Weaseling out of Weingarten: Why Outsourcing Investigatory Examinations Does Not Obviate Representational Rights under the FSLMRS

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The Federal Service Labor Management Relations Statute (hereinafter “FSLMRS”) grants covered federal employees the right to union representation at investigatory examinations conducted by “a representative of the agency.” While the Supreme Court has defined the term “agency representative” broadly, some courts have permitted agencies to evade the FSLMRS by outsourcing examinations to third parties. This trend is contrary to Supreme Court precedent, the text of the FSLMRS, and the purposes of the statute, and it deprives federal employees of their representational rights. As such, it should be repudiated.

This article first describes the history of unionization and outlines the substantive provisions of the FSLMRS. It then documents judicial inconsistency in interpreting the phrase “a representative of the agency,” and shows that the broad definition promulgated by the Supreme Court comports with the text, legislative history, and underlying policies of the FSLMRS. This article concludes by proposing factors that courts should consider when determining whether examiners qualify as agency representatives, and it calls upon the judiciary to adopt these standards.

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INTRODUCTION

The Federal Service Labor Management Relations Statute (hereinafter “FSLMRS”) governs unionization among federal employees. The statute requires agencies to permit bargaining unit employees to be accompanied by union representatives, if they so request, during investigatory examinations conducted by “a representative of the agency.” The Supreme Court has construed the quoted phrase broadly to include individuals who conduct examinations “with regard to, and on behalf of” agencies. Lower courts have been hesitant to follow this guidance, however, and have permitted agencies to conduct representative-less examinations so long as the examiner is employed elsewhere — such as at another agency or within an exempted component of the employing agency. This trend deprives federal employees of their

1. 5 U.S.C. § 7101(b).
2. Id. § 7114(a)(2)(B).
4. See Nat’l Treasury Empls. Union v. FLRA, 754 F.3d 1031, 1043 (D.C. Cir. 2014) (internal citation omitted).
representational rights and is contrary to the text, legislative intent, and underlying policy goals of the FSLMRS. As such, it should be repudiated.

This article proceeds in four parts. Part I recounts the history of public and private sector unionization and surveys the substantive provisions of the FSLMRS. Part II describes the Supreme Court’s guidance in two seminal cases — NLRB v. J. Weingarten Inc. and NASA v. FLRA — and documents judicial inconsistency which has ensued in the courts below. Part III shows that the broad definition of “agency representative” promulgated by the Supreme Court avoids potential constitutional pitfalls and comports with the text, legislative history, and policies of the FSLMRS. Part IV proposes factors that courts should consider when determining whether an examiner qualifies as an agency representative, and this article concludes by calling upon the judiciary to adopt these standards.

I. LEGAL FRAMEWORK OF FEDERAL SECTOR LABOR LAW

Worker unionization has traditionally been met with hostility. Congress has attempted to combat this hostility by enacting various statutory protections for unions. In the private sector, the National Labor Relations Act (hereinafter “NLRA”) permits employees to unionize, bargain over the conditions of employment, and strike. In the public sector, state and municipal employees are governed by local laws and ordinances, and federal employees are governed by the FSLMRS. The FSLMRS permits federal employees to form unions and it prohibits unfair labor practices. However, the statute also excludes numerous employees from coverage, and it prohibits federal workers from striking or bargaining over wages or benefits. The FSLMRS also creates an independent agency to adjudicate labor disputes, provides for judicial

6. See infra Part I.
7. See infra Part II.
8. See infra Part III.
9. See infra Part IV.
10. See infra Part I.A.1.
review, and allows for certain forms of equitable relief for aggrieved federal workers.15

A. Historical Background

1. History of Unions

Labor law is often controversial. To some, unions represent a way of overcoming disparate bargaining power and providing workers with equitable pay and benefits, protection against at-will employment, and grievance rights.16 To others, unions are costly monopolies that impede contractual freedom, prioritize seniority over productivity, and treat constituents inequitably.17

This latter view of labor has generally prevailed over the history of unions in the United States.18 Until the mid-1800s, unions were viewed as criminal conspiracies.19 As this doctrine faded, courts still freely enjoined collective bargaining because of the danger of "irreparable harm" to wealthy property owners and generally enforced yellow-dog contracts where employees promised not to unionize.20 When Congress passed the Sherman Antitrust Act in 1890, unionization was initially treated as an anticompetitive practice that artificially inflated the price of labor.21 Congress specifically exempted unions from the Sherman Act in

15. See infra Part I.B.3.
16. See, e.g., Charles B. Craver, The Impact of Labor Unions on Worker Rights and on Other Social Movements, 26 ABA J. LAB. & EMP. L. 267, 270-71 (2011); see Henry H. Drummonds, Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy, 70 LA. L. REV. 97, 100 (2009). Unions have also historically provided the impetus for important advancements like safety laws and hours restrictions. Id. at 170. Union advocates think higher wages are fair because wealth is created jointly by investors, managers, and employees. Id. at 100.
19. See id. at 564, 567, 571.

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1914, but courts nonetheless continued to exhibit hostility towards unionization.\textsuperscript{22}

While the history of unions is generally one of private sector unionization, public sector unions have encountered even greater hostility.\textsuperscript{23} Even generally pro-union advocates like President Franklin D. Roosevelt felt that unions were ill-suited to the public sector, and some courts opined that “[n]othing would be more ridiculous” than to grant government workers “power to halt or check the functions of government” by striking because such behavior would, in effect, “transfer to them all legislative, executive and judicial power.”\textsuperscript{24}

Private sector unions reached their zenith in the 1950s and 1960s, as state right-to-work laws, transnational trade, the burgeoning service economy, political hostility, burdensome legal requirements, and other factors began to diminish their influence.\textsuperscript{25} When President Ronald Reagan terminated over eleven thousand striking air traffic controllers in 1981, private firms followed the government’s lead by firing striking union members with greater frequency.\textsuperscript{26}


\textsuperscript{24} Ry. Mail Ass’n v. Murphy, 180 Misc. 868, 875, 44 N.Y.S.2d 601 (Sup. Ct. 1943); see also \textit{A Bill to Diminish the Causes of Labor Disputes Burdening or Obstructing Interstate and Foreign Commerce, and for other Purposes: Hearing on S. 249 Before the S. Comm. on Lab. and Pub. Welfare}, 81st Cong. 327 (1949) (quoting President Franklin D. Roosevelt).


At the same time, public sector unions gained strength, in part because of new legal protections, but also because of their unique ability to lobby politicians and their employers simultaneously, their relative freedom from economic forces, and — in the case of federal employees — their inability to make demands over wages or benefits.27 Today, unions represent less than seven percent of private sector workers, but almost thirty-four percent of public sector workers.28

2. History of Private Sector Laws

Statutory protections for private sector unions began in earnest with the enactment of the Railway Labor Act of 1926, which still governs unions of railroad and airline workers.29 The Railway Labor Act was followed by the Norris-LaGuardia Act of 1932, which expressly prohibits courts from enjoining nonviolent strikes, enforcing yellow-dog contracts, or preventing unions from collecting strike-relief funds.30 Employers responded to the Norris-LaGuardia Act by physically attacking union leaders, inciting violence during strikes, sponsoring and controlling company unions, and refusing to negotiate with labor unions in good faith.31

Because of these problems—as well as the ongoing Great Depression, the failure of the National Industrial Recovery Act to reduce strikes, and unresolved inequities in bargaining power—Congress enacted the Wagner Act in 1935.32 The Wagner Act permitted private sector


32. See National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169); Am. Steel Foundries v. Tri-City Cent. Trades Couns., 257 U.S. 184, 209 (1921) (stating that labor unions "were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the
workers to unionize, but it also placed burdensome requirements on employers and was frequently abused by unions. These problems persisted until Congress enacted the Taft-Hartley Act in 1947. The Taft-Hartley Act imposed similarly burdensome requirements on unions in an attempt to balance the rights of management and labor. The Wagner Act and the Taft-Hartley Act are collectively known as the National Labor Relations Act (hereinafter “NLRA”), which is the statutory compilation that governs most private sector unions today.

