No. 98-369

In the Supreme Court of the United States

OCTOBER TERM, 1998

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

v.

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

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

BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record

FRANK W. HUNGER
Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

DAVID C. FREDERICK
Assistant to the Solicitor General

WILLIAM KANTER
HOWARD S. SCHER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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, 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.

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1997. Pet. App. 1a. A petition for rehearing was denied on March 31, 1998. Pet. App. 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

Pertinent subchapters 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.*, and in its entirety the Inspector General Act, Pub. L. No. 95-452, 92 Stat. 1101, 5 U.S.C. App. 3,[1] are set forth in the statutory addendum to this brief.

STATEMENT

1. This case involves an alleged unfair labor practice committed when an investigative agent of an Office of Inspector General (OIG) interviewed a unionized federal employee who asserted certain rights created by the statute governing labor-management relations in the federal government. The issues can only be understood in light of the language, history, and purpose of two statutes enacted on consecutive days: the Inspector General Act, Pub. L. No. 95-452, § 1, 92 Stat. 1101 (Oct. 12, 1978), codified at 5 U.S.C. App. 3 § 1 *et seq.*; and the Federal Service Labor-Management Relations Statute (FSLMRS), Pub. L. No. 95-454, §§ 701, 703(a)(2), 92 Stat. 1191, 1217 (Oct. 13, 1978), codified at 5 U.S.C. 7101 *et seq.*

a. The Inspector General Act of 1978 established in each of a number of federal departments and agencies an Office of Inspector General, as an "independent and objective unit[]—(1) to conduct and supervise audits and investigations relating to programs and operations

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[1] The Inspector General Act appears in the U.S. Code Annotated as the third numbered Appendix to Title 5, and in the U.S. Code as the second unnumbered Appendix to Title 5. We follow the practice of the parties and the court of appeals in citing the Act as 5 U.S.C. App. 3.

of the above establishments." 5 U.S.C. App. 3 § 2. The original statute created Offices of Inspector General for the Departments of Agriculture, Commerce, Housing and Urban Development, the Interior, Labor, and Transportation, and for the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, and the Veterans Administration. See Pub. L. No. 95-452, 92 Stat. 1101. Subsequent enactments established Offices of Inspector General for other departments and agencies. See, *e.g.*, Pub. L. No. 97-113, Tit. VII, § 705(a)(3), 95 Stat. 1544 (Agency for International Development); Pub. L. No. 97-252, Tit. XI, § 1117(b), 96 Stat. 751 (Department of Defense); Pub. L. No. 100-504, Tit. I, § 102(f), 102 Stat. 2517 (Nuclear Regulatory Commission, Department of the Treasury, Department of Justice). Offices of Inspector General created by statute now exist in nearly 60 federal establishments and entities, nearly half of which (27) are led by an Inspector General appointed by the President. See Congressional Research Service, *Statutory Offices of Inspector General: A 20th Anniversary Review* 1 (Apr. 27, 1998); President's Council on Integrity and Efficiency (PCIE) and Executive Council on Integrity and Efficiency (ECIE), *Fiscal Year 1997: A Progress Report to the President* 1 (hereafter PCIE, *Fiscal Year 1997 Report*).[2]

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[2] Each of the 14 Cabinet departments has a statutory Inspector General appointed by the President. A number of federal agencies have Inspectors General created by statute and appointed by the head of the agency. For a listing of those OIGs, see Congressional Research Service, *Statutory Offices of Inspector General: Establishment and Evolution* 6 (Apr. 17, 1998).

The Inspector General Act was a response to deficiencies in auditing and investigative procedures within federal agencies, resulting from the control by agency management over the audit and investigation process. Thus, the House Report noted that "when complaints are received, investigators in some agencies are not permitted to initiate investigations without clearance from officials responsible for the programs involved." H.R. Rep. No. 584, 95th Cong., 1st Sess. 5 (1977). Congress received testimony about agency managers who had ordered investigations to be stopped or deprived investigative units of sufficient resources. *Id.* at 5-7.[3] As a result, Congress provided that, while the Inspector General "shall report to and be under the general supervision of the head of the establishment involved," the agency head may not "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." 5 U.S.C. App. 3 § 3(a). Congress further mandated the separation of investigative from operating responsibilities by providing that "there shall not be transferred to an Inspector General * * * program operating responsibilities." 5 U.S.C. App. 3 § 9(a).

In conducting investigations, OIGs adhere to professional standards and guidelines promulgated by the Department of Justice. PCIE, *Fiscal Year 1997 Re-*

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[3] See generally Congressional Research Service, *Statutory Offices of Inspector General: A 20th Anniversary Review* 2-7 (Apr. 27, 1998) (describing powers and functions of OIGs); P. Light, *Monitoring Government: Inspectors General and the Search for Accountability* 23-57 (1993) (describing background of Inspector General legislation and history of the concept of Inspectors General).

port, *supra*, at 3. OIG investigative agents are trained at the Federal Law Enforcement Training Center (FLETC), where agents of the Secret Service, Bureau of Alcohol, Tobacco and Firearms (BATF), United States Marshals Service (USMS), and other federal law enforcement agency investigators also receive training. See Federal Law Enforcement Training Center, *Catalog of Training Programs Fiscal Year 1995* at 4-5 (1994) (listing participants). As of September 30, 1997, the OIGs led by a presidentially-appointed Inspector General had more than 2,000 criminal investigative agents.[4] Those agents must be skilled in all facets of law enforcement techniques, from using firearms to making arrests. See United States Civil Service Commission, *Grade-Level Guides for Classifying Investigator Positions, GS 1810/1811* at 5-17 (1972). Each Inspector General must "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). "In FY 1997 alone, OIG investigations led to the recovery of almost $3 billion and the successful prosecution of 15,635, and the suspension or debarment of 6,365 people or businesses doing business with the government." PCIE, *Fiscal Year 1997 Report*, *supra*, at 3.

b. The Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101 *et seq.*, enacted as Title VII of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, established

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[4] That number is derived from a survey of OIGs conducted for a General Accounting Office report on Inspectors General scheduled to be issued after the submission of this brief and provided to the Solicitor General by the Vice Chair of the PCIE.

the right of federal employees to organize, select an exclusive representative, and engage in collective bargaining with agency management about a limited number of topics. The FSLMRS was designed to redress a perceived imbalance in the power relationships between an agency's management and its employees. The House report explained that "Title VII of the bill [the FSLMRS] establishes a statutory basis for labor-management relations in the Federal service" in lieu of the Executive Orders that governed those relations. H.R. Rep. No. 1403, 95th Cong., 2d Sess 38 (1978). "Title VII would for the first time enact into law the rights and obligations of the parties to this relationship – employees, agencies, and labor organizations." *Ibid.* In particular, it provides that when a "representative of the agency" examines an employee "in connection with an investigation" and the employee reasonably believes the examination may result in disciplinary action, the employee may upon request have a union representative present. 5 U.S.C. 7114(a)(2)(B).

According to records compiled by the Office of Personnel Management, as of January 1, 1997, the various agencies of the federal government had recognized 1,763 collective bargaining units represented by 91 different unions. See United States Office of Personnel Management, *Union Recognition in the Federal Government* I-5 to I-9 (June 1997). Those various entities had entered into 1,235 collective bargaining agreements. *Id.* at I-5. Although in some Executive departments the number of collective bargaining units recognized is low, such as the Department of Labor (3) and the Department of Education (1), in other departments many more distinct bargaining units have been recognized, such as in the Departments of Agriculture (87), Commerce (48), Health and Human Services (112),

Interior (146), Justice (23), Transportation (90), Treasury (37), and Veterans Affairs (62). *Id.* at I-2 to I-5. As of January 1, 1997, a total of 1,023,852 federal employees were covered by agreements between a union and a federal agency. *Id.* at I-5.

