The Rights of Probationary Federal Employee Whistleblowers Since the Enactment of the Civil Service Reform Act of 1978

Benjamin C. Indig

I. Introduction

The Civil Service Reform Act of 1978 ("CSRA") significantly restructured the federal civil service, abolishing the Civil Service Commission and replacing it with two new agencies. This radical reorganization was designed to correct two perceived problems. Congress believed that incompetent federal employees were too difficult to fire. At the same time, however, Congress also felt that federal employee whistleblowers—those who spoke out against wrongdoing or inefficiency within the government—were too easy to silence.

In keeping with Congress' goal of simplifying procedures for eliminating incompetents, the CSRA continues the traditional rule that a probationary employee may be fired with a minimum amount of

3. The Act was the most comprehensive reform of the federal work force in almost a century. SENATE REPORT, supra note 2, at 1, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2723-24; see also Note, 26 WAYNE L. REV. 97, 98-101 (1979) (discussing previous reforms).
5. Upon his first appointment to a competitive position (in general, a position awarded based on an examination) the civil service worker begins a one-year probationary period, during which time he lacks the civil service equivalent of tenure. See 5 C.F.R. §§ 315.801-.802 (1982) (OPM regulations setting forth when a probationary period is required and the length thereof); 5 U.S.C. § 3321 (Supp. V 1981) (authorizing probationary period). See also note 6 infra.

This Comment does not discuss separately the rights of the tenured employee who is serving a probationary period on initial appointment to a supervisory or managerial position. See 5 C.F.R. §§ 315.901-.909 (1982) (OPM regulations); 5 U.S.C. § 3321(a)(2), (b) (Supp. V 1981). These provisions, created by the CSRA, require an employee to serve a single probationary period when promoted to his first supervisory position, and another single probationary period when first assigned to a managerial position. 5 C.F.R. § 315.904 (1982). The length of this probationary period is determined individually by each agency. Id. § 315.905. If the employee's agency determines that his managerial or supervisory performance during this probationary period is not satisfactory, the agency may reassign him to a lower position in the agency. The only restriction on this reassignment is that the salary and grade of the
procedural red tape when his employing agency determines he is not performing adequately. The purpose of this rule is to make sure the worker is competent before he is granted the tenure rights that go with permanent employee status. Among the tenure rights granted to permanent employees but withheld from probationers under the CSRA is the right to appeal a dismissal within the administrative appeals procedure set up by the Act. Thus, at the same time that the CSRA creates new rights for most federal employees, including probationers, who "blow the whistle," the Act’s protections against reprisal are not all available to probationers.

Compared to the entire work force in the executive branch of the federal government, the approximately 100,000 probationers per year may seem insignificant. Nevertheless, given that forty-five percent of federal employees questioned in a recent survey said they had observed one or more instances of "illegal or wasteful activity" in the government within the preceding year, probationers should be encouraged to expose such activity when they encounter it.

new position must not be lower than those of the employee’s position before his promotion. Id. § 315.907. If a supervisor or manager is demoted according to these rules during this probationary period, he has no right to directly appeal the demotion. Id. § 315.908. Like the non-tenured probationers discussed in this Comment, his protection against retaliation for whistleblowing is limited. See notes 40-66 infra and accompanying text for a discussion of the limited appeal rights accorded probationers under the CSRA.

6. The probationer’s untenured status is reflected in the exclusion of probationers from the definition of “employee” in the CSRA at 5 U.S.C. §§ 7511 and 4303(f) (Supp. V 1981). OPM regulations regarding untenured probationers are set out at 5 C.F.R. §§ 315.801-806 (1982). See notes 40-66 infra and accompanying text for a discussion of the Act’s limited appeal rights for probationers. It is to be noted that probationers have enjoyed less protection than tenured employees since about 1912. Note, supra note 3, at 99; see 5 C.F.R. § 315.803 (1978) (old Civil Service Commission rules); the CSRA did not create the distinction between tenured and probationary employees. As previously noted, the CSRA did create a new class of tenured probationers—those serving probationary periods following certain promotions. See note 5 supra.


8. The probationer does have administrative appeal rights in certain limited situations. See notes 40-66 infra and accompanying text for a discussion of the CSRA appeals procedures.

9. See notes 40-66 infra and accompanying text for a discussion of the CSRA appeals procedures; see note 34 infra for a list of the employees and situations not covered by the Act.


11. Id. This figure does not include tenured employees serving a probationary period on first appointment to a supervisory or managerial position. Id. See note 5 supra for a discussion of the status of such tenured employees.

This Comment focuses on the rights, since the passage of the CSRA, of the probationary employee who exposes fraud and mismanagement in the federal government. It reviews the rights granted by the CSRA, as well as non-CSRA rights granted under the Privacy Act, and under the first and fifth amendments of the Constitution, including the right to sue one's supervisor in a Bivens action. As will be demonstrated, non-CSRA rights are particularly important to the whistleblower who is a probationer. The Comment concludes that the CSRA does encourage probationers, to an extent, to expose fraud and wrongdoing in government, but that it does not adequately protect them when they do so. Greater protection can and should be afforded probationary whistleblowers without discouraging management from firing incompetents. Recommended improvements include an increase in the budget of the Office of the Special Counsel—an office set up by the CSRA to guard the integrity of the federal civil service—and limited judicial review of that office's administrative decisions.

II. The Civil Service Reform Act

The old Civil Service Commission (CSC) acted as a management agent for the President, a provider of services and an adjudicatory board. Congress believed that the assignment of all these roles to one commission inevitably led to conflict, which damaged the Commission's performance. The system set up by the CSRA was designed to alleviate this problem by dividing the CSC's functions between two new agencies. The personnel agency functions were to be performed by the Office of Personnel Management (OPM), which was to manage the entire civil service system. The quasi-judicial function was assigned to the Merit Systems Protection Board (MSPB). Within the MSPB, the separate Office of the Special Counsel (OSC) was to act as a prosecutor.

13. See notes 27-86 infra and accompanying text.
14. 5 U.S.C. § 552a (1976); see notes 87-96 infra and accompanying text.
15. See notes 97-184 infra and accompanying text.
16. See notes 137-84 infra and accompanying text.
17. SENATE REPORT, supra note 2, at 5, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2727.
18. Id.
20. Id. §§ 1201-1205. The MSPB adjudicates disputes between federal workers and their agencies.
21. Id. §§ 1204, 1206. Established within the MSPB, OSC is an independent office designed to receive allegations of "prohibited personnel practices" (defined at id. § 2302 and including "personnel actions" taken or not taken in retaliation for whistleblowing, id. § 2302(b)(8)), unlawful political activities, arbitrary withholding of information requested pursuant to the Freedom of Information Act, and any other
In addition to restructuring the civil service, the CSRA streamlined procedures for firing incompetents. Congress believed that the complexity of antiquated civil service rules had made it difficult to fire those who were not performing. The Act's simplification of procedures was designed to correct this problem. Procedures designed to

Illegal activities within the federal civil service. "Personnel actions" are defined at id. § 2302(a)(2)(A), and include various disciplinary actions that can be taken against an employee. See note 36 infra; Frazier v. Merit Sys. Protection Bd., 672 F.2d 150, 154 (D.C. Cir. 1982).

22. Under the Civil Service Commission, an employee against whom his agency took action could avail himself of up to five steps of administrative review, Note, supra note 3, at 103-04, 113, whereas the CSRA allows for internal agency review followed (in some but not all cases) by one appeal to the MSPB. 5 U.S.C. §§ 7501-7702 (Supp. V 1981); Note, supra note 3, at 113. See notes 40-66 infra and accompanying text for a discussion of the appeals process provided for probationers.

The old performance evaluation system, abolished by the CSRA, required that employees be rated either unsatisfactory, satisfactory or outstanding. 5 U.S.C. § 4304 (1976). These ratings did not affect the determination of within-grade salary increases and an "unsatisfactory" rating was appealable by the employee even if no action was taken against him. Furthermore, an employee given an "unsatisfactory" rating could not be removed without a procedure that was generally long and aggravating for all concerned. The result was that supervisors gave few "unsatisfactory" ratings. Senate Report, supra note 2, at 39-40, reprinted in 1978 U.S. Code Cong. & Ad. News at 2761-62. Of course, "satisfactory" ratings in the record would make it harder to prove incompetence later.

The CSRA allows greater flexibility by requiring agencies to develop their own performance appraisal systems. 5 U.S.C. § 4302 (Supp. V 1981). These systems use the results of performance appraisals as a basis for rewarding employees with training, pay and rank. Id. § 4302(a)(3). Performance appraisals are given based on standards, developed under OPM regulations, that use objective criteria to evaluate job performance. Id. § 4302(b)(1). For a general summary of the changes the CSRA made to limit judicial review of administrative decisions, discussed at note 60 infra and accompanying text, to streamline the appeals process within the civil service, and to create more flexibility in the performance evaluation system, see Note, supra note 3, at 103-05, 107-10, 113-14.


24. See note 22 supra. Certain federal employees contended that mere simplification of procedures was not certain to assure the removal of more incompetents from the civil service. See, e.g., Civil Service Reform: Hearings on H.R. 11280 Before the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. 532 (1978) (statement of A.E. Fitzgerald) [hereinafter cited as House Hearings]. Congress assumed that procedures existed at the time whereby whistleblowers could be removed or rendered ineffective. See Senate Report, supra note 2, at 8, reprinted in 1978 U.S. Code Cong. & Ad. News at 2730. In fact, such procedures did exist. They were summarized in a manual, written during the Nixon administration, which was reportedly also used during the Carter administration. The procedures included forced transfers to other parts of the country, and removal of any meaningful authority from the unwanted employee. Note, supra note 3, at 105 n.73 (citing Sturm, Can Carter Get the Civil Service to Shape Up?, FORBES, Feb. 6, 1978, at 42). Given the existence of these procedures, it might be asked why such procedures were
facilitate the removal of incompetents, however, can also be used against whistleblowers. The most common form of reprisal taken against government employee whistleblowers is the granting of poor performance ratings. Low performance ratings can lead to dismissal, suspension or demotion for incompetence.

Congress intended the CSRA to protect whistleblowers from such retaliation. For the first time, the Act codifies "merit system principles" upon which federal personnel policies are to be based. One of these principles is that whistleblowers should be protected against reprisal for legal disclosure of information which they reasonably believe shows mismanagement or illegal activity. The Act defines certain "prohibited personnel practices" in which it is unlawful for any supervisor to engage. Among these prohibited practices is the taking of any of certain specified actions against an employee in reprisal for whistleblowing. Specifically, a supervisor or manager shall not, with respect to his authority . . . take or fail to take a personnel action with respect to any employee . . . as a reprisal not being used to remove incompetents. See House Hearings, supra, at 532. The answer, it was argued, was that senior management was not highly motivated to act against incompetents. Id. Congress nevertheless chose to believe that simplified procedures would encourage the firing of incompetents.