In general, the NLRA grants workers the right to engage in “concerted activity” in order to bargain collectively. Concerted activity means action taken by multiple employees together, and it also encompasses the assertion of collective bargaining agreement (hereinafter “CBA”) rights by individual employees. To merit protection, activities cannot be violent or unlawful and must be engaged in for “mutual aid and protection.” The NLRA also prohibits employers from interfering with, restraining, or coercing employees engaged in concerted activity. The NLRA does not cover agricultural workers, who remain largely unprotected, or state and municipal workers, who are generally protected by local laws and ordinances. The act does not cover federal employees either, who are instead governed by the FSLMRS.

maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment.”; Ron Lepinskas, Comment, The NLRA and the Duty of Loyalty: Protecting Public Disparagement, 60 U. CHI. L. REV. 643, 647 & n.23 (1993) (“[T]o anxious was Congress to combat the effects of the Depression that debate over fundamental elements of the bill supplanted debate over [its] outer limits.”).

33. See, e.g., Lepinskas, supra note 32, at 648 (including examples of unions attempting to restrict discharge for cause and other traditional employer prerogatives).


36. See Lepinskas supra note 32, at 644.


38. E.g., Lepinskas, supra note 32, at 645-46.

39. 29 U.S.C. § 157; Columbia Portland Cement Co. v. NLRB, 915 F.2d 253, 258 (6th Cir. 1990) (holding that employee attacking non-striking coworker with a baseball bat is unprotected activity); In re Thompson Prods., Inc., 72 N.L.R.B. 886, 887-89 (1947) (stating that a strike coercing employer to violate another union’s certification as such is unprotected).


42. See infra Parts I.B.1-2. Federal workers were originally excluded from the NLRA in part because of concerns for sovereign immunity. HEGJI, supra note 41, at 30.
3. History of Federal Sector Laws

Statutory protections for federal sector unions were not enacted until 1978, but they have their roots in several earlier laws.43 The first of these was the Pendleton Act of 1883, which was passed to combat the spoils system which then dominated federal employment.44 The Pendleton Act established the modern civil service examining system by requiring competition, prohibiting politically motivated appointments and removals generally, and creating the bipartisan Civil Service Commission to enforce its provisions.45 A second forerunner of modern protections for federal unions was the Lloyd-LaFollette Act of 1912, which permitted federal employees to join groups aimed at improving working conditions.46

While the Wagner Act was enacted in 1935, Presidents Franklin D. Roosevelt, Harry S. Truman, and Dwight D. Eisenhower each generally opposed public sector unions.47 President John F. Kennedy was more accepting, however, and issued a key executive order in 1962.48 This order allowed federal workers to unionize and required federal managers to recognize unions under certain conditions.49 The executive order did not allow workers to bargain over wages or hours, however, and it also permitted management to unilaterally decide the outcome of any bargaining impasses.50 President Richard M. Nixon did away with the latter requirement in a second executive order in 1969.51 This order instead directed the Federal Mediation and Conciliation Service to

43. See HEGJI, supra note 41, at 31.
45. Slater, supra note 44, at 307; Craig Westergard, Questioning the Sacrosanct: How to Reduce Discrimination and Inefficiency in Veterans' Preference Law, 19 SEATTLE J. FOR SOC. JUST. 1, 6, 7 (2020).
47. HEGJI, supra note 41, at 30 (noting that federal employees were expressly prohibited from striking by a companion provision of the Taft-Hartley Act of 1947); see also Act of June 23, 1947, ch. 120, title III, § 305, 61 Stat. 160 (codified as amended at 5 U.S.C. § 7311); Fox, supra note 26, at 267 ("[T]he continued exclusion of wage bargaining was, and continues to be, a strong remnant of the traditional model of public sector labor relations.").
50. E.g., Slater, supra note 44, at 302.
mediate bargaining impasses, and it gave the Federal Service Impasse Panel power to issue binding decisions in arbitration.\textsuperscript{52} These executive orders were codified as part of the Civil Service Reform Act of 1978.\textsuperscript{53} Title VII of this act is known as the Federal Service Labor Management Relations Statute, or FSLMRS, and it is the primary authority on federal labor management relations today.\textsuperscript{54}

B. Substantive Provisions of the FSLMRS

1. Rights and Obligations Under the FSLMRS

The FSLMRS does essentially three things: first, it grants federal employees the generalized right to form unions and bargain collectively; second, it requires unions and agencies to bargain in good faith; and third, it prohibits specific “unfair labor practices.”\textsuperscript{55} In addition, the FSLMRS outlines the procedures unions must follow to gain recognition as the official bargaining unit for the community of interest.\textsuperscript{56}

In general, the FSLMRS grants federal employees the right “to form, join, or assist any labor organization, or to refrain from any such activity.”\textsuperscript{57} This includes the related right “to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees.”\textsuperscript{58} Management is required to participate in collective bargaining, and both parties must negotiate in good faith.\textsuperscript{59}

The FSLMRS also prohibits unfair labor practices by both unions and the government.\textsuperscript{60} Unfair labor practices include specific violations

\textsuperscript{52} E.g., U.S. Fed. Lab. Rel. Auth., \emph{supra} note 49.
\textsuperscript{55} Hegh, \emph{supra} note 41, at 30-34.
\textsuperscript{56} Id. at 34-37. There are basically five steps in this process: first, a party must file a petition with the Federal Labor Relations Authority (hereinafter “FLRA”) indicating that at least thirty percent of employees in the relevant community would be interested in a change in unionization; second, the FLRA determines whether the petition is accurate; third, the FLRA orders a secret ballot election; fourth, the union is certified by the FLRA; and fifth, the parties may appeal to the FLRA or to the courts. Id. at 36-37.
\textsuperscript{57} 5 U.S.C. § 7102.
\textsuperscript{58} Id. § 7102(2).
\textsuperscript{59} Id. § 7114(a)(4). Agencies are not required to negotiate over management rights expressly reserved by the FSLMRS, however. See id. § 7106; see infra Part I.B.2.
\textsuperscript{60} 5 U.S.C. § 7116.
of the rights listed above, such as restraining, coercing, or interfering with any employee in the exercise of FSLMRS rights; controlling or sponsoring an employee union; failing to bargain in good faith; repudiating an otherwise valid CBA; and causing impasses by insisting on non-negotiable proposals. In addition, it is an unfair labor practice to discriminate or retaliate against a bargaining unit employee because of protected activity, race, color, creed, national origin, sex, age, civil service status, political affiliation, marital status, or disability. In stark contrast to the NLRA, federal employee strikes are also deemed to be unfair labor practices, as are other instances of noncompliance with the statute.

Most significantly for purposes of this article, the FSLMRS requires agencies to allow employees to have union representation during certain meetings and interviews. First, employees are entitled to union representation during formal discussions about grievances, personnel policies or practices, and other general conditions of employment. Second and more controversially, employees are entitled to union representation at “any examination of an employee in the unit by a representative of the agency in connection with an investigation,” so long as the employee requests representation and reasonably believes that the examination may result in discipline. The meaning of “a representative of the agency” is the subject of Parts II and III of this article.

2. Scope of the FSLMRS

The FSLMRS excludes numerous federal employees from coverage in its definitions section. For instance, the definition of employee does not include noncitizens, members of the military, Foreign Service employees, supervisors, or managers. In addition, the statute specifically exempts the Federal Bureau of Investigation, the Central

61. Id.
63. 5 U.S.C. § 7116(b)(7), § 7116(b)(8).
64. Id. § 7114(b)(2).
65. Id. § 7114(a)(2)(A).
66. Id. § 7114(a)(2)(B) (emphasis added).
67. Id. § 7103(a)(2).
68. Id. § 7103(a)(2)(B).
Intelligence Agency, the National Security Agency, and the Secret Service from its requirements, and other organizations such as the Tennessee Valley Authority, the Government Accountability Office, and the Postal Service are governed by other statutes.69 Courts have also indicated that members of the national guard and medical personnel employed by the Veterans Administration are not covered by the act, and the FSLMRS grants the president discretion to exclude other agencies for national security reasons.70

The FSLMRS also limits the power of covered employees to bargain collectively in ways that the NLRA and other statutes do not.71 Most significantly, federal employees are prohibited from bargaining over wages, hours, benefits, job classifications, and other subjects that are governed by statute or government-wide regulation.72 In addition, federal employees are prohibited from bargaining over management rights specifically reserved by the FSLMRS.73 These rights include the authority of agencies to terminate employees, allocate work assignments, and determine organizational missions, budgets, and hiring practices.74

In addition, the FSLMRS prohibits federal workers from engaging in strikes, slowdowns, or non-informational picketing that disrupts agency operations — a restriction which severely limits the

69. Id. § 7103(a)(3) (excluding the Federal Bureau of Investigation, Central Intelligence Agency, National Security Agency, and Secret Service); HEGII, supra note 41, at 31-32 (documenting coverage of the Tennessee Valley Authority, Government Accountability Office, and Postal Service elsewhere).