2. The unfair labor practice decision at issue in this case 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 Pet. App. 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, who throughout this litigation has been referred to as "P" (see Pet. App. 60a n.1), was suspected of authoring various incendiary documents. Pet. App. 23a. 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 Pet. App. 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, 42. 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. Pet. App. 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. Pet. App. 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). Pet. App. 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 government." *Id.* at 24a, 61a. The union representative, Patrick Tays, objected to the "ground rules," 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 Federal Labor Relations Authority (FLRA) pursuant to 5 U.S.C. 7116(a)(1), alleging that NASA-OIG and NASA Head-

quarters had committed an unfair labor practice.[5] 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 federal employees in a bargaining unit the right to the participation of a union representative at an examination by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action and requests representation.[6] The complaint alleged that petitioners violated the rule by refusing to allow the union representative to participate actively in the investigatory interview of P. Pet. App. 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. Pet. App. 63a. The administrative law judge (ALJ) concluded that the OIG investigator was a

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[5] 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; [or]
>
> * * * * *
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

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

"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. Pet. App. 64a-71a. The ALJ recommended that the FLRA 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 FLRA, arguing principally that its investigator was not "a representative of the agency" under the D.C. Circuit's decision in *United States Dep't of Justice* v. *FLRA*, 39 F.3d 361 (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 Pet. App. 27a-28a; C.A. R.E. 84-102. On July 28, 1995, the FLRA 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 purposes of the statutory *Weingarten* rule. Pet. App. 28a-48a. In reaching that conclusion, the FLRA 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 (1988) (*DCIS*). See Pet. App. 37a-40a. The FLRA based that conclusion on two premises: the OIG investigator is an employee of the agency and reports through a chain of

command that leads ultimately to the head of the agency; and the Inspector General provides investigatory information to the head of the agency. The FLRA concluded that the OIG investigator is a representative of agency management even though the Inspector General is largely independent of agency management and even though the OIG investigator is not part of the bargaining unit of the person under investigation. Pet App. 40a-43a. The FLRA reasoned that excluding OIG investigators from the category of "representative[s] of the agency" would open the door to evasion by the agency of its statutory responsibilities, Pet. App. 41 n.22, while in its view including OIG investigators as "representative[s] of the agency" subject to *Weingarten* rights would not in practice interfere with the mission of the OIG. Pet. App. 45a-48a.

In addition, the FLRA 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 49a-52a. The FLRA 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 FLRA further directed 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. Pet. App. 53a-55a.

3. The FLRA 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 FLRA 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." Pursuant to 28 U.S.C. 2112(a) and Multidistrict Litigation Panel Rule 24, a panel randomly chose the Eleventh Circuit to hear the case.

The Eleventh Circuit granted the FLRA's application for enforcement and denied the petition for review filed by NASA and NASA-OIG. Pet. App. 20a.[7] The court deferred to the FLRA'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 statutory *Weingarten* rule. In so ruling, in most pertinent respects 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*. Pet. App. 7a-9a, 12a, 15a. The court of appeals also concluded that because OIG investigators conduct investigations and provide information to management that may be used to support administrative or disciplinary actions, the investigators are "representatives of the agency" despite their independence from control by agency management. Pet. App. 11a. The court concluded that subjecting OIG investigators to *Weingarten*

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

rights would not impermissibly hinder the OIG's ability to perform its essential function. Pet. App. 14a-15a. The court thus found NASA-OIG guilty of an unfair labor practice in failing to accord the employee his rights under 5 U.S.C. 7114(a)(2)(B). 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.

SUMMARY OF ARGUMENT

I. A. The FSLMRS provides that a federal unionized employee may request and receive representation by a union official at an examination in which the employee reasonably fears discipline if the examination is conducted by "a representative of the agency." 5 U.S.C. 7114(a)(2). The rights created under Section 7114 arise out of the collective bargaining relationship between the employee's union and agency management. As the phrase "representative of the agency" is used in Section 7114 and elsewhere in the FSLMRS, it refers to a representative of agency management, *i.e.*, the entity that has a collective bargaining relationship with the employee's union. See 5 U.S.C. 7103(a)(12) and 7114(a)(2)(A). Limiting the application of Section 7114(a)(2)(B) to the agency management that collectively bargains with the employee's union is consistent with the development of private sector labor law after this Court's decision in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), which recognized the right of a union employee to union representation in an investigative interview by management The FLRA's construction erroneously equates any employee of the "agency" with "representative of the agency," ignoring the fact that the phrase "representative of the agency"

is a term of art with a particular meaning in a statute governing labor-management relations.

B. The Inspector General Act insulates the Inspector General from control by agency management in critical respects, so that an Inspector General and OIG investigators are not representatives of agency management. The Inspector General has discretion in what investigations to conduct and how to conduct them; the agency head cannot "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation." 5 U.S.C. App. 3 § 3(a). The Inspector General also has reporting functions – to Congress and to the Attorney General (when the OIG uncovers evidence of criminal activity) – that distinguish its responsibilities from those of agency management and shield it from political pressure. Although Congress required that an Inspector General be under the "general supervision" of the agency head, that requirement merely facilitates a workable relationship between the agency head and the Inspector General and does not limit the Inspector General's independence in performing the functions prescribed under the Inspector General Act. Congress also prohibited the Inspector General from performing the policy and programmatic functions of agency management and excluded OIGs from the collective bargaining process altogether. To compel OIG investigators to comply with 5 U.S.C. 7114(a)(2)(B) would be inconsistent with the requirements imposed under the Inspector General Act prohibiting OIGs from disclosing certain investigative information and ensuring the OIG's freedom to investigate allegations of misconduct. The FLRA and the court of appeals recognized that the term "representative of the agency" does not include law enforcement officers charged with investigating misconduct by

agency employees for possible criminal prosecution or administrative sanction, but it failed to recognize that under the Inspector General Act OIG investigators are such law enforcement officers, rather than aides of agency management.

C. The FLRA decision is not entitled to deference. First, to the extent it reads 5 U.S.C. 7114(a)(2)(B) to govern interviews by persons other than representatives of agency management, that construction is erroneous in light of the statutory text and the context in which it appears in the statute. Second, the FLRA's application of the statute to OIG investigators depends on an assessment of the relationship between an OIG and agency management, a question as to which the FLRA has no expertise and is entitled to no deference.

D. The court of appeals mistakenly viewed 5 U.S.C. 7114(a)(2)(B) as principally designed to protect federal employees in any investigation that might lead to disciplinary action. In so doing, the court overlooked the fact that the FSLMRS concerns the collective bargaining relationship between agency management and federal employee unions, and not the investigation of employee misconduct by law enforcement agencies like the FBI, which can also result in the imposition of discipline. Because the Inspector General is more like the FBI than an arm of management, OIG investigators are not subject to the requirements of Section 7114(a)(2)(B).