25. MSPB WHISTLEBLOWING REPORT, supra note 12, at 37.
26. See note 22 supra.
28. 5 U.S.C. § 2301(b)(9) (Supp. V 1981), which states: "Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—(A) a violation of any law, rule, or regulation, or (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."
30. Id. § 2302(b)(8).
31. The statute uses the words "[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action . . . ." Id. § 2302(b).
32. The covered "personnel actions" are enumerated in id. § 2302(a)(2)(A), and include an appointment, a promotion, disciplinary action under chapter 75 of 5 U.S.C., or other disciplinary or corrective action, a detail (a temporary assignment to another position), transfer (movement without a break in service from a position in one agency to a position in another, see 5 C.F.R. § 210.102(18) (1982)), or reassignment (lateral movement from one position within an agency to another position in the same agency, see id. § 210.102(12)), a reinstatement (noncompetitive reemployment to serve as a career or career-conditional employee, when the employee formerly had competitive status or was serving probation when separated from the service, see id. § 210.102(15)), a restoration (return to an agency of a person separated, furloughed, or given a leave of absence because of military duty or injury, see id. §§ 353.101-.501), a reemployment (see id. §§ 351.1001-.1005, 352.201-.209), a performance evaluation (under chapter 43 of 5 U.S.C.), a decision concerning pay, benefits, or awards, or concerning education or training if the education or training
for a disclosure of information by an employee . . . which the employee . . . reasonably believes evidences . . . a violation of any law, rule, or regulation or . . . mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . 33

Any such whistleblowing disclosure by an "employee" or "applicant for employment" is protected34 if made to the Special Counsel of the MSPB or to the Inspector General of an agency or other employee designated by an agency head to receive disclosures of this sort.35 Even if the disclosure is made to a person other than those listed above, the employee who makes it is protected unless such a disclosure is specifically prohibited by law, or the information disclosed was specifically required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.36 In short, with the rare exceptions just stated, disclosure to any person of information which the employee reasonably believes fits the quoted definition is pro-

may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other "personnel action," and any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level. See Vaughn, Statutory Protection of Whistleblowers in the Federal Executive Branch, 1982 U. ILL. L. REV. 615, 635-37 (1982), for a discussion of the coverage of this provision (5 U.S.C. § 2302(a)(2)(A) (Supp. V 1981))—suggesting that doubts as to the breadth of the coverage of the terms listed above should be resolved in favor of coverage so as to be more protective of whistleblowers. It should be noted that the Act did not include "reduction in force"—a discharge or demotion resulting from a management reorganization—among the acts of reprisal prohibited by this provision. See Vaughn, supra, at 635-36.

33. 5 U.S.C. § 2302(b)(8) (Supp. V 1981). This provision also applies to an "applicant for employment." Id.
34. It should be noted that the following agencies are not covered under the part of the Act dealing with prohibited personnel practices: The Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, at the President's determination, any executive agency or unit whose principal function is to conduct foreign intelligence or counterintelligence activities. Government corporations are also not covered. Id. § 2302(a)(2)(C). Prohibited personnel practices within the Federal Bureau of Investigation are covered under a special section. Id. § 2303. Also excluded from coverage under the Act are many confidential, policy-determining, policy-making, or policy-advocating positions. Id. § 2302(a)(2)(B). Included under the CSRA provisions are all positions in the competitive service (positions awarded by competitive examination), id. § 2302(a)(2)(B), career appointees in the Senior Executive Service (see id. §§ 3132(a)(2), (4); the Senior Executive Service is a group of high-ranking government managers created by the CSRA. A career appointee to the Senior Executive Service is appointed with the approval of OPM), id. § 2302(a)(2)(B), and most positions in the excepted service (in general, positions not in the competitive service. See 5 C.F.R. § 1.3, 1.4 (1982) (OPM regulations)). 5 U.S.C. § 2302(a)(2)(B) (Supp. V 1981).
36. Id.
tected. This is true whether the disclosure is made by a probationer or by a tenured employee.\textsuperscript{37}

The Act provides penalties\textsuperscript{38} for those responsible for any personnel action taken as a reprisal for disclosures made by whistleblowers. These penalties may include “removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1000,” and may be imposed in a final order of the MSPB.\textsuperscript{39} Significantly, the MSPB has power to enjoin a retaliatory action by an employing agency before it occurs.\textsuperscript{40} If OSC reasonably believes that a prohibited personnel action is to be, or has been, taken as a result of a prohibited personnel practice, it may request that the MSPB stay the agency action.\textsuperscript{41}

A. Chapter 77 Appeals

There are two ways for a whistleblower’s case to reach the MSPB. The first is through a “chapter 77” appeal.\textsuperscript{42} This appeal is brought

\textsuperscript{37} Construction of this provision to protect probationers is logical, since a failure to protect disclosures by probationers would allow reprisals for whistleblowing, something the Act was intended to prevent. Thus, in this section, the fact that another section of the Act, \textit{id.} § 7511(a)(1)(A), defines the term “employee” so as to exclude probationers, has not at all discouraged the District of Columbia Circuit Court from concluding that whistleblower-type disclosures by probationers are protected under the same provision that protects disclosures by tenured employees. See \textit{Wren v. Merit Sys. Protection Bd.}, 681 F.2d 867, 875 (D.C. Cir. 1982); \textit{Borrell v. United States Int’l Communications Agency}, 682 F.2d 981, 988 (D.C. Cir. 1982) (citing \textit{Civil Service Reform Act: Markup Session on S.2460, Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 85-86 (May 22, 1978) (unpublished transcript) (remarks of Sens. Percy and Chiles) [hereinafter cited as Markup Session]); see also notes 40-66 infra and accompanying text for a discussion of remedies available to probationers.


\textsuperscript{39} \textit{id.}

\textsuperscript{40} \textit{id.} § 1208. When an agency decides to terminate a probationer due to poor work performance or conduct, it must notify him in writing of the reasons and the effective date. 5 C.F.R. § 315.804 (1982). The probationer would thus have advance notice of his agency’s action.

\textsuperscript{41} OSC may request a stay for up to 15 calendar days. 5 U.S.C. § 1208(a)(1) (Supp. V 1981). If the stay is not denied within three working days of OSC’s request, the stay is granted. \textit{id.} § 1208(a)(3). If OSC requests an extension, the Board may grant one to last up to 30 additional days, or, if the Board concurs in OSC’s determination, after opportunity for comment by OSC and the agency involved, for any longer period the Board deems proper. \textit{id.} § 1208(b), (c). See \textit{In re Kass}, 2 M.S.P.B. 251, 257-61 (1980) for the Board’s determination of the proper standard of review to be used in granting stays (the longer the stay, the stricter the standard).

directly to the MSPB by an “employee or applicant for employment,” and may be submitted from “any action which is appealable to the Board under any law, rule or regulation.” 43 However, due to the congressional intent to facilitate the firing of incompetents, 44 a probationer is neither an “employee” 45 nor an “applicant for employment” 46 for the purposes of the basic chapter 77 appeal. The result is that this direct remedial procedure is not available to the probationer except in certain special cases. 47

43. Id. § 7701(a). The Act provides that MSPB may award attorney’s fees to a prevailing employee in a chapter 77 appeal. Id. § 7701(g); Frazier v. Merit Sys. Protection Bd., 672 F.2d 150, 168 (D.C. Cir. 1982).

44. Borrell v. United States Int’l Communications Agency, 682 F.2d 981, 988 (D.C. Cir. 1982) (chapter 77 appeal not available to probationers due to congressional intent to protect against incompetents’ attempts to halt deserved termination) (citing Markup Session, supra note 37, at 85-86 (remarks of Sens. Percy and Chiles)).

45. 5 U.S.C. § 7511(a)(1)(A) (Supp. V 1981). An “employee” is “an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less . . . .” Id. See also 5 C.F.R. §§ 315.801–802 (1982) (OPM regulations); Wren v. Merit Sys. Protection Bd., 681 F.2d 867, 875 (D.C. Cir. 1982) (MSPB has no jurisdiction to hear direct appeal from probationary whistleblower); Piskadlo v. Veterans’ Admin., 668 F.2d 82, 83 (1st Cir. 1982) (same; analyzes the statute to explain why the part of the statute authorizing “chapter 77” appeals—5 U.S.C. § 7701(a) (Supp. V 1981)—must be construed to incorporate the definition of “employee” in id. § 7511(a)(1)(A), which excludes probationers).

46. Piskadlo v. Veterans’ Admin., 668 F.2d 82, 84 (1st Cir. 1982) (the “applicant for employment” language does not authorize either an applicant or a probationer to appeal directly to the MSPB except in the specific situations in which the statute was intended to allow direct appeals to the MSPB by such parties—which are cases that allege discrimination prohibited by specified statutes. These statutes include the following: § 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16 (1976 & Supp. IV 1980)) (discrimination on the basis of race, color, religion, sex, or national origin), § 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 206(d) (1976)) (discrimination on basis of sex), § 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791 (1976 & Supp. IV 1980)) (discrimination on basis of handicapping condition), and §§ 12, 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 631, 633a (Supp. IV 1980)), 5 U.S.C. § 7702 (Supp. V 1981)). See also 5 C.F.R. § 315.806 (1982) (OPM regulation allowing a probationer a chapter 77 appeal when he alleges his termination was based on specified forbidden criteria, including partisan political reasons or marital status; this regulation applies only to those non-tenured probationers in the competitive service. Wren v. Department of the Army, 2 M.S.P.B. 174, 174 n.* (1980)).

