Wedging Open the Courthouse Doors: Federal Employee Access to Judicial Review of Constitutional and Statutory Claims

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ARTICLE ABSTRACT

This article addresses, in a comprehensive fashion, jurisdictional barriers that federal employees face in obtaining judicial review of statutory and constitutional claims. Many statutory claims that employees had previously brought in federal court are now precluded entirely by the Civil Service Reform Act of 1978. Courts, however, retain jurisdiction where there are independent jurisdictional bases for review. They also traditionally have preserved their jurisdiction to grant equitable relief for constitutional violations. Determination of those types of government action for which Congress intended the CSRA remedies to be exclusive has been hotly litigated. In addition, even when the claims are not precluded by the CSRA, government defendants are increasingly arguing that administrative remedies, including the grievance-arbitration process, must be exhausted before claims may be brought in court. The Supreme Court appeared poised to address these issues in the October Term of 2005 but ultimately addressed only a narrow issue, remanding the broader issues of preclusion and exhaustion to the lower courts for further exploration. *Whitman v. FAA*, 126 S.Ct. 2014 (2006). We examine those issues with respect of the different types of statutory and constitutional claims and the various administrative routes available, in an attempt to shed light on the relevant considerations that should inform the courts’ decision.
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INTRODUCTION

The federal government is the Nation’s largest employer, with nearly 2 million civilian employees, excluding the U.S. Postal Service; of these, about 1.8 million are employed in the Executive Branch. The working conditions of these employees are, to a high degree, dictated by statute and regulation. Federal employees are the beneficiaries of certain protections vis-à-vis their government employer that are guaranteed by statute, regulation and even the Constitution; in some cases, their protections exceed those of private sector employees.

At the same time, however, federal employees face hurdles in protecting their rights that are unique to the federal sector. For example, while state and local employees may bring a civil action under Section 1983 for damages caused by constitutional violations by their government employer,² there

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is no similar provision that covers the federal employer. Nor may federal employees bring Bivens actions against federal officials for damages for violations of their constitutional rights.\(^3\) Further, as discussed at length infra, at least one circuit is refusing to permit federal employees to bring actions for equitable relief for constitutional violations by their employer. And, even if such an action is not precluded entirely, some courts are beginning to require exhaustion of union-negotiated grievance procedures or other administrative remedies as a predicate to suit to vindicate a constitutional claim—even though the precise administrative procedures that must be exhausted, and under what circumstances, remain unclear.\(^4\)

Similar obstacles exist with respect to the enforcement of federal employees' statutory rights. The right to take such claims to court, invoking the traditional bases for jurisdiction, has been under siege for years, as we discuss infra. For many types of claims, employees are forced to pursue administrative options under the Civil Service Reform Act.

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4 See discussion infra, pp. 91-105.
first, before obtaining judicial review; still others may find that their administrative remedy is their sole and exclusive remedy, to the exclusion of any judicial review. Some may have no third party remedy at all.

Since the CSRA was enacted in 1978, the federal courts have been faced with numerous disputes concerning the rights of federal employees to invoke their jurisdiction. As we show, their decisions have often been based upon confusion about the scope and purposes of the CSRA’s remedial scheme, as well as a misapprehension of the controlling legal principles.

It appeared that there would be an authoritative resolution of many of these jurisdictional issues by the United States Supreme Court during its October 2005 term, when it granted certiorari in Whitman v. Dept. of Transportation, et al. Unfortunately, as discussed in greater length infra, the Court ultimately concluded that the question presented (involving the scope of CSRA preclusion) was not properly before it, and it issued only a very brief per curium decision that remanded the case back to the Ninth Circuit for further consideration of the preclusion issue, as well as a related exhaustion issue.

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This article discusses the critical issues of preclusion and exhaustion that were raised, but not decided, in *Whitman.* Its goal is to illuminate the path for the correct resolution of these issues by: 1) examining the bases for assertion of jurisdiction over federal questions and the jurisprudence on rebutting the presumption of such jurisdiction; 2) analyzing the types of statutory claims for which the CSRA is (and should be) exclusive, and the types of claims that are not barred by the CSRA; and 3) reviewing the statutory provisions of the CSRA that allegedly make the grievance procedure exclusive for matters that are covered by it and explaining why that procedure is merely the exclusive *administrative* remedy and does not bar *judicial* remedies. The article further addresses the availability of judicial review of constitutional claims, and explains the distinction between claims for damages and claims for equitable relief. Finally, for those cases where the claims are not precluded by the CSRA, the article discusses those circumstances in which it might be appropriate to apply a requirement that administrative remedies be exhausted as a prerequisite to judicial review.\(^7\)

\(^7\) The elaborate statutory scheme for protection of federal employees against discrimination based on race, color, religion, sex, national origin, age, or handicapping condition is largely beyond the scope of this article. Such allegations are generally pursued through a special complaint process, subject to regulations of the Equal Employment
I. BACKGROUND: THE CSRA AND THE FAUSTO DECISION

The CSRA is the network of statutory provisions that, with their implementing regulations, comprise the personnel management system covering the majority of employees in the Executive Branch. As such, it dictates most--but not all--of the rights and obligations, working conditions, benefits, and remedies for the largest single group of employees in the United States: the federal civilian workforce.

In United States v. Fausto, the Supreme Court first examined the relationship between the CSRA’s remedial scheme and pre-existing rights to secure judicial review of agency

Opportunity Commission. 29 C.F.R. Part 1614. There is, however, overlap with the CSRA. Certain actions taken against an employee for discriminatory reasons constitute a prohibited personnel practice that can be pursued administratively under CSRA administrative procedures or the grievance-arbitration process. See 5 U.S.C. § 2302(b)(1). Adverse actions, coupled with an allegation of discrimination, are known as “mixed cases” and are pursued through an elaborate administrative scheme that can include the EEOC (or, again, through the grievance-arbitration process). See 5 U.S.C. 7121(d); 29 C.F.R. 1614.302.

Approximately 1.2 million civilian federal employees fall within the coverage of the Civil Service Reform Act of 1978. With a few exceptions, the employees of the U.S. Postal Service are excluded from coverage under the CSRA. 39 U.S.C. § 1005. Civilian employees of the Department of Defense are now being moved to coverage under the National Security Personnel System, instead of the CSRA. 5 U.S.C. § 9902(a). A few other agencies or departments have statutory authority to depart from certain provisions of the CSRA. See, e.g., 49 U.S.C. § 44935(note) (Transportation Security Administration); 49 U.S.C. §§ 40122(g)(1), (2) (Federal Aviation Administration).

Id. at 456. See also, Karahalios v. NFFE, 489 U.S. 527 (1989) (unfair labor practice procedures set forth in the CSRA are the exclusive means for challenging alleged breaches by a union of its duty of fair representation to employees); Bush v. Lucas, 462 U.S. 367 (1983) (history and structure of the CSRA precludes creation of a Bivens damages remedy for federal employees suffering from unconstitutional acts by government actors).
actions taken against federal employees. It held that the CSRA’s administrative procedures and prescribed judicial review are the exclusive avenues for pursuing challenges to those types of administrative actions specifically addressed in—or deliberately excluded from—the “comprehensive scheme” of the CSRA. In other words, a remedial path of administrative review set forth in the CSRA—one that may or may not culminate in judicial review—is the employee’s sole option. Moreover, if the CSRA evinces, with the requisite clarity, a congressional intent to deny a remedy for a category of claims by a category of employees, those employees may not pursue that claim in court.\(^\text{10}\)

As described in greater detail below, there is no dispute that conflicts over such routine matters as performance, discipline, reclassification of position, and assignment of work are covered by the CSRA’s review procedures.\(^\text{11}\) But much

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\(^{10}\) Fausto, 484 U.S. at 451-455 (CSRA’s comprehensive scheme for resolving “adverse personnel actions” evinces a deliberate congressional intent to preclude direct judicial review of such matters, except as provided by that scheme.)

\(^{11}\) See, e.g., Fornaro v. James, 416 F.3d 63 (D.C. Cir. 2005) (per then-Judge Roberts) (CSRA precludes judicial review of benefit determinations committed to Office of Personnel Management resolution); Carducci v. Regan, 714 F.2d 171, 173-75 (D.C. Cir. 1983) (CSRA scheme exclusive and bars judicial review of allegedly arbitrary and capricious reassignment, despite lack of administrative remedy); NTEU v. Egger, 783 F.2d 1114 (D.C. Cir. 1986) (challenge to reclassification of positions from one pay system to another is within the CSRA scheme because it alleges a prohibited personnel practice); Cutts v. Fowler, 692 F.2d 138, 140-41 (D.C. Cir. 1982) (CSRA does not provide a private right of action to challenge alleged prohibited personnel action: discrimination based on marital status); Borrell v. United States Int’l Communications Agency, 682 F.2d
remains in contention beyond that area of general agreement. Federal employees on the one hand, and the U.S. Department of Justice attorneys representing federal agency-defendants on the other, have been heatedly contesting the boundaries of the 1988 Fausto decision for two decades. The government frequently argues that the judicial tribunal lacks jurisdiction to review the federal employee’s statutory or constitutional claim, sometimes simply because they interpret the CSRA to encompass not only employees’ individual challenges to the lawfulness of personnel actions taken against them but all “employment-related” claims.12 Those broad claims have often been rebuffed,13 but the battle continues.

981, 987 (D.C. Cir. 1982) (CSRA does not provide private right of action to enforce restrictions against reprisal for whistleblowing).


13 See, e.g., NFPE v. Weinberger, 818 F.2d 935, 940 (D.C. Cir. 1987) (admonishing government counsel for having the “effrontery” to invoke what the court called a “discredited theory of subject matter jurisdiction”--namely, that the CSRA precluded it from reviewing federal employees’ challenge to constitutionality of urinalysis drug testing). See also cases cited in n.12, supra.
II. THE SUPREME COURT’S GRANT OF CERTIORARI IN WHITMAN

As noted above, in the October term of 2005, the Supreme Court granted certiorari in Whitman v. Dept. of Transportation, et al.\textsuperscript{14} While the grant of review in Whitman provided the Court with an opportunity to more clearly delineate the scope of the CSRA’s preclusion of federal employees’ rights to pursue independent causes of action in court, in the end, the Court issued only a brief per curiam decision that shed only limited light upon these issues.

\textit{Whitman} involved a federal employee who alleged that his employing agency--the Federal Aviation Administration--had subjected him to drug-testing in a nonrandom manner, in violation of his constitutional and statutory rights. The district court held that, under the provisions of the CSRA, it was without jurisdiction to consider petitioner’s claims.\textsuperscript{15} The U.S. Court of Appeals for the Ninth Circuit affirmed based on its conclusion that petitioner’s claims were precluded because “5 U.S.C. § 7121(a)(1) does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal

\footnotesize{\textsuperscript{14} 382 F.3d 938 (9th Cir. 2004), cert. granted, 545 U.S. 1138 (2005), vacated and remanded, 547 U.S. ___, 126 S. Ct. 2014 (2006) (per curiam).}

employees’ collective bargaining agreements.”¹⁶ That section, encompassed within the CSRA, states that, with certain exceptions, the negotiated grievance procedures “shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.”

The Supreme Court granted certiorari on the question of whether Section 7121(a)(1) precludes an employee from seeking direct judicial redress of claims for which there is otherwise an independent basis for judicial review. The Court further agreed to consider whether the CSRA precludes federal courts from granting equitable relief for constitutional claims brought by federal employees against their employer. The briefs filed by the parties and amici addressed the preclusion issues at length.¹⁷ In addition, an exhaustion of administrative remedies issue was raised: at the Court’s order, supplemental briefs were filed “addressing the applicability of Darby v. Cisneros, 509 U.S. 137 (1993), to this case.”¹⁸ Darby involved the question of when exhaustion is required prior to judicial review of a final agency

¹⁶ Whitman v. U.S. Dept. of Transportation, 382 F.3d at 939.
¹⁷ The amici included the National Treasury Employees Union and the American Federation of Government Employees, AFL-CIO.
¹⁸ 126 S. Ct. 1942 (order dated May 2, 2006).
decision under the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq.\textsuperscript{19}

In the end, the Supreme Court addressed only the narrow question of the meaning of an aspect of 5 U.S.C. § 7121(a)(1). In its \textit{per curiam} decision of June 5, 2006, the Court corrected the Ninth Circuit on its framing of the jurisdictional question. Pointing out that there was an independent statutory basis for jurisdiction—namely, 28 U.S.C. § 1331—the Court explained that the issue was “not whether 5 U.S.C. § 7121 confers jurisdiction, but whether § 7121 (or the CSRA as a whole) removes the jurisdiction given to the federal courts . . . [by 28 U.S.C. § 1331] or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA. . . .”\textsuperscript{20}

To decide the issues of jurisdiction and preclusion, the Court observed, it was first necessary to ascertain where the claims of petitioner Whitman fit within the statutory scheme of the CSRA, “as the CSRA provides for different treatment for grievances depending on the nature of the claim.”\textsuperscript{21} The Court therefore remanded the case to the Ninth Circuit to address that question, as well as the ultimate question of

\textsuperscript{19} 509 U.S. at 143-54.
\textsuperscript{20} 126 S. Ct. at 2015.
\textsuperscript{21} Id.
It further suggested that the Ninth Circuit consider other issues that might obviate the need to reach the “more difficult question of preclusion,” including whether the petitioner had exhausted his administrative remedies and whether exhaustion is required given this statutory scheme and the Administrative Procedure Act, as interpreted in Darby.\textsuperscript{23}

This article addresses those issues, putting them in the broader context of the general principles underlying CSRA preclusion and exhaustion of remedies.

\textbf{III. GENERAL PRINCIPLES GOVERNING JUDICIAL REVIEW}

\textbf{A. Statutory Basis for Assertion of Jurisdiction}

The Supreme Court in \textit{Whitman}\textsuperscript{24} felt it necessary to remind the lower courts of the “very familiar” statutory basis for assertion of jurisdiction over federal questions: 28 U.S.C. § 1331. That provision grants jurisdiction to federal courts over “all civil actions arising under the Constitution, laws, or treaties of the United States.” Section 702 of the Administrative Procedure Act (APA)\textsuperscript{25} further waives the federal

\footnotesize{\textsuperscript{22} Id. at 2016. The Ninth Circuit has, in turned, remanded the case to the district court on August 9, 2006. On December 21, 2007, defendants filed a motion to dismiss the complaint and amended complaint for lack of subject matter jurisdiction. \textit{Whitman v. Dept. of Transportation}, Case No. 3:02-cv-112 (D. Alaska).

\textsuperscript{23} Id.

\textsuperscript{24} 126 S. Ct. at 2015.

\textsuperscript{25} 5 U.S.C. §§ 701, et seq.}
government’s sovereign immunity for “[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority. . . .” Together, Section 1331 and the APA confer all necessary jurisdiction on federal courts to review allegedly illegal or unconstitutional agency action.\(^{26}\)

Federal courts regularly exercise jurisdiction under Section 1331 to review complaints by federal employees seeking injunctive relief for allegedly unconstitutional action by a federal official.\(^{27}\) They similarly exercise jurisdiction to review claims by federal employees challenging federal agency action as contrary to statute.\(^{28}\) Indeed, judicial review is

\(^{26}\) Califano v. Sanders, 430 U.S. 99, 105 (1977). The Supreme Court clarified in Califano that the APA itself is not an independent basis for subject-matter jurisdiction to review agency actions. Id. at 105-07.


presumptively available whenever a claim is made that the
government has violated a statute and/or the Constitution.\textsuperscript{29}
As the Supreme Court has explained, “[w]e ordinarily presume
that Congress intends the executive to obey its statutory
commands and, accordingly, that it expects the courts to grant
relief when an executive agency violates such a command.”\textsuperscript{30}

B. The Standards for Rebutting the Presumption of
Reviewability

1. Statutory claims

The strong presumption of reviewability of statutorily
based claims may be rebutted only if there is “persuasive
reason” supported by “clear and convincing evidence” to
believe otherwise.\textsuperscript{31} The courts look to whether congressional
intent to preclude review is “fairly discernible in the
statutory scheme.”\textsuperscript{32} Even when there is “substantial doubt”
about Congress’ intent, the general presumption of
reviewability prevails.\textsuperscript{33}

\textsuperscript{29} Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

See also, McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 496-99
(1991) (discussing the “strong presumption in favor of judicial review of
administrative action”).

\textsuperscript{31} Abbott Laboratories, 387 U.S. at 140.

\textsuperscript{32} Fausto, 484 U.S. at 452, quoting Block v. Community Nutrition Inst.,
467 U.S. 340, 351 (1984), which quoted Data Processing Service v. Camp,

\textsuperscript{33} Block, 467 U.S. at 351.
"[S]ilence on the subject leaves the jurisdictional grant of § 1331 untouched."  
Furthermore, an express provision of judicial review of some types of claims does not, in and of itself, support an inference that other types of claims are excluded from review.  
The denial of jurisdiction must either be based on explicit statutory language or on inferences drawn from a statutory scheme that reveal a "clear," "considered," and "deliberate" congressional intent to preclude review. Thus, the presumption of reviewability is overcome only where the courts are persuaded that Congress made that decision consciously and intentionally.

2. Constitutional claims

In the context of constitutionally based claims, the principles favoring judicial review are even stronger. As the Supreme Court warned in Webster v. Doe, a "serious constitutional question" would arise "if a federal statute were construed to deny any judicial forum for a colorable

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36 Fausto, 484 U.S. at 447.

37 Id. at 448.

38 Id. at 455.
constitutional claim.” To avoid raising such a “serious constitutional question,” the Court has required a “heightened” showing of a “clear” statement of congressional intent to preclude judicial review.

The care with which courts guard their jurisdiction is at its zenith when it concerns their inherent equitable power to enjoin unconstitutional acts by the government, which is founded in the Constitution itself. As one commentator has observed, denying federal courts “the power to review the sufficiency of legislative schemes” and to provide equitable relief violates the separation of powers, because the courts are unable to serve “as a check on other branches of government.” There is, therefore, a “presumed availability of federal equitable relief against threatened invasions of constitutional interests.” Although Congress may be able to


41 See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).


limit this power to grant equitable relief,\(^{44}\) the courts require it to do so explicitly.\(^ {45}\) The comprehensiveness of equitable jurisdiction is therefore not to be restricted or limited except by a “statute in so many words, or by a necessary and inescapable inference.”\(^ {46}\)

Given this extraordinary reluctance to deny judicial review of constitutional claims, the Supreme Court has held that the courts are “obligated” to adopt any alternative “fairly possible” interpretation of the statute that would preserve court review.\(^ {47}\) Statutes are to be construed “‘in favor of an interpretation that affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.’”\(^ {48}\)

\(^{44}\) See Ex Parte McCordle, 74 U.S. (7 Wall) 506 (1869).

\(^{45}\) See Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (“Of course, Congress may intervene and guide or control the exercise of the courts’ discretion, but we do not lightly assume that Congress has intended to depart from established principles.”); see also id. at 320.

\(^{46}\) Id. at 313, quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).


