

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION, ETC., ET AL., Petitioners v.
FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

CASE NO: 98-369

PLACE: Washington, D.C.

DATE: Tuesday, March 23, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL AERONAUTICS AND SPACE :

ADMINISTRATION, ETC., ET AL., :

Petitioners :

v. : No. 98-369

FEDERAL LABOR RELATIONS :

AUTHORITY, ET AL. :

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Washington, D.C.

Tuesday, March 23, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

DAVID C. FREDERICK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

DAVID M. SMITH, ESQ., Solicitor, Washington, D.C.; on behalf of the Federal Labor Relations Authority.

STUART KIRSCH, ESQ., Riverdale, Georgia; on behalf of the American Federation of Government Employees.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 98-369, National Aeronautics and Space
5 Administration v. Federal Labor Relations Authority.

6 Mr. Frederick.

7 ORAL ARGUMENT OF DAVID C. FREDERICK

8 ON BEHALF OF THE PETITIONERS

9 MR. FREDERICK: Mr. Chief Justice, and may it
10 please the Court:

11 This case concerns whether an office of
12 Inspector General investigator interviewing a Federal
13 unionized employee for alleged misconduct is a, quote,
14 representative of the agency who must allow the
15 participation of a union representative under the Federal
16 Service Labor-Management Relations statute.

17 The FLRA and the court of appeals held that the
18 OIG agent is such a representative either because the
19 Inspector General is under the control of agency
20 management or because the office of Inspector General
21 investigative work product provides a benefit to agency
22 management.

23 Both theories are mistaken.

24 QUESTION: Mr. Frederick, before you get too far
25 into it, how is the FLRA appointed? Is it a independent

1 agency?

2 MR. FREDERICK: Yes, it is, Justice Scalia,
3 appointed by the President.

4 QUESTION: But once appointed, cannot be removed
5 by him?

6 MR. FREDERICK: No. The President can remove
7 the officers in the FLRA.

8 QUESTION: Well, if all of the agencies don't
9 like this ruling that the FLRA has come up with, why don't
10 they just tell the President to -- you know, to tell them
11 to shape up or ship out and put in people who will agree
12 with what the agencies want? Why do you come to us to
13 solve this internal executive branch problem?

14 MR. FREDERICK: This Court has made clear on
15 numerous decisions, Justice Scalia, that this particular
16 statutory scheme is permissible and acceptable and that
17 the courts are the appropriate place to resolve disputes
18 that arise between the FLRA and agency management. And
19 this case is no different from those other types of
20 disputes.

21 QUESTION: You're right. We've done it before,
22 but I must say, it just seems surpassing strange. I mean,
23 here you have the agencies -- usually when you have a
24 disagreement among the agencies, you go to the -- you go
25 to the chief executive and you say, you know, the FBI and

1 the CIA are in disagreement. Tell us which one is going
2 to prevail.

3 QUESTION: We had the Federal Power Commission
4 suing the Department of Interior 50 years ago, 60 years
5 ago here in this Court. So, this is nothing unusual.

6 QUESTION: Well, the Power -- isn't the Power
7 Commission an independent -- wasn't the Power Commission
8 an independent regulatory agency?

9 MR. FREDERICK: I'm not an -- I am not prepared
10 on the Federal Power Commission.

11 QUESTION: Well, I think it was so the President
12 couldn't control it. Now, whatever the constitutionality
13 of that, I could understand why you had to come here, but
14 here you have two agencies -- one agency against the rest
15 of the Government, all of them within the control of the
16 President, and -- well, all right. You say we've done it
17 before. I guess -- I guess that's enough of an answer,
18 but it seems surpassing strange.

19 MR. FREDERICK: If I could return to this case,
20 the control theory upon which the court below based --
21 part of its theory is based on a mistaken construction of
22 the Inspector General Act, a statute that is outside the
23 FLRA's expertise. Although the Inspector General Act
24 requires that the Inspector General be under the, quote,
25 general supervision of the head of the agency, that

1 requirement does not transform the Inspector General into
2 a representative of the agency. Rather, the general
3 supervision requirement requires the Inspector General to
4 comply with the generally applicable rules and regulations
5 of the agency, such as procurement rules, equal employment
6 opportunity regulations, limitations on outside employment
7 by the Federal employees that are partisan, political --

8 QUESTION: Well, Mr. Frederick, normally we
9 would defer to the agency interpretation of the meaning of
10 the language, and here the FLRA wants to tell us that they
11 interpret this language of representative of the agency as
12 including the Inspector General.

13 MR. FREDERICK: Deference --

14 QUESTION: So, why don't we defer?

15 MR. FREDERICK: Two reasons, Justice O'Connor.

16 First, that interpretation rests not so much on
17 an interpretation of what representative of the agency
18 means, but an application of that to the Inspector General
19 Act. The theory -- and I have given two theories.

20 One is that the control by the agency
21 representative constitutes who a representative of the
22 agency is. The FLRA is wrong about that because they have
23 misconstrued the Inspector General Act. They are not
24 entitled to deference because that is not a statute within
25 their expertise.

1 The second theory is that the IG provides a
2 benefit to agency management. The FLRA is not entitled to
3 deference under that theory for several reasons.

4 First, their interpretation that any entity that
5 provides a benefit to agency management is -- is seriously
6 overbroad. That construction departs from the purposes
7 behind the labor statute and it would also encroach on an
8 Inspector General's independence. It would reach not only
9 an agency's Inspector General, but it would also apply to
10 Federal and State law enforcement officers who investigate
11 criminal wrongdoing by agency employees and submit an
12 investigative report to the head of the agency who then
13 uses that report for disciplinary purposes.

14 QUESTION: Could I come to your first point?
15 You say the FLRA does not have the expertise. Is -- is
16 that the criterion for whether we give deference? I
17 thought it was rather whether the agency was acting within
18 its scope of administration. If it's a field that the
19 agency has been given authority over, whether or not it's
20 very expert, even if in this aspect of it it may not know
21 any more than courts, if it has been given authority over
22 that area, we generally defer. And hasn't the FLRA been
23 given authority over this area to -- to stop this or to
24 permit it?

25 MR. FREDERICK: Justice Scalia, the answer is

1 no, and the reason is that there is nothing in the
2 Inspector General Act that gives the FLRA authority to
3 construe the provisions of that statute just as this Court
4 in the ATF case held that the FLRA was not entitled to
5 deference in -- in construing the travel allowance
6 statute, which is a statute that was outside its area of
7 presumed expertise.

8 QUESTION: Well, I thought the statute we were
9 construing was 5 U.S. Code, section 7114(a)(2)(B). Is
10 that right?

11 MR. FREDERICK: That's correct, Justice
12 O'Connor.

13 QUESTION: Is that within the jurisdiction of
14 the FLRA?

15 MR. FREDERICK: Yes, it is, Justice O'Connor.

16 QUESTION: So, why can't it say what is meant by
17 the term a representative of the agency?

18 MR. FREDERICK: Well, there are two bases on
19 which it has done that, and -- and let me try again.

20 What a representative is depends upon the
21 application of various other laws, and the basis of their
22 decision is -- is based on two theories.