47. Significantly, the direct appeal is available where a probationer alleges discrimination covered by one of the statutes specified in 5 U.S.C. § 7702 (Supp. V 1981)—which are set out in note 46 supra—or by 5 C.F.R. § 315.806 (1982) (OPM regulation described in note 46 supra). Another special case in which a whistleblower may appeal directly to the Board is one in which he was terminated for “conditions arising before appointment” and alleges that improper procedures were followed. 5 C.F.R. §§ 315.805, 315.806 (1982) (OPM regulations).
B. Corrective Action Authority of OSC

The second way for a whistleblower’s case to reach the MSPB is through the “corrective action” authority of OSC. The CSRA provides that OSC must investigate any allegation of a prohibited personnel practice, at least to the extent necessary to determine whether the allegation has merit. If, in a case involving alleged whistleblowing, OSC determines within fifteen days of receipt of the allegation that there is a substantial likelihood that the information disclosed by the alleged whistleblower is protected under the CSRA’s whistleblowing provisions, it may require the head of the agency in question to conduct an investigation of the information furnished by OSC. The agency must then submit its findings to OSC (as well as to the President and Congress) within sixty days or such longer period as OSC may stipulate in writing. If the Special Counsel concludes that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, and that corrective action is necessary, he must so report to the MSPB, the agency involved, and OPM. Upon the agency’s failure to take the recommended corrective

49. Defined in id. § 2302; see note 21 supra.
50. 5 U.S.C. § 1206(a)(1) (Supp. V 1981), which provides: “The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.” The OSC may also make such an investigation in the absence of an allegation. Id. § 1206(a)(3).
51. As defined in id. § 1206(b)(1). The definition of whistleblowing in this section is essentially identical to that in id. § 2302(b)(8), discussed at notes 30-37 supra and accompanying text.
52. 5 U.S.C. § 1206(b)(3)(A) (Supp. V 1981); that is, that there is “a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to the public health or safety . . . .” Id.
53. OSC is required to furnish the agency head with whistleblowing information regarding his agency, id. § 1206(b)(2), but may not reveal the whistleblower’s identity, except in the rare case where OSC determines that such a disclosure is necessary in order to carry out OSC’s functions. Id. § 1206(b)(1). OSC may require the agency head to investigate only in cases where the information was transmitted to OSC by an “employee,” “former employee,” or “applicant for employment” in the agency which the information concerns, or by any employee who obtained the information in connection with the performance of his duties and responsibilities. Id. § 1206(b)(3)(B). The statute sets out the issues required to be addressed in the agency’s report. Id. § 1206(b)(4).
54. Id. § 1206(b)(5)(A).
55. Id. § 1206(b)(3)(A)(ii).
56. Id. § 1206(c)(1)(A).
action, OSC may request that the Board consider the case.\textsuperscript{57} After OPM and the agency concerned are given opportunity to comment, the Board may order "such corrective action as [it] considers appropriate."\textsuperscript{58}

Assuming the Board gets jurisdiction, it is the final administrative arbiter of complaints brought to it;\textsuperscript{59} a final order or decision of the MSPB is appealable to the U.S. Court of Appeals for the Federal Circuit.\textsuperscript{60} However, because of the unavailability of the chapter 77 appeal in the case of a probationary whistleblower, the Board will not get jurisdiction if OSC decides not to being a corrective action appeal.\textsuperscript{61} OSC will not bring the appeal unless it believes the Act's goal of achieving a "fair, efficient, and lawfully-conducted Civil Service" requires it.\textsuperscript{62} Thus, OSC's decision whether to proceed to a corrective action petition is based not on the interest of a complaining employee, but on OSC's perception of the interest of the civil service system as a whole. A probationary whistleblower appealing to OSC has no way to assure that his complaint will be heard by the Board.\textsuperscript{63}

When OSC decides not to bring a corrective action petition to the Board, probationers have been unsuccessful in getting courts to review

\textsuperscript{57} Id. § 1206(c)(1)(B).

\textsuperscript{58} Id. See notes 40-41 \textit{supra} and accompanying text for a discussion of the Board's power to enjoin actions taken by an agency in retaliation for whistleblowing.

\textsuperscript{59} The Civil Service Commission had a similar role. For a summary of the pre-CSRA appeals process, see Note, \textit{supra} note 3, at 104.


\textsuperscript{61} See note 47 \textit{supra} and text accompanying notes 42-47 \textit{supra}.

\textsuperscript{62} Frazier v. Merit Sys. Protection Bd., 672 F.2d 150, 162 (D.C. Cir. 1982) (upholding the Board's construction of OSC's purpose; OSC is not a "public defender" for federal employees).

\textsuperscript{63} If the probationer is fortunate enough to be covered by a collective bargaining agreement under 5 U.S.C. § 7121 (Supp. V 1981), he will be able to elect the protection of negotiated grievance procedures under \textit{id.} § 7121(a)(1).
OSC's decision.\textsuperscript{64} Clearly, Congress did not intend to make reviewable on the merits OSC's decision to terminate its investigation of a whistleblower's complaint.\textsuperscript{65} As the District of Columbia Circuit Court has concluded, "Congress apparently wanted not only to provide an effective and expeditious process for investigating whistleblower allegations, but also to protect against abuse of that process to halt termination based on unsatisfactory job performance."\textsuperscript{66}

Unfortunately for probationers, OSC's investigation of whistleblower allegations has not been uniformly effective.\textsuperscript{67} For example, in Wren v. Merit Systems Protection Board,\textsuperscript{68} OSC had closed the probationary whistleblower's case without making even the limited investigation mandated by the Act.\textsuperscript{69} Although OSC's reasons for failing to investigate the alleged whistleblower's complaint\textsuperscript{70} were found legally invalid,\textsuperscript{71} the court held that it lacked jurisdiction to review OSC's

\begin{itemize}
  \item \textsuperscript{64} See Wren v. Merit Sys. Protection Bd., 681 F.2d 867 (D.C. Cir. 1982); Borrell v. United States Int'l Communications Agency, 682 F.2d 981 (D.C. Cir. 1982).
  \item \textsuperscript{65} Wren v. Merit Sys. Protection Bd., 681 F.2d 867, 875 n.9 (D.C. Cir. 1982) (citing Markup Session, supra note 37, at 85-86 (remarks of Sens. Percy and Chiles); A Bill to Reform the Civil Service Laws: Markup Meetings on H.R. 11280, House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. 46-47 (June-July 1978) (unpublished transcript)).
  \item \textsuperscript{66} Borrell v. United States Int'l Communications Agency, 682 F.2d 981, 988 (citing Markup Session, supra note 37, at 85-86 (remarks of Sens. Percy and Chiles)).
  \item \textsuperscript{67} For a discussion of OSC's problems, see notes 185-200 infra and accompanying text.
  \item \textsuperscript{68} 681 F.2d 867 (D.C. Cir. 1982).
  \item \textsuperscript{69} Id. at 870-71.
  \item \textsuperscript{70} When the probationary whistleblower, Wren, wrote to OSC almost a year after the investigation had been closed to inquire as to the status of her complaint, OSC finally informed her that the investigation had been closed for failure to file documents in a "timely" (a term not defined by statute or regulation) manner, and cited an inapplicable provision of the CSRA to justify the OSC's conclusion that her case would be more appropriately resolved "under an administrative appeals procedure or applicable grievance procedure." Id. The inapplicable provision was 5 U.S.C. § 1206(e)(2) (Supp. V 1981), which provides that the Special Counsel shall make no investigation of any allegation of any "(D) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and (E) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action." Based on the legislative history, the court held this provision was intended to grant OSC authority to investigate other matters in addition to—and not to detract from—its duty to investigate whistleblower complaints such as Wren's—at least to the extent of determining whether the complaint is meritorious. 681 F.2d at 874 (quoting H.R. REP. No. 1403, 95th Cong., 2d Sess. 20 (1978)).
  \item \textsuperscript{71} 681 F.2d at 875.
\end{itemize}
action.\textsuperscript{72} Casting about for some way to enforce OSC's procedural duty to make an initial investigation, the court speculated that the petitioner might have an action for mandamus in the district court to compel some form of inquiry into the merits.\textsuperscript{73} The court concluded in dicta that "the OSC does not have totally unreviewable discretion to refuse to look at the complaint altogether or to refuse to look at it for reasons unauthorized by the statute."\textsuperscript{74} Since the CSRA was designed to protect all employees from reprisals for whistleblowing, OSC's invalid but effective denial of the petitioner's protection cast doubt upon the "efficacy" of the Act's system for protecting whistleblowers.\textsuperscript{75}

No court has yet ruled on an attempted mandamus action such as the \textit{Wren} court proposed.\textsuperscript{76} In deciding whether such a right of action should be recognized, courts should consider the fact that OSC's role is patterned after that of the General Counsel of the National Labor Relations Board.\textsuperscript{77} The General Counsel's decision not to bring an unfair labor practice complaint is generally unreviewable.\textsuperscript{78} Neverthe-

\textsuperscript{72} Id. at 869.
\textsuperscript{73} Id. at 875. The question of whether such a mandamus action would lie has not been passed on by the courts, but the \textit{Wren} court noted the "substantial precedent to the effect that federal mandamus does not ordinarily lie under 28 U.S.C. § 1361 to compel prosecutions or even investigations." \textit{Id.} at 875 n.9. Nevertheless, the court cited the following cases as authority for the recognition of such a right for a probationary whistleblower: \textit{Inmates of Attica v. Rockefeller}, 477 F.2d 375 (2d Cir. 1973); \textit{Peek v. Mitchell}, 419 F.2d 575 (6th Cir. 1970); \textit{Moses v. Kennedy}, 219 F. Supp. 762 (D.C. Cir. 1963). 681 F.2d at 875 n.9.
\textsuperscript{74} 681 F.2d at 875 n.9.
\textsuperscript{75} Id. at 875. The \textit{Wren} case was properly before the circuit court only because it was an appeal from a decision by the Board. As the court noted, the Board, unlike OSC, has the power to take "final agency action." \textit{Id.} at 871 (citing 5 U.S.C. § 1205(a)(1) (Supp. V 1981)). \textit{Wren} had appealed directly to the Board at the same time she had registered her complaint with OSC. The Board had found itself without jurisdiction, \textit{Id.} at 870, and the court reluctantly affirmed the Board's reading of the statute. \textit{Id.} at 875.
\textsuperscript{76} See note 73 supra.
\textsuperscript{77} Office of Legal Counsel, U.S. Dep't of Justice, Civil Service Commission Reform: Role of Special Counsel (Special Memorandum May 26, 1978), \textit{reprinted in House Hearings, supra} note 24, at 819, 820.
\textsuperscript{78} See \textit{Frazier} v. Merit Sys. Protection Bd., 672 F.2d 150, 162 n.41 (D.C. Cir. 1982) (citing George Banta Co. v. NLRB, 626 F.2d 354 (4th Cir. 1980), \textit{cert. denied}, 449 U.S. 1080 (1981); \textit{Pacific Southwest Airlines v. NLRB}, 611 F.2d 1309 (9th Cir. 1980); \textit{Associated Builders & Contractors, Inc. v. Irving}, 610 F.2d 1221 (4th Cir. 1979), \textit{cert. denied}, 446 U.S. 965 (1980)). However, precedents suggest that the charging party may have standing to contest a dismissed complaint or a settlement between the NLRB and the charged party. \textit{Frazier}, 672 F.2d at 162 n.41 (citing \textit{International Union, United Auto., Aerospace & Agriculture Implement Workers v. Scofield}, 382 U.S. 205, 210 (1965) (as to dismissed complaint, charging party is
less, one important difference between OSC and the NLRB’s General Counsel must be kept in mind. The General Counsel performs a prosecutorial role in connection with employment relations in the private sector; OSC, by contrast, performs a similar role with respect to employment relations in the federal government. As part of the same bureaucratic organization it is supposed to oversee, OSC may lack the independent, unbiased judgment which its role requires. Thus, it could be argued that even assuming the General Counsel’s decision not to bring an unfair labor practice complaint is completely unreviewable, limited reviewability of OSC’s decision not to file a corrective action petition is desirable due to the special character of OSC’s role. The reviewability of OSC’s failure to act could be confined to cases involving non-tenured whistleblowers, since they are the ones who have no CSRA remedy other than a corrective action petition by the OSC.