IV. THE EXTENT OF CSRA PRECLUSION OF STATUTORY CLAIMS

As noted above, government defendants almost reflexively press the claim that the “comprehensive scheme”\(^{49}\) of the CSRA precludes judicial review of statutory claims brought by federal employees that are in any way related to their employment. To evaluate this oft-reiterated defense, it is necessary to examine closely the types of claims that Congress intended to cover in the CSRA’s scheme. As we argue, that examination reveals that the CSRA was intended to comprehensively address a specific category of employment-related claims: those dealing with statutorily defined “personnel actions” taken against individual employees. It was not intended to repeal the independent bases that exist for judicial review of other statutory claims related to federal employment that do not fall in this category.

A. Claims for Which the CSRA Explicitly Prescribes an Administrative Review Process

1. Administrative actions against employees

Prior to the enactment of the CSRA, courts routinely exercised jurisdiction to review a variety of administrative actions against employees, such as denials of promotion and denials of leave requests, striking them down if they were “arbitrary, capricious, an abuse of discretion, or otherwise

\(^{49}\) See Fausto, 484 U.S. at 445.
not in accordance with law." As described in Fausto, employees sought judicial review of removals by appealing decisions of the Civil Service Commission (CSC) or agency decisions unreviewed by the CSC to the district courts through actions such as suits for mandamus, injunctive relief and declaratory judgment. The Court of Claims or the district courts would also entertain Tucker Act actions by employees to recover back pay, for example, resulting from an incorrect personnel action.

This “patchwork system” of review was replaced with the enactment of the CSRA. The CSRA established a system of administrative and judicial review of various types of “adverse actions” taken against federal employees under Chapter 75 of Title 5; “actions based on unacceptable performance” under Chapter 43; and “personnel actions” taken against federal employees under Chapter 23. For each of these types of actions, the newly specified avenues for review replaced the pre-existing causes of action. See Fausto, 484

50 5 U.S.C. § 706(2)(A). See Carducci v. Regan, 714 F.2d 171, 174 n.1 (D.C. Cir. 1983) (collecting cases); McAuliffe v. Rice, 966 F.2d 979, 979-80 (5th Cir. 1992) (citing cases holding that, pre-CSRA, discharge of nonappropriated fund instrumentality employee was actionable under APA).

51 484 U.S. at 444-45, citing cases.


53 Fausto, 484 U.S. at 445.
U.S. at 445-46. An understanding of the breadth and limitations of that preclusion turns on an understanding of the nature of the covered actions—"personnel actions," "actions based on unacceptable performance," and "adverse actions"—each of which is statutorily defined.

a. Personnel actions

A "personnel action" is defined by 5 U.S.C. § 2302(a)(2)(A), and includes such actions as promotions, details, disciplinary or corrective measures, and performance evaluations. Covered entities commit a "prohibited personnel practice" by taking a "personnel action" motivated by one of twelve specified prohibited grounds, including discrimination on the basis of race, color, religion, national origin, age, handicapping condition, marital status or political affiliation; nepotism; reprisal for whistleblowing; and other nonmerit factors. Covered employees alleging violations under this chapter are given the right to file charges with the Office of Special Counsel (OSC), an independent federal

54 That section defines "personnel action" to mean an appointment; a promotion; an action under chapter 75 of this title or other disciplinary or corrective action; a detail, transfer, or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation under chapter 43 of this title; a decision concerning pay, benefits, or awards concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities, or working conditions.

agency, which is to investigate and, where appropriate, seek remedial action from the employing agency and the Merit Systems Protection Board (MSPB).\footnote{See 5 U.S.C. § 2302(a)(2)(B), (C) for covered positions and agencies; 5 U.S.C. § 1214 for jurisdiction of the OSC; 5 U.S.C. § 1204 for jurisdiction of the MSPB.} Such violations may also be grieved if the employee is covered by a collective bargaining agreement that includes such matters within its grievance-arbitration procedures.\footnote{5 U.S.C. §§ 7121(d), 7703(a)(1).} The decision of the arbitrator or the MSPB is subject to judicial review.\footnote{5 U.S.C. §§ 7121(f), 7703(a)(1).}

b. Unacceptable performance actions

Employees whose performance on the job is “unacceptable” may be reduced in grade or removed, pursuant to Chapter 43 of Title 5.\footnote{5 U.S.C. § 4303.} These actions may be grieved or appealed to the MSPB. Again, in either case, the decision is ultimately subject to judicial review.\footnote{See n.58, supra.}

c. Adverse actions, minor and serious

Other disciplinary actions against employees based on misconduct—denominated “adverse actions”—fall under Chapter 75 of Title 5. Suspensions for 14 days or less—commonly known as “minor” adverse actions—are treated differently than
more serious adverse actions.\textsuperscript{61} For union-represented employees, these suspensions may be grieved, arbitrated, and exceptions to the arbitrator’s decision taken to the Federal Labor Relations Authority (FLRA).\textsuperscript{62} They may not be appealed to the MSPB or judicially reviewed.\textsuperscript{63} More serious adverse actions include a removal, a suspension for more than 14 days, a reduction in grade or pay, and a furlough of 30 days or less.\textsuperscript{64} Such actions taken against a covered “employee”\textsuperscript{65} may be appealed to the MSPB or grieved by union-represented employees, and the Board’s or the arbitrator’s decision is subject to judicial review by the U.S. Court of Appeals for the Federal Circuit.\textsuperscript{66}

d. Exclusivity of these procedures

These prescribed administrative and judicial review procedures are the only means by which federal employees may challenge “personnel actions,” “adverse actions,” or “actions

\textsuperscript{61} 5 U.S.C. § 7502.

\textsuperscript{62} 5 U.S.C. §§ 7121(a), 7122(a). Employees not covered by a collective bargaining agreement may pursue a remedy under an internal agency grievance procedure that does not culminate in arbitration. 5 C.F.R. § 752.203(f). If the employee alleges that the suspension was motivated by discrimination or one of the other prohibited reasons listed in 5 U.S.C. §2302(b) (and was therefore a prohibited personnel practice), the employee may also file a charge with OSC.

\textsuperscript{63} 5 U.S.C. § 7701. Cf. 5 U.S.C. §§ 7121(e), (f).

\textsuperscript{64} 5 U.S.C. § 7512(1)-(5).


\textsuperscript{66} 5 U.S.C. §§ 7121(e), (f), 7703.
based on unacceptable performance.” Employees cannot expand the rights granted by the CSRA by resort to pre-CSRA remedies.⁶⁷

The principles with respect to adverse and other disciplinary actions are usually relatively easy to apply in practice because the nature of covered actions is well understood in federal sector labor relations. To the extent that there has been litigation over the exclusivity of the CSRA procedures for administrative actions taken against employees, the disputes have primarily centered on whether the complained-of action falls within the definition of “personnel action.”⁶⁸ As discussed above, a personnel action infected by improper animus or taken contrary to the merit principles is a “prohibited personnel practice.”⁶⁹

⁶⁷ See Fausto, 484 U.S. at 450 n.3; Lindahl, 470 U.S. at 796-98. See also, Graham v. Ashcroft, 358 F.3d 931, 933-36 (D.C. Cir.), cert. denied, 543 U.S. 872 (2004) (remedies under CSRA cannot be supplemented by district court actions claiming that agency had violated its own regulations in taking adverse personnel actions); Harrison v. Bowen, 815 F.2d 1505, 1516 n.25 (D.C. Cir. 1987) (rejecting reliance on the more general Administrative Procedure Act as basis for jurisdiction over removal of employee); Cutts v. Fowler, 692 F.2d 138, 139-40) (D.C. Cir. 1982) (CSRA-prescribed procedures for relief for whistleblowers are exclusive); Borrell v. United States Int’l Communications Agency, 682 F.2d 981, 987-88 (D.C. Cir. 1982) (same). As then-Judge Roberts summarized, “so far as review of determinations under the CSRA is concerned, what you get under the CSRA is what you get.” Fornaro v. James, 416 F.3d at 67.

⁶⁸ 5 U.S.C. § 2302(a)(2)(A). See, e.g., NTEU v. Egger, 783 F.2d 1114, 1116-17 (D.C. Cir. 1986) (finding that a challenge to the reclassification of positions from one pay system to another involves a prohibited personnel practice because it violates a “law, rule or regulation” implementing a merit system principle).

To illustrate, the Supreme Court in its *per curiam* order in *Whitman* directed the lower court, on remand, to consider whether the allegedly nonrandom mandated drug testing at issue there was a prohibited personnel practice (and thus precluded by the CSRA). Resolution of this question will turn on whether an order of urinalysis testing is a “personnel action,” even though it is not named as one in the statute. Justice Scalia suggested at oral argument that such an order might fall in the residual category of “other significant change in . . . working conditions.” He analogized it to an order of psychiatric testing, which is specifically listed as a “personnel action.”

Another contentious issue is the scope of the catch-all “personnel action” category of “an action taken under Chapter 75 . . . or other disciplinary or corrective action.” “Corrective action” is not defined by statute. Although there is little administrative interpretation of the term, the MSPB

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70 Whitman v. Dept. of Transportation, 126 S. Ct. at 2015.

71 5 U.S.C. 2302(a)(2)(A)(xi). See Whitman Tr. of Oral Arg. at 25-26, 52. The Assistant to the Solicitor General, arguing on behalf of the United States, stated that, in the government’s view, it was not a personnel action. Id. at 55. He pointed to *Bush v. Lucas*, 462 U.S. at 385 n.28, where the Court identified warrantless searches as a type of action that would not constitute a “personnel action” within the meaning of Section 2302(a)(2)(A).


has found a letter of admonishment to be a “corrective action;” there remains some uncertainty over whether “corrective action” also includes a verbal admonishment. The common thread in the caselaw appears to be that a “corrective action” must have a punitive or other disciplinary component. Despite that, the government has, on at least one occasion, argued (unavailingly) to a district court that the court lacked jurisdiction because an agency order to an employee to resign an outside employment position or face future disciplinary action is allegedly a “corrective action.”

Finally, there has been litigation over the applicability of the CSRA-preclusion principles to challenges to various forms of personnel actions or disciplinary actions that have been recast or reframed in another guise. The courts

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75 See Weaver v. U.S. Information Agency, 87 F.3d 1429, 1433 (D.C. Cir. 1996) (noting that the MSPB “apparently” does not distinguish between oral and written reprimands).

76 See Edwards v. Dep’t of Health & Human Services, 2006 MSPB LEXIS 2990 (June 13, 2006) (counseling memorandum not a personnel action); Special Counsel v. Spears, 75 M.S.P.R. 639 (1997) (“counseling letters” are not personnel actions.) See also Caddell v. Dep’t of Justice, 52 MSPR 529, 532-33 (1992) (limiting the phrase to acts “in the nature of a Chapter 75 action” taken in response to employee misconduct).

77 See Defendants’ Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction at 13-15, Ramirez v. U.S. Customs and Border Protection, 477 F. Supp.2d 150 (D.D.C. 2007). The Office of Special Counsel, however, disagreed and dismissed the complaint on the grounds that such an order was not a “corrective action.” See id. at 155.
typically disregard the artfulness of the pleading to focus instead on the fundamental nature of the claim.\textsuperscript{78}

For example, courts have generally held that the CSRA precludes federal employees from bringing state common law tort claims based on acts that are closely intertwined with their employment.\textsuperscript{79} Claims that a manager had defamed an employee in the course of an employment dispute, and claims of negligent and intentional infliction of emotional distress and invasion of privacy arising out of the employment relationship have all been held to be preempted by the CSRA, even where the CSRA remedies did not fully compensate the employee for his losses.\textsuperscript{80} Courts have similarly held tort claims by employees

\textsuperscript{78} "To permit the district court’s assertion of jurisdiction would simply put a premium on clever drafting of a complaint. ‘It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.’" Steadman v. Governor, U.S. Soldiers’ and Airmen’s Home, 918 F.2d 863, 967 (D.C. Cir. 1990), quoting Brown v. General Servs. Admin., 425 U.S. 820, 833 (1976).

\textsuperscript{79} In appropriate cases, employees may bring claims against the government under the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq., for injury or loss of property or personal injury or death arising from or resulting from the negligent or wrongful acts or omissions of federal employees while acting within their scope of employment.

\textsuperscript{80} See, e.g., Bush v. Lucas, 462 U.S. at 385-88 (defamation claim against director of space flight center); Steele v. United States, 19 F.3d 531, 532-33 (10th Cir. 1994) (former federal employee’s state law tort claims against former federal employer arising from employee’s discharge); Roth v. United States, 952 F.2d 611 (1st Cir. 1991) (defamation claim against supervisor for statements concerning job performance; Rollins v. Marsh, 937 F.2d 134, 140 (5th Cir. 1991) (defamation claim against federal employer arising from adverse personnel action); Saul v. United States, 928 F.2d 829 (9th Cir. 1991) (defamation, infliction of emotional distress, and invasion of privacy claims against supervisors); Broughton v. Courtney, 861 F.2d 639, 644 (11th Cir. 1988) (state claim of tortious interference with contractual relations arising from federal employee’s demotion); David v. United States, 820 F.2d 1038, 1043 (9th Cir. 1987)
against co-workers or union representatives to be preempted.\textsuperscript{81}

Such claims may often be more fairly characterized as alleging the commission of prohibited personnel practices\textsuperscript{82} or may arise out of adverse actions or other personnel actions that fall within the coverage of the CSRA.\textsuperscript{83}

In sum, there remain some lingering grounds for litigation over whether a particular complained-of action taken against an employee falls within the definition of a personnel action and persistent attempts to circumvent the CSRA procedures through careful pleading. But, there is virtually no dispute that the administrative procedures prescribed by Chapters 43, 23, or 75 of Title 5, which may or may not culminate in judicial review, are the exclusive

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(former federal employee’s state intentional infliction of mental harm claim arising from her status as a union steward).
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\textsuperscript{81} Mahtesian v. Lee, 406 F.3d 1131, 1133 (9\textsuperscript{th} Cir. 2005) (defamation claim brought by employee who had been denied a promotion against a co-worker who had provided investigators with criticism of employee, where co-worker had authority to “recommend” the employee); Schwartz v. Int’l Fed. of Prof. and Tech. Engineers, 2007 U.S. Dist. LEXIS 80735 (N.D.Tx. 2007) (intentional infliction of emotional distress claim by acting chief administrative law judge against union representatives); Greene v. AFGE, Local 2607, 2005 U.S. Dist. LEXIS 19983 (D.D.C. 2005) (defamation and invasion of privacy claims by employee against his co-worker/supervisee and supervisee’s union for statements made in grievance proceeding against employee).

\textsuperscript{82} Roth v. United States, 952 F.2d at 614; Saul v. United States, 928 F.2d at 933–34.

\textsuperscript{83} See cases cited supra, nn. 80, 81. As discussed \textit{infra}, allegations of union misconduct may also be more properly characterized as allegations of unfair labor practices, which fall within the exclusive province of the Federal Labor Relations Authority.
remedies for employees seeking review of actions taken under those statutory provisions.

2. Labor-management relations disputes

Chapter 71 of the CSRA, the Federal Service Labor-Management Relations Statute (FSLMRS),\textsuperscript{84} contains the labor-management and employee relations provisions applicable to federal sector employees. In many ways analogous to the National Labor Relations Act, 29 U.S.C. § 151, et seq., the FSLMRS establishes a statutory right to union representation and accords labor organizations the exclusive right of representation of employees in a designated unit.\textsuperscript{85} It includes a list of "unfair labor practices" and an elaborate statutory scheme for administrative adjudication of alleged unfair labor practices.\textsuperscript{86} It also includes provisions for resolution of negotiation impasses and questions concerning representation.\textsuperscript{87} Judicial review is available to aggrieved persons seeking appellate court review of final orders of a decision of the Federal Labor Relations Authority (with the exception of orders involving unit determinations or arbitral decisions that did not involve unfair labor practices); to the

\textsuperscript{84} 5 U.S.C. § 7101, et seq.
\textsuperscript{85} 5 U.S.C. §§ 7102, 7111.
\textsuperscript{86} 5 U.S.C. §§ 7116, 7118.
\textsuperscript{87} 5 U.S.C. §§ 7119, 7112.
FLRA seeking enforcement of its orders; and to the FLRA seeking temporary injunctive relief.\(^{88}\) These procedures are the exclusive means of obtaining administrative or judicial review of labor-management disputes.\(^{89}\)

The Supreme Court in *Karahalios v. National Federation of Federal Employees, Local 1263*,\(^{90}\) underscored the exclusivity of these procedures in a case involving an employee’s attempted reliance on an inferred cause of action in district court to enforce a federal sector union’s duty of fair representation. A breach of the duty of fair representation is an unfair labor practice, remedied through the statutorily prescribed procedures.\(^{91}\) While the Supreme Court had found a private cause of action implicit in the National Labor Relations Act,\(^{92}\) it concluded in *Karahalios* that no congressional intent to provide a comparable cause of action could be discerned in the CSRA.\(^{93}\) Accordingly, the judicial role in the enforcement of

\(^{88}\) 5 U.S.C. §§ 7123(a), (b), (d).

\(^{89}\) A narrow and rarely invoked exception exists for district court review of agency action in violation of a clear and mandatory statutory provision, for which there is no meaningful or adequate remedy. *Leedom v. Kyne*, 358 U.S. 184 (1958); *NATCA v. FSIP and FLRA*, 437 F.3d 1256, 1258, 1263 (D.C. Cir. 2006).

\(^{90}\) 489 U.S. 537 (1989).

\(^{91}\) 5 U.S.C. § 7116(b)(8).

\(^{92}\) *Vaca v. Sipes*, 386 U.S. at 180-83.

\(^{93}\) 489 U.S. at 533-36.
union and agency duties under this statute is confined to that
mandated by the CSRA.

Application of these principles has been relatively
noncontroversial. The courts have had little difficulty
dismissing for lack of jurisdiction complaints alleging
various types of misconduct that amount, "au fond," to a claim
that a union breached its duty of fair representation toward
the complaining employee, an action that would constitute an
unfair labor practice.\footnote{Montplaisir v. Leighton, 875 F.2d 1, 3-4 (1st Cir. 1989) (rejecting
attempt to couch complaint of malpractice in terms of state tort law, finding allegation to amount to a ULP charge). See also, Ivey v. NTEU, 2007 U.S. Dist. LEXIS 21794 (D.D.C. March 27, 2007); Buesgens v. Coates, 435 F. Supp. 2d 1 (D.D.C. 2006).}

In addition, the courts strictly enforce the prescribed routes for judicial review of FLRA-covered matters, routinely dismissing attempts to invoke jurisdiction through other routes.\footnote{See, e.g., Nat’l Assn. of Agriculture Employees v. FLRA, 473 F.3d 983 (9th Cir. 2007) (no judicial review of FLRA determination that employees were not “professional” and thus did not have the right to vote in a professional-only bargaining unit); Rizzitelli v. FLRA, 212 F.3d 710 (2d Cir. 2000) (decision of FLRA General Counsel not to issue complaint is not judicially reviewable); Patent Office Professional Ass’n v. FLRA, 128 F.3d 751, 753 (D.C. Cir. 1997), cert. denied, 523 U.S. 1006 (1998) (same); Dept. of Justice v. FLRA, 981 F.2d 1339, 1342-44 (D.C. Cir. 1993) (no appellate court review of FLRA decision affirming arbitral award in absence of unfair labor practice allegations); Griffith v. FLRA, 842 F.2d 487, 490-95 (D.C. Cir. 1988) (no district court jurisdiction over FLRA decision concerning arbitral award). But see n.89, supra. But see also Dept. of Treasury v. FLRA, 43 F.3d 682, 687-88 (D.C. Cir. 1994) (reviewing FLRA denial of exceptions to arbitral award where arbitrator lacked jurisdiction to find violation of a law that did not involve working conditions).} It is thus fair to say that the exclusivity of the CSRA-prescribed procedures is
settled and easily enforced in the context of labor-management relations disputes.