70. 5 U.S.C. § 7103(b) (national security exception); Am. Fed'n of Gov't Empls., Local 3936 v. FLRA., 239 F.3d 66 (1st Cir. 2001) (general exclusion of national guard members); Nat'l Fed'n of Fed. Empls. Local 589 v. FLRA., 73 F.3d 390 (D.C. Cir. 1996) (finding that Veterans Administration medical personnel are not covered).

71. Ralph Gildehaus, Future Civil Service Reform Legislation: Possible Effects of Repeal of the Management Rights Clause on the Scope of D.C. Circuit Review of FLRA Negotiability Decisions, 57 GEO. WASH. L. REV. 1360, 1362 (1989) ("[O]nly a fraction of the issues subject to bargaining in the private sector are negotiable in the federal sector."). In the private sector, the general rule is that all issues may be the subject of collective bargaining, though there may be a few exceptions. See Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 266-70 & n.5 (1965) (finding that decisions pertaining to the discontinuance of operations are non-negotiable); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (stating that decisions pertaining to the scope of the enterprise, what goods to produce, and the investment of capital are non-negotiable).


73. 5 U.S.C. § 7106(a).

74. Id. Scholars have frequently criticized this provision as impeding the resolution of important issues between labor and management. See, e.g., Charles J. Coleman, Federal Sector Labor Relations: A Reevaluation of the Policies, 16 J. COLLECTIVE NEGOT. PUB. SECTOR 37, 49 (1987); see also Donald H. Wollett, "The Bargaining Process in the Public Sector: What is Bargainable?", 51 OR. L. REV. 177, 178 (1951).
bargaining power of federal employees.\textsuperscript{75} The FSLMRS also requires workers to show they belong to a community of interest before unionizing, and it prohibits union-security agreements compelling federal employees to pay membership dues.\textsuperscript{76}

3. Enforcement of the FSLMRS

Besides defining the substantive rights of federal sector union members, the FSLMRS also created the Federal Labor Relations Authority (hereinafter “FLRA”), which is charged with administering the statute.\textsuperscript{77} The FLRA is an independent, bipartisan agency composed of three Authority Members, who are appointed by the president, as well as the Office of the General Counsel, the Federal Service Impasse Panel, and various administrative law judges.\textsuperscript{78}

When an unfair labor practice charge is filed, the Office of the General Counsel investigates the underlying events and decides whether

\textsuperscript{75} 5 U.S.C. §7103(a)(2)(B)(v) (excluding strikers from the definition of employee), §7116(b)(7) (designating strikes as unfair labor practices), §7120(f)(1) (requiring the FLRA to revoke the bargaining unit’s exclusive status if it condones a strike); see also 18 U.S.C. §1918(3) (making federal employee strikes a felony).


\textsuperscript{77} 5 U.S.C. §§7104, 7105.

\textsuperscript{78} E.g., U.S. FED. LAB. RELS. AUTH., AGENCY ADMINISTRATION AND STRUCTURE, HTTPS://WWW.FLRA.GOV/FLRA_ABOUT_ADMINISTRATION-STRUCTURE (last visited Mar. 26, 2020); U.S. FED. LAB. RELS. AUTH., supra note 49; see also 5 U.S.C. §§7104-7105 (giving the FLRA authority to engage in both rulemaking and adjudication).
to pursue the charge before an administrative law judge and eventually the three Authority Members. 79 Arbitrator decisions are also appealable to the FLRA, which reviews legal issues de novo and contractual issues with greater deference. 80 The FLRA's final orders regarding unfair labor practices, its reviews of arbitrator decisions, and its decisions on the negotiability of various issues are generally subject to judicial review, though the agency's determinations are entitled to "considerable deference." 81 While violations of the FLRA do not entitle grievances to monetary damages, infractions may result in cease and desist orders, injunctions, or other equitable relief like reinstatement or backpay. 82

II. WEINGARTEN RIGHTS AND THE FSLMRS

Under the Supreme Court's decision in Weingarten, unionized private sector employees must be permitted to have union representation during investigatory examinations that may result in disciplinary action against them upon their request. 83 The FSLMRS extends this right to federal workers, and specifies that it applies to examinations that are conducted by "a representative of the agency." 84 The Supreme Court has construed this phrase broadly to encompass individuals who conduct examinations "with regard to, and on behalf of" agencies. 85 Lower courts have applied this guidance inconsistently, however. 86 For instance, some courts have permitted representative-less examinations so long as examiners are employed by other federal agencies; 87 others have permitted them so long as examiners are not themselves covered by the FSLMRS. 88 The phrase "a representative of the agency" is thus

82. See 5 U.S.C. § 7118(a)(7); see also Dep't of the Army v. FLRA, 56 F.3d 273, 276-79 (D.C. Cir. 1995) (discussing damages, backpay, and equitable relief); United States v. Pro. Air Traffic Controllers Org., 653 F.2d 1134, 1143 (7th Cir. 1981) (discussing injunctive relief).
83. See infra Part II.A.1.
84. See infra Part II.A.2.
86. See infra Part II.B.1.
87. See infra Part II.B.2.
88. See infra Part II.B.3.
ambiguous and creates numerous questions for courts, agencies, and federal workers.89

A. Weingarten Rights and 5 U.S.C. § 7114(a)(2)

1. Private Sector Weingarten Rights

Bargaining unit employees are entitled to union representation at investigatory examinations when they reasonably believe such examinations may result in discipline against them and request representation.90 The Supreme Court first recognized this right in NLRB v. J. Weingarten, Inc., which concerned private sector workers and was decided in 1975.91

In Weingarten, a store employee was accused of stealing from a register and was interrogated by management.92 Though she repeatedly requested union representation, her requests were ignored.93 When the employee was eventually cleared of wrongdoing, she was nonetheless berated by management until she “burst into tears and blurted out that the only thing she had ever gotten from the store without paying for it was her free lunch.”94 The store’s policy against free employee lunches was not well known, even by management, and the employee refused to sign a document saying that she owed the store one hundred and sixty dollars for lunches.95 The union filed an unfair labor practice charge and the Supreme Court reviewed the decision rendered by the National Labor Relations Board (hereinafter “NLRB”).96 The Supreme Court reasoned that the right to union representation during investigatory interviews is derivative of the right to engage in concerted activity and the right to be free from interference, restraint, or coercion by management.97

Weingarten rights ensue only when an employee requests union representation.98 Employees must reasonably believe that discipline is

89. See infra Part II.B.4.
91. See id.
92. Id. at 254-56.
93. Id. at 254.
94. Id. at 255.
95. Id. at 255-56.
96. Id. at 252-53, 256.
97. Id. at 256-57.
98. E.g., Spartan Stores, Inc., v. NLRB, 628 F.2d 953, 958 (6th Cir. 1980).
possible, and the meeting must also be “investigatory” in nature.\textsuperscript{99} While the NLRB has vacillated on whether non-bargaining unit employees may receive Weingarten rights, it has consistently held that employees may \textit{not} insist upon non-union representation from an attorney, family member, or other third party.\textsuperscript{100} Union representatives must be permitted to attend and fully participate in investigatory examinations, but the union may waive these representational rights if the waiver is “clear and unmistakable.”\textsuperscript{101}

2. Federal Sector Weingarten Rights

Weingarten rights were extended to federal employees in 1978 as part of the FSLMRS, and the relevant provision of that statute was patterned after the Court’s decision in \textit{Weingarten}.\textsuperscript{102} This provision is found at section 7114(a)(2) of title 5 of the United States Code, and reads in pertinent part:

