Report for Statement 16

Organization of Adjudicative Offices in Executive Departments and Agencies

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Introduction

Federal administrative agencies today have more opportunities than ever to help enforce the criminal law. Congress has attached criminal sanctions to an increasingly wide range of regulatory violations that have not until now carried the moral stigma of more conventional crimes.[1] Criminal sanctions have increased to the point that they are at least as attractive in many settings as civil sanctions. Moreover, public sentiment lately seems to favor aggressive pursuit of white collar crime. These and other factors have involved an increasing number of federal regulatory agencies more routinely in investigations leading to criminal convictions.

The gathering of information is always a vital part of these agency efforts to enforce the law, whether criminal or civil. In areas where agencies collect information that may ultimately lead to criminal charges, they confront a tension between two investigative models. One model is the wide-open investigative process of the regulatory agency, which routinely collects huge amounts of information from the subjects of regulation, often with the cooperation of those subjects. The other potential model for agency investigations is the somewhat more bridled process imposed on more traditional criminal investigators, such as the police and the grand jury. These two models are alike in significant ways. Where they differ, however, the agency and the subject of regulation operate amid unsettled expectations.

This report assesses one aspect of the investigative process for federal administrative agencies: the role of legal counsel. It surveys the limitations federal agencies place on the presence and participation of legal counsel when the agencies conduct investigations. Special attention is devoted to those investigations where an agency has not ruled out the possibility of criminal penalties. The agency investigations canvassed include both investigations of regulated parties and investigations of agency contractors and employees.

Part I of the report describes the ways that an agency venturing into criminal law enforcement can encounter unsettled expectations regarding access to attorneys. It also introduces a general strategy for dealing with such uncertainties regarding the right to counsel during investigations. Part II reviews specific limitations now applicable to the role of counsel in investigations of those subject to regulation. Part III covers investigations of agency contractors, with more limited access to legal counsel. Throughout, the report compares agency

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[1] *See* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can be Done About It*, 101 YALE L.J. 1875, 1878-82 (1992); Lawrence G. Baxter, *Judicial Responses to the Recent Enforcement Activities of the Federal Banking Regulators*, 59 FORDHAM L. REV. S193 (1991).

practices to similar investigative practices of government bodies, such as police departments or grand juries, charged exclusively with enforcing the criminal laws. Part IV contains a summary of the changes in agency practice discussed and recommended earlier in the report.

I. General Approaches to Defining the Availability of Legal Counsel

Where the FBI, the federal grand jury, or the Department of Justice investigate a crime, traditional doctrines of criminal procedure answer many questions about the role of legal counsel for the target. But at other times a criminal prosecution is based on evidence collected by a federal administrative agency not typically associated with criminal law enforcement. The Environmental Protection Agency may gather evidence of an environmental crime, or the Nuclear Regulatory Commission may uncover evidence of a criminal violation by a utility company or its employees. Statutes, rather than constitutional doctrine, answer many of the questions about legal counsel in the context of an administrative agency's investigation.

This Part contains some general observations about the proper method for fleshing out ambiguities in those statutes. Should the statutes in the administrative setting be interpreted to mirror the right to counsel in the criminal context as much as possible, or are there special considerations calling for adjustment of the right to counsel in the administrative setting?

A. The Limits of Constitutional Guidance

Lawyers can expect the guarantees of the Fifth and Sixth Amendments to shape some of the opportunities for legal counsel to interact with the government as it gathers information to enforce the criminal law. The Fifth Amendment's privilege against self-incrimination voices an expectation that government will obtain information without forcing parties to testify against themselves. In some settings, the government will provide suspects with warnings about potential self-incrimination and about access to legal counsel. The Sixth Amendment's right to counsel emphasizes more directly the importance to parties of having access to informed legal representatives when interacting with the government.

The provisions of the Sixth Amendment, however, do not apply with full force to the early stages of criminal investigations. The Supreme Court has held that the constitutional right to counsel does not apply to investigatory stages of the criminal process. Instead, it attaches only after formal criminal proceedings,

signaled by an information or indictment, have begun against the defendant.[2] A grand jury witness has no constitutional right to the presence of counsel in the grand jury room when the witness is called to testify.[3]

Similarly, the warnings sometimes required of the government under the Fifth Amendment do not apply to every criminal investigation. The self-incrimination clause does not require government warnings if the government does not take "custody" of the person. The Supreme Court has decided that grand jury witnesses are not in "custody" for these purposes.[4]

Despite these limitations, constitutional provisions still provide reasonably good access to counsel during the phases of traditional criminal investigations where counsel is most important. Involvement with the criminal justice system is an extraordinary event for most; the government does not begin to gather evidence against most suspects long before an arrest or indictment occurs. Thus, ongoing contact with counsel is not critical for many until the time that the process has formally begun. Pivotal investigative events such as eyewitness identifications and custodial interviews are most often conducted after the suspect has access to counsel.

On the other hand, the constitutional right to counsel does not cover the most important aspects of an administrative investigation: the early and ongoing efforts of government to collect information. Instead, the Administrative Procedure Act, along with many enabling statutes and agency rules of procedure, extend the right to counsel into these earlier stages of the investigation. Section 555(b) of the APA provides that a person compelled to appear before an agency may be "accompanied, represented, and advised by counsel."

The brief reference to counsel in the APA leaves a number of questions open. The text does not specify the types of actions attorneys may take in representing their clients during agency investigative proceedings. Nor does it indicate precisely which persons coming in contact with an agency may invoke the right to counsel.

The legislative history of Section 555(b) is equally unilluminating. The 1941 Attorney General's Report on Administrative Procedure in Government Agencies is strangely taciturn on the subject of legal representation.[5] Statements in both House and Senate committee reports regarding this provision of the APA state simply that it is "designed to confirm and make effective" the "statutory and mandatory right" of interested persons to appear personally or with counsel

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[2]Kirby v. Illinois, 406 U.S. 682 (1972).

[3]*See* Fed. R. Crim. Proc. 6(e).

[4]United States v. Mandujano, 425 U.S. 564 (1976).

[5]Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941). The report throughout refers to the presentations and contentions of "parties," without any indication whether parties would or would not have the benefit of legal counsel.

before the agency.[6] The 1947 *Attorney General's Manual on the Administrative Procedure Act*, an influential contemporary interpretation of the APA, says only that the statute "restates existing law and practice that persons compelled to appear in person before an agency or its representative must be accorded the right to be accompanied by counsel and to consult with or be advised by such counsel."[7] Thus, the text and legislative history of the APA provision on counsel do not explain its relationship with the constitutional right to counsel.

The different needs of investigative targets in the purely criminal and the administrative settings may suggest why the APA provides for counsel earlier than the constitutional protections. Administrative agencies and criminal law enforcement operate on fundamentally different assumptions about the appropriate relationship of the government and its citizens. Criminal enforcement begins with the presumption that government involvement in the affairs of the citizen is exceptional. The law treats compliance as an ordinary state, and enforcement efforts aim to preserve an already existing peace. By contrast, agency investigations treat government involvement in the affairs of citizens as both ordinary and necessary. Where an agency creates and administers a regulatory regime, it has a mandate to change customary practices. The ongoing interaction between government regulators and the regulated target, in which routine collection of information could later form the basis for a criminal prosecution, make the presence of counsel more important earlier in the investigation of an administrative crime.

B. Context for Determining the Scope of the Statutory Right to Counsel

Inevitably, there will from time to time be some doubt about whether the government may properly limit the participation of counsel during an investigation. When that occurs in cases arguably covered by the APA, the first recourse should be to the text of the statute. As we have seen, however, that text will not answer many questions about the precise scope of the right to counsel because the statute declares its protections in general terms. The legislative history, as noted above, provides scant guidance. At this point, where should an interpreter turn?

1. Reasons for Limited Access to Counsel

It seems clear for several reasons that the subject of a routine administrative investigation cannot insist on the same access to counsel as a criminal suspect in

[6]Sen. Doc. No. 248, 79th Cong. 2d Sess. 205, 231, 263 (1946).
[7]Attorney General's Manual on the Administrative Procedure Act 61 (1947).

the custody of the government. First, government agencies often must investigate the activities of its employees or contractors in an effort to monitor and improve its own performance. Where the government gathers and uses information in its role as employer or supervisor of a contractor, the investigative methods open to the agency should be broader than those available to criminal investigators.

Second, many agency investigations lead either to civil sanctions or to no sanctions at all. Quite often, the investigators do not know in the early stages of investigation what sort of enforcement measure will be most appropriate and effective. The decision remains open until much of the evidence has been collected. So long as agencies remain uncertain about the type of sanctions they will seek, it seems acceptable for their investigations to take a path different from the one prescribed for criminal investigations.

There are several other less convincing reasons often used to argue for limited access to counsel during administrative investigations. For instance, it might be thought that certain agency investigations could be subject to less rigorous legal constraints because of the importance of a particular agency's job. One investigation of a violation of environmental regulations could affect the health and safety of large numbers of people, certainly more so than the typical criminal misdemeanor or felony. The serious consequences of many violations of health and safety regulations could conceivably lead towards allowing those agencies even greater latitude in their investigations than might be allowed in a criminal investigation.