3. Monetary claims against the government

Monetary claims by federal employees can come in several forms. These include claims for backpay related to illegal personnel actions under Chapters 23, 43, and 75 of the CSRA; monetary claims involving certain types of employee benefits which are covered by the CSRA; and causes of action based on independent money-mandating statutes.

Before 1978, litigants would rely on the Tucker Act’s grant of jurisdiction to the district courts and what was then the Court of Claims over a wide variety of monetary claims against the government.\(^96\) The Tucker Act, however, is merely jurisdictional and does not create “any substantive right enforceable against the United States for money damages[;] . . . the Act merely confers jurisdiction . . . whenever the substantive right exists.”\(^97\) Some litigants therefore attempted to invoke the Back Pay Act,\(^98\) where there was not a

\(^96\) Under the Tucker Act, 28 U.S.C. § 1491, the Court of Claims (and now the Court of Federal Claims) has jurisdiction over claims against the United States for, among other things, money damages in cases not sounding in tort. The district courts have concurrent jurisdiction under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), for claims not exceeding $10,000.


\(^98\) 5 U.S.C. § 5596. This Act provides that an employee who is found “by appropriate authority under applicable law, rule, regulation, or
separate money-mandating statute, to provide the requisite substantive right to money damages. During this pre-CSRA period, civilian and military pay disputes were “a staple” of Tucker Act litigation.99 These included claims for back pay arising in a wide variety of employment disputes, including removals and reduction in pay or rank.100 They also included challenges to the calculation of benefits, such as annuity claims.101

The Supreme Court in its 1976 decision in Testan explained that the Back Pay Act did not create a substantive right.102 It was necessary, however, for the Court to reiterate in Fausto that the Back Pay Act was not itself a substantive money-mandating statute that would allow judicial review of underlying personnel decisions giving rise to the claim for back pay.103 Before a payment is authorized under


100 Id.

101 See Dismuke v. United States, 297 U.S. 167 (1936) (holding that a retired employee could secure judicial review of an agency denial of his annuity claim by invoking the district courts’ Tucker Act jurisdiction to entertain monetary claims against the government).

102 424 U.S. at 407.

the Back Pay Act, an appropriate authority—not a court relying on Tucker Act jurisdiction—must have first found that the employee had suffered an unwarranted or unjustified personnel action.

In short, litigants cannot rely on either the Tucker Act or the Back Pay Act as establishing the substantive right to compensation. The procedures prescribed by the CSRA constitute the exclusive means for recovery of back pay or other types of monetary make-whole relief for actions taken against employees pursuant to Chapters 23, 43, and 75 of the CSRA. Therefore, courts have no jurisdiction, apart from that granted by the CSRA, to resolve claims for back pay resulting from an allegedly unlawful personnel action, as that is defined in the CSRA.\textsuperscript{104}

The CSRA’s administrative processes are, in addition, exclusive for resolution of disputes over payment of certain types of employment-related benefits. Where the CSRA has established a system for administrative review of benefit claims, plaintiffs are not permitted to circumvent the specified processes by filing a complaint in court. Thus, for example, the CSRA’s scheme for review of retirement disability

\textsuperscript{104} See, \textit{e.g.}, Black v. United States, 56 Fed. Cl. 19 (2003) (dismissing for lack of jurisdiction claims for damages related to the Federal Aviation Administration’s failure to re-employ air traffic controllers).
claims\textsuperscript{105} bars a district court action challenging agency
denial of these claims.\textsuperscript{106} Similarly, the CSRA’s review
procedures preclude initial judicial review of claims that
cost-of-living benefits should have been calculated as part of
retirement pay.\textsuperscript{107}

The other category of monetary claims includes those that
are based on an independent money-mandating statute that gives
rise to a substantive cause of action. As we discuss in
Section IV.C.1, infra, the courts have rejected the
government’s repeatedly urged argument that the CSRA precluded
the courts’ jurisdiction founded on such statutes as the Fair
Labor Standards Act, the Prevailing Rate Act, or the Federal
Law Enforcement Pay Reform Act. Such claims, accordingly,
remain viable, as described in greater detail below.

\textbf{B. Claims Where Congress’ Intent to Proscribe Review is
“Fairly Discernable” in the CSRA’s Scheme}

The CSRA has also been held to preclude judicial redress
for employees raising certain types of claims, even where the
CSRA itself affords no administrative or judicial process.
While, as discussed supra, rebuttal of the general presumption
favoring review is not to be undertaken lightly, the Supreme

\textsuperscript{105} 5 U.S.C. §§ 8347(b), 8347(d)(1).

\textsuperscript{106} See Lindahl v. OPM, 470 U.S. at 798-99; Fornaro v. James, 416 F.3d at
66-67.

\textsuperscript{107} See, e.g., Matsuo v. United States, 416 F. Supp. 2d 982, 997-98
(D.Hawaii 2006).
Court found that the presumption was overcome in the context of claims by a certain category of employee challenging adverse action of the type covered by Chapter 75 of the CSRA.\textsuperscript{108}

In \textit{Fausto}, the Court found evidence manifesting "a considered congressional judgment" that nonpreference eligibles in the excepted service\textsuperscript{109} should not be able to seek judicial review of adverse actions taken against them.\textsuperscript{110} The Court observed that no provision of the CSRA gave this category of employees the right to administrative or judicial review of their suspension for misconduct.\textsuperscript{111} The absence of a right to review was not "an uninformative consequence of the limited scope of the statute."\textsuperscript{112} Rather, the Court concluded, a congressional intent to affirmatively preclude review was "fairly discernible" in the comprehensive nature of the

\begin{footnotesize}
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\item Fausto, 484 U.S. at 448-55.
\item The CSRA accords preferential treatment to certain veterans and their close relatives, known as “preference eligibles.” 5 U.S.C. § 2108. It also distinguishes between members of the “excepted service” (who are appointed without competition) and members of the “competitive service.” See 5 U.S.C. § 2102, 2103. Employees in the excepted service who are not entitled to a veterans preference are known as nonpreference members of the excepted service and are accorded adverse action rights only after two years’ employment, while members of the competitive service and preference eligible members of the excepted service are accorded such rights after one year of service. See 5 U.S.C. § 7511(a)(1)(A), (B).
\item 484 U.S. at 448-49.
\item Id. at 443.
\item Id. at 448.
\end{enumerate}
\end{footnotesize}
Inferences of intent drawn from the statutory scheme as a whole showed that the exclusion of this category of employees was “deliberate.” Accordingly, the Court concluded, the general presumption favoring judicial review “for personnel action of the sort at issue here” was overcome.

According to the Supreme Court, a contrary conclusion—a finding that the withholding of a CSRA remedy merely left those employees free to pursue the remedies available before enactment of the CSRA—would invert the preferences articulated by Congress and undermine the structure of the CSRA. The Court declined to permit a category of employee disfavored by the CSRA, such as nonpreference eligibles or probationary employees, to obtain judicial review denied to other employees covered by the CSRA.

Following the reasoning in *Fausto*, the courts have refused to permit judicial review under the general jurisdictional provisions of the Administrative Procedure Act of various types of personnel actions taken against categories

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113 Id. at 452.
114 Id. at 455.
115 Id.
116 Id. at 450-51; Carducci v. Regan, 714 F.2d at 174-75.
117 *Fausto*, 484 U.S. at 449-450.
of employees excluded from coverage under the CSRA\textsuperscript{118} or other similar statutory schemes.\textsuperscript{119}

The courts have also refused to permit employees in categories covered by the CSRA to resort to APA review to “fill in the gaps” in their CSRA-provided remedies. For example, the CSRA prescribes no administrative or judicial review for minor personnel actions, such as a 10-day suspension or a letter of censure.\textsuperscript{120} Congress’ failure to include a remedy for such minor actions “reflects a congressional intent that no judicial relief be available.”\textsuperscript{121} This conclusion is driven by the same concern for inversion of congressional preferences discussed above: as the D.C. Circuit has noted, the “luxury of immediate judicial review” should not be accorded to personnel actions referenced in the

\textsuperscript{118} See Mann v. Haigh, 120 F.3d 34 (4th Cir. 1997) (CSRA, which provides no administrative or judicial relief for employees of nonappropriated fund instrumentalities (NAFIs) facing adverse employment decision, prevents NAFI employees from obtaining judicial review). See further discussion infra, pp. 41-44.

\textsuperscript{119} See Fligiel v. Samson, 440 F.3d 747 (6th Cir. 2006) (Veterans Administration physician covered by Title 38 may not obtain judicial review of her transfer because comprehensive remedial scheme of Veterans Benefits Act exclusive); Best v. Adjutant General, State of Florida, 400 F.3d 889 (11th Cir. 2005) (National Guard employee covered by Title 32 who is excluded from Title 5 administrative action administrative and judicial review provisions and who has only limited administrative review through appeals to Adjutant General, may not bring APA action for judicial review).

\textsuperscript{120} Under 5 U.S.C. § 7512, adverse action rights are accorded only to those subjected to more serious personnel actions.

\textsuperscript{121} Carducci v. Regan, 714 F.2d at 174. Accord, Graham v. Ashcroft, 358 F.3d 931, 934-35 (D.C. Cir.) (per then-Judge Roberts), cert. denied, 543 U.S. 872 (2004); Veit v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984).
CSRA that are “so insignificant” that they are not accorded any review.\footnote{122}

That does not mean, however, that the CSRA provides the exclusive review procedures—and denies access to any other form of relief—for any and all types of employment-related measures affecting federal employees. Rather, it is limited to the types of adverse actions and other personnel and disciplinary actions that are the subject of the “precisely drawn provisions” of the CSRA.\footnote{123} For that reason, the Federal Circuit refused the government’s invitation to read \textit{Fausto} so broadly as to preclude review of personnel actions unrelated to an individual’s performance or misconduct.\footnote{124} It held that “the CSRA is complete and exclusive in the areas it expressly governs” but that courts retained their pre-existing

\footnote{122} Carducci v. Regan, 714 F.2d at 174-75 (emphasis in original). \textit{See also} Graham v. Ashcroft, 358 F.3d at 934-45.

\footnote{123} \textit{Fausto}, 484 U.S. at 448-49.

jurisdiction to enforce under rights left “undisturbed” by the CSRA.\textsuperscript{125}

In short, where there is no evidence that Congress was seeking to abrogate established judicial review rights, the courts properly rebuff claims of an implied repeal of those rights, consistent with the “strong presumption that Congress intends judicial review of administrative action.”\textsuperscript{126}

C. Claims Based on Pre-Existing Statutory Causes of Action, where the CSRA Is Silent

The courts have consistently rejected contentions that a congressional intent to repeal a pre-existing statutory cause of action should be inferred from the mere enactment of the CSRA.

1. Money-mandating statutes

A significant amount of litigation ensued in the wake of Fausto as government defendants argued for dismissal of claims for money damages filed under a variety of money-mandating statutes.

A statute, regulation or constitutional provision provides a substantive right to recover money damages if it “can fairly be interpreted as mandating compensation by the

\textsuperscript{125} Id. at 713.

Federal Government for the damage sustained."\textsuperscript{127} The entitlement must be mandatory, and the statute must compensate a particular class of persons for “past injuries or labors.”\textsuperscript{128} It is not necessary, however, that the money-mandating language be explicit. Rather, a statute or regulation is money-mandating if it is “‘reasonably amenable to the reading that it mandate a right to recovery in damages’ and while such a reading is not to be ‘lightly inferred,’ a ‘fair inference’ that money damages are allowable under the statute or regulation in question will suffice.”\textsuperscript{129}

Statutes found to be money-mandating include the Fair Labor Standards Act\textsuperscript{130}; the Prevailing Rate Act\textsuperscript{131}; the Severance Pay Act\textsuperscript{132}; the Law Enforcement Availability Pay

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Act\textsuperscript{133}; the Federal Law Enforcement Pay Reform Act\textsuperscript{134}; and the Federal Employees Pay Comparability Act.\textsuperscript{135} Statutes held not to be money-mandating include the provisions articulating the merit principles of the CSRA\textsuperscript{136}; the Classification Act\textsuperscript{137}; and a provision permitting federal law enforcement officers to be placed on administrative leave, instead of sick leave, if injured in the line of duty.\textsuperscript{138}

In cases seeking relief under the various money-mandating statutes, the courts have concluded that the Court of Federal Claims (or the various district courts) retains jurisdiction under the Tucker Act, notwithstanding the enactment of the CSRA.\textsuperscript{139} As the Federal Circuit has observed, a holding that


\textsuperscript{139} See, e.g., Bosco v. United States, 976 F.2d 710 (Fed. Cir. 1992) (suit for back pay under Prevailing Rate Act, 5 U.S.C. § 5341); NTEU v. United
the CSRA provides the exclusive avenue for relief would render these statutes “largely, if not totally, superfluous as unenforceable.”\textsuperscript{140} Such an outcome cannot be countenanced in the absence of clear and convincing evidence that Congress intended such an outcome.\textsuperscript{141}

2. APA challenges

Actions brought under the Administrative Procedure Act (APA) typically argue that proposed agency action is arbitrary, capricious, or contrary to law; that agency action has been unlawfully withheld or unreasonably delayed; or that the agency failed to comply with the notice and comment provisions of Section 553 of the APA, 5 U.S.C. § 553.\textsuperscript{142} These actions seek equitable and declaratory relief.\textsuperscript{143} Certain types of APA actions have been successfully brought in the

\textsuperscript{140} Bosco v. United States, 976 F.2d at 714.

\textsuperscript{141} Id. at 715.

\textsuperscript{142} 5 U.S.C. § 706.

\textsuperscript{143} The APA provides for relief “other than money damages.” Id. at § 702. Specific relief permissible under the APA includes back pay only if it is “the very thing to which [the plaintiff] is entitled.” Hubbard v. U.S. EPA Adm’r, 949 F.2d 453, 533 (D.C. Cir. 1991) (en banc), quoting Bowen v. Massachusetts, 487 U.S. at 897. See 71 Geo. Wash. L. Rev. at 640-47 & n.316 (collecting cases).
wake of Fausto, while others have been dismissed as precluded by the CSRA.

Pre-enforcement challenges to the validity of regulations or agency policies have withstood arguments that the CSRA precludes judicial review.144 This type of challenge “is not the typical sort of labor altercation between a federal employee and his federal employer” to which the exclusive review provisions of the [CSRA] apply.”145 Review of “defined employment rights” is “quite different” from “pre-enforcement judicial review of rules.”146 In the latter situation, involving challenges to agency regulations or policies of general applicability on the grounds of inconsistency with a statute or the Constitution, the APA is properly invoked as a basis for jurisdiction.147

By contrast, jurisdiction previously invoked under the APA for review of adverse actions or other types of personnel actions that fall within the CSRA’s scope is now held to be precluded by the CSRA.148 Determination of the scope of

144 See cases cited supra, n.12.
146 Id., quoting NTEU v. Devine, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984).
147 Id., collecting cases.
148 See Mann v. Haigh, 120 F.3d 34, 37-38 (4th Cir. 1997) (CSRA repeals implicitly the APA to the extent that it allowed judicial review of
preclusion is relatively easy in the case of allegations that an agency acted arbitrarily or capriciously in terminating or transferring an employee. There are, however, closer cases. For example, the D.C. Circuit has dismissed allegations that an agency erred in failing to follow its own regulations in taking a particular personnel action.\footnote{Graham v. Ashcroft, 358 F.3d 931, 933-34 (D.C. Cir. 2004) (per then-Judge Roberts); Harrison v. Bowen, 815 F.2d 1505, 1513 (D.C. Cir. 1987) (CSRA "had the effect of depriving employees of a right of judicial review under the APA that they probably had prior to the enactment of the CSRA."); Brockway v. Block, 694 F.2d 979, 986 (5th Cir. 1982) ("We decline to allow an employee to circumvent this detailed scheme governing federal employer-employee relations by suing under the more general APA"). But see Ward v. Brown, 22 F.3d 516 (2d Cir. 1994) (asserting jurisdiction under APA over alleged wrongful termination of Veterans Administration employee, with no discussion of CSRA preclusion under \textit{Fausto}).} Although these so-called \textit{Vitarelli} claims brought under the APA\footnote{Vitarelli v. Seaton, 359 U.S. 535, 539 (1959), held that even agencies with broad discretion must adhere to internally promulgated regulations limiting the exercise of that discretion.} have long been permitted, the court nevertheless held it to be precluded by the CSRA, noting that similar claims were held to be precluded in \textit{Fausto}.\footnote{Graham v. Ashcroft, 358 F.3d at 935, citing the dissent in \textit{Fausto}, 484 U.S. at 456 (Stevens, J., noting that "in important respects [\textit{Fausto}'s] case is similar to \textit{Vitarelli}") and the majority's rejection of the dissent's contention that allowing \textit{Fausto}'s claims to proceed would not be disruptive of the comprehensive CSRA scheme because such claims "will be 'limited to those instances when the agency violates its own regulations'". 484 U.S. at 451 n.5, quoting dissent, id. at 466.}
Perhaps the most difficult application of the preclusion principles arises when a challenged agency action affecting a large number of employees is arguably a prohibited personnel practice.\textsuperscript{152} As discussed supra, the scope of a "prohibited personnel practice" is subject to some dispute. In addition, a challenge to an agency practice or regulation currently affecting many, and potentially affecting more, is difficult to distinguish from a pre-enforcement regulatory challenge. But, in general, it can be said that a challenge to the application of a general rule may be deemed to be exclusively within the CSRA scheme of review, while a challenge to the facial validity of that rule or rulemaking remains subject to judicial review.\textsuperscript{153}

3. Other statutory claims

Employees retain their right to bring actions under such statutes as the Freedom of Information Act\textsuperscript{154} and the Privacy

\textsuperscript{152} See, e.g., NTEU v. Egger, 783 F.2d 1114, 1116-17 (D.C. Cir. 1986), holding that an agency reclassification of positions into another pay category in violation of statutory provisions implementing pay classifications and rate systems was a prohibited personnel practice subject to OSC jurisdiction. See discussion supra, pp. .

\textsuperscript{153} Id. at 1117. Compare with NTEU v. Devine, 733 F.2d 114 (D.C. Cir. 1984).

Act.\textsuperscript{155} The courts, however, scrutinize claims carefully—particularly those brought under the Privacy Act—to guard against artfully pled complaints that attempt to circumvent the CSRA’s exclusive procedures.