An 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.\textsuperscript{103}

\begin{itemize}
\item \textsuperscript{99} See, e.g., \textit{NLRB v. U.S. Postal Serv.}, 689 F.2d 835, 839 (9th Cir. 1982) (finding belief in the possibility of discipline to be unreasonable where employer expressly told employee there would be no discipline); \textit{Storer Comm'n}s, 292 N.L.R.B. 894, 897 (1989) (finding meeting allowing employees to tell their version of events to be investigatory in nature).
\item \textsuperscript{100} E.g., \textit{TCC Ctr. Co.}, 275 N.L.R.B. 604, 609 (1985) (denying request for an attorney); \textit{John M. O'Connor, NLRB Tells Non-Union Workers: “Stop Your ‘Weining’—You Have No Weingarten Rights”}, \textit{EPSTEIN BECKER GREEN} (May 15, 2017), https://www.workforcebulletin.com/2017/05/15/nlrb-tells-non-union-workers-stop-your-weining-you-have-no-weingarten-rights/ (discussing the rights of non-bargaining unit employees).
\item \textsuperscript{101} E.g., \textit{NLRB v. Texaco, Inc.}, 659 F.2d 124, 126 (9th Cir. 1981) (finding employer's refusal to allow union representative to fully participate to be an unfair labor practice); \textit{Prudential Ins. Co. of Am.}, 275 N.L.R.B. 208, 210 (1985) (upholding CBA waiver of employees' Weingarten rights).
\item \textsuperscript{103} 5 U.S.C. § 7114(a)(2).
\end{itemize}
The meanings of the opportunity for representation,\textsuperscript{104} bargaining unit employee,\textsuperscript{105} investigatory examination,\textsuperscript{106} reasonable belief,\textsuperscript{107} employee request,\textsuperscript{108} and so on have each been addressed by the FLRA and various courts.\textsuperscript{109} The meaning of "a representative of the agency" has also been addressed by the Supreme Court, the circuit courts, and the FLRA, but with striking inconsistency.\textsuperscript{110}

3. The Supreme Court's Guidance in \textit{NASA v. FLRA}

The leading case on the definition of agency representative under the FSLMRS is \textit{NASA v. FLRA} (hereinafter "\textit{NASA}"), which was decided by the Supreme Court in 1999.\textsuperscript{111} In \textit{NASA}, the Court considered whether investigators from an agency's Office of the Inspector General (hereinafter "OIG") qualified as agency representatives for purposes of section 7114(a)(2).\textsuperscript{112} In \textit{NASA}, a worker allegedly spied on and threatened his coworkers, causing his superiors to instigate an OIG investigation.\textsuperscript{113} During the course of the investigation, the OIG permitted


Unions generally have freedom to select their representatives and may assign attorneys if they wish. \textit{Id.}

\textsuperscript{105} \textit{Id.} at 18. This inquiry is into whether the employee was part of the bargaining unit at the time of the investigatory examination rather than at the time of the events giving rise to the examination. \textit{Id.} Probationary employees qualify. \textit{Id.}; Dep't of the Navy, Charleston Naval Shipyard, 32 F.L.R.A. 222, 228-31 (1988); Dep't of Veterans Affs., Med. Ctr., 48 F.L.R.A. 787, 797-98 (1993).

\textsuperscript{106} U.S. FED. LAB. RELS. AUTH., supra note 104, at 21. Factors influencing whether a meeting qualifies as an examination include whether the meeting solicits information from the employee; is adversarial; attempts to elicit an admission of employee wrongdoing; or induces the employee to explain his or her conduct. \textit{Id.} Such examinations need not be mandatory or in person. \textit{Id.} at 22. Performance appraisals generally do not qualify. \textit{Id.} at 22-23; see also Nat'l Treasury Emps. Union v. FLRA, 835 F.2d 1446, 1450 (D.C. Cir. 1987) (remarking that the legislative history of the FSLMRS indicates that the term "investigatory interview" is synonymous with examination "in connection with an investigation").

\textsuperscript{107} E.g., Nat'l Treasury Emps. Union, 835 F.2d at 1451. The standard for whether an employee reasonably believes that an examination may result in disciplinary action against him or her is an objective one. \textit{Id.}

\textsuperscript{108} E.g., Circus Circus Casinos, Inc., 2018 N.L.R.B. LEXIS 215 (2018) ("No magic or special words are required to trigger a \textit{Weingarten} request.") (brackets omitted).

\textsuperscript{109} 5 U.S.C. § 7114(a)(3). In addition to the requirement found at 5 U.S.C. § 7114(a)(2), Federal agencies are also required to notify employees of their Weingarten rights at least once each year. \textit{Id.}

\textsuperscript{110} See infra Parts II.A.3, II.B.


\textsuperscript{112} \textit{Id.} at 232.

\textsuperscript{113} \textit{Id.} at 231-32; \textit{Id.} at 247 (Thomas, J., dissenting).
a union representative to attend the investigatory examinations, but limited the representative's participation. The union later filed an unfair labor practice charge, which the Supreme Court reviewed.

NASA teaches that individuals may qualify as agency representatives when they conduct investigatory examinations which benefit employing agencies. The Supreme Court offered two key articulations of this principle. First, it stated that individuals qualify as agency representatives when they conduct investigatory examinations "with regard to, and on behalf of, the particular agency." Second, the Court stated that individuals qualify as agency representatives if they "are employed by, act on behalf of, and operate for the benefit of [the agency]" when conducting investigatory examinations. In addition, NASA shows that agencies need not control examiners for them to qualify as representatives. This is because the Inspector General Act expressly removed OIG investigators from the control of their employing agencies. The Court reasoned that the secondary importance of an agency's control over its representatives is due to the fact that "in many cases we can expect honest cooperation" between agencies and the examiners they employ. Thus, the Court held that examiners may qualify as agency representatives even if they are relatively independent from, do not share the same interests as, and are required to audit and investigate their agencies.

NASA also illustrates two other general precepts. First, representational rights under the FSLMRS may be broader than private

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114. Id. at 232 (majority opinion).
115. Id.
116. Id. at 241.
117. Id. at 240-41.
118. Id. at 240.
119. Id. at 241.
120. Id. at 246.
122. NASA, 527 U.S. at 242; see also Def. Crim. Investigative Serv. v. FLRA, 855 F.2d 93, 100 (3d Cir. 1988) ("[T]he degree of supervision exercised by . . . management over the affairs of the [examiner] is simply irrelevant" when examiners are employees of departments in which agencies are housed and the purpose of examinations is "to solicit information concerning possible misconduct of [agency] employees in connection with their work" which then "may be disseminated."). The dissent in NASA argued that the OIG was not an agency representative because it lacked authority over agency employees. NASA, 527 U.S. at 252-57 (Thomas, J., dissenting). OIG inspectors and others may, of course, have substantial input into eventual disciplinary actions — and the line between authority and input is not always clear. Cf. id. at 259.
123. See NASA, 527 U.S. at 237-40.
sector Weingarten rights.\textsuperscript{124} This is in part because Congress enacted the FSLMRS after the Court’s decision in \textit{Weingarten}.\textsuperscript{125} As such, the Court rejected the agency’s argument that the FSLMRS should be construed to precisely mirror private sector rights.\textsuperscript{126} Second, the Court made clear that the focus of the inquiry is on the potential for employee discipline, not on pedantic, “who works for who” calculations: “FSLMRS rights do not depend on the organizational entity within the agency to whom the person conducting the examination reports.”\textsuperscript{127} The Court thus held that the OIG investigator in question qualified as an agency representative for purposes of section 7114(a)(2).\textsuperscript{128}

\textbf{B. Judicial Inconsistency After NASA}

\textbf{1. Means of Distinguishing NASA}

Despite the Supreme Court’s guidance in \textit{NASA}, lower courts, administrative bodies, arbitrators, and others have attempted to add definitional requirements to exclude examinations from coverage under the FSLMRS.\textsuperscript{129} Before \textit{NASA} was decided, courts generally did this in three ways. First, they would reason that examiners were sufficiently independent from agencies, either because they were appointed by the president and confirmed by the Senate, removable only for cause, supervised only by agency heads, or otherwise “shielded \ldots from agency interference.”\textsuperscript{130} Second, they would reason that the examiners themselves were exempted in whole or in part from the requirements of the FSLMRS.\textsuperscript{131} Third, they would reason that seemingly unique

