BANNING FEDERAL EMPLOYEES FROM THE MODERN PUBLIC SQUARE: SOCIAL MEDIA POLICIES THAT VIOLATE LABOR LAW

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Every major Federal agency uses social media, such as Facebook, Twitter, and YouTube, to promote and inform the public of its activities and to enhance interaction with the public.[1] But, within days of President Donald J. Trump's inauguration, employees of the United States Environmental Protection Agency, the United States Department of the Interior, and several other Federal agencies were instructed to temporarily halt posting on their agency social media accounts.[2] On March 16, 2017, all 43,000 employees of the United States Department of Commerce received a broadcast email reminding them of existing agency policies that restrict employees' use of their personal social media accounts.[3] These policies prohibit employees from disclosing any information on social media accounts obtained on the job that is not already publicly available or that identifies themselves as federal employees.[4] These policies also require employees to submit, for prior review, anything they intend to

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1. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-605, SOCIAL MEDIA: FEDERAL AGENCIES NEED POLICIES AND PROCEDURES FOR MANAGING AND PROTECTING INFORMATION THEY ACCESS AND DISSEMINATE 3–5 (2011); *Sharing Information Through Social Media*, U.S. NRC, https://www.nrc.gov/public-involve/open/social-media.html (last visited August 2, 2017).

2. Coral Davenport, *Federal Agencies Told to Halt External Communications*, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/some-agencies-told-to-halt-communications-as-trump-administration-moves-in.html; Juliet Eilperin & Brady Dennis, *Federal Agencies Ordered to Restrict Their Communications*, WASH. POST (Jan. 24, 2017), https://www.washingtonpost.com/politics/federal-agencies-ordered-to-restrict-their-communications/2017/01/24/9daa6aa4-e26f-11e6-ba11-63c4b4fb5a63; Andrew Restuccia et al., *Information Lockdown Hits Trump's Federal Agencies*, POLITICO (Jan. 25, 2017), http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122.

3. E-mail from broadcast@doc.gov to All DOC Employees (Mar. 16, 2017, 10:03 EST) (on file with author) [hereinafter *DOC E-mail*].

4. U.S. DEP'T OF COMMERCE, OFFICE OF DIGITAL ENGAGEMENT, POLICY ON THE APPROVAL AND USE OF SOCIAL MEDIA AND WEB 2.0, at 8–10 (2016).

post on personal social media accounts that relates to the work of their office or their official duties.[5] The restrictions the Department of Commerce places on its employees' personal use of social media are not unique. The Department of the Interior, the Department of Justice, and the Department of State have similar policies that strictly limit what their employees can say about their workplace on social media.[6]

Over 1.2 million Federal employees, including 21,000 Commerce Department employees, are represented by a variety of labor organizations certified by the Federal Labor Relations Authority ("FLRA" or "the Authority") as their collective bargaining representative under provisions of the Federal Service Labor-Management Relations Statute ("the Statute").[7] The FLRA has held that unionized Federal employees have a right to publicize information about their working conditions and the terms and conditions of employment to the general public, including information about agency staffing, operations, and management efficacy. While the FLRA has not yet addressed the issue of whether unionized Federal employees may use social media to publicize their workplace concerns, the National Labor Relations Board ("NLRB") has held that private sector employees have a right to do so under the National Labor Relations Act ("NLRA").[8]

This Article argues that the restrictions which the Department of Commerce and other agencies have placed on their employees' personal, non-official use of social media violates their employees' rights under the Federal sector collective bargaining statute. This Article first examines the specifics and scope of these restrictions. It then reviews the FLRA's case law establishing the right of Federal employees to publicize their workplace concerns and how this right is more expansive than the rights Federal employees have under the First Amendment to speak publicly about their employer. The Article then discusses recent NLRB decisions that have found that social media policies similar to those issued by the Department of Commerce and other Federal agencies violate employees' right to engage in workplace-related speech. Finally, this Article concludes by discussing how the public will benefit from removing restrictions on Federal employees' use of social media.

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5. *Id.*

6. U.S. DEP'T OF THE INTERIOR, SOCIAL MEDIA AND SOCIAL NETWORKING POLICY 4–5 (2010), https://www.doi.gov/sites/doi.gov/files/migrated/notices/upload/DOI-Social-Media-Policy-Final-Redacted.pdf; Memorandum for All Department Employees from James M. Cole, Deputy Attorney General, U.S. DEP'T OF JUSTICE (Mar. 24, 2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-memo-personal-use-social-media.pdf; *5 FAM 790: Personal Use of Social Media*, U.S. DEP'T OF STATE, https://fam.state.gov/fam/05fam/05fam0790.html (last visited August 2, 2017).

