a dispute between an Assistant District Attorney in New Orleans and her boss, the District Attorney.⁴⁵⁶ When the District Attorney proposed to transfer the employee from one section to another within the office, she strongly opposed.⁴⁵⁷ In an effort to forestall the transfer, the employee drafted a questionnaire.⁴⁵⁸ The questionnaire raised issues about office morale, office transfer policy, need for a grievance committee, and whether employees had been pressured to work in political campaigns.⁴⁵⁹ Although she talked to the Prosecuting Attorney the next day and he encouraged her to accept the transfer, the employer

447. *Id.* at 574-75.

448. *Id.*

449. *Id.* at 573.

450. *Id.*

451. *Id.* at 569-70.

452. *Id.* at 570.

453. *Id.* at 575.

454. 461 U.S. 138 (1983).

455. *Connick v. Myers*, 461 U.S. 138, 143-47 (1983).

456. *Id.* at 140-42.

457. *Id.* at 140-41.

458. *Id.* at 141.

459. *Id.*

did not mention the questionnaire.⁴⁶⁰ Instead, when he left the office, she began distributing the questionnaire.⁴⁶¹ After learning she was circulating the questionnaire, another Assistant District Attorney notified the District Attorney.⁴⁶² The District Attorney confronted her and advised her she was being terminated.⁴⁶³ The employee sued under 42 U.S.C. § 1983, contending that she was fired in violation of her First Amendment rights.⁴⁶⁴ Both the district court and the court of appeals held that the questionnaire involved matters of public concern and that the state had not clearly demonstrated that the questionnaire substantially interfered with the operations of the District Attorney's office.⁴⁶⁵

The Supreme Court disagreed, however. It found that both the district court and the court of appeals had erred in striking the *Pickering* balance in favor of the employee.⁴⁶⁶ The Court stated that if the questionnaire did not fairly constitute speech on a matter of public concern, then it was unnecessary to review the circumstances of the employee's dismissal.⁴⁶⁷ The Court found that the question of whether employees in the District Attorney's office felt pressured to take part in political campaigns potentially involved a matter of "public concern."⁴⁶⁸ Considering the record in its entirety, the Court ultimately held that this did not rise to the level of matters of "public concern" entitled to constitutional protection.⁴⁶⁹

When discerning whether there is an element of public concern in public employee speech, the Court advised that the content, form, and text of the speech should be determined by a reviewing court from the record as a whole.⁴⁷⁰ Of particular importance to the Court was the context in which the questionnaire was developed.⁴⁷¹ It was not, the Court said, developed out of academic interest, but rather it arose from a dispute that had occurred in the workplace.⁴⁷² The Court observed that "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.* at 141-42.

465. *Myers v. Connick*, 654 F.2d 719 (5th Cir.), *aff'g* 507 F. Supp. 752, 759-60 (E.D. La. 1981), *rev'd*, 461 U.S. 138 (1983).

466. *Connick*, 461 U.S. at 142.

467. *Id.* at 146.

468. *Id.*

469. *Id.* at 148.

470. *Id.* at 147-48.

471. *Id.* at 148.

472. *Id.* at 153.

application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office."⁴⁷³

Under this framework, the Court ultimately held that when a public employee speaks not as a citizen on matters of public concern, but as an employee on matters of personal concern, federal courts are not the appropriate forum for reviewing personnel decisions that result from the employee's actions.⁴⁷⁴ The Court rejected what it perceived in *Connick* as an attempt to "constitutionalize" the employee grievance process.⁴⁷⁵

2. *Applying the Connick test in Waters v. Churchill*

It is important at the outset to hone in on the nature of the speech involved in *Waters v. Churchill*,⁴⁷⁶ and the context within which it arose. The constitutional issues arose when a public hospital in Illinois fired a nurse, Cheryl Churchill, for remarks she made to a co-worker during a dinner conversation in the hospital cafeteria.⁴⁷⁷ The co-worker, another nurse, had expressed interest in transferring to the obstetrics department where Churchill worked.⁴⁷⁸ Other hospital employees overheard parts of the conversation.⁴⁷⁹ One employee reported that Churchill had made negative comments about Churchill's immediate supervisor, Cynthia Waters, a fact that was subsequently verified by Churchill's dinner partner in a meeting with Waters.⁴⁸⁰ Reportedly, Churchill was unhappy over an evaluation that Waters had given her and was disparaging of the obstetrics department.⁴⁸¹

Churchill's version of what occurred was different.⁴⁸² When interviewed by management, she acknowledged making certain comments, but contended that her comments were not about matters personal to her, but rather about matters involving the hospital's "cross-training" policy that allowed nurses from one overstaffed department to work in another understaffed department.⁴⁸³ Although she acknowledged making comments about one of her

473. *Id.*

474. *Id.* at 147.

475. *Id.* at 154.

476. 114 S. Ct. 1878 (1994).

477. *Waters v. Churchill*, 114 S. Ct. 1878, 1882 (1994).

478. *Id.*

479. *Id.*

480. *Id.* at 1882-83.

481. *Id.* at 1883.

482. *Id.*

483. *Id.*

supervisors, Churchill claimed that they concerned matters of staffing policy that were impeding nursing care.⁴⁸⁴ Recollections of two of the co-workers who overheard the conversation tended to support Churchill's version.⁴⁸⁵

Thus, it was unclear exactly what was said. According to the hospital, Churchill's remarks were insubordinate, disparaging, and disrespectful to her superiors, and could have had the effect of undermining supervisory authority. The hospital believed that Churchill's remarks did not relate to matters of public concern and impaired its ability to render services efficiently to the public.⁴⁸⁶ According to Churchill, however, her comments concerned matters of public concern because they addressed the staffing policies of a public hospital and matters that affected general health care at a public facility.⁴⁸⁷ The issue was whether the district court should "apply the *Connick* test to the speech as the government employer found it to be, or should [the court] ask the jury to determine the facts for itself?"⁴⁸⁸

The district court held that Churchill's speech was not a matter of public concern, and therefore was not protected. The court found that even if Churchill's speech involved a matter of public concern, the disruption it caused to the hospital was so great that the hospital could fire Churchill with impunity.⁴⁸⁹ The court of appeals disagreed.⁴⁹⁰ Viewing Churchill's speech in the light most favorable to her, it found that she had spoken on matters of public concern relating to alleged violation of state nursing regulations and the quality of care the public hospital provided patients.⁴⁹¹

It is important to recall that the Supreme Court in *Waters* did not decide when speech by a government employee is protected by the First Amendment; instead, the Court established the test to be applied when determining whether speech was purely private or part public, and who should apply the test—the employer, a reviewing court, or a jury.⁴⁹² The question before the Court was from whose perspec-

484. *Id.*

485. *Id.*

486. *Id.* at 1883-84.

