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RIGHT TO COUNSEL DURING INTERROGATIONS

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GOVERNMENT

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HEARINGS

BEFORE THE

KANSAS STATE UNIVERSITY



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SUBCOMMITTEE ON

MENT AND EMPLOYEE BENEFITS

OF THE

COMMITTEE ON

OFFICE AND CIVIL SERVICE

SE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.R. 1674

A BILL TO GUARANTEE TO THE CIVILIAN EMPLOYEES OF THE EXECUTIVE BRANCH OF THE UNITED STATES GOVERNMENT THE RIGHT TO HAVE A COUNSEL OR REPRESENTATIVE OF HIS CHOICE PRESENT DURING INTERROGATIONS WHICH MAY LEAD TO DISCIPLINARY ACTIONS AND TO PREVENT UNWARRANTED REPORTS FROM EMPLOYEES CONCERNING THEIR PRIVATE LIFE

MARCH 11, 26, APRIL 8, 1975

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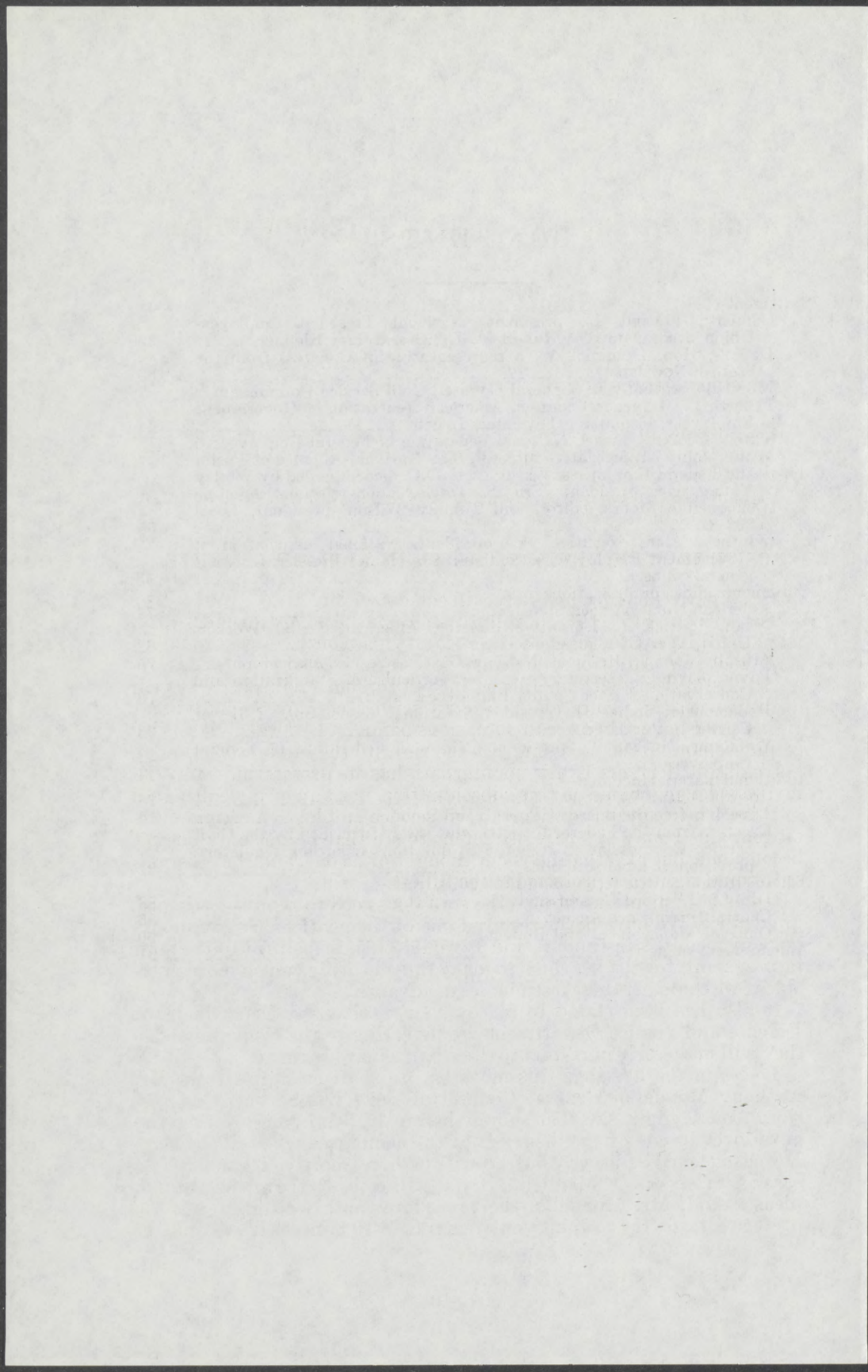
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RIGHT TO COUNSEL DURING INTERROGATIONS

TUESDAY, MARCH 11, 1975

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON RETIREMENT AND EMPLOYEE BENEFITS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:05 a.m., in room 219, Cannon House Office Building, Hon. Richard C. White (chairman of the subcommittee) presiding.

Present: Representatives Herbert E. Harris, Gladys N. Spellman, Norman Y. Mineta, and Gene Taylor.

OPENING STATEMENT BY CHAIRMAN RICHARD C. WHITE

Mr. WHITE. The subcommittee will come to order.

The subcommittee this morning will begin hearings on H.R. 1674, which will be carried over to the 26th of this month, in this room, to start at 9 a.m. Additional hearings will be scheduled if needed.

H.R. 1674 deals with an alleged inequity in our civil service system dealing with the protection of a civil service employee's individual rights. As I have said on many occasions before, a Federal civil service employee not only expects, but has the right to the same protection of his individual rights as his counterpart has in private industry. To my knowledge, no one on this subcommittee, nor any of my colleagues in this 94th Congress, consider a civil service employee a second-class citizen, and I may say it is my intent to see that he not only doesn't become one, but also that he is not thought of as one, and that his constitutional rights are protected to the fullest.

It has been mentioned to me the staff does need to receive testimony in advance. We have never received one of the gentlemen's testimony, nor anyone else's testimony, and it would be most helpful to the staff in preparing for the hearings to make these hearings much more valuable if we could get these testimonies in advance.

It also has been stated to me by counsel that the Department of Defense and Justice Department are deferring to the Commission, so they will not testify in respect to these particular hearings.

To begin the hearings this morning, we shall hear first from Mr. Anthony Mondello, General Counsel of the Civil Service Commission. And I might say that shortly before 10 I am going to turn the gavel over to one of the members of the committee who will be here. He hasn't arrived as yet, but he will be here shortly, I am sure. So we will proceed. Mr. Mondello, if you will come to the witness stand, please. And, Mr. Mondello, the procedure in this committee is we prefer that you try to limit your remarks to 10 minutes if possible. If

you prefer to read you may within that timespan, or if you prefer to, you may summarize.

Do we have copies of Mr. Mondello's testimony?

Mr. MONDELLO. No, sir. I apologize that you do not. As of this morning the prepared testimony had not been approved by anybody.

Mr. WHITE. OK. We hope you approve, Mr. Mondello.

STATEMENT OF ANTHONY L. MONDELLO, GENERAL COUNSEL, U.S. CIVIL SERVICE COMMISSION

Mr. MONDELLO. Mr. Chairman, we appreciate the opportunity to present the views of the Civil Service Commission on H.R. 1674, a bill "to guarantee to the civilian employees of the executive branch of the U.S. Government the right to have a counsel or representative of his choice present during interrogations which may lead to disciplinary actions and to prevent unwarranted reports from employees concerning their private life."

The Commission fully endorses the stated purpose of the bill to prevent unwarranted reports from employees concerning their private lives and has long recognized the right of an employee to have counsel or other representative of his choice present during formal proceedings which may lead to a disciplinary action. However, we believe the provisions of this bill to be overbroad, unwarranted, and unnecessary.

Subsection (a) of section 1 of the bill makes it unlawful for an officer of any executive agency to require or request any employee who is under investigation for misconduct to submit to interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice, if he so requests. The present regulations of the Civil Service Commission and executive branch agencies assure employees of the right to counsel in disciplinary proceedings, but not when ordinary day-to-day inquiries are necessary to allow normal supervisory operations.

The absence in the bill of definitions of "misconduct," "interrogation," and "disciplinary action" could lead to interpretations which would require the presence of an attorney during the most routine discussions between employees and supervisors, such as an unexplained absence or tardiness. It would be difficult for the Government to function if every question by a supervisor to an employee which could lead to a disciplinary action, however minor, must be preceded by a warning that the employee is entitled to the presence of an attorney before answering the question.

At least, therefore, the presence of counsel feature should not come into play except where written charges have been preferred against an employee. This would coincide nicely with the rule of the *Weingarten* case, recently decided by the Supreme Court in a related area. That case stands for the proposition that where summary discipline is immediately impending, in a context where lie detectors and special security investigators are used, and the sole question remaining is "whether certain conduct deserves discipline," then the employee may request the presence of a union representative. And it is very unclear from the decision just what the function of that representative might be. But I would like to suggest to you that summary discipline is almost unknown to the Federal service. The Veterans Preference Act has a

30-day notice requirement, the Lloyd-La Follette Act has a 30-day notice requirement. Indeed all of the competitive service employees of the Federal Government, who number about 1.7 million, have these rights, so that there is adequate notice of impending discipline.

The situation, of course, is quite unlike what you had in the *Weingarten* case where in particular the court in footnote 5 at page 7 of the slip opinion says the following:

The key objective fact in this case is that the only exception to the requirement in the collective bargaining agreement that the employer give a warning notice prior to discharge is if the cause of such discharge is dishonesty.

And the issue in this case, the *Weingarten* case, was the dishonesty or suspected dishonesty of an employee. The court continues:

Accordingly, if respondent had been satisfied based on its investigatory interview that Collins was guilty of dishonesty Collins could have been discharged without further notice.

So discipline was right there. This was the last step in deciding whether the particular conduct should warrant discipline.

You don't have that situation throughout the Federal service. With respect to the excepted service, some 700,000 of which are in the Postal Service, where these affairs are handled under collective bargaining agreements you have somewhat the same result, you have warning notices galore, and no employee whose supervisor simply asks the question need fear that there will be summary discipline immediately.

Subsection (b) of section 1 of the bill makes it unlawful for an officer of an executive agency to require or request any employee to make any report concerning any of his activities or undertakings unless such activities or undertakings are directly related to the performance of official duties to which he is or may be assigned in the department or agency, or to the development of skills, knowledge, or abilities which qualify him for the performance of such duties, or unless there is reasonable cause to believe that the civilian employee is engaged in outside activities or employment in conflict with his official duties. This subsection could be interpreted—I think probably would be—as preventing the Civil Service Commission from asking an employee about an alleged violation of the Hatch Act, which is a congressional statute, it could bar inquiries in areas relating to national security and employee safety, and it could prevent resolution of complaints received from citizens about the outside conduct of Government employees, that is, non-work-related conduct, which could affect their job performance or reflect adversely on the Government. Indeed, this provision could be interpreted as ruling out personal conduct as a basis of suitability determinations, essentially because of the lack of definition of the expression “directly related to the performance of social duties to which he is or may be assigned.”

In addition, the implementation of this provision could destroy much of the present ethical conduct and financial interest program within the executive branch.

And I should point out to you that some other Member of Congress has asked the GAO to conduct a massive investigation of 49 agencies of the Government, and the General Accounting Office is busy with that investigation, has indeed issued at least two reports already, in order to tighten up our ability to see that there are no conflicts of interest in the executive branch of the Federal Government.

This bill cuts the other way. The subsection seems to be applicable only when a conflict of interest appears to exist, as distinguished from the present executive branch program which is aimed at preventing conflict situations from arising. The present program is designed to prevent employees who occupy positions which could involve them in conflict of interest situations from inadvertent involvement in those situations. We do that through a process of consultation and counsel. All of this is set out in Executive Order 11222, and part 735 of title 5 of the Code of Federal Regulations. Our program stresses the confidential treatment of the financial interest statements filed by employees and expressly provides a means to resolve a complaint by an employee who feels his position is one that should not require that he file a statement.

Clearly, therefore, restrictions on requiring reports by employees about their activities should not bar reports about activities or undertakings that directly bear on their fitness for duty or on their obligations as Federal employees.

Section 2 of the bill prohibits violations of the provisions of section 1 by officers and members of the Armed Forces against civilian employees.

Section 3 authorizes complaints to the Civil Service Commission for violations of section 1 or 2, and it authorizes Commission hearings and appropriate Commission action to resolve the complaints.

Section 4 permits the establishment of grievance procedures negotiated by labor organizations and agency managers as a substitute for the appeal procedure provided by section 3.

While the Commission has no objection to provisions for employee complaints to the Commission from agency actions and encourages grievance procedures negotiated by labor organizations, we believe that this bill takes a piecemeal approach to employee relations by singling out two areas of alleged management abuse and making them subject to appeals to the Commission or negotiated grievance procedures.

Section 5 of the bill provides that any party aggrieved by any final determination or order under the provisions of the bill may seek judicial review. This provision would set an undesirable precedent with respect to determinations under procedures negotiated by labor organizations if the provision is read as permitting arbitration awards under the negotiated grievance procedure to be subject to direct judicial review. These determinations under negotiated procedures should be reviewed by the Federal Labor Relations Council initially, and perhaps exclusively, rather than by the courts.

As in the *Weingarten* case, the expert body set up to decide labor-management relations policy similar to the NLRB in the *Weingarten* case ought to be given the opportunity to consider the context in which these matters arise and to offer its rationalization for why the rules ought to be set the way they are. The court noted in *Weingarten* that it was furnishing great deference to NLRB in a decision which the National Labor Relations Act did not require, but did not either preclude. The Chief Justice, in dissent, suggested that the case was not ripe for decision and that it ought to be remanded to the Board so the Board could articulate the reasons for its decision.

We think that this kind of piecemeal approach to labor relations in the Federal service is unfortunate, and for the foregoing reasons the Commissioners strongly oppose the enactment of H.R. 1674.

I will be glad to try to answer any questions.

Mr. WHITE. Thank you.

Mr. Taylor?

Mr. TAYLOR. Mr. Mondello, to your knowledge has there been any problem with the Commission relating to the situation that this act seeks to rectify? Have there been any cases that have caused any strife, so to speak, between the Commission and agencies on the employees?

Mr. MONDELLO. No, sir. I have not noticed any, although I see a good many of the adverse action appeals that wind their way through the Commission on their way to the courts, and I am exposed to the complaints that are filed with the complaint office of the Commission, some—I don't know—1,500 complaints a year or so. And this would be a rare situation. I don't know of any complaints that, "I cannot have a representative present when I need one," either in the form of counsel or in the form of union representation.

I don't think it is a real problem, and I frankly used to believe that Congress passed legislation only to satisfy needs that showed up. I don't know of any demonstrated need for this legislation. No, sir.

Mr. TAYLOR. Well, certainly it would seem to me that—and I would concur that, if there were any serious charges being lodged against an employee they certainly should be represented by counsel, but it spooks me just a little bit here when we talk about action that might lead to disciplinary action. A supervisor might call an employee in to talk about a very routine supervision problem and it might develop into something bigger. I think at that point they certainly should be represented. But as I read this legislation it would be almost impossible for an agency to conduct any amount of meaningful supervision without the employee having the lawyer in. How do you know when you are going to stumble onto something?

Mr. MONDELLO. I don't know.

Mr. TAYLOR. I mean it seems to me this would boggle down the agencies of the Federal Government and make it almost impossible for them to function.

Mr. MONDELLO. I think the language of it is so broad that it might embrace any situation in which a supervisor became—

Mr. TAYLOR. I am certainly in sympathy with what I think the intent of this bill is, but to me it is so broad and has such a meat ax approach that, I think, it would certainly not be in the best interest of the taxpayers of this country who are paying the employees to work for the Federal Government. A supervisor is going to be almost afraid to talk to an employee about the most insignificant matter that might be in the daily routine of doing the job, without a lawyer being present.

Mr. MONDELLO. I agree. And there is something else that compounds the problem. Even, if you believe the *Weingarten* case and even, if you think, it fits the situation that this bill is trying to describe, the *Weingarten* case makes very clear that, if the employee wants the union representative present at this investigative interview, the employer doesn't have to acquiesce.

He has the choice. He can say "I don't want to talk to you under those circumstances," and then go his own merry way. What the court suggests is, that it would do the employee well to talk to the employer sometimes even without representation to get whatever benefit that might yield to the employee, but the employer can simply say "Well, if you do want union representation, I don't want to talk to you. I really want to talk only to you alone without anybody else present." And that is the right of the employer. This bill would set a rule that doesn't give the employer any right whatever. He would have no choice, and he would have no choice with respect even to the kinds of interrogations where nobody would know if it is going to lead to discipline or not, the situations that might readily be resolved short of discipline.

So that that's why we think it is so overbroad and goes far beyond what the Weingarten case would allow, even if Weingarten would apply to this situation; and we don't think it does.

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. WHITE. Thank you, Mr. Taylor.

Mr. Mondello, let me ask you some questions, if I may. Now you helped prepare the draft on privacy of the President's Council on Privacy, and we have it here, regarding the policy of employees' rights; did you not, sir?

Mr. MONDELLO. I don't know if I helped prepare that draft.

Mr. WHITE.

It is the policy of the United States, as an employer, to assure that those officials of Executive agencies charged with administrative or supervisory responsibility recognize and protect the personal and individual rights, entitlements, and benefits of employees of, and applicants for employment in, Executive agencies.

That is generally your language or you helped draft that type of language; did you not?

Mr. MONDELLO. Mr. Chairman, I don't wish to fudge, but I have to tell you honestly what I believe. This bill that I have just been handed by staff indicates that this bill was drafted by the President's Council on Privacy assisted by Anthony Mondello; and I do recognize it to be a bill that I did assist with, no doubt about that.

Mr. WHITE. But now from your testimony, do I understand that you are satisfied with the law as it presently stands?

Mr. MONDELLO. The law with respect to this draft bill?

Mr. WHITE. No, the law regarding the right of counsel, right to be represented.

Mr. MONDELLO. Yes, sir. What I intended by my testimony to Mr. Taylor was I know of no need for this legislation.

Mr. WHITE. Let's examine the sections that you have mentioned to me. Mr. Taylor asked you a question and you indicated that you felt it would be impossible to conduct an inquiry, routine inquiry in an employer's office, supervisor's office, if this bill were passed. That is the nature, I understand, of your testimony.

Mr. MONDELLO. I think this bill would have an effect to inhibit the ordinary discourse that occurs on a daily basis on the job between supervisors and employees; yes, sir.

Mr. WHITE. But now look at page 2, the very top, line 1. Isn't there qualifying language that says "who is under investigation for misconduct"? Do you have a copy of the bill, sir?

Mr. MONDELLO. Yes, sir, I do.

Mr. WHITE. That is H.R. 1674 by Mr. Dominick Daniels. Now at the top of page 2 it says "comma, who is under investigation for misconduct." Now doesn't that remove it from a routine investigation? In other words, it is not in the nature of a supervisor talking to his employees about the operation of the office, but it is as to a misconduct by an individual employee. Isn't that what this bill contemplates?

Mr. MONDELLO. Plainly from that language that is one of the things this bill contemplates, but I don't know what that language means. For example, if a supervisor is 100 yards away from one of these munitions things that they have in Edgewood Arsenal, or some such place, and he sees smoke coming from a place very near the open hatch, and he is a hundred yards away and as he walks toward the locale in order to see whether somebody was smoking near the munitions place where they shouldn't he is interrupted by someone who diverts his attention. The next time he looks at the open hatch he sees three people there. If he walks up and says to one of those three "was it you who was smoking near this open hatch?" that one could say "I won't talk about that without counsel present."

Mr. WHITE. All right, at that moment is he investigating?

Mr. MONDELLO. I think he is investigating, yes.

Mr. WHITE. All right, at that time he could say "now you understand that what you say could be held against you and that you have a right to be represented, but I want to know if anybody here or any one of you was smoking." That would fulfill the purposes of this bill, wouldn't it?

Mr. MONDELLO. He would have to stop in his tracks and allow the people to leave the scene, go get counsel. They would meet some other time.

Mr. WHITE. No, unless they require it. Unless they require it. It is voluntary.

Mr. MONDELLO. The bill says if they ask for it they get it.

Mr. WHITE. But if he gives the warning and they don't respond and ask for it, then he can proceed right there, correct?

Mr. MONDELLO. Yes, if in effect they waive a right they have under the statute, although the waivability of such a right may not be permitted. I realize this bill—

Mr. WHITE. It doesn't say that in the bill.

Mr. MONDELLO. Well, you have the same problem in the *Weingarten* case, and one of the dissenters, Justice Powell, was very troubled about this. The majority indicates you can waive it, but they weren't deciding that issue. Mr. Powell says "you know how these statutes are sometimes interpreted, you may not be able to waive it." And as a matter of fact, there are things in the Veterans Preference Act we don't allow veterans to waive, and I don't see why this bill would be different.

Mr. WHITE. Well, all we have to do in the bill is say "which right can be waived" and that would fulfill it, wouldn't it?

Mr. MONDELLO. But, Mr. Chairman, I think there is a better approach.

Mr. WHITE. But no, let's get your answer.

Mr. MONDELLO. I suggest you say what you mean by this language, rather than have cumbersome, overbroad language and then try to trim

it by indicating whether you can waive it or not, because the language you read to me, "who is under investigation for misconduct," is immediately followed by "to submit to interrogation which could lead to disciplinary action." And I suggest to you, sir, that the supervisor who is walking up to ask the question of who was smoking is not saying "I am going to fire him," is not meeting any of the tests in the *Weingarten* case. You are not close to impending discipline. He may simply say "Charlie, please don't ever smoke here again. It is dangerous and it is just unsafe."

MR. WHITE. Let's go to a parallel situation which I understand is more grave. But let's take a situation of a private citizen. Now if a policeman walks up to a private citizen he can say "is that your parked car," something like that, but if he arrests the man that man has an absolute right to have counsel because then he is on notice that he is under investigation at that point for a commission of a crime. Right?

MR. MONDELLO. In the *Miranda* case the focus of the investigation has fallen on him, which is why I put three people in the example that I gave. The focus of the investigation at the time the supervisor asks the question has fallen on nobody. And you are telling me that this bill is needed in order to furnish counsel rights to any one of the three who may want at that point to insist on it.

MR. WHITE. I didn't say anything. I was just testing your logic. Now suppose in the bill there was a provision that anything that was acquired prior to the time of the allowance of right of counsel could not be used in any manner as a basis for disciplinary action. Now what? Would that solve your problem?

MR. MONDELLO. No, sir. I don't think that would be a good rule.

MR. WHITE. Why?

MR. MONDELLO. Well, for whatever investigation anyone has made or for whatever information has come to your attention, to have this flat bar saying if you got it before a certain time you can't use it makes no sense to me. Information is there to be used if you have it, and if it leads to discipline we have built in protections that require notice to be given, 30 days notice in almost every case in the Federal service, before you can proceed with the course of discipline. That is when people need counsel. That is when we give them counsel.

MR. WHITE. Let's take the case of—what is the agency that prints money?

MR. MONDELLO. Bureau of Engraving and Printing.

MR. WHITE. And the supervisor calls X in and says "Mr. X, we can't understand, we have been missing some dollars here and we need your help. We need to know what happened to all these dollars because, you know, it is mystifying to us." And X says "well, I really don't know. I haven't seen any other people around." And this goes on and on back and forth until they have got this man boxed in with a strong suspicion that he had done it. Now he may not have done it, but by elimination they can't find anything else out, and they have recorded this man and they know precisely what he said, and they use what he has said against him in a disciplinary action. Now up to that point he has never had the right of counsel. He may be a man of not great intellect or unsophistication that would be led into things, and you know yourself that people can be led into positions, maybe not to say "I did it," but they can be led to incriminating things that they may never have

intended. Now at that point haven't you denied him that very material right of privacy in the sense that you have not given him the right of counsel with those who are conversant with the law and are wise enough to understand what the management is up to, because management has slyly developed a case against this man unbeknownst to this man, whereas if he had counsel he would have known and he would have had the right to protect his position from the inception.

Mr. MONDELLO. But the case you put, Mr. Chairman, is one that couldn't be made, if they decided to give him notice of adverse action and to file charges.

Mr. WHITE. They file charges after they get all the evidence. That's what I am trying to say.

Mr. MONDELLO. But I don't understand. Is this bill designed to protect the guilty?

Mr. WHITE. This bill is to allow an individual right, as I understand the bill, that every American citizen has when his reputation—and if it were a criminal case, where his freedom could be involved.

Mr. MONDELLO. He has the right to stand completely silent and nobody can do anything about it.

Mr. WHITE. Does it say that in your regulations?

Mr. MONDELLO. It says so in the first amendment to the Constitution.

Mr. WHITE. I am talking about your regulations. If you go in to a supervisor and the man asked you a question you say, "I won't talk."

Mr. MONDELLO. He can do that.

Mr. WHITE. You think he would?

Mr. MONDELLO. Yes, sir.

Mr. WHITE. He would get fired, sir.

Mr. MONDELLO. Mr. Chairman, people do that. It is not a question of whether they may; they do. You don't have to talk to anybody in the Federal service.

Mr. WHITE. Suppose a man says, "I would like to have a lawyer here to advise me." What happens then now?

Mr. MONDELLO. Well, I remember situations when I first joined the Commission some 6, 7 years ago where we didn't like the presence of counsel at suitability interrogations because we felt they got in the way, so people had no right to have counsel at that stage. But we decided that whether they had a right or not we were going to authorize them to have counsel.

Mr. WHITE. But then if you are going to authorize it why not let them know they can have counsel?

Mr. MONDELLO. Well, they do now.

Mr. WHITE. They warn them that they can.

Mr. MONDELLO. Yes; in every situation where you have a right to representation by counsel our regulations state it. In connection with disciplinary proceedings, for example, our regulations tell you—

Mr. WHITE. Do you have a copy of your regulations?

Mr. MONDELLO. No, sir, I don't.

Mr. WHITE. Would you provide it for the record so we can see what they are?

Mr. MONDELLO. Certainly.

[See p. 21.]

Mr. WHITE. For those "under investigation for misconduct," wouldn't that be a basis for having counsel? Not just merely an inquiry, but who is under investigation.

Mr. MONDELLO. Well, let's see. Well, despite the separation by commas, Mr. Chairman, I think you have got to read those two relatively independent clauses together.

Mr. WHITE. Mr. Mondello, this is a legislative body and all we are seeking to do is to weigh the equities, and if we pass out legislation, to pass out the tightest, most fair legislation that we can that is going to stand for some time in most situations. In this case perhaps you would be more satisfied if "who is under investigation" were defined in the bill.