7. 5 U.S.C. §§ 7101 *et seq.* (2012); U.S. OFFICE OF PERS. MGMT., OFFICIAL TIME USAGE IN THE FEDERAL GOVERNMENT, appendix B at 2, 8 (2017).

8. *See generally* Hispanics United of Buffalo, Inc., 359 N.L.R.B. 368 (2012).

I. THE SCOPE OF THE RESTRICTIONS

As previously stated, the Department of Commerce sent a broadcast email on March 16, 2017, reminding employees of existing agency policies that restrict employees' use of their personal social media accounts.[9] Ostensibly, it was sent "to extend a warm welcome to the Department's new employees"even though a government-wide hiring freeze had been in place for approximately two months.[10] The email went on to "take this opportunity to provide [recipients] and the Department's current employees with a summary of the existing rules and policies regarding the personal use of social media."[11] The email told employees that they "may maintain personal social media accounts such as Facebook, LinkedIn, Twitter[,] and YouTube, including engaging in group activities, but their use must comply with relevant ethics rules and procedures."[12] The email then listed eight bulleted prohibitions, including:

> You may not [make] . . . references to your Federal position when communicating in your personal capacity.
>
> Do not disclose any information obtained on the job that is not already publicly available, including classified information, personally identifiable information, proprietary or business confidential information, pre-decisional information, or similar sensitive information.
>
> Refer to the Department's *Policy on the Approval and Use of Social Media and Web 2.0* for additional information on the use of social media. The above are general guidelines that apply to employees using social media in a personal capacity.[13]

The *Policy on the Approval and Use of Social Media and Web 2.0* that the email referred to requires employees to submit the content of any social media posting for review that (1) relates to the programs or operations of their operating unit; (2) is related to their official duties; and (3) is not otherwise publicly available to their supervisor or other agency official.[14]

One of the major unions in the Department of Commerce, the National Weather Service Employees Organization, maintains a "members-only" Facebook group through which union members communicate with each other about workplace concerns.[15] The union's president has described this as a "24/7 virtual union meeting."[16] Off-duty Weather Service

9. *DOC E-mail*, *supra* note 3.
10. Memorandum on the Federal Civilian Employee Hiring Freeze, Donald J. Trump (Jan. 23, 2017).
11. *DOC E-mail*, *supra* note 3.
12. *Id.*
13. *Id.*
14. U.S. DEP'T OF COMMERCE, *supra* note 4, at 9.
15. *Member News*, NAT'L WEATHER SERV. EMPS. ORG., www.nwseo.org/Member_News/HR_1_Proposed.php (last visited August 2, 2017).
16. Joe Davidson, *Weather Service Conducts 'Illegal Surveillance' on Staff, Union Says*, WASH. POST (July 28, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/07/28/weather-service-conducts-illegal-surveillance-on-staff-union-says/.

employees help administer a Facebook group, titled "Protect the National Weather Service," on which posters and commenters publicize and critique agency understaffing, underfunding, service interruptions, and anticipated service reductions.[17] These activities are being conducted in apparent contravention of the Department of Commerce policies.

The Department of the Interior's policy on *Non-Official/Personal Use of Social Media and Social Networking* instructs employees: "In a publicly accessible forum, do not discuss any agency or bureau related information that is not already considered public information."[18] The Department of Justice's *Guidance on the Personal Use of Social Media by Department Employees* advises against the disclosure "of non-public information to further their own private interest or that of another," which presumably would include efforts to improve their working conditions or their co-workers' working conditions.[19] The Department of State's *Foreign Affairs Manual* similarly states that "[d]epartmental personnel who create and/or use non-official social media must not disclose nonpublic information."[20] Although Department of State employees "may establish personal blogs, wikis or other collaborative forum . . . [a]ny posting to a wiki or blog that contains information 'of official concern' to the Department must be cleared" through the Department's Public Affairs office, and "should not include discussions of internal department policy [or] procedures."[21] Matters "of official concern" that are subject to review before posting are defined to include anything "pertaining to current U.S. foreign policy or the Department's mission (including policies, programs, operations or activities of the Department of State or USAID)."[22]

Not all Federal agencies place similar restrictions on their employees' personal use of social media. The United States Department of Energy's social media policy, for example, simply prohibits employees from using their personal social media accounts for official departmental business.[23] The United States Department of Agriculture simply advises its employees that they "should not claim to officially represent the Department or its policies, or use the Department or other U.S. government seals or logos" when using social media in their private capacities.[24]

17. *Protect the National Weather Service*, https://www.facebook.com/pg/Protect-the-National-Weather-Service-193060867385939/about/ (last visited August 2, 2018).