However, the enacted law and judicial decisions do not appear to adopt this approach. The Administrative Procedure Act applies uniformly to federal agencies, with no effort to distinguish between the more and less important regulatory areas.[8] Similarly, courts evaluating different agency regulatory techniques have stated that they are not influenced by the relative importance of the work of the agency involved. When faced with issues of statutory construction, the courts emphasize the uniform treatment of agencies under the APA,[9] and hesitate to interpret an agency's enabling statute in a way that overrides the APA. Even when interpreting constitutional provisions such as the search and seizure clause of the Fourth Amendment, courts have tended to announce requirements that apply uniformly to all agencies.[10]

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[8]5 USC §551(1) (1988) ("agency" defined without regard to subject matter, except for military authorities).

[9]SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976).

[10]United States v. Powell, 379 U.S. 48 (1964) (setting out requirements for constitutional validity of administrative document subpoena); Dole v. Trinity Industries, Inc., 904 F.2d 867 (3rd Cir. 1990) (Secretary of Labor sought enforcement of subpoena duces tecum for required health and safety records; court determined the phrase "reasonably relevant" applied to any inquiry the Secretary might make, and there was no necessity that the information had to be relevant to one particular case); United States v.

It may seem remarkable that the importance of the regulatory interest has played so little role in judicial decisions, particularly in the constitutional issues raised by agency investigations. For some time now, courts have enthusiastically used "balancing" methodologies, which attempt to consider a wide range of relevant facts,[11] and the effect of regulation on health and safety would certainly seem to be a relevant fact here.

Nevertheless, if courts or lawmakers were to vary the controls on agency investigations based on the perceived importance of the agency's mission, it might lead to hopeless complexity. It could prove extremely difficult to identify the type and amount of "impact" a regulatory agency must have on the public in order to qualify for preferential investigation rules. One might classify all of the work of one agency for preferred treatment, or one might focus on some part of the agency's work that is most important. One would also have to decide on the relative importance of threats to health, versus threats to aesthetic values, and so on. It is little wonder that the courts have not generally tried to distinguish important criminal investigations from lesser ones, or to use this factor to identify agency proceedings where access to counsel should be enforced most stringently.

2. Contexts Calling for Broader Access to Legal Counsel During Agency Investigations

Although there will surely be times when the right to counsel during an agency investigation must remain limited, many subjects believe that the right to counsel should reach its apex when an agency enforces the criminal law. When agency investigations start to resemble traditional criminal investigations, there are several reasons why access to counsel becomes more important. First, an agency's criminal enforcement often leads to a different type of penalty for the target of the investigation than does civil enforcement. An individual target of an investigation would likely prefer to face a prosecution for civil violations than a criminal prosecution, since in the latter case he or she could be punished with a prison term rather than a fine. Regardless of the size of the fine involved, most assume that a deprivation of personal liberty is a more serious penalty than a fine.[12]

Admittedly, the type of penalty at stake has not been and should not be the sole determinant of the proper scope for the right to counsel. To begin with, the

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Comley, 890 F.2d 539 (1st Cir. 1989) (NRC attempted to enforce a subpoena for tape recorded telephone conversations between target and director of special interest group).

[11]T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943 (1987).

[12]Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. OF POLITICAL ECONOMY 169 (1968). On the continuum of restrictions on liberty available through various criminal sanctions, *see* NORVAL MORRIS AND MICHAEL TONRY, BETWEEN PRISON AND PROBATION (1991).

type of penalty involved matters little to organizational targets, and agency investigations are frequently aimed at organizations rather than individuals. Organizations cannot be imprisoned, and the penalties they face in criminal and civil proceedings are not dramatically different. Moreover, many individuals committing "regulatory crimes" do not face a realistic prospect of imprisonment under the federal sentencing guidelines. Nevertheless, restrictions on liberty are possible criminal penalties for some administrative crimes. To the extent they are available against an individual target, they do stand apart as a significantly different type of outcome and may justify the best available access to counsel.

A second factor also makes it appropriate to employ an expansive right to counsel where the agency takes on criminal enforcement functions. When the government proceeds with criminal charges, the target encounters more serious moral stigma and negative publicity than when the government chooses civil enforcement. This distinction may be the most reliable and traditional method of distinguishing civil from criminal enforcement. However, with the proliferation of criminal statutes based on relatively technical violations of complex regulatory regimes, and based on lessened mens rea requirements, the moral stigma attached to criminal violations may not be quite as distinctive as it once was.[13]

3. Proposal for a System Centered on the Government's Intended Use of Information

The characteristics of administrative investigations set forth so far seem to spell trouble for any uniform treatment of right to counsel issues. Since it is rare for an agency to know early in its investigation how it intends to use some information, it does not seem appropriate to insist on the fullest possible participation of counsel in every aspect of an agency's investigation. Yet there are cases, those ending in the uniquely intrusive and stigmatizing sanctions of the criminal law, where it does seem more important to involve counsel more completely from the start. The trouble, of course, is in identifying those cases early enough in the process.

The difficulty in identifying the government's future uses of information can be a real concern for regulated parties. Their expectations are shaped in a regulatory context where cooperation with regulators is often their best strategy. When criminal charges appear at the end of a lengthy and sometimes informal process of collecting information, the target may have a feeling of being duped. If the regulator had declared her intention to obtain criminal charges wherever

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[13] *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal?": Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193 (1991); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1.

possible, the target might have consulted more carefully and consistently with an attorney, and the attorney would likely have taken a more adversarial stance.

The agency's choice of its enforcement objective could be pivotal in determining the proper scope to give the right to counsel. Where the agency has decided to pursue regulatory or non-criminal remedies alone, a lower set of expectations about investigative techniques would be palatable to regulated parties. If the agency can declare prior to an investigative effort that it will only use the information obtained in a civil or regulatory enforcement action, or in the general policymaking functions of the agency, then a lenient set of expectations would provoke little or no controversy.

On the other hand, if the agency wishes to retain the possibility of a criminal prosecution arising out of an investigation, considerations of fair notice and consistency suggest that the agency should, to the extent practicable, allow the subject of its investigation to obtain the sort of legal representation generally at work in criminal investigations. This system mirrors the likely expectations of regulated parties, yet allows the government to carry out effective investigations. It forms the basis for the discussion that follows.

II. Investigations of Regulated Parties

When an agency tries to gather information about regulated parties, its representative may approach the parties themselves or they may go to third parties. These attempts to collect information occur in several formats, including informal interviews conducted by agency investigators, subpoenaed testimony before agency officials, and requests for production of documents.

A. Participation of Counsel in Witness Interviews

Agencies will periodically ask a person to submit to an interview or to testify in an investigative proceeding, prior to the initiation of any formal agency enforcement proceedings. They also typically have the power to compel the witness to provide the interview or testimony. Agencies make these requests with little guidance from the APA or enabling statutes about the proper procedure to follow.

The APA does not deal at length with "investigative" proceedings.[14] An agency hoping to obtain the statements of private parties might choose to send

[14]Section 555(c) of the APA mentions "investigative act[s] or demand[s]" such as inspections or requirements of a report. The same section also refers to "non-public investigatory proceedings" that could include a transcript of testimony.

officials out into the field to obtain voluntary statements,[15] or it might subpoena an individual to appear before an agency representative.

Section 555(b) of the APA provides for a right to counsel once a person is subpoenaed to testify:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.[16]

The statute distinguishes between a "person," who may be represented by counsel only when compelled to appear, and a "party," who may decide on her own to appear with counsel in an agency proceeding. Some agencies, including the IRS, have in the past argued that only parties are entitled to counsel in investigatory proceedings. However, there is universal agreement now that the plain statutory language extends to non-parties compelled to testify.[17]

Under § 555(b), counsel may "accompany," "represent," and "advise" the person. This language, while providing some guidance, does not settle exactly how counsel might participate in the proceedings. When attorneys have from time to time attempted to take active part in investigative proceedings, agencies have been forced to decide exactly what forms of lawyer participation they should allow.

Under the statute, it appears that counsel must remain free to observe the proceedings and to advise the witness at any point along the way. The statutory provision that an attorney may "accompany" and "advise" the person clearly extends this far. Some counsel attempt to provide more active representation than observation or advice to the client, hoping to create or shape the administrative record during the investigation. Agencies have more leeway to limit attorneys in this setting, and can restrict the ability of counsel to create a record during the investigative proceeding. In *Commissioner v. Schreiber*,[18] the court confirmed the power of an agency to prevent counsel representing a witness from objecting to questions, cross-examining witnesses or calling witnesses.

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[15]*See* United States v. Murray, 297 F.2d 812, 821 (2nd Cir. 1962) (no right to counsel during voluntary statements made to the IRS, those not made under compulsion or subpoena); Suess v. Pugh, 245 F. Supp. 661 (D.W.Va. 1965).

[16]5 USC §555(b).

[17]United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949).

[18]329 F.2d 517 (9th Cir.), *mod. on other grounds*, 381 U.S. 279 (1964).