II. If the Court agrees that an OIG investigator is not a "representative of the agency" under 5 U.S.C. 7114(a)(2)(B), it need not decide the second issue presented— whether NASA Headquarters is liable for an unfair labor practice because of the OIG's actions. But even if an OIG investigator were properly regarded as a representative of the agency, it would not

logically follow that an agency headquarters is liable for the investigator's conduct. The provisions of the Inspector General Act establishing the independence of OIGs from agency management deprive agency management of responsibility for any unfair labor practice committed by an OIG.

ARGUMENT

I. AN OIG INVESTIGATOR IS NOT "A REPRESENTATIVE OF THE AGENCY" WITHIN THE MEANING OF 5 U.S.C. 7114(a)(2)(B) AND THUS NEED NOT PERMIT A UNION REPRESENTATIVE TO PARTICIPATE IN AN OIG INVESTIGATIVE INTERVIEW

The FSLMRS provides that "[a]n exclusive representative of an appropriate unit in an agency 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 FLRA and the Eleventh Circuit held in this case that an investigator from NASA's Office of Inspector General is "a representative of the agency" within the meaning of that statute, but in so doing they misunderstood both the purpose of the FSLMRS to regulate relations between employees and management, and the purpose of the Inspector General Act to create investigative offices that are independent of agency management. An examination of the text and purposes of both statutes shows that a "representative of the agency" under the FSLMRS means a representative of agency management, and that an OIG investigator is not such a representative and therefore is not

required to comply with 5 U.S.C. 7114(a)(2)(B) when conducting investigative interviews.

A. A "Representative of the Agency" Within The Meaning Of 5 U.S.C. 7114(a)(2)(B) Is A Representative Of Agency Management That Has A Collective Bargaining Relationship With The Union

1. The *Weingarten* right is contained in 5 U.S.C. 7114, which is entitled "Representation rights and duties." All of the rights and duties in Section 7114 arise out of the collective bargaining relationship between a union and management. Section 7114(a)(2) creates and defines a labor organization's right to "exclusive representati[on]" of the employees in the unit; Section 7114(a)(2)(A) addresses the union's right to participate at a "formal discussion" between management and employees concerning "grievance[s] or * * * personnel polic[ies] or practices or other general condition[s] of employment"; and Sections 7114(a)(4) and 7114(b) address the duty of both agency management and the union to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement" covering that agency's employees. Section 7114(a)(2)(B) therefore must likewise be understood as a component of the "[r]epresentation rights and duties," meaning that it, too, is connected to the labor-management collective bargaining relationship. See *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"); see also *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) ("[T]he meaning of statutory language, plain or not, depends on context.") (internal quotation marks and citations omitted).

2. The phrase "representative of the agency" is consistently used in the FSLMRS to describe a representative of management, meaning the entity that has a collective bargaining relationship with a union. Congress used the phrase in three places in the FSLMRS. First, Section 7103(a)(12) defines the term "collective bargaining" as

> the performance of the mutual obligation of *the representative of an agency* and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute * * * a written document incorporating any collective bargaining agreement reached.

5 U.S.C. 7103(a)(12) (emphasis added). Because the term "representative of an agency" is used to define the party to a collective bargaining relationship in Section 7103(a)(12), subsequent uses of the term in the FSLMRS should also be understood as referring to the management entity that has a collective bargaining relationship with a union.[8]

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[8] Section 7103(a)(12) refers to the "representative of *an* agency," while Section 7114(a)(2)(B) refers to the "representative of *the* agency," but that discrepancy results from the fact that the two statutory provisions operate at different moments in time. Prior to the time when an exclusive representative of the employees in a collective bargaining agreement is recognized, management is simply "an agency." After establishing a collective bargaining relationship, management becomes "*the* agency" with respect to the "[r]epresentation rights and duties" (5 U.S.C. 7114) that must be observed between labor and management.

Second, Section 7114(a)(2)(A) (immediately preceding the *Weingarten* right in Section 7114(a)(2)(B)), provides a right of union representation at "any formal discussion between one or more *representatives of the agency* and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment." 5 U.S.C. 7114(a)(2)(A) (emphasis added). Only parties who have a collective bargaining relationship engage in "formal discussion[s]" that pertain to grievances, personnel policies or practices, and conditions of employment. Thus the term "representatives of the agency" in Section 7114(a)(2)(A) clearly refers to the representatives of agency management, *i.e.*, the entity that has a collective bargaining relationship with the union.

The "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning," *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996) (internal quotation marks omitted). Because the term "representative of the agency" is generally used in the statute to contrast the management entity involved in the collective bargaining process with the representative of employees, "representative of the agency" in Section 7114(a)(2)(B) must also refer to a representative of management in the collective-bargaining relationship between an agency and its employees.

3. A construction of Section 7114(a)(2)(B) limiting the statutory *Weingarten* rights to disciplinary interviews conducted by the management entity that has a collective bargaining relationship with the interviewee's union is consistent with the history and purposes underlying the rule. Congressman Udall, whose amendment to H.R. 11280 became the FSLMRS, ex-

plained that the "provisions concerning investigatory interviews reflect the U.S. Supreme Court's holding in *National Labor Relations Board* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975)." 124 Cong. Rec. 29,184 (1978), reprinted in *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978: Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 926 (1979) (*Legislative History*).

In *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court determined that the rule requiring the presence of a union representative at an investigatory interview conducted by management was a permissible construction of the employees' right, under Section 7 of the National Labor Relations Act, "to engage in * * * concerted activities for * * * mutual aid or protection." 29 U.S.C. 157. The Court stated that the rights enumerated in *Weingarten* arose out of the need to balance the power between the parties to the collective bargaining relationship:

> 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. * * * Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the in-

> equality 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."

420 U.S. at 260-261, 262 (quoting *American Shipbuilding Co.* v. *NLRB*, 380 U.S. 300, 316 (1965)) (footnote omitted) (emphasis added). The D.C. Circuit has emphasized that point: "The Supreme Court in *Weingarten*, and the National Labor Relations Board, viewed the matter [of representational rights] in terms of 'bargaining power.'" *DOJ*, 39 F.3d at 368. "These 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.*

In the private sector, the *Weingarten* right has been strictly confined to apply only when a representative of management interviews a bargaining unit employee and the employee reasonably fears discipline. When management interviews an employee who is *not* in the bargaining unit, the *Weingarten* right does not apply. See, *e.g.*, *E.I. DuPont de Nemours*, 289 N.L.R.B. 627 (1988), review denied per curiam sub nom. *Slaughter* v. *NLRB*, 876 F.2d 11 (3d Cir. 1989). See generally K. Judd, *The* Weingarten *Right in a Nonunion Setting: A Permissible and Desirable Construction of the National Labor Relations Act*, 19 Memphis St. L. Rev. 207, 213-217 (1989) (describing evolution of NLRB rulings culminating in decision that non-unionized employee does not have *Weingarten* rights). Similarly, when an entity other than management, such as a law enforcement officer, interviews a bargaining unit employee who might subsequently face discipline as a

result of information obtained in the interview, the employee has no right to the presence of a union representative.[9] Although Section 7 of the National Labor Relations Act at issue in *Weingarten* is worded differently from 5 U.S.C. 7114(a)(2)(B), nothing in the text or history of the FSLMRS suggests that Congress intended public sector employees to enjoy a right to union representation outside the labor-management relationship recognized in *Weingarten* and its progeny.