18. U.S. DEPT. OF THE INTERIOR, *supra* note 6.

19. U.S. DEP'T OF JUSTICE, *supra* note 6, at 4.

20. *5 FAM 790: Personal Use of Social Media*, *supra* note 6.

21. *5 FAM 770: Federal Web Sites*, U.S. DEP'T OF STATE, https://fam.state.gov/fam/05fam/05fam0770.html (last visited August 2, 2017).

22. *3 FAM 4173: Review of Public Speaking, Teaching, Writing, and Media Engagement*, U.S. DEP'T OF STATE, https://fam.state.gov/fam/03fam/03fam4170.html (last visited August 2, 2017).

23. *Social Media*, ENERGY.GOV, https://energy.gov/about-us/web-policies/social-media (last visited August 2, 2017).

24. U.S. DEP'T OF AGRIC., NEW MEDIA ROLES, RESPONSIBILITIES AND AUTHORITIES, Departmental Regulation 1495-001, at 4 (2011), https://www.ocio.usda.gov/sites/default/files/docs/2012/DR1495-001_0.pdf.

II. FEDERAL EMPLOYEES HAVE A RIGHT TO ENGAGE IN ROBUST, PUBLIC DEBATE IN LABOR DISPUTES WITH THE GOVERNMENT

Prior to the enactment of the Federal Service Labor Management Relations Statute in 1978, Executive Order 11491 established Federal employees' right to unionize, which guaranteed the right of most executive branch employees "to form, join, and assist a labor organization."[25] This language parallels § 7 of the NLRA.[26] In ruling that a Federal employee union could not be sued under state libel laws for calling a non-member a "scab," the Supreme Court explained that the labor-management relations system established by the Executive Order was "remarkably similar" to the NLRA and that "the same federal policies favoring uninhibited, robust, and wide-open debate in labor disputes are applicable here."[27] The Court noted that "the primary source of protection for union freedom of speech under the NLRA" was § 7, guaranteeing employees the right "to form, join, or assist labor organizations,"[28] and that the same language of the Executive Order protects Federal employees in the same way.[29]

Congress carried over the language of § 1(a) of the Executive Order, protecting the right of Federal employees who are covered by the Statute "to form, join, or assist any labor organization" which "includes the right . . . to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities."[30] The Statute established the FLRA to adjudicate unfair labor practice cases in a manner similar to the NLRB in the private sector.[31] The FLRA's General Counsel investigates charges that an agency or a union has committed an unfair labor practice proscribed by the Statute and issues a complaint, if appropriate.[32] A hearing on the complaint is then held before an Administrative Law Judge ("ALJ"), with appeal rights to the three-member, presidentially-appointed authority.[33]

Shortly after the Statute was enacted, a FLRA Administrative Law Judge found that management of a Veterans Administration hospital

25. Exec. Order No. 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969).
26. 29 U.S.C. § 157 (2012).
27. Letter Carriers v. Austin, 418 U.S. 264, 273–74 (1974).
28. *Id.* at 278.
29. *Id.* at 274 n.6.
30. 5 U.S.C. § 7102 (2012). Supervisors, managers, Foreign Service officers, and employees of the General Accounting Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, the Tennessee Valley Authority, the United States Secret Service and the Federal Labor Relations Authority itself, are excluded from coverage of the Statute. 5 U.S.C. § 7103 (2012). Foreign Service officers have their own collective bargaining statute. 22 U.S.C. §§ 4101 *et. seq.* (2012). This statute contains the same protections as § 7102. 22 U.S.C. § 4104.
31. Am. Fed'n of Gov. Emps. v. FLRA, 785 F.2d 333, 336 (D.C. Cir. 1986).
32. *Office of the General Counsel*, FLRA.GOV, https://www.flra.gov/components-offices/components/office-general-counsel-ogc (last visited August 2, 2017).
33. 5 U.S.C. § 7118 (2012).

