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THE DUTY OF FAIR REPRESENTATION UNDER THE CIVIL SERVICE REFORM ACT: JUDICIAL POWER TO PROTECT EMPLOYEE RIGHTS

TODD BROWER*

Introduction

In 1978, Congress enacted the Civil Service Reform Act (CSRA),1 a comprehensive revision of the laws regarding federal government employees.2 Title VII of the CSRA3 consisted of the first statutory framework for federal labor relations,4 which prior to that time had been completely governed by a system started by an executive order issued by President Kennedy in 1962.5

The findings and purposes of the new Act indicate the essential tensions involved in federal labor relations. Section 7101(a) declares that "[l]abor organizations and collective bargaining in the civil service are in the public in-
terest," and Title VII consciously strengthens the role of public employee labor unions. However, the Act also seeks to preserve traditional federal employer prerogatives in the interest of maintaining "an effective and efficient Government." The dichotomy between unionization and management efficiency is evident in the structure of the CSRA as well. The model for Title VII was clearly the National Labor Relations Act, and one goal of the CSRA was to make federal labor management relations more closely approximate private labor law. Nevertheless, the extent and wisdom of this parallelism was hotly debated by members of Congress, commentators, and courts.

Recently, this conflict has erupted on a new front: whether the duty of fair representation, so firmly entrenched in private labor relations, is present in

the federal public sector. This issue is a direct corollary to the increased role employee unions play in the federal sector under the Civil Service Reform Act. It illustrates the tension inherent in a statutory scheme that approaches the private National Labor Relations Act model, yet contains certain important caveats and omissions.

In the private sector, the Supreme Court has stated that "[t]he duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." Thus, while statutorily required to act as the exclusive bargaining representative for a group of employees, the union has a concurrent obligation to deal fairly with all bargaining unit employees, union members and nonunion members alike.

Similarly, the Civil Service Reform Act grants exclusive representative status to federal employee labor organizations. Along with that status is the statutory responsibility for "representing the interests of all employees in the unit it represents without discrimination and without regard to labor

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organization membership." Whether this duty may be enforced by the federal courts, as it is in the private sector, is the specific focus of this article.19

During late August of 1986, in Pham v. AFGE, Local 916,20 the Court of Appeals for the Tenth Circuit held that there existed a federal duty of fair representation directly cognizable in the federal courts. That decision directly conflicts with the Eleventh Circuit opinion in Warren v. Local 1759, AFGE,21 handed down scarcely one year earlier. The controversy in Pham, Warren, and related cases revolves around two analytically distinct, although closely related, issues.

The first issue is the propriety of federal subject matter jurisdiction. This issue stems from the absence in the Civil Service Reform Act22 of an analogue to section 301 of the Labor-Management Relations Act.23 That section gives the federal courts the power to hear suits for violations of contracts between an employer and a labor organization24 and is often the jurisdictional basis for private duty-of-fair-representation suits.

The second issue is the preemptive effect of the comprehensive labor relations scheme of the Civil Service Reform Act of 1978.25 This argument is based upon the presumption that Congress could have expressly provided a federal court remedy for the breach of duty of fair representation in the Act but chose not to do so in favor of an alternative remedial framework. Therefore, under this argument, the courts may not imply federal question jurisdiction in this instance. This article examines both of these arguments and concludes that the specific nature and goal of the duty of fair representation compels the extension of that duty and of federal court jurisdiction to federal sector labor relations.

The Tenth Circuit's brief opinion in Pham provides the proper analytical framework for approaching these problems.26 The structure of the opinion

18. Id. § 7114(a)(1).
20. 799 F.2d 634 (10th Cir. 1986).
26. The opinion takes up not quite six pages in the Federal Reporter, 2d series.

The facts of Pham can be summarized as follows. Sharon Pham was to be terminated from her position as supply clerk for the Air Force. Pham, 799 F.2d at 635. She decided to appeal that decision before the Merit Systems Protection Board (MSPB) and requested her union, Local 916, AFGE, to file the appropriate papers. Id. The union filed the papers ninety days too late and the MSPB refused the grievance. Id. Ms. Pham then began her duty-of-fair-representation suit in state court and it was removed to the Federal District Court for the Western District of Oklahoma. Id. The district court dismissed for lack of subject matter jurisdiction, id. at 636, and the Tenth Circuit reversed, id. at 635.
will serve as the organizational skeleton for this article: an examination of the goals and history of the Civil Service Reform Act; a discussion of private sector duty-of-fair-representation jurisprudence; and a review of the applicable authorities.

I. The Legislative History of the Civil Service Reform Act

As befitting a "comprehensive revision of the laws governing the rights and obligations of civil servants," the legislative history of the Civil Service Reform Act of 1978 is voluminous. In contrast, the history pertaining to the duty of fair representation under the CSRA or to federal court jurisdiction for breaches of collective bargaining agreements is nearly nonexistent.

Civil service reform in the United States began with the Pendleton Act of 1883. That Act was a reaction to the political patronage system and to the abuses that led to the assassination of President Garfield by a disgruntled political office seeker. The Pendleton Act provided for appointment to the Federal Civil Service on a merit basis through competitive examination, rather than through political cronymism.

Congress' next legislation on the issue came in response to executive orders by Presidents Roosevelt and Taft that forbade federal employees to communicate directly with members of Congress without prior permission of their superiors. The Lloyd-LaFollette Act of 1912 reaffirmed the merit system and provided for an extremely limited role for unions in the federal service. Specifically, the Act provided that membership in such organizations was not good cause for termination.

27. Id. at 636-37. See part I infra.
28. Id. at 637-38. See part II infra.
29. Id. at 638-39. See part III infra.
31. The reprinted and compiled legislative history of the Civil Service Reform Act of 1978 fills two volumes plus a separate volume of Committee hearings totalling 3,564 pages.
32. See infra notes 64-125 and accompanying text.
36. 22 Stat. 403, ch. 27, § 2 (1881).
37. 48 CONG. REC. 4513 (remarks of Rep. Gregg) (1912); id. at 4653 (remarks of Rep. Calder); id. at 4738 (remarks of Rep. Blackman); id. at 5201 (remarks of Rep. Prouty); id. at 5223 (remarks of Rep. O'Shaunessy); id. at 5634 (remarks of Rep. Lloyd); id. at 5637-38 (remarks of Rep. Wilson); id. at 10671 (remarks of Sen. Ashurst); id. at 10673 (remarks of Sen. Reed); id. at 10799 (remarks of Sen. LaFollette).
38. Exec. Order No. 1142 (1906) (President T. Roosevelt); Exec. Order No. 1514 (1904) (President Taft).
Provided, however, That membership in any society, association, club or other form of organization of postal employees not affiliated with any outside organiza-
However, no thorough examination of labor-management relations in the private sector was done until President Kennedy commissioned a Presidential Task Force to report on the issue and recommend a solution to the problem.\footnote{40} That report, entitled "A Policy for Employee-Management Cooperation in the Federal Service,"\footnote{41} became, in substance, his Executive Order No. 10988.\footnote{42}

That order, as amended by subsequent presidential orders, was loosely modeled on private sector labor relations.\footnote{43} \textit{Inter alia}, it gave employees the right to join or not to join labor organizations,\footnote{44} set up the Federal Labor Relations Council,\footnote{45} permitted federal agencies lawfully to recognize unions,\footnote{46} accorded exclusive representative status to lawfully recognized organizations,\footnote{47} permitted limited collective bargaining\footnote{48} and grievance mechanisms,\footnote{49} and provided certain administrative procedures by which prohibited conduct, called unfair labor practices,\footnote{50} could be resolved.\footnote{51}

Eventually, however, the executive order system was perceived as subject to several abuses, e.g., the promotion and immunization of bureaucratic sloth\footnote{52} by the complex administrative appeals process,\footnote{53} insufficient protection for "whistle-blowers,"\footnote{54} and political abuse of the merit system.\footnote{55} In the
labor relations arena, the executive orders suffered from a federal administrative body that was both adjudicative and prosecutorial, as well as perceived to be under the control of management.\textsuperscript{56} Further, the role of collective bargaining and unions generally was sharply circumscribed.\textsuperscript{57} It was against this background that Congress enacted the Civil Service Reform Act of 1978, which was proclaimed as "the most comprehensive reform of the federal work force since passage of the Pendleton Act in 1883."\textsuperscript{58}

Much of the controversy over the Civil Service Reform Act centered around issues not germane to this article.\textsuperscript{59} Even the debate over Title VII, dealing with labor-management relations in the public sector, dealt with issues only tangentially related to the duty of fair representation.\textsuperscript{60} The con-

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\textit{Hearings Before the Subcomm. on Manpower and Civil Service of the House Comm. on Post Office and Civil Service, 94th Cong., 2d Sess. 245-46 (1976).}

\textsuperscript{56} E.g., S. Rep. No. 969, \textit{supra} note 53, at 5.

\textsuperscript{57} E.g., Exec. Order No. 11,491, \S 6(b), 3 C.F.R. 861 (1966-1970) (limits on negotiating power); \S 7(1) and (2) (limits on grievance procedures); \S 8(a) and (b) (same); \S 11(b) (limited meet and confer obligations); \S 12(c) (no union security agreements). \textit{See generally Rosenblum & Steinbach, \textit{supra} note 43, at 855-62.}

\textsuperscript{58} S. Rep. No. 969, \textit{supra} note 53, at 1.


troversy over Title VII provoked many familiar philosophical arguments. The public sector was viewed as distinct from the private sector because marketplace control was absent and because salaries and benefits came from taxes and not profits. Unionization would have harmful effects on governmental budget-making and sovereignty; and the public, and thus government, was unable to refuse resolutely to accede to employee demands or strikes. These are concerns over which critical commentary and court opinion have been sharply divided.

The Duty of Fair Representation

In contrast, Congress paid no attention to the duty of fair representation. In the 179 pages in the Congressional Record of the House debate on House views; id. at 400-01 (separate views of Reps. Derwinski, Corcoran, and Leach); id. at 40910 (views of Rep. Taylor); id. at 12; 124 CONG. REC. H9453-9653 (daily ed. Sept. 11, 1978).

Scope of permissible bargaining and negotiations: H.R. REP. No. 1403, supra note 10, at 12; id. at 377-79 (supplementary views); id. at 400-01 (separate views of Reps. Derwinski, Corcoran, and Leach); id. at 404-05 (supplementary views of Reps. Rousselot, Collins, Derwinski, Lott, and Taylor); id. at 409 (views of Rep. Taylor); 124 CONG. REC. at H9453-9653 (daily ed. Sept. 11, 1978).


Bill 11280 and the Joint Conference Report on Senate Bill 2640, not a single mention is made of the duty of fair representation or related topics.\textsuperscript{64} The final legislation itself makes only a problematic reference to that duty. Section 7114(a)(1) of the Civil Service Reform Act provides:

If a labor organization has been accorded exclusive recognition, such organization is the exclusive representative of employees in the appropriate unit and is entitled to ask for and negotiate collective bargaining agreements covering all employees in such unit. \textit{It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership.}\textsuperscript{65}

Although it is disputed, some courts have found this provision to codify the private duty of fair representation in the federal sector.\textsuperscript{66} Yet, if this section was supposed to encompass the large and still evolving body of duty-of-fair-representation jurisprudence in the private sector, congressional indications to that effect are missing. The only congressional mention of section 7114(a)(1) merely restates the provision without explanation as to its significance or interpretation.\textsuperscript{67}

The language itself is taken almost verbatim from President Kennedy’s Executive Order No. 10988:

When an employee organization has been recognized as the exclusive bargaining representative of employees of an appropriate unit, it shall be entitled to ask for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.\textsuperscript{68}

However, the intent behind this provision is open to question. Despite its later interpretation,\textsuperscript{69} one might argue the executive order was not concerned with the duty of fair representation as that duty had been interpreted by the federal courts.\textsuperscript{70} Instead, the order may have been originally designed to pre-


\textsuperscript{65} CSRA, 5 U.S.C. § 7114(a)(1) (1982) (emphasis added). This language was identical in both the House and Senate versions of the Act. Compare H.R. 11280, § 7114(a), reprinted in 1 LEG. HIST., \textit{supra} note 10, at 597 with S2640, § 7114(a)(1), reprinted in 1 LEG. HIST. at 1248.

\textsuperscript{66} See infra notes 236-238 and accompanying text.