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{124} See \textit{id.} at 236-237.
\item \textsuperscript{126} \textit{NASA}, 527 U.S. at 236-37 \& n.2 (“Congress recognized that the right to union representation might evolve differently in the federal and private sectors.”); \textit{id.} at n.2 (“[T]he FSLMRS is not a carbon copy of the NLRA.”) (internal quotations omitted).
\item \textsuperscript{127} \textit{id.} at n.9 (internal quotations omitted).
\item \textsuperscript{128} \textit{id.} at 246.
\item \textsuperscript{129} This practice clearly contravenes binding Supreme Court precedent. See id. See generally Jonathan R. Macey, \textit{The Internal and External Costs and Benefits of Stare Decisis}, 65 CHI.-KENT L. REV. 93, 96 (1989) (discussing the value of stare decisis).
\item \textsuperscript{130} See, e.g., U.S. Nuclear Regul. Comm’n v. FLRA, 25 F.3d 229, 234 (4th Cir. 1994) (pre-\textit{NASA} OIG case); see also Def. Crim. Investigative Serv. v. FLRA, 855 F.2d 93, 100 (3d Cir. 1988) (Defense Logistics Agency employees questioned by Department of Defense level OIG).
\item \textsuperscript{131} See, e.g., U.S. Dep’t of Just. v. FLRA, 39 F.3d 361, 366 \& n.9 (D.C. Cir. 1994). The Supreme Court expressly repudiated this reasoning in \textit{NASA}. “FSLMRS rights do not depend on ‘the organizational entity within the agency to whom the person conducting the examination reports.’”
\end{enumerate}
\end{footnotesize}
procedural postures, factual circumstances, or policy considerations indicated that examiners were something other than agency representatives.132 Courts and other decision makers have continued to employ these techniques after NASA.133

2. National Treasury Employees Union v. FLRA

Several recent cases embody this trend. For instance, the D.C. Circuit recently held that Office of Personnel Management (hereinafter “OPM”) investigators who conduct “suitability interviews” of new Internal Revenue Service (hereinafter “IRS”) employees do not qualify as agency representatives.134 Before 2008, these interviews were conducted by IRS personnel, and union representatives were permitted to attend.135 When OPM examiners began conducting the interviews in 2008, the IRS nonetheless “retained a role in the investigatory process” by initiating investigations, providing facilities and official time for the examinations, requiring employees to participate in the examinations “as a condition of employment,” and informing employees that they would be “subject to discipline if they [did] not cooperate.”136 In addition, the IRS retained the investigation files assembled by OPM and used them in “evaluating character, honesty, integrity and loyalty.”137

The D.C. Circuit began its analysis by distinguishing NASA with a wave of the hand: “this matter involves investigators who are not employed by the Agency.”138 Apparently employment elsewhere in the

132. See, e.g., U.S. Dep’t of Just., 39 F.3d at 366 (upholding OIG examination so that criminal investigation could proceed unhindered).
133. See infra Parts II.B.
136. Id. at 1036.
137. Id. (internal quotation marks omitted).
138. Id. at 1044 (emphasis added). The court did acknowledge that “[t]here are similarities between NASA and this case. For example, the level of cooperation between OPM investigators, who conduct the suitability investigations of covered appointees, and the IRS, which initiates the investigations and makes suitability determinations... mirrors the cooperation between OIG investigators and NASA that the Supreme Court found significant in NASA.” Id. at n.7. The court chose to disregard these similarities in favor of applying Chevron deference, however. Id. at 1043. Numerous scholars have documented the Supreme Court’s increasing Chevron skepticism, and the doctrine probably should not control such inquiries going forward. See, e.g., Nicholas R. Bednar, The Winter of Discontent: A Circumscribed Chevron, 45 MITCHELL HAMLIN L. REV. 395, 395-96 & n.3
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federal government renders controlling Supreme Court precedent inapplicable. Instead, the court deferred to FLRA precedent and adopted the FLRA’s “function and control test,” which asks whether examiners perform agency functions and whether agencies exercise “any control” over examiners.139 The court then concluded that the function to be performed was an OPM function — rather than part of the larger agency hiring process — and that, despite the facts recited above, the IRS lacked control over the examination.140

3. American Federation of Government Employees v. FLRA

In another illustrative case, the Tenth Circuit held that investigators for the Air Force Office of Special Investigations (hereinafter “OSI”) do not qualify as agency representatives.141 In that instance, a civilian Air Force employee accessed pornography from his work computer and the case was assigned to OSI, whose employees are exempted from the FSLMRS for national security reasons.142 When the suspended employee was directed by his supervisor to attend an interview conducted by OSI, the employee’s union representative was not permitted to attend.143

The Tenth Circuit chose to side-step the issue of whether OSI investigators acted as representatives of the Air Force by construing the national security exception to permit the examination.144 This exception is found at 5 U.S.C. § 7103(b) and it applies to OSI investigators and other national security employees that might wish to unionize.145 According to the court, however, the provision wholly exempts OSI and therefore permits it to interfere with the representational rights of covered employees.146 Of course, the FSLMRS also exempts, among other

(2019) ("[A]dministrative law scholars and practitioners should anticipate a doctrinal revolution during the next decade.").

139. Nat’l Treasury Emps. Union, 754 F.3d at 1037, 1043-44.
140. Id. at 1037, 1047.
141. Am. Fed’n of Gov’t Emps., Local 1592 v. FLRA, 836 F.3d 1291, 1292-94 (10th Cir. 2016) (holding that Air Force OSI investigators do not qualify as agency representatives).
142. Id. at 1292-93.
143. Id. at 1293.
144. Id. at 1297-98.
145. 5 U.S.C. § 7103(b).
146. Am. Fed’n of Gov’t Emps., Local 1592, 836 F.3d at 1297-98. But see id. at 1298 (“The employee seeking to assert his Weingarten right is not an employee of the excluded agency. He faces potential work-related discipline from his employing agency . . . , not the excluded agency . . . Why then should his representational rights be affected by the exclusion of that other agency from the statute?”); id. at 1301 (Phillips, J., dissenting) (showing that the FSLMRS “excludes AFOSI’s employees from coverage”) (emphasis added).
agencies, the Tennessee Valley Authority, which regulates water in the East.\textsuperscript{147} Using the court’s rationale, the Bureau of Reclamation, which regulates water in the West, may also disregard the Weingarten rights of its employees — so long as it uses the Tennessee Valley Authority or some other exempted entity to do so.\textsuperscript{148} The court also indicated that the policies behind the national security exception outweigh employees’ Weingarten rights; but there were no indications in the facts of the case that national security was implicated at all.\textsuperscript{149} Instead, this case was, at its heart, a personnel matter, and the agency chose to circumvent the FSLMRS by outsourcing its examinations.\textsuperscript{150}

4. Additional Examples

In another case, the FLRA found, in direct contravention of NASA, that an OIG investigator did not qualify as an agency representative because management allegedly lacked input on the contents of an examination, and was absent from the actual interview.\textsuperscript{151} In another case, the D.C. Circuit held that the procedures to be followed during OIG investigations, including the presence or absence of union representation, are non-negotiable because the policies behind the Inspector General Act allegedly outweigh federal employees’ Weingarten rights.\textsuperscript{152}

While NASA is clear that an examination “with regard to, and on behalf of” an agency qualifies an examiner as “a representative of the agency,” courts have applied this guidance inconsistently.\textsuperscript{153} Cases where examinations are conducted by agency management or OIG investigators appear straightforward, but numerous questions remain.\textsuperscript{154} What of examinations by personnel from outside agencies?\textsuperscript{155} What is the relevant