While the APA gives counsel such powers in adjudicatory proceedings, this form of participation need not be allowed in investigative proceedings.[19]

Even though the APA allows the agency to limit the attorney's role during investigations to that of an observer and advisor, some agencies have chosen to promulgate rules allowing more than this. Some regulations authorize attorneys to ask for clarifications of questions or to make statements for the record in an investigative proceeding. For instance, a regulation of the FDIC allows attorneys during investigations to question the witness briefly at the end of the testimony," for clarification purposes."[20]

Agencies routinely retain the power to exclude attorneys who obstruct the orderly conduct of proceedings. Agencies may promulgate rules for such occasions,[21] or they might simply issue an order if authorized by statute. Common types of obstructive behavior by attorneys include shouting at witnesses, insulting the agency representative presiding at the hearing, frequent interruptions of testimony, or preventing witnesses from answering questions.[22]

The obstructive behavior may include efforts to delay the proceedings without overtly disrupting the proceedings. For instance, in *SEC v. Suter*,[23] the agency refused to grant a continuance of an agency proceeding where the witness had obtained several prior continuances after replacing his chosen counsel at the last moment.

A different question arises when an attorney for one party wishes to observe the investigative proceedings involving another party. Statutes granting agencies subpoena power usually authorize them to conduct an interview with nobody present except for counsel and agency representatives.[24] Alternatively, the agency could choose to hold an investigative "hearing" open to the public and compel the person to testify at this hearing.[25] Either of these routes is consistent with the APA, and the statutes granting subpoena power to the agency typically do not limit the agency's choices between these alternatives.

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[19]*See also* Hannah v. Larche, 363 U.S. 420 (1960) (Civil Rights Commission, court upholds limitations on cross-examination in investigative hearings); Avesta AB v. United States, 689 F. Supp. 1173, 1189 (C.I.T. 1988).

[20]12 CFR §308.148(b)(2) (1992) (FDIC procedure); *see also* 57 Fed. Reg. 33133, 33135 (July 27, 1992) (similar proposed rule of Resolution Trust Corporation).

[21]57 Fed. Reg. 33133, 33136 at §1625.8 (July 27, 1992) (RTC proposed regulation allowing RTC to exclude attorney from any investigation for "dilatory, obstructionist, egregious, contemptuous, or contumacious conduct"); 17 CFR §203 (1992) (SEC).

[22]*See* Great Lakes Screw Corp. v. NLRB, 409 F.2d 375 (7th Cir. 1969) (describing obstructive behavior by counsel, but placing heavier burden on agency to give specific examples of such behavior before excluding counsel).

[23]732 F.2d 1294, 1302 (7th Cir. 1984).

[24]15 USC §1914(a)(1) (DOT employees may issue subpoenas in investigations, motor vehicle bumper standards); §1990d(c)(1) (odometer requirements).

[25]17 CFR §§203.4, 203.5 (1991) (SEC formal investigative proceedings).

One need not search far for reasons to hold a non-public investigatory interview. The investigators may believe that if their interests and lines of inquiry become generally known to those who might be interviewed in the future, the investigation would be less successful. Public meetings may also prove less convenient because of the facilities that might become necessary. Courts have time and again upheld agency decisions to conduct non-public investigative interviews.[26]

A comparison of these limitations on the participation of counsel to similar areas in criminal practice does not reveal any areas of concern. Although counsel can be present and offer advice to clients during investigative events such as custodial interrogations or certain eyewitness identification procedures, they may not insist on asking clarifying questions or otherwise placing objections or evidence before the investigators. Indeed, attorneys representing grand jury witnesses in the federal system may not even accompany their clients into the grand jury room. By comparison, the ability of counsel to participate in administrative proceedings—regardless of whether they result in civil or criminal sanctions—is at least as broad.

B. Participation of Auxiliary Personnel

The APA does not resolve the question of whether a person may be represented by a non-lawyer during investigative proceedings. The right to counsel provisions of §555(b) seem to give conflicting guidance on the question of representation by non-lawyers. The statutory right to counsel for persons compelled to appear before an agency only extends to any "other qualified representative" if "permitted by the agency." On the other hand, the statute pointedly refuses to address the rights of non-lawyers to represent parties before an agency.[27]

1. Non-lawyers as sole representatives

Some agencies, such as the Social Security Administration, allow non-lawyers to represent parties during adjudicative proceedings. It is less common for non-lawyers to participate during investigatory proceedings, but it does occur

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[26] *See* Int'l Union, UMW of America v. Martin, 785 F. Supp. 1025 (D.D.C. 1992) (upholds decision of Mine Safety and Health Administration during investigation of mine explosion to exclude union representatives from interviews conducted away from mine; interviewees had representatives of their own choosing present at all times).

[27] 5 USC §555(b) ("This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding."). Perhaps the first clause described in the text addresses the rights of the target, while the clause noted here addresses the question from the point of view of the representative and prevents any inferences regarding APA-imposed qualifications for advocates.

on occasion. Once an agency passes regulations or policy statements regarding the representatives it will allow to attend investigative proceedings, it must abide by those regulations even though they are not required by statute. In *Trinity Industries, Inc. v. Dole*,[28] OSHA sought to interview employees during an investigation after an accident. All the employees, who were Hispanic, wanted a company supervisor to serve as translator and wanted another company representative present to prevent confusion by OSHA questions. OSHA subpoenaed the employees and prevented the company representatives from attending, despite a Field Manual provision calling for investigators to allow company representatives to attend interviews if the employee desired. The court required OSHA to abide by the provisions of its Field Manual.

At this point, there does not seem to be any reason to recommend any substantial changes in agency practice regarding party access to non-attorney support personnel. The APA gives the agencies discretion—albeit through seemingly contradictory clauses—to decide whether parties may be represented solely by non-attorneys. Several agencies have passed rules or policy statements allowing such representation, and parties have been able to obtain judicial enforcement of such rules without great difficulty. Given the lesser expense to parties of hiring a non-attorney representative, it might be desirable if more agencies explicitly allowed this type of support for parties during investigations.

2. Personnel to Assist Counsel

Another set of disputes has revolved around the presence during an interview of persons to assist the witness' attorney. Sometimes a person or organization involved in an investigation by the IRS or the SEC will desire an accountant or other financial analyst to be present along with the lawyer during a proceeding. At least one court has compelled the agency to allow for the presence of an accountant during an investigative interview. Even though the APA deals only with the right to legal counsel, the court in *SEC v. Whitman*,[29] considered the accountant's presence to be an indispensable part of the right to counsel in that case. The opinion emphasized the importance of technical advice in certain types of inquiries; without it, counsel cannot provide effective representation.

This same line of reasoning might extend to a number of settings where technical assistance might be important, even indispensable, to an attorney during an investigative interview. For instance, engineering or scientific advice may be necessary during an environmental investigation or an interview regarding a nuclear facility. Perhaps the issue has not arisen in these settings because the witness him or herself can usually provide the relevant technical information to

[28]760 F. Supp. 1194 (N.D.Tex. 1991).
[29]SEC v. Whitman, 613 F. Supp. 48, 49 (D.D.C. 1985).

the lawyer. However, where the witness cannot personally provide the attorney with an adequate technical background, access to such information is an indispensable part of providing competent legal advice.

Courts have been less receptive to attempts by witnesses and their attorneys to bring their own stenographers into the interviews. By and large, the courts agree that the APA allows the agency to exclude private stenographers. On the other hand, where the agency uses a subpoena to compel attendance at an investigatory hearing, statutes typically require the creation of a transcript,[30] and §555(c) of the APA gives witnesses the right to obtain a copy of that transcript.[31] Thus, the refusal to allow a private stenographer in an investigative interview compelled by subpoena does not provide the witness with anything of true value, since the government must provide the transcript anyway. Denying access to a private stenographer may simply protect the government from the logistical difficulties of dealing with an unfamiliar stenographic service.

The agency may resist allowing experts such as accountants or engineers into an interview because of concerns about the confidentiality of their investigative strategy or techniques. The expert may be able to help the witness anticipate the agency's concerns or suspicions. Alternatively, the agency may be concerned about the delay involved if an attorney must consult frequently during an interview with an expert before questioning may proceed.

Despite these reasons for agencies to disfavor the use of auxiliary personnel by witnesses, there does not appear to be any evidence of any widespread difficulties in this area. Apparently, parties do not often seek to bring such auxiliary personnel into an interview. Certainly there are very few judicial decisions on the subject. Moreover, the growing resort to criminal sanctions does not yet seem to be causing parties to request auxiliary personnel more frequently. On those rare occasions when a party tries to bring auxiliary personnel into an interview and the agency objects, there is generally some way to assure reasonable access to the technical expert, who can remain nearby without being physically present during the interview.

Analogues from more traditional criminal investigations do not provide a compelling argument for narrowing agency discretion on this question. While it is true that the constitutional right to counsel during a criminal trial may in some settings include access to certain expert opinion for the defendant,[32] that expertise

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[30]*Cf.* United States v. Murray, 297 F.2d 812 (2d Cir. 1962) (no transcript required in informal investigative interview not compelled by subpoena).

[31]Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1952) (witness testifying in non-public investigatory proceeding may not bring in stenographer, but may obtain copy of agency's transcript under 5 USC §555(c)); In re Neill, 209 F. Supp. 76 (S.D. W.Va. 1962); but *see* Mott v. MacMahon, 214 F. Supp. 20 (N.D. Cal. 1963) (nothing in IRC to prevent presence of private stenographer).