23 One is that a -- to be a representative, one has
24 to be under the control of agency management. To answer
25 that question, you have to look to the Inspector General

1 Act, which is the statute that the FLRA has no particular
2 expertise in construing, and they simply misconstrued that
3 statute.

4 QUESTION: But, Mr. Frederick, I didn't
5 understand them as doing that. I thought they said, well,
6 we're dealing with a statute that codifies the Weingarten
7 rule. So, the focus of our inquiry is, first and
8 foremost, the person who's supposed to benefit from that
9 rule, the employee who was there alone confronted by the
10 employer with an allegation of serious misconduct,
11 frightened and needful of help. That's what the
12 Weingarten rule was meant to take care of, and that's what
13 the FLRA has in its charge.

14 And then it says, for this purpose and this
15 purpose only, does the Inspector General represent the
16 agency vis-a-vis that employer? And it was only in that
17 very limited sense with the first view of FLRA its
18 bailiwick, which is we've got this statute that codifies
19 the Weingarten rule. What was Weingarten supposed to do?

20 MR. FREDERICK: I have several responses to
21 that, Justice Ginsburg.

22 First, the Weingarten decision itself was based
23 on equalizing the balance of power between labor and
24 management. It -- it -- as has been construed in
25 subsequent decisions, it does not include those employees

1 who are not unionized. It does not include outside law
2 enforcement agencies. It only includes management
3 interviewing a unionized employee for the -- so that the
4 rights that were collectively bargained would not be
5 undermined by management by using the investigatory
6 process.

7 That concern is not present here because the
8 Inspector General is precluded from participating in the
9 collective bargaining process and is not part of that
10 process.

11 QUESTION: What was the -- all the language in
12 Weingarten -- and I realize that Weingarten itself is not
13 what's before us, but 7114 -- that the employee may be too
14 fearful or inarticulate to relate accurate -- accurately
15 the incident being investigated? That doesn't sound like
16 we're concerned about equalizing bargaining power across
17 the table over an agreement, but the concern is 262 to 263
18 of Weingarten where the Court speaks of the fearful,
19 inarticulate employee who may not be able to relate
20 accurately the incident that's being investigated or being
21 too ignorant to raise extenuating circumstances.

22 MR. FREDERICK: That was a factor, Justice
23 Ginsburg, but as we have quoted in our main brief at pages
24 20 to 21 from the Court's Weingarten decision at pages 260
25 to 261, the safeguard is to redress the perceived

1 imbalance of economic power between labor and management.

2 QUESTION: The -- the statute says an exclusive
3 representative of an appropriate unit in an agency shall
4 be given the opportunity to be represented. The
5 representation is of the union. It isn't of the
6 individual.

7 MR. FREDERICK: That's correct, Mr. Chief
8 Justice. And it's also clear that if a person is not an
9 employee or is not a -- a person as defined under the
10 Federal labor statute, that person cannot invoke the
11 rights under the Weingarten statute. At present
12 approximately 45 percent of the non-uniformed Federal work
13 place -- work force cannot invoke these Weingarten rights.
14 So, it is perfectly clear that what Congress was intending
15 to get at was the balance of power between management
16 which would negotiate collective bargaining agreements and
17 the unionized work force which would be on the other side
18 of that --

19 QUESTION: Why wouldn't Congress have just
20 wanted to, just thinking about it crudely, say, well, if a
21 person who can afford it can have his lawyer in the room,
22 many of those who can't afford it could have their union
23 rep? I mean, the union rep would just represent the same
24 kind of thing, not in every case, but by and large --
25 protect the individual, particularly ones who can't afford

1 to pay for the lawyer. I mean, maybe they didn't think
2 that at all, but that's my question. Why wouldn't they -
3 - why wouldn't you want that?

4 MR. FREDERICK: Well, that would be --

5 QUESTION: Why isn't that a reasonable
6 interpretation of what Congress was doing here?

7 MR. FREDERICK: No, Justice Breyer, it is not.
8 And it is reasonable if management is conducting the
9 interview, and we would concede that in those --
10 throughout the Federal Government in virtually every
11 department, management conducts interviews for
12 disciplinary purposes of employees. And in those
13 contexts, it is perfectly appropriate for a union
14 representative to be present at that interview.

15 But an Inspector General investigation is not an
16 interview that is being conducted by or for agency
17 management. Agency management doesn't have the authority
18 to designate the Inspector General to do anything, to
19 order the Inspector General to designate what the
20 Inspector General --

21 QUESTION: No, that's right. But, I mean, my -
22 - my question is really just focusing on -- assuming it's
23 linguistically possible, is it a reasonable interpretation
24 of what Congress might have been after? I mean,
25 obviously, if Congress is trying to protect the individual

1 by giving him a right to have his union rep present, this
2 would be the classic case where he needs the protection.

3 MR. FREDERICK: No, it would not, Justice
4 Breyer.

5 QUESTION: All right. Well, that's what I would
6 like you to explain.

7 MR. FREDERICK: In the private sector, if an FBI
8 agent shows up at a company to interview an employee who
9 is accused of criminal wrongdoing, there is no Weingarten
10 right. And the reason why there is no Weingarten right is
11 that the FBI doesn't represent the corporation's
12 management. In the same way here, the Inspector General
13 is provided with independence within a -- within the
14 agency so that it does not represent agency management --

15
16 QUESTION: Would the Weingarten right apply in
17 the private sector if the employer hired the Pinkerton
18 Detective Agency to come in and conduct the interview?

19 MR. FREDERICK: Yes.

20 QUESTION: It would apply.

21 MR. FREDERICK: Yes, because --

22 QUESTION: Why isn't that the same as this?

23 MR. FREDERICK: The Pinkerton control -- the
24 Pinkerton Agency would be within the control of agency
25 management, and it would simply be a designatee -- a

1 designatee of agency management.

2 Here the agency manager is precluded by the
3 terms of the Inspector General Act from ordering the
4 Inspector General to conduct --

5 QUESTION: No, but doesn't the statute provide
6 that there -- that they report to and under the general
7 supervision of the -- of the agency?

8 MR. FREDERICK: That's correct.

9 QUESTION: And wouldn't they normally, if they
10 discovered some kind of employee misconduct, report it to
11 the agency?

12 MR. FREDERICK: That's correct, but that doesn't
13 transform the Inspector General into an agents -- anymore
14 than the FBI is --

15 QUESTION: No, but the whole purpose of the
16 Weingarten rule, it seems to me, is duplicated in that --
17 in that setting.

18 MR. FREDERICK: No. The distinction, Justice
19 Stevens, is that --

20 QUESTION: I understand that they have to be a
21 member of the bargaining unit and so forth, but that's --
22 this fellow was a member of the bargaining unit, wasn't
23 he?

24 MR. FREDERICK: That -- that's correct. And
25 here the focus is on whether the Inspector General is an

1 independent entity, and that is where --

2 QUESTION: Well, he's like an independent
3 contractor. He's got some control and some independence.

4 MR. FREDERICK: No. In fact, that's -- that's
5 not true because the -- an independent contractor would be
6 designated by the head of the agency. Here this person,
7 the Inspector General, is not being designated by the head
8 of the agency. Rather, the Inspector General Act provides
9 organic authority for the Inspector General to conduct
10 such investigations as he or she deems necessary or
11 desirable, to obtain the documents within an agency that
12 the Inspector General thinks are necessary to conduct the
13 investigations. The Inspector General is required to keep
14 confidential the criminal information that he obtains or
15 she obtains.