4. a. The FLRA's contrary position amounts to a determination that a "representative" of the "agency" must mean any official within the parent agency, because otherwise an agency could avoid its statutory responsibilities by using personnel from a sub-component of the agency other than the employee's to conduct investigative interviews. Pet. App. 41a n.22. But the FLRA's strained construction of the statute is not necessary to prevent evasion, because any person acting at the direction of management and under management's control can be a "representative of the agency" within the meaning of Section 7114(a)(2)(B), without regard to job title. Nonetheless, "representative of the agency" is a term of art. The critical provisions of the FSLMRS, Sections 7103(a)(12) and 7114, are worded in terms of two entities on either side of the bargaining table: the "exclusive representative of employees in an appropriate unit in the agency" that represents labor and the "representative of the agency" that represents management. Thus, there is no support in the text itself for the FLRA's attempt to extend

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[9] That proposition appears to be so well understood that it is not even discussed in treatises describing *Weingarten* rights. See, *e.g.*, 3 T. Kheel & M. Eisenstein, *Labor Law* § 10.06 (1998); W. Hartsfield, *Investigating Employee Conduct* § 10.40 (1998).

Weingarten coverage beyond agency management to any official housed within the agency. Nor is there any warrant for extending coverage to the Inspector General to prevent evasion of the rule, since as set forth below, the agency has no power to direct the Inspector General to conduct investigative interviews in aid of management functions.

b. The FLRA's construction leads to what the D.C. Circuit has described as a "semantic difficulty": there is no agency that the OIG investigator can be said to "represent" within the meaning of Section 7114(a)(2)(B). The investigator cannot represent the agency (or component of the agency) that directly employs the person under investigation, because the investigator is not in that entity and the employing agency "could not direct the investigator, and * * * ha[s] no control over him." 39 F.3d at 365. And the OIG itself cannot be the agency contemplated by Section 7114(a)(2)(B) in the phrase "representative of the agency," 39 F.3d at 365, because the "agency" in that phrase must be an entity that contains the employee's bargaining unit. See also pages 31-32, *infra*. The OIG does not in fact contain the bargaining unit to which the employee under investigation belongs, 39 F.3d at 365-366, 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 365 n.5 (citing *Nuclear Regulatory Comm'n* v. *FLRA*, 25 F.3d 229, 235 (4th Cir. 1994)).[10]

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[10] The Senate bill would have excluded investigative and audit employees from coverage under the FSLMRS only if the agency

c. The FLRA apparently recognizes that law enforcement officers cannot properly be treated as "representative[s] of the agency" that employs them. Thus, it has conceded that FBI agents need not comply with Section 7114(a)(2)(B) when investigating unionized federal employees within the Department of Justice, even though FBI agents themselves are employees of that Department. See FLRA C.A. Br. 39[11]; see also Union-Intervenor C.A. Br. 29, 40. Presumably by the same logic the provision would not apply to other law enforcement officers investigating employees of their parent agency, such as Secret Service agents (employed by the Department of the Treasury) investigating currency counterfeiting by a unionized Treasury employee, or agents of the Bureau of Tobacco, Alcohol and Firearms (also employed by the Department of the Treasury) investigating illegal gun or alcohol trafficking by unionized Treasury employees. Thus, the FLRA's determination that OIG investigators are covered by Section 7114(a)(2)(B) depends on a characterization of

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head determined that exclusion was necessary for the internal security of the agency. *Legislative History*, *supra*, at 563-564 (S. 2640 § 7202(c)). That exclusion, however, which parallels the exclusion of employees of the FBI and CIA, was made nondiscretionary in the version of the statute that was enacted into law. See *id.* at 141-142 (H.R. 13), 258 (H.R. 9094), 399-400 (H.R. 11280), and 972-973 (Udall substitute).

[11] The FLRA explains its decision to exempt FBI agents from the statutory *Weingarten* rule by citing 28 U.S.C. 535(a), which confers authority on the FBI to "investigate any violation of title 18 involving Government officers and employees – (1) notwithstanding any other provision of law." See FLRA C.A. Br. 39. That provision, however, is more naturally read as preserving the concurrent jurisdiction of the FBI to investigate offenses that Congress also charged other law enforcement agencies (such as OIGs) with investigating.

those investigators as more like administrative aides to the agency head than like law enforcement officers. That characterization rests on a fundamental misconception of the nature of a statutory Inspector General, a question governed not by the FSLMRS, which the FLRA is charged with administering, but by the Inspector General Act, to which we now turn.

B. The Inspector General Act Establishes That An Inspector General Is Not A Representative Of Agency Management Within The Meaning Of 5 U.S.C. 7114(a)(2)(B)

1. *The Inspector General Act makes an OIG independent of agency management*

As a general matter, the OIG's grant of statutory authority is entirely different from and independent of the grant of authority to the head of the agency. Compare 5 U.S.C. App. 3 § 9(a)(1)(P) (creating the Office of Inspector General of NASA) with 42 U.S.C. 2472 (creating NASA).[12] The Inspector General Act provides that the Inspector General for each department shall lead an "independent and objective unit[]," 5 U.S.C. App. 3 § 2, and be "appointed by the President" with "the advice and consent of the Senate, without regard to political affiliation and solely on the basis of

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[12] 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) 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).

integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations," 5 U.S.C. App. 3 § 3(a). That general directive to an Inspector General to be "independent" within the agency is complemented by specific statutory functions that OIGs must perform free of agency management direction.

a. When the OIG conducts investigations of potential criminal and administrative law violations, 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).[13] Instead, the OIG is authorized "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishments as are, *in the judgment of the Inspector General*, necessary or desirable." 5 U.S.C. App. 3 § 6(a)(2) (emphasis added). As the House Report on the Inspector General Act explained, "[t]he purpose of this language is to insure that no restrictions are placed upon the Inspector General's freedom to investigate fraud, program abuse and other problems

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[13] A narrow exception to that general principle is set forth in the special provisions of the Inspector General Act that authorize the Attorney General to prevent the Department of Justice OIG (DOG-OIG) from proceeding with an investigation that would disclose particularly sensitive law enforcement or national security information. See 5 U.S.C. App. 3 § 8E(a). According to the DOJ Inspector General, that provision has been invoked only once by the Attorney General since the creation of the DOJ-OIG. See M. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 Geo. L.J. 2027, 2044 n.14 (1998). The Secretary of the Treasury has similar authority with respect to the Treasury OIG, see 5 U.S.C. App. 3 § 8D(a)(2), as does the Secretary of Defense with respect to an investigation or audit by the Department of Defense OIG, see 5 U.S.C. App. 3 § 8(b)(2).

relating to agency activities." H.R. Rep. No. 584, 95th Cong., 1st Sess. 14 (1977). See also 124 Cong. Rec. 30,952 (1978) (statement by Sen. Eagleton) (Inspector General Act "explicitly provides that even the head of the agency may not prohibit, prevent, or limit the Inspector General from undertaking and completing any audit and investigation which the Inspector General deems necessary"). Thus, if the head of the establishment asked the Inspector General "not to undertake a certain audit or investigation or to discontinue a certain audit or investigation," the Inspector General "would have the authority to refuse the request and to carry out his work." S. Rep. No. 1071, 95th Cong., 2d Sess. 26 (1978).