C. Inferring From the CSRA a Private Right of Action

Attempts to infer from the CSRA a private right of action in district court to enforce directly a whistleblower’s protections against retaliation have also been unsuccessful. The first such case to be decided at the appellate level was Borrell v. United States International Communications Agency (ICA). On her second appeal to the District of

"person aggrieved" for purposes of appeal); Leeds & Northrup Co. v. NLRB, 357 F.2d 527, 536 (3d Cir. 1966) (charging party has right to a hearing on objections to settlement between Board and charged party); Retail Clerks Union 1059 v. NLRB, 348 F.2d 369, 370 (D.C. Cir. 1965) (same)).

79. See notes 185-200 infra and accompanying text.


81. 682 F.2d 981 (D.C. Cir. 1982). Borrell, a former probationary employee, alleged that she had been discharged from her job with the United States International Communications Agency (ICA) in reprisal for whistleblowing covered by the Act. Id. at 983; 5 U.S.C. § 2302(b)(8)(A) (Supp. V 1981), discussed at notes 30-37 supra and accompanying text. The OSC terminated its investigation of Borrell’s allegation, finding that “Borrell’s termination was based on certain aspects of her performance which were determined to be less than satisfactory by her supervisors.” 682 F.2d at 985. The District of Columbia Circuit did not appear to read Borrell’s record this way; it noted that Borrell was “one of the first outside professionals to work in [ICA] for some time,” id. at 983, that ICA’s own investigation in response to
Columbia Circuit Court, 82 the plaintiff, a probationary whistleblower, contended that Congress must not have intended to restrict probationers to the "illusory" remedy of the statutory allegation to the OSC. 83 Noting that the complaining employee is not even a party to any proceeding initiated by OSC, she argued that the court's failure to infer a private right of action would mean that Congress had given her a right without a remedy. 84

The Court, however, found that Congress had not intended to create a private right of action in district court to enforce restrictions against reprisals for whistleblowing: 85

Although Congress sought to safeguard all employees, both tenured and non-tenured, from prohibited personnel practices and thereby

---

Borrell's allegation had indicated a "'need to tighten up some management and contracting procedures within the Exhibits Service,'" id. at 984 n.2, that until Borrell began to complain about management practices, there had been no complaints from her superiors, and that only one—the last—of four supervisors Borrell worked under at ICA had given her a less-than-satisfactory work rating. Id. at 984. Borrell's whistleblowing consisted of complaints to fellow employees about the following improper practices within the agency: "allegedly improper use of repeatedly extended purchase order contracts for two vendors working on the premises of ICA, unnecessary and wasteful travel, use of government time by one official for private real estate transactions, and the improper hiring of the spouse of a senior ICA employee." Id. at 983-84. Her supervisor recommended to the division chief that Borrell be transferred. The division chief instead decided to recommend that she be discharged. Id.

82. After OSC declined to seek a stay of her termination as permitted under the CSRA, 5 U.S.C. § 1208 (Supp. V 1981), discussed at notes 40-41 supra and accompanying text, Borrell next filed a complaint in the district court, which temporarily delayed the effective date of her termination. See Gilley v. United States, 649 F.2d 449 (6th Cir. 1981) (the CSRA's authorization of OSC to request and of MSPB to grant stays of personnel actions is not a clear showing of legislative intent to deprive a federal district court of its equitable power to enjoin a transfer of an employee); but see Deitch v. Bliss, 512 F. Supp. 605 (E.D.N.C. 1981) (Congress contemplated that MSPB's stay authority would be exclusive; district court is without jurisdiction to hear plaintiff employee's request to enjoin his transfer). Subsequently, the court dismissed Borrell's complaint for lack of subject matter jurisdiction, on the ground that since Borrell's petition was still pending before OSC, she had failed to exhaust her administrative remedies before turning to the court. 682 F.2d at 984. The circuit court initially dismissed Borrell's appeal from the district court, but then vacated the lower court's dismissal order, citing a letter from the OSC, stating that the CSRA does not require the federal employee to submit his complaint to OSC, and that, should the employee choose to do so, he would still not be a party to any proceeding initiated by the MSPB. Id. at 984-85. On remand, after trial, the district court dismissed the action. Id. at 985.

83. Brief for Appellant at 26, Borrell v. United States Int'l Communications Agency, 682 F.2d 981 (D.C. Cir. 1982).

84. Id. at 26-27.

85. 682 F.2d at 987.
to insure a "more effective civil service" for the public generally, it established in the Act a detailed enforcement scheme to effect its purpose. That scheme allows probationary employees such as appellant relief only through investigation and corrective action by the OSC.\textsuperscript{66}

III. The Privacy Act

When a probationary employee whistleblower is terminated or deprived of rights as a result of an agency's inaccurate record-keeping, the Privacy Act\textsuperscript{87} allows the employee to bring a civil action in a United States district court.\textsuperscript{88}

In \textit{Borrell}, as the circuit court noted,\textsuperscript{89} the district court apparently misconstrued the plaintiff whistleblower's Privacy Act claim. The district court dismissed her claim, finding that the challenged statements in her personnel file were not disseminated to outside persons and that they concerned matters within the scope of employment.\textsuperscript{90} These holdings led the plaintiff to the conclusion that the district court believed she was claiming an invasion of privacy.\textsuperscript{91} As the circuit court found, she was not; she was merely alleging that ICA officials intentionally kept inaccurate files concerning her performance, which resulted in adverse personnel actions that led to her dismissal.\textsuperscript{92}

\textsuperscript{66} \textit{Id.} The court went on to note the congressional intent to protect against abuses by incompetent probationers. \textit{Id.} at 988. \textit{See} Vaughn, supra note 32, at 660 n.254 (suggesting that since OSC's decision not to seek corrective action can terminate the rights of a complaining whistleblower, it should be subject to review, but, given the congressional intent manifested in the CSRA, only under the limited standard of the Administrative Procedure Act (citing 5 U.S.C. § 706 (1976))).

\textsuperscript{87} 5 U.S.C. § 552a (1976).

\textsuperscript{88} \textit{Id.} § 552a(g)(1)(C), which provides:

\textit{Whenever any agency . . . fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual . . . the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.}

\textit{See} Borrell v. United States Int'l Communications Agency, 682 F.2d 981, 992 (D.C. Cir. 1982).

\textsuperscript{89} 682 F.2d at 992.

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} \textit{Id.; see} 5 U.S.C. § 552a(b), (d), (g)(1)(D) (1976).

\textsuperscript{92} 682 F.2d at 992. \textit{See also} Savarese v. United States Dep't of Health, Educ. & Welfare, 479 F. Supp. 304, 306-07 (N.D. Ga. 1979) (summary judgment not granted
Of course, the whistleblower may have trouble proving the necessary elements of this claim, but if the claim is established the court may order an appropriate remedy, which may include costs, fees, damages, and amendment of the employee’s record. The Privacy Act provides the same remedies for any specified determination not to amend an individual’s record in accordance with his request or for failure to make the required review of the employee’s record.

IV. Constitutional Remedies: Freedom of Speech and Due Process

A probationary whistleblower who has been fired in retaliation for speaking out may make a claim that the agency’s action has abridged his first amendment freedom of speech and deprived him of liberty or property without due process of law—a violation of the fifth amend-

where factual dispute exists as to whether agency’s determination of facts in plaintiff employee’s record was made reasonably so as to assure fairness to plaintiff, aff’d, 620 F.2d 298 (5th Cir. 1980); White v. United States Civil Serv. Comm’n, 589 F.2d 713, 714-15 (D.C. Cir. 1978) (evaluations of plaintiff solicited by the Civil Service Commission in connection with plaintiff’s application for administrative position are “records” under the Privacy Act; plaintiff may to some extent be able to get them modified), cert. denied, 444 U.S. 830 (1980).

93. For the initial burden of proof under 5 U.S.C. § 552a(g), see Mervin v. FTC, 591 F.2d 821, 827 (D.C. Cir. 1978).

94. The relevant Privacy Act remedies may be found at 5 U.S.C. § 552a(g)(2)(A), (B); id. § 552a(g)(4). One court has held that actual damages under the Privacy Act include damages for psychological as well as pecuniary or physical injury. Parks v. IRS, 618 F.2d 677, 683 (10th Cir. 1980).

95. 5 U.S.C. § 552a(g)(1)(A) (1976) (citing § 552a(d)(3)).

96. 5 U.S.C. § 552a(g)(1)(A) (1976). Another important means to protect the whistleblower—without which he might not have access to the information necessary to establish his case—is the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976 & Supp. V 1981), which provides:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.


In Borrell, the FOIA was held not violated, 682 F.2d at 993, because the government produced the required documents before the court ordered it to do so. Brief for Appellant at 43. But see Cuneo v. Rumsfeld, 553 F.2d 1360, 1365 (D.C. Cir. 1977) (though the government eventually produced the requested document, attorney’s fees may still be awarded). In a case in which the FOIA is held violated, the district court may award attorney’s fees to a substantially prevailing plaintiff. 5 U.S.C. § 552 (a)(4)(E) (1976); see, e.g., Cuneo v. Rumsfeld, 553 F.2d 1360, 1364-68 (D.C. Cir. 1977) (reviewing legislative history and citing factors to be considered in deciding whether to award attorney’s fees).
The first issue to be addressed concerning the constitutional claims of the non-tenured employee is whether the CSRA intended to eliminate such pre-existing causes of action. The Borrell court held that it did not. The District of Columbia Circuit Court found no clear congressional statement indicating an intent to displace pre-existing remedies for constitutional deprivations. Particularly considering the constitutional origin of these rights, the court refused to infer an intent to replace them with a remedy so limited as that granted probationary employees under the Act.