487. *Id.*

488. *Id.* at 1884.

489. *Churchill v. Waters*, 731 F. Supp. 311, 318-22 (C.D. Ill. 1990), *rev'd*, 977 F.2d 1114 (7th Cir. 1992).

490. *Churchill v. Waters*, 977 F.2d 1114, 1122-26 (7th Cir. 1992), *vacated and remanded*, 114 S. Ct. 1878 (1994).

491. *Id.* at 1122-23.

492. *Waters v. Churchill*, 114 S. Ct. 1878, 1884 (1994).

tive the facts should be viewed.⁴⁹³ The Court asked whether the *Connick* test should apply to the speech as understood by the government employer, or whether the jury should assess the speech for itself.⁴⁹⁴

Justice Scalia diverged from the plurality in a separate concurring opinion on this critical point.⁴⁹⁵ Justice O'Connor, writing for the plurality, placed the burden on the public employer to conduct a reasonable investigation beforehand to determine whether the employee's speech met the *Connick* test and was entitled to First Amendment protection.⁴⁹⁶ In Justice O'Connor's view, the jury or the court would then have the opportunity to conduct a second review to determine whether the public employer's investigation was reasonable.⁴⁹⁷ She felt this would provide greater protection for the employee.⁴⁹⁸ According to Justice O'Connor, the employee would have "two opportunities to be vindicated."⁴⁹⁹

Despite advocating this two-tiered approach, Justice O'Connor was concerned that it would present a problem for management. She noted that managers would be required to place themselves in the shoes of the jury, trying to ferret out how a jury might construe what had transpired rather than relying on what conclusions the manager, as an experienced professional, would reach.⁵⁰⁰ After grappling with this problem, however, she concluded that "employer decision making will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be."⁵⁰¹ Justice O'Connor pointed out that the Court had never specified the quantum of proof of workplace disruption that would be required before a public employer could take action against an employee, where the employee had engaged in protected speech.⁵⁰² She also noted that the Court had never established a general test to determine when a procedural safeguard, such as an investigation by the public employer, was required by the First Amendment.⁵⁰³ Nor had the Court ever attempted to identify specific types of public employee speech that

493. *Id.*

494. *Id.*

495. *See id.* at 1893-98 (Scalia, J., concurring in judgment).

496. *Id.* at 1889.

497. *Id.*

498. *Id.* at 1885.

499. *Id.*

500. *Id.* (mentioning concern that employer would have to consider evidentiary issues such as hearsay and bias).

501. *Id.* at 1889.

502. *Id.*

503. *Id.* at 1889-93.

were so lacking in value that they could not be accorded First Amendment protection.⁵⁰⁴ Noting that the Court did not “purport to do so now,”⁵⁰⁵ Justices O’Connor and Scalia agreed that the Constitution mandated some procedural protection.⁵⁰⁶ In Justice O’Connor’s view, the crux of the issue was whether a bright line rule could be established that would provide an answer for every case.⁵⁰⁷ Justice O’Connor believed that lower courts must use a case-by-case approach when subjecting a public employer to a “reasonableness” standard for review of its disciplinary actions in employee protected speech cases.⁵⁰⁸

Justice Scalia, however, criticized Justice O’Connor’s approach as placing a burden on management to not only investigate, but to “investigate . . . to determine whether . . . to investigate.”⁵⁰⁹ Justice Scalia felt that management should be entitled to rely on the facts as it found them, and a reviewing court should be limited to inquiring only about whether there might be some pretext involved in the management’s decision.⁵¹⁰ In Justice Scalia’s view, the Court already had a bright line rule. He was unhappy with Justice O’Connor for muddying the water:

[O]ur previously stated rule [is] that a public employer’s disciplining of an employee violates the Speech and Press Clause of the First Amendment only if it is in retaliation for the employee’s speech on a matter of public concern. Justice O’Connor would add to this prohibition a requirement that the employer conduct an investigation before taking disciplinary action in certain circumstances. This recognition of a broad new First Amendment procedural right is in my view unprecedented, superfluous to the decision in the present case, unnecessary for protection of public-employee speech on matters of public concern and unpredictable in its application and consequences.⁵¹¹

Although the question of how to apply *Connick* was not answered dispositively, federal managers would be well-advised to heed Justice O’Connor’s approach until the Court provides some clearer guidance.

504. *Id.* (explaining that Court still has responsibility to perform First Amendment analysis in case at bar using particular context of case as guide).

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.* at 1886.

509. *Id.* at 1897 (Scalia, J., concurring in judgment) (describing Justice O’Connor’s approach as posing more questions than answers).

510. *Id.* at 1895 (Scalia, J., concurring in judgment) (explaining that pretext inquiry will provide suitable protection for “public interest speech” without creating new First Amendment rights).

511. *Id.* at 1893 (Scalia, J., concurring in judgment).

From Justice O'Connor's perspective, *Waters* is simply a small cautious step by the Court toward expanding federal employee due process rights further that will not "unduly burden" employer decision-making.⁵¹² From Justice Scalia's view, it is a quantum leap, expanding First Amendment procedure "into brand new areas."⁵¹³ From both opinions, it is clear that *Waters* expands federal employee due process rights while attempting to reserve for public managers the ultimate ability to determine whether public employee speech detracts from the Government's ability to perform its mission.