16 QUESTION: Mr. Frederick, inside of an agency
17 like this one with an Inspector General, what percentage
18 of the employee misconduct would go to an ordinary manager
19 and what percentage would be under the wing of the
20 Inspector General?

21 MR. FREDERICK: I can't give you that
22 percentage, but what I can tell you is that approximately
23 15 percent of the NASA-OIG's investigative caseload
24 concerns employee misconduct cases. The other 85 percent
25 deal with other types of criminal misconduct by persons

1 that are outside the agency attempting to perpetuate a
2 crime against the agency.

3 QUESTION: Does it ever happen that the agency
4 head would request the Inspector General to make an
5 investigation?

6 MR. FREDERICK: Certainly, but that also does
7 not transform --

8 QUESTION: It's not an order, but I guess the
9 agency can request it.

10 MR. FREDERICK: Yes, just as an agency head has
11 requested the FBI to conduct an investigation too, and
12 that doesn't transform the FBI into a representative.

13 QUESTION: And I guess the agency head has to
14 order the employee to appear and be available.

15 MR. FREDERICK: That's correct, which further
16 indicates the insulation of the Inspector General's
17 investigative function. The Inspector General can't show
18 up and order an employee to submit to an interview, just
19 as an Inspector General who finds evidence of wrongdoing
20 has no authority to punish.

21 QUESTION: Well, it seems to me your case would
22 be stronger if he did have that authority.

23 MR. FREDERICK: No, I don't think so, Justice
24 Kennedy, because this shows that the Inspector General has
25 to -- in order to complete his -- his function, has to do

1 what he does, and then the agency manager does what he or
2 she does.

3 QUESTION: Well, but now, if the employee
4 doesn't want to cooperate with the interview, is it the
5 employing agency that says if you don't, I'll discipline
6 you or fire you?

7 MR. FREDERICK: That's correct, Justice
8 O'Connor.

9 QUESTION: So, there is to that extent control
10 over --

11 MR. FREDERICK: It's the same in an FBI
12 interview. If -- if -- if a Federal employee does not
13 want to submit to an interview by the FBI, the agency
14 manager can order the Federal employee to submit to that
15 interview, but that doesn't transform the FBI into a
16 representative of agency management either.

17 And in the disciplinary function, the IG has no
18 role whatsoever. Once the investigation is completed and
19 the report is transmitted to the head of the agency, that
20 process carries --

21 QUESTION: What position does the FLRA take
22 concerning an FBI investigation or a grand jury
23 investigation? Have they said?

24 MR. FREDERICK: They have hinted in their
25 decision in this case, which is at 43a of the petition

1 appendix in footnote 23, that the D.C. -- and they're
2 referring to a D.C. Circuit case which pointed out that
3 the FLRA's construction would also apply to the FBI in the
4 context of an -- of an investigation done of a Department
5 of Justice employee. And they have pointed out there that
6 there is a statute which they construe to exempt the FBI
7 in certain circumstances. That statute is 28 U.S.C.
8 535(a).

9 But I would like to give -- I would like to
10 point out to this Court that that statute has been
11 seriously misconstrued by the FLRA. That statute was
12 enacted in 1954 to resolve the dispute that had arisen
13 between the Treasury Department and the Department of
14 Justice over whether or not FBI employees could
15 investigate wrongdoing committed by Treasury employees.
16 The dispute that had arisen had blocked the FBI basically,
17 and -- and Congress passed this statute to ensure that the
18 FBI would have jurisdiction to investigate those matters.

19 The House report which accompanies that -- it's
20 House Report 2622 at pages 2 to 3, published in 1954 --
21 makes perfectly clear that that statute was not intended
22 to change anything about investigative procedures. It was
23 simply jurisdictional, to provide the FBI with concurrent
24 jurisdiction so that it also could investigate allegations
25 of wrongdoing.

1 If the FLRA is correct in this construction of
2 the statute, it would only apply to title 18 offenses, as
3 by the plain terms of 535(a). It would not apply to drug
4 offenses in title 21 or money laundering in title 31 or
5 anti-kickback and public contracting offenses in title 41
6 or in harboring a -- an immigrant or a fugitive under
7 title 8. So, the FLRA in relying on this statute, has --
8 has construed the phrase, notwithstanding any other
9 provision of law, in a -- in a very erroneous way.

10 QUESTION: Mr. Frederick, I -- I understood the
11 FLRA to take the position that the FBI and external
12 agencies, grand juries are not -- are out of this, and
13 perhaps it would be best for the FLRA to speak for itself
14 on that point.

15 MR. FREDERICK: Could I just have one point,
16 though, Justice Ginsburg? And that is that the FLRA has
17 held that in a joint investigation by the FBI and an
18 Inspector General, that the Weingarten rights are
19 appropriate under the theory that the information is
20 shared with agency management. And the NASA-OIG -- two-
21 thirds of its investigations are criminal investigations,
22 and over half of those, nearly 60 percent, are joint
23 investigations with another law enforcement agency like
24 the FBI or the Department of Defense.

25 QUESTION: May I ask you a question about

1 something that is in -- in your agency's domain and -- or
2 at least in the executive domain? There's just been a
3 change for the IRS. Now they have a real Inspector
4 General. Up until now the members of the union, NTEU,
5 have had the union representative with them. Now those
6 same people, I take it, will no longer have the
7 representative because of the new installation of an
8 Inspector General. Is that right?

9 MR. FREDERICK: When they are being investigated
10 by the Inspector General. When they are being
11 investigated by agency management, they are still entitled
12 to have a union representative.

13 QUESTION: Well, they had something that was
14 pretty close to an Inspector General, but not quite.
15 Right?

16 MR. FREDERICK: No. They had an internal
17 affairs committee that did internal affairs
18 investigations. This happened throughout the Government,
19 Justice Ginsburg, as amendments to the Inspector General
20 Act were made.

21 QUESTION: But in any event, there were people
22 who -- doing the same thing now that they -- if they had
23 done it a year ago, would have the union representative
24 with them and now will no longer.

25 MR. FREDERICK: It would be no different than

1 if, instead of creating an office of Inspector General,
2 Congress had said, we want the investigative function of
3 the agency transferred from under agency management's
4 control and given to the FBI. There would be no
5 difference.

6 QUESTION: Well, there is -- there is a
7 difference between a wholly external agency, an FBI or
8 CIA, and something that's still under the roof of the --
9 of the department.

10 MR. FREDERICK: It's a policy decision that
11 Congress made to create entities that would be developing
12 particular expertise, sources of information, and have
13 expert knowledge of the kinds of wrongdoing and other
14 frauds and abuses that might be committed within Federal
15 agencies.