A. First Amendment

When a probationary employee alleges that he was fired in retaliation for constitutionally protected activity, courts apply a standard derived from Mt. Healthy City School District Board of Education v. Doyle to determine whether the dismissal was made for proper reasons. In Mt. Healthy, an untenured teacher at a public school alleged that the school board's decision not to rehire him was based on his exercise of first amendment rights in turning over to the press a memo addressed to various teachers from the school principal. The Supreme Court held that the burden was initially properly placed on

---

98. Borrell, 682 F.2d at 989.
99. Id. at 989-90.
101. Borrell, 682 F.2d at 990.
102. Id. The court reserved the issue of whether the CSRA had precluded the pre-existing right of tenured employees to sue on similar constitutional claims in district court; that is a different issue, since tenured employees may appeal adverse actions directly to the MSPB, and from there to the Court of Appeals for the Federal Circuit, under 5 U.S.C. § 7701 (Supp. V 1981); 5 U.S.C.A. § 7703(b)(1) (West Supp. 1982); see note 60 supra and accompanying text. Borrell, 682 F.2d at 990.
103. 429 U.S. 274 (1977). In Borrell, the circuit court applied its Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977), standard, which is almost identical to the Supreme Court's Mt. Healthy standard. Borrell, 682 F.2d at 991. Under the Mazaleski standard, the plaintiff must show that his conduct was constitutionally protected and that it was "a 'substantial' or 'motivating' factor in the government's adverse action . . . ." If he does so, the burden shifts to the government to prove by a "preponderance of the evidence" that it would have reached the same decision had the protected conduct not occurred. Id. (quoting Mazaleski v. Treusdell, 562 F.2d at 715).
104. 429 U.S. at 282.
the teacher to show that his conduct was constitutionally protected and that the conduct was a "substantial" or "motivating" factor in the board's decision not to rehire him. However, these requirements having been met, the court should then determine whether the board had shown by a preponderance of the evidence that it would have decided not to rehire the teacher even in the absence of the constitutionally protected conduct.

Whether a whistleblower can carry the initial burden of showing that his disclosures were constitutionally protected by the first amendment guarantee of free speech depends on the somewhat indefinite guidelines articulated in *Pickering v. Board of Education*. In that case, the Supreme Court held that courts must balance the interests of the public (and of the employee) in the speech of public employees against those of the government in efficient administration. Only when the employee's speech is deemed more important is it protected under the first amendment. For example, where the employee's speech does not involve a matter of great public interest, there is less likelihood that the speech is protected by the first amendment. The same is true if the employee has criticized a superior with whom he

105. *Id.* at 287.
106. *Id.* See also *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979) (teacher's private communication with her school principal is protected speech); see generally *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (government may not deny the benefit of re-employment to a non-tenured teacher on a basis that infringes his first amendment right of speech).

107. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.
108. 391 U.S. 563 (1968) (setting forth factors for consideration in deciding whether the first amendment protects speech of public employees).
109. See *id.* at 567-68. See *Vaughn, supra* note 32, at 637-40, for a brief summary of case law decided with reference to *Pickering*. In remanding Borrell's case to the district court for findings of fact necessary to weigh her first amendment claim, the court of appeals requested the following information:
specific findings about the nature and truth of Borrell's allegations, the circumstances and timing of her complaints (including when she began to complain, to whom she complained, whether and when her complaining came to the attention of her superiors, and whether others in the agency were complaining about similar acts within the agency) and the history of Borrell's work performance (including the nature of the assignments, supervisor ratings, and timing of supervisory evaluations in relation to her complaints).

682 F.2d at 992.
110. See, e.g., *Foster v. Ripley*, 645 F.2d 1142 (D.C. Cir. 1981) (employee was engaged in a power struggle with management and his speech was such that it could have damaged his employer, the Smithsonian Science Information Exchange).
must work closely, or his speech has otherwise threatened the discipline or harmony needed in the operation of his office.\textsuperscript{111}

Of course, when the employee is blowing the whistle on corruption in his office, this \textit{Pickering} balancing test will usually weigh in favor of the whistleblower.\textsuperscript{112} As the Fifth Circuit stated in \textit{Porter v. Califano},\textsuperscript{113}

\begin{quote}
[a]n employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.\textsuperscript{114}
\end{quote}

However, the \textit{Pickering} test will not always protect the whistleblower. As the \textit{Porter} court continued, “the chilling of even accurate speech may be justified in certain extreme situations, for example, in which the employee unduly breached confidentiality or disrupted intimate working relationships.”\textsuperscript{115} The need for confidentiality in certain policy-making positions may exclude the holders of such positions from first amendment protection.\textsuperscript{116}

\begin{thebibliography}{99}
\bibitem{footnote111}\textit{Pickering}, 391 U.S. at 568, 570. The type of work done by the employer may tip the balance against first amendment protection of an employee’s criticism, see \textit{Gasparinetti v. Kerr}, 568 F.2d 311, 320-21 (3d Cir. 1977) (states may limit the speech of police to a greater extent than they may that of citizens in general, without infringing the first amendment guarantee of freedom of speech), \textit{cert. denied}, 436 U.S. 903 (1978), as may the type of statement, see \textit{Swilley v. Alexander}, 629 F.2d 1018, 1021 (5th Cir. 1980) (criticism of professional competence less disruptive than a personal attack); cf. \textit{Givhan v. Western Line Consol. School Dist.}, 439 U.S. 410, 415 n.4 (1979) (public employer may place time, place and manner restrictions on protected speech).
\bibitem{footnote112}See \textit{Vaughn}, supra note 32, at 638 (citing \textit{Williams v. Board of Regents}, 629 F.2d 993 (5th Cir. 1980), \textit{cert. denied}, 452 U.S. 926 (1981)).
\bibitem{footnote113}592 F.2d 770 (5th Cir. 1979).
\bibitem{footnote114}Id. at 773-74.
\bibitem{footnote115}Id. at 774 (describing the \textit{Pickering} balancing test). In a footnote later in its opinion, the court indicated that “the lower court, in making the \textit{Pickering} balance, should . . . determine and consider the extent to which the information Porter [who alleged her disclosures were whistleblowing and were protected under the first amendment] distributed . . . could have been distributed, in less disruptive ways.” Id. at 778 n.13.
\bibitem{footnote116}See \textit{Besig v. Friend}, 460 F. Supp. 134, 138-39 (N.D. Cal. 1978); see generally \textit{Branti v. Finkel}, 445 U.S. 507, 518 (1980) (bringing more “policymaking” positions within first amendment protection; only where the hiring authority can show that party affiliation is an appropriate requirement for performance of employee’s job may employee be dismissed based on political affiliation); \textit{Elrod v. Burns}, 427 U.S. 347, 367, 372 (1976) (plurality opinion of Brennan, J.) (dictum; policy-makers may be constitutionally dismissed based on their political affiliation); \textit{Coven, The First Amendment Rights of Policymaking Public Employees}, 12 \textit{Harv. C.R.-C.L. L. Rev.}
\end{thebibliography}
In short, in determining whether employee speech is covered by the first amendment, the courts have often tended to weigh heavily the government interest in avoiding office disruption, and as a result have sometimes rendered decisions against first amendment coverage. At the time of enactment of the CSRA, Congress was aware of the chill such decisions can put on whistleblowers; the legislators regarded the then-existing protection afforded whistleblowers as inadequate and passed the Act to provide additional protection. Nevertheless, probationers who blow the whistle must rely on these generalized and uncertain standards derived from Pickering.

Assuming, however, that an employee's speech is protected by the first amendment, the same amendment should protect the employee against retaliation for such speech. The probationer is entitled to a trial in district court. At that trial, the Mt. Healthy standard should be applied.

B. Due Process

Due process affords procedural protection to federal employees who have been improperly deprived of liberty or property interests.

---

559 (1977) (arguing for increased first amendment protection of the speech of policymaking employees).


119. Vaughn, supra note 32, at 639; see Lowy, Constitutional Limitations on the Dismissal of Public Employees, 43 Brooklyn L. Rev. 1, 3-4 (1976).

120. Lowy, supra note 119, at 4 n.16. For a discussion of the limited extent of procedural protection afforded by fifth amendment due process, see notes 122-36 infra and accompanying text. It should be noted that the district court's authority to grant temporary injunctive relief before exhaustion of administrative civil service remedies is very limited. See Sampson v. Murray, 415 U.S. 61 (1974).

121. See, e.g., Borrell, 682 F.2d at 991 (setting out the D.C. Circuit Court's Mazaleski v. Treusdell, 562 F.2d 701, 715 (1977), test); but see the discussion of Jolly v. Listerman at notes 133-36 infra and accompanying text.

122. Lowy, supra note 119, at 3. Since the publication of Professor Charles Reich's article, The New Property, 73 Yale L.J. 733 (1964), the Supreme Court has developed the idea that procedural due process guarantees extend to government-fostered expectation interests in property and liberty. Such an interest was recognized in Perry v. Sindermann, 408 U.S. 593 (1972) (teacher at state university has "implied" tenure, and thus a due process property right, in his job). Even for non-probationers, who have the civil service equivalent of tenure, protection of these government-fostered expectation interests in property and liberty is limited, see, e.g., the discussion of Jolly v. Listerman at notes 133-36 infra and accompanying text, and may vary
Unlike the tenured employee, however, the probationary employee is unlikely to have a due process interest in his job.\textsuperscript{123} A probationary employee normally can be fired with a minimum of procedural requirements,\textsuperscript{124} and thus would not ordinarily have the sort of expectation of future enjoyment of property that would justify a claim that his due process rights had been denied.\textsuperscript{125}

Of course, if the agency violates its rules, or a federal statute, the probationer may have a claim that his due process interests have been violated.\textsuperscript{126} As the District of Columbia Circuit Court held in Mazaleski v. Treusdell,\textsuperscript{127}

\begin{quote}
[p]rocedural rules, such as those promulgated by [an agency] to govern its personnel actions, are binding upon the agency issuing them . . . . This obligation to comply with established procedural standards applies even where the employee, in the absence of such standards, could have been summarily discharged at any time without procedural safeguards.\textsuperscript{128}
\end{quote}

It has been held, however, that a statute which grants an employee due process rights can by its terms limit the process which is due. In Arnett v. Kennedy,\textsuperscript{129} a statute granted a non-probationary employee a due process "expectation" that he would not be fired except for prescribed reasons. Three Supreme Court justices held that the statute creating this due process right had effectively limited the employee's due process remedy to a post-termination hearing.\textsuperscript{130}

depending on the facts of a particular case. Lowy, \textit{supra} note 119, at 3. The fifth amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

\textsuperscript{123} See Jolly v. Listerman, 672 F.2d 935, 941 (D.C. Cir.) (dictum), cert. denied, 103 S. Ct. 450 (1982).


\textsuperscript{125} Lowy, \textit{supra} note 119, at 6 n.24.

