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Jurisdictional Restraints on the Federal Labor Relations Authority: A Split in the Circuits

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JURISDICTIONAL RESTRAINTS ON THE
FEDERAL LABOR RELATIONS AUTHORITY: A
SPLIT IN THE CIRCUITS

I. INTRODUCTION

“Federal agencies and labor unions have long operated under collective bargaining laws that differ from private sector labor laws.” The statutory obligations of agencies and unions in the federal government are governed by Title VII of the Civil Service Reform Act of 1978 (“CSRA”), also known as the Federal Service Labor-Management Relations Statute (“FSLMRS”).

Congress created the Federal Labor Relations Authority (“FLRA” or “Authority”) to review and resolve arbitration disputes between federal agencies and their unions. Congress’s policy of deference to arbitration awards is evident in the provisions for appellate review of FLRA decisions. An FLRA decision reviewing an arbitration award becomes final and binding with no opportunity for judicial review unless the FLRA decision involves a statutory unfair labor practice.


3. See Powers, supra note 1, at 837.


5. See 5 U.S.C. § 7123(a)(1); see also United States Dep’t of the Interior v. FLRA, 26 F.3d 179, 184 (D.C. Cir. 1994) (holding that the FLRA’s order did not involve an unfair labor practice,
Despite the seemingly clear bar on judicial review, the D.C. Circuit has held that it can review an FLRA decision to determine whether the FLRA has exceeded its jurisdiction. The Ninth Circuit expressly disagreed with the D.C. Circuit's opinion. This split in the circuits has created a system whereby judicial review of the FLRA's decision to accept jurisdiction in a grievance is subject to review, if the appellant has access to the D.C. Circuit. This Note seeks to examine this circuit split and the conflicting policies behind it, and concludes that the judicial bar of FSLMRS precludes federal courts of appeals from the type of review that the D.C. Circuit advocates.

This Note begins with a brief background of the FLRA and the statutes that are at issue in the dispute. This is followed by a factual synopsis of the cases at issue. Next, the statute that created the FLRA, and grants it the power to adjudicate federal labor disputes, will be analyzed by considering both the plain meaning of the statute and its legislative history. Finally, an examination of the respective circuit's decisions and the policies behind them will be made.

II. BACKGROUND

The CSRA was enacted to provide the first comprehensive statutory scheme for the regulation of federal labor-management relations. Referred to as the FSLMRS, the enactment of Title VII signaled a sweeping change in federal labor relations. Prior to the enactment of...
CSRA, a system existed whereby federal employees had limited rights to engage in concerted activity. The FSLMRS states that "labor organizations and collective bargaining in the civil service are in the public interest," which strengthened the position of public employee unions while attempting to balance the country's need for an efficient government.

"The [FSLMRS] created a new and independent agency, the Federal Labor Relations Authority, to be primarily responsible for carrying out the purposes of Title VII [of the CSRA]." The FSLMRS invests the FLRA with both rulemaking and adjudicatory powers to "provide leadership in establishing policies and guidance relating to matters under this chapter." The FLRA's role in the public sector has been said to be analogous to that of the National Labor Relations Board ("NLRB") in regulating private sector labor relations.

The FLRA is composed of a three member, independent, bipartisan body within the Executive Branch, appointed by the President and subject to Senate confirmation. In order to fulfill its broad responsibilities, the FLRA delegates its authority to regional directors or administrative law judges. The FSLMRS provides that "any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability."
If either party is dissatisfied with the arbitration procedure, that party may seek review of the award by the FLRA. If the arbitrator’s decision is attacked ‘because it is contrary to any law, rule, or regulation,’ the Authority reviews the legal question de novo.” If the objection is not one of law, but of contract, the Authority’s role is limited to that of “federal courts in private sector labor-management relations.”

When the FLRA receives a request for review of a case, it either decides whether to grant the petition for review or sets a briefing schedule, and ultimately, issues a decision adjudicating the application.

Appellate jurisdiction of FLRA decisions is controlled by section 701 of the FSLMRS, which provides in relevant part:

Any person aggrieved by any final order of the Authority other than an order under-section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, . . . may . . . institute an action for judicial review of the Authority’s order in the United States court of appeals.

The key aspect of controversy that this Note will focus on, within the structure of federal labor relations, is the United States Court of Ap-
peal’s jurisdiction to review FLRA decisions that do not involve an unfair labor practice.

III. FACTUAL SYNOPSIS AND OVERVIEW OF CUSTOMS AND TREASURY

The two cases at issue are factually similar, with only procedural distinctions, which will be discussed within this Note. The disputes centered around the Tariff Act, the federal customs law which required ships originating from a foreign port to make formal entry with United States customs officials before unloading any goods or passengers at a United States port. At the time of the controversy, formal entry was made by a ship’s master presenting various documents, such as the ship’s manifest, to customs officials at the port’s customhouse. Since the formal entry procedure can be time-consuming, and because ships often arrive when customhouses are closed, Congress also provided for “preliminary entry” to enable unloading prior to formal entry. When preliminary entry was requested, the Customs Service would arrange to have customs personnel available to meet the vessel and receive the manifest, after which cargo could be unloaded and stored pending formal entry. The preliminary entry system enabled customs agents to work a considerable amount of overtime, which was paid by the shipper.

In the D.C. Circuit case, United States Customs Service v. FLRA (Customs), the grievance arose in 1990 when the Southeast Region of the Customs Service adopted the Coastwise Advanced Preliminary En-


[N]o merchandise, passengers, or baggage shall be unladen from any vessel or vehicle arriving from a foreign port or place until entry of such vessel or report of the arrival of such vehicle has been made and a permit for the unlading of the same issued by the appropriate customs officer.

Id.