[32]Ake v. Oklahoma, 470 U.S. 68 (1985) (indigent defendant who plans to make sanity a significant factor at trial must have access to competent psychiatrist to assist in defense).

may not be available to the criminal defendant earlier in the investigative process. The witness in an administrative investigation is also different from the criminal defendant at trial because he or she will often have some personal expertise on the subject of the interview, or will be able to prepare for the interview by consulting with others who are experts within the same organization.

Given the lack of evidence that agencies and parties are coming into conflict on this question, this report makes no recommendation for a change in agency practice. Agencies should keep in mind, however, that informed legal advice in complex regulatory areas will often be impossible without some ability to consult experts. If requested by the interviewee, the agency investigators should provide opportunities for attorneys to obtain such necessary background information, either by consulting an expert present during the interview, or by stopping the proceedings for a brief period to allow consultation with an expert elsewhere. Adequate notice regarding the subject matter of an interview may also allow the attorney to obtain such background information prior to the interview. However it is accomplished, the agency investigators must remain aware that a witness' access to counsel is meaningful only if the attorney has an opportunity to obtain the background technical expertise sometimes necessary when dealing with complex regulatory matters. Of course, the party—not the agency—would be responsible for providing the expert assistance to the party's attorney.

C. Selection of Counsel

An issue that has created controversy more recently involves the selection of counsel by the witness. The right to counsel in the APA is generally construed to mean the right to counsel of one's choice.[33] Yet some agencies have attempted to place restrictions on multiple representation of interviewees by the same attorney. These agencies, including the Internal Revenue Service, the Securities Exchange Commission, the Nuclear Regulatory Commission, the Federal Deposit Insurance Corporation, and the Resolution Trust Corporation,[34] all take statements from witnesses with their counsel present. In some cases, the investigation could lead to civil or criminal sanctions against a company or its employees, or both. Where a company under investigation offers its employees the services of the same attorney who represents the company, these agencies have reserved the right to insist, under some circumstances, that the witness choose some other attorney.

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[33]Baker v. Comm'r of Internal Revenue, 275 F.2d 141 (5th Cir. 1960); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949).

[34]10 CFR §19.18 (1990) (NRC attorney exclusion rule).

1. Agency Interests in Preventing Multiple Representation

Multiple representation of witnesses by one attorney could create several problems for the investigation. First, an attorney representing both employees and their company can keep management informed of any damaging statements the employees might make.[35] An employee who knows that her statements will be passed along to the company's management might be less inclined to provide any information about wrongdoing on the part of herself or others.

Second, the attorney with multiple clients can keep close watch over the course of the questioning and anticipate the government's concerns and investigative strategy. They could shape the witnesses' preparation for subsequent interviews in light of this knowledge. Where an early interview provides inadequate information to establish a violation, employees in subsequent interviews might be subtly inclined to conform their testimony—consciously or unconsciously—to the earlier harmless testimony of other witnesses. Without the ability to surprise a witness, the agent might be less able to elicit complete information.

Similar concerns are present in the grand jury context when one attorney represents several employee witnesses and their employer, a target of the investigation. However, the impact of multiple representation is somewhat blunted in grand jury proceedings, because counsel cannot be present during questioning, and must rely on the candor and memory of the witness to reconstruct the line of questioning and the answers given.

2. History of Federal Agency Efforts to Limit Multiple Representation

Agencies have generally dealt with the problems of multiple representation on a case-by-case basis. They might negotiate informally with defense counsel to avoid certain types of conduct that concern the agency, or the agency might issue an order requiring selection of new counsel in a particular case.[36] Such decisions come under judicial scrutiny when the witness refuses to comply with a subpoena after the agency excludes the witness' chosen counsel, and the agency must seek enforcement of the subpoena in court.[37]

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[35]Under the Model Code of Professional Responsibility, the attorney may give information from one client to another if the client giving the information consents. It might prove awkward for an employee, who wants to avoid seeming disloyal to the company or to antagonize counsel who is provided by the company, to insist that all statements be kept from the company.

[36]*See* Mississippi River Corp. v. FTC, 454 F.2d 1083, 1093 (8th Cir. 1972) (agency order prohibiting witness from conferring during recess with counsel also representing company, parties had not disclosed multiple representation to agency).

[37]Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1952); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949).

Some agencies have passed rules on this topic rather than dealing with multiple representation on a case-by-case basis. Thus far, courts have invalidated aspects of most of these rules. The Internal Revenue Service adopted what was perhaps the first general agency policy regarding multiple representation. In a manual for its agents, the agency announced the following policy: "a third party witness is entitled to attendance of his own counsel, but not the counsel for the taxpayer." The policy came under judicial scrutiny on several occasions. Twice, courts refused to permit the IRS to exclude an attorney, because the APA protects a witness' power to select his own attorney.[38] A court enforced the agency's decision to exclude counsel only where the agency complained that counsel was in fact obstructing an orderly inquiry process by improper conduct and tactics.[39] The investigative procedures of the IRS no longer instruct agents to exclude counsel representing both the taxpayer and a witness.

The Securities Exchange Commission made one of the earliest attempts to promulgate a regulation regarding exclusion of counsel from investigative interviews. The SEC regulation barred the presence in investigative interviews of attorneys who represented multiple witnesses, unless permitted "in the discretion of the officer conducting the investigation."[40] In the first reported challenge to this rule, the court in *United States v. Steel*,[41] held that the agency's decision to exclude corporate counsel from an interview of another client, a corporate employee, was not a violation of the APA statutory right to counsel. The limitation on selection of counsel was considered "reasonable" because the witness had adequate time (one week) to select some other counsel.

However, the first appellate court to review the SEC's rule, the Ninth Circuit in *SEC v. Higashi*,[42] refused to enforce it. In that case, a corporate director was subpoenaed to appear at an investigative hearing, and chose as his counsel the attorney representing the corporation under investigation. While recognizing the importance of the agency being able to hold an investigative hearing not open to other witnesses or their attorneys, the court decided that the witness should be able to select the corporate attorney to represent him. This was appropriate because the interests of the corporation and the director corresponded to a large extent, and because it would be expensive for new counsel to become familiar with the complex background of the case.[43]

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[38]Baker v. Comm'r of Internal Revenue, 275 F.2d 141 (5th Cir. 1960); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949).

[39]Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1952) (attorney representing taxpayer and employee witness was brother of taxpayer, and government agents were "put to much delay, trouble, and expense by the actions of the taxpayer's attorney.").

[40]17 CFR §203.7(b) (1976).

[41]238 F. Supp. 575 (S.D.N.Y. 1965).

[42]359 F.2d 550 (9th Cir. 1966).

[43]*Id.* at 553.

The court in *SEC v. Csapo*,[44] specified further the limits of an agency's ability to exclude the counsel chosen by a witness. SEC investigators had prevented Csapo's attorneys from attending an interview because the same attorneys were representing eight other witnesses in the investigation, and had already attended the lengthy interview of one of their clients. The court held that exclusion of counsel was inconsistent with the APA right to counsel unless the exclusion was based upon some "concrete evidence" that multiple representation of witnesses by one attorney would impede an investigation. Evidence that company officials encouraged some witnesses to accept the company's choice of attorneys, and that the company paid the attorneys' fees, was not enough to meet this standard.[45] The mere fact of multiple representation was also inadequate. An agency may inform witnesses of possible conflicts of interest on the part of their attorneys, but it may not exclude counsel based on "speculation" that counsel could frustrate the investigation.[46]

A rule issued in January 1990 by the Nuclear Regulatory Commission limited agency discretion more than the earlier SEC rule did. It gave the agency official conducting an inquiry the power to determine that a "reasonable basis exists to believe that the investigation or inspection will be obstructed, impeded or impaired, either directly or indirectly, by an attorney's representation of multiple interests."[47] Upon making this finding (in consultation with the Office of the General Counsel), the official could bar that attorney from the interview. The interviewee could appeal this decision to the Commission itself, and ultimately to federal court.[48] If the exclusion remained in effect, the interviewee could postpone the interview while obtaining new counsel.[49]

When industry representatives challenged the rule in *Professional Reactor Operator Society v. NRC*,[50] the D.C. Circuit overturned the rule because it allowed exclusion to take place where there was only a "reasonable basis" to believe the investigation would be obstructed. Since the "reasonable basis" standard was less exacting than the "concrete evidence" required under *Csapo*, the *Professional Reactor* court decided that the NRC's rule was inconsistent with the unequivocal right to counsel provided by the APA.

Following the *Professional Reactor* decision, the NRC proposed an amendment to its attorney exclusion rule by requiring "concrete evidence" rather

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[44]533 F.2d 7 (D.C. Cir. 1976).

[45]*Id.* at 10-11. The court recognized the power of the agency to discipline attorneys for improper solicitation of clients, but found that the allegations of solicitation remained unproven.

[46]The SEC retains its attorney exclusion rule, but apparently no longer invokes it to exclude counsel based on multiple representation. 17 CFR §203.7(b) (1991).

[47]10 CFR §19.18(b), reported at 55 Fed. Reg. 247-48 (1990).

[48]10 CFR §19.18(d) (1991).

[49]10 CFR §19.18(e) (1991).