\textsuperscript{126} Cf. Arnett v. Kennedy, 416 U.S. 134, 151-52 (1974) (opinion of Rehnquist, J.) (non-probationary employee had a "statutory expectation" that he could not be removed other than for prescribed reasons); Bishop v. Wood, 426 U.S. 341, 344 (1976) (a property interest in continued employment may be created by statute or contract).

\textsuperscript{127} 562 F.2d 701 (D.C. Cir. 1977).

\textsuperscript{128} \textit{Id.} at 718 n. 38 (citations omitted); \textit{see also} Vitarelli v. Seaton, 359 U.S. 535, 539 (1959) (employee who could have been discharged summarily and without cause may not be fired in contravention of agency regulations); \textit{but see} the discussion of \textit{Jolly v. Listerman} at notes 133-36 \textit{infra} and accompanying text.

\textsuperscript{129} 416 U.S. 134 (1974).

\textsuperscript{130} \textit{Id.} at 151-52 (1974) (opinion of Rehnquist, J.). Two other justices also concluded that due process was satisfied by a post-termination hearing, but on different grounds. \textit{Id.} at 164-71 (opinion of Powell, J.). As to the various standards applied by the different justices to determine what process is due, see Lowy, \textit{supra} note 119, at 16-18.
In sum, while statutes or an agency's regulations may create a due process expectation that the probationer will not be fired for prohibited reasons, there is typically no due process property right in the probationer's retention of his position past the end of the probationary period. As to the extent of the probationer's "liberty" rights, it is clear that if his dismissal involves alleged dishonesty or other misconduct amounting to moral turpitude, and there is communication to others, the liberty interest is implicated and he would be entitled to a due process hearing to clear his name.

Even for non-probationers there is a question whether due process grants a meaningful remedy when the employing agency retaliates against them for whistleblowing. In *Jolly v. Listerman,* the employing agency's original reasons for terminating the plaintiff in 1974 were found to be constitutionally invalid. The agency had indicated in a letter to the district court that the reasons not declared invalid were by themselves enough to justify its original decision to terminate the whistleblower. The *Mt. Healthy* standard was not applied; rather, the circuit court simply held that the plaintiff's due process rights had been satisfied by the administrative review he had received, and that, under the test prescribed by the Administrative Procedure Act, the court would not go further than to determine that the agency's action in dismissing the plaintiff had not been "arbitrary and capricious."

The Supreme Court's denial of certiorari in *Jolly* lends support to the conclusion that the first amendment and due process rights of the

---

131. *But see* Beeson v. Hudson, 630 F.2d 622, 626 (8th Cir. 1980) (holding that if a probationary employee is threatened with removal based on grounds that existed prior to his appointment, that employee may have a qualified property interest in continued employment); cf. *Jolly v. Listerman,* 672 F.2d at 941 (though an employee is in a probationary period in his current job, he might have a due process property interest in continued employment within the *agency* which employed him for a number of years before he began his current job in the same agency).


133. 672 F.2d 935 (D.C. Cir.), *cert. denied,* 103 S. Ct. 450 (1982).


135. *Jolly v. Listerman,* 672 F.2d at 943 n.27.

136. 103 S. Ct. 450 (1982). One of the questions presented to the Supreme Court in the petition for certiorari was:

2. Whether, after remand for reconsideration of decision to discharge a federal employee on several grounds, some of which involve constitutionally-protected activity, the requirements of *Mt. Healthy* City School Dist. Bd. of Education v. Doyle [citation omitted] are satisfied by a letter from
whistleblower are vaguely defined and inadequate to protect him against reprisal.

V. The Right of a Federal Employee to Sue His Supervisor—
 a Bivens-type Suit

Assuming a probationary whistleblower's constitutional rights have been infringed by his supervisor's action, he may have a Bivens claim against the supervisor. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, the Supreme Court held that violation of the fourth amendment prohibition against unreasonable searches and seizures by a federal agent acting under cover of his federal authority gave rise to a cause of action for damages against the agent. The Court, noting that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," thus ruled that a federal employee could be liable in damages for injury resulting from his invasion of another person's constitutional rights.

The Court's current standard for determining whether a Bivens action may be inferred in a given case is set out in Carlson v. Green. Under this standard, victims of a constitutional violation by a federal agent are presumed to have a cause of action for damages against the agent. In either of two "situations," however, the cause of action may be precluded. First, the victim may be denied a Bivens action if the defendant demonstrates "special factors counselling hesitation [in

agency management asserting that the remaining, unprotected, grounds were sufficient to justify the discharge.

Petition for Certiorari at i, Jolly v. Listerman, 672 F.2d 935 (D.C. Cir.), reh'g denied, 675 F.2d 1308, cert. denied, 103 S. Ct. 450 (1982).

138. See notes 103-36 supra and accompanying text for a discussion of the extent of constitutional protection accorded probationary whistleblowers.
139. 403 U.S. 388 (1971).
140. Id. at 389. The Supreme Court has held that government officials' violations of other constitutional rights may trigger Bivens actions for damages against the official: Davis v. Passman, 442 U.S. 228 (1979) (gender-based employment discrimination claim arising in a Congressman's staff implies a fifth amendment due process right of action); Carlson v. Green, 446 U.S. 14 (1980) (Bivens action allowed for violation of the eighth amendment proscription against cruel and unusual punishment).
141. 403 U.S. at 395.
142. Id. at 397.
143. 446 U.S. 14 (1980).
144. Id. at 18.
inferring a Bivens action] in the absence of affirmative action by Congress.'"145 Second, a Bivens action may be precluded when the defendant shows that Congress has "provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective."146

Unfortunately, neither of these two "situations" has been very well defined by the Court. As to the "special factors," the Court's opinions offer little guidance as to just what factors would justify withholding a Bivens remedy.147 In the only one of the Supreme Court's Bivens-type cases to find such concerns—created by defendant's status as a member of Congress in Davis v. Passman148—they were not discussed except for the Court's holding that "these concerns are coextensive with the protections afforded by the Speech or Debate Clause."149 That holding is not helpful in the case of a whistleblower whose employer is one of the federal agencies covered by the CSRA.

Similarly, as to the "explicit declar[ation]" by Congress, the Court does not make very clear just what Congress would have to say to "explicitly declare" an alternative remedy to be a "substitute" for, and viewed equally effective as, a Bivens remedy.150

Under this standard, three circuit courts have been asked to decide whether a federal civilian employee has a Bivens action for damages against his supervisor who allegedly violated the employee's constitutionally protected rights.151 Two circuits have answered this question in the negative,152 and one in the affirmative.153 The two courts denying a Bivens action found that non-Bivens remedies were available that could give the plaintiff employee meaningful relief.154

145. Id. (quoting Bivens, 403 U.S. at 396; citing Davis v. Passman, 442 U.S. 228, 245 (1979)).
146. 446 U.S. at 18-19 (citing Bivens, 403 U.S. at 397; Davis v. Passman, 442 U.S. at 245-47).
149. Id. at 246.
150. See Carlson v. Green, 446 U.S. at 19 n.5, 18-19. "To satisfy this [second situation] test, petitioners need not show that Congress recited any specific 'magic words.' . . . Instead, our inquiry at this step in the analysis is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the Bivens remedy." Id. at 19 n.5.
151. See notes 103-36 supra and accompanying text for a discussion of the extent of constitutional protection accorded probationary whistleblowers.
154. See Bush v. Lucas, 647 F.2d 573, 577 (5th Cir. 1981), cert. granted, 102 S. Ct. 3481 (1982); Bishop v. Tice, 622 F.2d 349, 357 (8th Cir. 1980).
court recognizing a *Bivens* action found that no other available action could afford meaningful relief.\(^{155}\)

In *Bush v. Lucas*,\(^ {156}\) a first amendment case involving an alleged retaliation against a tenured federal employee's whistleblowing, the Fifth Circuit held that the government employer-employee relationship in the case constituted a "special factor which counsels hesitation in recognizing a constitutional cause of action [for damages] in the absence of affirmative action by Congress."\(^ {157}\) Noting that such a cause of action might encourage aggrieved employees to bypass the "very comprehensive" scheme\(^ {158}\) which the government had carefully designed to balance the employee's rights against the government's interest in efficiency,\(^ {159}\) the court refused to recognize a *Bivens* action. Although the court might have inferred a *Bivens* remedy had the plaintiff been without other meaningful remedies,\(^ {160}\) the statutory and administrative remedies available to civil servants convinced the court that the government employer-employee relationship precluded a cause of action for damages.\(^ {161}\) The Supreme Court has granted certiorari.\(^ {162}\)

In *Bishop v. Tice*,\(^ {163}\) the Eighth Circuit reached the same conclusion on similar grounds. The court found that the plaintiff, a tenured employee who alleged he had been constructively discharged in violation of his fifth amendment due process rights, had an administrative remedy without inferring the availability of a *Bivens* cause of action.\(^ {164}\) Finding a "'special factor counseling hesitation'" in the

---

155. See Sonntag v. Dooley, 650 F.2d 904, 907 (7th Cir. 1981). The Supreme Court noted the lack of any other meaningful remedy when it recognized *Bivens* actions in Davis v. Passman, 442 U.S. 228, 245 (1979) (since Davis' employer Passman, who fired her in violation of the fifth amendment, was no longer a Congressman, equitable relief was not available to restore her job; the only meaningful relief would be damages—in a *Bivens* action), and in *Bivens*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) (for the *Bivens* plaintiff, damages would provide the only meaningful relief).

156. 647 F.2d 573 (5th Cir. 1981), cert. granted, 102 S. Ct. 3481 (1982).

157. Id. at 577.

158. Id.

159. Id. at 576-77.

160. Id. at 577.

161. *Bush*, 647 F.2d at 575-76. The court did not reach the question "whether Congress intended the civil service remedies to be an equally effective substitute for a *Bivens* remedy," id. at 577; had the court found that Congress did so intend, this could have been an alternative ground on which to preclude a *Bivens* remedy for the government employee whistleblower. See Carlson v. Green, 446 U.S. at 18-19.

162. 102 S. Ct. 3481 (1982).

163. 622 F.2d 349 (8th Cir. 1980).