16 QUESTION: But -- but maybe what that argues for
17 is that we've really got a -- a third alternative here,
18 and instead of looking at it in an either/or situation,
19 there's a new possibility. Let's assume that we conclude
20 that, in fact, the -- the statute does guarantee the --
21 the right to have the presence of the union rep. Might it
22 be the case that -- that where things are going wrong here
23 is in assuming that the agency, for purposes of an unfair
24 labor practice determination, is the normal head of the
25 agency, as distinct from the Inspector General for that

1 agency.

2 The reason I suggest that is the object of the
3 unfair labor practice determination is to change the
4 behavior of management. Well, the agency here is being
5 represented, to the extent that it's represented at all,
6 by the Inspector General. Conversely, management in the
7 sense of the usual line of authority can't control the
8 Inspector General.

9 Is it open to us here to conclude that, number
10 one -- and I realize you disagree with this -- that the --
11 -- that there is a guarantee of the rep at the interview,
12 but that any determination of unfair labor practice has to
13 run against the Inspector General as opposed to running
14 against the agency in the usual sense?

15 MR. FREDERICK: Justice Souter, that would --
16 that would impose a penalty on an Inspector General for
17 violating something in the collective bargaining
18 relationship to which the Inspector General is not a
19 party.

20 QUESTION: Well, he's not a party, but he -- he
21 has -- he certainly has as much knowledge or is entitled
22 to as much knowledge of the collective bargaining
23 arrangement as the -- as the normal head of the agency is.
24 And -- and the point is, if you're -- I mean, the
25 rationale is if Congress wants these investigations to be

1 done not by the FBI but within the agency itself, there's
2 -- there's nothing conceptually odd about saying that
3 they've got to be done within the -- the confines of the
4 agreements that the agency has made, including a
5 collective bargaining agreement. And as long as the
6 Inspector General has access to it and has as much chance
7 to know what's going to violate it as the nominal head of
8 the agency would, there's -- there's nothing odd about
9 saying that the -- that the Inspector General should be
10 bound by it.

11 MR. FREDERICK: Yes, there is, Justice Souter,
12 for two reasons.

13 First, the agency head would be given
14 extraordinary leverage to decide how independent an
15 Inspector General could be by being able to bargain over
16 the Inspector General's independence in exchange for
17 concessions by --

18 QUESTION: Well, that might violate the statute
19 creating the Inspector General. I'm assuming that we've
20 got a situation like this in which there is -- there is no
21 claim that there is a -- a -- in effect, a -- a statutory
22 -- or a conflict between what the collective -- what the
23 -- the labor right is and -- and the Inspector General's
24 capacity to investigate.

25 MR. FREDERICK: My second point then I hope will

1 satisfy you is that nothing in either statute would --
2 gives the FLRA the authority that it asserts in this case,
3 which is to decide on a case-by-case basis whether or not
4 the prerogatives of the Inspector General, as defined in
5 the Inspector General Act, have been defeated. The FLRA
6 has no expertise in law enforcement matters, and it is --
7 is attempting to arrogate to itself the authority to
8 decide on a case-by-case basis whether the Inspector
9 General Act is being hindered by particular demands made
10 by the union.

11 QUESTION: Right.

12 Let me go back to my -- my question with maybe a
13 slight more exact question. Is it textually possible to
14 come out the way I have just suggested?

15 MR. FREDERICK: I don't think so, Justice
16 Souter.

17 QUESTION: What's the textual bar to it?

18 MR. FREDERICK: Because it requires you to
19 determine that an Inspector General is under the control
20 of agency management.

21 QUESTION: No, it doesn't. I mean, my
22 assumption is -- is exactly the contrary. My assumption
23 is that the Inspector General is part of the agency.
24 Administratively we know that's so. My -- my assumption
25 also is that the agency head, whoever that may be, cannot

1 control the Inspector General in -- in structuring his
2 investigation. I -- I'm saying that the object to be
3 served by an unfair labor practice determination is an
4 object to change behavior, and the relevant agency
5 behavior here is the behavior of the Inspector General.

6 MR. FREDERICK: And the Inspector General does
7 not --

8 QUESTION: Now, textually if that -- if you --
9 if that rationale is -- is roughly sound, is there any
10 textual basis that precludes our indicating that that is
11 the way the -- the two schemes ought to fit together?

12 MR. FREDERICK: Yes. It's overbroad. It
13 interprets representative far broadly and sweeps in
14 outside law enforcement agencies as well.

15 QUESTION: How does -- how does it do that? The
16 rationale is that the Inspector General is part of the
17 agency, and -- and we know that the statute constituting
18 the Inspector General so provides.

19 MR. FREDERICK: It would make the FBI a
20 representative of the agency --

21 QUESTION: Why?

22 MR. FREDERICK: -- an internal Department of
23 Justice investigation of a Department of Justice employee.

24 QUESTION: It might well. It might well.

25 MR. FREDERICK: If I can reserve the balance of

1 my time.

2 QUESTION: Very well, Mr. Frederick.

3 Mr. Smith, we'll hear from you.

4 ORAL ARGUMENT OF DAVID M. SMITH

5 ON BEHALF OF THE FEDERAL LABOR RELATIONS AUTHORITY

6 QUESTION: Mr. Smith, the Government in its
7 brief in this case, the -- the part of the Government that
8 is petitioning --

9 (Laughter.)

10 QUESTION: -- says that the Federal Labor
11 Relations Authority has greatly expanded on Weingarten
12 rights. They are no longer just the right to have the
13 union be represented alone. They -- they say -- and they
14 cite cases -- the -- the right to be informed in advance
15 of the general subject of an examination so the employee
16 and union representative can consult before questioning
17 begins, the right to halt an examination and step outside
18 the hearing of investigators to discuss with the union
19 representative answers to the investigator's questions,
20 the right to negotiate for 48 hours' notice before an
21 investigator can begin an examination. Do you agree that
22 those are correct descriptions of rulings of the FLRA?

23 MR. SMITH: No, Your Honor. I'm sorry. No, Mr.
24 Chief Justice. I think they would be distorted
25 explanations of what the Authority has held in a number of

1 cases.

2 It is true, in point of fact, that unions have
3 come forward and attempted to expand on the basic
4 Weingarten right and to bargain for matters over and above
5 the basic right to have a union representative present
6 during an investigation.

7 And it is true, in some of the examples you
8 cite, the Authority might have held certain proposals to
9 be negotiable.

10 What they failed to cite in their brief is when
11 the Authority makes such a ruling, if we are deemed to be
12 overbroad in our interpretation of what the right under
13 section 7114(a)(2)(B) includes, we're subjected to
14 judicial review and have, in some of those cases, been
15 corrected by the courts of appeal on review.

16 QUESTION: But presumably you -- if the argument
17 that you're making here, you ought to get deference so
18 that if -- if the thing is debatable one way or the other,
19 your view ought to prevail. The view of the agency ought
20 to prevail.

21 MR. SMITH: Of course, we would make that
22 argument.

23 And in point of fact, I think the Authority's
24 interpretation of how the statutory right in section
25 7114(a)(2)(B) should be interpreted is pretty much in line

1 with how the courts have interpreted the Weingarten right
2 in the private sector. For instance, you -- you advert to
3 the right to prior notice to an interview.