\textsuperscript{69} \textit{E.g.}, NFFE, Local 1453, 23 F.L.R.A. 686 (1986); AFGE, Local 2126, 1 F.L.R.A. 993 (1979); NTEU, ch. 202, 1 F.L.R.A. 910 (1979); U.S. Dep’t of the Navy, Naval Ordnance Station, 3 F.L.R.C. 866 (1975).

\textsuperscript{70} By 1962, the Supreme Court had decided only Steele v. Louisville & Nashville R.R., 323
vent the infringement of employees' civil rights with respect to race, color, creed, national origin, and religion. Antidiscrimination was a priority of the Kennedy administration, and thus antidiscrimination provisions were specifically included in the executive order as mandatory qualifications for unions in the federal sector. If the provision in the executive order was in fact designed only to protect civil rights, then it obviously was not intended to encompass the private sector duty of fair representation. Although the judicially developed duty of fair representation had its genesis in racial-discrimination complaints, it had been "extended beyond the racial factor [involved] in the Steele case" by 1962 when President Kennedy issued the executive order, and thus it encompassed more than protecting employees from discrimination. Therefore, since the origins of the antidiscrimination language are unclear in the executive order and congressional history is absent, the interpretation of the provisions of the Civil Service Reform Act which mimic that language is similarly clouded.

Nevertheless, the issue is only theoretically significant. Regardless of whether Congress intended to codify the duty of fair representation in section 7114(a)(1), that section clearly gave exclusive representative status to lawfully


73. See infra notes 130-133.


76. One might argue that the congressional silence on this issue only underscores the need for the protection provided by the duty of fair representation. One of the fundamental premises of the duty is that the individual employee's rights may be lost due to the structural bias in the labor laws in favor of the more powerful institutional actors, the employer and the union. Vaca v. Sipes, 386 U.S. 171, 182-83 (1967). Representatives of both management and labor testified before the congressional committees in hearings on the Civil Service Reform Act. See, e.g., S. REP. No. 969, supra note 53, at 14-17; Hearings Before the Comm. on Post Office & Civil Service on H.R. 11280, 95th Cong., 2d Sess. 1-1025 (1978). Those persons could be expected not to be extremely interested in drawing legislative attention to a legal doctrine in which they are potential defendants.

77. But see Warren v. Local 1759, AFGE, 764 F.2d 1395, 1399 n.5 (11th Cir. 1985).
recognized unions. Further, the legislative history of the Act clearly shows that Congress meant for unions to have an increased role in collective bargaining and grievance procedures. The increased role of unions was a congressional trade-off for a strengthening of management prerogatives in other sections of the Act. Thus, the legislative history of the Act shows a congressional policy shift toward the protection of employee rights through collective bargaining and away from traditional civil service administrative remedies and safeguards. This shift marked the movement of public sector labor-management relations toward the private model.

Both opponents and proponents of the legislation agreed that federal sector labor relations should approach the situation developed in the private arena. The real question was to what extent, particularly with respect to the

81. "It [Title VII of the Civil Service Reform Act] will permit the establishment through collective bargaining of grievance and arbitration systems . . . Such proceedings will largely displace the multiple appeal systems which now exist and which are unanimously perceived as too costly, too cumbersome and ineffective." Message of President Carter, Mar. 2, 1978, reprinted in H.R. Rep. No. 1403, supra note 10, at 102.

Mr. Speaker, a major criticism leveled against the civil service system dealt with employees' rights. The press in particular was quick to pick up on employees who apparently abused the rules by prolonging a transfer, demotion, or dismissal. This will no longer be possible, however. Instead of the "preponderance of the evidence rule" a manager will now only have to prove by "substantial evidence" that the employee is performing unsatisfactorily and [can] therefore be dismissed. The new standard adopted by the conferees will enhance a manager's authority to remove incompetent and inefficient workers within a reasonably shorter length of time.

As a counterbalance to these new procedures the conference report contains stronger measures to allow Federal workers to organize, join, and contribute to a union. Presently, labor-management relations are governed by an Executive order issued during the Kennedy administration. During this 16-year period the unions have acted responsibly on behalf of their members. As a result employee unions have earned the statutory recognition and protection provided under this bill.

Mr. Speaker, this is a good bill. It represents the collective efforts of many people. It has balanced the needs of the Federal employee to feel secure from political and personal reprisals against the public's expectations for an honest, hard-working, and efficient civil service system.

83. E.g., H.R. Rep. No. 1403, supra note 10, at 404-05 (additional views of Reps. Rousselot,
scope of bargaining. Many legislative opponents were concerned about the efficiency of the federal service. Specifically, they were concerned that management's ability to set the terms and conditions of employment would be destroyed by the proposed law. Yet, supporters of the Civil Service Reform Act worried that the legislation went too far in granting rights to management in the name of efficiency. Thus, increased union power was given as a counterbalance.

Congressional desire for efficiency is one of the reasons given for denying federal court jurisdiction over government union duty-of-fair-representation suits. In congressional debates, efficiency in the federal service is equated with management flexibility and the simplification or acceleration of employee review and dismissal procedures. Of these, only the concern with streamlining the appeals process bears much relevance to the question of permitting court jurisdiction over duty-of-fair-representation challenges.

Despite the language of the Senate Report quoted in Martel v. Carroll, the balance of the Senate Report makes it clear that the trade-off for reduced administrative safeguards was an augmented union role in the protection of employee rights. This increased union role was touted as being "more efficient, less time consuming and less formal than the statutory appeals system." Further efficiency and a business-like approach were intended to be gained in this process by having the union serve as a screen for frivolous or nonmeritorious employee grievances and appeals.

84. See supra note 60.
87. See, e.g., S. REP. No. 969, supra note 53, at 9-10 (dismissals); id. at 10-11 (Senior Executive Service); id. at 11-12 (merit pay increases).
91. Id.
Members of Congress recognized that there were three parties to labor relations—management, unions, and individuals—and that collective rights and individual ones were not always the same.\(^{92}\) The potential conflict between individual and collective rights coupled with the union screening mechanism were some of the considerations the United States Supreme Court found in \textit{Vaca v. Sipes} that mandated the imposition of the duty of fair representation in the private sector.\(^{93}\) Therefore, as federal employee labor organizations began to fulfill the same roles as their private sector counterparts,\(^{94}\) the corresponding need for a judicially enforced duty of fair representation increased.\(^{95}\) Far from implying that efficiency prevented duty-of-fair-representation suits in the federal courts, the legislative history of the Act intimates a need for such checks on the unions’ power.

\textit{Federal Court Jurisdiction}

Jurisdictional issues did not claim a large portion of the congressional attention span in the enactment of the Civil Service Reform Act. Nevertheless, some time was spent on these issues. Two versions of the bill were debated in the House—the Collins amendments to Title VII\(^{96}\) and the Udall substitute for the Collins provisions.\(^{97}\)


\(^{93}\) 386 U.S. 171 (1967). See generally notes 182-186 \textit{infra} and accompanying text.

\(^{94}\) See generally \textit{Bureau of Alcohol, Tobacco & Firearms}, 464 U.S. at 107-08.

\(^{95}\) See \textit{Vaca}, 386 U.S. at 186 ("We cannot believe that Congress in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract.").

The only possible reference to a duty of fair representation in the entire congressional legislative history is Representative Ford’s brief mention of it on the floor of the House when introducing the joint House-Senate Committee bill. While discussing the scope of the negotiated grievance process under the CSRA, he stated: "The labor organization is required to meet a duty of fair representation for all employees, even if not dues paying members, who use the negotiated grievance procedure." 124 \textit{CONG. REC.} H13609 (daily ed. Oct. 4, 1978) (remarks of Rep. Ford). Representative Ford had been discussing the general replacement of administrative remedies with the negotiated grievance procedure. In this context, the duty of fair representation clearly was viewed as a check on the unions’ expanded powers. Further, one might argue that if the duty of fair representation does exist, it should be construed analogously to that duty in the private sector and, thus, be cognizable in federal courts. However, Representative Ford’s statement means that at least one congressman believed that the duty of fair representation exists in the federal sector. Since it was not challenged, the inference may be that the others did not find that statement controversial enough to reply. Although spun from the remark of a single legislator, this attenuated logic seems to be consistent with the tenor of legislative debate on Title VII of the Civil Service Reform Act.


\(^{97}\) The Udall substitute amendment is at 124 \textit{CONG. REC.} H9625-32 (daily ed. Sept. 13, 1978).
The Collins amendments would have provided, *inter alia*, for no judicial review or enforcement of Federal Labor Relations Authority decisions except on constitutional questions.98 This amendment was consistent with the judicial role, if any, of the supplanted executive order.99 The reason for the Collins amendments on this point was the fear of Representative James Collins (Rep., Tex.) that an individual might challenge an action of the FLRA judicially rather than administratively, thus creating overcrowded courts and more paperwork and weakening the power of the Federal Labor Relations Authority.100

No discussion of this provision was made by any other member of Congress, and the Collins amendment was defeated in favor of the Udall substitute,10 which provided for judicial review of FLRA decisions. The Civil Service Reform Act as enacted is identical to the Udall amendment in this respect.102 Thus, at a minimum, it can be inferred that no other member of Congress felt strongly enough about the risks of judicial review to argue that point on the floor. More strongly, it might be hypothesized that Congress affirmatively disapproved the notion that the courts would infringe upon the statutory and administrative scheme. In any event, the two houses of Congress provided for judicial oversight,103 which had previously not existed.104 Thus, the Civil Service Reform Act reflects a congressional intent that both the judiciary and the administrative agencies are intended to play a role in the enforcement of the Act.105

98. *Id.* at H9625, H9639-40 (remarks of Rep. Collins about his section 7204(I)).
100. The committee bill seriously weakens the Federal Labor Relations Authority by providing that all of its decisions and orders are subject to judicial review in any U.S. district court.

What would happen under this judicial review is that one individual could go to court instead of bringing it before the Federal Labor Relations Authority, this when our courts are so overcrowded. Although we want everyone to have full recourse to judicial review, this would mean that it would go to the court system if one individual wished, and this would mean unending litigation and would make the paperwork on this unbearable.


Apparently, Representative Collins misspoke when he stated review of FLRA orders under the House bill was in the United States district courts. Other than section 7121(c) discussed at notes 106-19 infra, the only provision of the bill dealing with judicial review appears in section 7123(a) and (b) and places review in the court of appeals. See H.R. 11,280, supra note 65, § 2123(a) and (b), at 606-07. Thus, the import, if any, of his comments may be undercut by his misunderstanding.

102. Compare Udall, § 23(a) and (b), 124 CONG. REC. H9631 (daily ed. Sept. 13, 1978), with CSRA, 5 U.S.C. § 7123(a) and (b) (1982).
105. Even that statutory grant of jurisdiction has not been held to encompass the sole function of federal courts within the Civil Service Reform Act statutory scheme. United States v. PATCO, 653 F.2d 1134, 1138 (7th Cir. 1971).
More directly relevant to the duty-of-fair-representation issue is the legislative history with regard to H.R. 11280, section 7121(c):

Any party to a collective bargaining agreement aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the negotiated grievance provided in the agreement may file a petition in the appropriate United States District Court requesting an order directing that arbitration proceed pursuant to the procedures provided therefor in the agreement. The court shall hear the matter without jury, expedite the hearing to the maximum extent practicable, and issue any order it determines appropriate.  

That provision of the House Bill was subsequently excised from the final version of the Civil Service Reform Act after the joint House-Senate conference. It is the removal of this provision that some courts have used as the basis for refusing to permit plaintiffs to bring duty-of-fair-representation suits in federal court. Those courts perceive H.R. 11280, section 7121(c) to be the analogue to section 301 of the Labor-Management Relations Act.

Not only are the two sections different in language and in scope, but the only mention of H.R. 11280, section 7121(c) in the entire legislative history of the Civil Service Reform Act is in the traditional restatement of all provisions of the legislation in the report introducing that bill before the House. The House Report regarding section 7121(c) shows that the purposes of the provision focused on the single issue of compelling arbitration

106. H.R. 11,280, supra note 65, § 7121(c), at 606.
108. See infra notes 217-219 and accompanying text.
109. See supra note 23, discussed in Warren. See infra notes 263-266 and accompanying text.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.