164. Id. at 357.
existence of civil service remedies, the court held that a Bivens-type action was precluded.\textsuperscript{165}

The Seventh Circuit in Sonntag v. Dooley,\textsuperscript{166} however, reached a contrary conclusion, based largely on the fact that civil service statutes and rules, which if applicable would have afforded reinstatement and back pay, could not give the plaintiff meaningful relief.\textsuperscript{167} Claiming under the fifth amendment, the plaintiff, a former tenured employee, alleged that the defendants had used various “extra-legal” means to obtain her retirement by destroying her health until she was forced to leave her job under her doctor’s orders. Unable to work due to ill health, she could obtain relief only in the form of damages—in a Bivens action.\textsuperscript{168} The court inferred the Bivens cause of action, holding that neither of the Supreme Court’s criteria\textsuperscript{169} for denying such an action was applicable. According to the Seventh Circuit, the defendants had not demonstrated “‘special factors counselling hesitation’” because they did not enjoy “‘such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate,’”\textsuperscript{170} and Congress had not provided “‘an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.’”\textsuperscript{171}

Given the standard articulated in Carlson v. Green,\textsuperscript{172} the Supreme Court’s pending decision in Bush v. Lucas,\textsuperscript{173} as to whether the government employee whistleblower has a Bivens claim against his superior, will depend in large part on Congress’ intent in passing the civil service laws, including the CSRA. Weighing against a Bivens claim is

\begin{footnotesize}
\begin{enumerate}
\item[165.] 622 F.2d at 357.
\item[166.] 650 F.2d 904 (7th Cir. 1981).
\item[167.] \textit{Id.} at 907. Sonntag, like Bishop, alleged that her retirement had been coerced; the Sonntag court found, contrary to the finding in Bishop, that the civil service regulations relied on in Bishop afforded no relief as they had been superseded by inapplicable regulations. \textit{Id.}; see Bishop, 622 F.2d at 356. However, the real basis for the Sonntag court’s decision to infer a Bivens cause of action was that the plaintiff could not have benefited from any relief other than damages. \textit{See Sonntag}, 650 F.2d at 907.
\item[168.] 650 F.2d at 907.
\item[169.] 446 U.S. 14, 19 (1980). \textit{See} discussion at notes 143-50 \textit{supra} and accompanying text.
\item[170.] 650 F.2d at 907 (quoting Carlson v. Green, 446 U.S. at 19).
\item[171.] \textit{Id.} (quoting Carlson v. Green, 446 U.S. 14, 18-19 (1980) (emphasis in original)).
\item[172.] \textit{See} notes 143-50 \textit{supra} and accompanying text.
\item[173.] 647 F.2d 573 (5th Cir. 1981), \textit{cert. granted}, 102 S. Ct. 3481 (1982).
\end{enumerate}
\end{footnotesize}
the rationale of the *Bush* and *Bishop* courts—that the complex, carefully balanced administrative scheme created by the CSRA constitutes a "‘special factor counselling hesitation in the absence of affirmative action by Congress.’" It is an established principle that the federal government has a special interest in the efficient administration of its internal affairs. As the Supreme Court said in *Pickering*, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Considering the complexity of civil service legislation, and the extent to which the government administrative protections do guard against deprivation of the constitutional rights of government employees, the government’s interest in efficiency of operation might well be considered a "special factor" that would in most cases preclude a *Bivens* action. Of course, in an extreme case such as *Sonntag v. Dooley,* where the defendants’ actions have allegedly rendered the plaintiff incapable of benefiting from any non-*Bivens* remedies that could be afforded her, a *Bivens* remedy may well be appropriate. Even assuming, however, that the Supreme Court would be disposed to infer a *Bivens* remedy on facts similar to those in *Sonntag,* most probationary whistleblower plaintiffs could not argue that retaliation for whistleblowing had rendered them incapable, as was the *Sonntag* plaintiff, of benefiting from the type of remedy offered under existing administrative procedures. It might be argued, where OSC fails to appeal to the

177. It should also be noted that after deciding in *Carlson* that neither of the situations existed which could preclude a *Bivens* remedy, the Supreme Court considered four additional factors, all of which bolstered its conclusion that the Federal Tort Claims Act (FTCA) did not preempt a *Bivens* action. 446 U.S. at 20-23. These four factors were that the *Bivens* remedy served a deterrent purpose since it was recoverable against individuals, *id.* at 21, that punitive damages may be awarded in a *Bivens* action, *id.* at 22, that the plaintiff may opt for a jury in a *Bivens* action, *id.* at 22-23, and that a *Bivens* action recognizes uniform rights for the plaintiff throughout the United States. *Id.* at 23. The FTCA offered the plaintiff none of these benefits. *Id.* at 21-23.

The CSRA does offer a plaintiff two of these benefits. It acts as a deterrent to retaliation against whistleblowers by providing for fines and other sanctions against the offender, 5 U.S.C. § 1207(b) (Supp. V 1981); see *Carlson,* 446 U.S. at 21, and provides uniform rules not dependent on state laws. Cf. *Carlson,* 446 U.S. at 23.
178. 650 F.2d 904 (7th Cir. 1981).
179. *Id.* at 907.
MSPB the case of a deserving probationary whistleblower, that because the whistleblower has not in fact received the benefit of the indirect administrative appeal provided by the Act, \textsuperscript{180} a \textit{Bivens} action should be inferred. Congress, however, carefully weighed competing goals in deciding to grant the probationer only the indirect remedy of appeal through OSC.

If the complex administrative procedures that Congress developed for the civil service do in fact constitute a "special factor counselling hesitation," there is presently little basis in the Supreme Court's decisions for predicting whether a probationary government employee whistleblower will have a \textit{Bivens} action against his superior.\textsuperscript{181} Perhaps the Court in \textit{Bush} will offer a refinement of its standard for determining whether a \textit{Bivens} action will lie. For example, the Court might hold that existing civil service remedies do constitute a "special factor counselling hesitation," and then go on to develop a test that would allow for a \textit{Bivens} action in some cases even in the presence of such a factor.\textsuperscript{182} This approach could harmonize the sensible but apparently contradictory results in the circuit court cases.\textsuperscript{183} It could also give the probationary whistleblower a clearer indication as to whether he is likely to have a \textit{Bivens} action against his superior. In the absence of such a standard, comparison of the facts and holdings in \textit{Bush}, \textit{Bishop}, and \textit{Sonntag} suggests that in most situations the aggrieved probationary whistleblower will not have a \textit{Bivens} claim.\textsuperscript{184}

\textsuperscript{180} For a discussion of the administrative appeals procedures under the CSRA, see notes 40-66 \textit{supra} and accompanying text.

\textsuperscript{181} As previously noted, see notes 147-49 \textit{supra} and accompanying text, the Court's holding in \textit{Davis}, 442 U.S. at 246, that the special factors counselling hesitation in that case were "coextensive with the protections afforded by the Speech or Debate Clause," offers little guidance toward the resolution of the question whether the probationary federal employee whistleblower has a \textit{Bivens} action against his superior.

\textsuperscript{182} The Court might decide that the \textit{Sonntag} facts suggest a good basis for such a standard. The standard could provide that despite the existence of a "special factor," a \textit{Bivens} action for the employee would lie where the defendant's intentional action has rendered the plaintiff incapable of benefiting from existing administrative remedies. Cf. \textit{Sonntag}, 650 F.2d at 907 (allowing a \textit{Bivens} action based on a finding that civil service procedures did not constitute a special factor counselling hesitation).

\textsuperscript{183} Compare \textit{Sonntag}, 650 F.2d at 907 (no special factors counselling hesitation) \textit{with Bush}, 647 F.2d at 576-77 (civil service administrative scheme is a special factor counselling hesitation), \textit{[and] Bishop}, 622 F.2d at 357 (same).

\textsuperscript{184} See discussion at notes 151-71 \textit{supra} and accompanying text. Once a \textit{Bivens} action is inferred, the next issue is whether the defendants are immune. The Supreme Court held in \textit{Carlson v. Green}, 446 U.S. 14 (1980), that though requiring the defendants to defend a \textit{Bivens} suit might inhibit their efforts to perform their duties,
VI. Problems With the Functioning of the New Administrative System

It is clear that, at least in the early stages of its existence, the Office of the Special Counsel was not effectively protecting the whistleblowers who brought allegations of reprisals to OSC. Two cases involving probationary federal employee whistleblowers, which have been passed on by the District of Columbia Circuit Court, have been discussed.\(^{185}\) In *Wren*, OSC closed the investigation without making the preliminary inquiry required by the CSRA—to determine if the

---

complaint was meritorious. In *Borrell*, OSC's finding that the plaintiff was fired for poor performance in her job was apparently erroneous.

The OSC's handling of these cases is troubling, but what is worse is that they appear not to be isolated cases. In a 1980 report, the General Accounting Office (GAO) concluded that "[s]erious startup problems, delays in case processing, poor communication with whistleblowers and inadequate followup of agencies' responses to complaints jeopardize the Special Counsel's relationship with whistleblowers." One striking finding of the report deserves particular mention: The GAO found that "[w]hen the Special Counsel's office receives an agency report, the office does not determine the accuracy of the report. Nor does the office determine if corrective action has or has not been taken."

The GAO "believe[d] that the Special Counsel's office [was] taking a narrow interpretation of its responsibilities in reviewing agency reports." OSC's view was that unless it required an agency to investigate an allegation in depth, the CSRA did not allow OSC to take further action concerning the report, or even to comment on the report's accuracy. To the extent that OSC elects not to question the agency's report, the probationary whistleblower's CSRA protections against reprisal are nullified.

Several reports, including that of the GAO, indicate a number of reasons for the poor performance of the OSC. First, the OSC has from the start had very limited funding. For example, a July 1980 law reduced the Special Counsel's office budget by almost fifty percent for the fiscal year 1980. Although there has been a significant increase

186. 681 F.2d at 873-74; see notes 68-75 supra and accompanying text.
187. See 682 F.2d at 983-85, discussed at note 81 supra.
188. GENERAL ACCOUNTING OFFICE, THE OFFICE OF SPECIAL COUNSEL CAN IMPROVE ITS MANAGEMENT OF WHISTLEBLOWER CASES, front cover (1980) [hereinafter cited as GAO REPORT].
189. Id. at 4 (emphasis added).
190. Id.
191. Id.
192. See notes 40-66 supra and accompanying text for a discussion of the limited appeal rights of probationers under the CSRA.
195. OSC's budget was cut from $4.5 million to $2.5 million. GAO Report, supra note 188, app. 1, at 2; OFFICE OF THE SPECIAL COUNSEL, 1980 ANNUAL REPORT 2 (1981). Even for fiscal year 1984, OSC's budget is not expected to reach the $4.5 million level. Office of the Special Counsel, Analysis of Authorized Level for Fiscal
PROBATIONARY WHISTLEBLOWERS in the number of permanent OSC employees since the GAO report was filed, the budget increase in fiscal 1984 will be held to a minimum level through a decrease of twenty-seven full-time positions in OSC. This does not bode particularly well for OSC’s future performance.

OSC’s performance also is not helped by its lack of independent budget authority. In 1980, OSC sued the MSPB over the Board’s allocation of funds between OSC and MSPB. As the GAO underlined, “[t]he intended legal relationship [between MSPB and OSC] is not clearly defined . . . .” Thus, with respect to the budget, “the Special Counsel’s operations are influenced by administrative decisions of the Board—concerning office space, contracts, and procurement.” In sum, OSC’s problems include a lack of funds, of personnel, and of independence from the MSPB.