The Inspector General thus has the freedom to decide whether to investigate particular allegations of wrongdoing, what documents to request of agency officials, and what persons to interview. If during the course of an investigation the Inspector General learns of "reasonable grounds to believe that there has been a violation of Federal criminal law," the Inspector General Act requires him to "report expeditiously to the Attorney General," 5 U.S.C. App. 3 § 4(d), and to do so "directly, without notice to other agency officials," *NRC*, 25 F.3d at 234.[14]

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[14] Conferring independence on the Inspector General was intended to correct a perceived deficiency in existing procedures for handling the investigation of internal affairs matters. "Justice Department officials responsible for prosecuting fraud against the Government testified that, with some exceptions, working relationships with other Federal departments and agencies on fraud matters are far from optimum." H.R. Rep. No. 584, *supra*, at 5. Those concerns were echoed in a floor statement by Representative Levitas, who observed that "administrators have an allegiance to their programs and are not inclined to pursue efforts that may

That independence in the conduct of investigations extends to the selection of personnel to perform the work. An Inspector General is empowered under the Inspector General Act to appoint an Assistant Inspector General for Investigations who is responsible "for supervising the performance of investigative activities relating to such programs and operations" of the agency. 5 U.S.C. App. 3 § 3(d)(2). An Inspector General also has the authority to select and employ whatever personnel are necessary to conduct its business, to employ experts and consultants, and to enter into contracts for audits, studies, and other necessary services. 5 U.S.C. App. 3 §§ 6(a), 7-9 (1994 & Supp. II 1996).

OIG investigative personnel conduct the full range of criminal and administrative investigations within the programmatic scope of the agency they oversee. 5 U.S.C. App. 3 § 4. See, *e.g.*, *New England Apple Council* v. *Donovan*, 725 F.2d 139, 143 (1st Cir. 1984) (as to those matters over which the OIG has investigative jurisdiction, the "functions of OIG investigators are no different from the functions of FBI agents"—both "investigate federal crimes, serve in undercover capacities, perform surveillance, and conduct investigatory interviews"); *Burlington Northern R.R.* v. *OIG*, 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 mismanage-

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reveal fraud and reflect badly upon their programs. Who wants to be identified with a program that is full of cheaters?" 124 Cong. Rec. at 10,404-10,405.

ment in the programs and operations of [various executive] departments and agencies").[15]

b. The reporting functions of the OIG further demonstrate its independence from agency management. An Inspector General must submit semiannual reports to Congress on the results of the OIG's investigations. An agency head may add comments to the OIG's report, but cannot prevent the report from being transmitted to Congress or change its contents. 5 U.S.C. App. 3 § 5(b)(1). The same is true for reports of "particularly serious or flagrant problems, abuses, or deficiencies" in programs, which must be reported by the Inspector General to the head of the establishment involved and transmitted by that person to the appropriate committee or subcommittee of Congress within seven calendar days, along with a report prepared by the agency if the agency head deems one appropriate. 5 U.S.C. App. 3 § 5(d). Thus, in requiring certain reports by the Inspector General, Congress ensured that the agency head would have the authority to comment upon, but not alter, the Inspector General's report.[16]

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[15] See, *e.g.*, U.S. Department of Agriculture Office of Inspector General, *Semiannual Report to Congress, FY 1998-Second Half* 4-5 (Nov. 1998) (describing food stamp and food program fraud investigations); Department of Health and Human Services Office of Inspector General, *Semiannual Report, April 1, 1998-September 30, 1998*, at 8-15, 23-25, 62-63 (describing medical laboratory fraud, employee misconduct, and criminal billing fraud investigations).

[16] The House report explained the rationale for this approach: "In order to prevent lengthy delays resulting from agency 'clearance' procedures, reports or information would be submitted by each Inspector General to the agency head and the Congress without further clearance or approval." H.R. Rep. No. 584, *supra*, at 3. See also S. Rep. No. 1071, *supra*, at 9 (The Inspector General "derives independence from the fact that the agency head can add

c. Although the Inspector General "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).[17] Congress imposed the requirement of "general supervision" to overcome concerns that the OIG's work might be "significantly impaired if [the Inspector General] does not have a smooth working relationship with the department head." S. Rep. No. 1071, *supra*, at 9. But that supervision does not extend to the most important specific functions performed by the OIG: "the agency head would have no authority to prevent the Inspector and Auditor General from initiating and completing audits and investigations he believes necessary." *Id.* at 7. Indeed, other than the "general supervision" of the agency head and one deputy, an Inspector 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).

Accordingly, "no one else in the agency may provide any supervision to [an] Inspector[] General," and an OIG is entirely "'shielded * * * from agency interference'" in the conduct of its work, *NRC*, 25 F.3d at

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his comments to the semi-annual report" of the Inspector General "but cannot generally prevent it from going to Congress or change its contents.").

[17] Certain "designated Federal entities," listed in 5 U.S.C. App. 3 § 8G(a)(2) (1994 & Supp. II 1996), have an Inspector General appointed and removable by the head of the entity; in such entities if the Inspector General is removed from office the head of the entity must "promptly communicate in writing the reasons for any such removal or transfer to both Houses of the Congress." 5 U.S.C. App. 3 § 8G(e). NASA, the agency at issue here, is not among the designated federal entities, which include, *inter alia*, the FLRA. See *ibid.*; 5 U.S.C. App. 3 §§ 9(a)(1)(P) and 11(2).

234, which includes the following 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 for documentary evidence 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).[18]

Just as agency management is prohibited from interfering with the functions of the OIG, so too the OIG is prohibited from performing the policy and programmatic functions of agency management. See generally *Inspector General Authority to Conduct Regulatory Investigations*, 13 Op. Off. Legal Counsel 54

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[18] The Inspector General Act, however, does not confer the authority on OIGs to compel testimony from witnesses through subpoenas. An employee witness who refuses an OIG request for an interview may be compelled by agency management to appear at an OIG investigative interview. See 5 U.S.C. App. 3 § 6(a)(3) (authorizing Inspector General "to request such information or assistance" as is needed) and § 6(b) (providing that "the head of any Federal agency shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation * * * furnish to such Inspector General * * * such information or assistance"). Such testimony cannot be used against the witness in a criminal proceeding. See, *e.g.*, *Kalkines* v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973). An employee who refuses to cooperate with an OIG investigation may be punished administratively for that refusal by the employing agency. See generally *LaChance* v. *Erickson*, 118 S. Ct. 753 (1998); 5 U.S.C. 7513.

(1989). When Congress required the transfer of offices and employees to OIGs under the Inspector General Act, it expressly provided that "there shall not be transferred to an Inspector General * * * program operating responsibilities." 5 U.S.C. App. 3 § 9(a). That prohibition was intended "to prevent compromising the independence and objectivity of the Offices of Inspector General," H.R. Rep. No. 584, *supra*, at 15, as well as to give OIGs "absolutely no policy responsibility" in the running of Executive Branch establishments, 124 Cong. Rec. 10,404 (1978) (statement of Rep. Horton).[19]

In particular, the OIG does not have a collective bargaining relationship with any union or even with its own employees. See 5 U.S.C. 7112(b)(7) (prohibiting "any employee primarily engaged in investigative or audit functions" functions from participating in a bargaining unit). Moreover, an OIG is not in a position to "initiate or continue a practice of imposing punishment" with respect to a bargaining unit employee, *Weingarten*, 420 U.S. at 260-261, because only employers can impose punishment. An OIG lacks statutory authority to impose punishment; it can only investigate suspected

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[19] As Representative Horton explained, "It is important, Mr. Speaker, to remember and to realize that this new Office of Inspector General will have absolutely no policy responsibility. The new IG's are to be totally independent and free from political pressure. If I have any reservations at all, they are concerned with that independence. I would merely suggest that we keep an eye on these IG's and see to it that they have the freedom to operate independently." 124 Cong. Rec. at 10,404. Representative Levitas took up that theme: "The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibilities to divide allegiances. The Inspector General will be responsible for audits and investigations only." *Id*. at 10,405.

waste, fraud, and abuse. See 5 U.S.C. App. 3 §§ 4, 6. Indeed, just because an OIG finds instances of wrongdoing does not mean that the agency necessarily will impose discipline.[20] Thus, the concerns expressed in *Weingarten* that management would use the disciplinary process as a means of exerting coercive influence over employees in derogation of collectively bargained provisions does not arise in the context of an OIG investigation. See *Weingarten*, 420 U.S. at 262.