111. See, e.g., Smith v. Evening News, 371 U.S. 195 (1962) (section 301 must be given broad interpretation); Painting & Decorating Contractors Ass'n v. Painters & Decorators Jt. Comm. of East Bay Counties, 707 F.2d 1067 (9th Cir.), reh. denied, 717 F.2d 1293 (9th Cir. 1983), cert. denied, 466 U.S. 927 (1984) (section 301 must be given broad interpretation); Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507 (9th Cir. 1978) (section 301 encompasses not only suits between employers and unions, but also those brought by individual employees to vindicate uniquely personal rights); Maita v. Killeen, 465 F. Supp. 471 (E.D. Pa. 1979) (same).

112. Subsection (c) of section 7121 provides that either party to an agreement may seek to compel the other to proceed to arbitration by filing a complaint in the appropriate U.S. District Court, or in any appropriate court of a State, territory, or possession of the United States. The court shall hear the matter without a jury in an expedited manner and shall decide whether to issue an order that arbitration proceed under the terms of the agreement.

under a collective bargaining agreement. Proposed section 7121(c) implied only that either the union or the agency would have the power to sue the other to compel arbitration. No mention is made in that report, or in contemporaneous portions of the Congressional Record, of any other purpose for the provision. Thus, section 7121(c) is not relevant to the present inquiry. In duty-of-fair-representation suits, neither the union nor the employer is the plaintiff, and the relief sought is not this type of arbitration order.

In fact, at no time did a member of Congress ever discuss section 7121(c), much less even hint that it was intended to address the issue of federal court jurisdiction over duty-of-fair-representation breaches. Indeed, it is not even clear from the language of the proposal whether section 7121(c) was intended to cover the question of federal jurisdiction over suits for violation of collective bargaining agreements other than those brought to compel arbitration.

Section 301 of the Labor-Management Relations Act predated the Civil Service Reform Act by thirty-one years. If the House had intended to create a parallel in the Civil Service Reform Act to section 301, presumably it would have done so more clearly, more consciously, and with unequivocably referable language. Further, the removal of section 7121(c) by the Joint House-Senate Committee gives no indication of why the provision was not retained.

House section 7121(c) authorizes any party to a collective bargaining agreement to directly seek a District Court order requiring the other party to proceed to arbitration rather than referring the matter to the Authority. The Senate has no comparable provision. The House recedes. All questions of this matter will be considered at least in the first instance by the Authority.

Nor is there any explanation in the Congressional Record for the deletion. Apparently, neither the presence nor the absence of the provision occasioned much thought on the part of Congress. The inferences which may be drawn from the cryptic comment, "The House recedes," are minimal.

Finally, although Congress clearly envisioned the Civil Service Reform Act of 1978 as a comprehensive revision of labor-management relations in the federal sector, there were existing legislative models from which Congress

113. Id.
114. Section 301 of the Labor-Management Relations Act was enacted in 1947. The Civil Service Reform Act became law in 1978.
119. But see Pharn, 799 F.2d at 639. See infra notes 288-289 and accompanying text.
120. Bureau of Alcohol, Tobacco & Firearms, 464 U.S. at 91; United States v. PATCO, 653 F.2d 1134, 1137 (7th Cir. 1971); S. Rep. No. 969, supra note 53, at 1.
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could obtain guidance. The basis for the Act was the private sector paradigm of the National Labor Relations Act,\textsuperscript{121} which implied judicial cognizance of duty-of-fair-representation suits,\textsuperscript{122} even without section 301 as a jurisdictional basis.\textsuperscript{123} As stated by the Supreme Court:

In passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest than it had been under the Executive Order regime. There is no evidence, however, that the Act departed from the basic assumption underlying collective bargaining in both the public and the private sector that the parties proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest.\textsuperscript{124}

Thus, the silence of Congress on the specific issues of duty of fair representation and the appropriateness of federal court jurisdiction ought not be viewed as conscious disapproval. Rather, the silence more properly should be perceived as tacit acceptance.\textsuperscript{125}

II. Genesis of the Duty of Fair Representation

Neither the National Labor Relations Act nor the Railway Labor Act\textsuperscript{126}

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121. See, e.g., supra note 10.
122. See infra notes 149-186 and accompanying text.
123. See infra notes 284-287 and accompanying text.
125. PATCO, 633 F.2d 1134 (7th Cir. 1971) (court upholds jurisdiction of federal district court to enjoin federal employee union strikes despite the Civil Service Reform Act placing such activity within the province of the FLRA and even though the 5 U.S.C. § 7123 grant of judicial review does not encompass this activity). "It is a familiar maxim of statutory interpretation that courts should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation." Id. at 1141 (quoting Haberman v. Finch, 418 F.2d 664 (2d Cir. 1969)). The Seventh Circuit reversed the district court, which had held that the limited scope of section 7123(d) "embrace[d] the only role given the federal courts under the statute." Id. at 1138 (citing United States v. PATCO, No. 80-C-4390, mem. op. at 5 (N.D. Ill. Dec. 15, 1980)).

Under the prior labor relations scheme of Executive Orders Nos. 10,988 and 11,491, there is no indication that duty-of-fair-representation suits in the federal courts were preempted by that comprehensive administrative system. Only one case directly discussed the issue of federal jurisdiction over duty-of-fair-representation breaches under the executive orders. See Kuhn v. National Ass'n of Letter Carriers, Branch 5, 570 F.2d 757, 760-61 (8th Cir. 1978) (executive order scheme appropriate prior to coverage of employees by NLRA through the Postal Reorganization Act of 1970, 39 U.S.C. § 209(a) (1982)). That decision denied jurisdiction on the sole basis that the executive orders were not "laws of the United States" for the purposes of general federal question power under 28 U.S.C. § 1331 (1982). Id. The court's decision may have implied that, had the duty of fair representation been through federal legislative action rather than executive action, jurisdiction would have existed. See Kuhn v. National Ass'n of Letter Carriers, 528 F.2d 767, 770 (8th Cir. 1976) (prior decision in same case which assumed federal district court jurisdiction over duty of fair representation claim). Cf. NFFE v. Commandant, Defense Lang. Inst., 493 F. Supp. 675, 681 n.14 (N.D. Cal. 1980).

126. 44 Stat. 577 (1926) (as amended by 48 Stat. 1185 (1934); 49 Stat. 1198 (1936); 54 Stat.
contains an explicit statutory duty of fair representation. Rather, in the private sector, the duty of fair representation is a federal obligation that has been judicially fashioned from the national labor statutes and is part of the federal common law of labor relations.

The evolution of this doctrine can be traced in a series of Supreme Court decisions under the Railway Labor and the National Labor Relations acts. In *Steele v. Louisville & Nashville Railroad*, the Supreme Court set aside a union bargained-for seniority system that discriminated against blacks. The Court stated that the exclusive representative status of the union granted by the statute imposed a concomitant duty to represent all members, majority and minority alike. The Court held that the language of the Railway Labor Act and its purposes "expressed the aims of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them." Subsequent cases elaborated on the duty of fair representation. Finally, in 1967 the Supreme Court decided the seminal case of *Vaca v. Sipes*.

In *Vaca*, Benjamin Owens sued his union, Local 12 of the National Brotherhood of Packinghouse Workers, and its officers for breach of the union's duty of fair representation. Specifically, Owens alleged that, due

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785, 786 (1940); 64 Stat. 1236 (1951); 78 Stat. 748 (1964); 80 Stat. 208 (1966)) (current version codified in 45 U.S.C. §§ 151-188 (1982)).


130. 323 U.S. 192 (1944).

131. Id. at 202.

132. Id. at 203.


135. E.g., Humphrey v. Moore, 375 U.S. 335 (1964); Syres v. Oil Workers, Local 23, 350 U.S. 892 (1956), rev'd per curiam, 223 F.2d 737 (5th Cir. 1955) (conferring federal question jurisdiction over claims by black oil workers that the union had negotiated separate discriminatory seniority progressions).


137. *Vaca*, 386 U.S. at 173.
to his health problems, he had been discriminatorily discharged by his employer, Swift and Company, in violation of the collective bargaining agreement.\textsuperscript{138} He further alleged that the union had refused to process his grievance with Swift through the final levels of arbitration.\textsuperscript{139} After a jury verdict in Owens' favor in the Missouri state court, the trial judge reversed and set aside the verdict on the ground that the National Labor Relations Board had exclusive jurisdiction over the case.\textsuperscript{140} The Supreme Court of Missouri reversed and reinstated the verdict.\textsuperscript{141} and the United States Supreme Court granted certiorari.\textsuperscript{142} The Court, in an opinion by Justice White,\textsuperscript{143} held that although there was concurrent jurisdiction in the state courts, the duty of fair representation was a federal obligation that required application of the governing federal standards.\textsuperscript{144} Since the applicable federal standards were not applied, the Court reversed the Missouri Supreme Court.\textsuperscript{145}

In so holding, the Court in \textit{Vaca} specifically recognized the union's exclusive bargaining representative status as the source of the duty of fair representation\textsuperscript{146} and further stated that a breach of that duty occurred "only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."\textsuperscript{147} More importantly, the Supreme Court in \textit{Vaca} held that the duty of fair representation was not preempted by the unfair labor practices provisions of the NLRA. The argument for preemption that had been unsuccessfully advanced by the union in \textit{Vaca} is directly analogous to the arguments for preemption made in the federal sector duty-of-fair-representation cases. Specifically, it is argued that sections of

\textsuperscript{138} Id. at 173-75.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 173.
\textsuperscript{141} Sipes v. Vaca, 397 S.W.2d 658 (Mo. 1965) (en banc).
\textsuperscript{142} Vaca, 384 U.S. 969 (1966).
\textsuperscript{143} Vaca, 386 U.S. at 173.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. . . . It is obvious that [plaintiff's] . . . complaint alleged a breach by the Union of a duty grounded in federal statutes.
\textsuperscript{147} Id. at 177.
the Civil Service Reform Act dealing with unfair labor practices foreclose federal court jurisdiction over alleged breaches of the duty of fair representation in federal labor relations.148

In Vaca the Supreme Court declined to decide specifically whether a breach of a union’s duty of fair representation constituted a section 8(b) unfair labor practice,149 though the National Labor Relations Board and the lower federal courts had already so held.150 Such a decision was unnecessary to the Court’s holding. The National Labor Relations Act gave the National Labor Relations Board exclusive jurisdiction over the determination of unfair labor practice proceedings.151 Under the federal preemption doctrine of San Diego Building Trades v. Garmon,152 neither federal nor state courts have jurisdiction over suits directly involving activity arguably protected by section 7 or prohibited by section 8 of the National Labor Relations Act.153 Although the question of whether a union has breached its duty of fair representation at least arguably falls within the scope of the National Labor Relations Board and, therefore, federal court jurisdiction would seemingly be preempted by Garmon, the Garmon preemption doctrine has not been applied inflexibly.154 Other laws have been permitted to come into potential conflict with the National Labor Relations Act where regulation was over a matter of particularly local import155 or over matters of merely peripheral concern to the National Labor Relations Act.156

148. See text accompanying note 324 infra.
150. Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), cert. denied, 369 U.S. 837 (1967); Miranda Fuel Co., 140 N.L.R.B. 181 (1962) rev’d, 326 F.2d 172 (2d Cir. 1963) (violation of §§ 8(b)(1)(A) and 8(b)(2)); Independent Metal Workers (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964) (violation of §§ 8(b)(1)(A), 8(b)(2), and 8(b)(3)). Since Vaca, the Board and courts have continued to hold breaches of duty of fair representation to be an unfair labor practice. E.g., Dycus v. NLRB, 615 F.2d 820 (9th Cir. 1980); H.O. Canfield Rubber Co., 223 N.L.R.B. 832 (1976); Automobile Plating Corp., 170 N.L.R.B. 1234 (1968); Fanning, The Duty of Fair Representation, 19 B.C.L. Rev. 813 (1978).
153. Id. at 245; Vaca, 386 U.S. at 179. As recently as last term, the United States Supreme Court reaffirmed this type of preemption analysis. Wisconsin Dep’t of Indus. v. Gould, Inc., 106 S. Ct. 1057, 1061 (1986). The Supreme Court has actually developed two separate lines of labor preemption analysis: Garmon preemption, which is at issue here, and Machinists preemption. The latter takes its name from the Supreme Court’s decision in Machinists Lodge 76 v. Wisconsin Employment Relations Comm’n, 427 U.S. 132 (1976). Machinists preemption prevents states from regulating where Congress neither protected nor prohibited the activity by the National Labor Relations Act, but where Congress intended the area to be free from regulation. Golden State Transit Corp. v. City of Los Angeles, 106 S. Ct. 1395, 1398 (1986).
154. The Court’s preemption decisions show “little interest in logical consistency and less interest in building a coherent and continuing body of law.” Cox, Recent Developments in Federal Labor Law Preemption, 41 Ohio St. L.J. 277, 300 (1980).
In holding that the NLRB’s unfair labor practice proceedings did not preempt the judicially created duty of fair representation, the Court in *Vaca* reasoned that the history of the duty of fair representation compelled the conclusion that it was a federally imposed right. Next, the Court noted that the NLRB’s *Miranda Fuel* decision found that section 8(b) of the National Labor Relations Act encompassed the duty of fair representation, thereby raising the possibility of preemption under *Garmon*. However, the Court disagreed with this extrapolation from the *Miranda Fuel* decision, declaring that the purpose of the *Garmon* preemption doctrine was to avoid conflicting rules of law, remedies, and administration in the labor area.