Mr. MONDELLO. Very much more.

Mr. WHITE. Would this be helpful?

Mr. MONDELLO. Very much more.

Mr. WHITE. All right, let's go to another section because I don't want to hog the time. You were concerned in section 5, as I understand your testimony, that section 5 would allow an appeal to a civil court, U.S. district court in situations of a grievance procedure. Now would you be satisfied in section 5 if we said "in situations involved in sections 1 through 3" or say even exclusive of section 4? Wouldn't that satisfy you on that objection?

Mr. MONDELLO. It might. I would like to read—I hate to offer or venture an opinion just sitting here. But I would like to read 4 against 5 to see if it would have that effect. I think what we really complain of is the reception of arbitral decisions in the courts. That is something we would like to leave blissfully alone. The law seems right, the courts are happy with it, the unions are happy with it, I think we are happy with it. We saw this provision as an inroad in that area, turning the thing on its head.

It would be the only provision I know of where an arbitral decision would be directly reviewable on the merits in the courts, and that is a rarity that I don't know the need for, but it seemed to come about as a result of the procedures produced in the bill.

Mr. WHITE. Let me say this as a last suggestion, and then I will turn the questioning over to my colleagues. It is apparent that there is pressure and need because there have been abuses of this situation. Now your agency comes and says, "We object to the bill." All right, we suggest, I suggest to you that insofar as the pressures are such that the bill is going to be forthcoming in this session or next session that you give us an alternative, write up an alternative and let us look at it, that you feel will be fair to both sides, not just to management and not just to labor or employees, but to both sides, that will be workable and livable.

So I earnestly urge that within, say, a week or two, because we are going to act reasonably soon—we may not pass it, we may pass it—that you come forward with such a bill. And it may be that you prefer to submit amendments to this bill, and I certainly hope that you would submit a definition of who you would want to mean when you say "who is under investigation for misconduct," at what point that investigation commences, so that we can test the equities in your language.

Mr. MONDELLO. Mr. Chairman, I will be very happy to assist in the drafting of language that would take care of the situation you are describing. I wonder, though, would you permit your staff to share with me the evidence of the needs that exist, because I would like to tailor-make a bill to whatever the needs are. That is easy.

Mr. WHITE. All right. I am sure some of the gentlemen sitting behind you will have much evidence through the experience of their membership, and I am sure that we can try to generally synopsise the need. I don't know that there is a need, but it sounds like there is a need to me, and my commonsense says that there seems to be some area proper for legislation.

Fine. Thank you very much. I will turn it over to Mr. Harris first.

Mr. HARRIS. Mr. Mondello, this is an area that I have a particular interest in, and I do see a need when a person is actually under investigation to have the right to have somebody with them, whether it happens to be a legal counsel or whether it just happens to be a friend or representative, what have you. I see that need, and I share the chairman's comments that if there is a problem of defining "when under investigation" that we ought to get on with the job of defining that point in time instead of arguing ad absurdum as to when in fact counsel is necessary.

And I did have to note, as you drew the example of investigating an incident rather than a person and you got into discussion as to the power of waiving, I really didn't see how you could have read that into the bill. The bill specifically says "if requested by the individual." It does not say that right to counsel is an absolute one. It says that right to counsel is only his or her right if he or she requests it. And if the individual when placed in circumstances where he feels like his misconduct is under investigation requested counsel then this bill would give him that right. I don't see how the other type of instance which you described and which you question whether or not he could waive the right really would come into play. I wonder if on reflection you don't agree with them on that.

Mr. MONDELLO. I certainly lean more than half way toward you.

Mr. HARRIS. Thank you.

Mr. MONDELLO. Perhaps I read this too quickly, and I don't seem to find it right now, but in Justice Powell's decision there was this reminder of how the court sometimes with respect to particular legislation doesn't permit waivers. I know we have done that in the Veterans Preference Act, or the courts have done that.

Mr. HARRIS. Now I am referring specifically to the top of page 2 of the bill, first section, (a), the language which says "which could lead to disciplinary action without the presence of counsel or other person of his choice, if he so requests." Now if the investigation is being pursued and if at a known time the person requests counsel how in the world would we run into any trouble as far as his not, or waiving any right if in fact the language makes it clear that he does not have a right to counsel if he requests?

Mr. MONDELLO. Mr. Harris, you have persuaded me. I withdraw the point.

Mr. HARRIS. Now having been that mean to you, I have to ask you for your help. Could you tell me the definition of a grievance under the Civil Service regulations and explain to me the procedure for handling grievances?

Mr. MONDELLO. Grievances are carried under part 771 of the Commission's regulations. These are found in title 5 of the Code of Federal Regulations. They are carried separately from the adverse action regulations of the Commission. The Commission has—we don't have as tight control over the grievance procedure, I don't believe, certainly don't exercise as tight control over the grievance as we do over the adverse action. In the latter we set very flat rules, and we all have to abide by them. We insist on rules in cases that are appealed to the Commission, so we are in very sharp and definite control of that situation.

With respect to grievances we set general rules for agencies to follow with respect to grievances. We set umbrella regulations of a sort that tell them the kind of process that they have to use for their grievances. But the agency grievance system is one where an employee grieves and can reach ultimately only to the head of the agency. Ordinarily grievances are not reviewable in the courts unless the grievant states a constitutional issue, in which case there is no way to keep the courts out.

The adverse action, on the other hand, follows a different course. There is appeal to the Commission and there is reviewability in the courts. So that you have that difference. I don't know if that—

Mr. HARRIS. Yes; it definitely helps. Do I understand that there is not necessarily an appeal for a grievance?

Mr. MONDELLO. I think under most agency regulations there are appeals within the agency with respect to grievance, yes, sir. Ultimately I think in every agency you can get to the agency head or his designee for the purpose, so you do get at the highest levels of the agency.

Mr. HARRIS. Does an employee have a right to representation during such a procedure?

Mr. MONDELLO. I don't know the answer to that. Shall I furnish that for the record, Mr. Harris?

Mr. HARRIS. If you would.

Mr. MONDELLO. I think there are regulatory provisions about it, and I will.

[See p. 21.]

Mr. HARRIS. Mr. Chairman, I know Mrs. Spellman is under some time pressure and I am prepared to stay here. I have a couple other questions. I wonder if I could pass to Mrs. Spellman.

Mr. WHITE. Fine. Mrs. Spellman.

Mrs. SPELLMAN. Thank you. I was just about to write a note to the Chairman saying I was called by Banking and Currency for a markup session which has been moved up earlier than I anticipated.

The questions that you, Mr. Chairman, and you, Mr. Harris, are asking are very much along the lines which I was concerned about. I frankly also couldn't see the interpretation that Mr. Mondello was giving on this legislation. And so I think I can leave it in your good hands. I have a feeling, Mr. Mondello, listening to the discussion here, that you are beginning to see, too, that there is another point of view and that all we want to do is provide the proper protections without hampering anybody. I think that is terribly important.

Mr. MONDELLO. That is a principle we agree on. No problem with that. It is just a question of where we can draw the line.

Mrs. SPELLMAN. That's right, because if we go too far we will be impeding operations.

Mr. MONDELLO. As long as you say you are willing not to impede operations, fine.

Mrs. SPELLMAN. Fine. I know your capabilities, and I feel real sure that we are in good hands working together. So I am perfectly happy. Thank you.

Mr. HARRIS. Having gotten a little bit educated on the grievance procedure, let me refer back to the adverse actions that you referred to in your answer. Could you tell me again how does the Commission define adverse action?

Mr. MONDELLO. It is defined in the Veterans Preference Act as—there are four elements in it: Dismissal, suspension for more than 30 days, I think furlough without pay, and reduction in rank or pay. Those are the four statutory definitions of adverse action.

Mr. HARRIS. OK. Tell me what kind of representation is an employee entitled to when appealing to the Federal Employees Appeals Authority and to the Appeal Review Board?

Mr. MONDELLO. I don't know the answer to the first question on the Federal Employees Appeals Authority, and I think for the most part the representation there has almost invariably been union representation. That is to say the parties have been unions for the most part. So that their representation is representation of counsel, and there is the full argument, adversary proceedings in which everybody has a good lawyer.

In the adverse action situation before the Appeals Review Board, you are entitled to whatever counsel you choose. You can come with a friend, you can come with anybody you please. We have no qualification restrictions on who you choose to represent you. There is no doubt under our regulations you are entitled to counsel, counsel of your own choice. And it needn't be a lawyer. It can be a union representative, it can be anybody.

Mr. HARRIS. As I was persuing I ran into section 772.307(c)(4) of the FPM supplement 990-1, and it says, "Attendance at the hearing will be limited to persons determined by the appeals officer to have a direct connection with the appeal." What does that mean?

Mr. MONDELLO. That may have been overtaken by events, namely, the *Fitzgerald* case in the Court of Appeals. I think the regulation itself has been changed in that regard, and if 990-1 hasn't been changed we ought to change it. We are not in control of the situation of who shows up at a particular hearing now. The employee is. The employee may have a closed hearing if he desires one. The employee will get a public hearing if he desires one, and the only possibility of closing one that has been made public is if the appeal examiner on the case for a special reason which he has to state on the record decides that because of what they are listening to some part of the hearing may have to be closed.

But the moment the *Fitzgerald* case came out of the Court of Appeals we changed our regulations. We had to.

Mr. HARRIS. I have given a citation, it may be—and I don't even know what procedures in the executive branch are necessary to go ahead into appeal—I mean to amend the regulation. But seems to me like we ought to look into this one.

Mr. MONDELLO. Yes, sir. I will pick this up out of the transcript and I will report back to you on it.

[See p. 21.]

Mr. HARRIS. Let me say again it is section 772.307(c)(4) of the FPM supplement 990-1.

Could you tell me how the members of the Federal Employee Appeals Authority and the Appeals Review Board are selected?

Mr. MONDELLO. The designation of people who serve on that Board is made by the three Commissioners of the Civil Service Commission. In former days others who had operational functions had some say, and we decided that we had to make the Appeals Review Board as independent as we conceivably could within the entity in order for it to do its work properly and with a fair amount of credibility. So we changed the selection. Now the Executive Director, the Deputy Executive Director and the Bureau Chiefs have nothing to do with it. The Chairman and the other two Commissioners make those decisions.

Mr. HARRIS. You say they are appointed by the Commission members?

Mr. MONDELLO. Yes, sir.

Mr. HARRIS. Whom do they report to?

Mr. MONDELLO. To the Commission.

Mr. HARRIS. To the Commission?

Mr. MONDELLO. Yes, sir.

Mr. HARRIS. Good.

Mr. Mineta, do you have questions?

Mr. MINETA. No, but I would like to express my views on the need for this legislation. In so many instances, the die is cast before employees have a right to get to the point of saying, "Yes, I need counsel or want counsel." As you have indicated, and as has been reflected by the members here, we don't want to impede the process, but we do, I think, want to be able to provide the needed measure of protection to the employee. I have seen many instances in local government, and I am sure Mr. Harris has witnessed similar cases, where the person really didn't have adequate protection because at the point that the right to legal counsel was afforded the employee the investigation was at the point of actually being a formal proceeding and the die was already cast.

It seems to me that there has to be some protective measure afforded to employees before they get into that formal proceeding as the law allows right now. This is the area that needs to be worked on, and I think maybe it can be done by definition.

Mr. MONDELLO. I hope so, Mr. Mineta. We have a concern that you ought to share with us, or I ought to share with you. There is an attitude afoot in the Federal service on the part of managers—and much of this they attribute to the evils of the Civil Service Commission system—that it is almost impossible to get rid of employees who are not measuring up to whatever standards you set for employees and that this is so because of the rules of the Commission. Our rules, of course, are directly responsive to statute, and I make no apology for that. And as a matter of fact, we think it is quite possible, if a manager is adept and effective, to deal with people who cannot measure up to whatever standards you set. But the theory persists, and managers in effect are throwing up their hands very often, saying "There is nothing we can do anyway, you know the Commission is going to reverse us." So that you have a great many managers in the Federal

service who are not at all as arbitrary as the kind that you are suggesting exist also. There is the fellow who makes up his mind in mid-course during the investigation so that, as you say, the die is cast by the time the employee can react to this and say, "I should have had a lawyer or representative." My own judgment about the Federal service is that there are more managers who feel helpless than there are those who are arbitrary in the way they handle these cases.

But with the protections that the Congress has built into the system we have tried to devise an adverse action procedure that makes a good deal of sense in the sense that while it is formal and adversary, to be sure, we have created within it as part of the procedure the opportunity for higher levels to look down at what the lower level supervisor did and see if they agree with him, because they may decide that the die was cast too soon. And so we have built-in provisions, for example, that require any manager who is trying to take disciplinary action to show the entire file that he is using as the basis for the action to the person against whom the action is taken. So that at that point certainly the individual can have a lawyer who will come in and look at this evidence and say "but it doesn't support your charges" and proceed from there to go to the next higher level.

So that it is not that we lack concern for what you are saying. We are simply troubled that this bill seems to bring counsel and representation too early on the scene so that it will impede the more "milk-toastish," if you will, manager who doesn't think he has much push anyway, and he just wanted to ask a simple question about who was smoking and before he knows it the roof falls in—"My God, another representative"—and we are off and running.

I don't want to make the service ineffective. I really believe what Mrs. Spellman said, that we ought to be able to chart a course between impeding day-to-day operation that has to go on or you can't function, and having counsel when counsel is needed.

Mr. HARRIS. Thank you. I just have a couple other questions. Do you have or could you give me an estimate of the number of grievances that were filed in 1974?

Mr. MONDELLO. No, sir, but I will be glad to get that information and furnish it for the record.

Mr. HARRIS. Thank you. If there is no objection, I would like to have that in the record at this time.

[The following information was subsequently furnished:]

The Commission does not maintain this information since there are no appeals to the Commission from agency actions under their grievance proceedings. The information can be obtained only by request made to each agency.

Mr. HARRIS. Do you have an estimate of the number of appeals to the FEAA and ARB for the same period?

Mr. MONDELLO. I will furnish that for the record. But for present purposes I can give you the guesstimates I have heard from the Appeals Authority. They anticipate—and we have only been operating since sometime in September with the recently adopted changes in the rules—they anticipate that the Appeals Review Board will have something like 2,000 cases per year to decide. That includes adverse actions, RIF appeals, EEO appeals. Those are the main ingredients.

Mr. HARRIS. And you would like to have the opportunity to supply the specific figures for the record at this point?

Mr. MONDELLO. Yes, sir.

[The information follows:]

U.S. CIVIL SERVICE COMMISSION APPEALS BEFORE THE BOARD OF APPEALS
AND REVIEW, FISCAL YEAR 1974

On Hand Beginning of fiscal year-----	882
Total receipts-----	3, 556
Total appeals-----	4, 438
Total processed-----	3, 455
Remaining-----	983
Types of Appeals Processed:	
Adverse action-----	1, 453
Reduction in force (RIF)-----	530
Equal employment opp. (EEO)-----	778
Retirement-----	243
Acceptable level of comp. ¹ -----	123
All others-----	328
Total-----	3, 455

¹ Denial of periodic step increase for failure to perform at an acceptable level of competence.

Mr. HARRIS. Has the Civil Service Commission reviewed the new adverse action and appeals procedure?

Mr. MONDELLO. Yes, sir. It was reviewed by the GAO, by the Administrative Conference of the United States, separately by the Civil Service Commission itself, and some 3 years ago by a group from the Nader group. And as a result of all of these surveys of what was going on we made very significant changes to the appeals procedure. Formerly this was called the agency appeals system, and then appeals were ripped out of the agencies completely. One thing was that the adverse action process was taking much too long. I think the average for a case was something like 283 days. And we now have a process that we anticipate will be much quicker in its operation. Optimally we should be able to handle a case within 100 days, so long as people are not asking for delay. But under the current procedure the disciplinary action takes place in the agency and every employee has a right to appeal from that action to the Commission. An agency may have a hearing on it for the purpose of having the hearing before they visit disciplinary action, but they don't have to, and most agencies do not. So that ordinarily when an agency takes disciplinary action the first hearing the individual gets will be at the Civil Service Commission.

But we have made the decision that the appeal examiner's hearing, which is the first hearing and the first time anybody makes a record on the case through cross examination, is final if the employee wants to treat it as final. So that from that decision, which he can get very quickly, the employee can go to court and have review there.

Mr. HARRIS. I think the point I am reaching for here, if I may, if there has been evaluation of the new procedures that I think went into effect—when? July 1?

Mr. MONDELLO. Technically July 1. But we had to take care of the cases in the system under the old rules first, and I think the more effective date was sometime in September when an executive order that bore on this process was effective. So that we don't really have a lot of experience under the new system, but I think there are some cases that have already come under it.

Mr. HARRIS. Really what I was wondering was if an evaluation of the new procedures had been made.

Mr. MONDELLO. I don't know of anything that is published or even an interim report. I haven't seen even an interim report within the Commission of an evaluation of the new system, no, sir. It may not exist, but I will go back and find out and we will see what we can report about it.

[The following response was furnished:]

We have determined that there has not yet been an evaluation of the new system but that one is planned to be made after the first year of operation.

Mr. HARRIS. I know, Mr. Taylor has some questions and has to leave, and I wonder if I could recognize you, sir.

Mr. TAYLOR. Mr. Chairman, I really have no more questions. I would just like to say that I certainly am concerned with the problem we are trying to address ourselves to in this legislation. I do have some concern about the way that it is written. I think, as Mr. Mondello said, some reinterpretation of definitions might be most helpful.

I know that many times in agencies, especially in rural areas where I live, in agricultural agencies complaints come in about employees, and 90 percent of the time, 95 percent of the time they are probably crank complaints and the supervisor knows they are crank complaints, and I wonder whether or not he is not going to be impeded from going back and saying "look, Joe, we have got this complaint, let's kind of get this thing set aside," and 95 percent of them are handled that way probably hundreds, thousands of them a day across the Nation. I fear that this is going to work adversely upon that employee who is being falsely accused a great majority of the time by not having the opportunity to clear this thing up with his supervisor in a friendly atmosphere rather than him having to fear that I can't go back and talk to him.

Now I think there should be a point where he says "look, Joe, this thing is more serious than what I thought it was. Now at this point I think that you should have counsel or you have got a right to have counsel." But I am afraid in the day-to-day supervisory role we are going to work adversely as far as the employee himself is concerned, if this legislation is passed as I interpret it. And I would like to see some revision in the wording of the legislation and have it a little bit more definitive where the actual formal complaint might begin.

Mr. HARRIS. Thank you, Mr. Taylor.

In preparing a case does the employee have access to his or her personnel records?

Mr. MONDELLO. Yes, sir.

Mr. HARRIS. He does?

Mr. MONDELLO. Even outside the range of the case an employee has access to his own official personnel folder.

Mr. HARRIS. Now with regard to all these procedures how are they publicized? How does the employee know what the procedures are?

Mr. MONDELLO. Well, first of all, they appear in title 5 of the Code of Federal Regulations. They are also the subject of so-called fact sheets which are put out by the Commission and other agencies and which in perfectly lay language purport to describe the whole program. I guess a lot of it is learned by word of mouth as well. But some agencies

are quite good. If the agency has 60,000 strong they will print up 60,000 fact sheets and they distribute one per each. Others don't do that well.

And of course, the very active growth of Federal unions has been just amazing over the last few years; and the unions are quite knowledgeable about these matters. They handle a great variety of cases. And I am sure that union membership has means through the union of learning about the adverse action procedures.

There is also a good deal written about it in papers like the Federal Times and other trade journals that deal with this situation, and the local columns that write about it all the time. And the Federal Personnel Manual which, by the way, amplifies this, is available in every Federal personnel office everywhere, and all a person has to do is go to the personnel office and he can read it all.

Mr. HARRIS. Very good. Thank you very much for your testimony here. I can't help thinking as I was listening to the various colloquies that the first time a person gets called in by the IRS for any sort of discussion if he says "I want to bring counsel with me" he can. And I just don't know why a Federal employee shouldn't have the same privilege. Now I understand the arguments that go every time you check on a person coming in late he could demand counsel, and I guess if he thinks counsel in that sort of situation is going to help him, he could. But I don't see where that is going to help him a whole lot.

Mr. MONDELLO. That may not be his perception.

Mr. HARRIS. It may not be. But he has got bigger problems than that, if he thinks that this is a way for him to get out of it. I do think that we have an important area here which I hope the subcommittee will persist in reviewing legislation on it. But I am very concerned that we define points in time and situations carefully enough so we do not impede careful supervision, and I am pleased that you say that you will cooperate in trying to help us draft this, and with the idea that I think we have identified an area that needs additional legislation.

Mr. Mondello, thank you very much for coming.

Mr. MONDELLO. Thank you.

Mr. HARRIS. Mr. George Tilton of the National Federation of Federal Employees.

STATEMENT OF GEORGE TILTON, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. TILTON. Thank you, Mr. Chairman. I am appearing on behalf of Mr. Nathan Wolkomir, president of the National Federation of Federal Employees. Unfortunately, he was unable to attend today.

I must also apologize for the fact that we do not have prepared testimony. We had an equipment failure, we were unable to reproduce any testimony at all.

Mr. Chairman, we represent approximately 150,000 employees of the Federal Government throughout the Government and overseas. We think there is a need for this bill. There are instances where a person should be entitled to have an attorney present or another representative of his own choice.

Having said that, however, I must frankly say that the bill as presently drafted is unacceptable to us for various reasons. Surprisingly enough, I find myself agreeing with Mr. Mondello on a few items. It is overly broad in some areas, definitions do need to be

drawn up more clearly, and I would like to see a definition for what misconduct is. I think it would help us all.

I do not, however, agree that the way the bill is presently drafted an attorney would automatically come on the scene immediately. In point of fact I see this as one of the weaknesses of the bill. It says that a person may have an attorney if he so requests. There is nothing in the language of the bill that states that the employer must advise a person of his right to have an attorney present. I think this should be put in there. Of course, coupled with this there has to be some definite rules as to when an attorney will be present.

It seems to me, if we can draw perhaps a parallel with the criminal law, the time might be when suspicion begins to focus on an individual employee as perhaps being guilty of some offense which would lead to an adverse action or to some other form of disciplinary action. If this were provided for I think that informal type of counseling could possibly still go on. There may well be a need for formal counseling, but again there is always a difficulty as to what is informal and what is not.

Coupled with this there must, it seems to me, be some sanction imposed for a failure to follow this. Again the parallel might best be had with the criminal. On the criminal side if a police officer conducts an investigation without advising a person of his rights to an attorney at such time as suspicion has focused on that person the evidence so obtained may not be used against the person.

In the Federal laws it is referred to as the exclusionary rule. And it seems to me that the appropriate protection would be to impose the exclusionary rule in this area also. This would simply mean that when the agency truly believes that the person is guilty of an offense for which he may be disciplined before they proceed with their questioning they must advise him of his right to have an attorney, and if they don't do so they can't use any of the evidence obtained against him.

I believe that Mr. Mondello stated that you need all the evidence and you should be able to use all the evidence you have, or words to that effect. Well, this isn't necessarily true in the Federal courts. It was ruled that the only way you would adequately enforce the rule against self-incrimination and against questioning a person without an attorney was to exclude the evidence. It is a balancing factor. It is true that this excludes relevant evidence, but I believe it is the only workable way to assure that an attorney would in fact be present.

Now moving on to other parts of the law, section 3, for example, allows a complaint to be filed with the Civil Service Commission, or if a grievance procedure has been negotiated to go through with the negotiated grievance procedure. The problem that I have with this section is that it does not address the situation of an unfair labor practice complaint.

Now under present executive order if an agency refuses to advise a union or if there is a refusal to allow a union representative to be present during a formal discussion then that refusal may be the subject of an unfair labor practice complaint which would go up through the Department of Labor and ultimately to the Federal Labor Relations Council if necessary.

The problem I see with this section is that it may be interpreted as excluding this type of particular action. That is I can see where it

could be interpreted as preventing action perhaps by the Department of Labor, that if there is a complaint of this nature you must either go to the Civil Service Commission or you must go the grievance procedure, therefore excluding the unfair labor practice complaint; and frankly, Mr. Chairman, I would much rather go to the Department of Labor any time. From the union point of view we think that the Department of Labor will give the employee a much fairer shake than the Commission will.

And in this connection I point out another thought as to how the bill could be amended and changed. Most employees of the Federal Government are now unionized. Most of them are represented by exclusive arrangements and—

Mr. HARRIS. Are you talking about situations for the purpose of bargaining?

Mr. TILTON. Yes. Most employees are represented. Now it seems to me that there should be a provision where the employees are represented that if there is a complaint of this nature—that is that the employee did not have his attorney present when he is entitled to do so—that the law be amended or the bill be amended to permit the employee or the union, rather, to file a complaint with the Department of Labor and to go that route instead of the Civil Service Commission. In areas where there is no union representation then there would be no problem of appealing directly to the Civil Service Commission or any other procedure that one may outline.

I think, Mr. Chairman, that would essentially be all that we would have to say on this. If you have any questions I will be delighted to try to answer them.

Mr. HARRIS. Yes. I see an area that this bill has tried to cover that really may be a little bit different than the way you have interpreted, Mr. Tilton.

I see an area where it may not be a formal investigation. There is a problem that a supervisor is investigating, and we are not saying that the bill does not seem to try to say that there is some sort of absolute right for counsel here with all its formal requirements. It is just saying that if that employee says, "I want to have somebody with me," and he may be saying his friend Joe down the line, but he said "you know, I am the type of guy that gets real nervous when somebody starts asking me a bunch of questions and I would just like to have somebody there to help me," we are trying to say in this bill that in a very simple situation like that a supervisor or what-have-you cannot say "look, you have got to come in by yourself and you can't have any friend sitting next to you when you do it." And that is the type of protection we would like to give that employee, and I don't see what is the matter with that.

Mr. TILTON. Mr. Chairman, I hope I didn't imply that there was anything wrong with that. If I did I would like to correct the record right now. What I am saying is I agree with you, I can't see any situation where the Government would be adversely affected by having someone come in and represent the person just because they are nervous. I totally agree with that, and I think that is the way it ought to be. But when we get into the different area where you say—I was speaking of the area where you say you must advise the person of their right to have a counsel.

Mr. HARRIS. Were you suggesting that as an addition?