IV. IMPACT OF *WATERS* AND *NTEU* ON FEDERAL CIRCUIT AND MERIT SYSTEM PROTECTION BOARD PRACTICE

Neither *Waters* nor *NTEU* appear to have an impact on the MSPB's or the Federal Circuit's prior decisions.⁵¹⁴ Of the two, *Waters* will have more direct impact on Federal Circuit and MSPB jurisprudence

512. *Id.* at 1889 (stating that objective analysis of facts will prevent trampling on First Amendment rights without burdening employer).

513. *Id.* at 1894 (Scalia, J., concurring in judgment) (stating that procedural requirements endorsed by majority exceed due process protections offered to public employees).

514. A review of MSPB and Federal Circuit case law conducted after *Waters* and *NTEU* were decided found that federal employee First Amendment issues have been raised before in both forums, resulting in at least 33 separate opinions. The review found that on at least 26 occasions, the MSPB or the Federal Circuit had engaged in substantive discussion of issues involving First Amendment rights. It is worth noting the context within which these issues are raised. The cases arise when management, upset at some form of workplace conduct by a particular employee, moves to discipline the employee and the employee raises the First Amendment as an affirmative defense. *See, e.g.,* *Mings v. Department of Justice*, 813 F.2d 384 (Fed. Cir. 1987); *Stanek v. Department of Transp.*, 805 F.2d 1572 (Fed. Cir. 1986); *Means v. Department of Labor*, 60 M.S.P.R. 108 (1993); *Social Sec. Admin. v. Whittlesey*, 59 M.S.P.R. 684 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994); *Higgins v. United States Postal Serv.*, 43 M.S.P.R. 66 (1989); *Henry v. Department of Navy*, 40 M.S.P.R. 482 (1989), *aff'd*, 902 F.2d 949 (Fed. Cir. 1990); *Jackson v. Small Business Admin.*, 40 M.S.P.R. 137 (1989); *Sigman v. Department of Air Force*, 37 M.S.P.R. 352 (1988); *Wenzel v. Department of Interior*, 33 M.S.P.R. 344 (1987); *Lewis v. Bureau of Engraving & Printing*, 29 M.S.P.R. 447 (1985); *Ledeaux v. Veterans Admin.*, 29 M.S.P.R. 440 (1985); *Osokow v. Office of Personnel Management*, 25 M.S.P.R. 319 (1984); *Kehrier v. Department of Justice*, 27 M.S.P.R. 477 (1985); *Barnes v. Department of Army*, 22 M.S.P.R. 243 (1984), *aff'd*, 840 F.2d 972 (D.C. Cir. 1988); *Special Counsel v. Biggs*, 16 M.S.P.R. 355 (1983); *Brown v. Department of Transp. (FAA)*, 15 M.S.P.R. 224 (1983), *remanded*, 735 F.2d 543 (Fed. Cir. 1984), *decision on remand* 21 M.S.P.R. 572 (1984); *Farris v. United States Postal Serv.*, 14 M.S.P.R. 568 (1983); *Curry v. Department of Navy*, 13 M.S.P.R. 327 (1982); *Johnson v. Department of Transp. (FAA)*, 13 M.S.P.R. 187 (1982), *aff'd on other grounds*, 735 F.2d 510 (Fed. Cir. 1984); *Prescott v. National Inst. of Child Health & Dev.*, 6 M.S.P.R. 252 (1981); *Bradley v. Defense Communications Agency*, 3 M.S.P.R. 498 (1980); *Quarry v. General Accounting Office*, 3 M.S.P.R. 200 (1980).

A number of other cases have raised First Amendment defenses, but the MSPB or the Federal Circuit did not reach those issues because the cases were decided on other grounds, either procedural or substantive. *See Manning v. MSPB*, 742 F.2d 1424 (Fed. Cir. 1984); *Ferdon v. United States Postal Serv.*, 60 M.S.P.R. 325 (1994); *Massimino v. Veterans Affairs*, 58 M.S.P.R. 318 (1993); *Umshler v. Department of Interior*, 55 M.S.P.R. 593 (1992), *aff'd*, 6 F.3d 788 (Fed. Cir. 1993); *Jones v. United States Postal Serv.*, 27 M.S.P.R. 193 (1985); *Karapinka v. Department of Energy*, 6 M.S.P.R. 124 (1981).

because it involves disciplinary action against a public employee, while *NTEU* involves the underlying constitutionality of a statute. Although the Federal Circuit's and the MSPB's case law adhere to *Pickering* and *Connick*, it is useful nonetheless to examine the context in which cases involving similar scenarios arise within both jurisdictions.

A. Early Decisions by the MSPB

The earliest MSPB case involving a First Amendment question was decided shortly after the MSPB was created in 1980. In *Bradley v. Defense Communications Agency*,⁵¹⁵ an employee was removed from his position in 1977 after sending a memorandum to his immediate supervisor and copies of the memorandum to three other supervisors in his chain of command that criticized reliability studies of a defense computer network.⁵¹⁶ The case was the subject of a decision by the MSPB's predecessor, the Federal Employees Appeals Authority in 1978.⁵¹⁷ Timeliness was an issue. The employee submitted what he claimed was new and material evidence not originally available to him, but he failed to explain why he waited more than five months after the information came to his attention.⁵¹⁸ The MSPB denied the employee's petition to reopen, but found that because his statements appeared to be constitutionally protected, it reopened the case on its own motion and remanded it to an administrative law judge for further proceedings.⁵¹⁹ The *Bradley* decision did not refer to the *Pickering*⁵²⁰ balancing test.

The first MSPB case to refer to the *Pickering* balancing test occurred one year later in *Prescott v. National Institute of Child Health and Development*.⁵²¹ *Prescott* involved a senior scientist's dispute with his agency director over the scientist's views of the agency's mission.⁵²² After research proposals that Prescott had prepared were rejected because his supervisor thought they went beyond the scope of the agency's mission, and when he was denied permission to speak at

515. 3 M.S.P.R. 498 (1980).

516. *Bradley v. Defense Communications Agency*, 3 M.S.P.R. 498, 499-500 (1980).