The Court concluded that Congress gave the Board exclusive jurisdiction over administrating and regulating unfair labor practice proceedings on the rationale that a “multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.”

From that conclusion, the Court discussed the exceptions to exclusive Board jurisdiction expressly provided in the National Labor Relations Act and those exceptions judicially created. The exceptions demonstrated to the Court that preemption was dependent upon the nature of the interests asserted and their effect on the administration of national labor relations policy. The Court believed that such considerations did not operate to preempt the duty of fair representation.

The Court noted that a primary rationale for *Garmon* preemption—avoidance of conflicting substantive rules of law and deferral to the congressionally created expert administrative agency—was inapplicable to the duty of fair representation. First, the duty-of-fair-representation doctrine was judicially created and primarily expanded by the courts. Second, the Board had adopted the standards created by the courts when it eventually found duty-of-fair-representation breaches to be unfair labor practices. Third, some duty-of-fair-representation allegations concern the negotiation of collective bargaining agreements and the administration of the grievance

158. 140 N.L.R.B. 181 (1962), rev’d, 326 F.2d 172 (2d Cir. 1963).
159. *Vaca*, 386 U.S. at 178.
160. *Id.* at 178-79.
161. *Id.* at 179 (citing Garner v. Teamsters Union, No. 776, 346 U.S. 485, 490-91 (1953)).
163. See *supra* cases at notes 155-56.
165. *Id.* at 180-81 (emphasis added).
166. *Id.* at 181.
167. *Id.*
process, matters not normally within the Board's unfair labor practice jurisdiction.\textsuperscript{160} Therefore, the Court reasoned that the Board had no expertise to which the Court should defer because of the subject matter and the Board's lack of experience in this area.\textsuperscript{169}

In the context of federal civil service labor relations, the same considerations apply and should operate to preclude preemption. Until the passage of the Civil Service Reform Act in 1978, there existed no independent expert administrative agency to handle duty-of-fair-representation complaints. The Federal Labor Relations Authority (FLRA) was first organized in 1978.\textsuperscript{170} It was designed as a direct parallel to the National Labor Relations Board\textsuperscript{171} and was given jurisdiction over unfair labor practices.\textsuperscript{172} Thus, the FLRA could not have had expertise in handling duty-of-fair-representation complaints at the time the CSRA was passed.

Further, the long history of federal court duty-of-fair-representation cases has not been ignored in the federal sector\textsuperscript{173} and, in fact, has traditionally served as a guideline for administrative determinations.\textsuperscript{174} Indeed, the primacy of federal court standards in the area has been so entrenched as to shut out conflicting rules by the Federal Labor Relations Authority. For example, section 7114(a)(1) of the CSRA mandates nondiscrimination by an exclusive bargaining representative.\textsuperscript{175} In \textit{National Treasury Employees Union v. FLRA}, the District of Columbia Circuit upheld the Federal Labor Relations Authority's construction of section 7114(a)(1) in the context of an unfair labor practice relating to the union's duty of fair representation.\textsuperscript{176} In that case, the Authority had used \textit{Vaca} and \textit{Del Casal v. Eastern Airlines},\textsuperscript{177} another federal private sector duty-of-fair-representation case, as precedent.

\begin{flushleft}
\textsuperscript{168} \textit{Id.} \\
\textsuperscript{169} \textit{Id.} \\
\textsuperscript{170} CSRA, 5 U.S.C. §§ 7104, 7105 (1982). \\
\textsuperscript{171} \textit{Bureau of Alcohol, Tobacco & Firearms}, 464 U.S. at 92-93. See H.R. REP. No. 1403, \textit{supra} note 10, a: 41. \\
\textsuperscript{172} CSRA, 5 U.S.C. § 7105(a)(2)(g) (1982). \\
\textsuperscript{173} See infra notes 177-180. \\
\textsuperscript{175} CSRA, 5 U.S.C. § 7114(a)(1) (1982). This provision of the CSRA has sometimes been held to be an embodiment of the duty of fair representation. The few courts who have spoken on this topic are split as to where, if at all, the Civil Service Reform Act provides for a statutory duty of fair representation. Two courts have stated that section 7114(a)(1) is the source of that duty. National Treas. Empls. Union v. FLRA, 800 F.2d 1165, 1169 (D.C. Cir. 1986); \textit{Warren}, 764 F.2d at 1396. Another has assumed it arguendo. NTEU v. FLRA, 721 F.2d 1402, 1406 (D.C. Cir. 1983). However, the Tenth Circuit has expressly stated that section 7114(a)(1) is \textit{not} the source of that duty. \textit{Pham}, 799 F.2d at 639. Rather, it is imposed, as in the private sector, by the latitude of the labor relations statutory scheme. \textit{Id.} at 637. Accord Karahalios v. Defense Lang. Inst. Foreign Lang. Center, 534 F. Supp. 1202, 1207 (N.D. Cal. 1982) (Karahalios I). This confusion is not surprising, given the evolution of the duty of fair representation in the private sector. See \textit{supra} notes 126-136 and accompanying text. \\
\textsuperscript{176} 721 F.2d 1402, 1407 (D.C. Cir. 1983). \\
\textsuperscript{177} 634 F.2d 195 (5th Cir.), \textit{cert. denied}, 454 U.S. 892 (1981).
\end{flushleft}
to determine the standards for an unfair labor practice breach of the duty of fair representation under the Civil Service Reform Act.\textsuperscript{178}

So dominant are private sector federal court cases in the duty-of-fair-representation area, that when the FLRA interpreted section 7114(a)(1) inconsistently with private labor relations court precedent, the Court of Appeals for the District of Columbia Circuit reversed the Authority's finding of an unfair labor practice.\textsuperscript{179} The court held the inconsistent interpretation was precluded by private sector duty-of-fair-representation standards.\textsuperscript{180} Therefore, as in \textit{Vaca},\textsuperscript{181} the \textit{Garmon} fear of conflicting interpretations of substantive law and deferral to Board expertise seem to be inappropriate concerns in the federal sector.

Next, the Supreme Court in \textit{Vaca} noted that the unique interests served by the duty of fair representation foreclosed preemption.\textsuperscript{182} The duty of fair representation sprang from the congressionally created power of unions to act as the exclusive bargaining representative for employees.\textsuperscript{183} Consequently, the rights of individual union members are necessarily subordinated to those of the union itself.\textsuperscript{184} Thus, when the union is given control over the collective bargaining agreement and its grievance processes, the duty of fair representation serves to protect against arbitrary union conduct directed at individuals within the bargaining unit left without other means of redress.\textsuperscript{185} The Court in \textit{Vaca} was specifically concerned about the unreviewable discretion of the Board's General Counsel to refuse to initiate an unfair labor practice complaint,\textsuperscript{186} leaving employees without an impartial method of review.

In the federal sector, the union also controls the collective bargaining grievance systems. Additionally, the General Counsel of the FLRA has analogous powers and the same discretion to issue an unfair labor practice complaint under the Civil Service Reform Act as the NLRB General Counsel has in the private sector. "The decision whether to issue a complaint is entirely within the General Counsel's discretion and is not subject to judicial review."\textsuperscript{187} Thus, the considerations the Court found in \textit{Vaca} to foreclose

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\textsuperscript{178} \textit{NTEU}, 721 F.2d at 1407.

\textsuperscript{179} \textit{NTEU}, 800 F.2d 1165, 1172 (D.C. Cir. 1986).

\textsuperscript{180} \textit{Id.} at 1168. Indeed, so strong is private sector duty-of-fair-representation precedent that the FLRA, in its brief before the D.C. Circuit, sought to bring its interpretation of section 7114(a)(1) within applicable federal court decisions. Brief for the FLRA at 15 n.10, \textit{NTEU}, 800 F.2d at 1172 n.6.

\textsuperscript{181} See supra notes 165-169 and accompanying text.

\textsuperscript{182} \textit{Vaca}, 386 U.S. at 181-82.

\textsuperscript{183} \textit{Id.} at 182.

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Id.} at 182-83. Under the National Labor Relations Act, the General Counsel has complete discretion to process or drop an unfair labor practice complaint. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138-39 (1975); Myers v. Bethlehem Corp., 301 U.S. 41, 49 (1938).


Under subsection (a)(1) the sole responsibility for investigating a charge rests with the General Counsel of the Authority. If, after investigation, the General Counsel determines that a complaint should issue, he is required to cause the complaint to
preemption of private sector duty-of-fair-representation suits should also apply to duty-of-fair-representation suits in the federal sector.

As in the National Labor Relations Act, under the CSRA, the negotiated collective bargaining agreement grievance procedures are the preferred mechanism for the resolution of disputes. However, disputes that allege unfair labor practices may also be resolved through that machinery.188 Unique to the federal sector, however, is an exception to exclusivity in limited circumstances.189

In the case of grievances over performance appraisal systems,190 certain

be served upon the charged agency or labor organization. The General Counsel's decision as to whether a complaint should issue shall not be subject to review.

Id., citing H.R. Rep. No. 1403, supra note 10, at 52 (emphasis added). Similarly, the Senate Report states:

The General Counsel is intended to be autonomous in investigating unfair labor practice complaints, in making "final decisions" as to which cases to prosecute before the Authority. . . . Specifically, the Authority would neither direct the General Counsel concerning which unfair labor practice cases to prosecute nor review the General Counsel's determinations not to prosecute.

S. Rep. No. 969, supra note 53, at 102; Turgeon v. FLRA, 677 F.2d 937, 940 (D.C. Cir. 1982); Martel, 562 F. Supp. at 444.


189. (d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 [performance appraisal systems] and 7512 [adverse actions] of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of parties' negotiated grievance procedure, whichever event occurs first.

Id. § 7121(d) and (e).

190. Id. § 4303.
dismissals or reductions in grade or pay,\textsuperscript{191} or complaints alleging discrimination based on race, color, sex, age, religion, handicap, or political affiliation,\textsuperscript{192} an employee has the option of pursuing either the negotiated procedure or a statutory one leading to an appeal before the Merit Systems Protection Board (MSPB).\textsuperscript{193} Each procedure is exclusive, although an appeal from the negotiated arbitration system can be taken to the MSPB.\textsuperscript{194} Thus, a grievance can always be handled by the negotiated arbitration procedure in the collective bargaining agreement. If the grievance constitutes an unfair labor practice, that procedure also may be available.\textsuperscript{195} Finally, in limited circumstances, the employee may elect to appeal directly to the MSPB. This last option is not provided by the National Labor Relations Act, but it does not resolve the concerns articulated by the Court in \textit{Vaca} about the need for independent judicial review.