\textsuperscript{148} Id.
\textsuperscript{149} See \textit{Am. Fed’n of Gov’t Emps., Local 1592, 836 F.3d at 1293, 1298-1300; see also id. at 1302} (Phillips, J., dissenting). Like the D.C. Circuit, the Tenth Circuit probably gave undue weight to \textit{Chevron}. \textit{Compare id. at 1295} (majority opinion), \textit{with} Bednar, supra note 140, at 393-94, 396 n.3.
\textsuperscript{150} \textit{Am. Fed’n of Gov’t Emps., Local 1592, 836 F.3d at 1297.}
\textsuperscript{152} U.S. Dep’t of Homeland Sec. v. FLRA, 751 F.3d 665, 668 (D.C. Cir. 2014); \textit{see also} U.S. Nuclear Regul. Comm’n v. FLRA, 25 F.3d 229, 234-35 (4th Cir. 1994).
\textsuperscript{153} NASA v. FLRA, 527 U.S. 229, 240 (1999).
\textsuperscript{154} U.S. FED. LAB. RELS. AUTH., supra note 104, at 18; \textit{see also id. at} 19 (“A parent agency is responsible for the actions of investigators it employs and utilizes to investigate its employees. This is true even where the investigators receive direction and oversight by outside entities, or where investigators from a separate component or a different regional office within the agency are utilized.”) (footnotes omitted).
\textsuperscript{155} \textit{See Nat’l Treasury Emps. Union v. FLRA, 754 F.3d 1031, 1043} (D.C. Cir. 2014).
agency? What of examinations by private contractors — such as attorneys, doctors, psychiatrists, or polygraph examiners? What of examinations conducted by agency attorneys? What of examinations conducted by team leads or coworkers at management’s behest? NASA provides the general rule which governs each of these questions, yet courts have been hesitant to follow its guidance. Additional analysis and standards on federal Weingarten rights may therefore be necessary.160

III. MEANING OF AGENCY REPRESENTATIVE UNDER THE FSLMRS

The meaning of “a representative of the agency” under the FSLMRS is ambiguous, but various principles of statutory construction mitigate in favor of a broad understanding of the phrase.161 First, the statutory definition of “agency” and the ordinary meaning of “representative” are each broad and encompassing.162 Second, while the legislative history of the FSLMRS may be somewhat unclear, the statute’s general purpose is to promote federal labor rights, not minimize them.163 Third, because representational restrictions could implicate constitutional considerations like due process and free speech, the constitutional avoidance doctrine favors a broad construction.164 Fourth, federal Weingarten rights help ensure that employees, unions, and employers are each treated fairly, and the presence of union representatives at investigatory interviews

156. See Am. Fed’n of Gov’t Emps., Local 1592 v. FLRA, 836 F.3d 1291, 1298 (10th Cir. 2016).
157. U.S. Nuclear Regul. Comm’n, 25 F.3d at 234 (“Inspectors General are . . . granted the power to select and employ whatever personnel are necessary to conduct their affairs, to employ experts and consultants, and to enter into contracts for audits, studies and other necessary services.”); Soc. Sec. Admin., 59 F.L.R.A. 875, 879-80 (2004) (contractor working as agency equal employment opportunity investigator was an agency representative); Def. Logistics Agency, 39 F.L.R.A. 999, 1013 (1991) (contractor administering employee assistance program was an agency representative); see also Safeway Stores, Inc., 303 N.L.R.B. 989, 989-90 (1991) (drug test was an examination); Dep’t of Just., Bureau of Prisons, 14 F.L.R.A. 334, 351-52 (1984) (strip search was an examination). But see U.S. Postal Serv., 252 N.L.R.B. 61, 61 (1980) (physical fitness test was not an examination).
160. See infra Parts III-IV.
161. See infra Part III.
162. See infra Part III.A.
163. See infra Part III.B.
164. See infra Part III.C.
facilitates factfinding and governmental efficiency. As such, the phrase “a representative of the agency” should be construed broadly.

A. Text of the FSLMRS

1. Definition of “Agency”

The first step in statutory construction is to examine the text. The phrase “a representative of the agency” is generic, and courts have often found it to be ambiguous. The phrase has two important components: first, the definition of “agency,” and second, the definition of “representative.”

Definitions of “agency” found in Title 5 of the United States Code indicate that the word is broad and encompasses departments in the executive branch rather than just individual agencies. First, the FSLMRS states that “agency means an Executive agency . . . , the Library of Congress, and the Government Printing Office, but does not include” the Government Accountability Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, the Tennessee Valley Authority, or the FLRA. Title 5 further provides that, “[f]or the purpose of this title, ‘Executive agency’ means an Executive department, a Government corporation, and an independent establishment.” Title 5 lists the various “Executive departments,” and includes entities like the Department of Defense and the Department of the Interior, but not their components.

Other canons of statutory construction likewise indicate that the definition of agency is broad. For instance, other statutes like the Administrative Procedure Act define agency to include almost all entities

165. See infra Part III.D.
168. See infra Part III.A.2 (discussing the broad meaning of “representative,” which largely overshadows the statutory definition of “agency” in this analysis).
170. Id. § 105 (emphasis added).
171. Id. § 101; see also FLRA v. U.S. Dep’t of Just., 137 F.3d 683, 688-90 (2d Cir. 1997) (finding that the relevant agency was the Department of Justice rather than its constituent, the Immigration and Naturalization Service); Def. Crim. Investigative Serv. v. FLRA, 855 F.2d 93, 98 (3d Cir. 1988) (finding that the relevant agency was the Department of Defense rather than its constituent, the Defense Logistics Agency).
within the executive branch. Dictionaries from the 1970s and 1980s define agency as "a governmental bureau, or an office that represents it," "an administrative division of government," and "a department or other administrative unit of a government." In addition, the Oxford English Dictionary defines agency as "[a] department or body providing a specific service for a government or similar organization." The Whole Act Rule obliges courts to consult the entire FSLMRS when construing individual provisions of the act, and the FSLMRS as a whole generally distinguishes between insular bargaining units and the broader concept of the agency. The statute could have specifically referred to "agency management" if that was what it meant. But it did not. Instead, it explicitly references the established definition of "agency," which Title 5 of the United States Code, various dictionaries, and other textual sources define as high-level executive departments like the Department of Defense.

2. Definition of "Representative"

Even if the word "agency" were construed narrowly, the phrase at issue here, "a representative of the agency," is still broad and encompassing because anyone can be an agency's representative. While the definition of "representative" is not found in the FSLMRS or in Title 5, it is found in Title 29, which governs labor management relations in the private sector. According to Title 29, "[t]he term 'representatives'
includes *any individual* or labor organization."\(^{178}\) Therefore, "any individual" may act as an agency's representative in the context of labor management relations.\(^{179}\)

Dictionary definitions comport with this general principle. Justice Thomas's dissent in *NASA* consulted various dictionaries which define representative as "standing for or in the place of another," "acting for another or others," and "one that represents another as agent, deputy, substitute, or delegate usu[ally] being invested with the authority of the principal."\(^{180}\) The Oxford English Dictionary defines "representative" as "[a] delegate who attends a conference, negotiations, legal hearing, etc., so as to represent the interests of another person or group."\(^{181}\) Furthering the interests of the representative's principal is clearly of paramount importance.

In addition, the FSLMRS uses the article "a" to introduce "representative of the agency."\(^{182}\) This grammatical appendage broadens the meaning of the phrase and indicates that agencies may have multiple representatives.\(^{183}\) Moreover, the statute could have used "a representative of supervisory personnel," "a representative of agency management," "a representative employed by the agency," or other like phrases if that was what it meant. But it did not.\(^{184}\) Instead, it used broad language that accords with the larger statutory scheme, which is aimed at extending private sector labor rights to federal employees.\(^{185}\) The ordinary meaning of "a representative of the agency" thus likely

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178. 29 U.S.C. § 152(4) (emphasis added); see also id. § 142 (applying this definition to other parts of 29 U.S.C.).

179. Id. § 152(4).

180. NASA v. FLRA, 527 U.S. 229, 253-54 (1999) (Thomas, J., dissenting) (quoting dictionaries); see also Representative, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1535 (2d ed. 1983) (defining representative as "acting or speaking, especially by due authority, in the place, or on behalf, of another or others").