517. *Id.* (citing Aug. 9, 1978 decision of Federal Employees Appeals Authority). The decision advised the employee (under the regulations then in effect) that he could seek reopening and reconsecration within a reasonable time after receipt of the decision. On November 29, 1979, he did so. By the time his request was acted on the MSPB had come into existence and took over the case.

518. *Id.* at 500.

519. *Id.* at 500-01 (finding that field office limited employee's ability to develop case).

520. For a discussion of the *Pickering* balancing test, see *supra* notes 432-506 and accompanying text (striking balance between employee interest in public commentary and employer interest in workplace efficiency).

521. 6 M.S.P.R. 252 (1981).

522. *Prescott v. National Inst. of Child Health & Dev.*, 6 M.S.P.R. 252, 254-55 (1981).

certain professional conferences, he filed an administrative grievance against the director.⁵²³ While the grievance was pending, Prescott wrote several letters criticizing the director's view of the agency's mission to colleagues in the scientific community outside of his agency.⁵²⁴ He used government time, employees, materials, and franked postage-paid envelopes to send the letters.⁵²⁵ Also, he signed them in his official capacity.⁵²⁶

The letters generated great response and "outrage" from recipients, and it took considerable effort for the agency to rectify matters.⁵²⁷ Prescott was subsequently removed for misusing his official position and for using government resources for personal matters.⁵²⁸ He asserted that his firing for sending these letters violated his First Amendment right to free speech.⁵²⁹

The MSPB agreed with the Presiding Official's⁵³⁰ reliance on the balancing test set forth in *Pickering* and *Mount Healthy City School District Board of Education v. Doyle*⁵³¹ to determine whether the interests of Prescott, as a citizen, in commenting on matters of public concern, were outweighed by the interest of the Government, as an employer, in promoting the efficiency of the public service.⁵³² The Presiding Official had decided that the Government's interest in promoting efficiency outweighed Prescott's First Amendment rights.⁵³³ On appeal, the MSPB determined that Prescott's efforts were meant to further his own private interests in an internal dispute within the agency by taking his fight outside the agency.⁵³⁴ The MSPB thus held that Prescott's actions were not protected by the First Amendment.⁵³⁵ In arriving at this result, the MSPB presaged the

523. *Id.* at 254.

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.* at 256.

528. *Id.* at 256-57.

529. *Id.*

530. Under MSPB regulations, the Presiding Official is now called the Administrative Judge. 15 C.F.R. § 1201.4(a) (1995). When the MSPB first established its administrative hearing procedures, the hearing official who heard the employee's appeal was called a "Presiding Official." See 54 Fed. Reg. 53,501, 53,501-02 (Dec. 29, 1989). This was subsequently changed from "Presiding Official" to "Administrative Judge" to more accurately describe the hearing official's adjudicatory function. *Id.* If an Administrative Judge's decision is adverse to the employee, the employee can appeal the decision to the three-member MSPB. 5 C.F.R. § 1201.114-.118 (1995).

531. 429 U.S. 274 (1977).

532. *Prescott*, 6 M.S.P.R. at 255.

533. *Id.* (finding that employee wrote letter to bolster his own position, and not as matter of public concern).

534. *Id.*

535. *Id.* at 256.

Court's approach in *Connick* concerning whether workplace related speech involved a matter of public concern or was based on the purely private motives of the employee.⁵³⁶

B. First Amendment Review in the Air Traffic Controllers Strike by the MSPB and Federal Circuit

One of the Federal Circuit's most significant First Amendment decisions arose out of the 1981 air traffic controller strike. The Federal Circuit and the MSPB had the opportunity to review the air traffic controller case in light of both *Pickering* and *Connick*.

The MSPB's first decision, *Brown v. Department of Transportation*,⁵³⁷ came less than a month after the Court decided *Connick*.⁵³⁸ Interestingly, the case involved a management air traffic control official who did not participate in the strike, but who was removed from his position for his comments concerning the work stoppage.⁵³⁹ Harold Brown had been an agency employee for almost twenty-five years when he was removed in September 1981.⁵⁴⁰ Brown worked at the New York Air Traffic Control Center, supervising approximately nine air traffic controllers.⁵⁴¹ On the evening of August 4, 1981, while off-duty, he went to the local PATCO union hall in Mineola, New York.⁵⁴² He claimed that his purpose was to inform those air traffic controllers who he supervised that he was still working.⁵⁴³ He stated that he then somehow found himself at a podium in the union hall and told a listening crowd, *inter alia*, "I'm so happy you're together. Stay together, please, because if you do, you'll win."⁵⁴⁴ News media representatives were present and his "stay together" remarks were recorded and subsequently broadcasted nationwide on the ABC television news program "Nightline."⁵⁴⁵ Unfortunately for Brown, his supervisor saw the television program that evening and within twenty-four hours Brown received a letter proposing his removal from

536. See *Connick v. Myers*, 461 U.S. 138, 143 (1983) (determining whether speech was matter of public concern).

537. 15 M.S.P.R. 224 (1983), *aff'd in part, rev'd in part*, 735 F.2d 543 (Fed. Cir. 1984).

538. *Connick v. Myers* was decided April 20, 1983. 461 U.S. at 138. The MSPB's first decision in *Brown* was issued May 19, 1983. *Brown v. Department of Transp. (FAA)*, 15 M.S.P.R. 224, 225 (1983), *aff'd in part, rev'd in part*, 735 F.2d 543 (Fed. Cir. 1984).

539. *Brown*, 15 M.S.P.R. at 225.

540. *Brown v. Department of Transp. (FAA)*, 735 F.2d 543, 544 (Fed. Cir. 1984).

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.* at 545.