First, appeal to the MSPB is available only in a restricted class of cases.\textsuperscript{196} Second, the practical nature of an MSPB decision regarding adverse agency action is something less than the ideal of independent judicial review.\textsuperscript{197} Indeed, the MSPB and its jurisprudence "reveal a marked disposition to circumscribe the protections afforded federal employees."\textsuperscript{198} The formal, adversarial nature of the process stands in sharp contrast to the negotiated procedures under the collective bargaining agreement.\textsuperscript{199} Further, the employee was represented by his or her union in approximately 25 percent of the cases appealed to the MSPB.\textsuperscript{200} Thus, the same potential for union abuse is present here as in the arbitration provisions of the collective bargaining agreement.\textsuperscript{201}

\textsuperscript{191} Id. § 7512.
\textsuperscript{192} Id. § 2302(b)(1).
\textsuperscript{193} Id. § 7121(e)(1).
\textsuperscript{194} Id.; \textit{Pham}, 799 F.2d at 637.
\textsuperscript{195} However, the procedure is not available if the matter is appealable to the MSPB. CSRA, 5 U.S.C. § 7116(d) (1982); Comment, \textit{Federal Sector Arbitration Under the Civil Service Reform Act of 1978,} 17 S.D.L. REV. 857, 867 (1980).
\textsuperscript{196} See supra notes 190-192. Both the Board and those appellate courts that have reviewed the issue have construed the Board's grant of authority in a very limited fashion. \textit{E.g., Mastroian v. Federal Aviation Admin.}, 714 F.2d 1152, 1155 (Fed. Cir. 1983); Perez v. Army & Air Force Exch. Serv., 680 F.2d 778, 787 (D.C. Cir. 1982); Piskadlo v. Veteran's Admin. Merit Sys. Protection Bd., 668 F.2d 82 (1st Cir. 1982). See \textit{generally, Developments, supra} note 12, at 1636-37.
\textsuperscript{197} \textit{Developments, supra} note 12, at 1636.
\textsuperscript{198} Id. Further, a 1980 survey stated that civil service employees were "generally ignorant" of their statutory protections and without much confidence in those procedures of which they were aware. \textit{See Office of Merit Sys. Review & Studies, U.S. Merit Sys. Protection Bd., Breaking Trust: Prohibited Personnel Practices in the Federal Service} 5, 18-26 (1982).
\textsuperscript{201} See, \textit{e.g.}, \textit{Pham}, 799 F.2d 634. See supra note 26 for a discussion of the facts of that case.
Third, the scope of MSPB review of agency decisions, while appearing independent, has in fact given wide deference to management personnel decisions. The Civil Service Reform Act empowered federal agencies to discipline public employees not only for "cause," but merely for inadequate performance, as long as discipline is supported by "substantial evidence." This has been interpreted by the Merit Systems Protection Board to mandate upholding the employer/agency decision as long as a reasonable person could agree with that action. Thus, the Merit Board's deferential posture necessarily limits the extent to which the Board serves the rights-vindicating function envisioned by its proponents.

Finally, although the Merit Systems Protection Board has wide remedial powers granted to it by the Civil Service Reform Act, it has shown reluctance under the present administration to exercise its authority broadly. Further, the Board has consistently held that it is without power to award back pay for violations of a Board order by a federal agency. This limitation of remedies is particularly inappropriate for a review procedure if it is to serve the independent oversight function of protecting an employee against breaches of the duty of fair representation. Therefore, even in those limited situations where the union-controlled negotiated grievance procedure is not exclusive, an employee's independent rights may not be adequately protected.

202. The Merit Systems Protection Board review is through a hearing (5 U.S.C. § 7701(a)(1) (1982)) before which discovery may be had (5 C.F.R. § 1201.71-75 (1986)) and witnesses subpoenaed (5 C.F.R. § 1205(b)(2)(a) (1986); 5 C.F.R. § 1201.81 (1986)).

203. Developments, supra note 12, at 1638-40 and cases cited therein.


208. Developments, supra note 12, at 1640.

209. 5 U.S.C. § 1205(a)(2) (1982) ("The Merit System Protection Board shall—or any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order.").


by either of the two administrative avenues of redress.\textsuperscript{212} Thus, the Supreme Court's desire in \textit{Vaca} to protect impartial review of employee claims by federal district court suits for duty-of-fair-representation breaches is equally applicable to federal government employees.\textsuperscript{213}

The Supreme Court in \textit{Vaca} also articulated some preliminary guidelines for when the duty of fair representation litigant should be excused from exhausting his or her internal collectively bargained-for procedures.\textsuperscript{214} Since those guidelines concern situations in which a union or employer can effectively stymie the internal systems or otherwise render them futile,\textsuperscript{215} these same guidelines arguably should also apply to the federal sector collective bargaining agreement.

To conclude, the long expertise of federal courts in duty-of-fair-representation suits has served as a model for substantive interpretation of that duty. That model has been used both by the courts dealing with issues under the Civil Service Reform Act and by the nine-year-old Federal Labor Relations Authority. Thus, any fears of inconsistent determinations or inadequate expertise by the federal courts are unfounded.

Further, as in the private sector, the administrative mechanisms of the Civil Service Reform Act—the unfair labor practice procedures of the FLRA and the statutory appeal to the Merit Systems Protection Board—contain inadequate safeguards for individual interests when they clash with collective ones. Therefore, the considerations that led the Supreme Court in \textit{Vaca} to exempt duty-of-fair-representation suits from preemption by the National Labor Relations Act should apply with equal force to lawsuits for breaches of that duty in the federal government employee sector.\textsuperscript{216}

III. \textit{Federal Duty-of-Fair-Representation Cases: Warren, Pham, and Their Predecessors}

Judicial objections to federal court cognizance of duty of fair representation suits have taken two distinct approaches. One argument is typified by the decision of the Court of Appeals for the Eleventh Circuit in \textit{Warren v. Local 1759, AFGE},\textsuperscript{217} which argues that the absence of a corollary in the


\textsuperscript{213} See supra text accompanying notes 182-186.

\textsuperscript{214} \textit{Vaca}, 386 U.S. at 183-186.

\textsuperscript{215} \textit{Id. See also} Clayton v. Automobile Workers, 451 U.S. 679, 689 (1981).


\textsuperscript{217} 764 F.2d 1395 (11th Cir. 1985).
Civil Service Reform Act to section 301 of the Labor-Management Relations Act\(^\text{218}\) bars federal jurisdiction over duty-of-fair-representation suits.\(^\text{219}\) The second argument is articulated by the Federal District Court for Rhode Island in *Tucker v. Defense Mapping Agency Hydrographic/Topographic Center*.\(^\text{220}\) *Tucker* infers a Garmon-type preemption\(^\text{221}\) from the comprehensive nature of the Civil Service Reform Act.\(^\text{222}\) A close examination of *Warren, Tucker*, and related cases show that they are in error.

*Warren v. Local 1759, AFGE*

Warren was a civilian employee of the army represented by Local 1759 of the American Federation of Government Employees, although he was not a union member.\(^\text{223}\) The army suspended him twice based upon allegations of misconduct. He challenged both suspensions through the bargained-for grievance procedure.\(^\text{224}\) Despite his requests, the union refused to take Warren's grievance to arbitration.\(^\text{225}\) Warren then filed unfair labor practice charges with the Federal Labor Relations Authority, which, after investigation, refused to issue complaints.\(^\text{226}\) Warren appealed to the Federal Labor Relations Authority General Counsel who affirmed the union's refusal to initiate unfair labor practice proceedings.\(^\text{227}\)

Warren finally filed a complaint in the Federal District Court for the Northern District of Georgia alleging that his union had breached its duty of fair representation by refusing to initiate unfair labor practice proceedings on his behalf merely because he was not a union member.\(^\text{228}\) The district court dismissed the complaint, holding that general federal question jurisdiction under section 1331 of title 28 of the United States Code\(^\text{229}\) was not permissible since the Federal Labor Relations Authority had exclusive jurisdiction over Warren's claim.\(^\text{230}\)

The Eleventh Circuit affirmed, holding that the Civil Service Reform Act governed federal employee labor relations.\(^\text{231}\) The court stated that section 7114(a)(1) of the CSRA explicitly codified the duty of fair representation.\(^\text{232}\)

\(^{218}\) LMRA § 301, 29 U.S.C. § 185(a) (1982).
\(^{219}\) See *supra* notes 22-23 and accompanying text.
\(^{221}\) See *supra* notes 152-156 and accompanying text.
\(^{222}\) See *supra* note 24 and accompanying text.
\(^{223}\) *Warren*, 764 F.2d at 1395-96.
\(^{224}\) *Id.* at 1395.
\(^{225}\) *Id.*
\(^{226}\) *Id.*
\(^{227}\) *Id.*
\(^{228}\) *Id.* at 1396.
\(^{230}\) *Warren*, 764 F.2d at 1397.
\(^{231}\) *Id.* at 1399.
\(^{232}\) *Id.* For the text of CSRA § 7114(a)(1), 5 U.S.C. § 7114(a)(1) (1982), see *supra* text at
Thus, the court reasoned, a violation of section 7114(a)(1) would be an unfair labor practice under sections 7116(b)(1) and (8). Since the Civil Service Reform Act gives the Federal Labor Relations Authority exclusive jurisdiction over unfair labor practices, the court concluded that the federal district courts were preempted from hearing such matters.

The Warren court's reasoning is flawed in two respects. First, it is not clear that section 7114(a)(1) does in fact codify the duty of fair representation in the federal sector. While some courts have so found, others disagree, stating that like the Railway Labor Act and the National Labor Relations Act, the duty of fair representation in the Civil Service Reform Act is implied from the general statutory grant of exclusive representative status. As discussed earlier, the legislative history is silent on this issue.

Second, despite the decision in Warren, whether the Civil Service Reform Act does in fact codify the duty of fair representation is not dispositive of the issue of jurisdiction. Warren reasoned that federal court jurisdiction over duty-of-fair-representation suits was preempted because that duty was codified by section 7114(a)(1), thereby making it an unfair labor practice enforceable exclusively by the Federal Labor Relations Authority. This is the same Garmon-type preemption analysis that the United States Supreme Court in Vaca held did not mandate preemption. Vaca is equally applicable to the federal sector and, therefore, federal court jurisdiction should not be foreclosed.

Further, the Eleventh Circuit stated that the CSRA only permitted federal court action in three instances: review in the court of appeals of Federal Labor Relations Authority final orders; enforcement in the court of ap-

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note 65. The courts have disagreed as to whether section 7114(a)(1) is in fact the statutory codification of the duty of fair representation. See supra note 175 and accompanying text.

233. 5 U.S.C. § 7116(b)(1982) states in pertinent part:
   (b) For the purposes of this chapter, it shall be an unfair labor practice for an organization—(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . (8) to otherwise fail or refuse to comply with any provision of this chapter.


235. Warren, 764 F.2d at 1397.

236. Id. at 1399; NTEU, 800 F.2d at 1168-71.

237. Pham, 799 F.2d at 639. Accord NTEU, 721 F.2d at 1403, 1406 (statutory duty was in fact the duty of fair representation).

238. Pham, 799 F.2d at 637, 639. This interpretation is more closely akin to the analysis under the Railway Labor and National Labor Relations Act. Vaca, 386 U.S. at 177; Steele, 323 U.S. at 202; Feller, A General Theory of the Collective Bargaining Agreement, 61 CAL. L. REV. 663, 807-08 (1973). In any event, the majority status of the union serves as the basis for the duty of fair representation. Humphrey, 375 U.S. at 342; Steele, 323 U.S. at 198. A minority union has no duty of fair representation. Wells v. Railway Conductors, 442 F.2d 1176 (7th Cir. 1971), aff'd 398 F. Supp. 397 (N.D. Ill. 1970).

239. See supra notes 64-75 and accompanying text.

240. See supra notes 170-187 and accompanying text.

peals of FLRA orders upon petition by the Authority;\footnote{242} temporary injunctive relief by a federal district court when the FLRA so requests upon the finding of an unfair labor practice.\footnote{243} The court concluded by negative implication that because of this limited statutory grant of jurisdiction, the federal courts were without power to assert jurisdiction in all other cases.\footnote{244} In so holding, the court relied on National Federation of Federal Employees, Local 1263 v. Commandant National Defense Institute\footnote{245} and Columbia Power Trades Council v. United States Department of Energy.\footnote{246} However, both of those cases dealt with factual and legal situations distinguishable from the enforcement of duty-of-fair-representation suits.