183. See, e.g., Reid v. Angelone, 369 F.3d 363, 367 (4th Cir. 2004) ("[B]ecause Congress used the definite article 'the,' we conclude that . . . there is only one order subject to the requirements."); Warner-Lambert Co. v. Apotex Corp., 316 F.3d 1348, 1356 (Fed. Cir. 2003) (reasoning that "the" is specific, whereas "a" or "any" are general); see also NASA, 527 U.S. at 235-36 ("the fact that some representative[s] of the agency may perform functions relating to grievances and bargaining does not mean that other personnel who conduct examinations . . . are not also fairly characterized as agency 'representatives'."); Freytag v. Comm'r, 501 U.S. 868, 902 (1991) (Scalia, J., concurring); Am. Bus. Ass'n v. Slater, 231 F.3d 1, 4-5 (D.C. Cir. 2000).


encompasses individuals who are employed at other agencies, who work for private contractors, or who otherwise examine bargaining unit employees "with regard to, and on behalf of" an employing agency.186

B. Congressional Intent of the FSLMRS

1. Legislative History of the FSLMRS

The legislative history of the FSLMRS is somewhat opaque, but it likely supports a broad interpretation of "a representative of the agency." The Civil Service Reform Act, of which the FSLMRS was a part, was controversial at the time of its passage, and the FSLMRS "engendered particularly heated debate."187 The legislative haggling so affected the contents and legislative history of the new law that many onlookers were confused about what the FLRA was supposed to do and how it was supposed to do it.188 The FSLMRS was expressly modeled after the NLRA, however, and it confers many of the same rights on federal employees as its sister statute does upon private sector workers.189 The most important amendment to the FSLMRS concerned the management rights provision, which was initially quite broad.190 It was only after the bill was amended with the assurance that this provision would be narrowly construed to encourage negotiation that the legislation was enacted.191

186. NASA, 527 U.S. at 240. In addition, while the FSLMRS specifies that investigatory examinations by agency representatives necessarily trigger Weingarten rights for federal employees, it does not necessarily follow that examinations by non-representatives fail to trigger such rights. See, e.g., Rodney C. Roberts, Dissent and Fallacy in Dickerson v. United States, 8 Tex. Wesleyan L. Rev. 1, 2-3 (2001) (discussing the relationship between necessary and sufficient conditions). In many cases, examiners will represent multiple parties and serve multiple interests. See, e.g., U.S. Dep't of Just. v. FLRA, 266 F.3d 1228, 1229-32 (D.C. Cir. 2001) (rejecting agency's contentions that, whenever a criminal investigation is underway, the OIG only represents the Attorney General and not the agency).


191. Id.
Thus, the legislative history of the FSLMRS may support an expansive view of worker protections.\textsuperscript{192}

2. Purposes of the FSLMRS

Congress passed the FSLMRS to strengthen the bargaining position of employees and to increase the efficiency of the collective bargaining process.\textsuperscript{193} The FSLMRS shares these goals with the NLRA, which the Supreme Court has said was "designed to eliminate the 'inequality of bargaining power between employees . . . and employers.'"\textsuperscript{194} The Supreme Court has also stated that Weingarten rights "effectuate[] the most fundamental purposes of the [NLRA]," in part because "[r]equiring a lone employee to attend an investigatory interview which he [or she] reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided."\textsuperscript{195} The FSLMRS effectuates these same goals, and the express purpose of section 7114(a)(2) was to confer upon federal employees the same rights enjoyed by private sector workers under Weingarten.\textsuperscript{196} As such, the term "a representative of the agency" should be construed broadly with the larger goals of the FSLMRS, the NLRA, and Weingarten in mind.\textsuperscript{197}

C. Constitutional Analysis

1. Constitutional Avoidance

There are also constitutional reasons to construe federal Weingarten rights broadly. Courts often construe statutes to avoid raising constitutional questions.\textsuperscript{198} Depriving federal employees of union

\textsuperscript{192} See supra notes 187-191 and accompanying text.
\textsuperscript{195} Id. at 261-62; see also Def. Crim. Investigative Serv. v. FLRA, 855 F.2d 93, 99 (3d Cir. 1988) ("Congress wanted federal employees to have the assistance of a union representative when they were placed in a position of being called upon to supply information that would expose them to the risk of disciplinary action.").
\textsuperscript{197} See Def. Crim. Investigative Serv., 855 F.2d at 100.
representation during investigatory examinations raises due process and free speech issues.\textsuperscript{199} As such, courts should interpret the phrase "a representative of the agency" broadly to encompass most government examiners as a matter of constitutional avoidance.

2. Due Process

In analyzing federal workers’ due process claims for the deprivation of their representational rights, courts must decide three issues. First, they must decide whether the governmental actions in question implicate procedural or substantive due process.\textsuperscript{200} Second, they must decide whether these actions deprive federal employees of life, liberty, or property.\textsuperscript{201} And third, they must decide whether these actions unduly favor the government’s interests over the interests of federal employees and their unions.\textsuperscript{202}

First, there is no fundamental right to federal employment, and so only procedural due process is implicated by the exclusion of an employee’s union representative from an investigatory interview.\textsuperscript{203} Second, the exclusion of an employee’s union representative may lead to termination or other disciplinary action, which implicates the bargaining unit employee’s property interest in employment, and perhaps the employee’s liberty interests as well.\textsuperscript{204} Third, while the government surely has an interest in conducting fair and efficient investigations, the presence of a union representative only furthers this goal, while also protecting worker interests.\textsuperscript{205} As such, the exclusion of a federal employee’s union representative during an investigatory examination may implicate due process.

\textsuperscript{199} See infra Parts III.C.2-3. Such deprivations may also implicate equal protection and other constitutional issues, but this article limits its analysis to the aforementioned claims. Id.

\textsuperscript{200} See, e.g., Ryan C. Williams, The One and Only Substantive Due Process Clause, 120 YALE L.J. 408, 417-20 (2010).


\textsuperscript{204} See, e.g., Bd. of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

\textsuperscript{205} E.g., NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260-63 (1975).
3. Free Speech

In analyzing federal workers' free speech claims for the deprivation of their representational rights, courts must decide two issues. First, they must decide whether the governmental actions in question substantially infringe upon protected speech.206 Second, they must decide what type of restrictions the government has imposed and what kind of constitutional scrutiny such restrictions require.207

Free speech includes most communications, as well as association for the purpose of communication.208 Certain types of speech are not protected, such as fighting words, obscenity, and defamation, and government employees must also show that their speech pertains to a matter of public concern.209 While union representation is often an insular matter, it also affects broader labor rights, and so it may qualify for protection under the first step of this analysis.210 Under the second step, representational restrictions may qualify as restrictions on the time, place, or manner of speech, or as restrictions pertaining to government-controlled, non-public fora.211 Each of these restrictions is subject to a certain degree of constitutional scrutiny and, even if representational restrictions survive such scrutiny, they thus raise free speech issues.212 As such, federal Weingarten rights should be construed broadly to avoid implicating the Constitution.213

207. E.g., id.
208. E.g., id. at 891-93; see also Charlotte Garden, Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech, 79 FORDHAM L. REV. 2617, 2647-58 (2011).
211. E.g., Galloway, supra note 206, at 954-58.
213. See Galloway, supra note 206, at 891-92 ("[T]he first amendment protects all types of communication and association for purposes of communication .... Unless an exception is applicable, one should assume that claimant's communications are protected.").
D. Policies of the FSLMRS

1. Fair Treatment of Employees, Unions, and Agencies

The meaning of "a representative of the agency" is made clear by the policies behind the FSLMRS.\(^{214}\) The most important function served by union representation at investigatory examinations is to ensure that employees are not manipulated, coerced, bullied, or otherwise treated unfairly by agency representatives.\(^{215}\) Employers often interrogate employees behind closed doors, and the presence of a union representative helps ensure that employees are treated with dignity and respect, and that due consideration is given to each side’s views.\(^{216}\)

Another function served by the presence of union representatives at investigatory examinations is to protect the rights of all bargaining unit employees.\(^{217}\) This is because, when an employer treats some employees unfairly, or disregards procedure, or asks an employee to implicate a coworker, other individuals are affected, and the likelihood that such behavior will reoccur increases.\(^{218}\) Unions are tasked with representing entire bargaining units, and excluding their representatives from

\(^{214}\) See Def. Crim. Investigative Serv. v. FLRA, 855 F.2d 93, 98-99 (3d Cir. 1988) ("It is apparent from the face of the statute that Congress wanted federal employees to have the assistance of a union representative when they were placed in a position of being called upon to supply information that would expose them to the risk of disciplinary action.").