[50]939 F.2d 1047 (D.C. Cir. 1991).

than a "reasonable basis" to believe the attorney's presence would obstruct or impede the investigation.[51] Although the Federal Register notice of proposed rules did not specify the agency's definition of "concrete evidence," it did identify some relevant evidence in making that decision. The notice conceded that mere multiple representation or vigorous advocacy by competent counsel would not be sufficient grounds for an exclusion. On the other hand, "evidence that the employee had a concern that his employment would be jeopardized by transmittal of information from the interview to the [employer]" might qualify as concrete evidence. The agency also identified a potentially more far-reaching basis for showing concrete evidence: "It would also be relevant if there were evidence that the multiple representation would lead to disclosure of the substance of an interview to a future interviewee or subject in the investigation and that this disclosure would have an adverse impact on the investigation."[52]

The proposed rule has now become final.[53] In the statement accompanying the final rule, the NRC conceded that "the mere sharing of information provided by an interviewee to a subsequent interviewee" would not, standing alone, be a sufficient basis for excluding counsel. However, the NRC insisted that such evidence could support the exclusion of an attorney if there is also evidence (based on something more than speculation) that the information to be shared is important enough to interfere with the investigation.

More recently, the Federal Deposit Insurance Corporation has promulgated a rule that allows FDIC investigators to respond to "perceived or actual" conflicts of interest arising when an attorney represents multiple witnesses.[54] The rules allow an ALJ to take "corrective measures" to prevent the conflict of interest, including an order limiting the scope of representation.[55] In every case of multiple representation, counsel and the witness must certify that (1) the attorney has fully discussed the possible conflict with all the clients involved, (2) the clients know of no material existing conflict, and (3) the clients waive any right to challenge the agency proceedings based on any conflict that may arise.

The Resolution Trust Corporation has followed the lead of the FDIC. It has proposed a rule that would allow the RTC to disqualify an attorney or law firm from representing multiple witnesses in an investigation if there is a "perceived

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[51] 56 Fed. Reg. 65,951 (Dec. 19, 1991).

[52] 56 Fed. Reg. at 65950.

[53] 57 Fed. Reg. 61780 (Dec. 29, 1992) (codified at 10 CFR §§19.3, 19.18(b)-(e)).

[54] 12 CFR §308.148(d), 308.08 (1992) (adopted August 9, 1991).

[55] It is not clear which agency official makes this decision during an investigation. Section 308.148 empowers the person conducting the investigation to "require the attorney to comply with the provisions of §308.08." Section 308.08 provides for certification and waiver regarding a conflict of interest, and empowers the ALJ to take corrective measures. One possible reading of §308.148 is that the person conducting the investigation will carry out the corrective measures described generally in §308.08.

or actual conflict of interest."[56] The investigating official for the agency, acting alone, could require an attorney representing multiple witnesses to make the certification described above. The rule gives the RTC power to "take corrective measures at any stage of an investigation" to cure a conflict of interest.

The FDIC and RTC rules are interesting, first, because they identify conflicts of interest—rather than impeding an investigation—as the problem. They also seem to depart from other rules of this genre, because a "perceived or actual conflict" appears to be a less onerous burden of proof on the agency than the "concrete evidence" courts have required of other agencies.

3. Nature of Showing Necessary to Exclude Counsel: An Analogy to Grand Jury Practice

The exact nature of the "concrete evidence" that the government must show before excluding counsel from an agency investigative proceeding is still unclear. The facts of *Csapo* and the handful of other cases on this subject discussed above provide only a few clues. Courts and agencies might flesh out the meaning of this standard by looking to the grand jury context. Where the government has tried to prevent an attorney from representing multiple witnesses before a federal grand jury, courts have required the government to provide some "concrete evidence" that the multiple representation will interfere with the investigation.[57]

When the government makes a motion to disqualify counsel who represents multiple grand jury witnesses or a witness and a target, the court will occasionally grant the motion even though the witness desires to retain counsel despite the conflict of interest.[58] The courts explain that they do so to protect the investigative ability of the grand jury, as well as the interests of the witness.[59] However, courts have been very reluctant to invoke this "extreme" remedy.[60]

Admittedly, some early case law suggests that a court should retain broad discretion to disqualify counsel for a grand jury witness to prevent conflicts of interest and impediments to the investigation.[61] However, most courts over the last fifteen years have made it very difficult for the government to disqualify counsel chosen by a grand jury witness. Before disqualification can occur in the

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[56] 57 Fed. Reg. 33133, 33135 at §1625.7(b)(2)(ii) (July 27, 1992).

[57] Although the phrase "concrete evidence" appears regularly in grand jury disqualification cases, *see* In re Grand Jury Proceedings (Doe), 859 F.2d 1021 (1st Cir. 1988), it does not appear in every case.

[58] *See* In re Grand Jury Investigation, 436 F. Supp. 818 (W.D.Pa. 1977).

[59] Matter of Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978).

[60] Matter of Investigative Grand Jury Proceedings on April 10, 1979 and Continuing, 480 F. Supp. 162 (N.D. Ohio 1979) (enumerating lesser remedies).

[61] United States v. Gopman, 531 F.2d 262 (5th Cir. 1976).

grand jury setting, the government must show that there is a "serious potential for conflict" of interest.[62]

Courts have refused to disqualify attorneys when the government suggests that one witness could potentially give testimony damaging to another client.[63] Nor does it suffice for the government to allege generally that employee witnesses have an incentive to be less than forthcoming about the violations of their employers.[64]

A serious potential for conflict is established most commonly in the grand jury setting when a grant of immunity to one witness makes that person likely to testify against another client of the same attorney.[65] Moreover, there must be some specific indication that the immunized testimony of one client will in fact incriminate or adversely affect the other client.[66] Where an attorney represents some witnesses designated as targets of the investigation, along with other witnesses who are granted immunity and are declared not to be targets, those facts may combine to provide the necessary evidence of a potential conflict.[67]

These inquiries into the likely subjects of a witness' testimony, and the likelihood that a witness will testify despite the Fifth Amendment self-incrimination privilege, all focus attention on the *incentives* of a witness rather than the actions of a witness or an attorney. Hence, the government does not have to wait until the damage is done before it can successfully exclude counsel for a grand jury witness.

On the other hand, the courts have commonly relied on two factors—the witness' status as a target or non-target, and the use of immunized testimony—in an effort to identify cases where the incentives for a witness or attorney to damage the investigation or the interests of another party are exceptionally clear and strong. While many witnesses wish to preserve a good relationship with an employer who is providing legal counsel, and many witnesses could potentially provide testimony damaging to other clients of the same attorney, something more exceptional must be present to justify an exclusion in rare cases.

Agencies generally do not and cannot offer a grant of immunity to witnesses testifying in an agency investigation. Hence, one of the clearest indications of a

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[62]In re Grand Jury Proceedings (Doe), 859 F.2d 1021 (1st Cir. 1988) (applying standard from Wheat v. United States, 486 U.S. 153 (1988), for disqualification at trial, to grand jury proceedings).

[63]In re Taylor, 567 F.2d 1183 (2d Cir. 1977).

[64]*See* In re Special Grand Jury, 480 F. Supp. 174 (E.D.Wis. 1979) (all witnesses represented by one attorney claim no memory of events in question, not adequate showing of conflict without facts suggesting their answers would be different if represented by different counsel).

[65]Matter of Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978); In re Grand Jury Investigation, 436 F. Supp. 818 (W.D.Pa. 1977).

[66]In re Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978).

[67]In re Investigative Grand Jury Proceedings on April 10, 1979 and Continuing, 480 F. Supp. 162 (N.D. Ohio 1979).

witness' incentives is not available in the agency context as it is for grand jury matters. Some other factor must be present, then, to make an exceptional witness stand apart from the universe of employee witnesses represented by employer-provided counsel. If the witness volunteers some hesitation about providing candid testimony, that should certainly suffice. If the "concrete evidence" standard is to be interpreted consistently with the case law in the grand jury context, the focus must remain on finding factors beyond the fact of an employment relationship or the fact of multiple representation, factors making a witness unusually threatening to the investigation.

4. Procedural Challenges to Attorney Exclusions

Although the courts addressing the agency practice of excluding certain counsel have focused on the justification that the agency must give before interfering in the witness' selection of counsel, there are other potential grounds for challenging the legality of the practice. For instance, the identity of the agency decisionmaker might be the basis for a challenge to exclusion rules. When government prosecutors wish to disqualify counsel for a grand jury witness, they must obtain the assent of the judge supervising the grand jury. Similarly, under the RTC's proposed exclusion rule, the RTC itself—rather than the investigating officer—decides whether to exclude an attorney representing multiple witnesses. Under both the SEC and NRC exclusion rules, however, the agency investigators themselves make the initial decision whether to exclude counsel for a witness.[68]

Assuming that the APA creates a property or liberty interest in having counsel of one's choice, one might argue that due process requires a neutral official to decide whether to deprive the witness of that interest. The ability to appeal the decision of the investigator higher up within the agency, or ultimately in court, might satisfy such a due process requirement, at least if the appellate panel had plenary power of review.

5. Strategic Reasons for Agencies to Exercise Sparingly Any Discretion to Exclude Counsel

Aside from the question of whether attorney exclusion is legally permissible, there is a serious question whether it can effectively safeguard an investigation. To begin with, there are statutes prohibiting obstruction of justice. Those statutes could lead, in extreme cases, to prosecution of an attorney or a witness who

[68]Under the similar rules of the FDIC, an investigator may require certification of no conflict of interest during an investigation, and may perhaps disqualify counsel. These regulations might be read, however, to allow only an ALJ to exclude the attorney from an investigative interview. 12 CFR §308.148, 308.08 (1992).

willfully misleads agency investigators.[69] In addition, statutes governing some industries, such as the nuclear power industry, prohibit any employer retaliation against an employee who reports wrongdoing.[70] Such a statute might give some assurance to the witness asked to provide information of employer wrongdoing while a company representative is present.