After the FLRA decided the case in United States Dep’t of Treasury, United States Customs Serv. v. National Treasury Employees Union, 46 F.L.R.A. No. 137 (1993), Congress amended § 1448(a) so as expressly to provide for preliminary entry through electronic communication. See Pub.L. No. 103-182, Title VI, § 656, 107 Stat. 2211 (1993); Customs, 43 F.3d at 686.

28. See Customs, 43 F.3d at 684.
29. A manifest is defined as an invoice of cargo for a ship. See Websters New Collegiate Dictionary 693 (1980).
31. See id.; Customs, 43 F.3d at 684.
32. See Customs, 43 F.3d at 684.
try program ("CAPE"). The program streamlined the preliminary entry process by using a technological innovation, which enabled incoming vessels to transmit manifests electronically. CAPE eliminated the physical transfer of manifests to waiting customs officials, which in turn, eliminated boarding as a routine aspect of preliminary entry. This consequence of the program resulted in a loss of overtime work assigned to customs agents, as they were no longer needed to meet incoming ships at odd times during the night.

The customs inspector's exclusive representative, the National Treasury Employees Union ("NTEU"), filed a grievance over the Customs Service implementation of the CAPE program. NTEU alleged that the implementation of CAPE violated a provision of the Tariff Act, which stated that a vessel could make entry to a port by presenting the manifest "to the customs officer who boards such vessel." This provision, NTEU alleged, required that vessel entry necessary to allow the unlading of cargo could only be effected by a customs inspector boarding the vessel. As CAPE eliminated this boarding requirement, the union claimed that the Customs Service had violated the Tariff Act. The arbitrator originally dismissed the union's complaint on the grounds that the Tariff Act was not, under the definition of a grievance in the

34. See Customs, 43 F.3d at 684.
35. See id.
36. See id.
37. See id.
38. The FSLMRS defines grievance in part as any complaint concerning "(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(C) (1994).
39. See Customs, 43 F.3d at 684.
41. Brief for Respondent at 2, United States Dep't of the Treasury, United States Customs Serv. v. FLRA, 43 F.3d 682 (D.C. Cir. 1994) (No. 93-1388). The Customs Service argued that there could not be review of their decision to use the CAPE program because it was essential that the Customs Service be able to assign work and to determine the agency's mission pursuant to 5 U.S.C. § 7106 (1994). See Brief for Petitioner at 2, United States Dep't of the Treasury, United States Customs Serv. v. FLRA, 43 F.3d 682 (D.C. Cir. 1994) (No. 93-1388); see also 5 U.S.C. § 7106 (1994) (setting forth the rights of management). This argument was summarily rejected in Customs. See Customs, 43 F.3d at 690.
42. See Customs, 43 F.3d at 685.
43. A direct consequence of the elimination of the boarding requirement was a "diminution in the amount of lucrative overtime work assigned to customs agents, who were no longer needed to meet arriving vessels at odd hours of the day or night." Id. at 684. The diminution of overtime work provided the motive for the union to file a grievance. See id.
44. See id.
FSLMRS, "a law ... affecting conditions of employment." The arbitrator reasoned that although CAPE could be thought of to "affect conditions of employment," every law-related action of the Agency has some impact on its employees. Therefore, the arbitrator ruled that a mere effect on employees was an insignificant connection to establish an arbitrable grievance; in order to constitute a grievance, a particular law, rule, or regulation must fall within the "zone of interest.

The NTEU appealed the arbitrator's decision to the FLRA, which has authority to review arbitration awards pursuant to the FSLMRS. In United States Customs Service v. National Treasury Employees Union, the FLRA determined that the arbitrator had too narrowly construed the term "grievance" and found that there were no definitional constraints on the available grounds for grievances under the FSLMRS, other than that the law in question "affects" conditions of employment in some way.

The FLRA remanded the case to the arbitrator who determined that under the FLRA's definition of grievance, the issue was an arbitrable dispute. Further, the arbitrator found that CAPE violated the Tariff Act by dispensing with the physical boarding of vessels by customs agents. The arbitrator awarded the relevant customs officials back pay for overtime which was lost due to the CAPE program.

The Customs Service appealed this decision to the FLRA. The FLRA found for the Union and upheld the arbitrator's award. Customs

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46. 5 U.S.C. § 7103(a)(9) (1994); Customs, 43 F.3d at 684.
47. Id. § 7103 (a)(9)(c)(ii); see Customs, 43 F.3d at 685.
48. See Customs, 43 F.3d 682, 683 (D.C. Cir. 1994).
49. See id. at 685. Whether a law falls within the "zone of interest" is determined by examining whether the law was intended to benefit the employees on whose behalf the grievance was brought. See id.
50. 5 U.S.C. § 7122(a) (1994); see supra note 21.
51. 43 F.L.R.A. No. 72 (1992). This was the FLRA's first review of the arbitrator's decision. The FLRA then remanded the case to the arbitrator with instructions. See Customs, 43 F.3d at 485-86. After the arbitrator held that the CAPE program was in violation of the Tariff Act, this case was once again appealed to the FLRA. See U.S. Dep't of Treasury v. National Treasury Employees Union, 46 F.L.R.A. No. 137 (1993).
53. See Customs, 43 F.3d at 685-86.
54. See id. at 686.
55. See id.
56. See id.
57. See id.
58. See Customs, 43 F.3d at 686.
Service then petitioned the District of Columbia Court of Appeals for review.

The D.C. Circuit held that the Court of Appeals had jurisdiction to review the case for the limited purpose of determining whether the FLRA exceeded its jurisdiction, despite the plain language of section 7123(a). Exercising this newly created limited right to review, the D.C. Circuit determined that the FLRA had exceeded its jurisdiction. The court concluded that the arbitrator "essentially got it right the first time" and found that the section of the Tariff Act did not fall under the definition of grievance as set forth in the FSLMRS.