\(^{215}\) See 5 U.S.C. § 7101(a)(1)(A) (finding that legal protection for unions "safeguards the public interest"); NASA v. FLRA, 527 U.S. 229, 244 (1999) ("[T]he right Congress created in § 7114(a)(2)(B) . . . provides a procedural safeguard for employees."); id. at 244-45 ("The interest in fair treatment for employees under investigation is . . . strong."). Procedural safeguards such as 5 U.S.C. § 7114(a)(2) are somewhat akin to the Constitution's guarantees for due process and assistance of counsel. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 499 (1972) (Douglas, J., dissenting in part) (reasoning that the due process clause promotes "faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men"); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring) (stating that due process is designed to promote "fairness" and "reason").

\(^{216}\) See NASA, 527 U.S. at 245 ("[T]he participation of a union representative will facilitate . . . a fair inquiry of an agency investigation."). It is this potential for unfair discipline that is perhaps the true inquiry underlying Weingarten rights. See, e.g., Lennox Indus., Inc. v. NLRB, 637 F.2d 340, 344 (5th Cir. 1981) ("[I]t is whenever the risk of discipline reasonably inheres in an investigatory interview that a union representative is required."); see also Fed’n of Gov’t Empls., Local 2544 v. FLRA, 779 F.2d 719, 723 (D.C. Cir. 1985) ("[T]he possibility, rather than the inevitability, of future discipline determines the employee’s right to union representation.").

\(^{217}\) See, e.g., NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260-61 (1975) (Weingarten rights "safeguard[] not only the particular employee’s interest, but also the interests of the entire bargaining unit by . . . [ensuring] that the employer does not initiate or continue a practice of imposing punishment unjustly.").

\(^{218}\) Id.
investigatory examinations prevents unions from fulfilling this purpose and unduly limits their influence.\textsuperscript{219}

The danger of unfair treatment does not diminish when an agency outsources its investigatory examinations either.\textsuperscript{220} Agency employees may be just as fearful, ignorant, or unsophisticated when they are interviewed by outside examiners as when they are interviewed by agency personnel, and the potential for eventual discipline is generally the same.\textsuperscript{221} In addition, outside examiners may have fewer incentives to treat employees fairly, and the danger of administrative bungling likely increases.\textsuperscript{222} Construing the phrase "a representative of the agency" narrowly incentivizes agencies to "keep their hands clean" by outsourcing investigatory examinations to others.\textsuperscript{223} This type of behavior sidesteps the requirements of the FSLMRS and allows agencies to undermine the rule of law.\textsuperscript{224} Courts should thus construe the phrase "a representative of the agency" broadly to avoid unfairly repealing the FSLMRS rights of federal employees.

2. Efficient Examinations

A second function served by union representatives is to "facilitate the factfinding process."\textsuperscript{225} According to the Supreme Court:

\textsuperscript{219} See 5 U.S.C. § 7101(a) ("[L]abor organizations and collective bargaining in the civil service are in the public interest.").

\textsuperscript{220} E.g., FLRA v. NASA, 120 F.3d 1208, 1213 (11th Cir. 1997) ("[T]he risk of adverse employment action . . . 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."); aff'd by NASA, 527 U.S. 229 (1999).

\textsuperscript{221} See NASA, 527 U.S. at 244-45 ("The interest in fair treatment for employees under investigation is equally strong whether they are being questioned by employees or . . . by other representatives of the agency.").

\textsuperscript{222} See NASA, 527 U.S. at 243 (noting that outside examiners increase the risk of improper disclosure).

\textsuperscript{223} See, e.g., NASA, 527 U.S. at 232 (arguing that permitting third party examinations outside the presence of union representatives "might erode the right [to representation] by encouraging the use of investigative conduits outside the employee's bargaining unit"); see also FLRA v. U.S. Dep't of Just., 137 F.3d 683, 690-91 (2d Cir. 1997) (stating that third parties qualify as agency representatives when they are "merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibilities"); Am. Fed'n of Gov't Emps., Local 1592 v. FLRA, 836 F.3d 1291 (10th Cir. 2016) (FSLMRS-exempt Air Force OSI personnel examining non-exempt Air Force employee); Nat'l Treasury Emps. Union v. FLRA, 754 F.3d 1031, 1044 (D.C. Cir. 2014) (OPM personnel examining IRS employees).

\textsuperscript{224} See Nat'l Treasury Emps. Union, 754 F.3d at 1044.

\textsuperscript{225} NASA, 527 U.S. at 245.
The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them.

... A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly [the representative’s] presence need not transform the interview into an adversary contest.226

Thus, union representatives may increase the efficiency of investigations and save the government time and money by encouraging examinees, clarifying their answers, eliciting pertinent information, and providing the names of other relevant workers for the employer to interview.227 In addition, facts developed by union representatives are likely to aid in judicial review, and robust Weingarten rights probably increase the morale of the federal workforce as a whole.228 In general, upholding legal protections for unions “contributes to the effective conduct of public business, and ... facilitates and encourages the amicable settlement[] of disputes between employees and their employers.”229 Outsourcing investigatory examinations likely reduces these potential efficiencies.230 Therefore, the right to union representation during investigatory examinations by agency representatives should be construed broadly, in order to maximize governmental efficiency and protect employees from unfair labor practices.

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227. See id.; see also 123 CONG. REC. 2415 (1977) (remarks of Rep. Clay) (“A well-balanced labor relations program will increase the efficiency of the Government by providing for meaningful participation of employees in the conduct of business in general and the conditions of their employment.”).
230. See supra Part III.D.1.
IV. PROPOSED FACTORS

Proposing that the phrase “a representative of the agency” be construed broadly is not dramatic. It accords with the statutory definition and ordinary meaning of the term, its legislative history, and its underlying policies, as well as with the Constitution and controlling Supreme Court precedent.231 Defining “a representative of the agency” broadly also accords with traditional factors from the law of agency such as control, benefit, and assent — which in turn illuminate other factors which may be helpful for courts to consider.232 The prime factor in this inquiry is always whether the examiner acts in furtherance of the agency’s interests, or, in the Supreme Court’s words, whether the examiner acts “with regard to, and on behalf of, the particular agency.”233 Other factors should normally include whether the examiner is employed or paid by the federal government; whether the examiner may report the results of the examination to the employing agency; whether the examiner conducts the examination at the agency’s behest; whether agency management gives input into the contents, structure, location, or timing of the interview; whether the agency and the examiner collaborate; and whether the employee may be disciplined as a result of the examination.234 This analysis indicates that anyone may qualify as an agency representative. An examiner’s employment outside a given agency or partial exemption from the FSLMRS cannot diminish covered employees’ Weingarten rights.

CONCLUSION

Unions have traditionally been viewed as monopolistic and inefficient by courts, businesses, and much of the general public. While Congress enacted the FSLMRS to permit unionization among federal employees, public sector unions have encountered particularly vehement opposition. The FSLMRS grants covered federal employees the right to union representation during investigatory examinations by agency representatives — if they so request. While the Supreme Court has

231. See supra Parts II, III.
233. NASA, 527 U.S. at 240.
construed the phrase “a representative of the agency” to include individuals who conduct examinations “with regard to, and on behalf of” agencies, lower courts have applied this guidance inconsistently.

Courts should adhere to the Supreme Court’s broad construction of the phrase “a representative of the agency” for five reasons. First, the Supreme Court’s interpretation represents controlling precedent. Second, the statutory definition of agency and the ordinary meaning of representative are each broad and encompassing. Third, the legislative history of the FSLMRS supports a broad interpretation of the statute, which was intended to protect federal employees. Fourth, permitting union representation during investigatory examinations avoids potential due process and free speech issues. Fifth, the presence of union representatives makes examinations more efficient and helps ensure that all parties are treated fairly. Therefore, courts should follow the Supreme Court’s definition of “a representative of the agency” by looking primarily to whether the employing agency benefits from the examination. This definition comports with ordinary principles of statutory construction and balances the interests of agencies, unions, and individuals alike.