4 The D.C. Circuit ruled in the Postal Service
5 case, which is cited in the brief, that this would
6 actually facilitate the interview if the union
7 representative, where possible, knew in advance what was
8 going to be discussed at the interview. Then the union
9 representative would be prepared and be able to -- to
10 adequately advise the individual being subjected to the
11 interrogation about what was going on. So, this is a
12 private sector rule. I'm not aware that the Authority has
13 specifically adopted it.

14 The other rule, the right to stop an interview,
15 the Authority has specifically gone the other way and said
16 there is, in fact, no right to cease and stop an
17 interview. In one case, we did say that where it would
18 not have interrupted the flow of the legitimate function
19 of an employer to do an interrogation, that that was a
20 permissible -- permissible thing to acquire an occasional
21 break to allow conferences. But there's no per se right
22 to break during an investigation.

23 The Authority has embraced this Court's rule
24 that the employer has the right, when -- when
25 interrogating an employee, to -- to get to the bottom of

1 what's going on, to hear the employer's -- the employee's
2 story and to perform the interrogation.

3 The -- the Authority's rule in this case --

4 QUESTION: Has the Authority taken a position in
5 the situation of an FBI investigation or a grand jury
6 investigation?

7 MR. SMITH: We note in -- in our -- in our
8 brief, as counsel adverted to, Your Honor, that the FBI
9 would not be a representative of the agency under our
10 statute in all likelihood because the FBI has, number one,
11 concerns outside of the internal agency. If you will, in
12 this case, the NASA-OIG only has concerns that relate to
13 the -- that particular agency. An FBI agent, on the other
14 hand, has concerns that relate outside of the Department
15 of Justice and to any other agency.

16 We also note 28 U.S.C., the particular section
17 that says that FBI agents have the ability to conduct
18 interrogations notwithstanding any other provision of law.
19 I think it's important to note that the Inspector General
20 statute contains no such language. So, when we look at
21 the FBI statute on the one hand, which says, you've got
22 the right to -- to investigate a crime notwithstanding any
23 other provision of law, the IG statute starkly contains no
24 such provision, which led the Authority and the Eleventh
25 Circuit to conclude that the Inspector General must comply

1 with, among other laws, the labor statute when
2 interrogating a bargaining unit employee.

3 Justice Ginsburg, if I could return to a point
4 that you raised. It is in fact true that the trend is
5 that investigations are being conducted more and more by
6 agency Inspectors General. In the Fourth Circuit's NRC
7 case, which is cited in our brief, the Fourth Circuit
8 noted that all investigations within the Nuclear
9 Regulatory Commission are conducted by the office of
10 Inspector General. You noted that the amicus NTEU had
11 filed a brief recognizing that under the IRS
12 Reorganization Act of 1998, investigations previously
13 performed -- excuse me -- by the office of Chief Inspector
14 are now being performed by the Department of Treasury IG
15 for tax matters.

16 The -- the upshot of this is, employees who
17 previously enjoyed the Weingarten right under our statute
18 are being stripped of it because of the -- the growing
19 trend of Inspectors General doing interviews. This is
20 very significant. There's no indication that that was the
21 will or the intent of Congress when they -- when they
22 passed any of these -- any of these bills or that agencies
23 should, by the simple expedient of its assigning an
24 investigation or requesting an investigation by the
25 Inspector General, to be able to avoid section

1 7114(a)(2)(B) of our statute.

2 QUESTION: Does the NASA Inspector General
3 appoint to anyone other than the head of NASA?

4 MR. SMITH: No. Justice Kennedy, as we read the
5 statute, the NASA-OIG reports to the Administrator of
6 NASA.

7 QUESTION: Well, I assume -- could he go
8 directly to the FBI or does he have to go first to the
9 head of NASA, if he sees something he thinks the FBI
10 should know about?

11 MR. SMITH: In this case?

12 QUESTION: No, generally.

13 MR. SMITH: Generally, I think the Inspector
14 Generals might well receive tips or advice from an
15 external law enforcement agency, but they have the right
16 to investigate on their own. They don't have to be
17 ordered to investigate by the head of the agency.

18 QUESTION: Does the -- does the Inspector
19 General for NASA report to anybody in -- in the office of
20 Inspector General?

21 MR. SMITH: If I understand your question, the
22 -- the office of Inspector General has a number of people
23 that work in it. This particular individual --

24 QUESTION: Yes.

25 MR. SMITH: -- that did this interrogation was

1 at the Marshall Space Flight Center and reports to the
2 NASA-OIG in Washington at headquarters NASA.

3 QUESTION: To the NASA-OIG.

4 MR. SMITH: That's correct. So the -- so the
5 line of command is that the OIG personnel work OIG
6 personnel.

7 QUESTION: Was -- was the employee in this case
8 entitled to counsel to be present?

9 MR. SMITH: Yes.

10 QUESTION: Why?

11 MR. SMITH: The employee requested counsel and
12 the request to counsel was acceded to.

13 QUESTION: But was he entitled? Was the
14 employee entitled as a matter of law to have counsel
15 present if -- assume the OIG objected.

16 MR. SMITH: As I understand the OIG position,
17 they acknowledge that the right to counsel is present.

18 QUESTION: Assume that -- and why? Is that
19 because of the APA, section 555?

20 MR. SMITH: The Eleventh Circuit found as much.
21 We think the Eleventh Circuit is correct. They quibble
22 with this in their reply brief. I don't know that it
23 matters so much where the right to counsel comes from.
24 There seems to be agreement -- and -- and once again, as I
25 understand their position -- that there is, in fact, a

1 right to counsel at an investigative interview.

2 Now, this makes a good point, if you will. If
3 the right to counsel can be done without affecting and
4 harming the -- the -- the sanctity of the investigation,
5 if the OIG can perform their -- their important and
6 independent investigative role with a counsel present, it
7 does cause the question, as the Eleventh Circuit noted,
8 why a union rep would cause more of a problem than -- than
9 the right to counsel.

10 QUESTION: Well, because I suppose the answer
11 is, is that the union rep has a obligation to -- to report
12 to the union. The -- the OIG could tell the counsel and
13 the employee, look it, this is going to be confidential.
14 If -- if you people do not cooperate with me, if you do
15 not keep this confidential, I'm going to lower the boom on
16 you. I'm going to recommend discipline and so forth and
17 so on. He can't say that with the union because the
18 union's obligation is to -- to report back to the union.

19 MR. SMITH: In point of fact, the Authority has
20 responded to that very concern, Justice Kennedy, in a
21 recent decision of the Authority, which we -- which we
22 cite in our brief. The Authority has interposed no
23 objection to the bargainability of proposals that would
24 place confidentiality constraints on the representative
25 during an investigation. So, in fact, to the extent that

1 the sanctity of the investigation requires that
2 confidentiality attain, then the Authority has said this
3 is a permissible way to go.

4 QUESTION: Yes, but that's troublesome because
5 that seems to me to compromise the union representative's
6 function and role vis-a-vis the union --

7 MR. SMITH: Well --

8 QUESTION: -- which is the whole reason that
9 he's there under -- under Weingarten.

10 MR. SMITH: No. The whole -- I think there's a
11 -- there's a two-part reason that -- that a representative
12 is -- is there during such an interrogation. In the first
13 place, the representative is representing the employee.
14 In the second place, he -- he or she is representing the
15 interests of the bargaining unit.