545. *Id.*

the federal service for statements contradicting President Reagan's public orders directing striking controllers to return to work.⁵⁴⁶

Brown was subsequently removed for misconduct and he appealed.⁵⁴⁷ The Presiding Official found that the agency had established, by a preponderance of the evidence, that Brown's remarks amounted to approval of and support for the strike.⁵⁴⁸ The Presiding Official, however, further found that Brown's remarks constituted free speech under the First Amendment.⁵⁴⁹ Accordingly, the Presiding Official held that the agency could demonstrate "no legitimate interest in efficiency that outweigh[ed] appellant's interest in free speech."⁵⁵⁰ The Presiding Official reversed the agency's removal, and the agency petitioned the MSPB for review.⁵⁵¹

The MSPB recognized that the balancing test of *Pickering* should be used to determine whether a public employee's speech was or was not protected.⁵⁵² The MSPB also recognized that in the recent *Connick*⁵⁵³ decision, the Supreme Court had decided that in public employee disciplinary actions, First Amendment protection for public employee speech extended only to speech on matters of public concern.⁵⁵⁴ The MSPB noted that the Court in *Connick* had found that the Government's burden for justifying a particular personnel action varied with the degree of public concern involved in the subject matter of the speech.⁵⁵⁵ At the time of Brown's remarks, the country was in real danger of a virtual shutdown of all air travel and shipping.⁵⁵⁶ The MSPB noted first, that only 2308 of 9034 controllers who were scheduled to report for work the day the strike was called did so, and second, that within the first five days of the strike, the FAA was forced to cancel approximately 26,000 flights and operate at sixty-nine percent capacity.⁵⁵⁷ Viewing Brown's remarks in this context, the MSPB found that his comments were not on matters of

546. *Id.*

547. *Id.*

548. *Id.*

549. *Brown v. Department of Transp. (FAA)*, 15 M.S.P.R. 224, 225 (1983) (citing decision of regional board).

550. *Id.* at 226 (quoting Presiding Officer).

551. *Id.*

552. *Id.* ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1988))).

553. *Connick v. Myers*, 461 U.S. 138 (1983).

554. *Brown*, 15 M.S.P.R. at 229 (explaining that federal court was appropriate forum for matters of public concern, not for personnel matters).

555. *Id.* at 230.

556. *Id.*

557. *Id.*

public concern because of the audience (local air traffic controllers), and content of the remarks (no information or viewpoint regarding the strike that could be construed as of significant interest to the general public in terms of air safety or issues involved in the strike).⁵⁵⁸ Given these factors, the MSPB held that Brown's speech was entitled only to limited First Amendment protection⁵⁵⁹ so that the agency's decision to fire him for remarks made to the striking air traffic controllers did not infringe on his First Amendment rights.⁵⁶⁰ The MSPB thus reversed the decision of the Presiding Official and sustained the agency's decision to remove Brown.⁵⁶¹

Brown appealed the MSPB's decision to the Federal Circuit.⁵⁶² The Federal Circuit disagreed with the MSPB that the remarks were not matters of public concern, but found that the *Pickering* balance tilted in favor of the agency.⁵⁶³ The court, however, examining the appropriateness of the penalty, found that removal was too harsh given the circumstances.⁵⁶⁴ The Federal Circuit looked to the "content, form and context" of Brown's remarks "as revealed by the whole record."⁵⁶⁵ While Brown's remarks were indeed made at a union hall with union members present, journalists were also present.⁵⁶⁶ Further, his comments were made in a highly charged atmosphere.⁵⁶⁷ Also, he made other comments to reporters after he left the podium that the strike was illegal but that he nonetheless supported some of the demands made by the strikers.⁵⁶⁸ Weighing all this, the Federal Circuit concluded that Brown's comments rose "to the level of speech on a matter of urgent public concern."⁵⁶⁹

Applying what it characterized as the "delicate balancing process"⁵⁷⁰ of *Pickering*, the Federal Circuit nonetheless weighed the balance in favor of the agency.⁵⁷¹ The Federal Circuit found that the strike was nationwide, that the strike was both illegal and criminal

558. *Id.* at 233.

559. *Id.*

560. *Id.* (finding that FAA did not have to tolerate employee's disruptive activity given extent of labor crisis).

561. *Id.*

562. *Id.* at 236.

563. *Brown v. Department of Transp. (FAA)*, 735 F.2d 543, 548 (Fed. Cir. 1984) (holding that severity of national crisis outweighed employee's interest in public commentary).

564. *Id.* at 548-49.

565. *Id.* at 546 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

566. *Id.*

567. *Id.*

568. *Id.*

569. *Id.*

570. *Id.*

571. *Id.* at 547-48.

under federal law, and that a vital artery of the nation's transportation system was adversely affected.⁵⁷² The Federal Circuit was also struck by the timing of Brown's remarks, which occurred less than thirty-six hours after the strike had been called and within the forty-eight hour grace period authorized by President Reagan for the strikers to return to work.⁵⁷³ It also weighed in Brown's status as a supervisor and his numerous years of experience, which made him one to whom the strikers might look for guidance.⁵⁷⁴ The court further found that cooperation, loyalty, and trust were critical among those tasked with managing the operation of a complex, sophisticated transportation system in which hundreds of lives were at stake at any given moment and split second judgments were often required.⁵⁷⁵ Accordingly, the court found that "the interest of the agency did, in this national emergency, outweigh Brown's interest in free speech, such that his remarks are not constitutionally protected."⁵⁷⁶

The Federal Circuit nonetheless found that the agency had overreacted in imposing an unreasonable penalty, given Brown's long years of service, his dedication, and his exhortation to the strikers to "all come back."⁵⁷⁷ On remand to the MSPB, the removal order was canceled, and Brown was ordered demoted to a nonsupervisory position with the least possible reduction in grade.⁵⁷⁸

C. *First Amendment Review by the MSPB and Federal Circuit in Other Cases*

1. *MSPB cases*

The *Waters* decision held that a public employer was required to conduct an initial investigation into whether comments made by an employee were protected by the First Amendment before taking disciplinary action.⁵⁷⁹ Although the MSPB did not hear a case specifically involving the adequacy of an employer's investigation as

572. *Id.* at 547.

573. *Id.*

574. *Id.*

575. *Id.*

576. *Id.* at 548.

577. *Id.*

578. *Brown v. Department of Transp. (FAA)*, 21 M.S.P.R. 572, 573 (1984).