Mr. TILTON. Yes. I certainly did not mean to imply that the person should not have a representative at any other time. But I believe in that area where suspicion begins to focus on the person and someone somewhere says "I think John Smith is guilty of theft of Government property" or "I think that his conduct has been such that he ought to be removed," at that particular point, wherever it may be—and it may be in the middle of a conversation with that employee—at that particular point I think the Government ought to say "we think that we are going to take an action against you. I am advising you right here and now that you have the right to have an attorney present."

Mr. HARRIS. I think at that point the right becomes absolute and he has to be advised of that absolute right.

Mr. TILTON. It should become absolute at that point. And I further recommend that if the agency manager does not do so that any evidence obtained thereafter should not be able to be used against the employee. That would be our recommendation on it, Mr. Chairman.

Mr. HARRIS. Thank you very much, Mr. Tilton. I appreciate your comments.

There are no further witnesses to come before the subcommittee. The hearing is then adjourned.

[Whereupon, at 10:15 a.m., the hearing was adjourned.]

[The information which follows was received by the subcommittee for inclusion in the record subsequent to the appearance of Mr. Mondello, General Counsel of the Civil Service Commission. The information is from the Federal Register of September 9, 1974:]

PART 752—ADVERSE ACTIONS BY AGENCIES

Sections 752.102, 752.104 and 752.105 are revised in their entirety as set out below.

§ 752.102 *Definitions*

In this part: Days mean calendar days and not workdays.

* * * * *

§ 752.104 *General standards*

(a) An agency may not take an adverse action against an employee covered by this part except for such cause as will promote the efficiency of the service. Among the reasons that constitute "such cause as will promote the efficiency of the service" for this purpose are the reasons for disqualification of an applicant listed in § 731.201(b)—(g) of this chapter. These reasons may be based on pre-appointment factors as well as on postappointment factors.

(b) Except when required by statute, an agency may not take an adverse action against an employee covered by this part because of marital status or for partisan political reasons.

§ 752.105 *Agency records*

Each agency shall make a part of its records, copies of the notice of proposed adverse action, the material relied on by the agency to support the reasons in that notice, any answer made by the employee and the notice of decision.

* * * * *

§ 752.201 *Coverage*

(a) *Employees covered.* This subpart applies to:

(1) (i) Any career, career-conditional overseas limited, indefinite, or term employee, or any employee serving under a career executive assignment, in a competitive position who is not serving a probationary or trial period and (ii) any employee serving in a competitive position who has completed 1 year of

current continuous employment except one serving under a temporary appointment with a definite time limitation or a limited executive assignment;

(2) Any employee having a competitive status who occupies a position in Schedule B of Part 213 of this chapter under a nontemporary appointment; and

(3) Any preference eligible employee who has completed 1 year of current continuous employment in a position outside the competitive service.

(b) *Adverse actions covered.* This subpart applies to:

(1) Removal;

(2) Suspension for more than 30 days;

(3) Furlough without pay; and

(4) Reduction in rank or pay, including that taken at the election of the agency after a position classification decision by the Commission.

(c) *Exclusions.* This subpart does not apply to an employee or adverse action excluded by § 752.103.

§ 752.202 *Procedures*

(a) *Notice of proposed adverse action.* (1) Except as provided in paragraph (c) of this section, an employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.

(2) Subject to the provisions of subparagraph (3) of this paragraph, the material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review that material.

(3) Material which cannot be disclosed to the employee, or to his designated physician under § 294.401 of this chapter, may not be used by an agency to support the reasons in the notice.

(b) *Employee's answer.* Except as provided in paragraph (c) of this section, an employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. The time to be allowed depends on the facts and circumstances of the case, and shall be sufficient to afford the employee ample opportunity to review the material relied on by the agency to support the reasons in the notice and to prepare an answer and secure affidavits. The agency shall provide the employee a reasonable amount of official time for these purposes if he is otherwise in an active duty status. If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing. The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does not include the right to a trial or formal hearing with examination of witnesses. When the employee requests an opportunity to answer personally, the agency shall make a representative or representatives available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.

(c) *Exceptions to notice period and opportunity to prepare answer.* (1) Advance written notice and opportunity to answer are not necessary in cases of furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or emergencies requiring immediate curtailment of activities.

(2) When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the agency is not required to give the employee the full 30 days' advance written notice, but shall give him such less number of days advance notice and opportunity to answer as under the circumstances is reasonable and can be justified.

(d) *Duty status during notice period.* Except as provided in paragraph (e) of this section, an employee against whom adverse action is proposed is entitled to be retained in an active duty status during the notice period. When circumstances are such that the retention of the employee in an active duty status in his position may result in damage to Government property or may be detrimental to the interests of the Government or injurious to the employee, his fellow workers, or the general public, the agency may temporarily assign him to duties in which these conditions will not exist or place him on leave with his consent.

(e) *Suspension during notice period.* In an emergency case when, because of the circumstances described in paragraph (d) of this section, an employee cannot be kept in an active duty status during the notice period, the agency may suspend him. This suspension is a separate adverse action. An employee whose suspension under this paragraph is proposed is entitled, in connection with the suspension, to the following:

(1) If the suspension is for more than 30 days, to the procedures required by this subpart:

(2) If the suspension is for 30 days or less and the employee is covered under § 752.301, to the procedures required by this subpart;

(3) If the suspension is for 30 days or less and the employee is in the expected service and not covered by § 752.301, to a written notice at least 24 hours in advance of the effective date of the suspension. The agency shall include in the notice of suspension the reasons for not retaining the employee in an active duty status during the notice period. If the employee appeals from the final adverse decision, the Commission reviews the reasons for not retaining him in an active duty status to determine their consonance with the circumstances described in paragraph (4) of this section. The agency may place the employee in a non-duty status with pay for such time, not to exceed 5 days, as is necessary to effect the suspension.

(f) *Notice of adverse decision.* The employee is entitled to notice of the agency's decision at the earliest practicable date. The decision shall be made by a higher level official of the agency, when that exists, than the "official" who proposed the adverse action. The agency shall deliver the notice of decision to the employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee.

(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained;

(2) Of his right of appeal to the appropriate office of the Commission;

(3) Of the time limit for appealing as provided in section 752.204; and,

(4) Where he may obtain information on how to pursue an appeal.

§ 752.203 *Right of appeal to the Commission.*

An employee is entitled to appeal to the Commission from an adverse action covered by this subpart. The appeal shall be in writing and shall set forth the employee's reasons for contesting the adverse action, with such offer of proof and pertinent documents as he is able to submit.

(a) *Time limit for appeal.* An employee may submit an appeal at any time after receipt of the notice of adverse decision but not later than 15 days after the adverse action has been effected. The Commission may extend the time limit on an appeal to it when the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit.

(b) *Finality of the decision.* The decision of the office of the Commission having appellate jurisdiction is final. However, either party to the appeal may petition the Appeals Review Board to reopen and reconsider the decision under § 772.310 of this chapter.

"Section 752.304 (d) is added as set out below.

§ 752.304 *Appeal rights to the Commission*

(d) *Finality of decision.* The decision of the office of the Commission having appellate jurisdiction is final. However, either party to the appeal may petition the Appeals Review Board to reopen and reconsider the decision under § 772.310 of this chapter.

Section 752.401 is revised in its entirety as set out below.

§ 752.401 *Agency action when Commission recommends restoration or other corrective action*

It is mandatory that the agency take all corrective action recommended in the decision of the Commission office having appellate jurisdiction unless the agency petitions the Appeals Review Board to reopen and reconsider the decision under § 772.310 of this chapter.

PART 771—EMPLOYEE GRIEVANCE

Part 771 is revised in its entirety as set out below.

SUBPART A—GENERAL PROVISIONS

§ 771.101 *Purpose*

This part sets forth the regulations under which each agency shall establish an agency grievance system.

§ 771.102 *Definitions*

In this part:

- (a) Days mean calendar days.
- (b) Employee includes a former employee of an agency.
- (c) Examiner means a person utilized by an agency to conduct an inquiry, and, when necessary, hold a hearing on a grievance.
- (d) Grievance means a request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction which is subject to the control of agency management.

COVERAGE

§ 771.103 *Agency coverage*

(a) *Agencies covered.* Except as provided in paragraph (b) of this section, this part applies to the executive agencies and military departments as defined by sections 105 and 102 of title 5, United States Code, and to those portions of the legislative and judicial branches and of the government of the District of Columbia having positions in the competitive service.

(b) *Agencies not covered.* This part does not apply to the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, the Atomic Energy Commission, the Tennessee Valley Authority, and the U.S. Postal Service.

§ 771.104 *Establishment and publication*

(a) Each agency shall establish and administer an agency grievance system in accordance with this part.

(b) In the development of its grievance system, each agency shall give its employees an opportunity to express their views and shall consult or negotiate with recognized labor organizations as required under the form of recognition held.

(c) Each agency shall publish the provisions of its grievance system; make copies available to employees, their representatives, veterans organizations; and recognized labor organizations; and notify employees where copies are available for review.

§ 771.105 *Presentation of grievance*

(a) An employee, in presenting a grievance under an agency grievance system, shall:

- (1) Be assured freedom from restraint, interference, coercion, discrimination, or reprisal;
- (2) Have the right to be accompanied, represented, and advised by a representative of his own choosing; and
- (3) Be assured a reasonable amount of official time if he is otherwise in an active duty status.

(b) When an employee designates another employee of the agency as his representative, the representative, in presenting a grievance under an agency grievance system shall:

- (1) Be assured freedom from restraint, interference, coercion, discrimination, or reprisal; and
- (2) Be assured a reasonable amount of official time if he is otherwise in an active duty status.

§ 771.106 *Allegations of unfair labor practices*

(a) An allegation of an unfair labor practice made in connection with a grievance under this part shall be incorporated in the grievance and processed under this part; however, the decision on the grievance may not be construed as an unfair labor practice decision under Executive Order 11491, as amended.

(b) If an allegation of an unfair labor practice made in connection with a grievance under Subpart C of this part has already been filed with the Assistant Secretary of Labor, the grievance may not be processed under this part.

§ 771.107 *Employee coverage*

(a) *Employees covered.* Except as provided in paragraph (b) of this section, this subpart applies to all employees of an agency.

(b) *Employees not covered.* This subpart does not apply to:

- (1) A noncitizen appointed under Civil Service Rule VIII, § 8.3 of this chapter;
- (2) An alien appointed under section 1471(5) of title 22, United States Code;
- (3) A nonappropriated-fund employee as defined in section 2105(c) of title 5 or section 4202(5) of title 38, United States Code;
- (4) A physician, dentist, or nurse appointed under chapter 73 of title 38, United States Code;
- (5) A Foreign Service officer, Foreign Service Reserve officer, Foreign Service Information officer, and staff officers and employees appointed under chapter 14, chapter 14A, or chapter 32 of title 22, United States Code; and
- (6) An employee otherwise included under paragraph (a) of this section when he is a member of a class of employees excluded from coverage by the Commission on the recommendation of the head of the agency concerned.

§ 771.108 *Grievance coverage*

(a) Except as provided in paragraphs (b) and (c) of this section, this subpart applies to any matter of concern or dissatisfaction to an employee which is subject to the control of agency management.

(b) This subpart does not apply to:

- (1) A matter which is subject to final administrative review outside the agency under law or the regulations of the Commission;
- (2) The content of published agency policy;
- (3) Nonselection for promotion from a group of properly ranked and certified candidates;
- (4) A grievance over the interpretation or application of an agreement negotiated under section 11 of Executive Order 11491, as amended;
- (5) An action terminating a temporary promotion within a maximum period of 2 years and returning the employee to the position from which he was temporarily promoted or reassigning or demoting him to a different position that is not at a lower grade or level than the position from which he was temporarily promoted;
- (6) Nonadoption of a suggestion or disapproval of a quality salary increase, performance award, or other kind of honorary or discretionary award; or

(7) A preliminary warning or notice of an action which, if effected, would be covered under the grievance system or excluded from coverage under subparagraph (1) of this paragraph.

(c) This subpart does not apply to a separation action. However, an agency may extend the coverage of its grievance system to any aspect of a separation action that is not subject to final administrative review outside the agency under law or the regulations of the Commission.

THE GRIEVANCE

§ 771.109 *Right to present grievance*

(a) An employee is entitled to present a grievance under the agency grievance system. The agency shall accept and process a properly presented grievance in accordance with its grievance system except that an allegation of discrimination made in connection with a grievance shall be processed under Part 713 of this chapter.

(b) An employee, in presenting his grievance, is entitled to communicate with and seek advice from:

- (1) His servicing personnel office;
- (2) The Director of Equal Employment Opportunity of the agency or an Equal Employment Opportunity Officer or Counselor designated under Part 713 of this chapter;
- (3) The counselor of the agency, or his deputy, designated under Part 735 of this chapter; and
- (4) A supervisory or management official of higher rank than the employee's immediate supervisor.

§ 771.110 *Avoidance of delay*

(a) An agency shall give each grievance full, impartial, and prompt consideration and shall require that the decision on a grievance be issued within 90 days after initiation of the informal procedure established under § 771.112.

(b) To insure orderly processing, an agency shall establish time limits for:

- (1) Completion of action under the informal procedure;
- (2) Filing a grievance under the formal procedure after completion of action under the informal procedure;

- (3) Adjustment or referral of the grievance under § 771.316(b) ;
- (4) Completion of the examiner's inquiry ; and
- (5) Issuance of the decision after completion of the examiner's inquiry.

§ 771.111 *Cancellation of grievance*

An agency shall cancel a grievance :

- (a) At the employee's request ;
- (b) Upon termination of the employee's employment with the agency unless the personal relief sought by the employee may be granted after termination of his employment ;
- (c) Upon the death of the employee unless the grievance involves a question of pay ; or
- (d) For failure to prosecute if the employee does not furnish required information and duly proceed with the advancement of his grievance.

INFORMAL GRIEVANCE PROCEDURE

§ 771.112 *Establishment of informal procedure*

Each agency shall establish a procedure appropriate to its organization and delegations of authority for the informal adjustment of grievances.

§ 771.113 *Presenting grievance under informal procedure*

(a) *Time limit.* (1) An employee may present a grievance concerning a continuing practice or condition at any time.

(2) An employee shall present a grievance concerning a particular act or occurrence within 15 days of the date of that act or occurrence or the date he became aware of that act or occurrence. The agency may extend the time limit in this subparagraph for good cause shown by the employee.

(b) *Form of grievance.* An employee may present a grievance under the informal procedure either orally or in writing.

§ 771.114 *Mandatory use of informal procedure*

Each agency shall require that an employee complete action under the informal procedure before a grievance concerning the same matter will be accepted from him for processing under the formal procedure.

FORMAL GRIEVANCE PROCEDURE

§ 771.115 *Presenting grievance under formal procedure*

(a) An employee is entitled to present a grievance under the formal procedure if he (1) has completed action under the informal procedure and (2) presents the grievance within the time limit established by the agency under § 771.110(b) (2).

(b) The grievance shall (1) be in writing, (2) contain sufficient detail to identify and clarify the basis for the grievance, and (3) specify the personal relief requested by the employee.

§ 771.116 *Processing grievance under formal procedure*

(a) The grievance shall be referred to a deciding official at a level of management designated by the agency. The deciding official shall be at a higher administrative level than any official who could have adjusted the grievance under the informal procedure.

(b) The deciding official shall attempt to resolve the grievance. If he cannot resolve the grievance in a manner acceptable to the employee, he shall refer the grievance for inquiry to an examiner.

(c) An examiner who meets the standards of experience and training prescribed by the Commission shall conduct an inquiry on a grievance referred under paragraph (b) of this section. The agency shall provide a method for selecting an examiner who (1) is fair, impartial, and objective, and (2) does not occupy a position which is, directly or indirectly, under the jurisdiction of an official involved in the grievance or the deciding official, except when such an official is the head of the agency. If an agency desires to use an examiner from another agency, the agency shall make the arrangements. When these arrangements are made, the examiner is on a reimbursable detail to the requesting agency.

(d) The examiner shall conduct an inquiry of a nature and scope appropriate to the issues involved in the grievance. At the examiner's discretion, the inquiry may consist of :

- (1) The securing of documentary evidence;
- (2) Personal interviews;
- (3) A group meeting;
- (4) A hearing; or
- (5) Any combination of subparagraphs (1) through (4) of this paragraph.
- (e) If a group meeting or hearing is held, a labor organization which holds exclusive recognition for the unit where the employee is located shall be given an opportunity to be represented.
- (f) If a hearing is held the examiner shall conduct the hearing to conform with the following. (1) Except as provided in paragraph (e) of this section attendance at a hearing is limited to persons determined by the examiner to have a direct connection with the grievance.
- (2) The hearing is conducted so as to bring out pertinent facts, including the production of pertinent records.
- (3) Rules of evidence are not applied strictly, but the examiner shall exclude irrelevant or unduly repetitious testimony.
- (4) Decisions on the admissibility of evidence or testimony are made by the examiner.
- (5) Testimony is under oath or affirmation.
- (6) The examiner shall give the parties opportunity to cross-examine witnesses who appear and testify.
- (7) The examiner may exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.
- (8) Both parties are entitled to produce witnesses.
- (9) The agency shall make its employees available as witnesses before an examiner when requested by the examiner after consideration of a request by the employee or the agency.
- (10) If the agency determines that it is not administratively practicable to comply with the request of the examiner, it shall notify him in writing of the reasons for that determination. If, in the examiner's judgment, compliance with his request is essential to a full and fair hearing, he may postpone the hearing until such time as the agency complies with his request.
- (11) Employees of the agency are in a duty status during the time they are made available as witnesses.
- (12) The agency shall assure witnesses freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.
- (13) The examiner, in his discretion, shall determine how the hearing shall be reported and shall have a verbatim transcript or written summary of the hearing prepared, including all pertinent documents submitted to and accepted by him. When the hearing is reported verbatim, the examiner shall make the transcript a part of the record of the proceedings. When the hearing is not reported verbatim, a suitable summary of the pertinent testimony shall be made. When agreed to in writing by the parties, the summary constitutes the report of the hearing and is made a part of the record of the proceedings. If the examiner and the parties fail to agree on the summary, the parties are entitled to submit written exceptions to any part of the summary, and those written exceptions and the summary constitute the report of the hearing and are made a part of the record of the proceedings.
- (g) The examiner shall establish a grievance file containing all documents related to the grievance, including statements of witnesses, records or copies thereof, and the report of the hearing when a hearing was held. On completion of his inquiry, the examiner shall make the grievance file available to the employee and his representative for review and comment. Their comments, if any, shall be included in the file.
- (h) After the employee and his representative have been given an opportunity to review the grievance file, the examiner shall prepare a report of his findings and recommendations and submit that report, with the grievance file, to the deciding official. The examiner shall also furnish the employee and his representative a copy of the report.
- (i) The deciding official shall accept the examiner's recommendations and issue the decision on the grievance, except that:
 - (1) If the head of the agency is the deciding official, he shall consider the grievance file and make the decision on the basis thereof.
 - (2) If the deciding official decides to grant the relief sought by the employee, he shall issue the decision accordingly without regard to the examiner's recommendations.

(3) If the deciding official determines that the examiner's recommendations are unacceptable, he shall transmit the grievance file with a specific statement of the basis for that determination to a higher level of authority, designated by the agency, for decision. The deciding official shall also furnish the employee and his representative a copy of that statement.

(j) The decision on the grievance shall be in writing and shall contain findings on all issues covered by the examiner's inquiry.

NEGOTIATED GRIEVANCE SYSTEMS

§ 771.117 *Negotiated grievance systems.*

This subpart does not apply to a grievance system established through a negotiated agreement between an agency and a labor organization to which exclusive recognition has been granted.

COMMISSION ACTION

§ 771.118 *Employee requests for review.*

The Commission does not act on a request by an employee for a review of an agency's action under an agency grievance system.

§ 771.119 *Review of grievance systems.*

The Commission reviews agency grievance systems through its inspection activity. When it finds that a system or operations thereunder do not conform with the requirements of this part, the Commission requires corrective action to bring the system or operations into conformity.

PART 772—APPEALS TO THE COMMISSION

New Subpart A is added to Part 772 and Subpart C is revised in its entirety as set out below.

SUBPART A—OFFICES OF THE COMMISSION AUTHORIZED TO DECIDE APPEALS

§ 772.101 *The Federal Employee Appeals Authority.*

The Federal Employee Appeals Authority reports directly to the Commission and has authority to make final decisions on appeals to the Commission except as otherwise provided.

§ 772.102 *The Appeals Review Board*

The Appeals Review Board reports directly to the Commission. The board has authority to reopen and reconsider any decision of the Federal Employee Appeals Authority as provided in § 772.310 and has original jurisdiction of appeals to the Commission under Parts 300, 713, 831 except Subpart L, 870, 871, 890 and 891 of this chapter.

SUBPART B—[RESERVED]

SUBPART C—COMMISSION'S APPELLATE REVIEW OF ACTIONS AGAINST EMPLOYEES

§ 772.301 *Coverage.*

(a) *Agency-initiated actions.* Except as otherwise provided, this subpart applies to appeals to the Federal Employee Appeals Authority (hereinafter referred to as the Appeals Authority) under Subpart H of Part 315 of this chapter. Subpart B of Part 330 of this chapter. Subpart I of Part 351 of this chapter, Subparts, B, C, E and F of Part 352 of this chapter, Subpart G of Part 353 of this chapter, Subparts D and E of Part 531 of this chapter, and Subparts B and C of Part 752 of this chapter.

(b) *Commission-initiated actions.* Except as otherwise provided, this subpart applies to appeals to the Appeals Authority from adverse suitability determinations under Part 731 of this chapter, adverse actions effected under Part 754 of this chapter, and from decisions of the Bureau of Retirement, Insurance, and Occupational Health on applications for disability retirement effected under Part 831 of this chapter, and to appeals to the Appeals Review Board from decisions of the Bureau of Retirement, Insurance, and Occupational Health on issues of entitlement to rights or benefits by claimants under Parts 831,

870, 871, 890 and 891 of this chapter. In appeals, under Part 754 of this chapter, the Commission's Bureau of Personnel Investigations is deemed the agency as that term is used in this subpart.

§ 772.302 Time limit for appeal.

(a) The Appeals Authority may consider an appeal only if the appeal is submitted within the time provided in the part of the regulations of this chapter concerning the subject of the appeal.

(b) The Appeals Authority may extend the time limit on an appeal when the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit. When an appellant has not been notified of a right of appeal, the Appeals Authority will accept an appeal only when the appellant has exercised due diligence in discovering and pursuing the administrative appeal available.

§ 772.303 Failure to prosecute.

The Appeals Authority shall close an appeal for failure to prosecute if an appellant does not furnish required information and duly proceed with the advancement of his appeal. However, instead of closing for failure to prosecute, the Appeals Authority may adjudicate the appeal if sufficient information for that purpose is available. The appeals Authority may reopen an appeal closed under this section only on a showing by the appellant that circumstances beyond his control prevented him from prosecuting his appeal.

§ 772.304 Death of appellant.

When an appeal covered by this part is filed properly before the death of an appellant, the Commission shall process it to completion and adjudicate it unless the redress sought, or any other benefit that would accrue from a decision favorable to the appellant, is nullified by the death of the appellant. The Appeals Authority, in recommending corrective action in the decision on such an appeal, may provide for amendment of the agency's records to show retroactive restoration and the appellant's continuance on the rolls in an active duty status to date of death.

§ 772.305 Evidence.

(a) Affidavits. Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse decision. It is the responsibility of both parties to the appeal to submit all evidence to the appropriate office of the Appeals Authority having jurisdiction.

(b) *Availability of evidence and representations.* A representative of the Appeals Authority shall discuss all relevant representation and evidence with both parties and make the representations and evidence available to them for review. However, when adverse action has been taken, or decision on an application for disability retirement has been made, on the basis of the reported mental condition of the appellant or another condition of such a nature that a prudent physician would hesitate to inform a person suffering from it as to its exact nature and probable outcome, the representative of the Appeals Authority shall make the medical evidence available only to a duly licensed physician designated in writing by the appellant or the appellant's representative.

§ 772.306 Allegations of discrimination.

(a) Except as provided in paragraph (e) of this section, when an employee makes a timely allegation in writing in connection with an appeal under this subpart that the agency's action was based in whole or in part on discrimination because of race, color, religion, sex, or national origin, the Appeals Authority shall determine whether the appellant has been informed by the agency of his right to proceed under this subpart or under Part 713 of this chapter and of the scope of review provided in each procedure. If the appellant has not been informed of the separate rights of appeal, the Appeals Authority shall refer the matter to the agency so the agency may explain the alternate rights of appeal to the appellant as provided in § 713.236 of Part 713 of this chapter and afford him the opportunity, if appropriate, to elect which avenue of appeal he wishes to pursue.

(1) The allegation of discrimination in connection with an action otherwise appealable to the Commission may not serve as a basis for extending the time for filing a complaint as provided in § 713.214 of this chapter.

(2) If the employee chooses to pursue an appeal under the provisions of Part 713 he may not concurrently pursue an appeal to the Commission of the action that is otherwise appealable to the Commission. However, on appeal of the decision of the agency to the Commission under § 713.231 of this chapter, the Commission will review all issues raised in connection with the action taken against the employee.

(b) Where an appellant elects to appeal directly to the Appeals Authority and alleges discrimination in connection with the action appealed to the Appeals Authority, the Appeals Authority shall process the case under the regulations appropriate to that appeal. The allegation of discrimination shall be referred to the Equal Employment Opportunity Officer of the agency for investigation in accordance with § 713.216 of this chapter. The investigative file and a report thereon shall be sent to the Commission to be incorporated in and become a part of the appeal file under this subpart.

(c) A decision on the appeal under this subpart may be made only after completion of investigation of the allegation of discrimination, except when the decision on the appeal under this subpart is to reverse the appealed action on the basis of failure to comply with procedural requirements.

(d) The decision on the allegation of discrimination shall be incorporated in and become a part of the decision on the appeal under this subpart, except when the decision has previously been issued as provided in paragraph (c) of this section.

(e) When the allegation of discrimination is presented for the first time in a hearing under this subpart, and the employee shows good reason for not having presented the allegation when the appeal was filed, the appeals officer shall suspend the hearing and refer the allegation for investigation and processing as provided in paragraphs (a) through (c) of this section. If the appeals officer determines that the employee did not have good reason, the hearing shall be broadened to include evidence and testimony on the issue of discrimination without referral to the agency for investigation.

§ 772.307 *Hearings.*

(a) *Coverage.* This section applies only to appeals under Subpart B of Part 752 of this chapter, Part 754 of this chapter, and Subpart L of Part 881 of this chapter.

(b) *Right to a hearing.* An appellant is entitled to a hearing before the office of the Appeals Authority having jurisdiction of the appeal. That office shall inform the appellant of his right to a hearing. If the appellant does not desire a hearing, he shall so advise that office in writing.