16 It is not fair to assume that representing the
17 interests of the bargaining unit requires that at the
18 conclusion of the interview the union rep tell everybody
19 what transpired during every aspect of a particular
20 investigation. The interests of the bargaining unit are
21 served by the fact that other -- other employees know that
22 if I'm interrogated by the Inspector General, I'll have a
23 representative there. They'll be looking out for my
24 interest. I'll have an opportunity to -- to be
25 represented, and I won't get treated unfairly in such a

1 case.

2 QUESTION: Mr. Smith, you mentioned NRC, and
3 while you may not agree with that case, I take it that
4 Judge Kravitch thought that the Eleventh Circuit decision
5 was compatible with the NRC decision.

6 MR. SMITH: That's correct. The Fourth Circuit
7 held that bargaining on the Weingarten right to enhance it
8 over and above the basic representation right was
9 improper, but the Fourth Circuit noted that its position
10 was consistent with the Third Circuit. And -- and I think
11 Judge Kravitch in the Eleventh Circuit agreed with as
12 much.

13 If you're looking at sheer numbers now, the
14 Third Circuit, the Eleventh Circuit, and the Fourth
15 Circuit have all agreed with the Authority's rule that an
16 office of Inspector General investigator is a
17 representative of the agency when interviewing a
18 bargaining unit employee.

19 If there are no other questions --

20 QUESTION: The D.C. Circuit seems to think that
21 the NRC case was dispositive of this situation, and
22 according to the Eleventh Circuit, it is not.

23 MR. SMITH: The D.C. Circuit errs in a number of
24 respects, Judge Ginsburg. In -- in the first place, the
25 D.C. Circuit conflates a case over negotiability with a -

1 - with a straight case of the application of the right to
2 have someone present in the room, and we think that's a
3 significant difference. Building on the Weingarten right
4 is -- is different from the simple -- simple application
5 of the Weingarten right. And -- and the D.C. Circuit is
6 -- is erroneous in that respect and we think that's a
7 salient distinction between the D.C. Circuit, which is out
8 on its own here, and all the other courts of appeal which
9 have reviewed and affirmed the Authority's interpretation
10 in this case.

11 We think that it is for the Authority to
12 determine the breadth and scope of the term representative
13 of the agency, and that unless the Authority's
14 interpretation is unreasonable or impermissible, that
15 interpretation is due to be affirmed. We submit to this
16 Court that it is.

17 QUESTION: Mr. Smith, I'd like to revisit with
18 you. You said there is a trend away from or toward
19 Inspector Generals investigating these types of cases.

20 MR. SMITH: Yes, sir.

21 QUESTION: Now, isn't that only a part of the
22 story? Wasn't there a trend some years ago away from
23 internal auditors in agencies?

24 MR. SMITH: Prior to the passage of the
25 Inspector General?

1 QUESTION: That's right.

2 MR. SMITH: It might get before my time, but
3 I'll have to take your word for it.

4 QUESTION: Well, not all before your time. For
5 the independent regulatory agencies, wasn't that during
6 the '80's?

7 MR. SMITH: Well, the Inspector General Act was
8 passed in 1978.

9 QUESTION: Well, there's a separate Inspector
10 Generals act for the smaller agencies.

11 Wasn't there then an attitude in Congress that
12 the investigation should not be controlled by the agency
13 heads?

14 MR. SMITH: I'm not aware of that particular
15 attitude, Your Honor. I can't --

16 QUESTION: Well, that was the attitude.

17 MR. SMITH: I can't dispute your point. I'll
18 certainly accept it.

19 QUESTION: The point was, I don't think you can
20 have it both ways. You can't say that the Inspector
21 General is under the agency head when we know that the
22 purpose was to do just the opposite and to get the
23 investigations from under the agency heads.

24 And let me ask you this question. Do you agree
25 that in the old days that the head of the agency could

1 actually direct the auditor's investigation of these
2 matters?

3 MR. SMITH: Yes.

4 QUESTION: Do you agree that the head of the
5 agency cannot direct the investigation by the IG?

6 MR. SMITH: The -- the legislative history says
7 that if an agency head requested an Inspector General to
8 undertake an audit or an investigation --

9 QUESTION: No, that's not what I'm talking
10 about.

11 MR. SMITH: -- it is assumed that they would do
12 so.

13 QUESTION: No, that's not what I'm talking
14 about.

15 If the IG said, I want to investigate this
16 matter --

17 MR. SMITH: Yes.

18 QUESTION: -- can the agency head say, no, you
19 can't?

20 MR. SMITH: They cannot do so.

21 QUESTION: If the IG said, I want to investigate
22 this matter in this manner, can the agency head say, you
23 cannot?

24 MR. SMITH: I think so. I think the agency
25 head --

1 QUESTION: The agency head can tell them that?

2 MR. SMITH: Yes. I think the agency head can
3 say to the Inspector General --

4 QUESTION: By what authority?

5 MR. SMITH: I think the authority is you are
6 expected under the IG Act to comply with, quote, other
7 statutes when you perform your investigative function.

8 QUESTION: Well, I don't know where you get that
9 authority. I think you -- that's -- you know, that's --
10 that's an interpretation.

11 Doesn't the -- doesn't the IG -- let's say the
12 -- the -- the IG and the agency head were at loggerheads
13 about a matter. To whom would the IG then report this
14 dispute?

15 MR. SMITH: Well, the IG would have to go to
16 their employing authority if they chose to do so, which
17 would be either, depending on the size of the agency, the
18 agency head or the President of the United States.

19 QUESTION: Isn't it true that the IG has a
20 separate line of communication and separate reporting
21 authority to Congress?

22 MR. SMITH: Right. They have -- they have the
23 obligation under their statute to file semiannual reports
24 to the Congress.

25 QUESTION: And in reality they have separate

1 reporting authority to Congress.

2 MR. SMITH: Yes.

3 QUESTION: If they are at loggerheads with the
4 head of the agency.

5 MR. SMITH: Yes.

6 QUESTION: Do you know of any instance where the
7 agency head has been directed by or the IG has been
8 directed by -- an IG has been directed by an agency head
9 to conduct an audit or an investigation in a certain way?

10 MR. SMITH: Well, in this case, the Authority
11 directed the NASA headquarters to inform the NASA-OIG to
12 comply with the 7114(a)(2)(B) right in subsequent cases.

13 QUESTION: No. Earlier you asked -- you said
14 that the agency head can direct an investigation. Do you
15 know of any instance in which that has happened?

16 MR. SMITH: Where an agency head has requested
17 an Inspector General to perform an investigation?

18 QUESTION: No. Where an agency head has said to
19 an -- an IG, this is the manner in which I want you to
20 conduct this investigation.

21 MR. SMITH: We have no -- we have no such case,
22 but I think it's fair, Justice Thomas, to conclude that an
23 Inspector General can be told to comply with the law when
24 you conduct an investigation. The Privacy Act, for
25 example. It's acknowledged that the Privacy Act must be

1 complied with, a host of criminal and civil laws.