The factual scenario in the Ninth Circuit case, National Treasury Employees Union v. FLRA (Treasury), is very similar to that in Customs, with the exception that the program at issue in Treasury, while the same substantive program as CAPE, was named the Radio Preliminary Entry program ("RPE").

Procedurally, however, the cases are not analogous. In Treasury, the arbitrator originally found for the NTEU and awarded back pay to the affected customs workers. The Customs Service filed exceptions to the arbitrator's decision with the FLRA. The FLRA found that NTEU's challenge to RPE was not arbitrable under the FSLMRS. Thus, in Treasury, the NTEU alleged that the FLRA had underreached by failing to find the jurisdiction over the relevant section of the Tariff Act. In Customs, however, the Customs Service lost at the FLRA level and argued that the FLRA had overreached by holding that the Tariff Act was arbitrable.

59. See id. at 690.
60. See id. at 690-91.
61. Id. at 691.
63. 5 USC § 7103(a)(9)(C) (1994); see Customs, 43 F.3d at 690.
64. 112 F.3d 402 (9th Cir. 1997).
65. See Treasury, 112 F.3d at 405.
66. See id. at 404.
67. See id.
68. 5 U.S.C. § 7103(a)(9)(C); see Treasury, 112 F.3d at 404. The FLRA held that National Treasury Employees Union's challenge to the RPE program was not arbitrable under 5 U.S.C. § 7103(a)(9)(C), which sets forth the possible grounds for a grievance. See Treasury, 112 F.3d at 404.
69. See Brief for Intervenor at 7, Treasury, 112 F.3d 402 (9th Cir. 1997) (No. 95-70714). "Under-reaching" is a term defined by the author as an adjudicatory body declining to assert jurisdiction, where such jurisdiction is proper.
70. See Customs, 43 F.3d at 686.
The Ninth Circuit dismissed the Union's suit for lack of jurisdiction. The court expressly rejected the D.C. Circuit's decision in *Customs* stating, "[w]e are not persuaded by the D.C. Circuit's opinion and therefore decline to follow it. The language of [section] 7123 is clear—judicial review of the FLRA's decision regarding an arbitrator's award is precluded unless it involves an unfair labor practice."72

This split in the circuits creates an asymmetrical scheme for the judicial review of federal arbitration cases.73 It is important for the judiciary to be uniform in deciding whether they can review the FLRA's decision that a grievance is arbitrable and hence within their jurisdiction. The disparate result of the two cases in the respective circuits will encourage federal agencies and unions, in want of judicial review, to shop their dispute to the D.C. Circuit for adjudication.

However, it is important to note that the D.C. Circuit does not claim that the Court of Appeals has jurisdiction over all FLRA decisions. It asserts that the Court of Appeals has the power to review only whether the FLRA exceeded its jurisdiction in reviewing a dispute.74 Thus, the D.C. Circuit decision ensures that the FLRA is not exercising unbridled power by deciding cases outside of the scope which Congress intended.

**IV. INTERPRETING THE STATUTE**

The main focus of the conflicting opinions between the two circuits was the jurisdictional issue, to wit, whether the FSLMRS precluded judicial review of decisions of the FLRA. It is well established that unless a grant of jurisdiction over a particular case affirmatively appears, a federal court is presumed to lack jurisdiction.75 It is, therefore, essential to examine the plain meaning of the relevant parts of the FSLMRS in order to help determine whether a grant of jurisdiction exists. The powers and duties of the FLRA are set forth in the FSLMRS which provides in pertinent part: "[t]he Authority shall . . . resolve exceptions to arbitra-

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71. See *Treasury*, 112 F.3d at 406.
72. Id.
73. See Brief for Respondent at 13, *Treasury*, 112 F.3d 402 (9th Cir. 1997) (No. 95-70714).
74. See *Customs*, 43 F.3d 682, 691 (D.C. Cir. 1994).
75. See General Atomic Co. v. United Nuclear Corp., 655 F.2d 968 (9th Cir. 1981) (holding that provisions of the Arbitration Act did not confer subject matter jurisdiction upon the federal district court to entertain applications for the confirmation of arbitration awards); *Treasury*, 112 F.3d at 403.
tor's awards under section 7122. Parties may assert exceptions to an arbitrator's award pursuant to the relevant section of the FSLMRS. After a grievance is decided by the FLRA, section 7123(a) of the FSLMRS precludes judicial review of the decision "unless the order involves an unfair labor practice."

The Ninth Circuit found that the FSLMRA clearly bans the judicial intervention of the Court of Appeals in decisions of the FLRA that do not involve an unfair labor practice allegation. The court stated:

The plain language of this section [5 U.S.C. § 7123(a)] makes it clear that a circuit court can review a final decision of the FLRA involving an arbitrator's award only if an unfair labor practice is involved. It is undisputed that the present case does not involve an unfair labor practice. Therefore, under the plain language of the statute, the FLRA's decision is unreviewable.

V. HISTORY OF THE D.C. CIRCUIT'S INTERPRETATION OF SECTION 7123

The seminal case in the D.C. Circuit which interpreted section 7123(a) was Overseas Education Association v. FLRA (OEA). In OEA, the D.C. Circuit's interpretation of the FSLMRS was seemingly consistent with other circuits around the country in precluding judicial review where there was no allegation of an unfair labor practice.