579. *Waters v. Churchill*, 114 S. Ct. 1878, 1882 (1994) (holding that employer must objectively analyze content of speech). Justice O'Connor characterized this as "two opportunities to be vindicated." *Id.* at 1885. Justice Scalia, in his separate concurring opinion was less charitable to Justice O'Connor's view. He characterized it as a needless requirement to "investigate . . . to determine whether . . . to investigate." *Id.* at 1897 (Scalia, J., concurring in judgment).

to whether a public employee's statements were protected by the First Amendment, *Barnes v. Department of Army* dealt with a similar type of investigation for disciplinary action.⁵⁸⁰ The agency removed a computer programmer for making false and malicious statements "with the intent to harm the reputations, authority and official standing of agency employees."⁵⁸¹ The employee wrote six letters alleging that various agency personnel had perjured themselves in testimony at a hearing.⁵⁸² In upholding the agency's removal notwithstanding the employee's claims of First Amendment protection, the MSPB noted:

It also adversely affected the efficiency of the agency as it became necessary to conduct an extensive investigation to determine the veracity of appellant's allegations, when he had every reason to know the falsity of the charges and every opportunity to determine the accuracy of the allegations. Consequently, we find that these statements are not entitled to the protection of the First Amendment.⁵⁸³

Other MSPB decisions have exposed the tension between statutory protections against discrimination in the workplace and claims that alleged discriminatory remarks are entitled to First Amendment protection so as to shield the speaker from possible discipline. This tension can be seen in *Curry v. Department of Navy*,⁵⁸⁴ where a female apprentice reported to her supervisor a conversation in which a machinist foreman denigrated the place of women in the machine shop as well as in the apprentice program.⁵⁸⁵ When discipline was proposed, the foreman asserted that his comments were protected by the First Amendment.⁵⁸⁶ Citing *Pickering*, the MSPB held that an agency, as a public employer, may properly regulate speech that is directly related to the "employment milieu as opposed to the public forum" in sustaining the agency's disciplinary action.⁵⁸⁷ In *Higgins*

580. 22 M.S.P.R. 243 (1984), *aff'd*, 840 F.2d 972 (D.C. Cir. 1988).

581. *Barnes v. Small*, 22 M.S.P.R. 243, 244 (1984), *aff'd*, 840 F.2d 972 (D.C. Cir. 1988).

582. *Id.* at 245.

583. *Id.* at 247.

584. 13 M.S.P.R. 327 (1982) (holding that employee's sexist remarks were not protected by First Amendment).

585. *Curry v. Department of Navy*, 13 M.S.P.R. 327, 328 (1982) (holding that employee's demotion resulting from sexist remark to co-worker did not violate right to free speech under First Amendment). The court in *Holland v. Department of Air Force*, 31 F.3d 1118 (Fed. Cir. 1994), in which the court, finding it unnecessary to reach the First Amendment issue, reversed the agency's decision to demote a warehouse foreman for making derogatory remarks to women in the workplace. *Id.* at 1121. The court held that the charges were insufficiently vague as a matter of law to support the discipline imposed. *Id.*

586. *Curry*, 13 M.S.P.R. at 328.

587. *Id.* at 332.

v. United States Postal Service,⁵⁸⁸ an employee was removed for making obscene remarks during a lecture and for distributing a handout that repeated many of the same remarks.⁵⁸⁹ The MSPB held that the employee enjoyed no First Amendment protection.⁵⁹⁰

In other decisions the MSPB has shown a strong propensity to uphold management action against claims by employees of First Amendment protections. In *Lewis v. Bureau of Engraving & Printing*,⁵⁹¹ an employee wrote a letter regarding racial problems to which he allegedly had been subjected.⁵⁹² As a result of the letter, the employee was disciplined for being absent without leave (AWOL) and insubordination.⁵⁹³ The employee contended that the information he provided in the letter concerning racial problems was protected by the First Amendment.⁵⁹⁴ The MSPB disagreed and held that the First Amendment public concern was only tangential and that the employee's activities were disruptive to the workplace.⁵⁹⁵ In *Osokow v. Office of Personnel Management*,⁵⁹⁶ the MSPB upheld the removal of an employee for a pattern of disrespectful conduct toward his supervisors stemming from the distribution of leaflets outside the Office of Personnel Management's Los Angeles and San Francisco offices.⁵⁹⁷ The leaflets asked employees if they were tired of being subjected to "unscrupulous supervisions," and advised them that if so, they should plan to organize a "federal employees complaint day."⁵⁹⁸ Similarly, in *LeDeaux v. Veterans' Administration*,⁵⁹⁹ the MSPB held that allegations contained in criminal charges filed in state court by an employee against his supervisor were not protected by the First Amendment because the statements had an adverse impact on the agency's mission.⁶⁰⁰ In *Sigman v. Department of Air Force*,⁶⁰¹ the MSPB did not overturn the agency's removal of an employee who circulated a four-page memo-

588. 43 M.S.P.R. 66 (1989).

589. *Higgins v. United States Postal Serv.*, 43 M.S.P.R. 66, 67 (1987).

590. *Id.* at 68-69.

591. 29 M.S.P.R. 447 (1985).

592. *Lewis v. Bureau of Engraving and Printing*, 29 M.S.P.R. 447, 451 (1985).

593. *Id.* at 452.

594. *Id.* at 451 (arguing that complaint to employer about racial discrimination was protected speech).

595. *Id.*

596. 25 M.S.P.R. 319 (1984).

597. *Osokow v. Office of Personnel Management*, 25 M.S.P.R. 319, 321 (1984).

598. *Id.* at 321-22.

599. 29 M.S.P.R. 440 (1985).

600. *LeDeaux v. Veterans' Admin.*, 29 M.S.P.R. 440, 445 (1985) (finding that employee's comments disrupted employer-employee relationship).