\textit{NFFE} was a lawsuit brought by a union to compel the federal agency to bargain with it over the impact of a proposed reduction in force.\footnote{247} This type of lawsuit is distinguishable from a duty-of-fair-representation complaint because it falls squarely within the exclusive jurisdiction of the Federal Labor Relations Authority, which had refused to issue an unfair labor practice complaint.\footnote{248} The scope of bargaining was a major concern of Congress,\footnote{249} which specifically placed that issue under the control of the administrative agency,\footnote{250} thereby preempts federal court jurisdiction. Thus, the court's decision in \textit{NFFE} was a classic example of Garmon-type preemption, which the Supreme Court in \textit{Vaca} held inapplicable to duty-of-fair-representation suits.\footnote{251}

Similarly, \textit{Columbia Power Trades} involved a union attempt to compel a writ of mandamus against an employer to implement an arbitration award.\footnote{252} As in \textit{NFFE}, the issue revolved around the scope of bargaining authority in the federal government.\footnote{253} Once again, the court used a Garmon-type preemption analysis to find sole power in the Federal Labor Relations Authority to resolve disputes constituting unfair labor practices in the federal sector.\footnote{254} These cases, therefore, are inapposite to the issue of whether the CSRA preempted federal court jurisdiction over duty-of-fair-representation

\footnotesize{\begin{verbatim}
242. Id. § 7123(b).
243. Id. § 7123(d).
245. 493 F. Supp. 675 (N.D. Cal. 1980). The court also relied upon Yates, 533 F. Supp. 461 (D.D.C. 1982). Freemant of federal court jurisdiction was based upon the absence in the Civil Service Reform Act of a parallel to section 301 of the Labor-Management Relations Act. The plaintiffs in Yates filed untimely grievances with their employer and then sought to overturn in court the agency's denial of their complaint. Id. at 462.
246. 671 F.2d 325 (9th Cir. 1982).
248. Id. at 678.
249. See supra note 60 and accompanying text.
251. See supra notes 157-169, 182-186.
253. Id. at 326 n.2.
254. Id. at 327.
\end{verbatim}}
suits because the issues involved were clearly and consciously placed by the Civil Service Reform Act within the exclusive jurisdiction of the FLRA.

Despite its supposed reliance on NFFE and Columbia Power Trades, the real rationale upon which the court of appeals based its decision was the absence of a section 301 parallel in the Civil Service Reform Act of 1978. Section 301 of the Labor-Management Relations Act grants federal court jurisdiction over breaches of collective bargaining agreements by employers or by unions. That section is more than jurisdictional; it permits the federal courts to fashion a federal common law of labor relations. Moreover, because it is an express grant of jurisdiction, section 301 has been held not to be preempted by the National Labor Relations Board’s exclusive power over unfair labor practices. Section 301 has, therefore, been a jurisdictional foundation for private sector duty-of-fair-representation suits also alleging a breach of a collective bargaining agreement by an employer. It is not, however, the sole jurisdictional basis for such suits. As the Supreme Court in Del Costello v. Teamsters noted, suits against the union are based upon the interstices of federal law implied from the National Labor Relations Act. Warren itself recognized that federal jurisdiction of private sector duty-of-fair-representation suits could be based upon section 1337 of title 28 of the United States Code. Alternatively, another possible jurisdictional basis might be section 1331 of the Code.

Despite possible jurisdiction under sections 1331 and 1337 for private sector duty-of-fair-representation suits, the court in Warren held there was no federal jurisdiction over similar federal sector suits. Instead, where a breach of the collective bargaining agreement is alleged in federal sector duty-of-fair-representation cases, the lack of a section 301 analogue completely ousts

258. Del Costello, 462 U.S. at 164.
259. Id. See infra cases at notes 285-287.

   The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interests and costs.

(Emphasis in original.)
federal court jurisdiction. The Eleventh Circuit based its holding on the fact that the House version of the Civil Service Reform Act provided for federal court jurisdiction for ordering arbitration pursuant to a collective bargaining agreement. That provision was struck from the final version of the CSRA, thereby implicitly precluding federal court jurisdiction.

Although section 301 grants federal court jurisdiction over suits to compel arbitration, that section is considerably broader in its language and focus than the proposed section 7121(c). Moreover, as already discussed, the legislative history of proposed section 7121(c) does not support the Eleventh Circuit's conclusion that its excision from the final version of the Civil Service Reform Act precluded federal court jurisdiction. Additionally, lawsuits by unions or employers to compel conformity with the arbitration provisions of the collective bargaining agreement raise different concerns than do duty-of-fair-representation suits. The enforcement of a collective bargaining agreement to compel arbitration frequently entails an examination of the provisions of the agreement itself. Deferral of these questions to the administrative agency familiar with the particular contours of the scope of bargaining and arbitration in the federal sector seems appropriate, especially since the two principal actors, unions and employers, are powerful enough to have their voices heard in the administrative forum. Duty-of-fair-representation suits, on the other hand, stem from an opposite premise: specifically, that the collective bargaining system and administrative procedures do not adequately protect the interests of the individual when they diverge from the principal actors.


263. H.R. REP. No. 1403, supra note 10, at 286; H.R. 11280, supra note 65, § 7121(c).


266. Compare H.R. 11280, supra note 65, § 7121(c) with 29 U.S.C. § 185(a) (1982).

267. See, e.g., Smith v. Evening News, 371 U.S. 195 (1962) (section 301 must be given broad interpretation); Painting & Decorating Contractors Ass'n v. Painters & Decorators Jt. Comm. of East Bay Counties, 707 F.2d 1067, reh. denied, 717 F.2d 1293 (9th Cir. 1983), cert. denied, 466 U.S. 927 (1984) (section 301 must be given broad interpretation); Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507 (9th Cir. 1978) (section 301 encompasses not only suits between employers and unions, but also suits by individual employees to vindicate uniquely personal rights); Maita v. Killeen, 465 F. Supp. 471 (D. Pa. 1979) (same).

268. See supra notes 106-125 and accompanying text.


271. See supra notes 130-132, 185-186 and accompanying text.
Finally, in the private sector, binding arbitration is viewed as the quid pro quo for the no-strike clause,\textsuperscript{272} and orders to compel arbitration may be tied to no-strike provisions.\textsuperscript{273} In the public sector, compulsory arbitration\textsuperscript{274} has engendered nearly as much controversy as the right to strike.\textsuperscript{275} Both compulsory arbitration of grievances and the use of the strike weapon are treated differently in the private and public sectors\textsuperscript{276} due to the difference of opinion as to the special nature of public employee labor relations.\textsuperscript{277} Given the heated debate over these issues, it is rather surprising that neither the inclusion nor deletion of H.R. 11280, section 7121(c) elicited any comments in either legislative body.\textsuperscript{278} Nevertheless, the eventual removal of this provision may simply reflect a policy choice by Congress to defer these questions to the administrative body created to handle them.\textsuperscript{279}

Thus, although the court in \textit{Warren} speaks about the express rejection of a section 301 counterpart in the Civil Service Reform Act as implying a conscious denial of federal court jurisdiction over federal sector duty-of-fair-representation suits,\textsuperscript{280} the appropriateness of that inference is open to question. This is especially true given the quite different and limited scope of the proposed provision and congressional silence as to its existence.

Even if the removal of H.R. 11280, section 7121(c) implied a withdrawal of federal court jurisdiction over suits for breaches of collective bargaining agreements in the federal employee sector, the further extrapolation that \textit{Warren} makes from that implication is also flawed. The \textit{Warren} court assumes that because Congress did not provide jurisdiction over collective

\textsuperscript{272} Teamsters Local 174 v. Lucas Flour, 369 U.S. 95 (1962).
\textsuperscript{277} See \textit{supra} note 61 and accompanying text.
\textsuperscript{278} See \textit{supra} notes 112-119 and accompanying text.
\textsuperscript{279} See H.R. \textit{Conf. Rep. No. 1717, supra note 67, at 157. See also, CSRA, 5 U.S.C. § 7117(c); Department of Defense, 659 F.2d at 1146-47.}
\textsuperscript{280} \textit{Warren}, 764 F.2d at 1397-98. One court has stated that the deletion of section 7121(c) merely shows intent not to permit \textit{injunctive} relief in the district courts, not intent to prohibit damage actions. \textit{Karahalios II}, 544 F. Supp. at 80.
bargaining contract breaches, all duty-of-fair-representation suits are barred.\textsuperscript{281} This assumption appears to be based upon two premises: (1) that section 301 is the true basis for duty-of-fair-representation suits in the private section;\textsuperscript{282} and (2) that its finding that section 7114(a)(1) of the Civil Service Reform Act is the embodiment of the duty of fair representation in the federal sector distinguishes private labor relations law precedent.\textsuperscript{283}

The first premise ignores the fact that section 301 has never been the sole basis for federal court jurisdiction over duty-of-fair-representation suits.\textsuperscript{284} In \textit{Del Costello}, the United States Supreme Court stated that private sector duty-of-fair-representation suits comprised two distinct causes of action: one against the employer based on section 301 and the other against the union based on the implied general federal question jurisdiction garnered from the intersection of federal labor statutes.\textsuperscript{285} Thus, the suit against the union is not dependent on section 301 for its jurisdictional foundation. An employee may sue either the employer or the union or both.\textsuperscript{286} This is consistent with the Supreme Court's interpretation of \textit{Vaca}:

[W]e held [in \textit{Vaca}] that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective agreement.\textsuperscript{287}

Even assuming there is no federal court jurisdiction against the federal agency, there is no reason to prohibit a duty-of-fair-representation suit by an employee against his or her union. The Tenth Circuit in \textit{Pham} speculated that by the removal of proposed H.R. 11280 section 7121(c), Congress was specifically drawing a distinction between duty-of-fair-representation suits against the unions and those against the federal agency—the latter being subject to sovereign immunity.\textsuperscript{288} The court in \textit{Pham} reasoned that the deletion of proposed section 7121(c) merely meant that Congress was not consenting to suits against the federal government. By immunizing the government against duty-of-fair-representation suits, Congress did not also intend to insulate labor unions from such suits.\textsuperscript{289}

282. \textit{Id.} at 1398.
283. \textit{Id.} at 1399.
286. \textit{Del Costello}, 462 U.S. at 166.
287. \textit{Lockridge}, 403 U.S. at 299 (emphasis added).
288. \textit{Pham}, 799 F.2d at 639.
289. \textit{Id.} at 639.
The Tenth Circuit argument appears to be pure speculation. Not only is the legislative history of the Civil Service Reform Act silent as to the duty of fair representation generally, but the specific history of section 7121(c) makes no mention of intent to abrogate sovereign immunity. "The House recedes" probably refers to the narrow issue of Authority dominance in cases about compulsion of arbitration. To suppose Congress made a conscious decision not to waive sovereign immunity seems to be clear conjecture. Nevertheless, the ultimate conclusion of the Tenth Circuit in Pham is sound. A separate suit against a union may be maintained even if the administrative agency is immune.

Not only did the Warren court ignore the dual and distinct nature of duty-of-fair-representation claims, it also failed to grapple with the precedent the court itself cited: that duty-of-fair-representation suits have been premised on jurisdictional bases other than section 301. Recognizing that such suits have been brought under sections 1331 and 1337 of title 28 of the United States Code, the court merely stated that in those cases there was only a union breach of fair representation and no employer violation of the collective bargaining agreement. The court implied that in those situations plaintiffs were required to find alternate sources for federal jurisdiction because section 301 was unavailable.

The Eleventh Circuit's conclusion in Warren that there was no section 301 analogue in the Civil Service Reform Act, there is no federal court jurisdiction for federal sector duty-of-fair-representation breaches is erroneous. However, far from indicating that without a section 301 jurisdictional base, duty-of-fair-representation suits are not cognizable, the cases cited in Warren demonstrate the independence of union suits from any corresponding breach by an employer.