OSC’s constant shortage of funds and dependence on the MSPB is only one side of the problem. The other is the low level of utilization of OSC. Although OSC is struggling to deal with its workload, its share of the complaints being filed to all the various agencies is

---


197. Budget Estimates Table, supra note 195. This decrease, from the previous year’s 113 to 86, is “consistent with the [Reagan] Administration’s budget.” Office of the Special Counsel, Summary Justification of FY 1984 Budget Estimates 1 (undated and unpublished) [hereinafter cited as Summary Justification]. See also id. at 2 (“The Office of the Special Counsel has been beset by funding, staffing and leadership problems since its inception”).

198. See GAO REPORT, supra note 188, app. I, at 3-4. See also OFFICE OF THE SPECIAL COUNSEL, 1979 ANNUAL REPORT 5 (initially, only one permanent private office was allocated to OSC by the Board, which controlled office space. Overcrowding of staff, lack of privacy and somewhat unsafe office quarters were still problems in mid-1980); OFFICE OF THE SPECIAL COUNSEL, 1980 ANNUAL REPORT 5 (the staff in OSC’s central office in Washington, D.C. continued to work in crowded conditions and open space throughout 1980); OFFICE OF THE SPECIAL COUNSEL, 1981 ANNUAL REPORT 2 (crowded conditions continued until October 1981 when OSC moved to new office with adequate space).

199. GAO REPORT, supra note 188, app. I, at 3.

200. Id.
201. MSPB WHISTLEBLOWING REPORT, supra note 12, at 24 (survey showing that when government employees report wrongdoing, less than 1% report it to OSC).
202. See generally id. at 49-53 (discussing employees' knowledge of, and confidence in, various channels for reporting wrongdoing).
203. See id. at 53.
204. See id. at 27-28.
205. Summary Justification, supra note 197, at 2.
206. See note 201 supra and accompanying text.
207. Vaughn, supra note 32.
208. Id. at 663-64.
209. Id. at 664.
211. For example, in March 1981, President Reagan signed an executive order creating the President's Council on Integrity and Efficiency, which is designed to improve cooperation among federal agencies in fighting fraud and waste. MSPB WHISTLEBLOWING REPORT, supra note 12, at ii. Late in 1981, the chairman of that organization claimed that its efforts to encourage employees to report instances of suspected fraud and mismanagement had resulted in an 80% increase in "hotline
nation to change the attitude among employees that "'nothing would be done'" were they to report illegal or wasteful activity. Most importantly, OSC has been making increased efforts to inform federal employees of its function and services. As employees become more knowledgeable about these various initiatives, they are likely to develop more confidence that action will be taken to correct the problems a whistleblower exposes. Similarly, as they learn more about OSC, many will be convinced that OSC can protect them from reprisal for whistleblowing. A probationary employee who reacts to recent government exhortations by reporting wrongdoing or waste should be protected.

VII. Recommendations

Congress apparently intended to preclude extensive judicial review of OSC's decisions. In light of the congressional intent to remove obstacles to the firing of incompetents, there is serious question as to how much protection the courts can give probationary whistleblowers under the Act. At a minimum, courts should strike down an arbitrary and capricious refusal by OSC to conduct the statutorily mandated investigation.

More protection is certainly desirable for probationary whistleblowers, and given the administrative structure created by the

calls" and letters received by the member agencies. Letter to the author from Robin Raborn of the OSC, Feb. 1, 1983. The Council on Integrity and Efficiency publicized a list of whistleblower hotline numbers set up by more than 20 departments and agencies in the spring of 1981. MSPB WHISTLEBLOWING REPORT, supra note 12, at iii. 212. MSPB WHISTLEBLOWING REPORT, supra note 12, at iii (quoting a presidential statement in reaction to an April 1981 preliminary draft of the MSPB Whistleblowing Report).

213. Id. (during 1981, OSC "increased its outreach efforts by encouraging other Federal agencies to inform their employees about the Special Counsel, and by widely distributing informational posters and pamphlets").

214. Id. at 53, 55.

215. Id. at 53-54.

216. See notes 65-66 supra and accompanying text; Vaughn, supra note 32, at 660 n.254 (the focus of the Act on administrative relief, the failure to create a private right of action, and the statutory scheme's structure support this conclusion).

217. See Vaughn, supra note 32, at 661 n.258, 660 n.254 (OSC's failure to pursue a complaint may be "final agency action," subject to review under the Administrative Procedure Act's "arbitrary and capricious" standard); 5 U.S.C. §§ 702, 704, 706 (1976); discussion of the Wren case at notes 68-79 supra and accompanying text.

218. See discussion of the Borrell case at notes 80-86 supra and accompanying text, and of the Wren case at notes 68-79 supra and accompanying text.
CSRA, this protection should be provided in large part by OSC, in the form of more aggressive investigation of whistleblower allegations and protection of probationary whistleblowers' interests.\textsuperscript{219} To that end, Congress should correct two ongoing problems—OSC's constant budget constraints,\textsuperscript{220} and its incomplete independence from the Board.\textsuperscript{221} With improved protection of whistleblowers by OSC, it is likely that some probationary whistleblowers will be encouraged to blow the whistle where they would otherwise not have done so.\textsuperscript{222} The resulting savings would help pay for the cost of the proposed increase in OSC's budget.\textsuperscript{223}

Such corrections, however, will not change the fact that OSC is not an attorney for the whistleblower.\textsuperscript{224} For example, OSC may decide not to pursue a meritorious case if it feels that resources would be better used elsewhere.\textsuperscript{225} As a result, a probationary whistleblower is left with the same pre-CSRA causes of action that Congress considered

\textsuperscript{219} See notes 185-92 supra and accompanying text.
\textsuperscript{220} See notes 193-97 supra and accompanying text.
\textsuperscript{221} See notes 198-200 supra and accompanying text.
\textsuperscript{222} Of federal employees questioned in a recent survey, 41\% reported that they would be encouraged to report illegal or wasteful activity by knowledge that they would be protected from reprisal. MSPB WHISTLEBLOWING REPORT, supra note 12, at 57, 59.
\textsuperscript{223} The survey discussed in note 222 supra indicated that 45\% of federal employees claimed to have observed one or more instances of illegal or wasteful activity during one year. \textit{Id.} at 7. Of this 45\%., over half (52\%) claimed that the observed activity involved more than $1,000 in federal funds or property. \textit{Id.} Many said the waste they had observed amounted to over $100,000. \textit{See id.} at 12. Of those claiming personal knowledge of fraud, waste, or mismanagement, 70\% did not report the misconduct. \textit{Id.} at 21.

Making allowances for the fact that more than one employee may observe the same wasteful incident, and recognizing that the data discussed above were drawn from a sample not limited to probationary employees, it may nevertheless be concluded that the government could profit by encouraging probationers to believe that they will be protected from reprisal. \textit{See note 222 supra.} If 45,000 (45\%) of the 100,000 federal employee probationers, \textit{see notes 10-11 supra and accompanying text}, observe an illegal or wasteful activity during one year, and if 52\% of these activities involve at least $1,000, \textit{see MSPB WHISTLEBLOWING REPORT, supra note 12, at 7}, a minimum of roughly $23,000,000 of waste is observed by these probationers—not allowing for duplicate reporting of a given incident, but also not allowing for the fact that many observed incidents of waste involve far more than $1,000. \textit{See id.} at 12. If 70\% of this waste goes unreported, \textit{see id.} at 21, the unreported amount observed by probationers may be estimated to be in the range of $16,000,000 per year. This amount is roughly 3\frac{1}{2} times OSC's entire budget for fiscal year 1984. \textit{See note 195 supra.}

\textsuperscript{224} \textit{See notes 61-63 supra and accompanying text.}
\textsuperscript{225} Vaughn, supra note 32, at 660.
inadequate to protect whistleblowers from reprisal. OSC thus frustrates one of the Act’s goals, the protection of whistleblowers. Moreover, it does not necessarily achieve the Act’s other goal, the firing of incompetents. Some limited judicial review is therefore desirable to assure that OSC exercises its discretion in a manner that promotes the goals of the CSRA.

VIII. Conclusion

A justifiable goal of the CSRA was to ensure that incompetent employees could be fired from the federal civil service. Congress in effect decreed that because of the need for efficiency in government, probationary whistleblowers cannot be protected to the extent that they should be. Under the CSRA, probationary federal employees are in most cases denied the direct administrative appeal rights granted to tenured employees, and must rely on OSC to appeal for them. The OSC, designed to protect the integrity of the civil service system as a whole, has not consistently protected the rights of the individual probationer. Without corrective action by OSC, the probationary whistleblower is left with the same pre-CSRA causes of action that Congress considered inadequate to protect whistleblowers against reprisal. The most important of these causes of action are those deriving from the Constitution. Unfortunately, however, the extent of the probationary whistleblower’s constitutional rights is determined by uncertain and ill-defined standards. The probationer has no guarantee that the Constitution will adequately protect him from retaliation for whistleblowing.

The structure of the administrative system set up by the CSRA dictates that increased protection for the probationer should be provided largely by OSC. The OSC, however, has suffered from budget constraints and from its lack of independent budget authority. Currently, OSC’s staff is scheduled to be cut. Congress should correct these problems. Given the small size of OSC’s budget, a budget increase small in absolute terms would significantly enhance OSC’s

226. Of course, courts may hold that the CSRA whistleblower provisions create in the probationer a due process “statutory expectation” that he will not be fired in retaliation for whistleblowing. See notes 122-36 supra and accompanying text.

227. See Vaughn, supra note 32, at 660 n.254 (citing Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L.J. 965 (1969)). For example, should a court find that OSC is too acquiescent towards certain sister government agencies, it should claim jurisdiction and review the case to ascertain whether OSC is basing its decisions on proper grounds.
ability to protect probationary whistleblowers. The mere existence of OSC probably encourages employees to blow the whistle; more effective protection of whistleblowers by OSC is likely to encourage more whistleblowing by probationers. Increased whistleblowing would result in savings that would pay for part or all of the cost of increasing OSC’s budget.

Finally, some limited judicial review of OSC’s actions is necessary to ensure that OSC does not arbitrarily refuse to enforce the probationer’s CSRA whistleblowing rights. Even assuming, however, that such judicial review is made available, the limited nature of the probationer’s CSRA rights suggests that he would be wise not to blow the whistle until the end of the probationary period. At that time, the CSRA appeal rights will protect him far better than a necessarily limited judicial review of OSC’s administrative actions.

Benjamin C. Indig