601. 37 M.S.P.R. 352 (1988).

random to various offices on the air base where she worked, containing allegedly disrespectful and intimidating comments about her supervisors.⁶⁰² The MSPB found that the information concerned personal and other internal matters and, as such, was not protected by the First Amendment.⁶⁰³

The MSPB, applying the *Pickering* balancing test in *Jackson v. Small Business Administration*,⁶⁰⁴ sustained a charge of insubordination against an employee who mailed a memorandum, prepared for his supervisor, to a member of the public, who was the subject of the memorandum.⁶⁰⁵ The memorandum alleged discrimination against minority contractors by the Small Business Administration.⁶⁰⁶ The MSPB found that the Administrative Judge erred in finding that the contents of the memorandum did not involve a matter of public concern.⁶⁰⁷ The MSPB found, however, that this was harmless error because although the letter did address a matter of public concern, it adversely affected the public's confidence in the integrity of the government.⁶⁰⁸ The MSPB found that the agency's interest in promoting the efficiency of the service outweighed appellant's right to free speech.⁶⁰⁹

There has been one case in which the MSPB found that an employee's speech was protected by the First Amendment. In *Farris v. United States Postal Service*,⁶¹⁰ the employee, while off-duty, prepared and distributed a flyer that was critical of agency management.⁶¹¹ The employee distributed the flyer at an employee entrance to the worksite.⁶¹² The flyer was also prepared and distributed in connection with the employee's union activities, but the Presiding Official who heard the employee's initial appeal determined that it was unnecessary to reach this issue because the flyer constituted protected speech under the First Amendment.⁶¹³ The Presiding

602. *Sigman v. Department of Air Force*, 37 M.S.P.R. 352, 354-56 (1988).

603. *Id.* at 355 (explaining that employee's memorandum concerned intra-office issues and was not matter of public concern).

604. 40 M.S.P.R. 137 (1989).

605. *Jackson v. Small Business Admin.*, 40 M.S.P.R. 137, 142 (1989).

606. *Id.* at 143.

607. *Id.* at 145 (finding that issue addressed by memorandum, namely racial discrimination, was matter of public concern).

608. *Id.* at 146.

609. *Id.* (stating that letter to one contractor could diminish public's confidence in agency and thus adversely affect operation of agency).

610. 14 M.S.P.R. 568 (1983).

611. *Farris v. United States Postal Serv.*, 14 M.S.P.R. 568, 570 (1983).

612. *Id.* at 571.

613. *Id.*

Official applied an extensive *Pickering* analysis.⁶¹⁴ He found that there was no evidence that the information in the flyer was written in reckless disregard of the truth and that the real focus should be on whether the flyer was disruptive of the employment relationship.⁶¹⁵ The Presiding Official had no difficulty in finding that due to the appellant's past distribution of numerous writings and that the flyer in question was met by other employees with "complete apathy," that there was no disruption of the employment relationship.⁶¹⁶ Accordingly, the employee was found to have engaged in protected speech and could not be disciplined by management.⁶¹⁷

2. Federal Circuit cases

In addition to *Brown v. Department of Transportation*⁶¹⁸ several other Federal Circuit decisions deal with First Amendment issues. In *Stanek v. Department of Transportation*,⁶¹⁹ the Federal Circuit upheld the removal of an employee for unauthorized use of government property, improper loan solicitation, and promotion of a research system that interfered with the agency's own program.⁶²⁰ The employee's activity included testifying before a congressional committee, authoring numerous newspaper articles critical of the agency, and preparing and distributing a position paper critical of an agency study.⁶²¹ In his position paper, which was distributed to highway departments in all fifty states, the employee asked state officials to send information to him so that he could send it directly to the appropriate congressional committee.⁶²²

In *Stanek*, the employee argued that once it had been established that the speech at issue was on a matter of public concern, the burden shifted to the Government to "clearly demonstrate" that the speech "substantially interfered" with agency operations.⁶²³ The Federal Circuit categorically rejected this interpretation, stating that *Connick*⁶²⁴ stood for the proposition that the Government's burden in justifying a particular disciplinary action in a First Amendment

614. *Id.*

615. *Id.* at 572.

616. *Id.*

617. *Id.* at 571-73.

618. 15 M.S.P.R. 24 (1983), *aff'd in part, rev'd in part*, 735 F.2d 543 (Fed. Cir. 1984); *see also supra* note 537 and accompanying text (discussing *Brown* as MSPB's first decision).

619. 805 F.2d 1572 (Fed. Cir. 1986).

620. *Stanek v. Department of Transp. (FAA)*, 805 F.2d 1572, 1574 (Fed. Cir. 1986).

621. *Id.* at 1575.

622. *Id.* at 1574.

623. *Id.* at 1578.

624. *Connick v. Myers*, 461 U.S. 138 (1983).

context varies depending on the nature of the employee's expression.⁶²⁵ The Federal Circuit noted that the nature of the employee's speech was of far greater public concern than the type of internal office dispute involved in *Connick*.⁶²⁶ The Federal Circuit stated that the appropriate burden in such a circumstance was on the agency to demonstrate that the matter of public concern interfered with the agency's program in a material way.⁶²⁷

Commenting that common sense suggests that an agency cannot function correctly where an employee establishes an unauthorized quasi-official office that directly competes in function with an existing government program, the Federal Circuit held that the agency had met this burden.⁶²⁸ The Federal Circuit concluded that the agency's interest in maintaining a coherent system of coordinating highway research outweighed the employee's interest in public comment.⁶²⁹

Two Federal Circuit decisions involve First Amendment claims on matters with a more particularized concern to the employee. In *Mings v. Department of Justice*,⁶³⁰ the letter at issue never left the agency, but its author asserted First Amendment rights nonetheless.⁶³¹ In *Mings*, a Border Patrol agent was removed for writing and sending, on agency letterhead, a letter to the agency's Assistant Director for Investigations, disparaging Catholics, Hispanics and other Border Patrol agents.⁶³² The Federal Circuit sustained the removal, finding that the letter related only peripherally to a matter of public concern and was likely to have a highly disruptive impact on the agency's operations.⁶³³ The Federal Circuit addressed the prospect of disciplining an employee for engaging in protected speech on a matter of public concern:

Even assuming *arguendo* that the petitioner's letter did address a matter of public concern, the agency would be precluded from relying upon the letter as a basis for removal only if the petitioner's

625. *Stanek*, 805 F.2d at 1578-79 (holding that state's burden is not fixed, but rather varies according to nature and degree of speech at issue).