(c) *Hearing procedures.* (1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative. The agency is also entitled to participate in the hearing. Both parties are entitled to produce witnesses. The Appeals Authority is not authorized to subpoena witnesses.

(2) Any agency that has employees entitled to appeal to the Appeals Authority under this part shall make its employees available as witnesses at the hearing when (i) requested by the Appeals Authority after consideration of a request by the appellant or the agency and (ii) it is administratively practicable to comply with the request of the Appeals Authority. If the agency determines that it is not administratively practicable to comply with the request of the Appeals Authority, it shall submit to the Appeals Authority its written reasons for the declination. If the reason for the declination is adequate, the Appeals Officer shall insert the explanation in the record, notify the appellant that his request for the witness(es) has been denied and provide the appellant with the reason for the denial. Employees of the agency shall be in a duty status during the time they are made available as witnesses. Employees of the agency shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

(3) An appeals officer of the Appeals Authority shall conduct the hearing and shall afford the parties opportunity to introduce evidence (including testimony and statements by the appellant, his representative, representatives of the agency, and witnesses), and to cross-examine witnesses. Testimony is under oath or affirmation. Rules of evidence are not applied strictly, but the appeals officer shall exclude irrelevant or unduly repetitious testimony. The appeals officer may exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(4) Except as provided in subparagraph (5) of this paragraph, attendance at the hearing will be limited to persons determined by the appeals officer to have a direct connection with the appeal.

(5) When requested by the appellant and the agency does not object, the appeals officer shall hold a public hearing. When the agency objects, the appeals officer may deny the appellant's request only when he determines this action to be in the best public interest. The appeals officer in his discretion, may close one or more sessions of a public hearing, when he determines that this action is in the best interest of the appellant, a witness, or the Government. The reasons for the appeals officer's decision to deny a request for a public hearing or to close one or more sessions of a public hearing shall be made a part of the record.

(6) The hearing is reported verbatim. The transcript is part of the record of the proceedings and a copy of the transcript shall be furnished to each party.

§ 772.308 *Closing the record*

(a) The Appeals Authority shall close the record in any case after the parties to the appeal have had a full opportunity to present any and all relevant and material evidence. When there is a hearing, the record shall be closed at the conclusion of the hearing except that the appeals officer has discretion to permit the parties to submit written argument of briefs after the record is closed.

(b) When the record is closed there is no right to submit additional evidence into the record.

§ 772.309 *Decision on appeal*

(a) The office of the Appeals Authority having initial jurisdiction of the appeal shall issue a written decision and send copies thereof to the appellant, his representative, and the agency. The decision on each appeal covered by this part shall contain an analysis of the evidence, findings, a statement of the reasons for the conclusions reached, and recommendation for any corrective action required. The agency shall report, within 30 calendar days after receipt of the decision, that it has carried the decision into effect or that it is petitioning the Appeals Review Board to reopen and reconsider the decision under section 772.310 of this chapter.

(b) The decision of the appeals officer is final and there is no further right of appeal.

§ 772.310 *Reopening and reconsideration by the Appeals Review Board*

(a) *Request for reopening and reconsideration.* Either party may request the Appeals Review Board (hereafter referred to as "Board") to reopen and reconsider any previous decision of an appeals officer. The Board may reopen and reconsider the decision when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the appeals officer was issued:

(2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or

(3) The decision of the appeals officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand.

(b) *Limitations on agency request to reopen.* (1) An agency may not request the Board to reopen and reconsider a decision of an appeals officer when that decision reverses an original decision of the Commission under Part 731 or Part 754 of this chapter.

(2) The Board may not consider an agency request to reopen and reconsider a decision of an appeals officer after the agency has complied with the recommended corrective action.

(3) A request by an agency to reopen and reconsider a decision of an appeals officer shall be filed no later than 30 days after receipt of the appeals officer's decision.

(c) *Where to file.* Requests to reopen and reconsider a decision of an appeals officer shall be filed with the Appeals Review Board, U.S. Civil Service Commission, Washington, D.C. 20415.

(d) *How to file.* A request to reopen and reconsider a decision of an appeals officer shall be in writing and set forth in detail the reason for the request.

(e) *Impact of a request to reopen upon the previous decision.* (1) When an employee or agency requests the Board to reopen and reconsider a decision of an appeals officer affirming an original adverse decision of the Commission under

Part 731 or Part 754 of this chapter, or a decision of an appeals officer affirming or reversing the original adverse decision of the Bureau of Retirement, Insurance and Occupational Health under Subpart L of Part 831 of this chapter, that decision may not be given effect pending decision by the Board.

(2) An agency request for reopening under paragraph (a) of this section shall stay the corrective action recommended by the appeals officer except in those cases where the appeals officer has recommended:

(i) The retroactive restoration of an employee who was removed under Subpart B of Part 752 of this chapter, Part 351 of this chapter or Subpart H of Part 315 of this chapter, or

(ii) The cancellation of an indefinite suspension under Subpart B of Part 752 of this chapter.

The immediate action in such cases shall be a temporary appointment, a temporary restoration to duty status to a position of like grade or pay, or a similar conditional action pending decision of the Board on the case. Evidence of temporary or conditional compliance with the appeals officer's recommended corrective action must accompany the agency's request for reopening to the Board under subparagraph (1) or (2) of this paragraph. However, service by the employee under the provisions of this paragraph may not be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure.

(f) *Board procedures.* The Board shall review any request to reopen to determine whether a basis for reopening under § 772.310(a) has been established. When the Board determines that the request does not establish a basis for reopening the Board shall notify the requesting party in writing of its decision to deny the request. When the Board reopens a previous decision, the Board will determine and conduct whatever further investigation is necessary. There is no right to a hearing before the Board. The Board may, in its discretion, afford the parties an opportunity to appear personally and present oral argument and representations.

(g) *Reconsideration decision of the board.* When the Appeals Review Board has reopened an appeals officer's decision for reconsideration, it shall review the record of the proceedings and all written representations. The board shall issue a written decision and shall send copies thereof to the parties and to the employee's representative. The decision of the board is final. When corrective action is recommended, the agency shall report promptly to the board that the corrective action has been taken.

§ 772.311 *Board procedures in appeals directly to the board*

(a) When a person files a timely appeal of an action appealable directly to the board, other than under Subpart D of this part, the board will review the record of the proceedings and all relevant written representations submitted by the parties to the appeal. There is no right to a hearing before the board. The board may, in its discretion, afford the parties an opportunity to appeal personally and present oral arguments and representations.

(b) The board shall issue a written decision and shall send a copy to each party and to the employee's representative. The decision of the board is final. When corrective action is recommended, the agency shall report within thirty days that it has carried the decision into effect or that it is petitioning the Commissioners to reopen and reconsider the decision under § 772.312.

§ 772.312 *Review by the Commissioners*

(a) The Commissioners may, in their discretion, reopen and reconsider any previous decision on their own motion or when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) The previous decision of the Board on a request to reopen and reconsider involves policy implications extending beyond the case at hand of such significance as to merit the personal attention of the Commissioners; or

(2) A basis for reopening exists for the same reasons as those set out under § 772.310(a) in cases where the Board issued the original appellate decision.

(b) When an agency gives notice of intent to request reopening within the time specified in the decision of the Appeals Review Board for the agency report of corrective action, the agency may not effect the corrective action recommended by the Board except as provided in this paragraph. When the agency gives notice of intent to request reopening, and when the appeal involves removal, separation, or suspension continuing beyond the date of the re-

quest for reopening, and when the Board decision recommends retroactive restoration, the agency shall comply with the Board decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Board pending decision of the Commissioners on the agency request for reopening. The agency shall notify the Board and the employee in writing that the corrective action it takes is temporary or conditional at the same time it gives notice of intent to request reopening. When the agency does not give notice of intent to request reopening within the time specified in the Board decision for the agency report of corrective action, or when, after giving notice of intent to request reopening, the agency does not file a request for reopening within 30 days from the date of the Board decision, or when a request to reopen is denied, the agency shall effect the corrective action recommended by the Board, and there is no further right by the agency to request reopening. However, service under the temporary or conditional restoration provisions of this paragraph may not be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure.

Sections 772.401, 772.403, and 772.404 are revised in their entirety as set out below.

§ 772.401. *Coverage*

This subpart applies to appeals to the Appeals Review Board under Subpart A of Part 300 of this chapter.

§ 772.403 *Processing of appeal*

(a) *Right to a hearing.* Except when an appeal is rejected on the basis of timeliness or on the basis of a prior final administrative decision, the appellant is entitled to a hearing on his appeal. He shall be notified in writing of his right to a hearing and allowed a reasonable time to reply in writing either requesting a hearing or stating that he does not desire a hearing.

(b) *Hearing.* (1) A hearing shall be conducted by a member of the board or by an appeals officer designated by the Appeals Authority for that purpose. The member or appeal officer, as appropriate, shall schedule the hearing, considering the convenience of the parties as to time and place, and shall notify the parties of the time and place at least 15 days in advance. The member or appeals officer, as appropriate, shall take all action needed to control the hearing and shall conduct the hearing in accordance with § 772.307 (c).

(2) The hearing shall be recorded verbatim by an official reporter furnished by the Commission. The transcript of the official reporter is the sole official transcript. The transcript shall be made part of the record and the official reporter shall supply the parties, at their own expense, with a copy of the transcript at a rate not in excess of the maximum rate fixed by contract between the Commission and the reporter.

(3) When the hearing is conducted by an appeals officer, he shall prepare a report of findings and recommendations for submission to the Board.

(c) *Decision of the Board.* The Appeals Review Board shall issue a written decision and send copies thereof to the parties and to the appellant's representative. When the appeal is sustained, the decision shall inform the appellant of the corrective action directed by the Board. The decision of the Board is final and there is no further right of appeal.

§ 772.404 *Review by the Commissioners*

The Commissioners may reopen and reconsider any previous decision on their own motion or under the principles set forth in § 772.310.

STATEMENT OF NATHAN T. WOLKOMIR, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. Chairman and members of the subcommittee, I am Nathan T. Wolkomir, President of the National Federation of Federal Employees. The NFFE is the largest independent union in the Federal sector representing both at home and overseas about 150,000 persons throughout the government.

Mr. Chairman, H.R. 1674 would give employees the right to be represented by counsel during interrogations leading to disciplinary actions and other matters. During previous testimony before this Subcommittee we made similar suggestions. We are therefore pleased this Subcommittee is now considering legislation on this very important subject. We do not, however, believe that the bill, as now written

will significantly affect the rights most Federal employees now enjoy. The bill, for example now provides that employees are entitled to be represented by counsel or another person of their choice whenever an employee is interrogated over a matter which might lead to disciplinary action, if the employee so requests. Executive Order 11491 as amended also provides in Section 10(a) when a labor organization has been accorded exclusive recognition, the labor organization . . . "shall be given the opportunity to be represented at formal discussions with management and employees . . . concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." I would suggest that in effect that this is the same type of protection offered by Section 1 of the bill. We recognize, of course, that not all employees are covered by exclusive recognitions. We think, however, that any new legislation should enlarge the rights of all employees and, in our opinion, this bill does not do so. Indeed, there is a possibility that as this bill applies to employees covered by an exclusive representation agreement that this bill could be construed in such a fashion as to lessen existing rights and remedies.

Section 3 of the bill provides that an employee aggrieved or affected by a violation of the Act may file a complaint with the Civil Service Commission. The difficulty with this provision is, that with the exception found in Section 4, for negotiated grievance procedures, is that it does not mention other possible remedies. Specifically, we are concerned with unfair labor practices. Under Executive Order 11491 as amended a violation of Section 10(e) subjects the Agency to an unfair labor practice charge. It is unclear whether the procedures outlined in Section 3 and permitted by Section 4 are the exclusive remedies permitted whenever improper interrogation is used or whether an unfair labor practice might still be filed. The difference is, in our opinion, most significant. We simply do not trust the Civil Service Commission to adequately protect the rights of the employees. We do not believe that the Commission has either the will or the inclination to vigorously champion the rights of an employee against management. The Commission could be called the protector of the employees. Whether or not the provisions of Sections 3 and 4 are intended to be exclusive remedies should be clarified. Based on our experience, if given the opportunity, we will choose the remedies of the Department of Labor.

As now drafted we find the bill unacceptable. We are, however, of the strong opinion that legislation is needed in this area. Accordingly, we suggest that the bill be amended along the following lines.

First, we suggest that in order to make the right to counsel truly meaningful, that the person who is conducting the interrogation or investigation be required to advise the person that he or she has a right to have an attorney present or, in the case where the employees are represented by a labor organization, that the Union has a right to be present and represent the employee. In instances where the subject of the interrogation is covered by a negotiated agreement the Union's right to represent the employee should, of course, be exclusive.

In addition to affirmatively warning the person of his or her right to be represented, sanctions should be imposed for the failure to do so. Specifically, we recommend that in addition to the other remedies permitted by Section 3(b) that any evidence obtained as a result of an unlawful interrogation be excluded from any subsequent hearing and the material so obtained removed from the record.

Second, that different types of hearings, according to the circumstances, be provided for in the bill. We suggest that whenever employees are not represented by a labor organization that the type of hearing already provided for be the exclusive hearing. However, in instances where the employee is represented by a labor organization the hearing should be conducted by a Department of Labor Administrative Law Judge with an Appeal to the Assistant Secretary of Labor and the Federal Labor Relations Council or to the Civil Service Commission at the option of the Exclusive Representative.

In conclusion, Mr. Chairman, we find H.R. 1674 as now drafted unacceptable. We hope that the Subcommittee will seriously consider our recommendations and amend what is otherwise a very good concept.

RIGHT TO COUNSEL DURING INTERROGATIONS

WEDNESDAY, MARCH 26, 1975

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON RETIREMENT AND EMPLOYEE BENEFITS,
Washington, D.C.

The subcommittee met at 9 a.m. in room 219, Cannon House Office Building, Hon. Richard C. White (chairman of the subcommittee) presiding.

Mr. WHITE. The subcommittee will come to order.

The subcommittee is continuing hearings this morning on H.R. 1674. Another day of hearings has been scheduled for April 8 at 9 a.m. in this same room.

H.R. 1674 deals with an alleged inequity in our civil service system dealing with the protection of a civil service employee's individual rights. As I've said on many occasions before, a Federal civil service employee not only expects, but has the right to the same protection of his individual rights as his counterpart has in private industry. To my knowledge, no one on this subcommittee, nor any of my colleagues in this 94th Congress, consider a civil service employee a second class citizen, and I may say it is my intent to see that he not only doesn't become one, but also that he is not thought of as one, and that his constitutional rights are protected to the fullest.

To begin the hearings this morning we shall first hear from Mr. Vincent L. Connery, national president, National Treasury Employees Union. Accompanying Mr. Connery is Mr. Robert M. Tobias and Mr. Jerry D. Klepner.

STATEMENT OF VINCENT L. CONNERY, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION, ACCOMPANIED BY ROBERT M. TOBIAS AND JERRY D. KLEPNER

Mr. CONNERY. Thank you, Mr. Chairman.

My name is Vincent L. Connery. I am president of the National Treasury Employees Union. Our union has been elected the exclusive representative of nearly 70,000 employees of the U.S. Treasury Department, which includes employees working for the Internal Revenue Service, the Bureau of Alcohol, Tobacco and Firearms, and the U.S. Customs Service.

We would like to thank you, Mr. Chairman, and the other members of this subcommittee for holding hearings on H.R. 1674 as well as Congressman Dominick Daniels for introducing this most important bill. This legislation would guarantee Federal employees the same basic rights and protections which are now assured their private

sector counterparts by allowing those who are under investigation for misconduct to be represented by an attorney or other person of their choice at interrogations which would lead to disciplinary action.

Our experience has convinced us that Federal employees must be provided with this essential "right-to-counsel" to avoid the evils of "coercion and intimidation" which often arise when representation is denied and were so eloquently discussed by the Supreme Court in *Miranda v. United States*. In that case, the Court concluded that the presence of an attorney during criminal interrogations is as basic due process right that "enhances the integrity of the fact-finding process."

We believe that this same principal applies, with equal force, when an employee is confronted with an investigatory interview that could result in disciplinary action or dismissal. Even more than in the private sector, the loss of one's job in the Federal service is more often than not equivalent to economic capital punishment. Because of the "mark of Cain" placed upon them by private sector employers, discharged Federal employees, in all too many instances, must face a bleak future of permanent unemployment. It is imperative that those who must suffer such a severe penalty be assured of the protection of their rights throughout any discharge procedure, including the initial interrogations which form the basis of the dismissal action.

Just a little more than a month ago, this right to representation was guaranteed to private sector workers. In *National Labor Relations Board v. J. Weingarten, Inc.*, the Supreme Court held that section 7 of the National Labor Relations Act requires that private sector employees be permitted representation during investigatory interviews when they "reasonably fear" disciplinary action and request such assistance. H.R. 1674 would extend this same right to Federal employees; a right which is presently denied them because they are not protected by the National Labor Relations Act.

Writing for the court in the *Weingarten* case, Justice William Brennan explained that representation can be beneficial to both employer and employee as "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 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 his presence need not transfer the interview into an adversary contest."

Mr. Justice Brennan also pointed out that there are those who believe that representation during investigatory interviews is unnecessary "because a decision as to employee disciplinary action can be corrected after the decision to impose discipline has become final. In other words, [they] would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined." However, as the court explained, "at that point it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished."

We could not agree more with the learned Justice. In the Federal service, as in the private sector, employees who must face an investi-

gatory interview which would result in the loss of their job often become nervous and confused, particularly when they are being questioned about events which occurred long ago. Without representation or counsel to assist them, they may not respond accurately to the questions or raise mitigating factors and, no matter what protections are afforded them at a later stage in the disciplinary procedure, it is too little and too late.

Some have suggested to this subcommittee that the "right-to-counsel" assured Federal employees under H.R. 1674 is unnecessary and that present Civil Service Commission regulations are adequate. Nothing could be further from the truth. We could present the subcommittee with a litany list of "horror stories" in which employees were unjustly disciplined or discharged from the Federal service based upon statements made during investigatory interviews which could have been fully explained or clarified if counsel would have been present at the interrogations. We are not simply raising aberrations in our support of this legislation, the problems are real and apparent.

Within the Internal Revenue Service, for example, the Internal Security Division of the Inspection Service is charged with the responsibility for investigating allegations of employee misconduct. In fiscal year 1973, there were 345 inspectors assigned to various posts-of-duty within the seven regions of the Internal Revenue Service under the supervision of a regional inspector. In this same year, the Internal Security Division investigated 14,109 cases of which 1,034 involved alleged employee misconduct, and 838 resulted in disciplinary action being taken against an employee. In very few, if any, of these cases was the employee permitted counsel or union representation during the investigatory interview.

Typically, an employee is summoned to appear without warning in the inspector's office or a conference room and is seldom advised of the nature of the interview. With no opportunity to collect his thoughts, the employee is immediately sworn and must answer all questions. If the employee fails to report for the interview, be sworn, or answer questions, he may on that basis alone be subject to discipline. Normally, an employee is questioned by two inspectors and there is no transcript or official recording of the interview, only the notes of one of the inspectors which serves as the basis for an affidavit that an employee is requested to sign very soon after the conclusion of the interview.

Just place yourself, if you would, in the position of the employee. Because he is denied representation or counsel, he must face two inspectors alone knowing that he may be subject to disciplinary action if he refuses to answer questions or answers them incorrectly. He has no one to advise him on what may or may not be relevant and is not accustomed to such interview. Oftentimes, the employee is questioned about matters which occurred years before and may be subjected to badgering and harassment, becoming so confused and flustered that he will agree with answers "suggested" by the inspectors even if they do not truly reflect what transpired.

Though the Internal Revenue Service regulations require that the inspectors reveal information within their possession concerning the incidents which are being questioned and that an employee be advised that he is not obligated to sign an affidavit, the employee is not informed by the inspectors of these rights and does not have an attorney

or union representative to counsel him. Since the employee is subjected to continuous questioning and does not have an opportunity to take notes nor is there a transcript of the interview, if the affidavit does not reflect his true statements it is nearly impossible for him to rebut them at a later stage in the disciplinary proceedings.

Furthermore, to complete this "Catch 22" procedure, if the employee, in his confusion, provides misleading or false information to the inspectors, he is subject to dismissal. And, if he refuses to sign the affidavit, this is noted in the inspector's report which is forwarded to the Internal Revenue Service official empowered to discipline employees. No matter which way an employee may turn, because he is denied an attorney or union representative to assist him in accurately articulating the incident being investigated and is raising extenuating factors and favorable facts as well as advising him of his rights, the employee is oftentimes doomed from the beginning.

It is the compulsion to answer questions, combined with the prospect of discipline, the intimidating surroundings and attitude of the inspectors, and the refusal to permit the presence of a union representative or attorney that gives rise to an atmosphere of interrogation at its very worst; one which, because of the palpable prospect of intimidation, results in unreliable and untrustworthy testimony. These are the very concerns to which the Supreme Court addressed itself in the *Miranda* and *Weingarten* decisions and concluded that an attorney or union representative must, if so requested, be present at the interrogation.

Literally hundreds of these types of interrogations occur within the Internal Revenue Service each year. Just last week, an employee in the Chicago district office was informed at 5 p.m., on Monday afternoon, that he was to report for an inspection interview at 9 a.m., Tuesday morning. He was not told of the nature of the interrogation, and was denied counsel when he requested it. For 3 full days, this man was bullied and tormented by the two inspectors, who accused him of being a homosexual and supporting his "companion" through the fraudulent use of a credit card.

Throughout the interrogation, the inspectors continuously suggested that the employee resign even though he had not engaged in wrongdoing which would justify disciplinary action or removal from service. Finally, on Friday morning, the employee could no longer tolerate the abuse which he had been forced to endure for the 3 previous days, and told the inspectors that he would return to his office and submit his resignation. If an attorney or a union representative had been present at the interrogation, not only would this man have been spared such humiliating treatment, he never would have agreed to resign from the IRS when, in fact, he had committed no wrong.

Critics of H.R. 1674 also charge that the legislation would impair the Federal Government's ability to function because employees would be constantly seeking to impose an attorney or union representative between themselves and supervisors or other management officials. Such allegations, however, are no more than smoke without fire; the bill clearly provides that an employee is entitled to representation only when he is under investigation for misconduct and during an interrogation which could lead to disciplinary action. This is the very same standard that the Supreme Court adopted in the *Weingarten* case.

In addition to the right-to-counsel, the bill also provides that Federal employees will not be required to report on activities not directly related to their jobs, unless there is reason to believe that such outside activities are in conflict with their official duties. We think that this provision is a very vital and integral part of the legislation. It would guarantee that Federal employees would only have to respond to questions directly related to their official duties, and would not be subjected to inquiries concerning matters which are purely of a personal nature and totally unrelated to their Government employment.

Even with the right-to-counsel, if this provision were not included in the bill, an employee would still be subject to dismissal for refusing to answer any question asked of him, no matter what the nature of the question. For example, employees would be required to respond to inquiries concerning their financial status, their personal habits, their family situations, and the like, none of which could have any relationship to their Government position.

Once again the Supreme Court has addressed itself to this issue. In *Gardner v. Broderick* and *Uniform Sanitation Men Association v. Commissioner of Sanitation*, the Court ruled that State and local employees do not have to respond to questions which are not specifically, directly, and narrowly related to the performance of their official duties, and for so doing, cannot be constitutionally punished by their employer. These decisions were handed down in 1968 and since that time public employees, other than Federal employees, have been protected by this right from unwarranted and unjustified inquiries. We believe it is time that Federal employees be accorded this same protection.

In effect, H.R. 1674 adopts the standard articulated by the Supreme Court in the *Gardner* and *Uniform Sanitation Men* cases. It requires that Federal employees must only respond to inquiries directly related to their employment unless there is reasonable cause to believe that the civilian employee is engaged in outside activities or employment in conflict with his official duties. Such a test is both reasonable and fair; it balances the interest of the employee in maintaining his privacy with the right of the Government to be aware of activities which relate to the official duties of its employees.

We urge this subcommittee to act on this legislation as soon as possible. Equity and justice demand that Federal employees under investigation for misconduct be granted the right to counsel during interrogations which could result in disciplinary action and that they no longer be required, on pain of dismissal, to respond to inquiries which may be totally unrelated to their employment. We believe that H.R. 1674 is a sound and equitable bill; a bill which would guarantee Federal employees basic rights which are now accorded other workers in the private and public sector.

We appreciate this opportunity to present the views of the National Treasury Employees Union to the subcommittee. I will be happy to answer any questions which you may have at this time.

Mr. MINETA. Thank you very much. Mr. Beard?

Mr. BEARD. I got here a little late and didn't get to read the entire statement. On the right to counsel—this would enable the employee during investigation for misconduct to be granted the right to counsel. Would that be a private counsel that he retains personally?

Mr. CONNERY. It could be. In the case of our union, we maintain a staff of attorneys and we guarantee our members' representation if it's permitted.

Mr. BEARD. So, in other words, this would not have to be a counsel provided at the expense of the Government?

Mr. CONNERY. No.

Mr. BEARD. This would be either private or union?

Mr. CONNERY. Yes, sir.

Mr. BEARD. The horror stories that are referred to in your testimony, are most of these horror stories? Could you relate a couple of them? Is this an everyday occurrence type of situation?

Mr. CONNERY. Well, as I stated in my testimony, the investigation process by internal security within the IRS is in fact an everyday occurrence. I testified that their investigations totaled some 14,000 last year, of which more than 1,000 were for alleged misconduct.

Now I have here with me our general counsel who handles for our union the representation of these employees when such representation has been permitted.

Mr. BEARD. How many were dismissed of these investigations or of the discipline investigations, how many last year?

Mr. CONNERY. 848. I so stated in the testimony.

Mr. BEARD. Were dismissed?

Mr. CONNERY. Yes; of about 1,014, I believe the figure testified to is, and 838 of those resulted in dismissals. Now I would like to respond to your question relative to these horror stories. There are many.

Mr. TOBIAS. The way it works is that an employee is summoned on very short notice to a meeting room, the kind of meeting room with no windows, and people are questioned for extended periods of time and then at the conclusion of that interview, after the individual having taken no notes and there being no transcript, in many of these cases he's asked to sign an affidavit. Now the affidavit is prepared by the inspector.

So a 25, 30, 40, or 50 page affidavit which you are asked to sign after submitting yourself to interrogations for 8, 16 or, as in the case President Connery mentioned, 24 hours of interrogation, puts you at an extreme disadvantage. It was that disadvantage which the Supreme Court spoke to in the *Weingarten* case.