2 QUESTION: Well, you could be told -- the IG can
3 be told anything. I -- my question is, can the agency
4 head direct the IG to do what the agency head wants the IG
5 to do or the agency head believes to be the law?

6 MR. SMITH: In our view, the -- the Inspector
7 General can be told by the agency head and/or the
8 appointing authority, the President of the United States,
9 to comply with the law, yes.

10 QUESTION: Okay. Now, do you have any examples
11 of that?

12 MR. SMITH: The only examples that we would
13 refer to would be the ones I previously mentioned, that in
14 the -- in the statute, in the legislative history it's
15 conceded, for example, that the Inspector General must
16 comply with the Privacy Act. If an Inspector General, in
17 performing an investigative function, was refusing to
18 comply with the Privacy Act, we think it would be
19 appropriate for the agency head to inform the IG to
20 comply. Failing the IG's compliance, we think the agency
21 head, if they appointed the IG, would remove him or
22 discipline. If they did not, they would report this to
23 the President of the United States.

24 QUESTION: But you would have to agree -- I
25 mean, you can't to a specific provision in the IG Act for

1 that. But if the agency head agreed with you that the
2 union representative should be in such an interview and
3 the IG said no, you can't point to any provision
4 authorizing the agency head to direct the IG to include a
5 union representative in such a meeting or interview.

6 MR. SMITH: The IG's position would have to be,
7 in such a case, that the inclusion of a union rep
8 prohibited or precluded me from conducting an
9 investigation because that's the statutory string that we
10 go through to analyze --

11 QUESTION: No, but if your argument is, if -- if
12 this were my chief of staff who was conducting the -- the
13 investigation and I said, look, you are to include the
14 union representative, my chief of staff theoretically as
15 the agency representative would have to do that. But I
16 don't think you can point to any authority where if the
17 head of the agency, the head of NASA, says, look, I'm
18 sensitive to this problem and I want the union
19 representative included in this investigation, and if the
20 IG says, buzz off, I don't know where the -- the head of
21 NASA would get the authority to force that or -- to force
22 that individual, the IG, to include such an individual.

23 MR. SMITH: We think the authority --

24 QUESTION: And I'd like you to point to me where
25 that authority is.

1 MR. SMITH: Well, the -- the premise of your
2 question is that it is the agency head that is imposing
3 this requirement on the Inspector General.

4 QUESTION: That's right.

5 MR. SMITH: We think that's incorrect. It is
6 the Congress that imposes this requirement on the agency,
7 any representative of the agency conducting the --

8 QUESTION: But your argument is that this IG
9 reports to the Administrator, and if the Administrator
10 can't direct the IG to do precisely what you think the IG
11 should be doing, then I don't know how you can say that
12 the IG reports to the Administrator.

13 MR. SMITH: Well, I don't want to -- I don't
14 want to butt heads with you. We think Inspector Generals
15 are not free agents in conducting their investigations --

16
17 QUESTION: I bet you the agency head does.

18 (Laughter.)

19 MR. SMITH: In conducting their investigations,
20 they have to comply with the law. This is but one law.

21 QUESTION: Thank you, Mr. Smith.

22 Mr. Kirsch, we'll hear from you.

23 ORAL ARGUMENT OF STUART KIRSCH

24 ON BEHALF OF

25 THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

1 MR. KIRSCH: Mr. Chief Justice, and may it
2 please the Court:

3 That the OIG investigator was acting here as
4 representative of the agency is manifested in a multitude
5 of activities that actually occurred and is also
6 consistent with the roles and duties and responsibilities
7 under the IG Act.

8 Here we had an IG investigator at the outset
9 invoke the disciplinary authority of the agency. This is
10 not a right inherent to the IG, but one that is routinely
11 unleashed -- this disciplinary hammer -- upon employees to
12 compel their attendance and to assure that they cooperate
13 fully and answer all questions.

14 This was not an isolated situation in this NASA
15 case. To review the Second Circuit case and the D.C.
16 Circuit case, agents that were specifically appointed and
17 selected by the OIG, who are not OIG agents since they
18 have the authority to gain further assistance from others
19 within the office, those agents also advise the employees
20 that they must appear or they will face dismissal.

21 QUESTION: Excuse me. It was my understanding
22 that the OIG could not issue such directives on his own,
23 but can only do so with the authority of -- of the agency.
24 Isn't that right? I mean, he doesn't have delegated
25 authority from the agency to summon employees. He has to

1 go to the agency head and say, I'm going to have a
2 hearing, would you make arrangements to have this employee
3 appear. Am I wrong about that?

4 MR. KIRSCH: Typically it is correct, I would
5 say, that an agency will instruct the employee to appear
6 before the IG. The IG apparently implicitly adopts an
7 authority, an apparent authority, because there was
8 nothing in the record here or in any of these cases that
9 it can invoke the disciplinary authority of the agency.
10 Whether -- whether they have that or not, the appearance
11 is certainly clear and they hold themselves out as having
12 the disciplinary authority of the agency.

13 Moreover, here we have an --

14 QUESTION: You say here, Mr. Kirsch. You're
15 talking about the facts of this particular case.

16 MR. KIRSCH: Yes.

17 QUESTION: And what did happen in that respect
18 here?

19 MR. KIRSCH: In this case we had a referral from
20 the FBI to the OIG. The OIG then contacted the -- the
21 agency and told them that we have some concerns about the
22 activities of an employee. Management then issued a
23 letter of discipline to the employee to immediately remove
24 him from the facility and to impose a fitness for duty
25 exam.

1 Within several days, the OIG sought to set up an
2 interview to be conducted of this employee. They agreed
3 to allow the employee to have an attorney and a union
4 representative present at the attorney's office in this
5 particular case, and that's when they said that the
6 employee must answer all questions or face dismissal.

7 QUESTION: What is it --

8 QUESTION: So, how did this case ever get here
9 if that's what happened?

10 Answer Justice Breyer's question.

11 QUESTION: Can you give me an example of -- if
12 you start with the proposition the head of the agency can
13 tell the IG exactly nothing, nothing that anyone in the
14 audience couldn't tell him, and moreover, he carries out
15 no authority of the agency. All right. Now, you're going
16 to say that statement is wrong.

17 So, can you give me the best examples you can
18 think of of things that the head of the agency could tell
19 the person, not just obey the law. Any citizen can go to
20 the IG and say, obey the law. I mean, is there any
21 authority at all that the head of the agency has to tell
22 the IG anything?

23 MR. KIRSCH: Nothing about specifically that he
24 has to tell --

25 QUESTION: No, I'm not saying --

1 MR. KIRSCH: But --

2 QUESTION: Does the -- does the head of the
3 agency have the authority to do anything whatsoever in
4 respect to the IG --

5 MR. KIRSCH: Yes.

6 QUESTION: -- that an ordinary citizen of the
7 United States wouldn't have?

8 MR. KIRSCH: Yes, and also --

9 QUESTION: What?

10 MR. KIRSCH: -- the OIG has duties and
11 responsibilities vis-a-vis the agency head and access to
12 certain information that others outside an agency would
13 not have. Typically, as we said from the outset, an
14 employee is directed to appear before the OIG who has a
15 physical location at that office. They have access to all
16 documents and access to the agency head at any time. They
17 have the right to select, appoint, and employ any official
18 to work with them as part of that OIG investigation.
19 Moreover, they have the duty and responsibility to
20 recommend corrective action wherever they see fraud,
21 waste, and abuse to the agency head. So, in a number of
22 respects, there is an interaction between the two.