To be sure, these statutes will not prevent all the problems associated with multiple representation. Often the proof of such conduct will be difficult to obtain, or once obtained may be insufficient to establish the government's case beyond a reasonable doubt. But if the more subtle forms of interference with investigations are the real problem, they will likely continue to plague an investigation even after the agency forces the witness to choose new counsel. So long as an employer pays the fees of the attorney representing the employee witness, that attorney will have some reason to share information and cooperate in other ways with corporate counsel. The witness, as well, has a continuing incentive to cooperate with the plans of her employer, so as to confirm her loyalty and value to the company.

These practices pose the same threats to the investigation as multiple representation. They could only be eliminated through draconian measures, such as a prohibition on sharing information among witnesses or attorneys before or after an interview. An agency unwilling to go this far is unlikely to accomplish the objectives of an attorney exclusion rule.

The ability of investigators to limit a witness' choice of counsel may be perceived as an unfair advantage for the agency. It restricts a choice generally open to those being investigated by the government, while providing little if any tangible benefit to the government. These perceptions become especially acute in a setting where the administrative investigators seem to focus on potential criminal violations. Although agencies are typically responsible for improving health and safety or other worthy public goals, they must, whenever possible, pursue those goals without creating the perception of injustice.

An agency implementing the "concrete evidence" standard for exclusion of counsel, or some other standard such as "perceived or actual conflict" for the FDIC and RTC, must look for truly extraordinary cases. They must recognize that many (probably most) witnesses will genuinely want the counsel representing them, even though the attorney represents other witnesses or targets in the

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[69] *See* 18 U.S.C. §1001 (false statements); §1505 (obstruction of proceedings before agencies); §1510 (obstruction of criminal investigations); §1622 (subornation of perjury).

[70] 29 U.S.C. §660(c) (1988) (protection from discharge for employee reporting workplace safety violations to OSHA); 42 U.S.C. §5851 (1988) (protection from discharge for utility employee reporting violations of atomic energy safety statutes). There are also state statutes providing protection to whistleblowing employees in some contexts (although usually limited to public employees). *See* Littman v. Firestone Tire & Rubber Co., 715 F. Supp. 90 (S.D.N.Y. 1990) (construing New Jersey Conscientious Employee Protection Act).

investigation. They must also concede that much information presented in one interview will be shared with other witnesses and targets, because their attorneys are coordinating their efforts. When the only harm is sharing information, there is nothing extraordinary enough to warrant an exclusion. When the only reasons to fear that a witness will not be candid are based on an employment relationship or multiple representation by an attorney, once again nothing extraordinary has taken place. For the most part, agencies should not attempt to exclude counsel unless there is evidence that would suffice to exclude counsel in the grand jury setting.

D. Informing Witnesses about Access to Counsel

Where an agency compels a witness to testify in an investigatory proceeding, the APA right to counsel should eliminate any need to inform the witness of his or her various rights during the proceeding. So long as the agency makes the subpoena recipient aware of the right to counsel, no other notice should be necessary. Agencies tend to inform subpoenaed witnesses of their right to counsel, although it is not clear that they are legally compelled to provide this notice.

Where the agency approaches a witness for a voluntary interview, there is no statutory or constitutional right to counsel. Further, because the witness is not in custody in any sense during the voluntary interview, the government is not obliged to notify the witness of his or her privilege against self-incrimination. The warnings prescribed in *Miranda v. Arizona*[71] do not apply in this non-custodial setting.[72]

Although there may be no legal requirement to notify a witness of a right to counsel or the privilege against self-incrimination,[73] some agencies choose to provide such warnings routinely.[74] This practice accords with the analogous policy of the Department of Justice to inform grand jury witnesses of their privilege against self-incrimination and their right to counsel. Witnesses receive this notice both in their grand jury subpoena and at the outset of their grand jury testimony. Although it is doubtful that this notice is a constitutional requirement, it is a routine practice of the Department of Justice.

It is difficult to imagine any reasons why an administrative agency would truly need to withhold such warnings, since they operate with so little controversy

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[71]384 U.S. 486 (1966).

[72]*See* Mirscheli v. Zampano, 201 F. Supp. 373, 376 (D.C.D.C. 1962) (in an voluntary investigative interview, the party investigated does not have to be informed of his right to have the advice of counsel).

[73]United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532, 543 (8th Cir. 1981).

[74]*See* U.S. Dept. of Interior, Inspector General Manual 844.4 (1988); Internal Revenue Manual §9781. The Inspector General's office in the Department of Defense is another example of an agency following this practice.

in federal grand jury practice. Investigators might depend on the ignorance of witnesses about their statutory right to counsel, and hope that they will provide more information than they otherwise would if represented by counsel. Such sharp practices, however, will appear unseemly to many, will invite controversy, and may not be worth the minimal benefits to an investigation.

E. Providing Information about the Investigation that Affects Legal Representation

There are also a few pieces of information about agency investigations that have a profound effect on the witness' decision to retain counsel, and on the attorney's ability to represent the witness. For instance, an attorney preparing for a proceeding will often find it critical to learn precisely what the client said at a past investigative proceeding. Under the APA, a witness who is compelled to submit data or evidence may procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.[75] In practice, agencies have allowed all witnesses, including those who participate in "nonpublic investigatory proceedings," to obtain copies of their testimony.[76]

The only source of controversy concerning transcripts involves the timing of the release of a transcript. The criminal discovery provisions of the Federal Rules of Criminal Procedure, along with the Jencks Act, require the government to release grand jury testimony of the defendant and prosecution witnesses before the defense puts on its case.[77] By analogy, agencies could at the very least provide transcripts to witnesses before they are called upon to defend themselves against adverse administrative action.

A witness might also find it valuable to know whether testimony is at all likely to lead to criminal sanctions against the witness. Once witnesses realize that criminal charges against them are a realistic possibility, one can surmise that the advice of counsel will become far more important to them. Knowledge about the government's intent regarding criminal charges also has a direct bearing on the selection of counsel. Such information can assist a witness in deciding whether to accept an offer by some other party to provide counsel. It may reveal the likelihood of a conflict of interest arising where the attorney represents multiple witnesses.

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[75] 5 USC §555(c) (1988).

[76] *See* 17 CFR §203.6 (1991) (SEC grants access to transcripts); 26 CFR §601.107(b)(1) (IRS).

[77] Federal courts have held that grand jury witnesses other than those who ultimately become defendants or witnesses at a criminal trial do not have the right to inspect their grand jury testimony. In re Application of Executive Securities Corp., 702 F.2d 406 (2d Cir.), cert. denied, 464 U.S. 818 (1983); United States v. Clavey, 565 F.2d 111 (7th Cir. 1977) (en banc), cert. denied, 434 U.S. 1070 (1978).

There is generally no legal requirement that agencies notify witnesses or others of their status in an investigation. In *SEC v. Jerry T. O'Brien, Inc.*,[78] the target of an SEC investigation argued that the agency was required to notify it of any document subpoenas issued to third parties, to allow a challenge to the sufficiency of those subpoenas. The Supreme Court held that the SEC had no duty to inform the target of any third-party subpoenas. The opinion also implied that the agency had no legal obligation to inform parties that they were themselves "targets," since it might prove difficult to define a target, and might create opportunities to obstruct justice or otherwise frustrate the investigation.

Given the discretion allowed to them under the *O'Brien* decision, many agencies do not notify those involved in their investigations of their status as a target or subject. However, a few federal agencies, including the SEC and the IRS, do provide some information of this sort to targets of their investigations.[79]

In federal grand jury investigations, the government attorney routinely notifies those subpoenaed by the grand jury whether they are subjects or targets of the grand jury's inquiry. "Subjects" are those whose activities fall within the scope of the grand jury's inquiry, while "targets" are those whom the grand jury or prosecutor can link to a crime with "substantial evidence," and who might ultimately be charged by the grand jury.[80] Although there may be no constitutional or statutory requirement that the government attorney provide this notice,[81] it is a practice that the government follows in purely criminal investigations out of a sense of fairness to those caught up in a stressful and dangerous situation.

The practice of informing subjects or targets of their status during a grand jury investigation will not translate easily into the context of agency investigations. In many instances, it will be literally impossible for agencies to notify a party about the government's intended use of information, or about the party's status in the investigation. Agencies generally will not know how information gathered during an investigation is likely to be used. Such decisions are generally in the hands of prosecutors at the Department of Justice. Although the agency may decide for itself which cases to refer to the Department of Justice for possible prosecution, it may be relatively late in an agency's investigation before it can make a referral decision. After the referral, the agency may be bound by executive order or other sources of law not to disclose to the person anything about the criminal referral.

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[78]467 U.S. 735 (1984).

[79]26 CFR §601.107(b)(2), (c) (1992); Internal Revenue Manual §9781; Handbook for Special Agents §342.132.