Privacy Act cases typically challenge errors in the accuracy of records maintained on individuals in a government system of records or the improper disclosure of such information.\textsuperscript{156} Some litigants have attempted, without success, to obtain judicial review of a personnel action by casting it as a Privacy Act claim.\textsuperscript{157} But, an employee who has suffered damages as a result of an adverse personnel action caused by an inaccurate or incomplete personnel record may bring a Privacy Act action, notwithstanding the CSRA.\textsuperscript{158} In other words, an action to enforce a right under the Privacy

\textsuperscript{155} 5 U.S.C. § 552a, et seq. See, e.g., Brune v. Internal Revenue Serv., 861 F.2d 1284 (D.C. Cir. 1988) (claim for damages by federal employee alleging violation of Privacy Act during internal investigation).

\textsuperscript{156} See 5 U.S.C. § 552a(g).

\textsuperscript{157} See, e.g., Kleiman v. Dep’t of Energy, 956 F.2d 335-338 (D.C. Cir. 1992) (employee claiming that personnel file inaccurately reflected his job title not properly brought under Privacy Act where records accurately reflected position; complaint was, in fact, collateral attack on his position classification, for which CSRA provides exclusive remedies).

\textsuperscript{158} See Hubbard v. EPA, 809 F.2d 1, 5 (D.C. Cir. 1986), aff’d in part on other grounds sub nom. Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (en banc) (per curiam) (district courts retain jurisdiction to award damages “for an adverse personnel action actually caused by an inaccurate or incomplete record); Doe v. Goss, 2007 U.S. Dist. LEXIS 2708 (D.D.C. 2007) (same).
Act and to obtain a remedy provided by that Act is not precluded by the CSRA.

D. Claims Based on Pre-existing Substantive Causes of Action that Are Also Covered by a Collectively Bargained Grievance Procedure

Even when an action seeks to enforce a right under a pre-existing substantive cause of action that has not been explicitly repealed by the CSRA, government defendants have often argued, with great persistence, that the cause of action is nevertheless precluded if it could have been pursued under a negotiated grievance procedure established under section 7121(a)(1) of the CSRA, 5 U.S.C. § 7121(a)(1). As we show, this assertion of preclusion is dubious, at best. But, in any event, it is premised on an interpretation of section 7121(a)(1) before its amendment in 1994. Whatever the merits of the original argument, it no longer has any traction in light of the 1994 changes.

1. Interpretation of Section 7121(a)(1) prior to 1994

Section 7121(a)(1) of the CSRA requires collective bargaining agreements to provide procedures for the settlement of grievances. “Grievances” include “any matter relating to the employment of the employee” and “any claimed violation, misinterpretation, or misapplication of any law, rule, or
regulation, affecting conditions of employment.”\textsuperscript{159} Prior to its amendment in 1994, section 7121(a)(1) provided that the negotiated procedures “shall be the exclusive procedures for resolving grievances which fall within its coverage,” with certain exceptions.\textsuperscript{160}

The jurisdictional impact of this section was at issue in a case brought in the late 1980’s under the Fair Labor Standards Act, \textit{Carter v. Gibbs}. At the government’s urging, the district court dismissed the suit on the grounds that section 7121(a)(1), as then written, deprived it of jurisdiction over the plaintiffs’ claims.\textsuperscript{161} On appeal, a panel of the Federal Circuit held that the district court had misinterpreted section 7121(a)(1) to repeal by implication the plaintiffs’ rights to bring FLSA enforcement actions in federal court.\textsuperscript{162} Among other things, it observed that the legislative history of the CSRA signaled “that Congress intended the ‘exclusive procedures’ provision to foreclose

\textsuperscript{159} 5 U.S.C. § 7103(a)(9).

\textsuperscript{160} That section, 5 U.S.C. § 7121(a)(1), drew exceptions for matters covered in subsections (d) and(e). Subsection (d) of section 7121 gives employees the right to elect the negotiated procedure or “statutory procedures” for resolving complaints of discrimination that constitute “prohibited personnel practices” under 5 U.S.C. § 2302(b)(1). Subsection (e) of 7121 preserves employees’ rights to file appeals with the Merit Systems Protection Board to challenge serious adverse actions based on misconduct or poor performance, under Chapters 75 and 43 of Title 5, as an alternative to the negotiated grievance procedure.


\textsuperscript{162} \textit{Carter v. Gibbs}, 883 F.2d 1563 (Fed. Cir. 1989).
access only to alternative administrative procedures for settling disputes, and not to bar judicial remedies expressly provided by other statutes."\textsuperscript{163}

An en banc Federal Circuit reversed.\textsuperscript{164} It held that the language of section 7121(a) contained no qualifying language confining its reach to "administrative" procedures and made the grievance procedure exclusive as to all other procedures, whether administrative or judicial.\textsuperscript{165} Because the FLSA claims could have been grieved, the court dismissed the FLSA lawsuit for lack of jurisdiction.\textsuperscript{166}

The en banc panel's interpretation of section 7121(a)(1) was a dubious one. It ran afoul of the cardinal principle of statutory interpretation that disfavors repeals by implication,\textsuperscript{167} and ignored the teachings of the Supreme Court in \textit{Barrentine v. Arkansas-Best Freight Sys., Inc.}\textsuperscript{168} Further,

\begin{flushleft}
\textsuperscript{163} Id. at 1566-67.  \\
\textsuperscript{165} Id. at 1454-55.  \\
\textsuperscript{166} See also O'Connell v. Hove, 22 F.3d 463 (2d Cir. 1994) (following Carter); Saul v. United States, 928 F.2d 829, 834-35 (9th Cir. 1991).  \\
\textsuperscript{167} See, e.g., Fausto, 484 U.S. at 452.  \\
\textsuperscript{168} 450 U.S. 728 (1981). \textit{Barrentine} held that private-sector employees have an unfettered right to bring civil enforcement actions under the FLSA, without regard to collectively bargained procedures. It held that "FLSA rights are best protected in a judicial rather than in an arbitral forum," that they were conferred on the plaintiffs "as individual workers, not as members of a collective organization," and that those rights "cannot be abridged by contract or otherwise waived because this would
the Federal Circuit failed to reconcile its conclusion with the statutory context in which the phrase "exclusive procedures" was used, or with legislative history of the CSRA, which supported a significantly narrower reading of that phrase than the one the court endorsed. The statutory context as well as the direct history showed that Congress was only addressing the relationship between the negotiated grievance procedure and other administrative procedures for review of federal employment disputes when it enacted section 7121(a)(1) and that the provision had nothing whatsoever to do with direct judicial causes of action.  

2. The 1994 amendments to section 7121(a)(1)

In any event, in 1994, Congress corrected the Federal Circuit’s interpretation of section 7121(a)(1) by adding to the statute the very term whose absence dictated the court’s conclusion in Carter. As modified, section 7121(a)(1) provides, in pertinent part, that a grievance procedure found

‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate.” 450 U.S. at 745, 740 (citations omitted).

169 See H.R. Rep. No. 95-1717 (1978), reprinted in 1978 U.S.C.C.A.N. 2860, 2891 (explaining that under the original version of section 7121(a)(1), with the exception of administrative remedies available at subsections (d) and (e), "an employee covered by a collective bargaining agreement must follow the negotiated procedures rather than the agency procedures available to other employees") (emphasis supplied); see also Petition for Writ of Certiorari in Carter v. Goldberg, No. 89-1675, at pp. 16-19 (discussing legislative history).

in a federal sector collective bargaining agreement "shall be the exclusive administrative procedure for resolving covered grievances." \(^{171}\)

Reviewing this statutory change, the Federal Circuit in *Mudge v. United States*\(^{172}\) found the "plain language" to be clear: "while § 7121(a)(1) [as amended] limits the administrative resolution of a federal employee’s grievances to the negotiated procedures set forth in his or her [collective bargaining agreement], the text of the statute does not restrict an employee’s right to seek a judicial remedy for such grievances."\(^{173}\) The Federal Circuit has been followed by the Eleventh Circuit.\(^{174}\) Those two circuits thus hold that section 7121(a)(1), as amended, poses no barrier to assertion of federal court jurisdiction over employee claims.\(^{175}\)

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\(^{171}\) Emphasis added. The amendment also states that the procedures would be exclusive administrative procedure except as provided in a new subsection (g). That subsection preserves employees’ rights to file complaints with the Office of Special Counsel in cases involving prohibited personnel practices other than those identified in subsection (d).

\(^{172}\) 308 F.3d 1220 (Fed. Cir. 2002), reh’g and reh’g en banc denied, 2003 U.S. App. LEXIS 3372 (Fed. Cir. 2003).

\(^{173}\) Id. at 1228. See also *Bailey v. United States*, 52 Fed. Cl. 105 (2002); *Abramson v. United States*, 42 Fed. Cl. 621 (1998) (similarly analyzing the meaning of the amendment).

\(^{174}\) *ASEDAC v. Panama Canal Comm’n*, 329 F.3d 1235 (11th Cir. 2003).

\(^{175}\) At least one court has found that the legislative history of the amendment of section 7121(a) also shows that it was enacted to reverse the result in *Carter, supra*, and clarify that the grievance procedure was not intended to supplant pre-existing judicial causes of action, but only
The Ninth Circuit, on the other hand, interpreted the amendment differently in its much criticized decision in *Whitman v. Dep’t of Transportation.* It gave no weight to the plain language of the amended statute and failed to state what Congress’ addition of the word “administrative” means. Instead, it discussed what the statute does not do, in its view: “the addition of the word ‘administrative’ to the statute does not constitute an express grant of federal court jurisdiction.” Because it interpreted *Mudge* as endorsing an “implicit-authorization approach,” and because its circuit precedent precludes implied grants of action, the Ninth Circuit rejected the Federal Circuit’s reasoning. The Supreme Court subsequently reversed and remanded that decision.

other administrative remedies. See Bailey v. United States, 52 Fed. Cl. at 110–12. But see *Mudge*, 308 F.3d at 1223–34, 1230 n.5 (recounting legislative history but finding it inconclusive); *Whitman*, 382 F.3d at 942 (stating that Congress amended the statute “without explanation”).

176 See Joshua La Boeuf, *Federal Court Jurisdiction under the Civil Service Reform Act, Whitman v. United States Department of Transportation*, 7 Fl. Coastal L. Rev. Special Supp. 46 9 (2006) (discussing the “substandard analysis” of the Ninth Circuit in *Whitman*). It is perhaps significant that the plaintiff in *Whitman* was proceeding pro se in the court of appeals, as in the district court, and the Ninth Circuit therefore was without the benefit of considered legal analysis supporting plaintiff’s position.

177 Id. at 943.

178 Id. at 942–44. The Sixth Circuit has read *Mudge*’s holding in a fashion contrary to that of the Ninth Circuit. See *Toledo v. Jackson*, 485 F.3d 836, 840 (6th Cir. 2007) (characterizing *Mudge* as holding that section 7121(a)(1) does not restrict a right of action).

179 126 S. Ct. at 2016.
The Supreme Court corrected the Ninth Circuit on the appropriate starting place for the analysis, pointing out the obvious: section 7121 was not intended to confer jurisdiction. Rather, it stated, the question is whether section 7121(a)(1), or the CSRA as a whole, was intended to remove the jurisdiction given to federal courts under other statutes. It did not address whether the Federal Circuit had correctly interpreted Congress’ intent with respect to the preclusion issue when it amended section 7121(a)(1). Instead, the Court left that issue, and others, for the lower courts on remand.

3. Subsequent litigation pressing preclusion arguments based on availability of a grievance-arbitration process, despite the amendment to section 7121(a)(1)

Notwithstanding the clarity of the legislative change, the government has continued to maintain, in pleadings filed in various cases, that the district courts or the Court of Federal Claims lack jurisdiction where the claim could have been pressed through a grievance-arbitration process. In

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180 Id. at 2015.

181 Id.

182 Id. at 2015-2016. See Toledo v. Jackson, 485 F.3d at 840 (following the Supreme Court in reserving question whether Mudge was correctly decided).

183 See, e.g., Brief for the Respondents on Writ of Certiorari at 36-44, Whitman v. Dep’t of Transportation, 126 S. Ct. 2014 (2006) (No. 04-1131); Memorandum in Support of Defendants’ Motion to Dismiss Plaintiff’s Amended
essence, the government’s position is that *Mudge* was wrongly
decided\(^{184}\) and that Congress did not intend the 1994 amendment
to remove any barriers to judicial review based on independent
statutory grants of jurisdiction.

Although the government continues to reject the
contention that the amendment to section 7121(a)(1) was
intended to reverse *Carter* and limit preclusion of grievable
claims to administrative remedies, it has not offered a
persuasive alternative explanation of the amended language.
To the Supreme Court, as to the Federal Circuit, the
government argued that Congress added the word
“administrative” “to clarify” the remedies available to
federal employees for grievances.\(^{185}\) It argued that such

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\(^{184}\) The government’s attack on *Mudge*, as presented in its briefs to the
Supreme Court in *Whitman*, was based in large part on the Ninth Circuit’s
misreading of *Mudge*, discussed supra. See Brief for the Respondents on
Writ of Certiorari at 17 n.7; *Whitman*, 382 F.3d at 943-44. Like the Ninth
Circuit, the government read *Mudge* as holding that section 7121(a)(1) had
created a right to judicial review. In light of the Supreme Court’s
clarification of the meaning of section 7121(a)(1), as described supra,
the government may decide not to press this particular contention further.

\(^{185}\) See *Mudge*, 308 F.3d at 1228 (characterizing the government’s argument);
Brief for the Respondents on Petition for a Writ of Certiorari at 18-19,
*Whitman v. Dep’t of Transportation*, 126 S. Ct. 2014 (No. 04-1131). In its
brief on the merits, however, the government shifted its argument,
claiming for the first time that the amendment “clarif[ied]” that the
exclusive procedures in subsection (a)(1) did not “implicitly compromise
the ability of employees to seek judicial review in the instances
specified in subsection (f),” 5 U.S.C. § 7121(f). Brief for the
Respondents on Writ of Certiorari at 28. This is unpersuasive for the
availability of judicial review under section 7121(f) of arbitration
decisions involving matters covered under 5 U.S.C. §§ 4303 and 7512 had
clarification was needed in light of the new subsection (g) of section 7121, which gave federal employees a choice of administrative remedies for grievances concerning prohibited personnel practices. The Federal Circuit in Mudge correctly rejected this contention, noting that there was “no need for Congress to clarify § 7121 in this fashion” because the pre-1994 statute, which already provided a choice of administrative remedies under subsections (d) and (e), had unambiguously made the negotiated procedure exclusive as to other administrative remedies.\footnote{308 F.3d at 1228.}

In support of its refusal to give the amendment to section 7121(a)(1) its plain meaning, the government has pressed certain policy arguments. The government has argued, for example, that removal of a barrier to judicial remedies undermines Congress’ preference for the grievance-arbitration

\footnote{308 F.3d at 1228. The government did not raise to the Supreme Court, and thus has apparently abandoned, its argument in Mudge that reading section 7121(a)(1) consistently with its plain language would render superfluous section 7121(a)(2)(which provides that the parties may agree to exclude any matter from the coverage of the negotiated procedure). Id. at 1230-31. The government based this contention on the erroneous notion that the sole function of subsection (a)(2) is to enable the union to preserve employees’ rights to pursue judicial remedies by excluding matters from the coverage of the negotiated procedure. See id. at 1231. The Federal Circuit rejected this argument, observing that exclusion from this subsection served other purposes. Id. The parties to a collective bargaining agreement may wish to exclude matters from the grievance procedure for any number of reasons, entirely unrelated to the effect of such exclusion upon employees’ rights to judicial relief. These reasons range from the union’s desire not to devote its resources to particular issues to an interest in channeling particular types of disputes to other administrative forums.}
process.\textsuperscript{187} But that preference, however strong, cannot override the plain language of the statute, as the Federal Circuit pointed out in \textit{Mudge}.	extsuperscript{188}

In any event, the vast majority of claims will continue to be pursued through the grievance-arbitration process or the other administrative remedies of the CSRA. As described \textit{supra}, \textit{Fausto} dictates that routine challenges to management assessment of employee performance and conduct, as well as labor relations disputes, must be resolved through the CSRA-prescribed procedures. Similarly, agency action that merely constitutes a breach of a collective bargaining agreement will have to be grieved.\textsuperscript{189} Finally, even where there are alternative judicial remedies available, the grievance-arbitration route is normally more desirable to employees because its procedures are less formal and it can often provide adequate relief without the expense of litigation. For these reasons, practical as well as legal, the preference

\textsuperscript{187} Brief for the Respondents on Writ of Certiorari at 28, \textit{Whitman; Mudge}, 308 F.3d at 1231.

\textsuperscript{188} 308 F.3d at 1231-32, \textit{citing Artuz v. Bennett, 531 U.S. 4, 10 (2000).}

\textsuperscript{189} Clear and patent breaches that amount to a repudiation of the agreement may be an unfair labor practice that can be pursued as a ULP-grievance or through charges filed with the FLRA. See, \textit{e.g.}, AFGE, Local 2924 v. FLRA, 470 F.3d 375, 377-78 (D.C. Cir. 2006); Dep’t of the Air Force, 376th Mission Support Squadron, Scott Air Force Base, 51 FLRA 858, 861-63 (1996). Most breaches, however, involve differing and arguable interpretations of an agreement, and are remedied only through the grievance process. Marine Corps Logistics Base, Barstow and AFGE Local 1485, 33 FLRA 626, 642 (1988).
for the grievance-arbitration route remains strong. The flood of litigation feared by government has not materialized in the more than thirteen years since the amendment of section 7121(a)(1).

The government has further asserted that Mudge’s reading of the plain language of section 7121(a)(1) would invert the CSRA’s basic scheme. Its explanation how it would do so has varied. At one point, it argued that employees who are covered by collective bargaining agreements would have access to the federal courts while employees who are not so covered would be forced to litigate those cases exclusively through an internal agency grievance procedure.\(^{190}\) This argument, however, rested on the government’s misreading of Mudge as holding that section 7121(a)(1) conferred jurisdiction. As discussed, Mudge merely held that this section did not preclude federal courts from exercising jurisdiction that they otherwise possessed, solely because the employee’s claims were also covered by the negotiated grievance procedure. Accordingly, employees’ rights to judicial review are identical, whether or not they are covered by a negotiated grievance procedure.

The government’s claim of inconsistency with the CSRA was framed differently in its brief on the merits in \textit{Whitman}.\(^{190}\) Brief for the Respondents on Petition for a Writ of Certiorari at 16-17, \textit{Whitman}.
There it argued that *Mudge*’s reading of section 7121(a)(1) would “invert” the preferences in the CSRA by granting greater rights to employees with minor complaints than to those with more serious complaints.\(^{191}\) It assumed that the former group would be able to proceed directly to district court while those who were subject to major actions such as removal would have to await administrative review before obtaining judicial review. This argument overlooks that, under *Fausto*, the CSRA-prescribed procedures are exclusive for the claims covered by its scheme, even if the CSRA itself affords no relief.\(^{192}\) Accordingly, employees with minor complaints covered by the CSRA would have no right to judicial review.