23 QUESTION: Those are examples of instances in
24 which the IG might have some authority that he wouldn't
25 have were he not part of the agency. I got that half.

1 What about the other half? Is there anything at
2 all that the head of the agency can tell the IG?

3 MR. KIRSCH: By -- by -- he can tell him to not
4 assert the disciplinary authority of our agency here to
5 compel the attendance of our employees, if he so chose to
6 do that. But apparently they don't do that and so they by
7 -- by implicitly allowing the IG to go in and exercise
8 that authority of the agency, that compels the attendance
9 of the -- of the employees there.

10 QUESTION: Could the agency head tell the
11 employee directly, now, when the IG calls you, you don't
12 have to go and I won't give you any discipline unless you
13 have the union rep there? You're entitled to the union
14 rep.

15 MR. KIRSCH: Yes.

16 QUESTION: Would that -- that would not be an
17 interference with the OIG's authority? Of course, it
18 depends on the answer in this case, but --

19 MR. KIRSCH: There's nothing in the OIG act that
20 gives the OIG subpoena power over a particular employee
21 within his agency, and there's nothing that could compel
22 the employee to appear there and to fully cooperate other
23 than disciplinary --

24 QUESTION: Well, if that's so, then he wasn't
25 entitled to counsel here, was he?

1 MR. KIRSCH: I'm sorry.

2 QUESTION: If he was not compelled, he wasn't
3 entitled to counsel in this case.

4 MR. KIRSCH: If he was not compelled in this
5 particular case, the -- the statute says compelled to
6 appear before any agency -- then he would be entitled to
7 counsel. Correct.

8 QUESTION: But if he was not compelled, then he
9 was not entitled to counsel.

10 MR. KIRSCH: Perhaps he may not have been
11 entitled to counsel unless there was a custodial
12 interrogation, a criminal type investigation, or some way
13 otherwise overbearing the will of the individual --

14 QUESTION: Well, that would -- that would mean
15 that the evidence might not be introduced -- introducible
16 in a criminal trial, but that doesn't necessarily mean
17 that he has a right to counsel.

18 MR. KIRSCH: If he -- the statute -- you are
19 both correct -- indicates where an -- where an employee is
20 compelled to appear before the agency. Now, that
21 compulsion may --

22 QUESTION: Mr. Kirsch, I -- I would -- I had
23 assumed -- and please correct me if I'm wrong -- that if
24 an employee is told show up at that interview or you lose
25 your job and the employee then says, okay, can we meet in

1 my lawyer's office, that that employee is being compelled
2 to show up at the interview even though he says okay. But
3 the threat is you lose your job and you're not going to be
4 paid.

5 MR. KIRSCH: That's exactly our position, that
6 absent an affirmative statement that you don't have to be
7 there, the -- the appearance is clear to any employee that
8 their job is in jeopardy for refusal to participate or
9 cooperate fully in an investigation. And the compulsion
10 exists both -- either through the circumstances or the
11 specific statements here.

12 Moreover here, we have a situation where an
13 agency routinely utilizes the information that's gathered
14 by the -- by the investigator for purposes of going
15 forward with the discipline in the case, and often where
16 the IG testifies on behalf of the agency where an employee
17 contests that particular discipline.

18 The -- one statement about the FBI, if I may.
19 The FBI is specifically excluded under the labor statute
20 from coverage as an agency. So, the issue would not even
21 apply with respect to the FBI. Moreover, the FBI has --

22 QUESTION: You say it's excluded under the labor
23 statute. Does that mean that the ability to bargain with
24 management and so forth is not given in the -- in the case
25 of the FBI?

1 MR. KIRSCH: They're explicitly excluded by
2 definition of being an agency and therefore would not be
3 subject to the provisions of the labor statute in any
4 respects.

5 QUESTION: So -- so that -- you say an FBI
6 investigation is by definition not covered by the --

7 MR. KIRSCH: An exclusive FBI investigation,
8 yes, that would be correct.

9 The -- and as I attempted to take you through
10 the IG Act, as you can see, the only authority of an IG to
11 act for or on behalf of the agency is by virtue of that
12 employee's existence and creation as a vehicle of that
13 agency. The legislative history says that this IG is to
14 be the strong right arm.

15 Thank you very much.

16 QUESTION: Thank you, Mr. Kirsch.

17 Mr. Frederick, you have 2 minutes.

18 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

19 ON BEHALF OF THE PETITIONER

20 MR. FREDERICK: Justice Kennedy, I'd like to
21 return to your question about who the IG reports to
22 because Executive Order 12993, which is not cited in the
23 briefs, provides that the President shall engage a process
24 to investigate wrongdoing by an Inspector General. So, in
25 those instances when the Inspector General and the agency

1 head are at loggerheads, pursuant to this delegated
2 authority, the deputy of the Office of Management and
3 Budget convenes a committee called the President's
4 Committee of Integrity and Efficiency.

5 The PCIE investigates outside the realm of the
6 agency whether or not the Inspector General has committed
7 any wrongdoing, and pursuant to that process, the agency
8 head is basically taken out of the disciplinary process
9 through the investigation of whether or not the IG has
10 committed wrongdoing.

11 So, in answer to your earlier question, the IG
12 really reports not only to Congress through those
13 mechanisms created in the Inspector General Act, but also
14 to the President who has the authority to appoint and to
15 remove and to create this mechanism for the discipline of
16 the Inspector General. That creates a further insulation
17 and independence of the Inspector General in performing
18 its function.

19 I would also like to point out that the remedy
20 that the FLRA asserts in this case runs against the agency
21 and the agency, therefore, has to be able to have the
22 authority to direct the Inspector General to comply in a
23 certain way. And that's exactly contrary to the -- to the
24 prerequisites of the Inspector General Act which provide
25 for investigative independence on the part of the

1 Inspector General in conducting investigations.

2 Allowing a union representative in these
3 contexts allows the union representative to serve as an
4 advance beacon of all of those types of questions that an
5 Inspector General might ask not only of the worker who is
6 being investigated, but also of the coworkers, and in the
7 D.C. Circuit case, in which the D.C. Circuit held that a
8 union -- that an IG was not a representative, the court
9 there specifically noted the problem where the worker had
10 confided to the union representative having committed a
11 number of crimes and the D.C. Circuit there held that the
12 IG was not the representative.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
14 Frederick.

15 The case is submitted.

16 (Whereupon, at 12:10 p.m., the case in the
17 above-entitled matter was submitted.)
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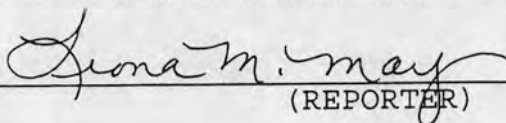
The United States in the Matter of:

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ETC., ET AL.,
Petitioners v. FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

CASE NO: 98-369

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