In Griffith v. FLRA, for the first time, the D.C. Circuit created a new type of jurisdiction over FLRA decisions that did not involve an unfair labor practice. Although the D.C. Circuit reiterated its position that judicial review of FLRA decisions was precluded, the court held...
that because there was no explicit preclusion to the review of constitutional claims, the court could review such claims.66

In Griffith, the appellant asserted that the FLRA’s disposition of her claim deprived her of “property” without due process, in violation of the Fifth Amendment.67 Although the court ruled against her, the D.C. Circuit held that it had jurisdiction to review the constitutional claim.68 The court stated, “[t]he maxim that congressional preclusion of judicial review must be ‘clear and convincing’ applies ‘in a particularly rigorous fashion,’ . . . when constitutional claims are at stake.”69 The Court decided that because neither the statute itself, nor the legislative history expressly precludes review of constitutional claims, the Court of Appeals has jurisdiction to review them.90

Although Griffith is a constitutional issue, and of much greater importance from a policy standpoint than the jurisdictional issue being discussed in this Note, the Griffith decision demonstrates a willingness of the D.C. Circuit to look beyond the FSLMRS’s blanket preclusion of judicial review, and to usurp jurisdiction to review a decision made by the FLRA.91

arbitral awards . . . . Congress could hardly have made its view on the matter clearer.

Id.

86. See id. at 494-95. The Court held, “[t]his silent deletion is not enough, under our cases, to support an inference of intent to preclude constitutional claims.” Id. at 495. This decision is well supported because of the separation of powers created by the Constitution. It would be undesirable to have an executive agency ruling on constitutional matters. However, an argument can be made, albeit a weak one, that Congress intended to have the FLRA decide collateral constitutional issues without judicial review. The conference committee dropped the provision which would have provided for the review of FLRA decisions arising under the Constitution. It could, therefore, be argued that because this clause was discussed and dropped, Congress intended constitutional claims to be decided by the FLRA. See House Conference Report on Civil Service Reform Act of 1978, H.R. Conf. Rep. No. 95-1777, at 153, reprinted in 1978 U.S.C.C.A.N. 2723, 2887.

87. See Griffith, 842 F.2d at 490. The property at issue was an interest in an annual withingrade pay increase.

88. See id.

89. Id. at 494; Bartlett v. Bowen, 816 F.2d 695, 699 (D.C. Cir. 1987). The Bartlett court stated:

It is axiomatic that this presumption [of judicial review of administrative action] can be overcome only by “clear and convincing evidence” that Congress intended to restrict access to judicial review. . . . Courts have applied this “clear and convincing” standard in a particularly rigorous fashion when constitutional rights form the basis of the action over which judicial action is sought.

Id.

90. See Griffith, 842 F.2d at 494.

91. The Ninth Circuit has yet to address the issue decided in Griffith, specifically, whether the court of appeals has the authority to review an FLRA decision involving a constitutional claim.
VI. LEGISLATIVE HISTORY OF THE FSLMRS

The legislative history of the FSLMRS\(^2\) supports the nearly unanimous interpretation of the United States Court of Appeals, with the exception of the D.C. Circuit, in precluding the judicial review of FLRA decisions that do not involve an unfair labor practice or a constitutional issue. The House Report states:

"[T]here will be no judicial review of the Authority's action on those arbitrators awards in grievance cases which are appealable to the Authority. The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector. In light of the limited nature of the Authority's review, the conferees determined it would be inappropriate for there to be subsequent review by the court of appeals in such matters."\(^9\)

Further, the Congress specified in the FSLMRS that the FLRA was to review arbitrator's decisions on grounds "similar to those applied by federal courts in private sector labor-management relations."\(^9\) Congress thus appears to have intended that the FLRA would perform the same role assigned to district courts in private sector labor law.\(^9\)

In the private sector, the Supreme Court has exalted the role of the arbitrator in labor-management disputes and set forth a general policy of judicial deference to the decisions of arbitrators.\(^9\) This analogy to private sector labor relations is further evidence of Congress's intent to keep the judiciary out of arbitration rulings. The traditional approach to the judicial review of FLRA decisions may be summed up by a quote from the D.C. Circuit in Griffith,\(^9\) where the court, in referring to the availability of judicial review for a non-constitutional claim stated,

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95. See Griffith, 842 F.2d at 491.
96. See id. at 492; see also United Steelworkers v. American Mfg., 363 U.S. 564, 568 (1960) (stating that "[t]he courts ... have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim"); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).
“[w]e find unusually clear congressional intent generally to foreclose review.”\textsuperscript{98}

In \textit{Customs}, the D.C. Circuit altered its position in order to review whether the FLRA had exceeded its jurisdiction by ruling on a grievance.\textsuperscript{99} This change in position was based on policy judgments, whereby the court called the entire structure of the FLRA into question.\textsuperscript{100}

The United States Supreme Court has stated that access to judicial review should be limited “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent.”\textsuperscript{101} This presumption of judicial review is determined “not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.”\textsuperscript{102} The D.C. Circuit’s argument for judicial review ignores both the plain meaning and legislative history of the statute and instead uses the structure and policies behind the FSLMRS to justify their review. Although the D.C. Circuit’s view has not garnered support, the opinion has essentially created a new issue by calling into question whether the legislature intended to confer upon the FLRA this relatively large power. It is this discussion of policy that is at the heart of these two conflicting opinions.

\section*{VI. An Independent Analysis of Customs}

In \textit{Griffith}, the Court of Appeals for the D.C. Circuit concluded that the jurisdictional bar of the FSLMRS\textsuperscript{103} precludes the review of FLRA rulings that do not include an unfair labor practice charge or a constitutional claim.\textsuperscript{104} However, the court in \textit{Customs} created a new, third category of FLRA rulings that are subject to judicial review.\textsuperscript{105}

The court, reflecting on the lack of limitations on the FLRA, framed the central issue of the case as follows:

\begin{footnotesize}
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\item \textsuperscript{98} \textit{Id.} at 490.
\item \textsuperscript{99} \textit{See Customs}, 43 F.3d 682 (D.C. Cir. 1994).
\item \textsuperscript{100} \textit{See id.} at 689-90.
\item \textsuperscript{101} \textit{Lindahl v. OPM}, 470 U.S. 769, 779, 791 (1985) (holding that while the “factual underpinnings” of the statute in question may not be judicially reviewed, such review is available to determine whether there were errors of law or procedure).
\item \textsuperscript{102} \textit{Id.} at 779.
\item \textsuperscript{103} 5 U.S.C. § 7123(a) (1994).
\item \textsuperscript{104} \textit{See Griffith v. FLRA}, 842 F.2d 487, 501 (D.C. Cir. 1988).
\item \textsuperscript{105} \textit{See Customs}, 43 F.3d at 690-91.
\end{itemize}
\end{footnotesize}
Can it be that the FLRA's interpretation of any "law"—including the Constitution, judicial decisions, or any statute—is immune from judicial review. (On the Authority's understanding, it is not even open to us to ask whether a particular law has any effect whatsoever on employment conditions; once the Authority is satisfied that a law falls within the limitation imposed by § 7103(a)(9)(C)(ii) ("any law, rule, or regulation affecting conditions of employment"), its determination to that effect would foreclose our review.)