Similarly, the finding of the court in Warren that section 7114(a)(1) of the Civil Service Reform Act codified the duty of fair representation, thus making private sector precedent distinguishable, is without merit. Apparently, the Warren court's unarticulated reasoning is that there is a "qualitative" difference between statutorily expressed unfair labor practices and those actions interpreted by the administrative agency to be unlawful. The implica-

290. See supra notes 112-119 and accompanying text.
291. See supra note 116.
292. See also Del Costello, 462 U.S. at 164, 166.
293. Warren, 764 F.2d at 1398.
294. Id.
295. Id.
296. See also Del Costello, 462 U.S. at 164, 166. Two-pronged suits have been permitted under the Railway Labor Act, which also does not have a parallel to section 301. Glover v. St. L.-San Francisco Ry., 393 U.S. 324 (1969); Conley v. Gibson, 355 U.S. 41 (1957); Bagnall v. Airline Pilots Ass'n, 626 F.2d 336 (4th Cir. 1980), cert. denied, 449 U.S. 1125 (1981).
297. Warren, 764 F.2d at 1399.
298. Obviously, the use of the phrase "expressed unfair labor practice" is somewhat of a misnomer in this context. Section 7116(b)(8) refers explicitly only to a failure to comply with any
tion of Warren is that preemption is less appropriate for the former type of violation than the latter.299

There are two defects in the Eleventh Circuit's reasoning on this point. First, as discussed earlier,300 it is dubious whether section 7114(a)(1) codifies the private sector duty of fair representation. Second, and more important, there is no recognized qualitative difference between expressly stated and administratively interpreted unfair labor practices.301

The Garmon-preemption doctrine implicitly excludes recognition of such differences.102 Garmon itself makes no distinction between stated and implied unfair labor practices.303 Instead, Garmon provides that, if proper, the scope of preemption even reaches activity only arguably prohibited by the NLRA.304

Moreover, the United States Supreme Court in Vaca did not draw a distinction between these two types of unfair labor practices. In fact, although the Court refused to resolve the issue of whether a breach of the duty of fair representation constituted an unfair labor practice,305 Vaca held that the duty of fair representation was cognizable in the federal courts even if the Board also had unfair labor practice jurisdiction.306

The Court in Vaca does speak of "the NLRB's tardy assumption of jurisdiction in these cases,"307 perhaps implying that a more prompt assertion of Board jurisdiction would have influenced the Court's opinion. However, a major problem with exclusive Board power over duty-of-fair-representation suits is the unreviewable nature of the NLRB General Counsel's discretion in the issuance or denial of an unfair labor practice complaint.308 The General Counsel of the FLRA is given the same statutory powers in this regard.309 Thus, the Supreme Court's concerns in Vaca should apply with equal force here in the case of federal sector duty-of-fair-representation suits and mitigate against preemption.310

Perhaps the court of appeals in Warren was implying that by enacting section 7114(a)(1) Congress made a policy decision favoring the Federal Labor

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299. Warren, 764 F.2d at 1399. The Court distinguished the Karahalios I and Karahalios II decisions on this point. Id. at 1399 n.5. The Karahalios decisions are discussed infra at notes 373-402 and accompanying text.
300. See supra notes 236-238 and accompanying text.
302. See supra notes 152-156 and accompanying text.
303. See generally Garmon, 359 U.S. at 236.
304. See id. at 245.
305. Vaca, 386 U.S. at 186.
306. Id. at 173, 186. Indeed, the opinion was written after the Board's assertion of jurisdiction in Miranda Fuel, 140 N.L.R.B. 181. See supra notes 149-150 and accompanying text.
307. Vaca, 386 U.S. at 183.
308. Id. at 182-83.
310. See supra notes 182-186 and accompanying text.
Relations Authority over the courts to resolve duty-of-fair-representation complaints. Congress could certainly have taken such a position. However, this inference is a bit strained given the total absence of any legislative history on this issue and, especially, given the fact that private sector duty of fair representation was so clearly enforceable in the courts by 1978. Presumably, Congress was aware of the forums available for duty-of-fair-representation suits in the private sector and would have expressly stated such a policy decision.

Thus, although the arguments of the Eleventh Circuit in Warren are initially appealing, the analysis of the court is flawed. Both NFFE and Columbia Power Trades deal with preemption situations distinguishable from duty-of-fair-representation suits. The history of the deletion of H.R. 11280 section 7121(c) is problematic, but there is little reason to believe that the section was intended to be a congressional decision to preclude duty-of-fair-representation suits in federal court. Finally, regardless of whether the Civil Service Reform Act contains an explicit duty of fair representation in section 7114(a)(1), the resolution of that issue should not affect the ability of the federal courts to hear duty-of-fair-representation claims in that forum.

Tucker v. Defense Mapping Agency Hydrographic/Topographic Center

In Tucker, Tucker sued his employer, the Defense Mapping Agency, and his union, AFGE, Local 1884, for, among other things, infidelity to the duty of fair representation. Tucker’s claim arose out of a temporary change in hours of work negotiated between the employer and the union. Tucker claimed that the change was in violation of the collective bargaining agreement and alleged separate duty-of-fair-representation claims against the agency and the union.

The court dismissed the duty-of-fair-representation claims for lack of jurisdiction on the ground that the comprehensive scheme of the Civil Service Reform Act operated to preempt those claims. The court began with an ex-

311. See supra notes 64-73 and accompanying text.
312. See supra notes 130-136 and accompanying text.
313. Accord PATCO, 653 F.2d at 1138 ("in interpreting the legislative history of a statute, there is a presumption that Congress was aware of the judicial construction of existing law") (citing Shapiro v. United States, 335 U.S. 1, 16 (1948)).
314. See supra notes 245-254 and accompanying text.
315. See supra notes 106-119 and accompanying text.
316. See supra text accompanying note 119.
317. See supra notes 65-75, 236-238 and accompanying text.
318. See supra notes 76-95 and accompanying text.
320. Id.
321. Id. at 1237.
322. Id. Although the Tucker court treated the duty-of-fair-representation liability of the union and the agency separately, the arguments discussed were essentially the same. See id. at 1244 n.9.
position of the doctrine of preemption, specifically considering (1) whether Congress intended the Civil Service Reform Act entirely to occupy the field of labor relations and (2) whether the asserted remedies would inhibit the purposes or goals of the Act.

The first issue in Tucker was the limited role of the federal courts under the Civil Service Reform Act. The court described the two statutory avenues of dispute resolution, negotiated grievance systems and unfair labor practice proceedings, before the Federal Labor Relations Authority. The court then concluded that the entire limited role of the federal courts was articulated by section 7123 of the Civil Service Reform Act, which provided for judicial review of Federal Labor Relations Authority decisions and orders.

The Tucker court quoted from the Senate Report to the effect that the Civil Service Reform Act was a comprehensive reform of the Civil Service. The court next stated that Congress specifically pared down federal court jurisdiction through the Civil Service Reform Act to minimize decisional nonuniformity via such suits in federal district court. As authority, the court cited a section of the Senate Report dealing specifically with review of MSPB decisions. However, the court’s reasoning is not persuasive since it relied on congressional legislative history regarding review of MSPB decisions to support its finding of a similarly limited federal court role in reviewing FLRA decisions and orders. Nowhere in the Senate Report or the House-Senate Joint Committee Report on review of FLRA decisions and orders does Congress evince the same fears about federal court jurisdiction.

323. Id. at 1238.
324. Id.
325. Id.
326. Id. The Eleventh Circuit made an abbreviated version of this argument in Warren. Warren, 764 F.2d at 1396. See supra notes 241-244 and accompanying text for an articulation and criticism of this argument.
329. S. Rep. No. 969, supra note 53, at 63:

Currently employees who wish to challenge Commission decisions generally file their claims with U.S. District Courts. The number of these courts has caused wide variations in the kinds of decisions which have been issued on the same or similar matters. The section remedies the problem by providing that Board decisions and orders ... be reviewable by the Court of Claims and U.S. Courts of Appeals, rather than by U.S. District Courts.

In any event, congressional provisions about review of FLRA (or MSPB) orders and decisions in the court of claims and/or courts of appeals\textsuperscript{334} should not be the basis for excluding federal court jurisdiction under the maxim \textit{expressio unius est exclusio alterius} (the expression of one thing is the exclusion of another).\textsuperscript{335} Like the CSRA, the NLRA\textsuperscript{336} gives the courts of appeals jurisdiction to review and enforce decisions and orders of the NLRB (upon which the FLRA was based\textsuperscript{337}). Nevertheless, the limited judicial role under the NLRA did not prevent the Supreme Court in \textit{Vaca} from recognizing that the duty of fair representation required judicial enforcement.\textsuperscript{338} Further, the fact that the CSRA provided for judicial review of NLRA decisions increases the judicial role in federal employee labor relations.\textsuperscript{339} Under the executive order scheme, decisions of the Federal Labor Relations Counsel were not subject to judicial review.\textsuperscript{340}

Nor would finding federal court jurisdiction over duty of fair representation be "a formidable barrier to the speedy and efficacious accomplishment of the salutary objectives of the Civil Service Reform Act."\textsuperscript{331,341} The court in \textit{Tucker} distinguished \textit{Vaca} and the private sector duty-of-fair-representation jurisprudence by stating that collateral district court jurisdiction would be counter to the ideals of efficiency in the federal service.\textsuperscript{342} Once again, the


\textsuperscript{335} \textit{Tucker}, 670 F. Supp. at 1239. See \textit{Sutherland}, supra note 244, § 47.24.

\textsuperscript{336} NLRA §§ 10(e), (f), 29 U.S.C. §§ 160(e), (f) (1982).

\textsuperscript{337} E.g., H.R. Rep. No. 1403, supra note 10, at 41. See also \textit{Turgeon}, 677 F.2d at 938 n.4.

\textsuperscript{338} \textit{Vaca}, 386 U.S. at 186-87. In the private sector, 29 U.S.C. § 185(a) does not always provide the statutory grant of jurisdiction. \textit{Accord Del Costello}, 462 U.S. at 164-65. See supra notes 285-287, 296.

\textsuperscript{339} Indeed, a major sponsor of the legislation, Representative Ford, viewed the role of the courts as a protector of employee rights. Additionally, he saw judicial review as a spur to a more even-handed enforcement of the Act away from the executive order regime and approaching the private model.

But if at the beginning or later the Authority refuses to follow its mandate [to move away from the executive order scheme], we expect courts to vigorously defend the rights of employees and their representatives under Title VII against misrepresentation or half-hearted enforcement by the Authority.


\textsuperscript{340} \textit{Bureau of Alcohol, Tobacco & Firearms}, 464 U.S. at 92.

\textsuperscript{341} \textit{Tucker}, 607 F. Supp. at 1239.

\textsuperscript{342} \textit{Id.} at 1240 n.6, 1244 (citing \textit{Martel}, 562 F. Supp. at 445).

The district court in \textit{Tucker} accepted the reasoning of Judge Zobel in \textit{Martel}. \textit{Tucker}, 607 F. Supp. at 1244. \textit{Martel} concerned an air traffic controller terminated as a result of the illegal PATCO strike. \textit{Martel}, 562 F. Supp. at 443. In plaintiff's duty-of-fair-representation claim, he alleged that his union coerced him into joining the unlawful strike and that his employer failed to protect him from his union's conduct and had fined him unfairly. \textit{Id.} at 444. The court found that \textit{Vaca} did not apply to plaintiff's claim because: (1) government efficiency prevents judicial cognizance of duty-of-fair-representation claims, \textit{id.} at 445, and (2) plaintiff had adequate administrative remedies available by appeal to the MSPB, \textit{id.} The latter rationale is erroneous.
court has misconstrued the intent of Congress in enacting the Civil Service Reform Act. Congress was concerned with efficient government and with streamlining the appeals process. Yet, it perceived that efficiency was promoted through strengthening the collective bargaining process. Efficiency was intended to be obtained by protecting employee rights through an enlarged union role in the labor relations scheme and by reducing the traditional civil service administrative remedies. With increased union power came the attending responsibility of the duty of fair representation and the corresponding need to have these disputes heard in an impartial judicial forum.

The court in Tucker relied heavily on Bush v. Lucas in its analysis of the comprehensive remedial scheme of the Civil Service Reform Act. In Bush the United States Supreme Court denied a non-CSRA, separate cause of action to a federal employee from alleged violations of his first amendment rights. Bush had alleged that he had been retaliated against for "whistleblowing." The Court declined to create a Bivens-type remedy given the comprehensive nature of the Civil Service Reform Act.

The court in Tucker interpreted Bush to explain the relationship between section 1331 of title 28 of the United States Code (general federal question jurisdiction) and the Civil Service Reform Act. According to the court in Tucker, Bush effectively held "the detailed remedial structure of CSRA 'preempted' the less specific federal jurisdictional grant under § 1331." Even accepting this characterization of Bush, the question posed by the Supreme Court in that decision was not the power to add a new constitutional remedy but the appropriateness of that addition in light of the rele-

because review by the MSPB does not meet the Supreme Court's concern for impartial review for duty-of-fair-representation breaches. See Vaca, 386 U.S. at 182. See supra notes 196-211 and accompanying text.