Mr. CONNERY. Typically, this situation as I testified involves two inspectors in a bare room sitting there when the employee is asked to come to room so and so. He doesn't know why he's being summoned there but he comes in. There's two inspectors sitting there.

Now, typically, the inspectors play the good guy and bad guy role. The one fellow is irritated, ruffled, gruff, and so forth, and the other fellow is understanding and reasonable. They play that scene.

Now, they swear the man or woman, who is frightened. One inspector sits there and takes notes, usually the bad guy. The other fellow keeps pouring on the questions. At the conclusion, as Mr. Tobias stated—this could go on for 8 hours, 10 hours or it could be 3 days. Now comes the time for the affidavit. The two inspectors retire and overnight, generally, will prepare a lengthy affidavit that relates to this entire process that they have gone through.

Now one of the problems—and I have seen this—is that what they will do is go through this kind of scene that the courts later refer to

is the exquisite care that's given a defendant once in a formal setting of a courtroom, but not protecting his situation downtown. The person being interviewed will be invited to change anything he wants in the affidavit, to read it carefully, initial any changes, rule out anything that might be in error, and you look at these people and you can see it in their face—they don't know which way to turn because the problem is the "Catch 22" type of thing which is that this thing is slanted from page 1 right through page 26, and there's nothing really that could be lined out to change the thrust of this thing without lining out all 26 pages or 14 pages. It's slanted and this is a particular problem that I have seen myself in such areas. But the badgering that takes place in these interrogations is something else. That's another thing.

Mr. BEARD. These inspectors are professional? Is that all they do, just go around and do that to Federal employees?

Mr. CONNERY. Yes, sir. They are criminal investigators. First of all, their job description within the Federal Government—they are GS-18-11. That's their job description which is specifically criminal investigator. Now that's all they do, those that are assigned to the internal security division.

There is another division within the inspection service in IRS and it's called internal audit. Those fellows are more in the professional audit class, reviewing reports and things like that from the field.

Mr. BEARD. All right. Thank you.

Mr. MINETA. Thank you, Mr. Beard.

Mr. Connery, in your testimony on page 5, you refer to the affidavit that the employee is requested to sign immediately upon the conclusion of the interview. Does that person receive a copy of the affidavit?

Mr. CONNERY. No; he does not. But I must explain that they not only follow the procedure with regard to someone in this situation; IRS also follows this same procedure with regard to taxpayers generally. A taxpayer is suspected of criminal activities with regard to his tax return. That's questioned by IRS agents. As a matter of IRS top-drawer policy, he will not receive, under any circumstances, a copy of the affidavit unless he signs it. That was during my entire 18 years of service with the IRS. That was absolute, a must.

Mr. MINETA. You also mentioned 838 cases involving disciplinary action. Does that mean discharge cases or could the disciplinary action have been in some other form?

Mr. CONNERY. It could all be discharge, but I'm quite certain it isn't. I don't have the breakdown of that figure. Those are exact IRS figures but as to the breakdown, it would most likely involve either discharge, suspension for less than 30 days, or it could involve other types of severe reduction in grade, from grade 11 or 12 to grade 7. Disciplinary action would involve either discharge or reductions in grade or something similar that would be a penalty type of sanction.

Mr. TOBIAS. They all involve an adverse or disciplinary action and disciplinary action means suspension.

Mr. BEARD. But once the formal charges are placed against the employee he is due representation at this time; is that right?

Mr. CONNERY. This is of little moment because what these inspectors do is once they have your case tied up with a ribbon then they will file a charge against you. They start out knowing that they have, say,

possibly some grounds for calling you in. They call you in and go through an elaborate third party inquiry that constitutes—in almost every instance I have seen—complete and total over investigation of the case, and you're the last one called in. If you are the suspect, you're the last witness. They have been all over your town. They have talked to everyone you could have possibly been doing business with, everybody in the community half the time knows that you're under some kind of inquiry and you're the last one called in. Now that's a typical situation.

In others, it's a kind of surprise thing where they have certain information of another type.

Mr. TOBIAS. The Supreme Court dealt with that specific issue of the employer making the argument, "Well, you have representation if we should impose any action against you," and to quote the Supreme Court in the *Weingarten* case: "The employer suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee had been discharged or otherwise disciplined."

The Supreme Court says at that point, however, it becomes increasingly difficult for the employee to vindicate himself and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than reexamining them.

So that issue of representation after the case is made—and it's made on a statement that you have already signed which is slanted against you—the Supreme Court, in balancing those interests, said that the individual should have that right to counsel at the time of the interrogation.

Mr. BEARD. What if the employee refuses to sign the statement? Does he have the right to refuse to sign the statement?

Mr. TOBIAS. The short answer is yes, he does have the right to refuse to sign, but when you're sitting in that room and an inspector says, "Sign this," after you have been sitting there for an extended period of time and he doesn't tell you that you have the right to refuse to sign and he says, "Sign this," that person signs it and that seals his action.

Mr. CONNERY. What's more, as a working agent, you're told you don't really care whether that guy signs it or not because both of the inspectors are in a position later to testify that he did say this and, for instance, of the two, if I'm the note-taker, I can present my notes as evidence of what he said, and so it's oftentimes, more often than not, an advantage to the Government if the man doesn't sign because, as I stated before to Mr. Mineta, the man doesn't get a copy of it and later his attorneys have no way of knowing what he did say. All of that paper is in the possession of the Government. So it's quite to the advantage of the Government that he not sign in a very real sense.

Mr. KLEPNER. And when you go forward into the later stages of the procedure you're not provided with a full copy of what the actual inspection report is. So you don't know what the inspectors have found,

what the information is that's being used against you. That's withheld from you when you actually go into the disciplinary procedures.

Mr. CONNERY. Then, on top of that, the inspection service will claim loftily that, "We are just factfinders. We just turn over the reports of our investigation to the administrative officials and they just go on the facts and they mete out whatever punishments," but the fact of the matter is in the IRS, the inspection service is furnished a copy of the district director's finalization of the case, whether he metes out punishment and what kind of punishment. Now if they were just factfinders, the internal security division would not get a copy of every single action that's taken by administrative officials, and I know for an absolute fact that if the action which that administrative official takes does not meet with the pleasure of the internal security division, then the internal security division has, during all of my time in IRS, gone to the top man in the personnel division of IRS to complain about it.

So the typical district director doesn't want to get crosswise with these criminal investigators relative to the way he has handled one of their cases. If it was just simply a factfinding situation, as they claim it to be, there would be no reason under the sun for them to have any further connection with that case once they had turned in their facts. But they get a copy of the final report of the case and they view it and I know for a fact that they have—I'm certain of these cases that do not meet their pleasure—complained about the fact that the administrative official has not dealt summarily enough with the suspect.

So there are many facets to this and I would say that we have been complaining about this to the Internal Revenue Service for many years and have been urging them, during the periods of time which are now hitting the newspapers, to straighten themselves out, but they have adamantly refused to.

One of the things that most concerns us is that the Internal Revenue Service, in league with the Civil Service Commission, have invented this smoke screen of which I spoke, and that, for instance, was addressed to me back as far as 1966 by the then Internal Revenue Service Commissioner Sheldon Cohen, in which he said, "Vince, if we give these people this type of protection, every time one of our supervisors calls a man in for being tardy you will want a lawyer down there." And the Civil Service Commission has used this argument ever since and, as I understand it, Mr. Mondello of the Commission used that same argument here the other day.

Now this is an absolute and total smoke screen. We explained to Sheldon Cohen in 1966 and to his predecessors that this is not what we are talking about. They know this is not what we are talking about; that we are absolutely concerned about the violations and the kicking around that these people have been getting from these criminal investigators, and this is the absolute fact.

Mr. BEARD. Thank you very much for your time.

Mr. CONNERY. Thank you.

Mr. MINETA. The next witness to make a presentation today is Mr. Pellerzi, the General Counsel for the American Federation of Government Employees, accompanied by Mr. Lynch. It's nice to have you with us this morning.

STATEMENT OF L. M. PELLERZI, GENERAL COUNSEL, AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES, ACCOMPANIED BY
JAMES LYNCH

Mr. PELLERZI. Thank you, Mr. Mineta.

The American Federation of Government Employees, representing over 650,000 Federal employees, welcomes and appreciates the opportunity to testify in support of H.R. 1674.

This bill provides, among other things, that it shall be unlawful for any officer of an executive agency, or any person acting under his authority, to require or request any civilian employee serving in the same agency, who is under investigation for misconduct, to submit to interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice, if he so requests.

We strongly support this provision. It assures a Government employee of a basic element of fair treatment when his reputation, his livelihood, and the welfare of his family may be placed in jeopardy.

We have a few suggestions which we think will further strengthen this provision and we would like to present them briefly for your consideration.

(1) We suggest that section 1 be amended to apply to "any officer or employee." This would simply eliminate any ambiguities that might occasionally arise from the present wording of H.R. 1674 which applies only to "any officer"—or anyone acting under his authority. To restrict the prohibition to officer as defined in title 5 of the United States Code would not provide the full scope of protection which I believe is intended.

I might just say parenthetically, if your staff counsel looks at that definition I think they will understand that rather recondite statement, but it does not cover a great number of individuals in the executive branch who are acting in this area with official authority.

(2) We suggest also that section 1 be clarified to eliminate any inference that it applies solely to employees in the same agency as the particular officer requesting or requiring them to submit to investigative interrogation. It is equally important to insure the right of counsel when Federal law enforcement and security agents, Civil Service Commission investigators, or others outside the employee's own agency are conducting the investigation and the interrogation of the employee. We request that this provision be clearly made applicable to investigation, such as those in Hatch Act or security cases, employment suitability matters, or alleged falsification of employment applications, where the Civil Service Commission, the Federal Bureau of Investigation, or other Federal agencies, may have sole or concurrent jurisdiction and interrogate Federal employees in other agencies.

I'd like to add here parenthetically that we are speaking now in the context of civil cases, not criminal cases. I think the criminal law and the rules of the Supreme Court take care of the problems of counsel and I know of no great abuses in the civil service where criminal investigations are underway where the agents of the Government have failed to observe the *Miranda* rule and the procedures incident to the *Miranda* rule. So when we speak of the FBI conducting investigations, we are speaking of administrative investigations and the FBI does quite a few of those.

(3) We also recommend that it be made clear that section 1(a) does not, by implication, increase the authority for investigations or interrogations of Federal employees, but merely guarantees to an employee the right to counsel where the officer concerned already has valid authority to conduct the particular kind of investigation involved.

There may be, for example, cases involving possible criminal conduct where the employing agency should refer the matter to the Department of Justice for investigation. There may also be civil cases or disciplinary proceedings where the employee, under civil service regulations or negotiated grievance procedures, may have a right to request official charges in writing, to which he can respond in writing, before submitting to interrogation under oath.

We are not discussing the merits of these issues here but merely suggesting that it be made clear that H.R. 1674 does not, by implication, in any way, extend the existing scope of agency authority to investigate or interrogate employees.

(4) In order to insure that the right to counsel which section 1(a) of the bill seeks to provide is efficaciously administered, we believe it should be amended to require that the employee be specifically advised (a) that he is under investigation for misconduct; (b) of the precise nature of the alleged misconduct; (c) of the right to have counsel present at any interrogation; and, (d) of a reasonable amount of time to select counsel or other representative of his choice, before submitting to interrogation.

We believe that, unless the bill expressly requires that the employee be advised of these rights, many employees may, out of ignorance or fear, be deprived of the benefits which the bill seeks to provide.

Further, in order to insure that the safeguards provided will be observed in day-to-day governmental operations, the bill should provide that failure by the official investigator or interrogator to comply with such a requirement shall expressly invalidate any subsequent disciplinary action against the employee based on the investigation or interrogation involved. Further, in recognition of the importance of the right to counsel, a provision should be inserted providing for discipline of officers and employees who violate employee rights provided in section 1 of the bill.

I will skip section 2 and go to our comments on section 3 and go back to section 2 later, if I may.

(5) Under section 3, we propose that aggrieved employees be permitted to file complaints with the Attorney General of the United States, rather than with the U.S. Civil Service Commission; and that the Attorney General, rather than the Commission, be authorized to enforce rights provided in the bill and to issue implementing regulations.

The right to have counsel present during an investigative interrogation, which could lead to discipline, is a right that should be enforced by the principal legal officer of the United States and should be enforceable against the Civil Service Commission as well as other executive branch agencies.

Further, because the right to counsel is essentially a right related to the legal process, we believe an order of the Attorney General would be more acceptable and have more effectiveness than an order of the Civil Service Commission. If this suggestion is adopted we see

no need for the appeal provisions now provided in clause (3) of the proviso in section 3(b).

As we understand the bill, these provisions in section 3 would be separate from and not affect the employee's present right to appeal to the Civil Service Commission any disciplinary adverse action properly taken against him, or his right to arbitration if provided under a negotiated grievance procedure.

Let me say here, Mr. Mineta, if I may, that our suggestion that this matter be administered by the Attorney General instead of the Civil Service Commission is predicated upon the present structure and mission of the Civil Service Commission. We have proposed in earlier testimony before subcommittees of the full Committee last year that the Civil Service Commission be restructured to provide two commissioners for adjudication who would sit with the chairman of that commission and do the adjudicatory type matters that are now trusted to the Civil Service Commission.

The difficulty with the Commission as it is presently structured, as we see it, is you have three Commissioners who have the regulatory and administrative responsibilities for overseeing and administering a large number of personnel statutes and they also have adjudicatory functions and are often asked to sit in judgment on their own regulations which are, in effect, denying people proper process.

If the Committee, in its wisdom, is looking at restructuring the Civil Service Commission along the lines that would eliminate this problem, we would have absolutely no objection to having the Commission administer the right to counsel provisions of this bill; but without some restructuring of the Commission, we would suggest most strongly that this responsibility be placed with the Attorney General of the United States.

(6) We urge that section 4 of the bill, which provides that negotiated grievance procedures may be substituted for the section 3 procedures I have just mentioned, make it clear that any protections provided by the bill which are not incorporated into a negotiated grievance procedure, are preserved to the employee. For example, if agency management agrees to the authority of an arbitrator to overturn an improper agency disciplinary action, this should not prevent any employee of that agency from filing a complaint with the Attorney General or the Commission asking that his agency cease and desist from attempting to interrogate him without counsel being present, or that any records of improper interrogation be confiscated and destroyed. In short, agency management ought not be allowed to restrict the rights provided in the bill by refusing to conclude a negotiated agreement upon these rights.

(7) Finally, on this point, we suggest that the bill authorize the Attorney General or an arbitrator to award reasonable counsel fees and other legal costs to an employee against whom they find that an agency has taken an improper adverse action. (Back pay and the loss of other substantial benefits are already covered by statute, Comptroller General's decisions, and Commission regulations.)

Let me say parenthetically, in representing a number of employees who have been improperly proceeded against—and I say that because we have judicial vindication of that fact when we win the cases in court—the cost of attorney fees and the cost of representing these

employees is high. It often eats up a large chunk of the backpay award, and I don't regard that as justice.

If the agency has taken an improper action, the employee shouldn't have to give up a third of his backpay to have it restored.

(8) Section 1(b) of H.R. 1674 covers a second and quite different topic. It prohibits requiring or requesting an employee to make any report concerning any of his activities unless they are directly related to the performance of his official duties or unless there is reasonable cause to believe there is a conflict of interest.

The AFGE supports this provision of the bill, also. However, we recognize that this provision may be somewhat more controversial than the other provision of the bill guaranteeing the right to counsel, mainly because the executive branch already has a detailed Executive order, extensive Civil Service Commission regulations, and numerous individual agency regulations covering conflicts of interest, financial disclosure, conduct embarrassing to an agency, and outside employment. There are also criminal statutes covering a variety of kinds of conflict-of-interest in 18 U.S.C. 202 et seq.

Therefore, if this committee, in its judgment, determines that inclusion of this second provision in the bill would tend to delay passage of the guarantee of the right to counsel, the AFGE would not object to its separation from H.R. 1674. In that event, we would continue to support it either as a separate bill or as one of the numerous employee rights in the so-called "Ervin bill", S. 1688 in the last Congress. The Ervin bill had contained a provision identical to section 1(b) of H.R. 1674 ever since it passed the Senate as long ago as 1971. We take this position with the understanding that a bill similar to the Ervin bill will be introduced in this session of the Congress.

We hope that you will find these several suggestions helpful in your effort to develop and pass legislation guaranteeing these much needed right to Federal employees.

On behalf of the hundreds of thousands of employees represented by AFGE, we commend Mr. Daniels for introducing this bill and the chairman, Mr. White, for holding these hearings. These are significant efforts to insure that Federal employees get fair treatment in these and other matters, and I am personally gratified for the privilege of appearing here today to testify in support of this bill. I further thank you for your courtesy and will be most pleased to try to answer any questions you may have.

Mr. MINETA. In terms of housekeeping announcements, the House is going into session. What I would like to suggest is that we go ahead and ask Mr. Pellerzi some questions and then adjourn for about 15 minutes so that the committee members may respond to the quorum call. As I understand it, the tax bill conference report is not ready for consideration at 10 a.m. We will therefore be free to come back here and resume the committee meeting at that time.

Mr. Pellerzi, on page 2 of your testimony, you refer to employment suitability matters as one of the areas in which the right to counsel might apply.

Could I ask you to elaborate on this? It seems to me that this may be stretching the point a little bit, but I'd like to have you expand on that.

Mr. PELLERZI. Mr. Mineta, what that refers to are present Federal employees, not applicants, who are being investigated for another

position. This is a common occurrence in the Federal bureaucracy where an employee has moved to another position he sometimes has to undergo what they call a full field investigation by the FBI. At times derogatory information comes up.

There was a time when I was General Counsel of the Civil Service Commission when individuals in that position were not allowed counsel. I remember there was one situation where a lawyer was standing in the hall whose client was being interrogated in the room and he had to go outside in the hall to see his lawyer. We stopped that practice at that time, but there is no right, and we feel that a Federal employee who is being investigated and is subject to interrogation for suitability matters—and this gets into the security area, too—sexual conduct, criminal record, et cetera—should be entitled to counsel.

MR. MINETA. Mr. Pellerzi, the bill itself only applies to investigations that have to do with misconduct and not to the kind of investigation that you're referring to in terms of employment suitability for possible transfer or upward mobility. I wonder whether or not this was intended in the act itself.

MR. PELLERZI. Mr. Mineta, the action against the employee is taken on the basis of suitability. The adverse action is based on misconduct.

Let's take a hypothetical where a Federal employee is engaging in conduct off the job that does not relate to his job performance. He's taking annual leave or he's not taking annual leave during the lunch hour and he's engaging in some kind of illicit sexual liaison. This is an actual case. And he's then being investigated about that kind of misconduct because it deals with suitability for Government employment.

It's in that type of case that if the investigation is into his suitability and not into his job-related activities we think he ought to have counsel, too. The result for the Federal employee is the same. He's subject to eventual disciplinary action looking toward his removal or other discipline.

MR. MINETA. On page 5 you're talking about the conflict that might appear if the appeal went through the Attorney General, rather than the Civil Service Commission. Related to that, I am wondering, since the Commission itself is part of the executive branch, whether or not the designation of the Attorney General's Office to handle the Government case on appeal to the court would in fact amount to a conflict of interest if the fifth amendment aspect is adopted.

MR. PELLERZI. I don't think so. I think that can be handled structurally within the Department of Justice. The idea here is to get infused in the executive branch in its day-to-day operations an understanding and a commitment to the rule of law and to fairness in procedures.

At the present time, as you well know, Mr. Mineta, the Attorney General, the Office of the Assistant General Counsel for Legal Counsel, provides to agencies of the executive branch legal guidance and opinions at their request as to what should be done. They do this in the Freedom of Information Act at the present time. You will find in dealing with those problems that the perspective of the Department of Justice as to what should be released under the Freedom of Information Act, for example, is vastly different and much more liberal

than the normal perspective of some of the agencies being asked to release information.

It's with that concept in mind—that the Attorney General and the lawyers in the Justice Department are detached and aren't involved in this type of operation—that they should be the ones that advise the agencies of the executive branch, as they do in a great number of other instances, as to how they should proceed in these areas and, indeed, they do that with respect to the FBI at the present time. Moreover, the Civil Service Commission itself has in excess of 1,000 investigators conducting investigations and interrogations. I imagine 25 percent of the Civil Service Commission's staff is investigative. I question whether, because of its hybrid nature and its unsorted-out roles, due to the structure and the authority of the Commission, that this would be a wise thing to put in the Commission's jurisdiction.

Mr. MINETA. Thank you, Mr. Pellerzi.

Mr. Beard?

Mr. BEARD. On the transcript of the proceedings during the hearings, are they made public or are they distributed? Do you know if there's any type of black list situation as far as other agencies?

Mr. PELLERZI. In adverse actions you're speaking of, Mr. Beard?

Mr. BEARD. Right.

Mr. PELLERZI. Yes, sir. That was the *Fitzgerald* case, the famous *Fitzgerald* case. They tried to keep that private but that was opened up. Fitzgerald was the Air Force accountant who was disciplined and discharged, and he went to the Civil Service Commission for a hearing and those hearings were opened up.

Now internal grievance hearings are not. They can be kept private. The rule is that the individual involved can control that basically out of considerations of his own privacy. So if the individual involved in the charges objects to the public hearing, the Commission normally would respect that and have a private hearing out of consideration of privacy of the individual.

Mr. BEARD. So there have been no examples of, say, whether it be authorized or whatever, if there are questions regarding a man's suitability or whatever, that this is given to other agencies as far as maybe affecting the man in the future?

Mr. PELLERZI. I see. The standing rule in the investigative area is to confront the individual with unsavory suitability information. He's usually confronted with that. We are talking now in the investigative area. Yes; that's standard procedure to advise the individual that there is derogatory information in his file and what the general content of it is. They do not tell him where it comes from because of protection of investigative sources normally.

But if you are, for example, grade 12 Government employee of some talent and attractiveness and they want to give you a promotion to some rather significant position in an agency, you undergo usually another full field investigation, although you have been in the Government for years. There's a program which isn't adhered to or well administered at all that requires an update of the full field investigations of Federal employees I believe on a 5-year cycle, if memory serves me correctly. It isn't done. But there's nothing to prevent—in fact, your question, too, Mr. Mineta—there's nothing

to prevent this matter, again the suitability factors, from again confronting a Federal employee in his normal day-to-day employment.

Mr. BEARD. That's a 5-year cycle. As a member of Congress, we go through it every 2 years.

Mr. PELLERZI. You go through it a little differently, Mr. Beard.

Mr. BEARD. That's not including what Jack Anderson might do.

Mr. PELLERZI. There's just as much injustice as to what happens to you people, too, as well as the Federal employees, but that's the will of the people.

Mr. BEARD. I've heard that phrase before, too.

Thank you, Mr. Chairman.

Mr. MINETA. Mrs. Spellman?

Mrs. SPELLMAN. Sometimes it's just the will of a newspaper reporter.

Mr. PELLERZI. Sometimes.

Mrs. SPELLMAN. I'm seeing that at work in my State right now.

I shan't ask you questions because I think this is an excellent statement. I heartily agree with everything you have said in here.

The only question that I had initially was the question about the Attorney General, but you explained that so well; and your recommendation that employees be awarded reasonable counsel fees makes such good sense. I saw that in our Prince Georges County, where employees had really had to put out an enormous amount of money to defend themselves and in a couple of cases just couldn't do it. They just didn't have the wherewithal. Some of us got together and helped one employee because we felt it was important enough not only in his case but also to establish a policy. We are glad to say that the council then did agree to the passage of a provision which provides for such counsel fees.

I think this is an excellent statement and I'm real happy with it.

Mr. PELLERZI. Thank you, Mrs. Spellman, very much.

Mr. MINETA. Mr. Harris?

Mr. HARRIS. I want to compliment you on your statement, also. It's an area that I have had a particular interest in and it has appeared to me, not inconsistent with what you have said, that we may have to divide some of this up if we're going to get the legislation passed this time.

During the previous testimony, the point was made by the Civil Service Commission that any supervisor that's investigating an employee on some assorted minor infraction will be subjected to an untold number of procedural requirements to make just any sort of a minor investigation—since that investigation might lead to disciplinary action—and that this would be an undue burden to place on any manager or supervisor. Do you have any response to that?

Mr. PELLERZI. Yes, Mr. Harris. I didn't read your bill that way. I read the bill as involving investigation for misconduct and I think the intent, certainly as I read it, was more than the day-to-day interaction between first-line supervisors and employees concerning activities on the worksite.

It may be desirable to allay that type of misreading of the bill to adopt a minimum standard of disciplinary conduct where they are under investigation. The suggestion we made is that the bill require that the employee be advised of the nature of the discipline that could flow from it. It may be that you would put a floor in on the discipline, that any employee subject to an investigation that could

lead to discipline involving a suspension for more than 1 day or 3 days would have to be advised of this, and that the normal slapping on the wrist and the normal supervisory type of discredit markup for eventual annual evaluation of the employee is not the type of thing that we are concerned with.

Second, I would point out that the bill says counsel or a representative of his choice, and certainly as a labor union it's our obligation to represent the employees in the unit involved, and we would feel that the kinds of things that Mr. Mondello addressed are the kinds of things that don't involve attorneys necessarily, but involve shop stewards. That's what the shop steward is there for. That's what our union trains thousands of shop stewards for. We have them in every unit in the Government where we hold recognition and it would seem to me that good management would, under the policies enunciated in the executive branch for collective bargaining, be to have the union representative present, the shop steward. The previous witnesses in their statements talked about the Supreme Court case indicating what the private sector view of that is, and I think that the same general standard should apply in the public sector.

Mr. HARRIS. I think Mr. Mondello moderated a little bit on his reaction to the bill after we had some dialogue on it because this only applies when the employee actually requests counsel. If a supervisor walked up to an employee and said, "Were you smoking in the hall" and the employee said, "I demand counsel," it probably would be reason to dismiss him, and I don't think it's the amount of disciplinary action that he may be subject to eventually.

I think if there's any question—I'm not sure that there is—but if there's any question, it's a question of at what point does something become a formal interrogation as distinct from a simple inquiry, and I don't know whether that can be perfected in the bill or not. I just simply don't know. But I think it's that point, rather than how much discipline will eventually flow if in fact he's guilty, that is the dividing point.