2. *The Inspector General Act imposes obligations on the OIG that are inconsistent with 5 U.S.C. 7114(a)(2)(B)*

a. Attendance of a union representative at an OIG interview can interfere with the reporting and nondisclosure obligations imposed by the Inspector General Act. That Act provides that the Inspector General must report directly to the Attorney General (and not to the agency head) if the Inspector General finds reasonable grounds to believe there has been a violation of Federal criminal law. 5 U.S.C. App. 3 § 4(d). But the OIG's duty to maintain confidentiality would be undermined if its interviews were open to union representatives as required by *Weingarten*.

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[20] An example of that exercise of agency management discretion occurred after the Department of Justice OIG made findings of wrongdoing within the FBI Crime Laboratory. See Department of Justice Office of the Inspector General, *The FBI Laboratory: An Investigation Into Laboratory Practices and Alleged Misconduct in Explosives-Related And Other Cases* (1997). The Department of Justice management chose to impose discipline on only two FBI laboratory examiners among the thirteen past or present examiners and officers against whom the OIG had made findings of wrongdoing. See M. Sniffen, *Censure Urged for FBI Lab Employees*, Associated Press, Aug. 7, 1998.

The court of appeals mistakenly viewed the presence of a union representative as equivalent to the presence of legal counsel assisting an employee. See Pet. App. 14a. An attorney's first duty of loyalty is to the client, however, while a union representative's duty of loyalty is to the collective bargaining unit as a whole. See, *e.g.*, *E.I. DuPont de Nemours*, 289 N.L.R.B. at 629 (union steward has "obligation to represent the interests of the entire bargaining unit"). An employee's attorney may have incentives not to share information with other employees, in order to preserve the attorney-client privilege and avoid the appearance of witness tampering or obstructing a federal inquiry. See generally 18 U.S.C. 1512 (obstruction offense); P. Rice, *Attorney-Client Privilege in the United States* § 9.27 *et seq.* (1993) (describing what disclosures cause waivers of the privilege). By contrast, a union representative with a statutory right to attend an examination may well conclude that the interest of the bargaining unit would be best served by sharing information learned during the investigatory interview with other members of the collective bargaining unit, who might subsequently be interviewed or requested to produce documents. Thus the presence of a union representative has much more potential than that of a lawyer to undermine the investigation and the OIG's duty of confidentiality.

b. In addition, 5 U.S.C. App. 3 § 3 was designed to ensure that "no restrictions are placed upon the Inspector General's freedom to investigate" cases. H.R. Rep. No. 584, *supra*, at 14. By contrast, the statutory *Weingarten* provision as construed by the FLRA involves far more than the mere presence of a union representative at an interview, and thus imposes major restrictions on the OIG's freedom to investigate. Although the plain language of the statute requires

only the presence of a union representative at an interview, the FLRA has construed the Section 7114(a)(2)(B) right 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 *Federal Aviation Admin., New England Region, Burlington, Massachusetts*, 35 F.L.R.A. 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 F.L.R.A. 1526, 1553-1555, 1565-1569 (1993), rev'd on other grounds, *DOJ, supra*, 39 F.3d 361 (holding that the *Weingarten* right does not apply to OIGs, but the FLRA would recognize those rights in jurisdictions that require OIG compliance with 5 U.S.C. 7114(a)(2)(B)); and the right to negotiate for 48-hours' notice before an investigator can begin an examination (in criminal and non-criminal cases alike) of a union employee, see *U.S. Dep't of Justice, INS*, 40 F.L.R.A. 521, 549 (1991), rev'd on other grounds, *Department of Justice, INS* v. *FLRA*, 975 F.2d 218, 224-226 (5th Cir. 1992). If ultimately upheld by the courts as integral parts of the *Weingarten* rule, each of those rights would undermine an OIG's discretion to conduct an investigation in a manner consistent with sound practice. A union representative could do what the agency head cannot do – direct and limit how the Inspector General conducts an investigation. In concluding that NASA-OIG "points to no specific examples in which the assertion of *Weingarten* rights has interfered with OIG investigations," Pet. App. 14a, the court of appeals gave insufficient weight to the concerns expressed by OIGs over the broad expansion

of statutory *Weingarten* rights in the FLRA's decisions. See Gov't C.A. Br. 24.

One way in which OIGs have exercised their independence from agency management in conducting investigative work is through joint efforts with other law enforcement agencies. For example, according to data supplied by NASA-OIG, two-thirds of its investigative work consists of criminal investigations, and nearly one-half of those cases are conducted jointly with another law enforcement agency such as the FBI. Those joint investigations are typically conducted under a memorandum of understanding between an OIG and another law enforcement agency.[21] If the FLRA and the court of appeals were correct in characterizing OIG investigators as "representatives of the agency" subject to the *Weingarten* rule, then in a joint investigation conducted by the FBI and OIG the obligation to admit a union representative to an interview would depend on whether the particular interview was conducted by an FBI agent or an OIG investigator. That cannot be the law.

The OIG's independence is not diminished by the fact that an OIG investigation may eventually result in administratively-imposed discipline rather than criminal prosecution. It is widely recognized that allegations of workplace misconduct may lead to a criminal prose-

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[21] The FBI has memoranda of understanding (MOUs) with NASA-OIG and 17 other OIGs concerning referral and investigations of matters of "mutual interest." Most of those OIGs also have MOUs with the Attorney General deputizing their investigators as special agents with full law enforcement authority. The Department of Defense OIG and Department of Agriculture OIG have law enforcement authority pursuant to statute. See Pub. L. No. 105-85, § 1071, 111 Stat. 1897 (Defense OIG); 7 U.S.C. 2270 (Agriculture OIG).

cution, administrative discipline, or civil remedies. See, *e.g.*, FLRA C.A. Br. 39; Union-Intervenor C.A. Br. 42; Statement of DOJ Inspector General Michael Bromwich before the Commission on the Advancement of Federal Law Enforcement 4 (Nov. 12, 1998). The choice of sanction depends on many factors, including the strength of the evidence and the priorities that inform prosecutorial discretion. Those factors can be difficult to evaluate before an investigative interview has occurred or an investigation completed. The variety of possible outcomes to an investigation does not cast doubt on the independence or the law enforcement character of the agency that conducts the investigation.