[80]U.S. Dept. of Justice, United States Attorneys' Manual §9-11.260 (1984); *see also* United States v. Crocker, 568 F.2d 1049, 1054 (3d Cir. 1977); United States v. Jacobs, 531 F.2d 87, 89 (2d Cir. 1976).

[81]United States v. Wong, 431 U.S. 174 (1977); United States v. Washington, 431 U.S. 181 (1977).

Even when it would be possible for an agency to provide information to a target or subject about the investigation, it may be imprudent to do so. A person learning of the risks of criminal prosecution may flee, tamper with evidence, attempt to influence potential witnesses, or take other action to compromise the investigation. Moreover, a requirement that all agencies must determine when a person faces some particular risk of criminal charges would inconvenience many agencies, and force upon others a decision that their agents have no training or competence to make.

Despite these concerns, there will be limited circumstances when it will be possible to provide to a witness some information about the likelihood of criminal charges. In some cases, it will be apparent from early in the investigation that evidence of criminal violations will probably develop. The assignment to a subdivision within an agency primarily responsible for criminal investigations may in some cases indicate the intentions of the government regarding the persons involved. In other cases, the Department of Justice may express an interest in a case before it is referred for possible criminal charges.

In cases such as these, the agency already knows that a person is unusually likely to face criminal charges. To seek further information from this person under the auspices of an apparently routine administrative investigation would mislead both the person and any counsel involved. There is no constitutional requirement that the government inform the person of the risks he faces; however, the sense of fair play that leads the government to provide notice about target and subject status in the grand jury context also supports the practice of notice when an agency continues to seek information from those whom it knows to be at particular risk of criminal charges. If the agency is concerned that the person will flee or attempt to obstruct justice, it may decide not to approach the person for further information and thereby avoid any need to provide notice.

If the notice to a person depends on an existing agency determination that the person is likely to be referred for criminal charges, it becomes important to know whose determination will be attributed to the agency. A field investigator may have expectations different from senior officials in the agency, and those expectations may develop at different times. Given the difficulty of knowing the expectations of lower level investigators and the need to respect the internal controls in an agency, the expectations of senior officials should control.

III. Investigations of Agency Contractors

Agency investigations are not only directed at regulatory targets or those who have information about violations of the regulatory program. Agencies must also gather information about those who contract with the agency to provide

goods and services. This part of the report surveys the special limitations on the right to counsel available to contractors during agency investigations.

This inquiry does not involve nuanced questions of whether the right to counsel is being subtly undermined. The question in this context is whether the subject of the investigation will receive any legal advice at all during the investigative proceedings. The important changes in the availability of legal counsel are explained, at least in part, by the assumption that contractors consent to investigation by the agency.

A. Ambiguous Statutory Support for a Right to Counsel During Questioning

Some, but not all, agency investigators interview contractors and their employees without counsel present.[82] There is reason to ask whether this practice is consistent with the Administrative Procedure Act. Section 555(b) of the APA is phrased ambiguously, but one plausible reading of the statute suggests that those contractors and employees questioned during an investigation should be able to insist on the presence of counsel.

Section 555(b) has two sentences relevant for our purposes here. The first sentence provides that a "person compelled to appear in person before an agency or representative thereof" may be represented by counsel. The second declares that a "party" may appear with counsel in "any agency proceeding." Interpretive difficulties arise under each of the two sentences.[83]

Under the first sentence, the most common form of "compelling" a person to appear before agency investigators would involve a subpoena. Where the interviewee is a contractor, no subpoena is necessary to secure the appearance of the witness. Arguably, therefore, an investigation that occurs without a subpoena would not fall within the reach of the first sentence of §555(b). However, the statute does not mention subpoenas as the exclusive method of compelling attendance of a witness, and contractual terms may force a firm and its agents to choose between attending the interview or being disciplined or losing the contracts. Neither the legislative history nor any case law decided under this statute address the question of whether threatened termination of a government contract would qualify as compulsion that would create a right to counsel.

Under the second sentence in the statute, the difficulty appears in trying to determine if a contractor who is interviewed by the agency investigator is a "party" in "agency proceedings." According to the statutory definition, a party

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[82]Investigators for the Inspector General of the Department of Defense allow contractors to consult with attorneys during interviews.

[83]*See* 3 Kenneth C. Davis, Administrative Law §14.17 (1980) ("Altogether, the APA provision is susceptible of considerable improvement.").

includes a person "named or admitted as a party...in an agency proceeding."[84] The definition of a "proceeding" includes agency rulemaking, adjudication, or licensing.[85]

The strongest objection to the use of the second sentence as the basis for a right to counsel for contractors is the definition of "proceeding." An interview during an investigation of a contractor may not qualify as an agency proceeding, because that action does not fit within the ordinary meaning of "rulemaking" or "licensing" or "adjudication." On the other hand, the APA does contemplate that all agency action will fall within one of these categories,[86] meaning that an expansive definition of "adjudication" may be necessary. The practical implications of this expanded definition, however, might be intolerable. Unless there were some way of identifying certain contractor interviews that are "proceedings" and some that are not, the broad reading of this sentence would give an agency contractor a right to counsel whenever the agency takes any action in which the contractor has an "interest."

The legislative history does not untangle the problems presented in the second sentence of §555(b). The House and Senate committees involved in the drafting process stated that a "party" in the second sentence of the statute means "any person showing the requisite interest in the matter...whether or not formal proceedings are available."[87] Since the provision was designed to reach "any exercise of agency authority,"[88] it seems clear that in an investigative interview that could lead to the discipline of the contractor who is being interviewed, the interviewee has the "requisite interest." The proper scope for the term "proceeding," however, does not receive any helpful treatment in the legislative history.

In sum, the case for a statutory right to counsel for government contractors during an investigative interview appears to be stronger under the first sentence of §555(b) than under the second, but questionable under either sentence. If the first sentence did apply, it would grant a right to counsel only where contractual terms operate as the functional equivalent of a subpoena to "compel" the person to appear before an agency representative.

The right to counsel of federal employees during an internal agency investigation turns on many of these same ambiguities of the APA. The general language of the APA might be read to grant a right to counsel to federal

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[84] 5 USC §551(3).

[85] 5 USC §551(12), (5), (7), (9).

[86] An "adjudication" means the process for formulating an order, and an "order" means final disposition of "a matter other than rule making." 5 USC §551(6), (7).

[87] 81 Sen. Doc. No. 248, 79th Cong., 2d Sess. 205 (1946); *see also id.* at 263-64 (using the same language to describe parties).

[88] *See* id at 205, 264.

employees during an internal investigation. However, provisions of the Civil Service Reform Act of 1978 (CSRA) only allow a federal employee to consult with counsel in limited settings, not including investigative interviews.[89] The CSRA provides for the presence of a union representative for federal employees included in a bargaining unit, but the union representative is not the equivalent of legal counsel.[90] Thus, the silence of the CSRA on this precise subject may indicate that the CSRA does not contemplate a right to counsel during interviews of employees.

Nevertheless, given the general language of the APA and the silence of the CSRA on the precise question involved, there is still some doubt whether federal employees have a statutory right to counsel during investigative interviews they are compelled to attend. Some courts will not presume an amendment to the APA unless Congress clearly states its intention to do so. Courts also interpret statutes to steer well clear of any constitutional violations. For investigations in certain coercive settings, some courts may consider the lack of a right to counsel to be dangerously close to a constitutional violation. Because of the vagaries of statutory construction, it is hard to be confident in a single reading of the APA and the CSRA on this question.

B. Appropriate Scope for a Clarified Right to Counsel

If the APA is interpreted not to extend the right to counsel to agency contractors during investigations, it would be possible to address the issue either through a statutory amendment or through enactment of appropriate procedural rules by an agency. This section of the report will argue that a right to counsel for agency contractors should recognize the special importance of counsel where an investigation could lead to criminal charges. Where the agency retains the possibility of using the results of an investigation in a criminal proceeding against the interviewee, and relies on contractual provisions to compel the interviewee to appear, the person should have a right to counsel analogous to the right now provided to parties under the APA. As for investigations that will be used for regulatory purposes only, the need for counsel is diminished and will not justify the inconvenience it creates for the investigating agency.

1. Constitutional Analogues

The case for a right to counsel for certain investigations of contractors is not grounded in the Constitution. When an agency is only investigating potential contractor misconduct, there is plainly no constitutional right to counsel.

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[89] 5 USC §§1215(a)(2)(B), 4303(b)(1)(B), 7114(a)(5), 7121(b)(3)(A), 7513(b)(3), 7701(a)(2).
[90] 5 USC §7114(a)(2)(B).