Mr. PELLERZI. Mr. Harris, I think it may be a combination. If you go by the Miranda analogy, you get down to, in effect, custodial interrogation and you get down to the target of the investigation. In the context of civil procedures, civil procedures as opposed to criminal, I think the standard has to be one drawn in reference to the work environment and to civil-type procedures; but I hasten to add, and I think it's critically important to keep before the committee when you're dealing with the right to counsel in discipline of Federal employees, the loss of a Federal job is a life-long stigma. The suspension of a grade 12 employee for 2 or 3 weeks is equivalent to a misdemeanor fine that is seldom given in the criminal courts of this country. It's an \$800 or \$1,000 fine and you can go through some very serious misdemeanors in the criminal courts of this country and not come up with those kinds of fines, but they are handed out routinely in the Federal service without the right of counsel to the employee. I think it's a serious matter. I commend you again for dealing with it.

Mr. HARRIS. Thank you, Mr. Chairman.

Mr. MINETA. Thank you, Mr. Harris.

Mr. White?

Mr. WHITE. Thank you, Mr. Chairman.

I have been writing some language here trying to find a middle ground between the Government witnesses, the management witnesses, and the various employee representatives, so let me pose this just briefly and see if you feel that this is fair to the employees and to management.

If an employee who reasonably believes or is advised he's under investigation or possible disciplinary action requests counsel, he may request counsel or a representative, and any expressions by the employee to the investigators prior to such request shall not be used against him in any future disciplinary or criminal action: Meaning that if an employee is called in for interrogation—(at that moment it may be merely an inquiry, as is the illustration of when he walked up to a man who was one of them smoking in the ammunition dump). If the investigation proceeds to such a point that a reasonable man could reasonably believe he's under investigation or they tell him he's under investigation, he may say, "I request counsel" or "I request a representative," whether it be a union representative or whatever.

Now at that point, then it is established that he's possibly under investigation for disciplinary action. Any expression written or oral by him prior to that time may not be used for that disciplinary action or criminal action.

Now would that cover all the ground and avoid the complaints of the employers, superintendents, managers' position?

Mr. PELLERZI. Well, I understand the principle, Mr. White, that you're proceeding on. It's basically one of explicating everything that occurred before a certain point in a normal day-to-day process and when things get serious, then everything is barred prior to that and you have to start over.

Mr. WHITE. It's parallel to what happens in civilian life when police interrogate a man.

Mr. PELLERZI. Exactly. In our testimony we indicated that the bill should specifically provide that the employee be advised that he's under investigation. We are asking that you make that a requirement of your bill and he be advised of the nature of the offense, and at that point be further advised he has a right to counsel or a representative of his choice.

Now it seems to me that that approach that we suggested in the bill in everyday application does essentially what you're suggesting, Mr. White. What they are talking about is an employee who's smoking near an ammunition hazard, an explosive hazard or something, and the supervisor says, "Were you smoking over there, Charlie? Get away from there." They know Charlie. He's supervising Charlie every day. If Charlie has been a risk and today they just decide this is the last straw and they go over to Charlie and say, "Charlie, you're under investigation for misconduct. We are going to fire you because you have been smoking near the ammunition dump constantly," but if it's Charlie's first or second offense, they don't have to say that and they can still interrogate Charlie.

Mr. WHITE. Mr. Pellerzi, this language would give the employee more protection because a superintendent could be interrogating an employee gathering information on a very friendly, cunning basis, and never let the man know what he's driving at and get very incriminating evidence from the man and then say, "You're under investigation." So he's been denied counsel.

So what I'm trying to say in here is that anything prior to the time that he can reasonably believe he's under investigation and makes the request, or they inform him that he's under investigation and he makes a request, they would have to gather their evidence from other sources. Now they could use what he says as a lead to finding witnesses to determine his guilt, but they couldn't use what he says up to that point.

Mr. PELLERZI. I neglected, Mr. White, in my explanation of our position—I left out one crucial fact that answers the point that you're now making. That crucial point was that we suggested further that the bill be amended to say that if this warning is not made, that any disciplinary action taken is vitiated. So we're suggesting a procedure where management advises the employee that he's under investigation, tells him what the basic nature of the charges are, tells him that he's entitled to counsel, and if they fail to do that that any disciplinary action taken subsequently is vitiated based upon the information obtained.

I say that that gives management all of the supervisory discretion and all the managerial discretion it needs in managing the work force because I'll go back to the man smoking near the ammunition dump again—if it's Joe's first or second offense, you don't approach him with this kind of approach. You say, "Joe, quit smoking near the ammunition dump." But if it's Joe's third or fifth offense, you want to get rid of Joe because he's a work hazard, and then you say, "Joe, look, you have been doing this time and time again. You're now being investigated for misconduct and violation of regulations. You're entitled to counsel."

Mr. WHITE. That may not be as far as the Congress may want to go. You went beyond that. And I think that that would not be palatable to the Congress. However, I think some ground should exist and we'd be pleased to have your language.

Mr. PELLERZI. Mr. Chairman, we will be most happy to supply any assistance by way of language or drafting that you request and we will respond to any questions you may have.

Mr. MINETA. Thank you very much, Mr. Pellerzi.

At this time we have Mr. Whitney, the executive vice president of the National Association of Government Employees. Mr. Whitney, I'd like to welcome you to the subcommittee. I would like to have you introduce the gentleman who accompanies you.

**STATEMENT OF ALAN WHITNEY, EXECUTIVE VICE PRESIDENT,
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, ACCOMPANIED BY JAMES PRESSLER, ASSISTANT GENERAL COUNSEL**

Mr. WHITNEY. Thank you, Mr. Chairman.

I am accompanied today by Mr. James Pressler, assistant general counsel of our organization.

At the outset I would like to thank you and the members of the subcommittee for granting us the opportunity today to set forth our views on Congressman Daniels' bill, H.R. 1674, to guarantee Federal civilian workers the right to representation during predisciplinary interrogations and to prohibit requiring employees to make reports regarding their offduty activities which are not related to their governmental duties.

In our view, this bill and these hearings come at a most appropriate time in light of the recent Supreme Court decision in the case of *NLRB v. Weingarten*. In its February 19, 1975, decision, the Court held that an employer violated section 8(a) (1) of the National Labor Relations Act because it interfered with, restrained and coerced an employee in the exercise of her right to "engage in * * * concerted activities for mutual aid or protection * * *" under the National Labor Relations Act.

The specific violation on the employer's part occurred when it denied the employee's request for the presence of her union representative at an investigative interview which the employer reasonably believed would result in disciplinary action.

It is inevitable that this decision and the reasoning upon which it is based will have an impact upon Federal sector employer-employee relations, particularly where discipline is contemplated.

To some extent, an inroad of sorts already exists in connection with the case of Louisville Naval Ordnance Station, A/SLMR No. 400, June 21, 1974.

In this case, the Assistant Secretary of Labor for Labor-Management Relations held that under section 10(e) of Executive Order 11491, which parenthetically governs labor relations proceedings in the Federal service, an employee has the right to have a union representative present during a grievance hearing or "formal discussion" arising within the context of an agency grievance procedure. Adverse action hearings also were included.

However, this decision did not address specifically the question of preliminary interrogations or interviews, and it is presently on appeal to the Federal Labor Relations Council. But at least it demonstrates some movement in the direction of the Weingarten rationale in the Federal sector.

There is language in the Weingarten opinion which, I believe, crystallizes the basic problem confronting an individual employee in an interrogation setting. As aptly stated by Mr. Justice Brennan:

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 circumstances * * *

Skeptics may ask why a Federal employee should be entitled to representation at these early investigative stages of a disciplinary proceeding. These are administrative, not criminal, matters; therefore, one might suppose that the strictures of the *Miranda* ruling need not apply to so-called custodial interviews arising in the context of an employer-employee relationship.

A half-century ago, this philosophy might well have prevailed. At that time, the courts generally held that a public employee had no "right" to his job. Fortunately, however, the "right versus privilege" distinction has been successfully reversed. The Supreme Court has clearly recognized that a public employee has a property interest in his job. And he cannot legally be deprived of his livelihood without due process of law. Federal employees are included within the ambit of these principles.

Just as a suspected criminal is protected from incriminating himself during an investigatory interview without representation, a public employee should be similarly protected, especially when his job might

be jeopardized at a later date. Since the employee has a property interest in his job, there is no rational reason to prevent him from having the additional procedural safeguard of representation at the first stage of a situation where discipline can reasonably be expected to follow.

A Federal employee should not be made to hasten his way to the administrative "capital punishment" of removal from his job by compelling adverse statements from him under the guise of investigation of allegations.

A careful examination of such situations reveals that there is absolutely no prejudice to the Government if such representation is permitted. To the contrary, the extension of such protection to the employee would work to the benefit of his agency as well.

As Mr. Justice Brennan noted in *Weingarten*:

A knowledgeable representative (or counsel) 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 his presence need not transform the interview into an adversary contest ... (43 U.S.L.W. at 4279).

The NAGE legal staff has encountered a number of adverse action situations where employees were called in preliminarily by their supervisors and confronted with complaints or statements about their conduct. In a number of cases, the employees were asked or directed to give immediate responses to the allegations.

In one case in which the NAGE was involved a Veterans' Administration nursing assistant was confronted with statements from patients alleging that he physically and verbally abused a patient. He requested representation but was denied on the grounds that the interview was not part of the formal adverse action procedure, that is, no charges had yet been brought against him.

Compelled to give a statement, the employee had the presence of mind to deny the allegations, but was forced to admit he was in the room on the night in question.

This employee could have faced criminal or civil proceedings arising out of the alleged abuse incident. While he did not have to face legal action, he was removed from his job. Subsequently, however, his removal was reversed based on lack of evidence.

Such instances as these, we submit, justify our contention that management should not be permitted to confront an unrepresented employee and attempt to extract incriminating evidence from his own lips.

We are opposed to the language in section 5 of the bill which, in part, would allow an arbitrator's decision to be pleaded as a bar to court action under the proposed law. There are, unfortunately, instances where an arbitrator does not carefully address the issues before him or bases his decision on the wrong facts, interpretation of the law, and so forth.

At the most, an arbitrator's award should only be allowed to be introduced as evidence in the court action, with the court according whatever weight it wants to the arbitrator's ruling. In no event should the existence of an arbitrator's decision be permitted to deny the employee his statutory rights.

With regard to the last substantive area of H.R. 1674, the NAGE fully supports the proscription of any agency inquiry into any area of an employee's life which is unrelated to the performance of his duties and responsibilities as a Federal employee.

It is our position that any agency management official who attempts to encroach upon the private and personal activities of those subordinate to him should be subject to the strictest disciplinary proceedings; provided, of course, that he is accorded the right to counsel or other representative during any preliminary interrogation which might occur.

That concludes my prepared statement, Mr. Chairman. I believe Mr. Pressler has a couple of additional points he wanted to briefly address himself to.

Mr. PRESSLER. I'd just like to say one thing. There's a lot of talk about the analogy to *Miranda*. I think one thing that hasn't been brought out that's pretty important is that the problems that stem from *Miranda*, a great deal of those, have to do with the question of when the defendant or potential defendant has to be informed of his right to representation.

There is no such provision for this in this bill. He does not have to be told of his right to representation. It merely exists if he requests it and it's my personal feeling that there will be a great number of occasions where he won't even request the right to counsel. It's just the bare right that he should be afforded, if he does request it.

Mr. MINETA. Thank you, Mr. Pressler.

Mr. Whitney, I would like to thank you for your fine testimony.

Following up on what Mr. Pressler just mentioned, at what point can it be reasonably expected that disciplinary action might follow, and therefore, in anticipation of that, we ought to provide for counsel? How would we be able to really determine that? At what stage in an investigation might that be?

Mr. PRESSLER. This is the same area of concern that's been the subject of considerable number of problems in *Miranda*. Exactly when does this custodial interrogation actually begin? It's been defined somewhat better since the *Miranda* decision came down. It's still a very nebulous area and it should continue to be so because it's that type of situation that you just can't define.

However, the Supreme Court said in the *Weingarten* case that the situation calls for this right of representation when the employee reasonably fears that disciplinary action might follow. Now just when that point will be, I would imagine will be a matter that would only come with time and court decisions.

Mr. WHITNEY. It seems that that point will be defined through experience and evolution. It seems that that point is going to be at whatever stage the employee articulates an expectation of discipline.

Mr. MINETA. Before some die is cast as to the direction that the investigation is starting to take.

Mr. PRESSLER. I wouldn't suspect that there would be a terrible amount of activity, investigatory activity, before it's apparent that this employee may face disciplinary action, at which case it may be an automatic kind of thing that calls for this representation.

Mr. MINETA. Mr. Connery had indicated earlier that usually the investigation is continuing, and by the time they get to talking to the employee that the die has in fact already been cast.

Mr. WHITNEY. That's often the case, and for whatever it's worth, I think it is worth noting that Mr. Connery's particular constituency in the IRS has very special problems attached to it. His organization probably experiences much more or has many more problems in this

area than almost any other organization representing Federal employees.

Mr. MINETA. I understand that the Supreme Court ruled yesterday in some way changing its original ruling in the *Miranda* case. I am not really that familiar with what the ruling was yesterday.

Is there anything in that decision which affect consideration of what's in H.R. 1674?

Mr. PRESSLER. I'm not familiar with the ruling that was handed down yesterday regarding *Miranda*. I haven't seen it yet, so I really can't comment on it.

I suspect that it would be some type of watering down of *Miranda*. I don't think it would abrogate any of *Miranda's* strictures at this time. It would be just a question of lessening the strict requirements that were set down by *Miranda*.

Mr. WHITNEY. I'm not sure I'm very clear on the point, but what I can recall from having heard about it, it seems this most recent decision somehow relates to the use of statements which might have been made voluntarily by a suspect prior to the granting of a *Miranda* warning, the use of those statements at some subsequent point in legal action, but I'm really not sure how it would relate to this.

Mr. MINETA. Thank you, Mr. Whitney and Mr. Pressler.

Mrs. Spellman?

Mrs. SPELLMAN. The three of you have really put your finger on the one area that concerns me, and that is at what subsequent point? There could be, as earlier discussion brought out, opportunities for discussion with an employee, the normal kind of discussion in the course of the day and yet that could be leading to entrapment actually. So, that that is an area, I think, requires some real consideration.

When we say that at the time the employee feels he needs an attorney that might be the turning point. The employee may be intimidated at that point, too, so that he feels that, "Maybe if I don't say anything about it, it will go away," and he gets further and further into it.

So it does seem as though there needs to be some protection, but I don't have the answer just where it ought to be.

Mr. WHITNEY. I suspect part of the answer is going to be an educational problem. I think if this bill is enacted into law it's going to be incumbent upon groups like my own and Mr. Connery's and Mr. Pellerzi's to insure that the Government work force is aware, very thoroughly aware, of the existence of this new protection and to do all that we can to cajole, persuade, and enlighten them as to the protection it provides, and to ask them to be certain to take advantage of it when such circumstances arise.

I sense, having listened to previous testimony, that most of the attention has been directed toward the provision of legal representation, counsel, in such situations. I suspect that in actual practice we will find that much more of our experience under this statute would fall under the more mundane or work-a-day kind of relationship where a union steward is present to accompany an employee into such an interrogation because we have many, many more stewards in our organization than we have attorneys.

This is true of all the other organizations which also, I think, gets around to the point that was raised by Mr. Mondello; if the Commission and the executive branch are afraid that they are suddenly going to be inundated by requests for legal representation at some stage,

it simply isn't going to happen because most Federal employees are represented by Federal unions. It is a Federal union's responsibility to provide representation in such circumstances and our own internal structure establishes that the representation at these early stages is provided at the working level by the stewards. This is the kind of representation that will be provided.

Mr. PRESSLER. May I just say one thing briefly? My own experience has demonstrated the corrections of Mr. Whitney's statement. The overwhelming majority of these situations involve a problem where an employee asks for the counsel of his shop steward or someone higher up in the union organization, so to speak. We don't get called in on these problems unless it gets substantially more complicated.

So that the situation, as this bill is presented, the situation would almost exclusively call for having a union representative as counsel to this person instead of a full-fledged attorney.

Mrs. SPELLMAN. How does it work today? An employee at any time may say, "I'd like to have my union representative with me?"

Mr. WHITNEY. Actually, it doesn't work that way. That's much of the reason why this legislation is needed. He may ask at any time, but his agency may deny him that right until such time as they have framed formal charges against him; but as so many people have already pointed out, by that time the die is already cast.

Mrs. SPELLMAN. Once this bill is passed and there is education about it, if it isn't spelled out at which point the attorney might be brought in or a representative of a union brought in, are we going to have people who don't want to talk to anybody unless they are represented? Are we going to have employees who will say to their supervisors at almost anything a supervisor might say, "Hey, Gladys, that was a dumb thing you did," and I would say, "I don't want to talk about it until I have an attorney with me." Are we going to run into that kind of thing?

Mr. WHITNEY. I really don't think so because even under the bill as drafted, under the terms of the legislation, Gladys would not be entitled to representation at that point, and I think just as we are going to educate our workers, I'm sure the agencies and departments are going to be educating their management officials as to how this bill would apply to them and what discretion they have and what the employee's entitlements are; and I'm sure any supervisor worth his salt, upon receipt of that kind of request, would advise the employee that it simply isn't available to him at that point.

Mrs. SPELLMAN. Thank you.

Mr. MINETA. Thank you very much, Mrs. Spellman.

Mr. HARRIS?

Mr. HARRIS. I have no questions, Mr. Chairman.

Mr. MINETA. Mr. White?

Mr. WHITE. No questions. Thank you, Mr. Chairman.

Mr. MINETA. Mr. Whitney, thank you very much for having presented us this testimony. I would like to commend you and your staff for the testimony and the way you have outlined it in citing your cases. This has made it very clear and concise to all of us. We appreciate it very much.

Mr. WHITNEY. Thank you, sir.

Mr. MINETA. Anything else to come before the committee at this time? Otherwise, we stand adjourned until April 8.

[Whereupon, at 10:30 a.m., the hearing was adjourned.]

RIGHT TO COUNSEL DURING INTERROGATIONS

TUESDAY, APRIL 8, 1975

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON RETIREMENT AND EMPLOYEE BENEFITS,
Washington, D.C.

The committee met at 9:05 a.m. in room 219, Cannon House Office Building, Hon. Richard C. White (chairman of the subcommittee) presiding.

Mr. WHITE. The subcommittee will come to order.

The subcommittee has convened this morning to continue hearings on H.R. 1674.

H.R. 1674 deals with an alleged inequity in our Civil Service system dealing with the protection of a Civil Service employee's individual rights. As I have said on many occasions before, a Federal Civil Service employee not only expects, but has the right to the same protection of his individual rights as his counterpart has in private industry.

We are privileged this morning to first hear from the bill's sponsor, Congressman Dominick V. Daniels of New Jersey.

Mr. Daniels, if you will proceed, sir.

STATEMENT OF HON. DOMINICK V. DANIELS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. DANIELS. Thank you, Mr. Chairman. I would like to first thank you and the other members of the committee for the opportunity to testify here this morning in support of my bill, H.R. 1674, which I consider to be very important.

Government employees have been the victims of a patriarchal and paternalistic system which leaves them no protection whatever from superiors who would discipline them for actions in which they may or may not have engaged or which may not even be related to their work.

H.R. 1674 provides, among other things, that it shall be unlawful for any officer of any executive agency or any person acting under his authority to require or request any civil employee serving in the same agency who is under investigation for misconduct to submit to interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice if he so requests.

My bill also prohibits requiring employees to make reports regarding their off-duty activities which are not related to their governmental duties.

H.R. 1674 seeks to provide to Federal employees the same right to protection at disciplinary proceedings now enjoyed by employees in the private sector. It is not the intent of the bill to require counsel or

representation in every run-of-the-mill case or any shop conversation with a superior who may be engaged in corrective action with an employee.

It is the intent of the bill, however, to protect an employee in disciplinary proceedings, whatever their form, which the employee reasonably fears might lead to disciplinary action.

I am aware that this is not the standard which presently appears in the bill. But on restudying H.R. 1674 in light of the Weingarten case in which the Supreme Court approved that standard, I believe that the subcommittee should employ the standard in its markup.

The public record is replete with instances of employees having been disciplined for frequenting establishments or being seen in the company of persons their superiors did not approve of. We know of cases in which the interrogation process itself, the threat of publicity, and the threat of attorney's fees have been used to arbitrarily coerce employees into resigning from the Federal service regardless of the quality of their work.

In many instances, employees have been suspended from work after signing statements made during long interrogations without benefit of counsel or other assistance. Such suspensions, as has been already noted, are no different than fines levied by a criminal court, with one exception.

In the case of the courts, the law provides the protections of due process, the most basic of which are lacking in Civil Service interrogations.

I see little difference between the disciplinary proceedings of the Civil Service Commission and the star chamber proceedings of 16th and 17th Century England. Like star chamber procedures, the Civil Service Commission's procedures are secret, they are arbitrary, and they are often harsh.

Mr. Chairman, I have reviewed the record and am shocked at the attitude of the Civil Service Commission toward this bill. Mr. Anthony L. Mondello, General Counsel of the Commission, on page 12 of the transcript, states that he "Frankly used to believe that Congress passed legislation only to satisfy a need that showed up. He doesn't know of any demonstrated need for this legislation."

Mr. Mondello suggests that we have introduced this bill to "protect the guilty."

He also states that "In every situation where employees have a right to representation by counsel, our regulations state it."

Mr. Chairman, I can imagine no better language to illustrate an arbitrary attitude on the part of the Civil Service Commission, if not contempt, for employees rights. Mr. Mondello's testimony clearly indicates that it is the Commission's position that whatever rights accrue to employees of the Federal Service, these rights are derived from Civil Service regulations as if by divine right.

I find that attitude reprehensible. Employees of the Federal Service do not remove themselves from the basic protections of the Constitution, of simple justice or of recognized standards of 20th century human rights merely by virtue of their acceptance of employment by the Federal Government.

I am also unhappy, Mr. Chairman, that the General Counsel of the Civil Service Commission has chosen to misadvise the subcom-

mittee as to the holding by the Supreme Court in *National Labor Relations Board vs. Weingarten*.

The *Weingarten* case, of course, is not controlling as to Federal employees. The case was restricted to the National Labor Relations Act which guarantees employees the right to "engage in . . . concerned activities for . . . mutual aid for protection. . . ."

Mr. Mondello states on page 6 of the transcript that *Weingarten* "stands for the proposition that where summary discipline is immediately impending, in a context where lie detectors and special security investigators are used and the sole question remaining is 'whether certain conduct deserves discipline,' then the employee may request the presence of counsel."

Weingarten stands for no such restrictive principle, and I am shocked that Mr. Mondello would so state. Indeed, the court specifically rejected the interpretation Mr. Mondello puts on that case.

Rather, it upheld the National Labor Relations Board's clear holding that an employee was entitled to counsel or representation at an investigatory interview which he "reasonably feared might result in disciplinary action."

Thus, Mr. Chairman, nothing in the Supreme Court's holding even remotely resembles the characterization of the opinion suggested by the Civil Service Commission General Counsel.

Clearly, *Weingarten* stands for the principle that an employee's right to assistance comes into play when he, and he alone reasonably fears that an interview may result in discipline.

The court's language is broad and liberal. It does not even require that the interview be one which must result in discipline. It does not even set standards for the form of interview except that it may result in discipline.

The only exceptions are "Run-of-the-mill shop-floor conversations" which are corrective and which would not lead to disciplinary measures. I fail to understand, therefore, why the General Counsel would even suggest his parade of horrors should the bill be passed.

Neither does *Weingarten* rule that the employee be aware of the form of interview in which he is asked to take part nor that it even be a formal interview with the usual inquisitorial trappings.

The court's decision sensibly provides a "reasonable man" standard. It is the employee himself, not a regulation of the company—or in this case the Commission—nor even of the National Labor Relations Board or the court which brings the right into play. It is the reasonable fear of the employee himself which activates the right.

Mr. Chairman, I realize that I have dwelt on the *Weingarten* case even though it is not controlling. Even though it does not control, it evidences a philosophy that speaks directly to the issue before us.

Both the National Labor Relations Board, a body with four decades of experience and expertise in the field of labor relations, as well as the Supreme Court of the United States, a branch of Government with almost 200 years of experience concerned with individual liberties, have held that where there is a collective bargaining agreement, the right to counsel is a right to which employees are entitled and may be exercised at the reasonable discretion of the employee.

It is reasonable and proper that we provide those same rights to Federal employees.

There has been no testimony before this subcommittee which makes any rational argument against our extending this most basic protection to employees of the Federal Government. Instead, we have been presented with a falacious parade of horrors specifically rejected by the National Labor Relations Board and the Supreme Court.

We are offered arguments which are supported only by an 18th Century master-servant philosophy of labor relations rejected long ago by all three branches of our Government. I urge that we likewise reject the arguments and provide to Federal employees the opportunity to protect themselves.

Mr. Chairman, this morning before this hearing commenced, I met Mr. Patrick J. Nilan, the legislative director of the American Postal Workers Union, AFL-CIO, who handed me a letter which he would like to be made part of the record. The letter is addressed to me and is dated April 7, 1975.

I will not read it in full, but I would like to point out that the gist of the letter is that the American Postal Union as well as the other postal unions representing the postal employees in their collective bargaining rights preferred not to be included within this bill. They feel that under the terms of their agreement with the Postal Service, they and the other unions representing all the postal employees protect them at all these grievance hearings, and there is no necessity for this bill so far as they are concerned.

So, therefore, I offer the letter.

Mr. WHITE. Without objection, the letter addressed to Mr. Daniels, dated April 7, 1975, from Mr. Patrick J. Nilan will be included in the record at this point.

There is no objection; it is so ordered.

[The letter from Patrick J. Nilan follows:]

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Washington, D.C., April 7, 1975.

HON. DOMINICK V. DANIELS, M.C.,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN DANIELS: I am writing in regard to H.R. 1674 which you introduced in the House of Representatives on January 20, 1975 and which is now the subject of hearings before the Subcommittee on Retirement and Employee Benefits of the Committee on Post Office & Civil Service. While we commend you for sponsoring this legislation, we do want to make certain that the bill does not apply to the United States Postal Service Employee and Labor Organizations thereof.

It appears that your legislation does not address itself to the United States Postal Service and we prefer not to be included within the bill. However, if necessary we suggest specific language in the final draft of H.R. 1674 to accomplish this exclusion.

It is our opinion that not only the American Postal Workers Union but the three other labor organizations designated as the exclusive bargaining representatives within the United States Postal Service would be in agreement on this exclusion. I say this because we have a negotiated national contract with the United States Postal Service which requires these unions to represent all employees regardless of membership within their respective bargaining jurisdiction. We believe our negotiated contract and the grievance procedures contained therein protects all postal workers without the need of any further legislative consideration in this area.