committed an unfair labor practice and retaliated against a union steward when the hospital reprimanded him for calling a local television reporter and suggesting the reporter do a story on understaffing at the hospital. The ALJ found that reprimanding the steward violated his right under § 7102 to present the views of the labor organization to the agency, other executive branch officials, to Congress, and to "other appropriate authorities." The judge stated that "[t]he term 'other appropriate authorities' is not defined in the Act, but [the judge] ha[d] no doubt that such term includes reporters, whatever the medium."[34] The FLRA affirmed the ALJ's ruling, with one reservation. Although the Authority determined that the discipline was in retaliation for the steward's activity as a union representative, "the Authority f[ou]nd it [wa]s unnecessary to pass upon, and specifically d[id] not adopt, the Administrative Law Judge's conclusion . . . that the language 'other appropriate authorities' in section 7102(1) of the Statute applies to reporters."[35]

Two years later, the same ALJ held that the Bureau of Prisons violated § 7102 of the Statute, both by maintaining a rule prohibiting its employees from releasing information to the press and by admonishing a local union president who was an agency employee for giving an interview to a newspaper reporter about impending budget-driven staff reductions at the Danbury Federal prison.[36] The ALJ noted that in the earlier Veterans Administration case, the Authority had not ruled whether the right to express the union's views to "other appropriate authorities" included the media[37] and that nothing in the legislative history of the Statute shed light on the meaning of the phrase.[38] The ALJ then concluded that the particular phrase did not apply to appeals to the public, only to communications within official channels. But, he did find, relying on the Supreme Court's decision in *Old Dominion Branch 496 v. Austin*, that "appeals to the public" were protected by the general language of § 7102, which establishes the right to form, join or assist a labor organization.[39] He further noted that although the public and the press were not "other appropriate authorities" to whom employees may present their union's views concerning terms and conditions of employment, the list of those to whom the union's views may be communicated was "merely illustrative," as the Statute is prefaced by the word "include."[40] The Authority affirmed the ALJ's decision, writing that "the legitimate conduct of an employee, who, acting in his representative capacity, seeks to publicize, through contacts with the media, issues having a direct bearing upon the working conditions of unit employees, enjoys the protections of the Statute."[41] The Authority

34. Veterans Admin., Veterans Admin. Med. Ctr., Shreveport, La., 5 F.L.R.A. 216, 226 (1981).
35. *Id.* at 216.
36. Bureau of Prisons, Fed. Correctional Inst., Danbury, Conn., 17 F.L.R.A. 696 (1985).
37. *Id.* at 710.
38. *Id.* at 709.
39. *Id.* at 711.
40. *Id.* at 712.
41. *Id.* at 696.

added, however, that the right to communicate with the press and the general public is not "unfettered" and might not extend to the release of information "so sensitive as to pose a threat to the continuing security or safety of the institution."[42]

The FLRA later held that an employee's right under § 7102 to engage in robust speech as a union representative did not include the use of racial epitaphs in a union newspaper.[43] In affirming this decision, the United States Court of Appeals for the District of Columbia Circuit questioned the rationale for extending the right to join and assist a labor organization to situations where the presentation of views of the union goes beyond those entities specifically listed in § 7102, characterizing it as "somewhat troubling."[44]

Nonetheless, the Authority continued to find that § 7102 protects employees when they communicate their unions' views to the public. In response to proposed budget cuts, unionized teachers in the United States Department of Defense dependent schools on Clark Air Base in the Philippines sought, and were denied, permission to distribute handbills outside the base commissary to the military community whose children attended the on-base schools.[45] These handbills informed the parents of the budget cuts and how the teachers' union expected the cuts would negatively impact the children's education. The handbills urged the parents to write their congressional representatives about the need for adequate funding.[46] While the ALJ noted that the leaflets highlighted the adverse effects that the budget cuts would have on the students, many of the cutbacks would have adversely affected the teachers' conditions of employment, such as larger class sizes, a lengthened workday, and an increased workload. After noting that public sector unions may not generally negotiate over economic conditions of employment and must seek congressional or executive action to improve the working conditions of those they represent, he concluded that "[c]ommunicating with the public to encourage others to make common cause with the employees' collective bargaining representative . . . is merely a logical extension of the Union's Section 7102 rights."[47] The Authority affirmed the ALJ's decision, noting that there was no claim that passing out handbills would disrupt operations on the air base.[48] The Authority also ruled in a companion case that the Marine Corps violated the Statute by refusing to permit the teachers on one of its bases in Japan to engage in similar leafleting.[49]