In short, the arguments advanced by the government in litigation to support of its tortured reading of section 7121(a)(1) are not persuasive. As Congress recognized when it enacted the amended version of that section, there are sound reasons for preserving pre-existing rights to judicial review of claims that could theoretically be pursued through the grievance-arbitration process.

\(^{191}\) Brief for the Respondents on Writ of Certiorari at 12, 21-22, *Whitman*.

\(^{192}\) See discussion *supra*, pp. 17-38.
4. An interpretation of section 7121(a)(1) to bar judicial review of claims covered by a grievance-arbitration provision is contrary to public policy

Employee representatives and unions have defended the right of individual federal employees to seek judicial redress, notwithstanding the theoretical availability of the grievance-arbitration process. They argue that individual federal employees have statutory rights that should not be subordinated to the grievance-arbitration process for a number of reasons. As shown below, that process is controlled by the union, whose interests may not be aligned with those of the employee. In addition, unions do not have the resources to carry the entire burden of defending employee rights. Finally, the process may not be well suited for resolution of particular statutory claims and may not culminate in judicial review.

a. As discussed supra, every federal sector collective bargaining agreement must include a grievance-arbitration

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193 Employees in agencies that are not subject to collective bargaining and employees in agencies (or portions thereof) that have not been organized by a union are, of course, not covered by a negotiated grievance-arbitration process. They have only an internal agency procedure that does not lead to arbitration. See generally 5 C.F.R. § 771.101. Instead of a neutral third party, the final decision is made by a designated agency official, and this decision may be unreviewable. But see Winslow v. Brady, 1991 U.S. Dist. LEXIS 15125, *11 (W.D. Mo. 1991) (suggesting, in dicta, that an agency final decision on the employee’s grievance is subject to district court review under the APA). The deficiencies of the internal agency procedure make it even more inadequate than the negotiated grievance-arbitration process as an exclusive remedy.
While that procedure must include some basic elements to satisfy requirements of fairness and efficiency, its scope is negotiable, and certain subjects may be excluded. Typically, however, unions agree to a broad-scope grievance procedure covering violations of "any law, rule, or regulation affecting conditions of employment." Thus, alleged violations of such laws as the FLSA or the civil rights acts may be grieved.

Unions have, in fact, successfully pursued grievances over violations of law. It is, however, impossible for unions to shoulder the entire responsibility for vindicating the statutory rights of represented employees. Resources are scarce and demands are heavy. Moreover, even with the best intentions, unions cannot hope to satisfy the sometimes conflicting requirements of the entire bargaining unit.

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196 See 5 U.S.C. § 7102(A)(9)(C)(ii), defining "grievance." In U.S. Dept. of Treasury v. FLRA, 43 F.3d at 689, the D.C. Circuit limited grievances of violations of law, rule or regulation to "alleged violations of a statute or regulation that can be said to have been issued for the very purpose of affecting the working conditions of employees--not one that merely incidentally does so."

197 See, e.g., NTEU and FDIC, 53 FLRA 1469 (1998) (FLSA violation); Dep’t of Treasury, Customs Service, El Paso, TX, and NTEU Chapter 143, 52 FLRA 622 (1996) (Rehabilitation Act violation); Dep’t of Commerce, Patent and Trademark Office and NTEU Chapter 243, 52 FLRA 358 (1996) (discrimination based on race); Dep’t of Treasury, Customs Service, Dallas, TX and NTEU Chapter 140, 37 FLRA 1022 (1990) (retaliation for whistleblowing).
In addition, the negotiated grievance procedure is not designed to protect the rights of the individual employee over the collective interests of the bargaining unit as a whole. As an initial matter, the individual employee cannot invoke arbitration. Regardless of the issue, only the union (or the agency) may take a grievance to arbitration. Only the union (or the agency) may take exceptions to the arbitral award to the FLRA, and only the union may seek judicial review of the FLRA’s decision, in those limited circumstances when review is permitted. The actions of the union thus bind the individual grievant, including those who have not chosen to be a member of the union.

Unions have a statutory obligation to represent collective interests and may reasonably decide not to pursue the claims of a single individual. They may decline to invoke arbitration or to appeal an arbitrator’s decision to court for any number of legitimate reasons, aside from the strength of

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198 5 U.S.C. § 7121(b)(1)(C)(iii). As noted supra, under 5 U.S.C. § 7123(a)(1), judicial review is not available of an FLRA order involving an arbitrator’s award unless the FLRA’s order involves an unfair labor practice.

199 Under 5 U.S.C. § 7122(a), only a “party” to arbitration may file exceptions with the FLRA. The union and the agency are the “parties” in an arbitration. Under section 7123(a), “any person aggrieved” by a final FLRA order may seek review. This has been interpreted to limit the right to petition to the parties before the FLRA. See Hanlon v. FLRA, 859 F.2d 971, 974 (D.C. Cir. 1988) (refusing to permit individual employee to seek judicial review when the union declined). Individual employees may, however, appeal arbitrator decisions involving serious adverse actions, including removals, to federal court. 5 U.S.C. §§ 7121(e), (f), 7703.
the employee’s claim. Unions are entitled to consider such factors as limited resources, competing interests, and a desire to maintain harmony among employees and their employer, when deciding whether to invoke arbitration.\textsuperscript{200} Thus, a union may reasonably decline to pursue meritorious claims. Only if a union acts for arbitrary or discriminatory reasons will its decision not to proceed be an unfair labor practice.\textsuperscript{201}

For these reasons, the courts have concluded, in the private sector, that it would be contrary to public policy underlying various statutory provisions to relegate employees exclusively to the grievance process, denying them the right to pursue claims in court.\textsuperscript{202} Similarly, the courts generally hold that a union may not prospectively waive an employee’s right to judicial review, in favor of arbitration.\textsuperscript{203}

\begin{itemize}
\item \textsuperscript{200} See Pyner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997).
\item \textsuperscript{201} Cf. Vaca v. Sipes, 386 U.S. at 191-92 (outlining the scope of the duty of fair representation in the private sector).
\item \textsuperscript{202} See Barrentine, 450 U.S. at 743 (contrary to the public interests underlying the FLSA to deny employees the right to pursue overtime claims in court); Pyner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997) (holding that the negotiated grievance procedure does not preclude employees from pursuing judicial redress for violations of Title VII of the Civil Rights Act or other anti-discrimination statutes).
\item \textsuperscript{203} See Air Line Pilots Ass’n v. Northwest Airlines, 199 F.3d 477, 484 (D.C. Cir. 1999), \textit{judgment reinstated}, 211 F.3d 1312 (D.C. Cir. 2000) (\textit{en banc}) (digesting cases); Rogers v. New York Univ., 220 F.3d 73, 75 & n.1 (2d Cir. 2000) (same). \textit{But see} Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996) (holding that an employee may not sue under Title VII and the Americans with Disabilities Act where she was covered by a collective bargaining agreement that required submission of claims to arbitration); id. at 886-87 (dissent) (collecting cases to the contrary). By contrast, the Supreme Court held in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), that an individual may
\end{itemize}
Identical considerations underlie the argument that grievance-arbitration provisions negotiated by public sector unions should not be able to supplant individual employees' right to judicial review of claims that have independent statutory bases for jurisdiction.

b. Further weighing against the exclusivity of the grievance-arbitration forum is the fact that judicial review of the arbitrator’s decision is so limited. The typical arbitration decision challenging alleged violations of law, such as the FLSA and other money-mandating statutes, is subject to FLRA review, and, as discussed supra, the ensuing FLRA decision is not subject to judicial review.\footnote{5 U.S.C. § 7123(a)(1) (permitting review only if order involves an unfair labor practice). See, e.g., Griffith v. FLRA, 842 F.2d 487, 494 (D.C. Cir. 1988) (declining further judicial review of statutory claim).}

There is one category of arbitration decisions that is directly reviewed by a court: those involving serious adverse actions or reductions in grade or removals for unacceptable
performance, which are directly appealable to the U.S. Court of Appeals for the Federal Circuit.\footnote{5 U.S.C. § 7121(e), (f), 7703.} The appeal must be taken by the “adversely affected or aggrieved employee.”\footnote{5 U.S.C. § 7703. These procedures apply to appeals from arbitral awards under 5 U.S.C. § 7121(e), (f).} Should the union choose not to provide legal representation to the employee in the appeal—which is a decision well within its rights—the employee must either proceed pro se or incur the significant expense of private counsel. As a practical matter, few such appeals are undertaken; most appellants are pro se; and virtually none is successful.\footnote{Statistics supplied by the Clerk’s Office of the Federal Circuit to the author on December 4, 2007, indicate that 55 arbitration decisions were appealed and decided by that court from FY 2002 through FY 2007, or a little more than 9 cases a year. Of the 55 arbitration decisions, 30 were appealed without the assistance of an attorney. The Federal Circuit reversed the arbitrator in only 6 of the 55 cases; 4 of the 6 were handled pro se. It dismissed the appeals, with and without reaching the merits, in 21 cases and affirmed the arbitrator, in whole or in part, in 28 cases.} In short, an arbitrator’s decision, even one involving an alleged violation of law, rule or regulation, is very unlikely ever to be reviewed by a federal judge.

c. Finally, although the arbitration process has advantages over litigation in many contexts,\footnote{The federal policy favoring arbitration of labor disputes in the private sector is so well established as to need little discussion. See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).} there is still reason to question the suitability of federal sector
grievance-arbitration process of all types of claims and in all circumstances, to the exclusion of litigation as even an alternative possibility. As an initial matter, the grievance process typically has short time frames for initial filing, as well as for moving to the next step. Thus, there is a very real risk that a grievant may forfeit a statutory right through failure to satisfy contractual requirements.

Even if, as seems more reasonable, the statutory time limits prevail over the short contractual ones for initiating the grievance, the arbitration process is not well designed to resolve many or most statutory claims. Arbitrators, as well as their oversight body, the FLRA, may have limited experience or expertise in resolving statutory claims unrelated to collective bargaining and labor relations. Arbitration

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209 The FLRA has not yet definitively held that the statute of limitations prescribed by such statutes as the FLSA prevail over shorter periods set by the collective bargaining agreement for the initiation of a grievance. In U.S. Dept. of Commerce, National Oceanic and Atmospheric Admin, Office of NOAA Corps Operations, Atlantic Marine Center, Norfolk, VA, and International Brotherhood of Electrical Workers Local 80, 55 FLRA 816 (1999), the majority did not find it necessary to address this issue, although one member, dissenting in pertinent part, would have held that the statutory limitations period prevailed over shorter contractual filing periods. See also AFGE Local 3882 and U.S. Dept. of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Ray Brook, NY, 59 FLRA 469 (2003) (remanding to an arbitrator to consider the effect of a contractual provision establishing a longer time limit for filing a claim under a statute that provides for such a longer period).

210 See, e.g., Devine v. White, 697 F.2d 421, 438 (D.C. Cir. 1983) (questioning whether private sector assumption of arbitrator expertise is equally applicable in the federal sector when arbitrator is reviewing compliance with law, rule and regulation); U.S. Dep’t of Treasury v. FLRA, 43 F.3d at 689-90 (finding it “inconceivable” that Congress would have entrusted sweeping authority to construe all statutes to a “minor three-
proceedings are informal, with significantly limited
discovery.211 Arbitral awards are typically brief. At most,
the award need contain only those factual findings necessary
to enable the FLRA to assess the arbitrator’s legal
conclusions.212 In general, however, the arbitrator need not
make any specific findings or set forth more than a minimal
rationale.213 Finally, while an arbitrator has considerable
latitude in fashioning a remedy, that remedy must comport with
specific contractual limitations on the arbitrator’s

member commission with quite restricted expertise”, without contemplating
some judicial review).

In cases enforcing the obligation to arbitrate arising in the private
sector, the Supreme Court has rejected criticism of the arbitral process.
See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 34 n.5;
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614,
628 (1985). However, as noted supra, n.203, those cases involved
enforcement of an individual’s voluntary agreement to arbitrate, not the
imposition of arbitration pursuant to a collective bargaining agreement.
Compare Barrentine v. Arkansas-Best Freight System, Inc, 450 U.S. at 742-
45 (questioning arbitrators’ ability to resolve and enforce statutory
rights, and declining to require arbitration of statutory claim pursuant
to collective bargaining agreement).

See Mandatory Binding Arbitration and Employment Discrimination Suits,
EEOC Compl. Man. (BNA) No. 226 at N:3104; Reginald Alleyn, Statutory
Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum,
v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994), cert. denied, 516 U.S. 912
(1995) (noting remedies and procedural protections in arbitration differ
significantly from those available in litigation).

NFFE, Local 1437 and U.S. Dep’t of the Army, Army Research, Development
and Engineering Ctr., 53 FLRA 1703, 1710 (1998) (to enable FLRA to review
legal issues de novo, award must contain factual findings necessary to
enable Authority to assess legal conclusions).

See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp., 363
U.S. 593, 598 (1960) (“Arbitrators have no obligation to the court to give
their reasons for an award.”); Girani v. F.A.A., 924 F.2d 237, 242 (Fed.
Cir. 1991) (arbitrator not required to set out specific findings of fact
to support an award).
authority; must not affect positions or employees beyond the scope of the stipulated grievance; and must be limited to the issues submitted for resolution.$^{214}$

In sum, policy considerations, as emphasized supra, cannot alter the plain meaning of the statute, no matter how compelling they are. But, it appears clear that the stronger policy arguments weigh in favor of the conclusion that section 7121(a)(1), as amended, was not intended to require arbitration of statutorily based claims, to the exclusion of judicial review, and should not be read in this fashion.

V. THE EXTENT OF CSRA PRECLUSION OF CONSTITUTIONAL CLAIMS

It has long been settled that the CSRA remedial scheme bars recourse to courts for damages for constitutional tort claims arising out of the employment relationship. There is a split in the federal circuit courts, however, over the availability of equitable relief for federal employees alleging violations of their constitutional rights. In recent litigation before the Supreme Court and the Ninth Circuit, the Justice Department has conceded that Congress has not spoken with the requisite clarity to deprive the courts of their long-standing equitable jurisdiction to resolve constitutional claims by federal employees. It is therefore now the position

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of the government that the CSRA does not preclude employees from bringing constitutionally based claims for equitable relief.

A. Claims for Damages

In *Bush v. Lucas*\(^{215}\), the Supreme Court addressed the question of whether federal employees should be able to seek damages for actions—in that case, for demotion and defamation—allegedly taken in retaliation for the exercise of their constitutional rights. There is no statutory basis for such a remedy. Thus, the petitioner asked the Court to create a new nonstatutory damages remedy for federal employees whose constitutional rights are violated by their superiors, a remedy akin to the *Bivens*\(^{216}\) remedy for citizens suffering from constitutional violations by federal officials.

According to the Supreme Court, the question before it was “not what remedy the court should provide for a wrong that would otherwise go unremedied.”\(^{217}\) Indeed, the employee at issue in that case had received a remedy for the wrongful acts


\(^{217}\) *Bush v. Lucas*, 462 U.S. at 388.
of his supervisors, albeit not a fully compensatory one.\textsuperscript{218} Rather, the question was “whether an elaborate system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.”\textsuperscript{219} The Court answered this question in the negative.

Whereas in \textit{Bivens}, the Court could discern “no special factors counseling hesitation in the absence of affirmative action by Congress,”\textsuperscript{220} the Court in \textit{Bush} identified such factors in Congress’ attention to federal personnel actions and the potential harm to the personnel system that would result from the addition of another remedy.\textsuperscript{221} The Court was “convinced the Congress is in a better position to decide whether or not the public interest would be served by creating it.”\textsuperscript{222}

\textsuperscript{218} The administrative reviewing body had concluded that the employee’s demotion was unjustified and that his First Amendment rights had been abrogated. It directed the employee’s reinstatement with back pay. Id. at 371. The Supreme Court assumed, without deciding, that this remedy was not “as effective” as an individual damages remedy and did not fully compensate him for the harm suffered. Id. at 372.

\textsuperscript{219} Id. at 388.

\textsuperscript{220} \textit{Bivens}, 403 U.S. at 396.

\textsuperscript{221} \textit{Bush}, 462 U.S. at 385-88.

\textsuperscript{222} Id. at 390.
The lower courts have extended the holding in Bush even to cases where there are not meaningful or adequate CSRA remedies for the constitutional violations.\(^{223}\) In so concluding, the courts rely on Schweiker v. Chilicky,\(^{224}\) in which the Supreme Court denied a Bivens remedy for damages, even in absence of a full administrative remedy, where “congressional inaction has not been inadvertent.”\(^{225}\) The Court clarified that it is the comprehensiveness of the statutory scheme involved, and not the “adequacy” of specific remedies extended under it, that counsels judicial abstention.\(^{226}\)

That extension of Bush has been criticized insofar as it would deny a remedy when the employee was entitled to no remedy at all under the CSRA.\(^{227}\) As critics have observed, the Supreme Court has denied judicial relief for constitutional

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\(^{223}\) See Dotson v. Griesa, 398 F.2d 156, 165-68 (2d Cir. 2005) (collecting cases); Saul v. United States, 928 F.2d at 835-40 (same).

\(^{224}\) 487 U.S. 412 (1988). See, e.g., Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989) (holding that no Bivens action can be implied for demoted probationary federal employee in light of Chilicky, even though employee was entitled to no relief under the CSRA); Feit v. Ward, 886 F.2d 848, 854 (7th Cir. 1989) (agreeing with Kotarski that, after Chilicky, the courts need not make any “foray into the meaningfulness of a federal employee’s remedies within the CSRA” before applying the special factors doctrine).

\(^{225}\) Id. at 423, 425-29.

\(^{226}\) Id. at 423.

\(^{227}\) See Wells, 90 Mich.L.Rev. at 2624-25 (criticizing the refusal to inquire into the effectiveness of statutory remedies for constitutional violations).
violations only where Congress created an alternative remedy that provides meaningful relief.\textsuperscript{228} In any event, the limitation on judicial involvement is confined to the context of damages; as discussed infra, the “special factors counseling hesitation” that informed the result in \textit{Bush} do not apply in the context of the long-recognized availability of injunctive relief.

\section*{B. Claims for Equitable Relief}

The presumption in favor of judicial review, outlined supra, is strongest in the context of actions seeking to enjoin unconstitutional acts. The courts’ inherent power to order equitable relief is broader than their power to direct damages against individuals.\textsuperscript{229} The elimination of that traditional authority requires a clear and explicit statement of affirmative congressional intent, and will not be inferred from language suggesting that “congressional inaction has not been inadvertent.”\textsuperscript{230}

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\textsuperscript{228} Id. at 2637.
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\textsuperscript{229} Hubbard v. EPA, 809 F.2d at 11, vacated and affirmed in part sub nom. Spagnola v. Mathis, 859 F.2d at 229-30 & n.13. Equitable relief includes back pay only if it is “the very thing” to which the plaintiff is entitled. Hubbard v. Adm’r, EPA, 982 F.2d 531, 533-39 & n.4 (D.C. Cir. 1992) (en banc).
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\textsuperscript{230} Id. at 423. See discussion supra, pp. 14-16.
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1. The Justice Department’s concession

Citing the strong presumption against construing statutes to foreclose judicial review of constitutional claims and the heightened showing of congressional intent required to support such a conclusion, the Justice Department conceded in *Whitman* that the CSRA does not, “with the requisite clarity,” foreclose judicial review of constitutional claims for equitable relief.\(^{231}\) In the government’s brief on the merits submitted to the Supreme Court in *Whitman*, the Solicitor General, on behalf of the United States, abandoned preclusion arguments made in the lower courts.\(^{232}\) Acknowledging an entitlement to judicial review of such claims, the government confined its arguments to the issues of the appropriate forum and the appropriate point for such review.\(^{233}\) This concession was later repeated in the government’s brief\(^{234}\) and in oral argument by the government\(^{235}\) in other cases in the Ninth Circuit.