Thus, the central issue of the case was whether the Court of Appeals could review claims that the FLRA had abused its jurisdiction in deciding a grievance.

The D.C. Circuit held that "[section] 7123(a) (the preclusion of judicial review of arbitrated disputes) must be read in light of [section] 7103(a) (the definition of permissible grounds for grievances)." The court inferred that Congress intended that an arbitrator should never interpret a law that did not affect working conditions. Therefore, although the statute in question affected working conditions, it was not the primary goal, nor the purpose of the statute.

In a statement that defines their position on the merits of the case, the D.C. Circuit stated:

Absolutely any law could under some circumstances have some adverse consequences on the working conditions of one or more employees. The Authority's definition thus does not restrict the category of laws that may be brought to arbitration, but only suggests that a law may be the subject of a grievance if an employee is somehow aggrieved by its application—which in essence reduces the limitation to a standing requirement. We think, rather, that a "law, rule, or regulation affecting conditions of employment" can be only interpreted, as it initially was by the arbitrator in this case, to confine grievances 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.

Using their newly created third category of FLRA decisions that are reviewable, the D.C. Circuit ruled that a grievance "predicated on a

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106. Id. at 688.
107. Id. at 689.
108. See id.
109. See id.
110. Customs, 43 F.3d at 689.
claim of violation of a law that is not directed toward employee working conditions is outside both the arbitrator's and the FLRA's jurisdiction.\textsuperscript{111}

The court reached the merits of the case by reasoning that Congress could not have intended that a substantial part of American law would be interpreted by the FLRA.\textsuperscript{112} As evidence of this proposition, the court pointed out that there had been no congressional debate as to what would amount to a tremendous delegation of power to be given to an administrative tribunal.\textsuperscript{113} The court emphatically stated, "[t]hat Congress would entrust such sweeping authority to a minor three-member commission with quite restricted expertise is, when one pondersthe matter, utterly inconceivable."\textsuperscript{114}

The Court concluded:

A grievance claiming a "violation, misinterpretation, or misapplication of a law, rule, or regulation" may be brought under § 7103(a)(9)(C)(ii) ... if the particular legal authority relied upon was fashioned for the purpose of regulating the working conditions of employees. Our review is available for the limited purpose of determining whether the Authority exceeds its jurisdiction.\textsuperscript{115}

The D.C. Circuit acknowledged in Customs the existence of the Leedom exception\textsuperscript{116} to circumvent the preclusion of judicial review but

\textsuperscript{111} Id.
\textsuperscript{112} See id. at 689-90.
\textsuperscript{113} See id. at 690.
\textsuperscript{114} Id. In a footnote, the court added:

Major administrative boards and commissions (such as, for example, the Federal Communication Commission, the Federal Trade Commission, the National Labor Relations Board, the Securities and Exchange Commission) usually have at least five members at the rank of executive level 4 and a chairman at level 3. ... The Authority's two members are level 5 officials and its chairman is at level 4.

\textsuperscript{115} Id. at 690 n.10.
\textsuperscript{116} Leedom v. Kyne, 358 U.S. 184, 190 (1958). Leedom stands for the proposition that if an agency openly violates a clear mandate of a statute, even a preclusion of judicial review will not bar judicial intervention. See Customs, 43 F.3d at 688. The Leedom exception confers jurisdiction upon a district court in those cases where direct appellate review is presumptively foreclosed. The Leedom exception is a narrow one, and is not to apply simply when "an erroneous assessment of the particular facts ... has led it to a conclusion which does not comport with the law." Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964). The Leedom exception is only to apply when there is an attempted exercise of power that had been specifically withheld. See Leedom, 358 U.S. at 190. In Leedom, contrary to 29 U.S.C. § 159(b)(1), which prohibits placing both professional and non-professional employees in the same bargaining unit unless a majority of professional employees vote for inclusion in such unit, the NLRB included in a collective bargaining unit employees.
ruled that it did not apply because there was "no such clear transgression of a substantive statutory mandate." 117

The D.C. Circuit has not directly addressed the jurisdictional issue since Customs, however, the court seemed to waiver in its support of this new form of jurisdiction in a recently decided case. 118 In American Federation of Government Employees v. FLRA, 119 the D.C. Circuit concluded that it lacked jurisdiction to hear a case under section 7123. 120 The court stated that the case does not come within the compass of Customs, "pursuant to which this court might have jurisdiction to review the Authority's decisions." 121 The court does not appear confident in their new exception to the jurisdictional bar.

VII. THE NINTH CIRCUIT'S RESPONSE IN TREASURY

In Treasury, the Ninth Circuit expressly rejected the D.C. Circuit's holding in Customs, on the grounds that the Court of Appeals lacks jurisdiction to review FLRA decisions that do not involve an unfair labor practice. 122 Thus, in the Ninth Circuit, the Court of Appeals cannot review claims that the FLRA has abused its jurisdiction in deciding a grievance.

The court in Treasury concluded that the language of FSLMRS 123 is clear, specifically, that judicial review of the FLRA's decision regarding an arbitrator's award is precluded unless it involves an unfair labor practice. 124 The Ninth Circuit expressly stated, "[w]e are not persuaded by the D.C. Circuit's opinion and therefore decline to follow it." 125 The court systematically discredited the arguments that the D.C. Circuit

whom it found to be nonprofessional employees. The Supreme Court held that the Board's action deprived professional employees of a right assured to them by Congress and therefore a federal district court had jurisdiction of the original suit to set aside the bargaining unit. See id. at 191.

117. Customs, 43 F.3d at 688.
118. See American Fed'n of Gov't Employees, Local 2986 v. FLRA, 130 F.3d 450 (D.C. Cir. 1997).
119. 130 F.3d 450 (D.C. Cir. 1997).
120. See id. at 451.
121. Id. The case was decided by two of the three judges that heard Customs.
122. See Treasury, 112 F.3d 402, 406 (9th Cir. 1997). The Ninth Circuit made no mention of the constitutional exception set forth by the D.C. Circuit in Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988).
124. See Treasury, 112 F.3d at 404.
125. Id. at 405.
proffered in finding that the court of appeals may review the FLRA’s determination that a grievance falls within its jurisdiction.\textsuperscript{126}

In response to the D.C. Circuit’s argument that it is “utterly inconceivable” that Congress would make such a “staggering delegation” of interpretive authority to the FLRA,\textsuperscript{127} the court stated:

We find ‘utterly inconceivable’ arguments a poor substitute for clear statutory language. In any event, we do not read the delegation of authority to the FLRA as quite so broad as perceived by our D.C. Circuit colleagues, nor do we view the congressional decision to preclude judicial review of certain FLRA orders as quite so extraordinary.\textsuperscript{128}

In addressing the D.C. Circuit’s fear “that all or any part of American law would be definitively interpreted by the FLRA,”\textsuperscript{129} the Ninth Circuit countered, “[t]he FLRA only has the authority to determine the implications of such laws on labor relations; the agency is not forced to conform its substantive actions to the FLRA’s interpretation.”\textsuperscript{130} The court in \textit{Treasury} emphasized the fact that the FLRA could not have forced the Customs Service to change their policy, but could only require the agency to compensate its employees who were adversely affected by the policy.\textsuperscript{131} In the next sentence, however, the court recognized the weakness of their argument, admitting that cost can affect substantive decisions.\textsuperscript{132}

The Ninth Circuit believed it was significant that this dispute involved two executive branch agencies and executive branch employees.\textsuperscript{133} They did not find it inconceivable for Congress to have decided that the executive branch should work out its disputes from within, free from interference from the judicial branch.\textsuperscript{134} The court reasoned that ultimately, everyone involved is answerable to the President, “who has

\textsuperscript{126} See \textit{id.} at 405-06.
\textsuperscript{127} See \textit{Customs}, 43 F.3d at 690.
\textsuperscript{128} \textit{Treasury, 112 F.3d at 405.}
\textsuperscript{129} \textit{Customs, 43 F.3d at 689-90.}
\textsuperscript{130} \textit{Treasury, 112 F.3d at 405.}
\textsuperscript{131} \textit{See id.}
\textsuperscript{132} \textit{See id. Following the FLRA decision in \textit{Customs}, the Customs Service would have been forced to pay the overtime back pay that the customs officers would have received but for CAPE. The Tariff Act mandates that over-time pay is to be charged to shippers. See 19 U.S.C. § 216 (1988); \textit{Customs, 43 F.3d at 686.} Therefore, if the Customs Service did not change their CAPE program, they would risk bearing overtime costs that they would not, ordinarily, be responsible for.}
\textsuperscript{133} \textit{See \textit{Treasury, 112 F.3d at 405.}
\textsuperscript{134} \textit{See id.}
various informal remedies available if he is dissatisfied with FLRA decisions." The court believed it to be likely that Congress intended "just what it said—that the judicial branch stay out of the business of reviewing FLRA decisions involving an arbitration award." The court next attacked the D.C. Circuit's construction of section 7123(a), in which the D.C. Circuit stated that section 7123(a) must be read in conjunction with section 7103(a)(9), which defines the possible grounds for a "grievance." The Ninth Circuit noted that Congress left the definition of "grievance" vague, therefore, the court held that the D.C. Circuit's interpretation would require the court to infer congressional intent from an ambiguous statutory provision to override a clear statutory command, specifically, the bar on judicial review.

The Ninth Circuit argued that Congress knew that an award of an arbitrator would involve more than just the primary resolution of a "grievance." As evidence of this proposition, the court cited section 7121(a)(1), "in which Congress specified that 'procedures for the settlement of grievances' must include the resolution of 'questions of arbitrability.'" Therefore, the court argued, when Congress barred review of FLRA decisions "involving an award by an arbitrator," it also necessarily barred review of FLRA decisions involving questions of arbitrability, including whether a law "affects conditions of employment."

The Ninth Circuit concluded that the D.C. Circuit had exaggerated the threat of overreaching by the FLRA. The court argued that if the FLRA was to act in excess of its delegated powers and contrary to a specific statutory prohibition, federal district courts would have jurisdiction to intervene under Leedom.

The Ninth Circuit found the D.C. Circuit's claim that section 7123(a) must be read in conjunction with section 7103(a)(9) to be

135. Id. An example is refusing to re-appoint FLRA members when their terms expire. See id.
136. Id.
137. See id.; see also supra notes 104-07 and accompanying text (discussing the D.C. Circuit's construction of 5 U.S.C. § 7103 (1994)).
138. See 5 U.S.C. § 7103(a)(9)(C)(ii) (1994). Section 7103 states that a grievance encompasses "any claimed violation... of any law... affecting conditions of employment." Id.
139. See Treasury, 112 F.3d at 405-06.
140. See id. at 406.
141. Id.
142. Id.
143. See id.
144. See Treasury, 112 F.3d at 406; see also supra note 116 (explaining the basis for judicial review created in Leedom v. Kyne, 358 U.S. 184 (1958)).
strained. Indeed, "Congress knew that 'an award by an arbitrator' would involve more than the resolution of a 'grievance.'" Congress's intent seemed to allow the FLRA to completely resolve disputes between federal agencies and their unions. Thus, they intended to create a system whereby the judiciary would be kept out of federal labor disputes.