42. *Id.* at 696–97.
43. Veterans Administration, Washington D.C., 26 F.L.R.A. 114 (1987).
44. Am. Fed'n of Gov. Emps., AFL-CIO, Local 2031 v. FLRA, 878 F.2d 460, 464 (D.C. Cir. 1989).
45. Dep't of the Air Force, 3rd Combat Support Grp., Clark Air Base, 29 F.L.R.A. 1044, 1045 (1987).
46. *Id.*
47. *Id.* at 1061–62.
48. *Id.* at 1051.
49. U.S. Marine Corps, Marine Corps Base Camp Smedley D. Butler, 29 F.L.R.A. 1068 (1987).

The rights Federal employees have under the Federal sector labor relations statute "are more extensive than those same rights as protected by the first amendment."[50] The First Amendment only protects a public employee when he or she "speaks as a citizen on matters of public concern" and not "as an employee upon matters of only private interest."[51] § 7102 of the Statute, however, "goes beyond that, protecting speech that addresses 'internal office matters' such as the terms and conditions of employment."[52] On the other hand, § 7102 does not protect Federal employees when they opine about public policy in general, only protecting employees' comments insofar as it advances resolution of their own grievances about working conditions and terms and conditions of employment.

III. SIMILAR PRIVATE-SECTOR SOCIAL MEDIA POLICIES HAVE BEEN FOUND TO BE UNLAWFUL

The FLRA recognizes that "[t]he right of Federal employees under section 7102 of the Statute to publicize matters affecting unit employees' terms and conditions of employment is similar to the right of private sector employees under section 7 of the National Labor Relations Act (the NLRA) to publicize matters affecting unit employees' terms and conditions of employment."[53] The social media policies of various Federal agencies would not be legal had they been issued by private sector employers as a result of recent National Labor Relations Board rulings.

Like the Department of Commerce's social media policy, the "Social Media Code of Conduct" at issue in *Chipotle Services*, *LLC*[54] prohibited employees from posting any confidential information about the company on social media. The company's policy told employees that they "may not make any statements about Chipotle's business results, financial conditions, or any other matters that are confidential" in personal social-media postings. Employees also had to "keep confidential information confidential and . . . may not share it online or anywhere else."[55] In a decision affirmed by the Board, the ALJ found that the prohibition against posting anything "confidential" was illegally overbroad and that "[t]he prohibition against disclosing confidential information is also problematic" because the term "confidential" was undefined.[56] The ALJ found that

50. Carter v. Kurzejeski, 706 F.2d 835, 842 (8th Cir. 1983).

51. Connick v. Myers, 462 U.S. 138, 147 (1983). Even when a public employee speaks as a citizen on matters of public concern, the first amendment will not necessarily protect such speech. "[S]peech restrictions that are necessary for their employers to operate efficiently and effectively" may be imposed. Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

52. Am. Fed'n of Gov. Emps., AFL-CIO, Local 2031 v. FLRA, 878 F.2d 460, 469 n.1 (D.C. Cir. 1989) (Boggs, C.J., dissenting).

53. Department of the Air Force, Scott Air Force Base, Ill., 34 F.L.R.A. 1129, 1135 (1990).

54. 364 N.L.R.B. No. 72 (2016), *review denied,* ___Fed. Appx. ___, 2017 WL 2544543 (5th Cir. June 9, 2017).

55. *Id.* at 6.

56. *Id.* at 9.

"[w]hile the Respondent certainly has a valid interest in protecting private company information, and it is inappropriate to engage in speculation or presumptions of interference with employees' rights, the undefined word 'confidential' is vague and subject to interpretation, which could easily lead employees to construe it as restricting their Section 7 rights."[57] Like the Authority in *Clark Air Base*, the ALJ in *Chipotle Services, LLC* reasoned that "employee communications to the public that are part of and related to an ongoing labor dispute" are a protected activity, because "[e]mployees do not lose the protection of the Act when they seek to improve terms and conditions of employment through channels outside the immediate employee-employer relationship."[58]