\(^{231}\) Brief for the Respondents on Writ of Certiorari at 47-48, *Whitman*.

\(^{232}\) See *Whitman*, 382 F.3d at 940, 941-44.

\(^{233}\) Brief for the Respondents on Writ of Certiorari at 48-49, *Whitman*. The issue of whether exhaustion of administrative remedies is required is discussed infra.

\(^{234}\) Brief for the Appellee at 28-34, AFGE v. Hawley, No. 05-15206 (9th Cir.), decided sub nom. AFGE v. Stone, 502 F.3d 1027 (9th Cir. 2007).

\(^{235}\) See *Stanley v. Gonzales*, 476 F.3d 653, 657 n.4 (9th Cir. 2007) (noting the government’s shift in position at argument to contend that the CSRA does not preclude review of colorable equitable constitutional claims).
2. The stance of the circuit courts

Notwithstanding that concession, reviewing courts determine jurisdictional issues for themselves.236 This issue may therefore continue to fester in the lower courts. At this point, the courts are divided. Two circuits have squarely held that Congress did not limit the courts’ equitable jurisdiction when it enacted the CSRA, and another has indicated its agreement with their reasoning. One circuit has held to the contrary—as that the CSRA precludes equitable relief. Three have declined to decide the issue, and four have dismissed claims for lack of jurisdiction but without explicit recognition of the principles involved.

The D.C. Circuit, in a long line of cases, has repeatedly affirmed the right of federal employees to seek equitable relief in vindication of their constitutional rights.237 It has rested its conclusion on the breadth of the courts’ inherent equitable powers and on the presumed availability of equitable relief for threatened invasions of constitutional

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236 See, e.g., Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 652 (1973) ("Parties, of course, cannot confer jurisdiction; only Congress can do so.").

interests. The Third Circuit has chosen to follow the D.C. Circuit, in a lengthy and well-considered decision by then-Judge Alito. Most recently, the Ninth Circuit has aligned itself with the “more persuasive” reasoning of the Third and D.C. Circuits, albeit in the context of the preclusive effect of a statute analogous to the CSRA.

Four other circuits--the First, Fourth, Seventh, and Eleventh--have acknowledged the conflict in the circuits but have not found it necessary to decide whether the CSRA limits a court’s equitable jurisdiction. The Seventh Circuit, however, explicitly acknowledged that “doubts” are to be resolved “in favor of judicial review.”

238 Hubbard v. EPA, 809 F.2d at 11.


240 AFGE Local 1 v. Stone, 502 F.3d 1027, 1038 (9th Cir. Sept. 5, 2007). The issue there was the preclusive effect of the Aviation and Transportation Security Act, 49 U.S.C. § 114(n), not the CSRA. The court nonetheless looked to the caselaw arising under the CSRA, an analogous statutory scheme, for guidance in resolving the question of whether employees may be precluded from seeking equitable relief for constitutional claims.

241 See Irizarry v. United States, 427 F.3d 76, 78-80 (1st Cir. 2005); Hardison v. Cohen, 375 F.3d 1262, 1267-68 (11th Cir. 2004); Paige v. Cisneros, 91 F.3d 40, 44 (7th Cir. 1996); Bryant v. Cheney, 924 F.2d 525, 528 (4th Cir. 1991). Earlier, in Perry v. Thomas, 849 F.2d 485 (11th Cir. 1988), the Eleventh Circuit had squarely held that the CSRA does not deprive federal courts of their traditional injunctive powers to protect constitutional rights.

242 Paige v. Cisneros, 91 F.3d at 44, citing Czerkies v. Dept. of Labor, 73 F.3d 1435 (7th Cir. 1996) (en banc) (holding that “door-closing” statutes do not close the door to colorable constitutional claim for equitable relief unless expressly provided by Congress).
Only the Second Circuit has squarely addressed the issue and concluded that the CSRA precludes equitable relief for constitutional claims, at least in the context of judicial branch employees.²⁴³ It aligned itself with what it saw, at the time, as the "majority view" in the circuits, based on its conclusion that Congress' intent to foreclose judicial review is "clear."²⁴⁴ The requisite clarity, the court stated, was evidenced by the integration of equitable relief, including reinstatement, into the CSRA's comprehensive statutory scheme.²⁴⁵

The circuit head count relied upon by the Second Circuit as representing the "majority view" is less clear than it claimed. Two of the cited circuits--the Fourth and Eleventh--have in fact expressed reservations on the issue, as noted supra, and the Ninth Circuit has now changed course.²⁴⁶ The Fifth and Tenth Circuit have similarly failed to accord


²⁴⁴ Id. at 180.

²⁴⁵ Id. at 181.

²⁴⁶ In AFGE v. Stone, the Ninth Circuit noted that it had previously suggested that employees might be precluded from seeking equitable relief as well as damages for constitutional violations. 502 F.3d at 1037, citing Saul v. United States, 928 F.2d at 843. It distinguished Saul because the employee there had alternative mechanisms to pursue his constitutional claims. Id. Moreover, although not discussed by the court in AFGE v. Stone, there is no discussion in Saul of the differences between equitable relief and damages.
appropriate weight to the differences between the causes of action.\textsuperscript{247} The Sixth Circuit’s stance is unclear.\textsuperscript{248}

The better view, it is submitted, is that of the D.C., Third and Ninth Circuits. As the Justice Department, on behalf of the United States, has now agreed, the extraordinarily high bar set by the Supreme Court in Webster v. Doe--a “heightened” showing of a “clear” congressional intent to preclude judicial review of constitutional claims for equitable relief--cannot be met in the context of the CSRA.\textsuperscript{249}

No party or court has ever argued that the CSRA contains language explicitly barring courts from exercising their traditional equitable jurisdiction.\textsuperscript{250} There is also nothing

\textsuperscript{247} Broadway v. Block, 694 F.2d 979, 986 (5th Cir. 1982); Lombardi v. Small Business Administration, 889 F.2d 959, 961-62 (10th Cir. 1989).

\textsuperscript{248} In Gilley v. United States, 649 F.2d 449 (6th Cir. 1981), where the plaintiff had alleged constitutional violations, the court found no indication in the CSRA to deprive a court of its traditional equitable powers. Subsequently, in Braun v. United States, 707 F.2d 922 (6th Cir. 1983), the court perfunctorily dismissed the claim for equitable relief under 5 U.S.C. 702, stating simply that this section did not provide a basis for jurisdiction or a waiver of sovereign immunity. Id. at 926-27. It is, however, now undisputed that the requisite basis for jurisdiction is found in 28 U.S.C. 1331 (see, e.g., Whitman, 126 S. Ct. at 2015), and that Section 702 does, in fact, waive sovereign immunity for suits not seeking damages. See, e.g., Hubbard, 809 F.2d at 11. The Sixth Circuit acknowledged the tension between Gilley and Braun in Ryon v. O’Neill, 894 F.3d 199 (6th Cir. 1990). In a case that did not involve constitutional claims, and without discussing whether jurisdiction would be appropriate in such a case, the court held that the CSRA’s language and structure precluded judicial review.

\textsuperscript{249} 486 U.S. at 603. See discussion supra, p.71.

\textsuperscript{250} To the contrary, as discussed supra, there is some affirmative evidence of a congressional intent to preserve employees’ pre-existing right to

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in the legislative history, the ostensible purpose of the CSRA, or the statutory language to indicate that Congress "weighed and balanced the competing concerns and afforded constitutional rights the sole protection they deserved."\(^{251}\)

The conclusion of certain circuits that Congress intended the CSRA procedures to bar judicial review of equitable claims for relief from constitutional violations is based on inferences drawn from the comprehensiveness of the statutory scheme or the adequacy of the remedies. This reliance on mere inferences offends fundamental constitutional principles.

3. **The necessity for judicial review of constitutional claims**

a. As discussed supra, a "serious constitutional question" would arise if a statute were construed to preclude all relief for violation of constitutional rights.\(^{252}\) The Constitution requires, at a minimum, that there be meaningful and adequate relief for constitutionally based injuries, if not "complete" relief.\(^{253}\) It is the responsibility of the judiciary to assure that remedies are available to vindicate

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obtain judicial remedies. Thus, the 1994 amendment to Section 7121(a)(1) clarified that it was only the availability of administrative review that was foreclosed if the matter could also be grieved--not judicial review.

\(^{251}\) See Wells, 90 Mich.L.Rev. at 2643.

\(^{252}\) Webster v. Doe, 486 U.S. at 603.

\(^{253}\) Cf. Schweiker v. Chilicky, 487 U.S. at 425 (in declining to extend *Bivens* remedy, the Court observed that Congress had provided "meaningful" remedies, although not "complete" relief).
those rights.\textsuperscript{254} Equitable relief, the traditional bastion of the judiciary founded on the Constitution itself, is the minimum relief that is constitutionally sufficient.

The remedies provided by the CSRA do not assure adequate or meaningful relief for many types of federal employee complaints with a constitutional basis. The CSRA does not provide any relief, let alone meaningful relief, to certain categories of federal employees or to employees facing certain forms of disciplinary action.\textsuperscript{255} Certain types of constitutional claims are not even cognizable under the CSRA’s scheme, aside from the grievance-arbitration process, and we have shown that this process is not uniformly available and is largely outside the employee’s control.\textsuperscript{256} If, for example, an employee declines to risk discipline for disobeyance of an unconstitutional drug-testing order, there will not be a “personnel action” that can be challenged.\textsuperscript{257} In addition,

\begin{footnotesize}
\textsuperscript{254} See Bush v. Lucas, 462 U.S. at 374 (citing the authority of the federal judiciary “to choose among available judicial remedies in order to vindicate constitutional rights”).

\textsuperscript{255} See Wells, 90 Mich.L.Rev. at 2629-2634, 2641 (summarizing gaps in CSRA protections).

\textsuperscript{256} See discussion supra of the union’s control over the grievance-arbitration process.

\textsuperscript{257} As pointed out in the briefs in Whitman, the petitioner was not subjected to discipline because he did not decline to take the allegedly unconstitutional drug tests. He thus could not challenge the tests before the MSPB. Brief of the Petitioner at 38-39, Whitman.
\end{footnotesize}
some types of orders do not constitute “prohibited personnel practices.”\textsuperscript{258}

Even where relief is available, it can be grossly inadequate. The inadequacy can stem from failures of the administrative process set up under the CSRA.\textsuperscript{259} But, even assuming that the administrative process functions as it should, various components of the administrative scheme enjoy broad and sometimes unreviewable discretion.\textsuperscript{260} If the “prosecuting body” exercises its discretion to proceed, the administrative adjudicator may not have the expertise to resolve constitutional questions.\textsuperscript{261} Furthermore, and most significantly, that decision may not ever be subject to direct

\textsuperscript{258} An order to refrain from speaking on a certain topic or to resign an elected nonpartisan office, for example, is not a “personnel action,” and therefore an agency does not commit a “prohibited personnel practice” by taking such an action. See discussion supra.

\textsuperscript{259} For example, many commentators have observed that the Office of Special Counsel, charged with protecting whistleblowers and employees subjected to prohibited personnel practices, has failed lamentably in its mission and provides ineffective protection to employees. See Wells, 90 Mich.L.Rev. at 2631-33, 2642, and authorities cited.

\textsuperscript{260} The Office of Special Counsel has prosecutorial discretion in deciding whether to pursue a prohibited personnel practice. 5 U.S.C. § 1214. The General Counsel of the FLRA also has unreviewable discretion in deciding whether to issue complaint on an unfair labor practice charge. 5 U.S.C. § 7104(f)(2)(B); Rizzitelli v. FLRA, 212 F.3d 710 (2d Cir. 2000) (decision of the General Counsel not to issue a complaint is judicially unreviewable). The refusal of a union to pursue a grievance to arbitration is subject to challenge only if it constitutes a breach of the union’s duty of fair representation. See discussion supra.

\textsuperscript{261} See Califano v. Sanders, 430 U.S. 99, 109 (1977) (“Constitutional questions are obviously unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.”). Arbitrators, of course, have even less expertise in resolving constitutional questions than members of administrative bodies.
Where judicial review is available, it may be at the discretion of a union that chooses not to pursue the matter, over the objection of the individual grievant. Absent a right to pursue an action in court for equitable relief, many individuals would have no protection from violation of basic constitutional rights.

b. Those challenging a right to seek judicial relief outside of the CSRA remedial scheme argue, first and foremost, that this would run contrary to Congress’ intent. But, as discussed, Congress made no findings explicitly indicating an intent to deprive the courts of their traditional equitable jurisdiction. As the government has now conceded, such an intent cannot plausibly be discerned--with the requisite clarity to satisfy constitutional concerns--from the statutory scheme itself.

The further argument, that maintaining access to the courts for this purpose would open the proverbial floodgates, is similarly unpersuasive. Even if true, that would not justify a denial of jurisdiction for constitutional claims. In any event, there is no evidence that the circuits that permit such claims have experienced a flood of litigation.

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262 As discussed supra, certain decisions of the MSPB or the FLRA are final and not subject to judicial review.

263 See supra, pp. 60-61.
Most employees will voluntarily choose to pursue their administrative options to avoid the expense of litigation.\textsuperscript{264} Those few who choose to seek judicial review of frivolous claims will find them quickly dismissed.\textsuperscript{265}

On the other hand, for those claims alleging serious violations of constitutional rights, access to the courts for relief is essential. It ensures that fundamental individual rights are protected from abusive action by supervisors or managers and, in so doing, it promotes the efficient and effective operation of the civil service.

\textbf{VI. APPROPRIATENESS OF AN EXHAUSTION REQUIREMENT AS A PREREQUISITE TO JUDICIAL REVIEW}

In \textit{Whitman}, the Justice Department argued to the Supreme Court that, even if the plaintiff could ultimately obtain judicial review of his constitutional claim, he was first required to exhaust administrative procedures under the CSRA.\textsuperscript{266} The Supreme Court itself questioned whether petitioner’s statutory claim was subject to an exhaustion

\textsuperscript{264} See discussion infra concerning the appropriateness of imposing an exhaustion requirement before permitting access to court for some or all claims.

\textsuperscript{265} See, e.g., Tiltti v. Weise, 155 F.3d 596, 602 (2d Cir. 1998) (finding complaint did not state a valid claim for violation of First Amendment rights); Bryant v. Cheney, 924 F.2d at 528-29 (employee lacked standing; noting claim also failed on the merits).

\textsuperscript{266} Brief of the Respondents on Writ of Certiorari at 33-49, \textit{Whitman}. As discussed infra, respondents argued that the petitioner was required to exhaust the grievance-arbitration process. Id. at 36, 39-44. It did not, however, identify a statutorily prescribed route for ultimate judicial review at the conclusion of that process.
requirement, directing supplemental briefing on the
applicability of Darby v. Cisneros, a case holding that
exhaustion of administrative remedies is not required in cases
brought under the APA. Ultimately, the Court did not decide
either of these issues. It directed the Ninth Circuit to
consider exhaustion issues on remand, which might obviate the
need to reach the “more difficult question of preclusion.”

This section of the article addresses the principles
underlying the exhaustion doctrine and discusses the types of
federal employee claims for which exhaustion is appropriate
and the types for which it is not. Relevant to this issue is
an analysis of adequacy of administrative remedies available
under the CSRA.

A. General Principles Underlying the Exhaustion Doctrine

The doctrine of exhaustion of administrative remedies
governs the timing of federal court review, not whether
judicial review is precluded entirely. The doctrines of
exhaustion and preclusion are analytically distinct, although

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268 126 S. Ct. at 2016.

they have been confused on occasion in the course of litigation of CSRA claims.\textsuperscript{270}

"Of 'paramount importance' to any exhaustion inquiry is congressional intent."\textsuperscript{271} Exhaustion is required if specifically mandated by Congress.\textsuperscript{272} Where there is no specific congressional mandate, exhaustion is a matter of "sound judicial discretion."\textsuperscript{273}

The exhaustion doctrine is designed to serve two purposes: protection of administrative agency authority and promotion of judicial efficiency.\textsuperscript{274} It is an appropriate exercise of judicial discretion where it preserves a remedial scheme drafted by Congress; gives agencies the opportunity to

\textsuperscript{270} In a number of cases, the courts have dismissed claims for failure to exhaust administrative remedies where they might more accurately have dismissed the claims as precluded by the CSRA's scheme. See, e.g., Ayrault v. Pena, 60 F.3d 346, 349 (7th Cir. 1995) (holding that the plaintiff's failure to exhaust administrative remedies waived a right to judicial review, where the plaintiff--a student trainee--had failed to challenge her removal under the CSRA's procedures); Andrade v. Lauer, 729 F.2d 1475, 1484-90 (D.C. Cir. 1984) (pre-Fausto case, holding that failure to exhaust administrative remedies barred employees from bringing personnel and statutory claims in court); Ghaly v. United States, 228 F. Supp. 2d 283 (S.D.N.Y. 2002) (holding that employee bringing whistleblower claims must exhaust administrative remedies); Perdeaux v. United States, 33 F. Supp. 2d 187, 189-90 (E.D.N.Y. 1999) (holding that failure to exhaust administrative remedies with OPM and OSC barred plaintiffs from bringing action to compel agencies to classify them as a higher grade).


\textsuperscript{272} Id.


\textsuperscript{274} McCarthy, 503 U.S. at 145.
correct their own mistakes or exercise discretion they have been granted by Congress; eases the burden on the judiciary by enabling the parties to develop the record in an administrative forum; and focuses the issues for judicial review or resolves the issues, thus eliminating the need for judicial review.\textsuperscript{275}

At the same time, the Supreme Court has cautioned that federal courts have a “virtually unflagging obligation” to exercise the jurisdiction given them.\textsuperscript{276} Where the interest of the individual in retaining prompt access to a federal judicial forum outweighs countervailing institutional interests favoring exhaustion, the courts should not require exhaustion.\textsuperscript{277} The Supreme Court has outlined three broad sets of circumstances in which the interests of the individual weigh “heavily” against requiring administrative exhaustion.\textsuperscript{278}

First, exhaustion is not required if the individual would suffer undue prejudice as a result. Prejudice can result from “an unreasonable or indefinite timeframe for administrative

\textsuperscript{275} Id.; Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984); Martin v. EPA, 271 F. Supp. 2d 38, 45 (D.D.C. 2002).


\textsuperscript{277} Id.

\textsuperscript{278} Id.
Moreover, even when the timeframe is otherwise reasonable or definite, the plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim. Second, exhaustion is not required if the administrative remedy is inadequate: because the agency lacks "institutional competence" to resolve the particular type of issue presented; because the challenge is to the adequacy of the administrative procedure itself; or because the agency lacks authority to grant the type of relief requested.