If you and your colleagues on the Retirement and Employee Benefits Subcommittee deem it necessary we shall be happy to provide a more detailed statement in support of the recommendation outlined in this letter.

With best wishes, I am

Sincerely yours,

PATRICK J. NILAN, *Legislative Director.*

Mr. DANIELS. I want to thank you, Mr. Chairman. That concludes my testimony.

Mr. WHITE. Thank you, Mr. Daniels.

I want to ask just a few questions, if I may. It occurs to me that your bill has a great deal of justice inherent in its terms; that certainly an employee should not be brought into a supervisor's office and interrogated by those who are very adept at questioning and possibly place himself in jeopardy in his job and possibly in his liberty if the offense would so merit without some opportunity to be advised by counsel. And so I think to that extent, certainly, you have provided in your bill.

Now, the question that occurs to me is this: If this bill is amended to track the *Weingarten* language, I am not certain that we are really doing anything new in assisting the employee. Because the court has already ruled that the test of reasonable fear is his right. And that is case law which becomes a body of law.

Now, to go one step further, to give the employee a little bit more protection, it occurs to me that we might amend the bill in this nature—and I will see what you think about this—and I had counsel draft some language of a similar line. This is very rough, you understand. It would be something of this nature:

Subsection 7171, right to representation during interrogation:

(a) An employee of an executive agency or a commissioned or warrant officer of the uniformed services may not require or request or attempt to require or request an employee of an executive agency who is under investigation for misconduct which could lead to disciplinary action such as suspension, removal or reduction in rank or pay, to submit to interrogation unless the employee or commissioned or warrant officer has advised the employee in writing:

- (1) that the employee is under investigation for misconduct;
- (2) of the specific nature of the employee's alleged misconduct;
- (3) of the employee's right if he so elects to have an attorney or other representative of his choice present during the interrogation; and
- (4) of the employee's right to have a reasonable amount of time to select an attorney or other representative of his choice before submitting to interrogation.

The employee shall acknowledge in writing the fact that he has been advised in accordance with the provisions of this subsection.

There is a little bit further, if I may.

Mr. DANIELS. I understand what you are about to tell me. Apparently, you are following the philosophy of the decision in the *Miranda* case that you advise the employee—or in the *Miranda* case of the defendant—in his constitutional rights, what he has been charged with.

Mr. WHITE. But I go further than that.

Mr. DANIELS. I realize that.

Mr. WHITE. But in my subsequent language—I do not spot it off-hand in here—the subsequent idea I would incorporate with that would be that any testimony or evidence derived from the person that is being interrogated prior to submitting this warning or advice in writing could not be used in evidence against him in a disciplinary action.

In other words, if a person were called in on merely an inquiry and asked, What were you all doing out there? so on and so forth, whatever he says at that time could not be used against him.

This might be proper supervisory inquiry into the operation and management of his particular jurisdiction. But if it gets serious enough, even if the person is not intelligent enough to understand that he is under real interrogation for disciplinary action, or the interrogators are so skillful that he cannot reasonably otherwise believe, which can happen, too, that he is still protected.

Now, in other words, I am not leaving it to the quantum of the individual himself because that varies from individual to individual and from finesse to finesse, but it is a question of whether or not the man has been given the warning and everything prior to that time would be exonerated from evidence against him.

Mr. DANIELS. Mr. Chairman, I entirely agree with your thinking on the subject matter, and I would support such an amendment to the bill.

Mr. WHITE. Thank you, sir. Now, there is one other question. The CIA and some other agencies—all of the intelligence groups—have suggested that they be excluded from this particular bill.

Now, the amendment that was drafted by counsel indicated that such groups like CIA, NSA, FBI, should contemplate that the employee should bring only an employee of that particular agency so that the security would not be exposed to public view.

Would it be better, do you think, to adopt language where the agency would be exclusive within itself in representation or would it be better just to exclude them totally from this particular law or to treat them no differently than any other?

Mr. DANIELS. Well, that does raise a problem as to the question of security. I certainly would want to protect governmental agencies in investigations and not be compelled to divulge information which might bear upon the safety and the protection of the American people as a whole.

I have not given that provision sufficient consideration, but it is a matter, I think, that we should carefully consider before the markup of the bill.

At least, we ought to have a round of discussion among the members of the Committee to see what is best.

Mr. WHITE. Thank you very much, Mr. Daniels.

Mr. HARRIS?

Mr. HARRIS. I appreciate very much your testimony, Mr. Daniels. It helps me a great deal to understand the thrust of the legislation the concept of which I have supported.

I am afraid that the legislation may get so involved as to jeopardize its chances of getting signed into law. And I have had something of a simplistic view of the proceedings which simply said the employees who wanted to have an adviser with them during questions ought to have that right protected.

It seems to me now we are talking about going one step further and putting on to the supervisor a rather stringent requirement that he go through a *Miranda* type of injunction to the employee any time he starts questioning him about his conduct.

I wondered if you had any fear if maybe we make this requirement too elaborate, we will jeopardize the possibility of—

Mr. DANIELS. I don't think so, Mr. Harris, for this reason: Presently in the Postal Service, and it has been the practice in the Postal Service for years, when a man was charged with a grievance, he be

served with a notice as to the nature of the grievance, given sufficient time to respond to it, and have the right to appear in person or to just submit the facts for the record. And then, a decision would be made on that basis.

So the proposal suggested by the Chairman, Mr. White, is not an unusual proposal. And I do not think it would be imposing too much of a responsibility or too much work or labor upon any agency of the Government.

Mr. WHITE. Mr. Mineta?

Mr. MINETA. I have no questions, Mr. Chairman.

Mr. WHITE. Before I go to Mr. Taylor, I might mention one thing. Actually, Mr. Daniels, I misled you a little bit here without intention that you do make some type of arrangement for the CIA, NSA, and FBI in your bill that they should bring only agents.

But the other feature as to whether to exclude or not would be something we would have to consider. I think they are going to come and ask the committee for this type of action.

Mr. Taylor?

Mr. TAYLOR. I have no questions.

Mr. WHITE. Mr. Daniels, thank you so much for appearing before us today.

The next witness is Mr. John W. White, Director of Legislation. National Alliance of Postal and Federal Employees, accompanied by Mr. Wesley Young, Vice President, and Erie R. Doyle, Labor Relations Director.

And, Mr. White, you have been here any number of times, and you know how we proceed. That constitutes you as a veteran. So if you would like to proceed, sir.

STATEMENT OF JOHN W. WHITE, LEGISLATIVE DIRECTOR, THE NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES; ACCOMPANIED BY WESLEY YOUNG, VICE PRESIDENT, ERIE R. DOYLE, LABOR RELATIONS DIRECTOR, JACQUELINE MOORE, EDITOR, AND TOMMY WILSON, PRESIDENT, LOCAL 202

Mr. JOHN WHITE. Mr. Chairman, with your permission, I would like to read the statement in its entirety instead of summarizing it.

Mr. WHITE. You may do that.

Mr. JOHN WHITE. Mr. Chairman and distinguished members of the subcommittee, I am John W. White, legislative director of the National Alliance of Postal and Federal Employees, a national independent industrial union which represents postal employees in all crafts and Federal employees in all agencies.

I am accompanied this morning by Vice President Wesley Young of Chicago, Ill., Miss Jacqueline Moore, our national editor, Mr. Tommy Wilson, president, Washington Local 202, and labor relations director, Erie R. Doyle.

Mr. Chairman, you and the members of the committee are to be commended because of the manner in which you have scheduled and successfully held 9 a.m. hearings with frequency and of short duration. Such committee action in the early days of the 94th Congress is reassuring to those of us who were a part of the struggle to maintain

the vital jurisdiction of the Committee on Post Office and Civil Service in the House of Representatives over postal and Federal employees.

The opportunity to appear before you today to testify briefly in general support of H.R. 1674, "A bill to guarantee to civilian employees of the executive branch of the U.S. Government the right to have a counsel or a representative of his choice present during interrogations which may lead to disciplinary actions and to prevent unwarranted reports from employees concerning their private life," is deeply appreciated.

The highly esteemed member of the Committee on Post Office and Civil Service, Mr. Dominick V. Daniels, is commended because of his perception of the problem and the empathy and courage which caused him to introduce the legislation which we now know as H.R. 1674.

Mr. Chairman, as we see the bill, it has been drafted to meet a compelling need in the areas of employee-employer relations, individual dignity and freedom, as well as the invasion of the privacy of American citizens who, incidentally, have become employees of the Federal Government.

We strongly support H.R. 1674, but respectfully suggest one or two changes which we believe would strengthen the proposed act.

It is recommended that the language which defines the bill's purpose be clarified to include postal employees in the meaning of "employees of the executive branch of the U.S. Government" or that the words "and postal employees" be added to the bill's purpose and coverage.

Mr. Chairman, with the agreement of the Chair, I would like to deviate just a moment from the prepared text. It was observed this morning that a stroke of strategy was employed. The introduction of the bill was approved by the members of the AFL-CIO. And I am not making an attack on them, although they are out to destroy us as an independent union.

They were scheduled to testify this morning—a member of one of the crafts—the national president, but strategy, apparently dictated they should withdraw, and they did.

The continuing crisis in the U.S. Postal Service challenges the U.S. Congress to more forcefully accept its constitutional responsibility to cause effective mail service to be provided to all of the American people. By enactment of the Postal Reorganization Act of 1970, Congress accepted the oversight responsibility of the L.S.P.S.

The unabated criticism of postal service to the people, the increased cost of postage, the growing U.S.P.S. deficit and the deepening dips into the U.S. Treasury—the citizens' money—to subsidize the 4-year-old U.S.P.S. seemingly give the Congress a duty and a right to legislate on all matters concerning the U.S. Postal Service.

It may be said that postal employees are de facto Federal employees.

Postal employees need the same protection as all other Federal employees, and it is suggested that appropriate language should be included in this bill to achieve this result.

Section I of H.R. 1674 sets forth a criterion which guarantees a Federal employee the right to counsel or a representative of the individual's choice before the worker may be required "to submit to interrogation which could lead to disciplinary action."

At the same time, this provision is qualified by the following:

Provided, however, that a civilian employee of the United States serving in the Central Intelligence Agency or the National Security Agency may be accompanied only by a person of his choice who serves in the agency in which the employee serves, or by a counsel who has been approved by the agency for access to the information involved.

The two exceptions involving the CIA and the NSA too narrowly restrict an employee's right to choose a representative who may possess independence, integrity and courage. Such a counselor or representative may have the highest qualifications as a loyal American citizen; such an individual may pose absolutely no threat to our national security, but such a person could be barred from the representation proceedings if the two exceptions above are retained in the bill.

The very qualities which would make a representative or counselor attractive to a tormented worker could cause rejection by the agency. Such denials may deprive an employee of a meaningful opportunity to protect his or her job rights.

An employee involved in controversy may find it extremely difficult to lay a hand on a willing representative in the CIA or the NSA because of unusual and evil internal pressures which may oftentimes exist under the trumped-up pretext of national security. Such an individual must be allowed to choose a representative or counselor minus the suggested restrictions if the basic intent of the legislation is to avoid unnecessary enfeeblement.

Section 4 states in part: "Nothing contained in section 3 shall be construed to prevent the establishment of grievance procedures negotiated by labor organizations and agency managers which may be a substitute to the procedures provided in section 3."

The inclusion of language in section 4 which would permit a negotiated procedure between a labor organization and agency managers to replace the employee rights and protections contained in section 3 seems negative in its present form. If this provision could be amended so as to provide an additional means of action for employees, it would then become more positive and acceptable as a vehicle designed to achieve the primary goals of H.R. 1674.

The fundamental individual rights of Federal and postal employees must not become a pawn at a bargaining table where such rights may be diluted, ignored, watered down, or conditioned on union membership or other such extraneous factors as race, national origin, sex, age, et cetera.

The committee is urged to reject the substitution of a negotiated procedure for the worker protections contained in section 3.

Section 5 provides that: "any party aggrieved by any final determination or order under the provisions of this act may institute, in the district court of the United States for the judicial district, wherein the violation of this act occurred * * *, a civil action for the review of such determination or order. In any such order, the court shall have jurisdiction to

"(1) affirm, modify, or set aside any determination or order which is under review,

"(2) to set aside any finding, conclusion, determination or order complained of which is unsupported by substantial evidence on the record considered as a whole."

The foregoing protections would be nullified by the two exceptions in section 5 whenever the agency or other party establishes that all procedures had been correctly followed in dealing with the aggrieved party or an arbitrator's decision had been made pursuant to a negotiated agreement between a union and the agency managers.

The two cited exceptions could act as a bar to an aggrieved party's access to judicial review of actions by a Federal agency, the Civil Service Commission or an arbitrator. Such artificial barriers are extremely frustrating to a Federal and postal employee in a search for fairness and poses the solemn question as to whether any administrative decision should be immune from judicial review.

We believe that the U.S. district courts and even the Supreme Court must be made and kept accessible to Federal employees in the context of H.R. 1674. The courts must continue to play a crucial role in a changing world where increased value must be given to human beings in the work place and the community. The court is a symbol of last resort to many who seek orderly change; it must be kept reachable.

This concludes our testimony, Mr. Chairman and members of the committee. And again, we wish to express our appreciation for this opportunity to appear before this subcommittee.

We shall be happy to answer any question that the committee may ask.

Mr. WHITE. Mr. White, thank you for your testimony and your appearance.

I am going to call on Mr. Daniels at this time, author of the bill.

Mr. DANIELS. Thank you, Mr. White. And I particularly wish to express my appreciation for the endorsement of the philosophy of the bill.

I am sorry you don't agree in toto with its concepts.

I note your first objection with respect to the inclusion of postal employees, that they be covered by this act.

Now, before I concluded my testimony this morning, I made reference to a communication that was hand-delivered to me prior to testifying by Mr. Patrick J. Nilan who is the legislative director of the American Postal Workers Union AFL-CIO. I did not read his letter in full, but in substance he says that they prefer not to be included within the coverage of the bill.

And he expresses that opinion not only for his union which represents four of the crafts that are recognized as the collective bargaining agent of the U.S. Postal Service, but also on behalf of three other labor organizations which have been designated as the exclusive bargaining representatives.

So in view of that fact, how do you square your position here today?

Mr. JOHN WHITE. Mr. Chairman, that is very easy. It is a known fact that this organization is now in court. We are in conflict with the current interpretation of the labor divisions in the area of representation in the Postal Service. We are at war with the craft unions.

We are a result of the civilization in which we live that produced a predominantly black union that looks out for women, blacks, and other minorities.

Our organization submitted its statement as required by the subcommittee yesterday. Prior to that time, Mr. Chairman, and I am aware of this, and this can be verified, the national president of the Letter

Carriers Association was scheduled to appear before me at this same table. But it would appear that some strategy was developed, but that is aside from the point, the strategy part of it.

What this union has an obligation to do, as we see it, Mr. Chairman, and we certainly admire you from New Jersey, and our members have for a long time—and this is not said as flattery—is to protect the right of the individual.

For example, in testifying before a committee recently—President Robert L. White just came in at the rear of the room. We will present testimony before two committees this morning, and he was able to drop in. I am glad to have him with us.

In Akron, Ohio, a black female postal employee was involved in something very similar to what we are talking about today—interrogation. She had some conflict in the Akron Post Office; she was the only black person employed at the Ellet station in that city.

She had conflict with the letter carrier representatives, the clerks representatives, et cetera. And as a result, somewhere along the line, to shorten my report of the incident, the white letter carrier president allegedly caused the FBI to visit her at her home and interrogate her and frighten her almost into hysteria which caused her to seek medical treatment.

So that the question we asked before that hearing before Mr. Charles Wilson's subcommittee on the agency shop which we opposed for certain reasons was where could she go if she couldn't turn to us?

The letter carrier president allegedly caused the FBI to send two agents out to her home. So we have a problem with the right of the employee to be represented.

Congressman Parren Mitchell introduced a bill in this Congress and Congressman William Clay in the last Congress which will give a postal employee the right to choose a representative.

The contract now which represents people—and I don't wish to get too far into that, but we could go on and on that—there is a need for an employee to choose a representative.

And, Mr. Chairman, the numbers for which Mr. Nilan and others allegedly speak, I hope will not affect the thinking of this committee. We hope that you can evaluate the merit of what we are saying—and this is not any sermon—before you legislate.

Perhaps I didn't answer, but I tried to.

Mr. DANIELS. Then, I take from what you have said that the National Alliance of Postal and Federal Employees of which you are the legislative director is not one of the exclusive bargaining agents recognized by the Postal Service.

Mr. JOHN WHITE. That's right. We are an independent union that is national in scope. We have members throughout the country in all crafts.

Mr. YOUNG. Congressman Daniels, sir, however, there is no proviso in the current national agreement that was negotiated, which is up again this year for negotiation, that provides the language which you have in your bill here which will give postal workers the right to have a counselor representative of their own choosing during interrogation which may lead to disciplinary action. That is absent from their contract.

And there is no assurance that it will be included in the contract during this negotiating session or will it be accepted by the Post Office Department.

So I think postal workers need the same protective rights as other Federal workers. I think that is what the issue is.

Mr. DANIELS. According to Mr. Nilan's letter, he says that they are negotiating a national contract of the United States requiring these unions to represent all employees regardless of membership within their specific bargaining jurisdiction.

Mr. YOUNG. What I am referring to, Congressman Daniels, is this: In the current negotiating contract that covers postal workers, there is no provision which will allow them the opportunity to have counsel or a representative of their own choice present at an interrogation that will lead to disciplinary action.

Mr. DANIELS. In other words, what you are saying is it fails to provide the right of the individual to select his own counsel if he does not desire to be represented by the union representative.

Mr. YOUNG. Right.

Mr. JOHN WHITE. Pardon me. At the present time since they negotiated the first contract, a lawyer, an attorney, cannot represent a postal employee. He is barred by their contract. We don't feel it is right, but we feel this should be brought to your attention, at least, if it has escaped you in what they are saying.

In other words, Mr. Chairman and Congressman Daniels, a postal employee at the present time, if he is going to attempt to use the procedure which they have negotiated on grievances, can go to step 1 by himself.

If step 1 is unsatisfactory to the postal employee, step 2 is unavailable to that employee unless the union says, "We feel the action should take place."

Mr. WHITE. Will the gentleman yield?

As I understand, though, while there is not a provision for representation by an attorney, the member can be represented by a member of the union.

Mr. JOHN WHITE. That's right.

Of course, Mr. Chairman, what we are saying in my testimony for however the committee evaluates it is that we are concerned about the rights of the employee. And my union is convinced that the rights of the employee are not in conflict with the best interests of the Agency or Postal Service; that the rights of the employee, if you are aiming at it in this bill, should not be compromised.

This is our opposition, whether it is well stated or not. And I hope that the committee can understand what we say.

Mr. DANIELS. Mr. Chairman, in view of the lateness of the hour, I don't want to take all the time so, therefore, I will yield to other members for questioning.

Mr. WHITE. Mr. Taylor?

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. White, you mentioned the one instance where you felt an employee had been mistreated. Are you personally aware of very many instances such as this where you feel the rights of employees have not been properly protected in interrogation?

Mr. JOHN WHITE. Certainly. We have any number of examples in the Postal Service where the bulk of our membership is nationwide.

And we may go further. Congressman Rangel, according to the April issue of *Black Enterprise*, is asking Congress to investigate the CIA because of its racial policies, the very low percentage of blacks and females who are part of the work force of the CIA.

And it is the total picture of America which we are trying to improve. It took years and years before women were recognized as complete citizens who could exercise more of their rights even though their general rights exist in theory as well as those of blacks. But it took years and years for them to be recognized as human beings.

So we are needed. We are a product. Our existence is a result of a need that grew and developed since 1913. And it is still here. So that there are cases after case across the country where blacks have a problem. And we could document it.

I realize the time, and I appreciate the hearings here, but we could give some documentation, Congressman Taylor, if you wish on the question of how widespread it is.

Mr. TAYLOR. Thank you.

One thing that troubles me some with this legislation is at what point in interrogation or in the ordinary course of supervision does this come into play, does the right of the employee come into play, to have counsel or to be represented?

It would appear to me that what may begin sometime as an ordinary supervisory conversation between employer and employee might possibly lead to disciplinary action. And the thing that troubles me is, where is the threshold?

I mean, if an employee is having an ordinary conversation relative to supervisory, routine supervisory, control and does stumble onto something that might lead to disciplinary action, where does it begin?

Mr. JOHN WHITE. Mr. Taylor, if I may, you may have observed I am here as often as possible trying to listen carefully. And I have heard you express the same concern which you are expressing now, the operation of the Postal Service and other agencies. And I do attempt to assist, to include them, notwithstanding. But it is clear they are involved.

But many times, the line supervisor is not permitted to deal in the man-to-man or man-to-woman basis in an employee-supervisor situation. He may feel that he can talk and gain the desired reaction from the employees as far as the performance of their duties is concerned, but a superior is up there telling him to do something else. So he is forced to play cat and mouse.

I am representing an employee in Baltimore, Md., right now who stated that a supervisor told him, "The general foreman told me to do this as far as you were concerned. He told me to do the other."

The employee said, "You know this is not the case. You saw this other supervisor do something that was not exactly right. Can't you report this?"

He said, "No; I can't do this unless I hurt my possibility of future promotion."

So that this thing is not as big a bugaboo as my union sees it. This could almost become an informative approach.

Congressman Harris, I understand what he was saying. It doesn't have to become so complicated that a supervisor can't communicate with his subordinate, the employee. We see if that is the case that the supervisor doesn't have to fear his authorities. It could be a smooth

flow if in employee-supervisor relations he is permitted to operate with a certain amount of dignity and integrity.

I understand what you say. I don't believe, Mr. Chairman, that this would be harmful. I think it would be desirable if you could put it into the proper language. I think so. I could be wrong, but I believe so.

Mr. TAYLOR. That was my concern, how far does the thread go back where ordinary communications between the supervisor and the employee which might eventually lead to disciplinary action, the ramifications that this might have in some cases. And it would seem to me this could be a deterrent between ordinary and proper communication between employee and supervisor. If this supervisor thinks, "I can't talk to this employee because somewhere down there we may stumble onto something."

I think this is a real threat. And I am not opposed to the basic goal of this legislation, but I am troubled some by what the ramifications might be if carried to the extremes.

Mr. JOHN WHITE. Mr. Chairman and Mr. Taylor, perhaps in listening to our attempt to testify here, our opposition may seem conflicting within itself. But we don't view it as such. I don't think Francis Philbey or the president of the letter carriers or anybody else would take some actions or do things along the union lines any faster than we would. We embrace them completely.

That is, as long as the rights of the individual employees are protected. And we believe that the input from employees generally through an organized voice has a sound effect on the operations of any agency or even the Postal Service. As to some expressed fears, we believe that it is unnecessary to get bogged down to the extent that day-to-day work could not be done.

And of course, we do support Mr. Daniels' bill, as we said; we meant that, with the few hopeful changes that we suggested could be evaluated.

Mr. TAYLOR. As far as your objection to section 4 of the bill, you believe the rights of the employee would be diluted, believe you said, ignored, watered down, or conditioned on union membership.

Mr. JOHN WHITE. Correct, Mr. Chairman. The situation is—and I don't want to discuss it to death here—but we are going to be talking a long time on what they did to us.

The Postal Reorganization Act says that you may join a union. Employees can join us; we are an independent union of all crafts. They can pay us, and the Post Office takes it out. It is required by law. They didn't get a union shop, but they still negotiated with the Postmaster language which says that employees can't pick their own representative. They join us and pay us under the law, but we can't represent them in grievances and adverse actions.

So when this subject gets to the bargaining table for negotiation, they seemingly can do anything. All they got to do is to be able to be able to shake hands with the Postmaster General. And if you are black or female, it seems very easy to be left out, and I am not trying to be insulting, but this is how we see it.

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. WHITE. Mrs. Spellman?

Mrs. SPELLMAN. To go back to this section 4, you indicate that that provision seems negative. Have you given thought to the wording you would put in there? How would you change that?

Mr. JOHN WHITE. I would try to get something. What I am trying to say, Congresswoman Spellman, is that they have set forth in section 3 the different provisions that would come up through the Civil Service Commission and so forth.

We are not arguing they are perfect, but they are a means of coming up, finally going to court with the other suggestions that we made.

So if a union is able within its exclusive recognition as a result of an appropriate election and the union and the managers negotiate a method of protecting employees' rights as far as being interrogated in a situation that could lead to disciplinary action, OK, this is fine. This is a parallel path of trying to achieve the relief that you need, the protection that you need, so that you can't be fired the wrong way if you do not deserve to be fired.

This other procedure would stay in existence. So this is as we see it.

Make this a parallel. The language may be a little different or whatever it is involved. And if the union negotiates this, but make this one avenue as the one spelled out in section 3 up through the Commission and finally the court on certain conditions and their intelligence.

We can negotiate perhaps a better way. Because my suspicion from past experience is the only people who could have access to that better way if they come up with a better way would be those people who pay their dues. And the others, if they kill the other way and only have this one left, you have no way.

I don't know if I answered your question, but I could get some language if you request it.

Mrs. SPELLMAN. I would appreciate it. Thank you.

Mr. WHITE. Thank you, Mrs. Spellman.

Mr. HARRIS?

Mr. HARRIS. No questions.

Mr. WHITE. Mr. Mineta?

Mr. MINETA. Mr. Chairman, I have no questions. I do wish to thank Mr. White for his testimony.

Mr. WHITE. Mr. Jenrette?

Mr. JENRETTE. One question, Mr. White.

Did I understand you to say that in these meetings, a union official could accompany the individual, but an attorney could not?

Mr. JOHN WHITE. In the Postal Service?

Mr. JENRETTE. Yes.

Mr. JOHN WHITE. That's right. The way we understand the contract, and I think I understand what is in it, the postal employee who develops a problem in the area of discipline or who has a grievance, has the right as an individual postal worker to go to step to resolve his grievance by himself.

But he can't take anybody else except the exclusive union. He can't take a lawyer. He can't take us, although he has already paid us to represent him.

So that when he gets to step two, he still can't take anybody, but the exclusive union if they choose to go. So this is the situation. And this is troublesome to some people who really are our friends, but they are troubled as to whether they will weaken a certain function in the Postal Service or in any agency where they know it takes some kind of recognition and organized strength to gain certain goals.

But our problem is that if they are so strong, why can't they use persuasion without forcing employees to join? You can't hire a lawyer to represent you in step one. You can't hire a lawyer to represent you at any point in the procedure in the Postal Service. That is under their grievance procedure.