The Department of Commerce broadcast email sent in March, 2017, instructed employees not to make "references to [their] Federal position when communicating in [their] personal capacity."[59] In *Chipotle Services LLC*, however, the ALJ noted that "[e]mployees often need to identify their employer while they are engaged in Section 7 activities."[60]

Another recent Board decision adopted an ALJ's finding that an employer's policy, which, like several of the Federal agencies' policies, prohibited employees from disclosing all non-public information, violated employees' § 7 rights. In her decision, the ALJ recognized that an employer may legitimately require confidentiality rules in appropriate circumstances.[61] But, when a rule fails to contain language that would tend to restrict its application to those circumstances, employees reasonably could assume that protected concerted activities, such as discussing wages, hours, and terms and conditions of employment, are also prohibited.[62]

The Board would also find that the Department of Commerce's requirement that employees submit for review the content of any social media posting that relates to the programs or operations of their operating unit and to their official duties and is not otherwise publicly available, violates the NLRA. "Any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on the employee's free time and in non-work areas is unlawful."[63]

IV. THE PUBLIC CAN BENEFIT FROM LEARNING ABOUT FEDERAL EMPLOYEE WORKPLACE GRIEVANCES

Although a Federal employee's social media posting might not be, on its face, "a matter of public concern," it may nonetheless be in the

57. *Id.*
58. *Id.*
59. *DOC E-mail*, *supra* note 3.
60. *Chipotle Services, LLC,* 364 N.L.R.B. at 14.
61. TPI Iowa, LLC, Case No. 19-CA-164749, 2016 WL 5340240 (N.L.R.B. Div. of Judges, Sept. 22, 2016), *adopted as modified*, 2016 WL 7383928 (N.L.R.B., Dec. 16, 2016).
62. *Id.*
63. Mercury Marine-Division of Brunswick Corp., 282 N.L.R.B. 794, 795 (1987).

public's interest to learn of the employee's workplace grievance. Observing that "[g]overnment employees are often in the best position to know what ails the agencies for which they work," Justice O'Conner wrote that "the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment."[64] In holding that a city's ordinance, which prohibited its fire fighters and other city employees from commenting in the media "on internal business decisions or departmental rules and regulations without first clearing these comments with the department head," was unconstitutionally overbroad, a United States district court found that the public benefitted from hearing from the fire fighters about their working conditions:

> The public has a great deal of interest in and a right to hear the opinions of City employees with regard to the internal business decisions and departmental rules and regulations of City departments. Shift hours of firemen, overtime pay, equipment purchases, and the Media Contacts ordinance itself are all examples of topics of public concern that would fall within the plain meaning of the ordinance.[65]

The Secretary of the Interior has announced plans to reduce his department's workforce by 4,000 employees, and the Administrator of the Environmental Protection Agency pledged to eliminate 3,200 positions, or more than 20% of the agency's employees. The Department of State is reportedly seeking to eliminate 2,000 Foreign Service officers and other employees in the coming years.[66] What may constitute a personal grievance by agency workers about their increased workload, and other internal effects of such reductions, may well provide the public with insight into the impact of these retrenchments on the agencies' ability to deliver public services.

V. CONCLUSION

On May 8, 2017, the National Weather Service Employees Organization filed an unfair labor practice charge against the Department of Commerce, alleging that the Department's social media policy violated the Statute. The charge is under investigation by the Washington Regional Office of the FLRA's General Counsel's office.[67] Justice Kennedy has recently written that the most important place today for the exchange of views is social media,[68] which he termed "the modern public square."[69]

64. Waters v. Churchill, 511 U.S. 661, 674 (1994) (plurality opinion). Justice O'Connor cited the Whistleblower Protection Act of 1989, 5 U.S.C. § 2101, as an example. The Act protects Federal employees who disclose evidence of a violation of a law, rule or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

65. Wolf v. City of Aberdeen, 758 F. Supp. 551, 555 (D.S.D. 1991).

66. Lisa Rein, *Interior Chief Wants to Shed 4,000 Employees in Department Shake-up*, WASH. POST, June 22, 2017, at A-3.

67. Letter from Jessica Bartlett, Regional Director, to author (May 9, 2017) (on file with author).

68. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

69. *Id.*

"These websites may provide the most powerful mechanisms available to a private citizen to make his or her voice heard."[70] Whether unionized Federal employees can have access to that square in their efforts to protect and improve their work life and employment security, in a time of rapid change in the government, is yet to be determined.

70. *Id.*