626. *Id.* at 1579 (finding public matter in *Connick*, namely judgment of employee's supervisor, was of less public concern than public matter in case at bar).

627. *Id.* (increasing state's burden of restricting speech where issue of public concern is great).

628. *Id.*

629. *Id.*

630. 813 F.2d 384 (Fed. Cir. 1987).

631. *Mings v. Department of Justice*, 813 F.2d 384, 387 (Fed. Cir. 1987).

632. *Id.* at 386.

633. *Id.* at 389 (concluding that employee's letter disparaging Hispanics and Catholics would directly impact at least half of border patrol employees and thus disrupt mission of agency).

free speech interest outweighed the interest of the agency in promoting the efficiency of the public service it performs.⁶³⁴

In doing so, the Federal Circuit quoted *Connick* for the proposition that the First Amendment "does not require a public office be run as a roundtable for employee complaints over internal office affairs."⁶³⁵

In *Henry v. Department of Navy*,⁶³⁶ the letter at issue was circulated outside the agency. The employee, a payroll technician, wrote to four guest speakers who were scheduled to appear at an upcoming Martin Luther King Day event, criticizing the local commander of the Marine Corps Finance Center in Kansas City because gospel singing was not included in the celebration.⁶³⁷ The Federal Circuit acknowledged that whether or not gospel singing was included on an officially-sponsored program for the birthday of Dr. Martin Luther King could well be a matter of public concern.⁶³⁸ Conceding that public interest was part of the analysis, the Federal Circuit examined all the other facts and circumstances and determined that there was a justifiable basis for the agency taking the action it did.⁶³⁹ The Federal Circuit upheld the firing of the employee⁶⁴⁰ because the employee categorically refused to do assigned work and made patently false and unfounded accusations.⁶⁴¹ The false accusations, the court noted, were against the commander, the local union, and others.⁶⁴²

Finally, in *David v. United States*,⁶⁴³ the Ninth Circuit made it clear that an employee could not skirt the MSPB's jurisdiction by asserting a First Amendment claim in federal court, but was required by the Civil Service Reform Act to exercise MSPB appeal rights.⁶⁴⁴ In *David*, a longtime employee of a defense agency, who was also a union official, brought an action against the Government after she was terminated for being absent without leave.⁶⁴⁵ She alleged statutory and constitutional violations and sought back pay and damages for intentional infliction of mental harm.⁶⁴⁶ The district court granted summary judgment against her on all her claims except one, which it

634. *Id.* at 388.

635. *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 149 (1983)).

636. 902 F.2d 949 (Fed. Cir. 1990).

637. *Henry v. Department of Navy*, 902 F.2d 949, 950 (Fed. Cir. 1990).

638. *Id.* at 952.

639. *Id.* at 951-54.

640. *Id.* at 954.

641. *Id.* at 953.

642. *Id.*

643. 820 F.2d 1038 (9th Cir. 1987).

644. *David v. United States*, 820 F.2d 1038, 1043 (9th Cir. 1987).

645. *Id.* at 1039.

646. *Id.*

dismissed without prejudice.⁶⁴⁷ She appealed the district court rulings on all but the back pay issue.⁶⁴⁸ The court of appeals upheld the district court.⁶⁴⁹ Additionally, there is one reported case where two federal employees were disciplined for engaging in reprisal against an employee who exercised his First Amendment rights.⁶⁵⁰

CONCLUSION

Federal employees occupy a special status in the law. They are unlike their private sector counterparts in that their employment relationship is not governed by principles of contract law. Instead, they are "appointed" to a position in the federal civil service, which carries with it a corresponding change in their "status."

This change in "status" means that they are subject to more substantial intrusions by the Government, acting as their employer, than would be possible had they remained private citizens.

Whether in conscious or unconscious recognition of this fact, Congress, over the past twenty-five years, has created a substantial body of due process protections for federal employees in a variety of legislation. There is thus a trade-off. While citizens, who become employees of the Federal Government must accept restrictions on their constitutional rights in return for a job, they are the beneficiaries of a considerable body of workplace due process protections that their private citizen counterparts do not enjoy.

Correspondingly, the Supreme Court, when it has been asked to look at what the Government can do to regulate wholesale the conduct of its employees *ex ante*, has recognized the Government's authority to restrict the conduct of its employees. The Court, however, has created a balancing test that weighs the constitutional interest of employees in engaging in certain conduct against the Government's interest in regulating or restricting the conduct. The Court has also been asked to look at circumstances where the Government acts *ex post* to discipline employees for engaging in certain types of conduct, where the employees subsequently raise a constitutionally protected right, such as freedom of speech, as a defense to the Government's action. In the former situation, the Court has made it more difficult for the Government to outweigh the interests of the employees, for understandable reasons—the govern-

647. *Id.*

648. *Id.*

649. *Id.* at 1044.

650. See Special Counsel v. Lynn & Chiarella, 29 M.S.P.R. 666 (1986) (discussing only reported incident of employee retaliation).

ment action bars an entire category of speech or conduct and operates against an entire class of employees or a large number at least. In the latter situation, the Court tends to apportion the balance according to the facts and circumstances. For example, the Court recognizes that these cases typically involve only one individual. Where the speech or conduct involves complaints by an employee about his or her own job, the Court seems to tilt toward protecting the Government's interest; where the speech or conduct does not involve the employee's own job, but involves broader matters of government policy, the Court appears more likely to hold the Government to a tougher standard.

The nature of the MSPB's jurisdiction (and resultingly, that of the Federal Circuit) requires it to focus on cases involving *ex post* discipline of federal employees where the employees are raising constitutional matters as an affirmative defense to the Government's disciplinary action. Given the limited nature of the MSPB's and the Federal Circuit's jurisdiction, a review of the case law establishes that both have been consistent with the approach taken by Court, and the *NTEU* and *Waters* decisions will not require a change in case law.