Finally, exhaustion is not required "where the administrative body is shown to be biased or has otherwise predetermined the issue before it." This includes instances where resort to administrative action would be a futile act because the deciding official had already taken a position rejecting the individual’s claim.

B. Exhaustion in the CSRA Context

No one has ever argued that there is explicit language in the CSRA mandating exhaustion of administrative remedies

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279 Id. at 146-47.
282 Id. at 148-49.
283 Id.
before access to court is permitted. The government has rested its exhaustion argument (confined to the only claims it concedes are not precluded—constitutional claims for equitable relief) on inferences drawn from the statutory scheme of the CSRA. It argues that an exhaustion requirement is a “pervasive and integral feature of the CSRA.” The courts that have imposed an exhaustion requirement similarly base it on inferences drawn from an “enormously complicated and subtle scheme” governing employee relations in the federal sector. This language, it is submitted, falls short of the necessary explicitness that “specifically mandates” exhaustion.

Notwithstanding the inferential basis for the exhaustion requirement, the D.C. Circuit has recently characterized the

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284 The CSRA does, of course, specify, either explicitly or through fair inference, an administrative review process for disciplinary or performance-based actions that may or may not culminate in judicial review at the appellate level. That process is the exclusive avenue for relief for such claims, and judicial review is precluded entirely if not provided by the CSRA. As discussed supra, n.270, that doctrine of preclusion is a distinctly different concept from the doctrine of exhaustion, in which judicial review is simply deferred and will be available in the district courts or Court of Federal Claims, at the completion of the administrative process.

285 Id. at 10.

286 Steadman, 918 F.2d at 967. See also Irizzary, 427 F.3d at 79. To the extent that a specific statutory provision is cited, it is 5 U.S.C. § 7121(a)(1), a provision that has since been amended. See Suzal, 32 F.3d at 587 (Williams, concurring); Andrade, 729 F.2d at 1485-86), discussed infra.

287 McCarthy, 503 U.S. at 144.
requirement as a “jurisdictional” prerequisite to suit.\textsuperscript{288}

That conclusion appears to be based primarily on an extension of \textit{Fausto}.\textsuperscript{289} We submit, however, that \textit{Fausto}’s conclusion that certain claims are precluded entirely does not compel the conclusion that exhaustion is a jurisdictional prerequisite for those claims that are not precluded. Indeed, even the D.C. Circuit has indicated that courts retain jurisdiction “when an administrative proceeding cannot adequately redress the alleged constitutional violation.”\textsuperscript{290} This recognition that the exhaustion requirement may be excused under certain circumstances indicates that the requirement is prudential, not jurisdictional.

\textbf{VII. EXHAUSTION OF ADMINISTRATIVE REMEDIES MAY NOT BE JUDICIALLY IMPOSED ON CLAIMS BROUGHT UNDER THE APA}

Certain types of claims historically brought under the APA to challenge arbitrary agency personnel actions are precluded entirely under the CSRA, as discussed supra. APA

\textsuperscript{288} See Weaver, 87 F.3d at 1433; Convertino v. U.S. Dept. of Justice, 393 F. Supp. 2d 42, 45-47 (D.D.C. 2005). Earlier, in \textit{Andrade}, the D.C. Circuit was careful to state that “the exhaustion requirement is not in general jurisdictional in nature.” 729 F.2d at 1484.

\textsuperscript{289} See Weaver, 87 F.3d at 1433, citing \textit{Fausto}. See also Suzal, 32 F.3d at 585-86 (Williams, concurring), relying on \textit{Fausto} to argue that exhaustion is a jurisdictional prerequisite. The majority in \textit{Weaver} and the concurrence in \textit{Suzal} also cite \textit{Steadman}, 918 F.2d at 966-68, in support. \textit{Weaver}, 87 F.3d at 1433; Suzal, 32 F.3d at 586-87. The cited discussion in \textit{Steadman}, however, did not address the jurisdictional nature of the exhaustion requirement specifically; instead, it focused on whether the FLRA had exclusive jurisdiction over the alleged unfair labor practice.

\textsuperscript{290} NTEU v. King, 961 F.2d at 243 (interpreting \textit{Steadman}).
claims that are not precluded—such as pre-enforcement challenges to the validity of agency rules or regulations or APA claims raising constitutional issues—may be brought directly in district court. For such claims, the Supreme Court has held that an exhaustion requirement cannot be judicially imposed.

In *Darby v. Cisneros*, a unanimous Supreme Court held that courts may impose an exhaustion prerequisite on claims brought under the APA only when expressly required by statute or when an agency rule required appeal before review and the agency action was made inoperative pending that review. As the Court reasoned, Congress had “effectively codified the doctrine of exhaustion of administrative remedies” in the APA itself, and therefore no further exhaustion requirement could be imposed as a matter of judicial discretion.

The critical issue, in the wake of *Darby*, is whether the CSRA “expressly” requires exhaustion of administrative remedies. The government in *Whitman* conceded that the CSRA does not “specifically address” the application of exhaustion principles to constitutional claims (the only claims under the

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292 Id. at 153-54.

293 Id.
APA that, in its view, are not precluded). Nevertheless, it argued that the CSRA clearly manifested a congressional intent to require exhaustion of such claims prior to judicial review.

Courts have applied Darby strictly, to require that the statute “specifically mandate” exhaustion, and that it do so in “explicit” language. Inferences drawn from a “comprehensive scheme” of another statute have been deemed insufficient.

No court, citing Darby, has held that an exhaustion requirement should be inferred from the CSRA scheme; those courts imposing a CSRA exhaustion requirement on APA claims have failed to consider Darby and are thus of questionable

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294 Supplemental Brief for the Respondents at 13, Whitman.

295 Id. at 11-15.


validity.\textsuperscript{299} The sounder view, it is submitted, is that an exhaustion requirement cannot be imposed on claims brought under the APA based on no more than inferences drawn from the CSRA’s scheme.

A contrary conclusion would have broad implications, not just for federal employees but for all litigants bringing claims that could arguably fall within a “comprehensive scheme.” As the Supreme Court pointed out in \textit{Darby}, the exhaustion requirement should be “unambiguous” so that aggrieved parties know “precisely” what administrative steps are required before judicial review is available.\textsuperscript{300} The APA is not intended to make exhaustion a “trap for unwary litigants.”\textsuperscript{301} Where, as here, the alleged exhaustion requirement is not clearly mandated by express language, it should not be inferred.

\textbf{VIII. IMPOSITION OF AN EXHAUSTION REQUIREMENT AS A MATTER OF JUDICIAL DISCRETION PRIOR TO LITIGATION OF CONSTITUTIONAL AND NON-APA STATUTORY CLAIMS}

Litigation over the imposition of an exhaustion requirement has centered primarily on the appropriateness of requiring exhaustion of administrative remedies before

\textsuperscript{299} \textit{E.g.}, Weaver, 87 F.3d at 1433; Steadman, 918 F.2d at 968. See also discussion \textit{supra}, regarding the bases for inferring an exhaustion requirement.

\textsuperscript{300} 509 U.S. at 146.

\textsuperscript{301} Id. at 147.
permitting litigants to bring constitutional claims in court. For the many claims alleging constitutionally arbitrary agency action brought under the APA, Darby precludes the imposition of such a requirement. For other claims brought directly under the Constitution as well as for non-APA statutory claims, we submit that judicial imposition of such a barrier to federal court is rarely a prudent exercise of judicial discretion.

A. Constitutional Claims Independent of a Claim Arising under the CSRA

No court has dismissed a constitutional claim on exhaustion grounds where the claim does not challenge a “personnel action” as defined in the CSRA\(^\text{302}\) or other CSRA-related employment action. To the contrary, the D.C. Circuit has held that exhaustion is not required where the complaint for declaratory and injunctive relief “stands independently” of a personnel action.\(^\text{303}\) Litigants may bring such actions as pre-enforcement attacks on regulations restricting speech, even if the litigant had also experienced a personnel action related to that claim.\(^\text{304}\)


\(^{303}\) Weaver, 87 F.3d at 1434. Accord, Steadman, 918 F.2d at 967 (direct access to federal court permitted in the “unusual case” in which the constitutional claim raises issues “totally unrelated to the CSRA procedures”).

B. Constitutional Claims Intertwined with Claims Arising under the CSRA

The D.C. Circuit requires exhaustion of constitutional claims intertwined with, or related to, an adverse personnel action or a claim that arises under the CSRA—provided that the CSRA remedy would be “fully effective” in remedying the constitutional violation.\textsuperscript{305} The First Circuit has recently followed suit.\textsuperscript{306} The Third Circuit, by contrast, has permitted litigation of a constitutional claim without discussing an exhaustion requirement.\textsuperscript{307}

This requirement is an appropriate exercise of judicial discretion, under McCarthy, only if the institutional interests favoring exhaustion outweigh the individual’s interest in obtaining prompt judicial review of his constitutional claims.\textsuperscript{308} The balance should weigh heavily in favor of the individual, it is submitted, when the claim alleges infringement of constitutional rights. We discuss

\textsuperscript{305} E.g., Weaver, 87 F.2d at 1433-34; Steadman, 918 F.2d at 967. See Nat. Federation of Fed. Employees v. Weinberger, 818 F.2d at 940-44 (rejecting an exhaustion argument for, among other reasons, the fact that “the administrative mechanism will leave many of the affected employees remediless”).

\textsuperscript{306} Irizarry v. United States, 427 F.3d 76 (1st Cir. 2005).

\textsuperscript{307} Mitchum v. Hurt, 73 F.3d 30 (3d Cir. 1995).

\textsuperscript{308} McCarthy, 503 U.S. at 146. As discussed supra, however, the D.C. Circuit has characterized the exhaustion requirement as a “jurisdictional” prerequisite to suit.
below the extent to which the available remedies comport with McCarthy’s requirements.

1. Exhaustion of administrative options before the OSC and MSPB

In most of the litigated cases, the court dismissed the complaint for failure to file a complaint with the Office of Special Counsel (OSC).\(^{309}\) OSC has statutory authority to investigate alleged violations of constitutional rights, when the violation takes the form of a “prohibited personnel practice.”\(^{310}\)

a. Adequacy of the remedies

Prohibited personnel practices include personnel actions alleged to violate any law, rule, or regulation implementing the merit system principles.\(^{311}\) Among the merit system principles is the requirement that all employees be treated with proper regard for their constitutional rights.\(^{312}\) OSC therefore has (nonexclusive) jurisdiction over some constitutional violations; it has no jurisdiction over


\(^{310}\) 5 U.S.C. § 1214.

\(^{311}\) 5 U.S.C. §§ 2302(a)(1) & (b)(11).

\(^{312}\) Id. at § 2301(b)(2).
constitutional violations if the affected employee was not subjected to a personnel action.\(^{313}\)

Under the CSRA, OSC is given up to 240 days to investigate a complaint of a prohibited personnel practice, with more time as agreed by OSC and the complainant.\(^{314}\) If, after review, OSC finds “reasonable grounds” to believe a prohibited practice has occurred, it must report its findings to the MSPB, the involved agency, and to OPM.\(^{315}\) If the agency fails to correct the action within an (unspecified) “reasonable” period of time, OSC may--but is not required to--seek corrective action before the MSPB.\(^{316}\)

There is thus no specified time frame for resolution of complaints filed with OSC. In addition, the office has unreviewable discretion in whether to proceed with the complaint at all. Citing these flaws,\(^{317}\) litigants have argued

\(^{313}\) See discussion supra, pp. 19-20, 77-79. See also Nat. Federation of Fed. Employees v. Weinberger, 818 F.2d at 940-41.

\(^{314}\) Id. § 1214(b)(2)(A)(ii). A complainant’s agreement to additional time is normally forthcoming when the alternative is a nonreviewable refusal to proceed with the complaint.

\(^{315}\) Id. § 1214(b)(2)(B).

\(^{316}\) Id. § 1214(b)(2)(C).

\(^{317}\) Litigants have also claimed that recourse to OSC is a futile exercise, citing the notorious shortcomings of the office for much of its existence. See, e.g., Supplemental Brief for the National Treasury Employees Union as Amicus Curiae in Support of Appellant at 3-6, Weaver v. U.S. Information Agency, 87 F.3d 1429 (D.C. Cir. 1996) (No. 94-5406). See also n.259. The courts have ignored these arguments, perhaps from a reluctance to give judicial notice to relatively anecdotal litigant complaints.
that recourse to OSC does not provide an effective remedy. The D.C. Circuit has dismissed the complaints of delay, however, as “no more than the normal concomitant of an exhaustion requirement.”\(^{318}\) It has acknowledged that OSC’s discretion to act “adds an element of uncertainty that is distinct from the ordinary vicissitudes of agency proceedings[].”\(^{319}\) Nevertheless, because “Congress evidently thought [this process] adequate” and because judicial review is only postponed, not eliminated, the court deemed the procedure adequate.\(^{320}\)

It bears noting that the process that Congress “evidently thought” adequate was a process designed for “relatively minor” wrongs.\(^{321}\) Relegating issues of constitutional magnitude to a body with unreviewable discretion should give a court greater pause.

\(^{318}\) Weaver, 87 F.3d at 1434.

\(^{319}\) Id.

\(^{320}\) Weaver, 87 F.3d at 1434. Accord, Irizarry v. United States, 427 F.3d at 79-80. As an additional reason for finding the OSC processes adequate, a district court has observed that the D.C. Circuit had earlier held that “OSC cannot conduct, under the guise of an exercise of discretion, either an entirely inadequate inquiry or none at all.” Perdeaux v. United States, 33 F. Supp. 2d at 192, quoting Barnhart v. Devine, 771 F.2d 1515, 1525 (D.C. Cir. 1985). Limited judicial review is available to determine whether OSC has complied with its statutory obligations. Barnhart, 771 F.2d at 1535, citing Carducci v. Regan, 714 F.2d at 175.

\(^{321}\) Weaver, 87 F.3d at 1434.
b. Countervailing institutional interests

In approving an exhaustion requirement, the courts have evidently been influenced by the nature of the intertwined statutory claim. The statutory claims, of a nature easily resolved through the CSRA procedures, have included a failure to promote\(^\text{322}\); a discriminatory transfer\(^\text{323}\); an oral admonishment\(^\text{324}\); and other personnel actions.\(^\text{325}\) The constitutional claims, premised on the same set of facts, have often had a tinge of artful pleading, or a mere recasting of the same complaint in another guise. For example, the failure to promote was challenged as a deprivation of property without due process of law.\(^\text{326}\) In such cases, it is understandable why a court would view the exhaustion of administrative procedures as a means to resolve employment disputes without turning them into “federal cases,” thereby protecting agency authority and promoting judicial efficiency.\(^\text{327}\)

c. The appropriate balance

The balance to be struck between the competing interests is a difficult one in this context. On the one hand, the

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\(^{322}\) Perdeaux v. United States, 33 F. Supp. 2d at 188.

\(^{323}\) Irizarry v. United States, 427 F.3d at 77, 80.

\(^{324}\) Weaver, 87 F.3d at 1432.


\(^{326}\) Perdeaux v. United States, 33 F. Supp. 2d at 190-91.

\(^{327}\) Irizarry v. United States, 427 F.3d at 79.
constitutional claim may be virtually identical to a statutory claim well understood under the CSRA scheme. Under these circumstances, an exhaustion requirement might serve to resolve cases administratively, thereby reducing the demands on federal courts. On the other hand, the administrative process might not be “fully effective” in providing the necessary relief for a constitutional violation. Indeed, the administrative body might not have jurisdiction at all to address or remedy the alleged constitutional violation. The better course would seem to be for the courts to scrutinize more closely the adequacy of the administrative remedies for the particular constitutional violation alleged. They should freely exercise their discretion to resolve colorable constitutional claims before them without delay if the administrative body is not able to provide the relief requested or cannot do so in a timely fashion.

2. Exhaustion of proceedings before the FLRA

Relatively rarely, a court has imposed a requirement that the unfair labor practice (ULP) process be exhausted before a constitutional claim may be brought in court.\textsuperscript{328} That requirement is typically imposed where the alleged

\textsuperscript{328} See NTEU v. King, 961 F.2d at 243; Steadman, 918 F.2d at 967.
constitutional violation stems from the same facts as a pending ULP charge.\textsuperscript{329}

As with the OSC, the General Counsel of the FLRA has discretion as to whether to proceed in the case, and a determination not to proceed is not judicially reviewable.\textsuperscript{330} In deciding whether to issue a complaint on the allegations in the charge, the General Counsel operates under no external time constraints.\textsuperscript{331} If complaint is issued, it is adjudicated by the FLRA, albeit again under no externally imposed time frame.\textsuperscript{332} Thus, the process shares some of the same flaws involving discretion and delay as shown in the OSC review mechanism.

In recognition of the potential for delay, the D.C. Circuit took steps in one case to assure that the complaining union would not suffer irreparable harm though exhaustion of the FLRA’s processes.\textsuperscript{333} The compromise remedy it devised, discussed infra, reflected the court’s “keen interest” in balancing the competing institutional interests fostered by an

\textsuperscript{329} NTEU v. King, 961 F.2d at 243.

\textsuperscript{330} See, e.g., Rizzitelli v. FLRA, 212 F.3d 710 (2d Cir. 2000) (decision of FLRA General Counsel not to issue complaint is not judicially reviewable); Patent Office Professional Ass’n v. FLRA, 128 F.3d 751, 753 (D.C. Cir. 1997), cert. denied, 523 U.S. 1006 (1998) (same).

\textsuperscript{331} 5 U.S.C. § 7104(f)(2)(A), (B).


\textsuperscript{333} NTEU v. King, 961 F.2d at 244-45.
exhaustion requirement against the interest of the union plaintiff in obtaining timely judicial review of its First Amendment claims.\textsuperscript{334}

Similar judicial attention to the competing interests, it is asserted, is necessary where the administrative process might not afford a fully effective remedy for the constitutional claims.

3. Exhaustion of the grievance-arbitration process

Certain types of constitutional claims may not be brought before any administrative body under the CSRA’s remedial scheme. Facial challenges to the constitutionality of drug testing programs or to agency policies restricting First Amendment rights, for example, do not involve a prohibited personnel practice or an unfair labor practice and are therefore not cognizable under the CSRA’s administrative procedures.\textsuperscript{335} The government has nevertheless pressed exhaustion arguments even for these claims, arguing that the negotiated grievance-arbitration process must first be exhausted before judicial review may be sought.\textsuperscript{336}

\textsuperscript{334} Id. at 245.

\textsuperscript{335} See nn. 257, 258, supra.

\textsuperscript{336} See, e.g., Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint for Lack of Subject Matter Jurisdiction or, in the Alternative, for Summary Judgment at 8–14, Ramirez v. U.S. Customs and Border Protection (D.D.C. Civil Action No. 1:07-65) (arguing exhaustion of the grievance-arbitration process required for First Amendment claim brought directly under the Constitution and under the APA). See also Brief for the
In making this argument, the government has relied on inferences drawn from the CSRA’s scheme, in absence of any explicit language mandating exhaustion. It has also struggled to identify the court in which the “properly exhausted” claim may be brought.\(^{337}\) Its argument, as we show, is ill-conceived and supported by little precedent.\(^{338}\) Those few cases that exist are unpersuasive, as shown infra.

