Garrity and *Kalkines* Warnings:

What's a Government Employee to Do?

By Justin Dillon and Anthony F. Vergnetti

You're a federal employee. You've got years of experience. You love your job, even if sometimes the bureaucracy can get to you. You're sitting in your office, halfway through the morning's first cup of coffee, when all of a sudden two people appear at your doorway.

"Hi," says the one on the left. "We're from the Office of Inspector General (OIG). Do you have a few minutes to talk?"

You tense up, your palms start sweating, and you rack your brain for what they could want. You'd been wondering if you should have had that third beer at Bob's going-away party last month, but you don't *think* you said anything you shouldn't have. And it's true that you didn't report up the chain an uncomfortable encounter you overheard in the office the other day. