No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
WASHINGTON, D.C., AND NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL, PETITIONERSS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Service Labor Management Relations Statute, 5 U.S.C. 7114(a)(2)(B) gives a federal employee the right to the participation of a union representative at an interview by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action. The questions presented are:

1. Whether an investigator from the Office of Inspector General (OIG) is a "representative of the agency" within the meaning of that provision, notwithstanding the provisions of the Inspector General Act, 5 U.S.C. App. 3, § 1 *et seq.*, that insulate the OIG from agency control.

2. Whether, if OIG interviews are governed by 5 U.S.C. 7114(a)(2)(B), an agency headquarters commits an unfair labor practice by failing to require the OIG to comply with 5 U.S.C. 7114(a)(2)(B), notwithstanding the fact that the Inspector General Act deprives an agency head of authority to direct or control the investigations of the OIG.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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The Solicitor General, on behalf of the National Aeronautics and Space Administration, Washington, D.C. (NASA Headquarters), and the National Aeronautics and Space Administration Office of the Inspector General (NASA-OIG), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-20a) is reported at 120 F.3d 1208. The decision and order (App., *infra,* 21a-57a) of the Federal Labor Relations Authority (Authority or FLRA) is reported at 50 FLRA 601.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1997. App., *infra*, 2a. A petition for rehearing was denied on March 31, 1998. *Id*. at 76a. On June 22, 1998, Justice Kennedy extended the time for filing a petition for a writ of certiorari to July 29, 1998, and on July 24, 1998, further extended the time for filing to August 28, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (FSLMRS), enacted as Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, in pertinent part, provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at —
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> * * * * *
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if —
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> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

Section 2 of the Inspector General Act of 1978 (Inspector General Act), Pub. L. No. 95-452, 92 Stat.

1101, 5 U.S.C. App. 3 § 2, in pertinent part, provides:

> In order to create independent and objective units —
>
> * * * * *
>
> there is hereby established in each of such establishments [listed in section 11(2)] an office of Inspector General.

Section 3 of the Inspector General Act, 5 U.S.C. App. 3 § 3, in pertinent part, provides:

> (a) There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations. Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subp[o]ena during the course of any audit or investigation.
>
> (b) An Inspector General may be removed from office by the President. The President shall

communicate the reasons for any such removal to both Houses of Congress.

* * * * *

Section 9 of the Inspector General Act, 5 U.S.C. App. 3 § 9(a)(1) and (2), in pertinent part, provides:

(a) There shall be transferred —

(1) to the Office of Inspector General —

* * * * *

(2) such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act,

except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.

STATEMENT

1. This unfair labor practice decision arose out of the investigation of an employee of the National Aeronautics and Space Administration George C. Marshall Space Flight Center (Marshall Center) in Huntsville, Alabama. The material facts are not disputed. See App., *infra*, 23a-25a, 59a-63a.

a. In January 1993, NASA-OIG received information from the Federal Bureau of Investigation (FBI) that an employee at the Marshall Center, "P," was suspected of authoring various incendiary documents. App., *infra*, 60a. (To preserve his confidentiality, the name of the

employee was referred to as "P" in the administrative decisions below. See *id.* at 60a n.1.) The documents had such titles as "Payback List," "Revenge Tactics," "Retribution List," "Goals 1990," and "Goals 1991"; the latter two described aims to seek revenge on enemies within the Marshall Center. See C.A. R.E. 20-22, 43; see also App., *infra*, 60a. The documents named Marshall Center employees as potential targets for retribution and contained specific means and methods to get revenge, such as carbon monoxide poisoning, exploding natural gas under a house, making bombs, and injecting enemies with AIDS-infected blood. C.A. R.E. 20-21. Several documents had P's name on them, and a confidential source had identified P as their author. See *id.* at 21, 44-45. Investigators also received allegations that P had conducted surveillance of the homes of other employees. *Id.* at 43.

b. Upon obtaining that information from the FBI, NASA-OIG assigned the case a high priority and began investigating immediately. App., *infra*, 23a-24a, 60a-61a; C.A. R.E. 21, 42-44. NASA-OIG investigator Larry Dill sought to interview P as soon as possible and contacted him for that purpose. *Ibid.* P stated that he wanted both legal and union representation at the interview, and Dill acceded to both requests. App., *infra*, 23a-24a, 61a. Patrick Tays attended the interview as a representative of P's Union, Local 3434 of the American Federation of Government Employees (Local 3434 or Union). App., *infra*, 3a, 24a, 61a. At the interview in the office of P's attorney, Dill began by reading prepared "ground rules," which included the following: "The union representative, if present, serves as a witness and is not to interrupt the question and answer process. Additionally, the union representative is subject to being called as a witness for the govern-

ment." *Id.* at 24a, 61a. The union representative, Patrick Tays, objected to that "ground rule," after which Dill read the statement a second time and stated that he would move the interview somewhere else if Tays did not "maintain himself." *Id.* at 24a, 61a-62a. During the interview, Dill did not initially respond to Tays' request to see a particular document, although apparently Tays was able to see that document (and others) by standing behind P and his attorney. *Id.* at 24a-25a, 61a-62a. Tays later testified that P was affected by Dill's manner toward him (Tays) and that P only paid attention to his attorney and Dill and ignored Tays. *Id.* at 24a-25a, 63a. P was ultimately fired, and his current whereabouts are unknown to petitioners or (apparently) to the Union. *Id.* at 63a.

c. The Union filed charges with the FLRA, pursuant to 5 U.S.C. 7116(a)(1), alleging that NASA-OIG and NASA Headquarters had committed an unfair labor practice.[1] In particular, the Union charged that NASA-OIG and NASA Headquarters had violated 5 U.S.C. 7114(a)(2)(B), known as the "*Weingarten*" rule, which gives a federal employee in a bargaining unit the right to the participation of a union representative at an

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[1] Section 7116(a) provides, in pertinent part:

> For the purpose of this chapter, it shall be an unfair labor practice for an agency —
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> * * * * *
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

5 U.S.C. 7116(a)(1) and (8).

interview by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action.[2] The complaint alleged that petitioners violated the rule by refusing to allow the union representative to participate actively in the investigatory interview of P. App., *infra*, 22a, 59a. The FLRA General Counsel issued a complaint containing that charge, pursuant to 5 U.S.C. 7118(a).

The OIG responded that it had acted reasonably in light of the "delicate situation" involving the safety of Marshall Center employees and that it had not interfered with Tays' rights to participate fully as a union representative. App., *infra*, 63a. The Administrative Law Judge (ALJ) concluded that the OIG investigator was a "representative of the agency" for purposes of 5 U.S.C. 7114(a)(2)(B), that the union representative was entitled to participate actively in the interview of P, and that the OIG investigator's actions had interfered with the representative's ability to do so. App., *infra*, 64a-71a. The ALJ recommended that the Authority order NASA-OIG to cease and desist from interfering with *Weingarten* rights and to post at all NASA locations a notice that the NASA-OIG will not interfere with those rights. *Id.* at 71a-73a. Finding no evidence that NASA Headquarters "was responsible for this violation," the ALJ recommended dismissal of the charges against NASA Headquarters. *Id.* at 71a.

NASA-OIG appealed the decision to the Authority, arguing principally that its investigator was not "a representative of the agency" under the D.C. Circuit's

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[2] The provision is known as the *Weingarten* rule because it extends to federal employees the rights established for private-sector employees in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

decision in *United States Dep't of Justice* v. *FLRA*, 39 F.3d 361 (D.C. Cir. 1994) (*DOJ*). C.A. R.E. 71-80. The FLRA's General Counsel defended the ALJ's ruling against NASA-OIG, and did not take exception to the ALJ's ruling in favor of NASA Headquarters. See App., *infra*, 27a-28a; C.A. R.E. 84-102. On July 28, 1995, the Authority affirmed the ALJ finding of an unfair labor practice, concluding that Dill's announcement of the "ground rules" violated the statute and that, in conducting the interview, Dill was acting as a "representative" of NASA for *Weingarten* purposes. App., *infra*, 28a-48a. In reaching that conclusion, the Authority rejected the D.C. Circuit's contrary analysis in *DOJ* and adopted instead the approach set forth in the Third Circuit's earlier decision in *Defense Criminal Investigative Service* v. *FLRA*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*). See App., *infra*, 37a-40a. In addition, the Authority reversed the ALJ's ruling with respect to NASA Headquarters, holding that agency headquarters must be held responsible for the actions of NASA-OIG to effectuate the purposes of the statute, even though the FLRA General Counsel had not filed any exceptions to the ALJ's ruling that NASA Headquarters was not responsible for the conduct at issue. *Id.* at 48a-52a. The Authority, therefore, ordered NASA Headquarters and NASA-OIG to cease and desist from restricting the participation of union representatives in interviews conducted by NASA-OIG. *Id.* at 52a-53a. The Authority further ordered NASA Headquarters to order NASA-OIG to comply with the requirements of 5 U.S.C. 7114(a)(2)(B) and to post appropriate notices at the Marshall Center. *Id.* at 53a-55a.

2. The Authority immediately filed an application for enforcement in the Eleventh Circuit. C.A. R.E. 130,

132, 133. Four days after the FLRA's petition was docketed in that court, NASA-OIG and NASA Headquarters filed a petition for review in the D.C. Circuit. C.A. R.E. 134. Both petitions were filed pursuant to 5 U.S.C. 7123(a), which provides that judicial review of the FLRA's decision or an action for enforcement by the Authority may be filed "in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a). Pursuant to 28 U.S.C. 2112(a) and Multidistrict Lit. Panel R. 24, a panel randomly chose the Eleventh Circuit to hear the case.

The Eleventh Circuit granted the Authority's application for enforcement and denied the petition for review filed by NASA Headquarters and NASA-OIG. App., *infra*, 20a.[3] The court deferred to the Authority's interpretation of "representative of the agency" in 5 U.S.C. 7114(a)(2)(B), finding no evidence in the Inspector General Act that Congress sought to exempt the OIG from the *Weingarten* rule. In so ruling, the court of appeals adopted the analysis of the Third Circuit in *DCIS*, *supra*, and specifically rejected the contrary decision of the D.C. Circuit in *DOJ*, *supra*. App., *infra*, 7a-9a, 12a, 15a. The court thus found NASA-OIG guilty of an unfair labor practice in failing to accord the employee his *Weingarten* rights. The court also found NASA Headquarters guilty of an unfair labor practice on the theory that it has a supervisory role over the OIG and, therefore, has a duty to ensure that the OIG complies with the *Weingarten* rule.

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[3] The court of appeals also granted intervenor status to respondent American Federation of Government Employees, AFL-CIO. See App., *infra*, 4a.

The court denied rehearing on March 31, 1998. *Id.* at 76a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether an Office of Inspector General (OIG) investigator is a "representative of the agency" for purposes of the *Weingarten* rule, 5 U.S.C. 7114(a)(2)(B). That issue has broad practical implications for the manner in which the federal government investigates allegations of wrongdoing by federal employees; the issue affects thousands of cases and tens of thousands of interviews each year. Resolving that issue requires a reconciliation of two statutes —the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101 *et seq.*, and the Inspector General Act, 5 U.S.C. App. 3, § 1 *et seq.*— which were enacted on consecutive days in 1978 without any apparent consideration of the tension between them. Four circuits have addressed the issue presented here and have reached three different conclusions. This Court's review is warranted to resolve the conflict.

If, contrary to our submission, an OIG commits an unfair labor practice by restricting an employee's statutory *Weingarten* rights, the case also presents the question whether an agency headquarters is liable for an unfair labor practice for failing to direct the OIG to comply with 5 U.S.C. 7114(a)(2)(B). That issue also has broad implications for the independence of OIGs and the extent to which agencies may be held liable for actions over which management has no control. The decision below cannot be reconciled with the reasoning in *United States Nuclear Regulatory Commission* v. *FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*).

1. a. The better reading of the *Weingarten* provision in the FSLMRS, in conjunction with the Inspector

General Act, is that the OIG does not commit an unfair labor practice when OIG investigators restrict the participation of union representatives in OIG investigative interviews of federal employees. The court of appeals' ruling to the contrary is incorrect.

The FSLMRS establishes the scope and limits of federal sector collective bargaining. Section 7114, entitled "Representation rights and duties," provides that "[a]n exclusive representative of an appropriate unit * * * shall be given the opportunity to be represented at * * * any examination of an employee in the unit by a *representative of the agency* in connection with an investigation if * * * (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation." 5 U.S.C. 7114(a)(2)(B) (emphasis added).

The court of appeals upheld the FLRA's view that "representative of the agency" in Section 7114(a)(2)(B) means any official within an agency and thus includes the OIG.[4] That position, however, is inconsistent with the rationale for this Court's recognition of the right to union representation at investigative interviews in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). In *Weingarten*, this Court emphasized that the representational right grows out of the collective bargaining relationship between the union and management. *Id.* at 260-261, 262. The Court determined that the rights enumerated in *Weingarten* arise out of the need to balance the power between the parties to the collective bargaining relationship:

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[4] The FSLMRS defines "agency" to mean "an Executive agency * * *," see 5 U.S.C. 7103(a)(3), but that definition does not resolve the meaning of the phrase "representative of the agency."

> The union representative whose participation [the employee] seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire *bargaining unit* by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the *bargaining unit* that they, too, can obtain his aid and protection if called upon to attend a like interview.
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> * * * * *
>
> Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management."

Ibid. (footnotes omitted) (emphasis added). The phrase "representative of the agency" in 5 U.S.C. 7114(a)(2)(B), therefore, must be understood within the context of federal sector collective bargaining to encompass only a representative of the agency or agency component that engages in collective bargaining with the union at issue, which the OIG does not.

The Inspector General Act reinforces the conclusion that the OIG and its agents are not representatives of agency management. No other component of an agency has the independence conferred by statute upon the OIG, which operates independently of the direct supervision and influence of agency heads and outside the programmatic spheres of agencies. See *NRC*, 25 F.3d

at 232-236; see also *DOJ*, 39 F.3d at 366-367 (quoting *NRC*, 25 F.3d at 233-234).

That independence is codified in numerous ways. In particular, the NASA-OIG has a grant of statutory authority entirely different from and independent of the head of NASA. Compare 42 U.S.C. 2472 (creating NASA) with 5 U.S.C. App. 3 § 9(a)(1)(P) (creating NASA-OIG).[5]

More generally, the Inspector General Act provides that the OIG for each department shall be an "independent and objective unit[]," 5 U.S.C. App. 3 § 2, "appointed by the President" with "the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations," 5 U.S.C. App. 3 § 3(a). Each OIG must submit semi-annual reports to the agency head on the results of its investigations, and the agency head in turn must submit those reports to Congress within thirty days; even though an agency head may add comments on a report, the agency head cannot prevent the report from going to Congress or change its contents. 5 U.S.C. App. 3 § 5(b)(1). The same is true for reports of

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[5] That differentiation is common among agencies and their OIGs. Compare, *e.g.*, 7 U.S.C. 2201 (creating Department of Agriculture) with 5 U.S.C. App. 3 § 9(a)(1)(A) (creating Agriculture OIG); 20 U.S.C. 3411 (creating Department of Education) with 5 U.S.C. App. 3 § 9(a)(1)(D) (creating Education OIG); 29 U.S.C. 551 (creating Department of Labor) with 5 U.S.C. App. 3 § 9(a)(1)(J) (creating Labor OIG); 42 U.S.C. 3532 (creating Department of Housing and Urban Development (HUD)) with 5 U.S.C. App. 3 § 9(a)(1)(G) (creating HUD OIG); 42 U.S.C. 7131 (creating Department of Energy) with 5 U.S.C. App. 3 § 9(a)(1)(E) (creating Energy OIG).

"particularly serious or flagrant problems, abuses, or deficiencies" in programs, which must be reported by the OIG to the agency head and in turn transmitted by the agency head to the appropriate committee or subcommittee of Congress within seven days, along with a report prepared by the agency if the agency head deems one appropriate. 5 U.S.C. App. 3 § 5(d). An OIG is required to "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law," 5 U.S.C. App. 3 § 4(d), and is to do so "directly, without notice to other agency officials," *NRC*, 25 F.3d at 234.

Moreover, although the OIG "report[s] to and [is] under the *general* supervision of the head [of the agency]," 5 U.S.C. App. 3 § 3(a) (emphasis added), only the President, not the agency head, may remove an Inspector General, 5 U.S.C. App. 3 § 3(b). Absent a specific statutory provision pertaining to a particular OIG, neither the agency head nor the deputy may "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation." 5 U.S.C. App. 3 § 3(a). Indeed, other than the "general supervision" of the agency head and one deputy, the Inspectors General "shall not report to, or be subject to supervision by, any other officer of such [agency]." 5 U.S.C. App. 3 § 3(a). Thus, "no one else in the agency may provide any supervision to Inspectors General." *NRC*, 25 F.3d at 234.

Accordingly, an OIG is entirely "shielded with independence from agency interference" in the conduct of its work, *NRC*, 25 F.3d at 234, which spans a broad spectrum of responsibilities and powers: to conduct audits and investigations of the agency as the OIG deems "necessary or desirable," 5 U.S.C. App. 3 § 6(a)(2); to

have unfettered access to agency documents and personnel, 5 U.S.C. App. 3 § 6(a)(1) and (3); to issue subpoenas and administer oaths, 5 U.S.C. App. 3 § 6(a)(4) and (5); and to "receive and investigate complaints or information from an[y] employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety," 5 U.S.C. App. 3 § 7(a). OIGs conduct the full range of criminal and administrative investigations. 5 U.S.C. App. 3 § 4.[6] Because of the statutory separation of the OIG from the collective bargaining unit and the independence conferred on the OIG by statute, therefore, the OIG is not subject to 5 U.S.C. 7114(a)(2), which governs the relationship between labor and management. Accordingly, an OIG should not be charged with an unfair labor practice when it restricts the participation of a union representative in an investigative interview.

In construing the FSLMRS and the Inspector General Act to reach a contrary result, the court below erroneously focused on the effect of an interview on the employee rather than on the statutory separation of the

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[6] See, *e.g.*, *New Eng. Apple Council* v. *Donovan*, 725 F.2d 139, 143 (1st Cir. 1984) ("functions of OIG investigators are not so different from the functions of FBI agents"—both "investigate federal crimes, serve in undercover capacities, perform surveillance, and conduct investigatory interviews"); *Burlington N. R.R.* v. *OIG, R.R. Retirement Bd.*, 983 F.2d 631, 634 (5th Cir. 1993) (legislative history shows purpose of Inspector General Act "to consolidate existing auditing and investigative resources to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of [various executive] departments and agencies") (quotation omitted).

OIG from the agency it is charged with investigating. The court of appeals opined that "[t]he Statute [5 U.S.C. 7114(a)(2)(B)], like the *Weingarten* rule itself, focuses on the risk of adverse employment action to the employee. Because this risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relationship with the employee's union, we see no reason why the protection afforded by Congress should be eliminated in such situations." App., *infra*, 10a-11a (citing *DCIS*, 855 F.2d at 99). That analysis is incorrect. As the D.C. Circuit recognized, an employee can reasonably fear that disciplinary action may follow an interview conducted by an FBI agent or any number of other federal law enforcement agents, for example, yet it would not ordinarily be thought that the *Weingarten* statute requires the participation of a union representative at such an interview. *DOJ*, 39 F.3d at 366.

b. The four circuits to consider this issue have reached three different results and expressly acknowledged the circuit conflict. The Third Circuit has ruled that an OIG investigator is a "representative of the agency" and must therefore comply with the *Weingarten* rule in OIG investigations, *DCIS*, 855 F.2d 93, a result followed by the Eleventh Circuit below.[7]

The D.C. Circuit reached precisely the opposite conclusion in *DOJ*, 39 F.3d 361, creating a conflict that it acknowledged (*id.* at 366-67), as did the court below

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[7] The Eleventh Circuit has reserved the question whether the rule applies to interviews conducted in the course of a criminal investigation, see App., *infra*, 11a n.6., while the Third Circuit has held that the rule applies to all OIG interviews, whether criminal or administrative in nature. See *DCIS*, 855 F.2d at 100.

(App., *infra*, 7a-8a). The D.C. Circuit concluded that an OIG investigator is not bound by the *Weingarten* rule for several reasons: first, the effort to characterize the OIG investigator as a "representative of the agency" within the meaning of Section 7114(a)(2)(B) "encounters considerable semantic difficulty," *id.* at 365; second, applying the rule to OIG investigators "clashes with the Inspector General Act of 1978," *id.* at 366; and third, because the rule is "[r]ooted * * * in labor-management relations," which are not relevant to the activities of the OIG. *Id.* at 368.

The "semantic" problem identified by the D.C. Circuit arises from the fact that the *Weingarten* rule is triggered when "a representative of the agency" questions an employee. When an OIG investigator does the questioning, there is no suitable "agency" to which the statutory term could refer. The agency that directly employs the person under investigation cannot qualify, because the OIG investigator is not a representative of that agency; the employing agency "c[an] not direct the investigator, and it ha[s] no control over him." 39 F.3d at 365. And the OIG itself, which does control the investigator, cannot be the agency mentioned in the statute because the "agency" in that phrase must be an entity that contains the employee's bargaining unit.[8] The OIG does not in fact contain the bargaining unit to which the employee under investiga-

[8] Because Section 7114(a)(2) provides for participation by "an exclusive representative of an appropriate *unit in an agency*" (emphasis added)—*i.e.*, a labor union, see 5 U.S.C. 7114(a)(1)—at "any examination of an employee in the unit by a representative of *the agency*," 5 U.S.C. 7114(a)(2)(B) (emphasis added), the court reasoned that the agency represented by the investigator must contain the bargaining unit of the investigated employee. 39 F.3d at 365-66.

tion belongs, *id.* at 365-66, nor could it do so, because the FSLMRS, 5 U.S.C. 7112(b)(7), expressly "forbids the formation of bargaining units containing employees primarily engaged in investigating other agency employees to ensure they are acting honestly—an apt description of investigators working for the Inspector General." 39 F.3d at 366 n.5 (citing *NRC*, 25 F.3d at 235).

The D.C. Circuit also found the independence conferred on the OIG by the Inspector General Act inconsistent with the view that an OIG investigator is a "representative of the agency" for purposes of the *Weingarten* rule. See 39 F.3d at 366-367. For that point the D.C. Circuit drew heavily on the analysis of the Fourth Circuit in *NRC*, 25 F.3d at 235. In *NRC*, the Authority had ruled that agency management was compelled to bargain over four proposals intended to bind OIGs in the conduct of their investigations. The Fourth Circuit rejected that determination because it would interfere with and undercut the independence of the OIG. See generally 25 F.3d at 233-236. So too here, the D.C. Circuit concluded that "[g]iven these provisions [of the Inspector General Act], none of which the Authority or the Third Circuit in *Defense Criminal Investigative Services* mentioned, there cannot be the slightest doubt that Congress gave the Inspector General the independent authority to decide 'when and how' to investigate (*United States Nuclear Regulatory Comm'n*, 25 F.3d at 234)" and "that the Inspector General's independence and authority would necessarily be compromised if another agency of the government—the Federal Labor Relations Authority—influenced the Inspector General's performance of his duties on the basis of its view of what constitutes an unfair labor practice." 39 F.3d at 367. The D.C. Circuit thus re-

jected the Third Circuit's decision in *DCIS* in large part because the Third Circuit (and the Authority) had failed to consider or analyze the relevant provisions of the Inspector General Act. See *ibid.*

Finally, the D.C. Circuit noted that the *Weingarten* rule was intended to "ameliorate the inequality of bargaining power between an employee going it alone and his employer," 39 F.3d at 368, but found that "[t]hese considerations do not apply to examinations of employees under oath in the course of an Inspector General's investigation" because the OIG's independence means that "the Inspector General cannot side with management, or the union." *Ibid.*

The Second Circuit recently adopted a third approach, concluding that the applicability of *Weingarten* rights turns on the nature of the investigation being conducted by the OIG. *FLRA* v. *United States Dep't of Justice*, 137 F.3d 683 (2d Cir. 1997) (*FLRA* v. *DOJ*). The Second Circuit did "not agree with the Third and Eleventh Circuits that section 7114(a)(2)(B) applies to questioning by an OIG agent simply because the inquiry concerns 'possible misconduct' of employees 'in connection with their work,' *DCIS/FLRA*, 855 F.2d at 100, or because the information obtained might be used to 'support administrative or disciplinary actions,' *NASA/FLRA*, 120 F.3d at 1213." 137 F.3d at 691. Rather, the Second Circuit held that the OIG cannot be considered a "representative of the agency" for purposes of the *Weingarten* rule so long as an OIG's investigation involves matters within the scope of bona fide functions of the Inspector General Act. 137 F.3d at 690-691. The court based that conclusion on the view that "Congress would [not] have wanted the *Weingarten* protection of the [FLMRS] to be circumvented by a request from an agency head to have an OIG agent

conduct an interrogation of the sort normally handled by agency personnel, an interrogation beyond the scope of OIG functions." *Id.* at 690. Thus, "[s]o long as the OIG agent is questioning an employee for bona fide purposes within the authority of the [Inspector General Act] and not merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibilities, the OIG agent is not a 'representative' of the employee's agency for purposes of section 7114(a)(2)(B)." *Id.* at 690-691. The Second Circuit's general rule, therefore, is similar to that of the D.C. Circuit, but contains an important qualification: if the OIG acts beyond its statutory mandate, it may be required to comply with the *Weingarten* rule. *Id.* at 691. Thus, although the Second Circuit cautioned that OIG investigators "disregard the *Weingarten* protections at their peril," it also minimized that concern: "In view of the broad scope of [Inspector General Act] functions, however, the risk that questioning by an OIG agent without the presence of a union representative would violate section 7114(a)(2)(B) seems remote." *Ibid.*

c. The federal government has a strong interest in determining whether OIG investigators must comply with the *Weingarten* rule, because the rule severely impairs the ability of OIGs to discharge their statutorily-mandated functions. First, the union representative (unlike the employee's counsel) serves the collective bargaining unit as a whole, and not just the individual employee who is the subject of the investigatory interview. The OIG thus reasonably fears that the *Weingarten* representative will share information learned in the investigatory interview with other members of the collective bargaining unit who might sub-

sequently be interviewed or requested to produce documents in the OIG investigation. Second, under the Authority's precedent, when the *Weingarten* rule applies, it includes not only the right to the assistance of a union representative at the interview, but also an array of rights that would fetter the OIG's ability to conduct an investigation, from the right to prior notice of questions to a right to defer the interview for up to 48 hours.[9]

Moreover, the Authority has ruled that "nothing in section 7114(a)(2) * * * prevents parties from negotiating contractual rights to union representation beyond those provided by that section." *United States Dep't of Justice, Justice Management Div.*, 42 FLRA 412, 435 (1991). In particular, in *United States Nuclear Regulatory Comm'n*, 47 FLRA 370 (1993), the Authority ruled that organized components of an agency are required to negotiate regarding the "procedures" (5 U.S.C. 7106(b)(2)) and "appropriate arrangements" (5 U.S.C. 7106(b)(3)) that apply specifically to OIG investigations, even though OIGs are exempt from

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[9] The Authority has interpreted the *Weingarten* rule to include the right to be informed in advance of the general subject of an examination so that the employee and union representative may consult before questioning begins, see *FAA, New Eng. Region, Burlington, Mass.*, 35 FLRA 645, 652-54 (1990); the right to halt the examination and to step outside the hearing of investigators to discuss with the union representative answers to the investigator's questions, see *United States Dep't of Justice, INS*, 46 FLRA 1526, 1553-1555, 1565-1569 (1993), rev'd on other grounds, *DOJ, supra* (reversal on the ground that the rule does not apply to OIGs); and the right to negotiate for 48-hours' notice before an investigator can begin an examination of a union employee, see *U.S. Department of Justice, INS*, 40 FLRA 521, 549 (1991), rev'd on other grounds *sub nom., United States Dep't of Justice, INS* v. *FLRA*, 975 F.2d 218, 224-226 (5th Cir. 1992).

collective bargaining under the FSLMRS. Although that decision was reversed by the Fourth Circuit in *NRC*, we are unaware of any indication that the Authority would not apply it outside the Fourth Circuit in the absence of controlling contrary authority.

Finally, the FLRA's order prevents NASA-OIG from questioning a NASA bargaining unit employee without union participation no matter how serious the matter or what emergency circumstance might necessitate immediate questioning. App., *infra*, 52a-53a. Consequently, a determination as to whether the rule applies to OIG investigators may determine whether a particular matter can be effectively investigated by the OIG.

The continuing importance of the issue is underscored by the pendency of many unfair labor practice charges brought by federal employee unions against OIGs and the agencies in which they operate for alleged violations of the *Weingarten* statute. See, *e.g.*, *U.S. Dep't of Justice, Office of Inspector General*, Case No. WA-CA-80156 (motion for summary judgment and cross-motions to dismiss pending before FLRA); *Social Security Admin., Headquarters and Social Security Admin. Office of Inspector General*, Nos. AT-CA-60874 & 60875 (consolidated) (pending before FLRA); *USDA Farm Serv. Agency and USDA Office of Inspector General*, No. DE-CA-60399 (exceptions to ALJ decision pending before FLRA); *U.S. Dep't of Justice, Office of Inspector General*, Case No. DE-CA-80076 (motion for summary judgment and cross-motion to dismiss pending before FLRA); *Social Security Admin. Headquarters and Social Security Admin., Office of Inspector General*, Nos. SF-CA-80172 & 80174 (consolidated) (pending before FLRA); *U.S. Dep't of Justice, Federal Bureau of Prisons*, Case No. SF-CA-80415 (complaint pending before the FLRA); *U.S. Dep't of Justice, Office*

of Inspector General, Case No. SF-CA-80424 (complaint pending before FLRA). Thus, there is no question that the issue will recur.

Moreover, the circuit conflict creates uncertainty for OIGs as to which rules apply to which interviews and investigations. In this case, for example, review was appropriately sought in both the D.C. and Eleventh Circuits, see *supra* pp. 8-9, which now have conflicting rules. Before conducting an investigative interview, the OIG has no ability to determine which court of appeals will ultimately be called upon to decide the case. A single investigation might involve some interviews that are exempt from the *Weingarten* rule and some that are not, with the latitude afforded to the investigator and the rights enjoyed by the employee turning on where the person lives and transacts business and, in the event of multiple petitions, the vicissitudes of the court of appeals assignment process. This Court's review is essential to resolve the conflict, which has serious day-to-day consequences for an OIG's ability to perform its mission of investigating fraud and abuse within the federal government in a consistent and effective manner.

2. The court below also held that NASA Headquarters was liable for an unfair labor practice because NASA-OIG decided not to afford the employee statutory *Weingarten* rights. That conclusion is inconsistent with the construction of 5 U.S.C. 7114(a)(2)(B) and the Inspector General Act outlined above. If an OIG cannot be held to have committed an unfair labor practice because it is not a "representative of the agency," the agency headquarters itself cannot be liable for the OIG's actions.

Even if an OIG could be charged with an unfair labor practice for violating a federal employee's statutory *Weingarten* rights, it would not logically follow that an agency headquarters is also liable for the OIG's action. The decision below incorrectly construed the Inspector General Act and the FSLMRS to hold NASA Headquarters liable for the NASA-OIG's actions in this case. See App., *infra*, 19a. Because the D.C. Circuit in *DOJ* and the Second Circuit in *FLRA* v. *DOJ* found no unfair labor practice from the OIG's denial of a union representative at an interview, they had no occasion to address whether the agency headquarters would be legally responsible for the OIG's actions. In their reliance on the Inspector General Act, however, those courts made clear that they would have reached a result different from the Eleventh Circuit on that issue.

Similarly, the decision below cannot be reconciled with the rationale underlying the Fourth Circuit's decision in *NRC*. See 25 F.3d 229. In that case, the court considered whether the OIG's manner of conducting investigations was a proper subject of collective bargaining between the agency and the union. The court held that it was not. *Id.* at 234. The court reasoned that to permit such bargaining "would impinge on the statutory independence of the Inspector General." *Ibid.* "One of the most important goals of the Inspector General Act was to make Inspectors General independent enough that their investigations and audits would be wholly unbiased." *Id.* at 233. The court further rejected the FLRA's argument that "the power of 'general supervision' given to the two top agency heads could be used to limit or restrict the investigatory power of the Inspector General." *Ibid.* The court then noted its disagreement with how the FLRA had "chosen to expand the limited holding of

Defense Criminal Investigative Service" because such an expansion "would directly interfere with the ability of the Inspector General to conduct investigations." *Id.* at 235.

The decision below is inconsistent with the Fourth Circuit's reasoning. If an agency cannot bargain over the manner in which an OIG conducts investigations, it follows that an agency also cannot order an OIG to comply with an interpretation of law about which the OIG might have a good-faith disagreement. That concern is not hypothetical. As the examples in *supra* note 9 demonstrate, the scope of statutory *Weingarten* rights is uncertain. An OIG and an agency headquarters could reasonably disagree over whether an investigator must follow certain procedures to comply with rules that the FSLMRS does not elucidate but that eventually become law through FLRA decisions. An order by agency headquarters to an OIG to comply with such a procedure would "directly interfere with the ability of the Inspector General to conduct investigations," *NRC*, 25 F.3d at 235, in the same ways that an agency's collective bargaining over the OIG's investigative methods and procedures adversely affects an OIG's independence.

The Court would not reach the second issue presented if it agreed with our submission that an OIG is not a "representative of the agency" under 5 U.S.C. 7114(a)(2)(B). A reversal on the first issue would also require a reversal of the unfair labor practice charged against NASA Headquarters. But because of the way the courts of appeals have addressed the interplay between the FSLMRS and the Inspector General Act, full consideration on the merits is also warranted for the second question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1998