VIII. THE POLICY ARGUMENTS BEHIND THE DECISIONS

It is important to begin any discussion regarding the preclusion of judicial review of FLRA decisions by recognizing the primary policy rational for preclusion; to wit, "[t]o give district courts review of FLRA decisions would tend to redundancy and would imperil the features of the arbitral process that we believe Congress had in mind when it set up the scheme: finality, speed and economy." The D.C. Court of Appeals recognized that the entire purpose of Congress's barring judicial review of most Authority arbitration decisions was to facilitate the prompt, final resolution of federal sector grievances.

This policy argument, favoring the finality of FLRA decisions, can be seen in court decisions where the dispute at issue is categorized as a contract grievance and thus not subject to judicial review. Ideally, an aggrieved party to a contract grievance would also like to be able to claim an unfair labor practice in order to obtain appellate review. This was contemplated by the Congress who left the route selection to the discretion of the aggrieved party, but that the selection of one route precluded use of the other. Indeed, a number of the circuits have concluded that they lack jurisdiction when a statutory unfair labor practice was not raised in the original FLRA case.

145. See Treasury, 112 F.3d at 405.
146. Id. at 406.
147. Griffith 842 F.2d at 491; see also American Fed'n of Gov't Employees v. FLRA, 777 F.2d 751, 756 (D.C. Cir. 1985) (stating that the legislative history underscores the congressional intent that the arbitration process provide an efficient, expeditious mechanism for resolving federal labor-management disputes).
148. See Overseas Educ. Ass'n v. FLRA, 824 F.2d 61, 63 (D.C. Cir. 1987) (stating the rationale for circumscribed judicial review is "firmly grounded in the strong Congressional policy favoring arbitration of labor disputes and accordingly granting arbitration results substantial finality").
149. See id.; United States Marshals Serv. v. FLRA, 708 F.2d 1417, 1418 (9th Cir. 1983) (stating that the court of appeals may review an FLRA decision only if an unfair labor practice is either an explicit or necessary ground of the decision issued by the FLRA).
150. See Overseas Educ. Ass'n, 824 F.2d at 64.
151. See id. at 66. The court explained:
In interpreting section 7123(a), courts have cited Congress's general pro-arbitration policy as being the primary rationale for its refusal to re-characterize a contract dispute as an unfair labor practice for purposes of judicial review. The court in United Marshals Service v. FLRA stated:

To say that we have jurisdiction whenever a contract dispute can also fit within the unfair labor practice sections of the Act, though it has not been so treated either by the arbitrator or the Authority, would be to give too little scope and effect to the arbitration process and to the final review function of the Authority, procedures deemed important to the expeditious review that Congress made a central part of the Act.

Thus, the Ninth Circuit interpreted section 7123(a) to mean that a statutory unfair labor practice is an "unvarying requirement" to obtain judicial review. Underlying conduct that could be characterized as a statutory unfair labor practice will not suffice to obtain appellate review in the court of appeals. The Marshal and Overseas decisions demonstrate that the intention of Congress was to create a pro-arbitration scheme which valued speed and finality trumps the parties rights to further judicial review.

What does seem clear is that Congress required that a statutory unfair labor practice actually be implicated to some extent in the Authority's order. While the precise extent is unclear, the legislative record strongly suggests that the mere fact that conduct is capable of characterization as a statutory unfair practice is insufficient to satisfy the strictures of section 7123(a)(1); the conduct must actually be so characterized and the claim pursued, by whatever route, as a statutory unfair labor practice, not as something else.

Id.; see also United States Marshals Serv., 708 F.2d at 1417 (holding that by choosing to litigate the grievance as a violation of the collective bargaining agreement, the party is foreclosed from transforming the grievance into a statutory unfair labor practice in order to obtain the judicial review of the court of appeals); American Fed'n of Gov't Employees v. FLRA, 675 F.2d 612, 614 (4th Cir. 1982) (holding that because neither the arbitrator nor the FLRA decided an unfair labor practice charge, they lack jurisdiction to give judicial review). The practical application of these decisions is to prohibit a party that chooses to file a grievance based on contractual grounds, and loses, from later asserting an unfair labor practice in hopes of getting judicial review under section 7123(a).

152. See Overseas Educ. Ass'n, 824 F.2d at 67. The D.C. Circuit cited a Ninth Circuit decision which recognized Congress' general pro-arbitration policy, and their desire for finality and speed in the arbitration process. See id.; see also United States Marshals Serv., 708 F.2d at 1420 (explaining that the integrity of the collective bargaining process itself remains a compelling explanation for congressional encouragement to arbitrate).

153. 708 F.2d 1417 (9th Cir. 1983).
154. United Marshals Serv., 708 F.2d at 1420.
155. See Overseas Educ. Ass'n, 824 F.2d at 67.
156. See id.
A practical consequence of the D.C. Court’s ruling in *Treasury,* for federal sector labor relations is that a new category of arbitration decisions, abuse of jurisdiction cases, will now be subject to a second layer of review, after the FLRA. This “peek at the merits” to determine whether the FLRA has exceeded its jurisdiction will likely necessitate full briefing and argument to the Court, thereby adding months or years and significant expense before an arbitration award becomes final and binding. Although this new form of review jurisdiction is for the limited purpose of determining whether the FLRA has exceeded its jurisdiction, the speedy finality Congress intended will be lost.