Supreme Court case law, as interpreted by Article III courts and by agency adjudication, clearly establishes that the Sixth Amendment right to counsel does not attach until after the agency has moved beyond the investigative stage.[91]

There may be one limited exception to this observation. Since there is a right to counsel during a custodial interrogation conducted as part of a criminal investigation, there is some reason to believe that a government interview of a contractor regarding misconduct could trigger the right to counsel if it amounted to a custodial interview. This would only occur in an extreme case, where agency investigators physically limit the free movement of the interviewee to such an extent that it resembles an arrest. Courts have been quite reluctant to conclude that any agency interviews of its contractors are custodial, but the Merit Systems Protection Board has been willing to recognize the possibility for some federal employee interview.[92]

While it is true that the Constitution does not give contractors or employees the right to consult with counsel during an investigation, a related line of constitutional cases is nevertheless relevant in establishing the appropriate scope of a right to counsel to be conferred by statute or regulation. The existing APA provision on legal counsel makes the concept of "compulsion" a critical one. A person may be represented by counsel when "compelled" to appear before the agency. If the drafters of the APA were right to say that counsel is most important for persons who are compelled to act by the government, there is a line of constitutional cases that provides some helpful guidance as to which forms of "compulsion" should be a precondition for access to counsel. These cases confirm the commonsense notion that certain threats from the government are just as effective at compelling action as a threat to impose civil or criminal sanctions on a party. The cases arise under the Fifth Amendment's self-incrimination clause.

Agency contractors do not waive all Fifth Amendment rights as a condition of their employment. A threat of dismissal of a contractor who does not answer questions posed by agency investigators qualifies as "compulsion" of testimony under the Fifth Amendment. There is some authority suggesting that an adverse employment action short of dismissal does not work to "compel" testimony.[93]

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[91] Ashford v. Dept. of Justice, 6 M.S.P.R. 458 (1981) (investigation of government employee).

[92] In Chisolm v. United States Postal Service, 7 M.S.P.R. 116, 119-20 (1981), the MSPB decided that where agency investigators conduct an interview that amounts to a "custodial" interrogation, and they anticipate possible criminal charges against the interviewee, they must give Miranda warnings, including the right to counsel. *See also* United States v. Gillyard, 726 F.2d 1426, 1438-29 (9th Cir. 1984); United States v. Steele, 648 F. Supp. 1375 (N.D. Ind. 1986).

[93] *See* United States v. Indorato, 628 F.2d 711 (1st Cir.), cert. denied, 449 U.S. 1016 (1980).

Answers compelled in this way by agency investigators may not be used against the employee in subsequent criminal proceedings.[94]

The Constitution effectively confers on any compelled answers obtained in the workplace a "use immunity."[95] Although employee statements compelled by a threat of dismissal may not be used in later criminal proceedings, statements that demonstrate a violation of workplace rules or expectations can sometimes be the basis for dismissal or discipline.[96] So long as the government does not attempt to use an employee's statement to establish criminal liability, it can use the employee's immunized statements as the basis for adverse job actions. Further, a refusal to answer questions that are specifically, directly and narrowly related to job performance may, consistent with the Constitution, be the basis for dismissal or discipline by the government, even when the answers might incidentally reveal criminal wrongdoing.[97] The courts have reasoned that the government has a legitimate interest in obtaining work-related information from its employees or contractors.[98] This set of Fifth Amendment cases has attempted to balance this interest against the interest of the contractors or public employees in avoiding self-incrimination.

The Fifth Amendment jurisprudence in the government employment and contract context provides some support for a two-track rule governing access to legal counsel. Where the agency compels an employee to answer questions by threatening the employee with discharge, it may not use such compelled

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[94]Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Lefkowitz v. Turley, 414 U.S. 70 (1974); Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

[95]Gulden v. McCorkle, 680 F.2d 1070, 1074 (5th Cir. 1982).

[96]Gniotek v. City of Philadelphia, 808 F.2d 241 (3d Cir. 1986), cert. denied, 479 U.S. 984 (1987); D'Acquisto v. Washington, 640 F. Supp. 594, 622 (N.D.Ill. 1986).

[97]Weston v. Department of HUD, 724 F.2d 943 (Fed. Cir. 1983).

[98]A different outcome takes place once a case against a federal employee proceeds to the Merit Systems Protection Board and the employee refuses to testify in those proceedings. Although the employee's silence at that point may be the basis of adverse inferences by the hearing officer, silence in those proceedings cannot be the sole basis for a dismissal. Baxter v. Palmigiano, 425 U.S. 308, 317-19 (1976); Book v. United States Postal Service, 675 F.2d 158 (8th Cir. 1982). A refusal to testify in MSPB proceedings is treated differently from refusal to answer questions propounded by the agency itself, because the former situation does not undermine the agency's ability to monitor employee performance and compliance with the law.

Although the operation of an employee or contractor's right against self-incrimination seems fairly clear, the type of warning that the government must provide an employee under investigation is less certain. For employees covered by the Merit Systems Protections Board, the government employer must warn an employee before an interview that 1) a refusal to answer job-related questions can result in adverse action, and 2) any incriminating answer cannot be used in a later criminal proceeding. Ashford v. Dept. of Justice, 6 MSPR 458, 465 (1981). If the investigators fail to provide the required warnings, any statements obtained cannot form the basis for an adverse job action. Sternberg v. Dept. of Defense, 41 MSPR 46, 53 (1989); Laursen v. Veterans' Administration, 4 MSPR 66 (1980). Article III courts have tended to require less explicit warnings from agency investigators. Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982); Hester v. City of Millidgeville, 777 F.2d 1492 (11th Cir. 1985) (automatic immunity, no explicit offer required); Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987) (explicit offer needed).

statements to establish criminal charges. Criminal charges, however, might still flow from the investigation even though the agency compelled the interviewee to provide information, because the Fifth Amendment requires only use immunity rather than transactional immunity. In such a context, it would seem that the coercive effect of a threat of discharge or contract termination, combined with an intention to prosecute the employee on criminal charges if the investigation yields enough independent evidence, is the equivalent of the "compelled" appearance necessary to invoke a right to counsel under the APA. If the government plans to force cooperation from a person now and hopes to prosecute the same person later on criminal charges, it seems fitting to allow that person to consult with counsel.

On the other hand, so long as the agency is willing at the outset to forego any use of information in a criminal prosecution, it has more latitude to insist on a statement from its contractors and employees, and to use the answers or the refusal to answer as the basis for non-criminal sanctions. Similarly, the interviewee has a less pressing need for counsel because the sanctions at stake, workplace discipline or contract termination, are not as great as the loss of liberty at stake in the criminal process.

2. Effects on Agency

If federal agencies were to allow consultation with counsel by its contractors when (1) they are "compelled" by threat of discharge to appear at an investigative interview and (2) the investigation could potentially lead to criminal charges against the person, it would not have a debilitating effect on agency investigations. No counsel would be involved where investigators are simply enforcing workplace or contract rules. Employees or contractors would have to obtain their own legal counsel, and many would decline to do so. As for any delays caused by counsel during interviews, the agency could properly promulgate rules limiting the participation of counsel and could exclude those attorneys who obstruct the proceedings. Some federal agencies already allow contractors and employees to consult with counsel during interviews, without serious adverse effects.

There may be some special difficulties in creating a right to counsel for employees, even in the limited circumstances described above. One difficulty arises from the need to treat different groups of employees equitably, and to respect the existing provisions for union representation for those employees subject to collective bargaining agreements. Creating a uniform right to counsel might undermine the value of current workplace benefits secured for some workers by statutes and labor contracts. For that reason, the right to counsel described above should perhaps receive a higher priority for contractors than for employees.

IV. Recommendations for Change

This section will set forth briefly the changes in current law or practice that are outgrowths of the discussion above. Each recommendation is followed by a reference to the portion of the discussion relevant to that issue.

1. When participants in agency investigative proceedings have access to legal counsel, the agency should allow participants' counsel reasonable access to auxiliary professionals or experts, so as to provide fully informed legal advice during the investigative proceedings.

See the discussion at Part II B.

2. When an agency compels a witness to participate in an investigative proceeding (not including routine inspections), it should not seek to exclude the counsel of the witness, or insist that the witness choose different counsel, unless it has concrete evidence that the presence of the witness' counsel is likely to materially impede the investigation. For example, the agency might have evidence that the witness involved may not fully or truthfully answer an investigator's questions if the attorney continues to represent the client. Such evidence should wherever possible be based on statements of the witness rather than speculation regarding the incentives of the witness or the attorney. Similarly, the agency might have evidence that truthful testimony by the witness will incriminate another client of the attorney. The mere fact of multiple representation, an employment relationship between the witness and some other party involved in the investigation, or past dealings between the agency and a particular attorney are not, in and of themselves, a sufficient basis for excluding the counsel of a witness.[99]

See the discussion at Parts II A & C.

3. Whenever a person has a right to counsel under the APA (5 USC § 555(b)) or otherwise, the agency should inform the person of his or her right to counsel.

See the discussion at Part II D.

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[99] This recommendation does not, however, address the authority of an agency to exclude counsel from investigative interviews because of disruptive or obstructionist conduct. It also does not address situations where the attorney is suspected of personal involvement in criminal activity under investigation.

4. If the nature of an agency's investigation makes it likely that criminal charges could result, the agency should inform the person being interviewed of that fact. If, in the course of the investigation, it becomes apparent to senior agency officials that a particular person is likely to be referred for or otherwise become subject to criminal charges, the agency should inform the person of that fact before making further efforts to gather information from the person. The agency should withhold this notice only when it is legally obliged to do so. Agencies should train their personnel concerning their responsibilities with respect to the rights of witnesses.

See the discussion at Part II E.

5. Where agency investigators rely on contractual provisions to induce the cooperation of an interviewee who is the agent of a contractor, they should allow counsel to participate in any interview they believe could produce evidence that could be used in a criminal prosecution.

See the discussion at Part III B.