You can go some other routes which we have been forced to follow some of the time. But you can't come up through their procedures.

Mr. JENNETTE. Thank you, Mr. Chairman.

Mr. WHITE. Thank you very much, Mr. Jenrette.

Thank you, Mr. White and Mr. Young. We appreciate your appearance before us today.

There being no further questions from any member, this meeting is adjourned.

[Whereupon, at 10 a.m., the hearing of the subcommittee was adjourned.]

[The statements and letters which follow were received for inclusion in the record.]

STATEMENT OF THE AMERICAN NURSES' ASSOCIATION

The American Nurses' Association is the professional organization of registered nurses. Its 200,000 members belong to constituent associations in the 50 states, the District of Columbia, the Virgin Islands, and Guam. The Association represents registered nurses in both the private sector, and in the public sectors. The purposes of the American Nurses' Association are to foster high standards of nursing practice and patient care; promote the professional and educational advancement of nurses; and, promote the economic and general welfare of nurses to the end that all people may have better nursing care.

The right to counsel is a well established concept that is fundamental to systems of industrial democracy. Equity and justice dictate that this fundamental right be recognized and applied in the Federal sector employer-employee setting. In the employment setting an individual employee in an investigatory interview may well be too fearful or inarticulate to adequately respond to the incident under investigation. Further, the individual may not possess the skills to relate extenuating circumstances. A knowledgeable counsel or representative would actually be beneficial in eliciting and ascertaining relevant facts. The mere presence of a counsel or representative does not transform an investigation into an adversary proceeding.

The American Nurses' Association (ANA) believes that individual employees in the Federal sector should be accorded this fundamental right to have counsel or a representative of their choice in a proceeding that, in the opinion of an individual employee, may lead to, or result in, disciplinary action. Upon careful review, ANA believes that HR 1674 adequately accords this fundamental protection of the right to counsel to Federal employees.

This concept of right to counsel or presence of an advocate representative, in a proceeding that would lead to disciplinary action, is not a novel concept in an employment setting. The right of an individual to have a representative of his/her choice present in an investigation of alleged misconduct is well established in private sector employee-management relations. Only recently, the Supreme Court has upheld a National Labor Relations Board's decision that denial of an employee's request that a representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action was violative of the National Labor Relations Act.

Section 7 of the NLRA guarantees employees the right to act in concert for "mutual aid and protection." While the court was addressing only the right to insist on the presence of a union representative, ANA is of the opinion that the "Section 7 right" recognized by the Supreme Court, affording employees the right to act "in concert" in employer investigatory interviews, should also be available to Federal employees who lack the protection afforded by Section 7 of NLRA.

If the subcommittee recognizes the right to counsel as it generally exists in our legal framework, as a fundamental right, in the light of the obvious benefits of right to counsel or representation in the private sector employment setting.

the subcommittee should logically extend this right to counsel or representation in an investigatory interview to Federal civilian employees.

The American Nurses' Association is also very much concerned with protecting the right to privacy of Federal employees in their activities and undertakings that are not related to the performance of their official duties. Here again, the subcommittee is faced with a concept that incorporates a generally well recognized fundamental right in non-Federal employment settings. Barring exceptional circumstances, employer inquiries about employees' outside activities not related to the discharge of an individual's official duties, are an infringement of the individual's privacy. Such inquiries transgress the bounds of reasonable employment practice. The absence of statutory language memorializing this legitimate employer constraint in the Federal sector is inexcusable and requires forthright action. ANA believes that HR 1674 sufficiently fills this void.

In conclusion, the American Nurses' Association has expressed its support for passage of HR 1674, without modification, and has stated its reasons for this position. We hope these comments will be helpful to the subcommittee in its deliberations, and trust that the Congress will come forward quickly with legislation that will strengthen our Civil Service system.

STATEMENT OF JOHN J. MURPHY, PRESIDENT, THE NATIONAL CUSTOMS SERVICE ASSOCIATION

Mr. Chairman and members of the subcommittee, for the record, my name is John J. Murphy. I am President of the National Customs Service Association, a labor organization which holds exclusive representation rights for some 8,000 United States Customs Service Employees located in the United States, Canada, and the Virgin Islands.

We vigorously endorse each provision of H.R. 1674. It has for too long been a fact that an individual, by agreeing to work for the Federal Government, also agree to surrender some of his most fundamental rights. The right to counsel during interrogation is one of these fundamental rights which have long been denied Federal employees. Because H.R. 1674 serves to guarantee that right, it has our strongest support.

The plight of the civil servant is compounded by there being few, if any, effective checks on the near-boundless power wielded by the Federal employer. We have seen in recent weeks a new example of the Supreme Court's activism in protecting the rights of private sector employees in *NLRB v. Wingarten*, 43 U.S. Law Week 4275, where the Court stated:

"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 employee by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview."

It is clear that this rationale is just as meritorious in the Federal Sector, and that Congress should adopt this legislation in order to effectuate that purpose.

The area of so-called "administrative interrogations", interrogations of individual federal employees by Management which could lead to disciplinary action, has long been a basis of labor-management dispute. This matter is of particular importance to us and to the employees we represent. We say this because Customs employees, perhaps as much as, or more than, employees of any other agency, have seen and experienced the potential for abuse which is an inherent part of the existing "administrative interrogation" procedures.

The standard practice within Customs is as follows: The employee under investigation (at this point is usually unaware he is under investigation), is told by his supervisor to report to a certain office at a certain time (usually the next morning). The employee is not told why he is to report. He is left to think about that overnight.

Upon reporting to the designated location, the employee encounters a Special Agent from the Office of Internal Affairs, the Customs internal security bureau. The administrative warning is read, informing the employee that the session is an administrative interrogation, that nothing he says can be used against him in a criminal proceeding (with the exception of perjurious statements), and that all proper work-related questions must be answered under penalty of disciplinary action, including dismissal. An oath is then administered, the stenographer readies herself, and the questioning begins.

The employee is all alone—naked and helpless before a skilled, professional interrogator. He may be subtly or overtly badgered, harassed, intimidated, or tricked into making statements damaging to himself and to his fellow employees. As a nervous, apprehensive layman, he will answer all questions. He has neither the expertise nor the standing to distinguish the proper question from the improper, the work-related from the non-work-related. After the questioning, the employee is presented a transcript or summary of his statements, and is requested to sign it. At this point, in most cases, the employee has yet to be told why he has been questioned or even that he is under investigation.

We do not question the need for internal security—especially in a revenue-gathering agency such as Customs. We do not allege that the Office of Security and Audit generally carries on its work in Gestapo-like manner, although there are examples of abuse of the Special Agent's investigatory power. What we are contending is that, the nature of an administrative investigation bring what it is, with the broad power and enormous potential for abuse involved, and with the individual's career and his family's livelihood at stake, the fundamental right to representation should and must attach.

The courts offer little protection to civil servants in these matters. Certainly the Executive Branch offers no protection. The task of guaranteeing Federal employees fundamental procedural safeguards thus falls to the legislature. We believe it is time for Congress to act.

STATEMENT BY CLYDE R. PAYNE, SECRETARY-TREASURER, NATIONAL ASSOCIATION OF AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE COUNTY EMPLOYEES

The National Association of ASCS County Office Employees (NASCOE), consisting of 98% of the eligible membership in counties across the Nation, supports the provisions of H.R. 1674.

Our association feels every Federal employee of the United States, including persons employed by the County Committees established pursuant to Section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590H(b)), should have the right to counsel or have a representative of his choice, if desired, during interrogation which may lead to disciplinary action. We also feel the prevention of unwarranted reports from employees concerning their private lives should be prohibited. We feel the provisions of H.R. 1674 will effect the above, which, in our opinion, is merely placing into law a moral responsibility of the United States Government.

Our association appreciates the opportunity of being permitted to submit this statement.

Thank you.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
Washington, D.C., April 3, 1975.

Hon. RICHARD C. WHITE,

Chairman, Subcommittee on Retirement and Employee Benefits, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN WHITE: At the outset, please know that the National Association of Letter Carriers believes and expects that the recent Supreme Court decision (Weingarten case) covers our Union inasmuch as the NALC is now governed by rules and regulations promulgated by the National Labor Relations Board. Our sole purpose in expressing our brief views of this legislation is to place on record our strong belief in this regard and to further express the hope that our position will be supported by enactment of H.R. 1674. It is imperative that Government workers be assured all of the rights that are now enjoyed by all citizens of our country, whether those rights be related to the Hatch Act, the right to strike, or any other guarantee provided by our Constitution.

We hope that during the forthcoming negotiations with the United States Postal Service, postal unions will be able to incorporate into our labor contract a strong provision which encompasses the Supreme Court decision. We feel that any worker, Government or private sector employee, should be entitled to representation when he has been suspected of wrongdoing and his immediate supervisor intends to interrogate him with the intention of subsequent discipline. It is at this time when an employee is "speechless" and/or "tongue-tied," and finds

himself unable to respond to tough questioning. A skilled steward or representative of the accused worker's choice should be permitted in on all discussions which relate to the charge.

We feel it is not necessary to go into depth in testimony supporting the intent of H.R. 1674. We want to be on record, as we have been in all legislation which relates to the rights of citizens of our great country in support of this Bill which will do nothing more than assure a Government worker that he may be represented at this most serious time. We trust the Subcommittee and ultimately the Full Committee, as well as the Congress, will see fit to assure those rights.

Very truly yours,

JAMES H. RADEMACHER,
President.

94TH CONGRESS
1ST SESSION

H. R. 1674

IN THE HOUSE OF REPRESENTATIVES

JANUARY 20, 1975

Mr. DOMINICK V. DANIELS introduced the following bill; which was referred to the Committee on Post Office and Civil Service

A BILL

To guarantee to the civilian employees of the executive branch of the United States Government the right to have a counsel or representative of his choice present during interrogations which may lead to disciplinary actions and to prevent unwarranted reports from employees concerning their private life.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. It shall be unlawful for any officer of any
4 executive department or any executive agency of the United
5 States Government, or for any person acting or purporting to
6 act under his authority, to do any of the following things:

7 (a) To require or request, or to attempt to require or
8 request, any civilian employee of the United States serving in

1 the department or agency, who is under investigation for mis-
2 conduct, to submit to interrogation which could lead to dis-
3 ciplinary action without the presence of counsel or other per-
4 son of his choice, if he so requests: *Provided, however,* That
5 a civilian employee of the United States serving in the Cen-
6 tral Intelligence Agency or the National Security Agency
7 may be accompanied only by a person of his choice who
8 serves in the agency in which the employee serves, or by
9 counsel who has been approved by the agency for access to
10 the information involved.

11 (b) To require or request, or to attempt to require or
12 request, any civilian employee of the United States serving
13 in the department or agency to make any report concerning
14 any of his activities or undertakings unless such activities
15 or undertakings are directly related to the performance of
16 official duties to which he is or may be assigned in the de-
17 partment or agency, or to the development of skills, knowl-
18 edge, or abilities which qualify him for the performance of
19 such duties, or unless there is reasonable cause to believe that
20 the civilian employee is engaged in outside activities or em-
21 ployment in conflict with his official duties.

22 SEC. 2. It shall be unlawful for any commissioned of-
23 ficer, as defined in section 101 of title 10, United States
24 Code, or any member of the Armed Forces acting or pur-
25 porting to act under his authority, to require or request, or to

1 attempt to require or request, any civilian employee of the
2 executive branch of the United States Government under his
3 authority or subject to his supervision to perform any of the
4 acts or submit to any of the requirements made unlawful by
5 section 1 of this Act.

6 SEC. 3. (a) Whenever any officer of any executive de-
7 partment or any executive agency of the United States Gov-
8 ernment, or any person acting or purporting to act under his
9 authority, or any commissioned officer as defined in section
10 101 of title 10, United States Code, or any member of the
11 Armed Forces acting or purporting to act under his au-
12 thority, violates or threatens to violate any of the provisions
13 of section 1 or 2 of the Act, any civilian employee of the
14 United States serving in any department or agency of the
15 United States Government affected or aggrieved by the vio-
16 lation or threatened violation of the provisions of section 1 or
17 2 of this Act may file a complaint with the United States
18 Civil Service Commission.

19 (b) The Civil Service Commission shall have authority
20 to enforce the provisions of sections 1 and 2 of this Act
21 through appropriate remedies which shall provide complete
22 relief against the violation, threatened violation, or the con-
23 sequences of the violation, including the issuance of cease and
24 desist orders, or reinstatement as will effectuate the policies
25 of this Act, and shall issue such rules, regulations, orders,

1 and instructions as it deems necessary and appropriate to
2 carry out its responsibilities under this Act: *Provided, how-*
3 *ever,* That the regulations shall provide (1) for a hearing
4 to be conducted by a qualified Civil Service Commission
5 hearing examiner within thirty days of the date of filing
6 the complaint; (2) a notice of adverse decision; and (3)
7 one level of appeal within the Civil Service Commission.

8 SEC. 4. Nothing contained in section 3 shall be construed
9 to prevent the establishment of grievance procedures negoti-
10 ated by labor organizations and agency managers which may
11 be a substitute to the procedure provided in section 3. For
12 the purposes of this section, labor organizations shall be con-
13 strued to include any brotherhood, council, federation, orga-
14 nization, or union made up in whole or in part of civilian
15 employees of the United States Government and which has
16 as one of its purposes dealing with departments, agencies,
17 commissions, and independent agencies of the United States
18 concerning the condition and terms of employment of such
19 employees.

20 SEC. 5. Any party aggrieved by any final determination
21 or order under the provisions of this Act may institute, in the
22 district court of the United States for the judicial district
23 wherein the violation of this Act occurred, or in the United
24 States District Court for the District of Columbia, a civil ac-
25 tion for the review of such determination or order. In any

1 such action, the court shall have jurisdiction to (1) affirm,
2 modify, or set aside any determination or order which is
3 under review, or (2) to set aside any finding, conclusion,
4 determination, or order complained of which is unsupported
5 by substantial evidence on the record considered as a whole:
6 *Provided, however,* That, if under the procedures established,
7 the employee has obtained complete protection against
8 threatened violations or complete redress for violations, such
9 action may be pleaded in bar in the United States district
10 court: *Provided further, however,* That, if an employee has
11 received a decision from an arbitrator pursuant to a nego-
12 tiated procedure as set forth in section 4, the fact that the
13 decision does not violate applicable law or appropriate order
14 or regulation, or that the procedures were properly followed,
15 may be pleaded in bar in the United States district court.

16 SEC. 6. If any provision of this Act or the application of
17 any provision to any persons or circumstances shall be held
18 invalid, the remainder of this Act or the application of such
19 provision to persons or circumstances other than those as to
20 which it is held invalid shall not be affected.



CHAIRMAN

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

March 11, 1975

Honorable David N. Henderson
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in reply to your request for the Commission's views on H.R. 1674, a bill "To guarantee to the civilian employees of the executive branch of the United States Government the right to have a counsel or representative of his choice present during interrogations which may lead to disciplinary actions and to prevent unwarranted reports from employees concerning their private life." The Commission fully endorses the stated purpose of the bill to prevent unwarranted reports from employees concerning their private lives and has long recognized the right of an employee to have counsel or other representative of his choice present during formal proceedings which may lead to a disciplinary action. However, we believe the provisions of this bill to be overbroad, unwarranted, and unnecessary.

Subsection (a) of section 1 of the bill makes it unlawful for an officer of any executive agency to require or request any employee who is under investigation for misconduct to submit to interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice, if he so requests. The present regulations of the Civil Service Commission and executive branch agencies assure employees of the right to counsel in disciplinary proceedings, but not when ordinary day-to-day inquiries are necessary to allow normal supervisory operations. The absence in the bill of definitions of "misconduct", "interrogation", and "disciplinary action" could lead to interpretations which would require the presence of an attorney during the most routine confrontations between employees and supervisors, such as unexplained absence or tardiness. It would be difficult for the Government to function if every question by a supervisor to an employee which could lead to a disciplinary action, however minor, must be preceded by a warning that the employee is entitled to the presence of an attorney before answering the question.

Subsection (b) of section 1 of the bill makes it unlawful for an officer of an executive agency to require or request any employee to make any report concerning any of his activities or undertakings unless such activities or undertakings are directly related to the performance of official duties to

which he is or may be assigned in the department or agency, or to the development of skills, knowledge, or abilities which qualify him for the performance of such duties, or unless there is reasonable cause to believe that the civilian employee is engaged in outside activities or employment in conflict with his official duties. This subsection could be interpreted as preventing the Civil Service Commission from asking an employee about an alleged violation of the Hatch Act; it could bar inquiries in areas relating to national security and employee safety; and it could prevent resolution of complaints received from citizens about the outside conduct of Government employees which could affect their job performance or reflect adversely on the Government. Indeed, this provision could be interpreted as ruling out personal conduct as a basis of suitability determinations.

In addition, the implementation of this provision could destroy much of the present ethical conduct and financial interest program within the executive branch. The subsection seems to be applicable only when a conflict of interest appears to exist, as distinguished from the present executive branch program which is aimed at preventing conflict situations from arising. The present program is designed to prevent employees who occupy positions which could involve them in conflict-of-interest situations from any inadvertent involvement in those situations. (See Part 735 of Title 5 of the Code of Federal Regulations.) Our program stresses the confidential treatment of the financial interest statements filed by employees and expressly provides a means to resolve a complaint by an employee who feels his position is one that should not require that he file a statement.

Section 2 of the bill prohibits violations of the provisions of section 1 by officers and members of the Armed Forces against civilian employees.

Section 3 authorizes complaints to the Civil Service Commission by employees affected or aggrieved by violations of section 1 or 2 of the bill, hearings by the Commission, and appropriate relief to be provided by the Commission.

Section 4 permits the establishment of grievance procedures negotiated by labor organizations and agency managers as a substitute for the complaint procedure provided by section 3.

While the Commission has no objection to provisions for employee complaints to the Commission concerning agency actions and encourages grievance procedures negotiated by labor organizations, we believe that this bill takes a piecemeal approach to employee relations by singling out two areas of alleged management abuse and making them subject to complaints to the Commission or negotiated grievance procedures.

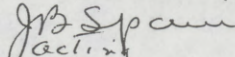
Section 5 of the bill provides that any party aggrieved by any final determination or order under the provisions of the bill may seek judicial review. This provision would set an undesirable precedent with respect to determinations under procedures negotiated by labor organizations by permitting arbitration awards to be subject to judicial review. These determinations under negotiated procedures should be reviewed by the Federal Labor Relations Council rather than the courts.

For the foregoing reasons the Commissioners strongly oppose the enactment of H.R. 1674.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,


acting
Chairman

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

5 April 1975

The Honorable David N. Henderson, Chairman
Committee on Post Office and Civil Service
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

I wish to provide you with my views on H. R. 1674, which it is understood has been the subject of hearings before the Subcommittee on Retirement and Employee Benefits and may be brought up for full Committee consideration shortly.

It is my understanding that the bill, as amended by the Subcommittee, imposes a statutory requirement for presence of counsel or other personal representatives in connection with any investigation and interrogation of an employee for misconduct which could lead to disciplinary action. Consistent with the underlying purpose of the bill, this Agency would be prepared to permit an employee to be represented by counsel of his choice, subject to understandable clearance requirements, in connection with adverse personnel actions in most instances. In the light of the great sensitivity of some of this Agency's work, however, there would be circumstances in which such a blanket requirement would pose an undue risk to important intelligence sources and methods. Moreover, it is noted that the phrase in Section 1(a) of the bill, "under investigation for misconduct," could apply to any questioning of an employee by a supervisor concerning any aspect of work. Such sweeping application would also run the risk of introducing contention and adversary relationships into every level of personnel management. We would thus oppose enactment of H. R. 1674. Our particular concerns relate to the possible conflict with other statutes which have as their purpose the protection of intelligence sources and methods from unauthorized disclosure.

In this connection, the National Security Act of 1947 provides:

a. "That, the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." (Section 102(d)(3))

b. "Notwithstanding the provisions... of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States..." (Section 102(c))

In addition, the Central Intelligence Agency Act of 1949 provides:

"In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organizations, functions, names, official titles, salaries, or numbers of personnel employed by the Agency:..."

In fulfilling these statutory responsibilities, one objective is to identify weaknesses of Agency personnel which could be exploited by opposition foreign intelligence services. Our personnel are not only attractive targets for intelligence services but may be particularly accessible to them in carrying out demanding and sometimes dangerous assignments alone in hostile areas. Our investigations into possible areas of vulnerability or misconduct have as their principal objective the uncovering of potential problems before a serious situation is confronted, and depends upon the existence of a mutual, constructive relationship between the Agency and its employees, not an adversary one.

In light of the above considerations, four problems arise with respect to the application of H. R. 1674 to this Agency:

1. Any interview of an employee to determine possible vulnerabilities could be construed as an

investigation for misconduct which "could lead to disciplinary action." Consequently, it would be necessary to include a third party who would not otherwise be privy to national security intelligence information protected by statute.

2. Failure to include a third party in the interview could subject the termination of an employee "necessary or advisable in the interests of the United States" as authorized by statute, or less severe action, to review by the Civil Service Commission and eventually a civil action (even though the statutory authority for termination is not now subject to such review).

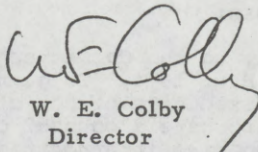
3. In the face of an allegation by an aggrieved party that "final action" was related to an "interrogation... without the presence of counsel or other person of his choice," the Agency may be faced with the dilemma of either refuting such an allegation, laying bare on the record sensitive information which is my responsibility to protect, and the disclosure of which might damage the national intelligence effort, or remaining silent and suffering the consequences of administrative and judicial sanctions provided in the bill.

4. Much preventative questioning of an employee by a supervisor could be construed as a violation of the bill if counsel or other personal representatives are not present. The introduction of such an adversary relationship would undermine this Agency's personnel management program, which for the reasons previously stated, must be based upon trust, confidence and mutuality of interest.

I recommend that the Committee not act favorably on H. R. 1674 because of its detrimental impact on Agency personnel management. If the Committee does favorably consider the bill, I strongly urge that this Agency and the National Security Agency be provided a full exemption in light of our unique mission and statutory responsibilities. (Suggested language enclosed.)

The Office of Management and Budget advises there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,



W. E. Colby
Director

AMENDMENT TO H. R. 1674

- (1) Strike out Section 1(a) and insert in lieu thereof:

"(a) To require or request, or to attempt to require or request, any civilian employee of the United States serving in the department or agency, who is under investigation for misconduct, to submit to interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice, if he so requests."
- (2) Following Section 5 insert the following new section:

"Sec 6. Nothing in this Act shall apply to the Central Intelligence Agency or the National Security Agency."
- (3) Renumber Sec. 6: "Sec. 7."



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

Honorable David N. Henderson
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Cannon House Office Building
Washington, D.C. 20515

APR 3 1975

Dear Mr. Chairman:

This is in reply to the Committee's request for the views of this Office on H.R. 1674, "To guarantee to the civilian employees of the executive branch of the United States Government the right to have a counsel or representative of his choice present during interrogations which may lead to disciplinary actions and to prevent unwarranted reports from employees concerning their private life."

The principal purpose of this bill is to require the presence of counsel during any interrogations of an employee which may lead to disciplinary action and to make illegal any report of an employee's outside activities or undertakings except where a conflict-of-interest may arise.

In its report, the Civil Service Commission states its reasons for strongly opposing enactment of H.R. 1674. The Commission points out that while the right of employees to counsel during formal proceedings has long been recognized, H.R. 1674 would appear to require counsel during the most informal, routine day-to-day confrontations between supervisors and employees, making it difficult for the Government to function. For this reason we suggest the Committee may wish to consider the views of additional agencies on this bill.

We concur in the views expressed by the Civil Service Commission and, accordingly, strongly recommend against enactment of H.R. 1674.

Since 1971,

James F. C. Hyde, Jr.
Acting Assistant Director
for Legislative Reference

SUMMARY OF RECOMMENDATIONS ON H.R. 1674

George Tilton, National Federation of Federal Employees, Tuesday, March 11, 1975

1. Strengthen the provisions that a person may have an attorney if he so requests in the following manner:

(a) Include language that states the employer must advise a person of his right to have an attorney present.

(b) Include imposition of a sanction for a failure to follow (a) above, such as the exclusionary rule of evidence.

2. Section 3 of the bill should be amended to allow union representation in the following manner:

(a) When an employee did not have his attorney present when he was entitled to do so because of lack of warning by employer, amend to permit union to file a complaint with the Department of Labor.

Mr. Alan J. Whitney, Executive Vice President, National Association of Government Employees, March 26, 1975

1. Opposed to the language in Section 5 of the bill which would allow an arbitrator's decision to be pleaded as a bar to court action.

a. At most, an arbitrator's award should only be allowed to be introduced as evidence in a court action, with the court according whatever weight it wants to the arbitrator's rulings.

Mr. L. M. Pellerzi, General Counsel, American Federation of Government Employees, March 26, 1975

1. Strengthen section 1 of the bill.

a. Section 1 be amended to apply to "any officer or employee," thus does not restrict the prohibition to officer as defined in title 5, USC.

b. Section 1 be clarified to eliminate any inference that it applies to employees in the same agency as the particular officer requesting or requiring them to submit to investigative interrogation.

c. Be made clear that section 1(a) does not, by implication increase the authority for investigations or interrogations of Federal employees.

d. That Section 1(a) be further amended to require that the employee be specifically advised that:

(1) he is under investigation for misconduct;

(2) of the precise nature of the alleged misconduct;

(3) of the right to have counsel present at any interrogation;

and

(4) of a reasonable amount of time to select counsel or other representative of his choice, before submitting to interrogation.

And that failure by the official investigator or interrogator to comply with such a requirement shall expressly invalidate any subsequent disciplinary action against the employee based on the investigation or interrogation involved.

2. Amend the appeal procedures outlined in section 3 of the bill.
a. Propose that aggrieved employees be permitted to file complaints with the Attorney General of the United States rather than with the U.S. Civil Service Commission; and that the Attorney General, rather than the Commission, be authorized to enforce rights provided in the bill and to issue implementing regulations.

3. Section 4 of the bill, be substituted for the section 3 procedures.

a. That section 4 of the bill, which provides that negotiated grievance procedures be substituted for the section 3 procedures and make it clear that any protections provided by the bill which are not incorporated into a negotiated grievance procedure, are preserved to the employee.

b. Authorize the Attorney General or an arbitrator to award reasonable counsel fees and other legal costs to an employee against whom they find that an agency has taken an improper adverse action.