343. See, e.g., S. REP. No. 969, supra note 53, at 4.
346. See Vaca, 386 U.S. at 186.
347. See Karahalios I, 534 F. Supp. at 1207-08.
349. Bush, 462 U.S. at 368.
350. Id. at 369-70. See supra note 54 and accompanying text for definition of "whistleblowing."
351. That is, a remedy implied from a violation of constitutional rights despite no express provision therefor. See, e.g., Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Bivens granted a nonstatutory damage award to a plaintiff whose fourth amendment rights had been violated by federal agents. Id. at 395-96.
354. Id.
355. The Court clearly has the power to remedy infringement of individual rights even
vant policy considerations of Congress.\textsuperscript{356} The Court stated that the issue was one of "federal personnel policy."\textsuperscript{357} After tracing the history of civil service remedies, paying particular attention to employee speech rights,\textsuperscript{358} the Supreme Court determined that Congress provided an elaborate system for the resolution of those disputes.\textsuperscript{359} Given the specific congressional policy decisions with respect to that particular problem, the Court decided to defer to the legislature for the creation of any new remedies.\textsuperscript{360}

Nevertheless, \textit{Bush} does not "virtually mandate[]" the denial of federal jurisdiction to duty-of-fair-representation suits by government employees.\textsuperscript{361} The problem of employee speech rights had been specifically addressed in both the general history of civil service reform and in the specific legislative history of the Civil Service Reform Act.\textsuperscript{362} Indeed, protection of whistleblowers and, thus, the intersection of the first amendment with government efficiency, constituted one area where Congress gave particular attention to conflicting policy considerations.\textsuperscript{363} Therefore, the Court's deferral in \textit{Bush} to those determinations was appropriate.

In contrast, Congress made no specific policy decisions about the duty of fair representation in the federal sector.\textsuperscript{364} As previously discussed, the pattern for federal sector labor relations was the national experience with private enterprise.\textsuperscript{365} The increased union role in the civil service system implied a need for the duty-of-fair-representation protection.\textsuperscript{366} Further, \textit{Bush} concerned the judicial creation of a "neoteric" cause of action.\textsuperscript{367} The duty of fair representation, on the other hand, has had a long history in the federal courts under private sector labor jurisprudence.\textsuperscript{368} In passing the Civil Service Reform Act based on the National Labor Relations Act, Congress should have specifically indicated where private sector precedents were inapposite.\textsuperscript{369}

\begin{itemize}
\item without congressional mandate. \textit{See}, e.g., Carlson \textit{v.} Green, 446 U.S. 14 (1980); \textit{Bivens}, 403 U.S. 388. \textit{See also}, \textit{Marbury} \textit{v.} Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
\item 356. \textit{Bush}, 462 U.S. at 373.
\item 357. \textit{Id.} at 380-81.
\item 358. \textit{Id.} at 381-86.
\item 359. \textit{Id.} at 386-88.
\item 360. \textit{Id.} at 389-90.
\item 361. \textit{Tucker}, 607 F. Supp. at 1239.
\item 362. \textit{See Bush}, 462 U.S. at 381-86. \textit{See supra} note 59.
\item 364. \textit{See supra} notes 64-75 and accompanying text.
\item 365. \textit{See supra} note 82 and accompanying text.
\item 366. \textit{See supra} notes 79-95 and accompanying text.
\item 368. \textit{See supra} notes 128-136 and accompanying text.
\item 369. \textit{E.g.}, H.R. Rep. No. 1403, \textit{supra} note 10, at 377 (supplementary views of Reps. Clay,
Finally, the 1967 Vaca opinion examined the meshing of the National Labor Relations Act with the duty of fair representation. In the search for relevant Supreme Court precedent on the accommodation of that duty with the comprehensive labor relations statutes, the Vaca opinion seems more suitable for review than is Bush. The creation of a Bivens-type remedy in the Civil Service Reform Act for constitutional violations appears only tangentially related to the issue of judicial cognizance of duty-of-fair-representation suits by federal employees. The Court's Vaca decision, in contrast, dealt with the same issue except under a different statute. Given the close relationship between the National Labor Relations and the Civil Service Reform acts, Vaca should be the more appropriate precedent.

As the foregoing analysis demonstrates, the authorities and inferences used by the court in Tucker and Warren are misapplied given the legislative history and purposes of the Civil Service Reform Act. This is not to suggest, however, that the opinions in Pham and other cases upholding judicial oversight of duty-of-fair-representation suits are always immune from criticism, as the following section will show.

Criticism of Supporting Cases

There are four cases supporting the grant of federal subject matter jurisdiction over duty-of-fair-representation suits. The Tenth Circuit opinion in Pham has already been discussed and criticized. The Federal District Court for the Western District of North Carolina issued a cursory decision in Naylor v. American Federation of Government Employees, Local 446 that was affirmed without written opinion by the Fourth Circuit. The two remaining opinions of the Northern District of California are examined below.

The earliest cases permitting duty-of-fair-representation suits under the Civil Service Reform Act to be brought in federal court were the decisions of the district court in Karahalios I and Karahalios II. Karahalios was a Greek teacher at the Defense Language Institute in Monterey, California. He was promoted to a position once held by another instructor who had been demoted due to the elimination of the job. When Karahalios was placed in the reopened position, the former employee challenged the appointment through collective bargaining arbitration and was eventually awarded the position. Throughout the grievance proceedings, neither the union nor the


370. See Aaron, supra note 10.
371. See supra notes 26-29 and 296-300 and accompanying text.
employer notified plaintiff of the controversy.\textsuperscript{375} After Karahalios was replaced, the union refused to process his grievance, stating it would conflict with the arguments previously made in the other arbitration.\textsuperscript{376} The union and the federal agency successfully opposed further arbitration brought individually by Karahalios.\textsuperscript{377}

Karahalios then filed unfair labor practice charges against the union and his employer with the Federal Labor Relations Authority.\textsuperscript{378} The Regional Director refused to issue a complaint and the General Counsel affirmed that refusal with respect to the employer.\textsuperscript{379} The General Counsel reversed as to the union and directed the Regional Director to issue a complaint or to settle.\textsuperscript{380} The union settled the unfair labor practice complaint with the FLRA without giving any individual relief to Karahalios.\textsuperscript{381} Specifically, the settlement provided merely that the union would agree to notify all members that in the future it would not represent more than one individual seeking the same job.\textsuperscript{382} Reconsideration of the decisions by the General Counsel was denied. Consequently, Karahalios brought suit in federal district court.\textsuperscript{383}

In \textit{Karahalios I} the court allowed Karahalios to maintain the duty-of-fair-representation complaint against the union, but dismissed with leave to amend the complaint against the government.\textsuperscript{384} The case against the employer was said to rest, if at all, upon the consent of the government to be sued for contract actions via the Tucker Act.\textsuperscript{385}

In \textit{Karahalios II} the court held that plaintiff had exceeded the $10,000 maximum amount in controversy requirement of the Tucker Act,\textsuperscript{386} and therefore the proper forum under the Tucker Act was the United States Court of Claims.\textsuperscript{387} The court also reaffirmed its earlier decision on the complaint against the union.\textsuperscript{388}

The facts of \textit{Karahalios I} and \textit{II} illustrate the tensions inherent in a labor relations system that protects individual rights through membership in a group.\textsuperscript{389} The potential for individual rights being subordinated by the collec-

\textsuperscript{375} Id. \\
\textsuperscript{376} Id. \\
\textsuperscript{377} Id. \\
\textsuperscript{378} Id. \\
\textsuperscript{379} Id. \\
\textsuperscript{380} Id. \\
\textsuperscript{381} Id. \\
\textsuperscript{382} Id. \\
\textsuperscript{383} Id. \\
\textsuperscript{384} Id. at 1208-09. \\
\textsuperscript{385} 28 U.S.C. § 1346 (1982); \textit{Karahalios I}, 534 F. Supp. at 1209. \\
\textsuperscript{386} 28 U.S.C. § 1346(a)(2) (1982); \textit{Karahalios II}, 544 F. Supp. at 78. \\
\textsuperscript{387} \textit{Karahalios II}, 544 F. Supp. at 79-80. \\
\textsuperscript{388} Id. at 79. Whether jurisdiction is proper under the Tucker Act or under the general federal question statute, 28 U.S.C. § 1331, cannot be resolved without an in-depth analysis of whether federal employment rights are contractual in nature. \textit{Karahalios I}, 534 F. Supp. at 1209. That complex question is beyond the scope of this article. The \textit{Karahalios} cases are the only decisions that arguably discuss duty-of-fair-representation suits through Tucker Act jurisdiction. \\
\textsuperscript{389} Patternmakers League of North Am. v. NLRB, 105 S.Ct. 3064 (1985) (right of union
tive was a major factor in the Supreme Court's decision in *Vaca* and was used in the district court in *Karahalios* to support its jurisdiction over plaintiff's duty-of-fair-representation suit. Further, the Federal Labor Relations Authority in *Karahalios* settled the unfair labor practice complaint without providing Karahalios individual relief. Thus, it is clear that in such an administrative procedure the individual charging party plays a secondary role to that of the agency. In *Karahalios* the FLRA was more concerned with preventing future abuses by the union than with obtaining individual relief for Karahalics. Thus, the institutional role of the administrative agency may lead to a predominant concern with the questions of broad labor policy to the detriment of the rights of individual employees.

If the decisions in *Karahalios* can be criticized, it is in the manner in which the court distinguishes past precedent on the issue of federal court jurisdiction under the Civil Service Reform Act. The court distinguished *Columbia Power Trades* United States v. *PATCO*, NFFE, and *Clark v. Mark* on the basis that they all involved injunctive relief, whereas in *Karahalios* the plaintiff sought damages for breach of the duty of fair representation. Logically, this distinction would seem to have little import.

In duty-of-fair-representation suits, there is no reason to distinguish between damage actions and injunctive relief. In the private sector, both the National Labor Relations Board and the courts have granted both legal and equitable remedies for duty-of-fair-representation


390. 386 U.S. at 182-83.
392. See also *Turgeon*, 677 F.2d 937.
394. *Id.* at 1207. See *Vaca*, 386 U.S. at 182-83.
395. 671 F.2d 325 (writ of mandamus to compel enforcement of arbitration award).
401. See, e.g., *Vaca*, 386 U.S. 171; *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281; *Local 12, Rubber Workers (Business League of Gadsden)*, 150 N.L.R.B. 312 (1964), aff'd, 368
breaches.\textsuperscript{402} There is simply no support either in duty-of-fair-representation doctrine or in the legislative history of the Civil Service Reform Act for such a limitation on remedies in the federal sector.

\textit{Conclusion}

In enacting the Civil Service Reform Act, Congress consciously adopted the National Labor Relations Act and private sector labor law as the model for federal sector employee-management relations. While some important concessions were made to accommodate concerns unique to public sector employment, the Civil Service Reform Act specifically granted labor organizations and the collective bargaining process an increased role in the federal workplace. This choice evidenced a congressional policy shift away from ensuring employee rights through the traditional civil service administrative system and toward protecting those rights by union representation.

In so doing, Congress not only provided the benefits of that system but its drawbacks. Both the National Labor Relations Act and the Civil Service Reform Act are premised on a collective bargaining scheme based upon majority rule. Such a scheme necessarily carries with it a risk of the subordination of individual employee rights to those of the collective. This result is a structural consequence of the labor laws. Indeed, potential "tyranny of the majority" is endemic to all democratic institutions.\textsuperscript{403}

In private sector labor relations, the United States Supreme Court has noted the parallels between a system of representative government and a union’s majority status.\textsuperscript{404} That analogy provided the foundation for the imposition of the duty of fair representation, which has served as a guard against overreaching by the majority against a minority rendered powerless by the structure of the collective bargaining process.\textsuperscript{405} As public sector labor relations in the Civil Service Reform Act approach the private model, this federal sponsorship of collective bargaining and union majority rule imposes an obligation on government to protect the individual through the federal court cognizance of duty-of-fair-representation suits.\textsuperscript{406}

\textsuperscript{402} Even the Norris-LaGuardia Act, (47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-15 (1982)), which denied federal court jurisdiction to issue injunctions in labor disputes, has been held not to prevent equitable relief in duty-of-fair-representation suits. Steele, 323 U.S. at 207-08; Tunstall, 323 U.S. at 213-14; Sindicato de Trabajadores Puckinghouse, 425 F.2d at 291.


\textsuperscript{404} Steele, 323 U.S. at 202.

\textsuperscript{405} Vaca, 386 U.S. at 182.

\textsuperscript{406} See Wellington, supra note 389, at 1339.
Nothing in the policies or history of the Civil Service Reform Act contradicts this conclusion. To the contrary, the congressional assumptions underlying the Act demand it. Therefore, the arguments of the Eleventh Circuit in *Warren* and other courts denying federal subject matter jurisdiction over duty-of-fair-representation suits are erroneous. Federal government employees are in need of, and entitled to, the same protection as their private sector counterparts.