The D.C. Circuit argued that it is “utterly inconceivable” that Congress would make such a “staggering delegation” of interpretive authority to a “minor three-member commission.” They feared that all of American law would be interpreted by the FLRA. The Ninth Circuit’s attempt to allay this fear by arguing that the FLRA could not force an agency to conform to its rulings and could only compensate affected employees, is flawed. Monetary sanctions can have the same effect as if the FLRA was to mandate a change in policy.

The Ninth Circuit’s argument that all of the players are in the executive branch and ultimately answerable to the President is equally as unrealistic. The idea that the President of the United States is directly supervising the outcome of a grievance between a federal agency and its union is difficult to imagine.

The circuit split has created an asymmetrical system whereby a federal agency can petition the D.C. Court of Appeals to review whether the FLRA exceeded their jurisdiction based upon their status as a fed-

157. 43 F.3d 682 (D.C. Cir. 1994).
158. See Brief for Respondent at 20-21, National Treasury Employees Union, 112 F.3d 402 (9th Cir. 1997) (No. 95-70714). The lack of finality of FLRA decisions has led to the belief that collective bargaining in the federal system is “practically extinct, being replaced by appeals, motions, and cumbersome procedures.” Daily Lab. Rep. (BNA) No. 214, at A10 (Nov. 6, 1987).
159. For an explanation of *Leedom,* see supra note 116.
161. See Brief for Respondent at 11, United States Dep’t of the Treasury, United States Customs Serv. v. FLRA, 43 F.3d 682 (D.C. Cir. 1994) (No. 93-1388).
162. Customs, 43 F.3d at 690.
163. It is unfathomable that the President of the United States is micro-managing FLRA decisions dealing with the rather complex subject of Federal Labor Relations.
eral agency. A union, however, will be foreclosed from such review if they do not have a jurisdictional basis for bringing the suit in the D.C. Circuit. 164

The cases that are the focus of this Note are a perfect example of the asymmetrical system. For jurisdictional reasons, NTEU cannot bring suit against the Customs Service in the D.C. Circuit, and would likely be forced to bring the suit in the Ninth Circuit, where they would be unable to obtain judicial review. 165 The Customs Service, however, can bring their suit to the D.C. Circuit and can therefore obtain judicial review of FLRA jurisdictional issues. 166 This asymmetrical system, while not unique, 167 raises serious fairness concerns which should be addressed by Congress.

VIII. CONCLUSION

The split in the circuits needs to be resolved in order to create uniformity within the judiciary system. The fairness of the carefully constructed system to regulate federal labor relations is undermined when one party can obtain judicial review while another is foreclosed review based solely on where the party is able to obtain jurisdiction.

While the D.C. Circuit has valid policy arguments, 168 the significance of these contentions are mitigated by the exceptions to the judicial bar. There is judicial review of FLRA decisions in the D.C. Circuit in cases where an agency openly violates a clear mandate of a statute or in which a constitutional claim is alleged. 169

Further, although the FLRA is a three-member commission, it deals exclusively with federal labor disputes. The Authority, through

164. See Customs, 43 F.3d at 682; Treasury, 112 F.3d at 402.
165. See Treasury, 112 F.3d at 406.
166. See Customs, 43 F.3d at 691.
167. See Brief for Respondent at 23, National Treasury Employees Union, 112 F.3d 402 (9th Cir. 1997) (No. 95-70714). In private sector labor relations, employers can contest the NLRB’s unit determination in the court of appeals by refusing to bargain with the union certified for the disputed bargaining unit and litigating the unit determination in the unfair labor practice case review proceeding. See id. See, e.g., Physicians Nat’l Housestaff Ass’n v. Fanning, 642 F.2d 492 (D.C. Cir. 1980). However, “a union that loses a representation case before the NLRB cannot initiate such indirect review of NLRB unit determinations... because the union cannot refuse to bargain.” Brief for Respondent at 23, National Treasury Employees Union, 112 F.3d 402 (9th Cir. 1997) (No. 95-70714); Miami Newspaper Printing Pressmen’s Union v. McCulloch, 322 F.2d 993, 997 (D.C. Cir. 1963).
168. For example, the fact that a large, relatively unchecked power has been delegated to a small commission.
169. See Customs, 43 F.3d at 688-89.
their experiences, become experts in the field. Moreover, although the FLRA will be called upon to interpret different parts of American law, the laws that are interpreted by the FLRA are laws that were involved in the context of a labor dispute. It is reasonable, and quite plausible to believe that Congress intended the FLRA to interpret laws that are involved in a federal labor dispute with the limitation that the disputes do not involve a clear violation of a statutory mandate or a constitutional claim.

The dispute between the Customs Service and National Treasury Employees Union involved a poor decision by the FLRA. To force the Customs Service to pay its workers overtime, when their services were no longer required due to a technological advancement, is wasteful. This led the United States Court of Appeals, D.C. Circuit, to usurp jurisdiction and reverse the FLRA’s decision. In its decision, the D.C. Circuit acknowledged that the Leedom exception to the preclusion of judicial review did not apply and instead invented a new category of reviewable decisions. The judiciary, however, cannot alter clear congressional intent of the FSLMRS, even under the guise of correcting a misguided decision.

In establishing the FSLMRS, Congress wanted a system of speed and finality. To this end, they gave the FLRA the power to arbitrate grievances between federal agencies and their unions. This power is diminished by both the Leedom exception which encompasses only errors which ignore a statutory command, and the constitutional claim exception.

While it may not be desirable to have a minor commission interpreting such a wide variety of law, Congress’s pro-arbitration policies seem to have driven the creation of the FSLMRS. Congress has expressly foreclosed judicial review in grievances that do not involve an unfair labor practice. Therefore, if change is needed, it is not for the courts, but for Congress to reform.

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