As a practical matter, the FLRA order in this case plainly restricts the NASA-OIG investigation in a manner that directly contravenes the purposes of the Inspector General Act. The FLRA's order prevents NASA-OIG from questioning a NASA bargaining unit employee without union participation, no matter how serious the crime or what emergency circumstance might necessitate immediate questioning without the restrictions and limitations imposed by the FLRA. Pet. App. 52a. The court of appeals' affirmance of that order is inconsistent with the text of both the FSLMRS and the Inspector General Act.[22]

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[22] Finally, the silence of the FSLMRS in addressing its applicability to OIGs contrasts with Congress's deliberate inclusion of references to OIGs elsewhere in the Civil Service Reform Act (CSRA). The CSRA refers specifically to "the Inspector General of an agency" only in provisions relating to the creation of the Merit Systems Protection Board, see 5 U.S.C. 1213(a)(2); 5 U.S.C. 2302(b)(8)(B) & 2302(b)(9)(C), but not in the FSLMRS itself. The legislative history of the Inspector General Act in turn, refers to the CSRA only in connection with the same MSPB provision, and does not refer at all to the FSLMRA. See S. Rep. No. 1071, *supra*,

c. Finally, the FLRA 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 F.L.R.A. 412, 435 (1991). Thus a union may seek to expand the role of a union representative under the *Weingarten* rule, and to bargain such a proposal to impasse (or binding arbitration by the FLRA). See 5 U.S.C. 7119(b) and (c); see also *Social Sec. Admin.* v. *FLRA*, 956 F.2d 1280, 1282 (4th Cir. 1992) ("A duty to bargain over a proposal, therefore, does more than simply require an agency to negotiate; it subjects the agency to the possibility that the proposal will become binding.").

Indeed, in *United States Nuclear Regulatory Commission*, 47 F.L.R.A. 370, 377 (1993)—the decision reversed by the Fourth Circuit in *NRC*, *supra*, 25 F.3d 229—the FLRA 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 the OIG itself was not a party to the collective bargaining agreement under the FSLMRS and is specifically prohibited under the Inspector General Act from the types of policy and programmatic responsibilities encompassed within the collective bargaining relationship. Despite the Fourth Circuit's reversal of that decision in *NRC*, the FLRA has given no indication of acquiescing in that decision in places outside of the Fourth Circuit.

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at 36. The silence of Section 7114 with respect to OIGs thus provides no support for the FLRA's conclusion that Congress intended to apply the provisions of the FSLMRS in OIG interviews of federal unionized employees.

Requiring OIGs to comply with the particular nuances of negotiated procedures contained in collective bargaining agreements could pose grave practical problems in numerous agencies that have dozens of different agreements with different unions. See pages 6-7, *supra*. Under the FLRA's approach, a violation of any such procedure by the OIG investigator would subject the OIG and the agency headquarters to an unfair labor practice charge.

C. The FLRA's Decision Is Not Entitled To Deference

The FLRA is ordinarily entitled to deference in its interpretation of the FSLMRS for a decision that is reasonable and consistent with the statutory text. *Department of the Treasury* v. *FLRA*, 494 U.S. 922, 928 (1990); *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983). Deference is not appropriate in this case, however, for two reasons. First, the FLRA's decision is inconsistent with the statutory text, impermissibly expands the reach of the statutory mandate, and lacks a rational basis. See, *e.g.*, *NLRB* v. *FLRA*, 952 F.2d 523 (D.C. Cir. 1992). For the reasons described in Part I.A, *supra*, the FLRA's construction of the FSLMRS is contrary to the statutory language and thus is not entitled to deference.

Second, the FLRA's ruling in this case depends on a construction not of the FSLMRS, but also of the Inspector General Act, a subject about which the FLRA has no expertise whatsoever. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); see, *e.g.*, *AFGE v. FLRA*, 46 F.3d 73, 76 (D.C. Cir. 1995) (stating that a court "of course, owe[s] no deference to the FLRA's interpretation of a statute that it is not charged with administering," and thus considers "*de novo* the effect of [statutes

other than the FSLMRS] on the * * * obligation to bargain over proposals relating to wages and benefits"). In misconstruing the Inspector General Act, the FLRA has violated the canon that statutes, where possible, should be construed to "foster harmony with other statutory and constitutional law." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994). See also *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("But where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (quotations omitted). The FLRA has also ruled inconsistently with the admonition that the FSLMRS "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. 7101(b).

D. The Court Of Appeals' Analysis Is Based On Flawed Premises

1. The court of appeals mistakenly viewed 5 U.S.C. 7114(a)(2)(B) as designed to protect federal employees in any investigation that might lead to disciplinary action, overlooking that the statute governs only the relationship between labor and management in a bargaining unit. The court of appeals opined that:

> The 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.

Pet. App. 10a (citing *Defense Criminal Investigative Service* v. *FLRA*, 855 F.2d 93, 99 (3d Cir. 1988) (*DCIS*)).[23]

That conclusion is incorrect. As this Court noted in *Weingarten*, the concern there arose out of the unequal power between management – represented in *Weingarten* by a supervisor and a management-hired security officer – and the lone employee who was being interviewed. 420 U.S. at 261-262. The Court nowhere suggested that the potential for an employee to be disciplined by itself was sufficient to warrant the presence of a union representative for interviews conducted outside the context of the labor-management relationship.

Indeed, the prospect of disciplinary action alone cannot be the primary determinant in requiring the broad right to union representation advocated by the FLRA. If it were, an employee would have the right to union representation at an interview conducted by a police officer outside the presence of the employee's managers. Yet there are no reported decisions or scholarly commentaries even suggesting that a unionized employee has such a right in the law enforcement context, thus supporting the conclusion that it is well understood in private sector labor law that the employee has no such right. See pages 21-22 & n.9, *supra*.

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[23] The Eleventh Circuit reserved the question whether the *Weingarten* provision applies to interviews conducted in the course of a criminal investigation, see Pet App. 11a n.6, demurring for the time being on the Third Circuit's holding that the rule applies to all OIG interviews, whether criminal or administrative in nature. See *DCIS*, 855 F.2d at 100. In that respect, the Eleventh Circuit's view is inconsistent with *Weingarten* itself, which arose out of an investigation of an alleged crime. See 420 U.S. at 254-255.

Indeed, in this case both the FLRA and the Union have conceded that the *Weingarten* right would not apply to interviews of federal unionized employees by the FBI. See page 24, *supra*. An employee can reasonably believe that disciplinary action may follow an interview conducted by an FBI agent, because—like the OIG—the FBI routinely provides to agency management information about the investigation in the event prosecution is declined.[24] The same is true of the Secret Service, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, the U.S. Marshals Service, and the Immigration and Naturalization Service.[25] As the D.C. Circuit observed, "[i]t

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[24] The routine-use provisions regarding disclosure of FBI records provide as follows:

> Personal information from this system may be disclosed as a routine use to any Federal agency where the purpose in making the disclosure is compatible with the law enforcement purpose for which it was collected, e.g., to assist the recipient agency in conducting a lawful criminal or intelligence investigation, to assist the recipient agency in making a determination concerning an individual's suitability for employment and/or trustworthiness for employment and/or trustworthiness for access clearance purposes, or to assist the recipient agency in the performance of any authorized function where access to records in this system is declared by the recipient agency to be relevant to that function.

63 Fed. Reg. 8659, 8682 (1998). Those routine-use provisions also authorize disclosure to non-federal government entities in certain circumstances. See *ibid*.