\textbf{a. The amendment to 5 U.S.C. § 7121(a)(1) strongly suggests congressional rejection of a requirement that the grievance-arbitration process be exhausted}

The exhaustion requirement imposed in the D.C. Circuit was premised in large part on a statutory provision establishing the grievance-arbitration process as the “exclusive procedures” for resolving grievances that fall

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\(^{337}\) Brief for the Respondents at 33, 45, Whitman. The government argued to the Supreme Court that the structure of the CSRA “strongly favors” review in the courts of appeals but acknowledged that the judicial review provisions regarding FLRA decisions generally excludes arbitrated claims, even when they involve constitutional claims. Id. at 48. Such a course, the government tacitly admitted, would require a judicial re-writing of the statutory review language. Id. at 48-49. It termed the alternative of district court review “perhaps more straight-forward” but found it “difficult to reconcile with the structure of the CSRA.” Id. at 49. If review were to be had in the district courts, it argued for review limited to the agency record rather than review de novo. Id. at 49 n.20. This tortured analysis highlights the strained and unpersuasive nature of the government’s argument.

within the scope of that process.\textsuperscript{339} As discussed at length supra, that statutory provision, 5 U.S.C. § 7121(a)(1), was subsequently amended to state that the grievance-arbitration process is only the exclusive administrative process. This amendment, while designed to reject prior caselaw precluding access to the courts, also signaled Congress’ general intent that the grievance-arbitration process not affect employees’ right to judicial review. It would be inconsistent with this express statutory language to impose the grievance-arbitration process as a barrier to the judicial process.

In any event, to the extent that the D.C. Circuit’s requirement of exhaustion of the grievance-arbitration process was based on now-amended language of the CSRA, the soundness of those decisions must be questioned. Similarly subject to question is reasoning relying on language in a collective bargaining agreement that merely mirrors the former statutory language.\textsuperscript{340} Even assuming that the CSRA ever manifested a

\textsuperscript{339} Suzal, 32 F.3d at 587 (Williams, concurring) ("[A]t a minimum § 7121(a)(1) must impose an exhaustion requirement: Congress plainly did not want employees to take their grievances straight to court when they could have pursued the negotiated grievance procedure instead."); Andrade, 729 F.2d at 1485-86 ("Congress has mandated that collective bargaining agreements contain provisions establishing this kind of grievance procedure as an exclusive remedy [in such cases!]")(emphasis in original).

\textsuperscript{340} Suzal, 32 F.3d at 583 (citing language in the collective bargaining agreement that parroted the statutory language in making recourse to the negotiated grievance procedure “mandatory”). It is a common practice for collective bargaining agreements to incorporate verbatim key statutory provisions, in order to provide employees and stewards with comprehensive guidance in the workplace.
congressional intent to make recourse to the grievance-arbitration process mandatory, that intent no longer exists.

b. **Reliance on a grievance-arbitration clause to postpone judicial review is contrary to public policy and does not provide an adequate remedy for constitutional claims**

Requiring exhaustion of procedures negotiated by the collective bargaining representative before permitting access to federal court also runs afoul of the principle set forth supra, that a union may not prospectively waive an individual’s right to judicial review, in favor of arbitration. Individuals have a right to judicial review of their constitutionally based claims. Just as the courts have found that it is contrary to public policy to permit a union to supplant an individual’s right to judicial review, so too should it be contrary to public policy to require the individual to exhaust the arbitration process.

Should an exhaustion requirement be imposed, then an individual could forfeit his or her right to judicial review by failing to follow one of the union-negotiated steps in the grievance-arbitration process. Further, the process, while well suited to resolution of many workplace disputes, contains numerous characteristics that make it a poor candidate for an exhaustion requirement.

341 See discussion supra, pp. 61-62 and nn. 202, 203.
First, as in the McCarthy internal grievance procedure, the typical negotiated grievance procedure has “short, successive filing deadlines that create a high risk of forfeiture of a claim for failure to comply.” As such, they pose a “likely trap” for the unwary, whose numbers include employees who have chosen not to be union members and who might not readily seek union assistance in filing a grievance.

Second, the Court found it relevant in McCarthy that the prison authorities who would resolve the grievance had no “special expertise” on the type of issue presented for resolution in that case. Similarly, neither an arbitrator nor the reviewing FLRA brings any particular expertise to bear on constitutional claims. While they have developed expertise in the context of federal personnel regulations and the CSRA, that expertise does not necessarily translate to expertise on constitutional matters.

342 503 U.S. at 152. In addition, as noted supra, it is not yet settled that the statutory time limits for filing a claim prevail over the short contractual time frames for initiating a grievance.

343 Id. at 155.

344 See Andrade, 729 F.2d at 1491 (observing that the bodies involved in the grievance procedure do not have “expertise that would be particularly useful” in resolving constitutional questions). In addition, most unions do not provide attorneys to represent grievants in the arbitration process.

345 See id. at 1487, 1489 (requiring exhaustion of personnel claims and statutory claims that mirror personnel claims, to enable arbitrator and FLRA to “apply their expertise and develop consistent policies in dealing with federal personnel regulations and statutes”); Suzal, 32 F.3d at 584-85 (citing the expertise of the labor arbitrator in resolving “labor
Third, the *McCarthy* Court observed that the grievance process at issue there did not create a formal factual record, with fact-findings that could be useful to a reviewing court.\(^{346}\) The same is true of the negotiated grievance procedure, at least the first stages that are within the employee’s control. While an arbitrator may (but is not necessarily required to) make fact findings in cases that proceed to arbitration,\(^{347}\) an individual employee has no power to invoke arbitration on his or her claim. That power rests exclusively with the union.

The role of the union is a significant additional factor not at issue in *McCarthy*, which addressed only an internal administrative process set up by the Bureau of Prisons.\(^{348}\) The arbitration process, including the rare instance of judicial review of the arbitral award, is under the union’s control.\(^{349}\)

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\(^{346}\) 503 U.S. at 155-56.

\(^{347}\) See discussion supra, pp. 58-62, of the nature of the arbitration process.

\(^{348}\) As such, it is akin to the abbreviated agency administrative grievance procedure in the federal sector. Such a truncated process, entirely in the control of the agency, offers virtually no protection to employees. Exhaustion of claims through this process serves no more useful purpose than the process found inadequate in *McCarthy*.

\(^{349}\) As discussed, decisions by arbitrators on claims for which the CSRA scheme is not the exclusive avenue for relief are rarely subject to judicial review. The FLRA’s review on exceptions to arbitral awards is final unless the matter involves an unfair labor practice; only then may the union—and only the union—seek judicial review.
As discussed supra, the legitimate interests of the union may not be aligned with those of the individual grievant, and the union may choose, for any number of valid reasons, not to invoke arbitration or to file exceptions from an adverse arbitral award. Thus, it is unclear what steps of the grievance-arbitration process are to be exhausted and how that is to be accomplished, if the union declines to pursue the matter.

As discussed above, the D.C. Circuit stipulates that the administrative remedy must be "fully effective" before imposing an exhaustion requirement on constitutional claims. This article questions whether a grievance-arbitration process can provide "fully effective" relief where the scope of the

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350 The impact of these realities is illustrated in Fernandez v. Chertoff, 2006 U.S. App. LEXIS 29856 (2d Cir. 2006), where the issue was whether equitable considerations excused the employee’s failure to exhaust his administrative remedies by not appealing his grievance to the EEOC. The equitable considerations included the fact that the union withdrew the arbitration after the employee rejected a proposed settlement affording full relief. Id. at *32, *8-9. The court noted that only parties to a collective bargaining agreement may pursue binding arbitration and, therefore, that the employee was unable to obtain a "final decision" that could be appealed to the EEOC. Id. at *32. The court directed the district court on remand to consider whether the failure to exhaust should be excused. Relevant considerations included the role the employee was entitled to play in the negotiated grievance process, the absence of a final decision by the arbitrator and its effect on the EEOC’s authority to grant relief, the reasonableness of the proposed settlement, and the reasonableness of the employee’s rejection of that settlement. Id. at *37.

351 Andrade, 729 F.2d at 1493. Accord, Steadman, 918 F.2d at 967. See also Suzal, 32 F.3d at 588 (concurring opinion). But see Weaver, 87 F.3d at 1433-34 (requiring exhaustion of constitutional claim intertwined with statutory claim even where relief through pursuit of administrative remedy was uncertain). The admonishment at issue in Weaver could not have been grieved; the administrative remedy discussed in that case was the filing of a complaint with the Office of Special Counsel. Id. at 1432-33.
grievance procedure and its stages are designed by each individual agency and union; it can be abandoned at any point by the union for any nonarbitrary or nondiscriminatory reason; and if pursued, it typically culminates in review by the FLRA, an agency with specialized and limited expertise.

C. **Statutory Claims Brought under Statutes other than the CSRA or the APA**

There is virtually no jurisprudence on the appropriateness of imposing an exhaustion requirement on litigants seeking to bring claims under money-mandating statutes such as the FLSA or other statutes providing a cause of action separate and apart from the CSRA or the APA. As noted, the government has largely confined its arguments to date to arguing that such claims are precluded entirely. We suspect that may change. When the government’s preclusion arguments prove unsuccessful, past experience in the context of constitutional claims suggests that the government may decide to switch its focus from preclusion to exhaustion.

The only potentially available administrative forum for such claims would be the negotiated grievance-arbitration process or an internal agency grievance process that does not exhaust prior to obtaining court review of claims under independent statutory bases for jurisdiction. We are aware of only one that has required exhaustion of an internal agency process. See Bailey v. United States, 52 Fed. Cl. 105, 114-15 (2002) (accepting the government’s argument that non-union plaintiffs should be required to exhaust of agency grievance procedure before bringing claim for reimbursement of travel expenses).
culminate in arbitration.\textsuperscript{353} Thus, the government would be arguing that employees, including nonmembers of a union and perhaps even employees with no union representation at all, would be required to exhaust a grievance process as a prerequisite to availing themselves of their statutory causes of action. As discussed, this makes little practical sense, even aside from the fundamental questions of fairness and adequacy of the remedy.

We have shown that there is very little that an individual employee can exhaust, without the union’s cooperation, under the negotiated grievance procedure: only the initial filing of the grievance and the first steps of the process. This, like the agency grievance procedure, leads simply to an internal agency decision. That decision would serve--at best--only one of the two purposes for which the exhaustion doctrine is designed.

It is at least conceivable that agencies would use this opportunity to correct their own mistakes. That possibility is, however, remote. The decision-maker is typically a

\textsuperscript{353} In addition to internal agency grievance processes, OPM has established an optional claims procedure for pay claims generally (5 C.F.R. Part 178) and for FLSA claims specifically. 5 C.F.R. § 551.703. OPM determinations on such claims are final and unreviewable. 5 C.F.R. § 178.104(c); 5 C.F.R. § 551.708. The governing OPM regulations themselves make it clear that they were not intended to limit the rights of employees to bring an actions in district court. 5 C.F.R. § 178.107(b); 5 C.F.R. § 551.703. The regulations also provide that filing a claim with OPM or through an internal agency grievance procedure does not toll the statute of limitations for filing an FLSA complaint in federal court. 5 C.F.R. § 551.703.
relatively low-level agency official, who is unlikely to have any more expertise in the statutory issues raised in the grievance than in the constitutional issues discussed above; he or she may not even have the authority to provide the remedy sought. Moreover, it is our experience that agencies do not devote the resources to addressing issues seriously until forced to do so at the arbitration stage.

It is highly unlikely that the agency decision rendered at this juncture would serve the other purpose of the exhaustion doctrine: the promotion of judicial efficiency. Unless the agency grants the grievance, there will be no conservation of judicial resources. The administrative decision is not going to facilitate judicial review of the claim. These decisions are normally perfunctory; there is no requirement that they meet any standards, include any reasoning, or be based on any fact-findings. Thus, there will not be a “record” developed or a focusing of the issues that could assist the court in its decision-making.

The value of the administrative process increases, of course, if the employee is represented by a union that chooses

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354 In Whitman, for example, the two steps of the negotiated grievance procedure within petitioner’s control were an informal discussion between the employee and his supervisor and then a decision by a “facility manager” or his designee. Reply Brief for the Petitioner at 12-13 n.6, Whitman; Supplemental Brief for the Petitioner at 7-8, Whitman. Because the statutory claim at issue there, like the constitutional claim, addressed nonrandom drug testing mandated by higher levels within the agency, the facility manager had no authority to stop the drug testing.
to take the grievance to arbitration. An arbitrator, as a neutral decision-maker, is more likely than an agency official to issue an award that provides meaningful relief to the employee. The pendency of an arbitration does serve to attract the attention of agency counsel, and settlement becomes a possibility. In addition, the union representative may be able to clarify the statutory issues for agency counsel and the arbitrator.\textsuperscript{355} For these reasons, parties may well voluntarily choose to pursue some statutory claims through the grievance-arbitration process. That does not mean, however, that an individual should be \textit{required} to exhaust that process before proceeding to court on a statutory claim.

The same aspects of the grievance-arbitration process that counsel against requiring its exhaustion in the constitutional context weigh strongly against its imposition in the statutory context. An individual should not be required to exhaust a process that is largely outside that individual’s control. Moreover, the process itself, with its short time frames for filing and pursuing the grievance, raises to unacceptable levels the likelihood that rights could be forfeited through inadvertence. Finally, many statutory

\textsuperscript{355} Statutory issues vary in complexity and in the frequency with which they arise in the employment context. Also, as noted supra, most unions do not provide attorneys to represent grievants in arbitrations. Thus, the statutory issues may not be briefed fully and effectively.
issues--like constitutional issues--fall outside the competence of the arbitrator or the representatives.

As the Supreme Court taught in McCarthy, prejudice to the individual stemming from the nature of the administrative process weighs “heavily” against the imposition of an exhaustion requirement. There can be no doubt that individuals would be prejudiced if they were forced to exhaust the grievance-arbitration process before they were able to take their statutory claims to court.

D. Constitutional and Statutory Claims Citing Irreparable Harm

Finally, McCarthy teaches that courts should decline to require exhaustion of administrative remedies with respect to any claim--constitutional or statutory--when a plaintiff could suffer irreparable harm if unable to secure immediate judicial consideration of his or her claim. In applying this principle, the courts examine whether the administrative body

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356 503 U.S. at 146. McCarthy arose in the context of a constitutional claim for money damages. The Court, however, did not confine its analysis of the exhaustion doctrine to litigation of constitutional claims. While the weight of the individual’s interest, which is to be balanced against the institutional interests at stake, might arguably be less in the context of a statutory claim, the analytical framework remains the same, as do the identified deficiencies of the grievance procedure.

357 503 U.S. at 147. Even where there is an explicit statutory exhaustion requirement, the courts retain an “inherent equitable power” to issue injunctions maintaining the status quo to “prevent irreparable injury pending exhaustion of administrative remedies.” Jackson v. District of Columbia, 254 F.3d 262, 268 (D.C. Cir. 2001). That inherent equitable power can only be trumped by statutory language that “expressly forecloses” its exercise. Id.
is capable of granting the relief requested before irreparable injury occurs.\textsuperscript{358}

One commonly cited reason for waiving an exhaustion requirement is the delay anticipated in the administrative forum. Delay is, unfortunately, the norm, rather than the exception, in the administrative process. In one case, the court imposed some safeguards to assure that a lower court could act if the administrative agency--the FLRA--failed to issue a timely order to alleviate or remedy a union's alleged First Amendment injuries.\textsuperscript{359} It directed that the case be maintained on the district court docket for three months or until the FLRA reached a final decision, whichever was earlier. It further provided that the union could renew its motion for injunctive relief if the FLRA had not acted within the three months. This "compromise," the court stated, reflected its "keen interest" in balancing "the need for the administrative proceeding to complete its course against the possible irreparable loss that the \[union\] will suffer if its constitutional claim is ultimately vindicated but the

\textsuperscript{358} See Nat. Federation of Fed. Employees v. Weinberger, 818 F.2d at 940; Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 740 (D.C. Cir. 1987); Andrade, 729 F.2d at 1489-90.

\textsuperscript{359} NTEU v. King, 961 F.2d at 244-45. Cf. Weaver, 87 F.3d at 1434 (imposing exhaustion requirement despite claim of "possible delays" by the OSC, citing the statutory deadline for OSC action as well as the "normal concomitant of an exhaustion requirement").
proceeding has taken so long that the purpose for its free
speech exercise has been practically eliminated.\textsuperscript{360}

The courts have been less receptive to the argument that
an exhaustion requirement should be waived simply because an
agency cannot provide injunctive relief to remedy the alleged
harm.\textsuperscript{361} One court observed that the CSRA provides a procedure
for obtaining a stay, which--like injunctive relief--could
prevent the employer from taking action before the
administrative body had the opportunity to determine whether
that action violated the CSRA.\textsuperscript{362} That stay procedure is,
however, dependent upon the OSC’s exercise of its discretion
to request a stay and the MSPB’s determination that it is not
inappropriate to grant one.\textsuperscript{363} A court might reach a different
conclusion if the alleged harm were more irreparable or the
rights undermined more fundamental; if the case did not
involve a personnel action and an alleged prohibited personnel
practice; or if the court were presented with evidence

\textsuperscript{360} Id. at 245.

\textsuperscript{361} Weaver, 87 F.3d at 1434; Martin v. U.S. EPA, 271 F. Supp. 2d at 45.


\textsuperscript{363} Under section 1214(b)(1)(A)(i), the Special Counsel may request a
member of the MSPB to order a stay of a personnel action for 45 days if
the Special Counsel “determines that there are reasonable grounds to
believe that the personnel action was taken, or is to be taken, as a
result of a prohibited personnel action.” That stay “shall” be ordered
“unless the member determines that, under the facts and circumstances
involved, such a stay would not be appropriate.” 5 U.S.C. §
1214(b)(1)(A)(ii).
demonstrating the ineffectiveness or unavailability, for all practical purposes, of the administrative remedy.

CONCLUSION

The abstract and relatively arcane principles of preclusion and exhaustion have had--and will continue to have, for the foreseeable future--concrete application when federal sector employees attempt to bring both constitutional and statutory claims in federal court. One can confidently expect continued vigorous litigation over the scope of CSRA preclusion, as government defendants persist in pressing preclusion claims, if no longer in the context of constitutional claims for equitable relief, then certainly in the context of a wide variety of statutory claims. And even in the former context, the war is not over; rather, the battleground has shifted to attempts to raise exhaustion of administrative remedies as the barrier to judicial review.

The issues of preclusion and exhaustion have not always been presented clearly to reviewing courts. Some cases, such as Whitman, are initially handled by pro se litigants; in some cases (Whitman again serving as an example), the issues are ill-framed and the government’s position evolves even during the course of appellate review.

The legal principles at stake--the fundamental right of access to judicial review of constitutional and statutory
claims--are worthy of more thoughtful analysis and resolution. To that end, this article examined the competing considerations with respect to the different types of statutory and constitutional claims and the various administrative fora available, in an effort to bring a more informed and nuanced approach to resolution of these issues.