[25] See 62 Fed. Reg. 36,572 (1997) (INS Alien File and Central Index System); 62 Fed. Reg. 26,555 (1997) (INS Law Enforcement Support Center Database); 61 Fed. Reg. 54,219 (1996) (DEA); 60 Fed. Reg. 56,648 (1995) (Secret Service, BATF, and other Treasury components); 60 Fed. Reg. 18,853 (1995) (U.S. Marshals Service); 54 Fed. Reg. 42,060 (1989) (FBI, USMS, and various

is impossible to believe Congress intended" that "the Federal Labor Relations Authority, through its administration of section 7114(a)(2)(B) * * *, may oversee questioning by FBI agents." *DOJ*, 39 F.3d at 366.

The court's view of the statute as protecting any employee facing possible disciplinary action is inconsistent with the fact that statutory coverage is limited to questioning *by* "representatives of the agency," and it is limited to questioning *of* employees who are members of a bargaining unit. The provisions of the FSLMRS do not apply to all federal employees. Although Congress found "collective bargaining in the civil service [to be] in the public interest" because it "facilitates and encourages amicable settlements of disputes between employees and their employers involving conditions of employment," 5 U.S.C. 7101, Congress excluded from the collective bargaining process large categories of federal workers, including members of the armed services, supervisors and managers, aliens or noncitizens who work for the United States outside the country, and members of the Foreign Service, 5 U.S.C. 7103, and further excluded from the bargaining unit confidential employees, personnel specialists, administrators of FSLMRS provisions, national security workers, and employees engaged in investigative and audit functions, 5 U.S.C. 7112(b). Thus, the court oversimplified in characterizing the purpose of 5 U.S.C. 7114(a)(2)(B) "to extend *Weingarten* protection to federal employees" (Pet. App. 10a), without

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Department of Justice record systems); 31 C.F.R. 1.36 (listing routine uses and other exemptions in disclosure of Treasury agencies' records). State law enforcement agencies that interview federal employees in the investigation of crimes also routinely provide reports of investigation or interviews to federal agency officials.

recognizing that the statutory rights at issue in this case apply only to "disputes between [certain federal] employees *and their employers* involving conditions of employment." 5 U.S.C. 7101(a)(1)(C) (emphasis added).

2. The Court of Appeals for the Second Circuit has recognized that an OIG investigator does not become a "representative of the agency" subject to Section 7114(a)(2)(B) merely because an investigation 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,' *FLRA/NASA*, 120 F.3d at 1213." *FLRA* v. *United States Dep't of Justice*, 137 F.3d 683, 691 (2d Cir. 1997), cert. pending, No. 98-667. However, the Second Circuit shared the concern of the FLRA that "Congress would [not] have wanted the *Weingarten* protection of the [FSLMRS] 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 690-691. Therefore, the Second Circuit held that an OIG investigator is not a representative of the agency subject to 7114(a)(2)(B) unless the agent is "merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibility." *Id.* at 691.

The Second Circuit's rule would introduce uncertainty into the OIG investigative process in order to solve a nonexistent problem. While an agency head may request an Inspector General to undertake an investigation, the agency head can neither compel the OIG to conduct a particular investigation nor direct the manner in which it is conducted. Instead, the OIG must

make an independent decision whether to conduct any particular investigation, based on the importance of the matter and the OIG's capacity to do the work. See 5 U.S.C. App. 3 § 6(a)(2) (Inspector General has authority "to make such investigations * * * as are, in the judgment of the Inspector General, necessary or desirable"). Once an OIG undertakes an investigation, it is no longer subject to the control of agency management. Indeed, the Inspector General retains the independence to conclude that the fault in a particular matter lies less with the employee than with agency management, such as through neglectful supervision or training. Likewise, an inquiry by an OIG that begins with allegations by workers may result in criticism of agency management or agency workers or both.[26] And the OIG investigator who conducts an examination of a unionized employee is therefore not a "representative of management" subject to Section 7114(a)(2)(B).

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[26] Compare, *e.g.*, Department of Justice Office of the Inspector General, *Alleged Deception of Congress: The Congressional Task Force on Immigration Reform's Fact-finding Visit to the Miami District of INS in June 1995* (June 1996) (criticizing INS management for creating a false impression of working conditions in investigation sparked by union complaints) with Department of Justice Office of the Inspector General, *Operation Gatekeeper: An Investigation Into Allegations of Fraud and Misconduct* (July 1998) (rejecting employee allegations of wrongdoing by management and criticizing union for tactics that delayed the investigation).

II. NASA HEADQUARTERS IS NOT GUILTY OF AN UNFAIR LABOR PRACTICE IF NASA-OIG DOES NOT COMPLY WITH 5 U.S.C. 7114(a)(2)(B)

The court below also held that NASA Headquarters was liable for an unfair labor practice on the ground that NASA-OIG infringed on the employee's rights under 5 U.S.C. 7114(a)(2)(B). Pet. App. 18a-19a. That conclusion is inconsistent with the construction of 5 U.S.C. 7114(a)(2)(B) and the Inspector General Act set forth above. If an OIG investigator cannot be held to have committed an unfair labor practice because he is not a "representative of the agency," the agency headquarters itself cannot be liable for the OIG's actions.[27]

Even if an OIG could be charged with an unfair labor practice for violating a federal employee's statutory *Weingarten* rights, it does 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 Pet. App. 19a.

Section 7116(a) of Title 5 sets out the circumstances in which "it shall be an unfair labor practice for an agency" to engage in certain practices. Assuming that the OIG is found liable for an unfair labor practice as the "agency" in Section 7116(a) that "interfere[d] with, restrain[ed], or coerce[d] any employee in the exercise of any right under this chapter," there is no indication in the text of Section 7116 that the agency head-

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[27] The Court does not have to reach this issue if it agrees that an OIG investigator is not a "representative of the agency" under 5 U.S.C. 7114(a)(2)(B). A reversal on that issue would also require a reversal of the unfair labor practice charged against NASA Headquarters.

quarters in which the OIG resides would also be liable for the OIG's actions.

By contrast, numerous provisions of the Inspector General Act establish the independence of the Inspector General from the head of the agency. See pages 26-33, *supra*. Those provisions range from the general provision creating the OIG as an "independent and objective unit[]," 5 U.S.C. App. 3 § 2, to the specific provisions that preclude the agency head or the deputy from "prevent[ing] or prohibit[ing] the Inspector General from initiating, carrying out, or completing any audit or investigation," 5 U.S.C. App. 3 § 3(a). Just as an agency head cannot "prevent or prohibit" (*ibid.*) the Inspector General from starting or completing an investigation, there is no statutory authority for the agency head to engage in the lesser step of prescribing the procedures the OIG must follow in conducting an inquiry.

The Fourth Circuit's decision in *NRC* is persuasive authority for why the parent agency should not be held liable for the actions of the OIG. In *NRC*, 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 correctly held that it was not. 25 F.3d 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. See generally *id.* at 233-236. 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." *Id.* at 234.

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." 25 F.3d at 235. An agency can neither bargain over the manner in which an OIG conducts its investigations nor order an OIG to comply with an interpretation of law in conducting an investigation or audit about which the OIG might have a good-faith disagreement.[28] Such an order would "directly interfere with the ability of the Inspector General to conduct investigations," *ibid.*, in the same ways that an agency's collective bargaining over the investigative methods and rules adversely affects an OIG's independence.

[28] That concern is not hypothetical. As the examples at pp. 34-35, *supra*, highlight, the scope of statutory *Weingarten* rights is uncertain. An OIG and an agency headquarters could quite 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.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
WILLIAM KANTER
HOWARD S. SCHER
Attorneys

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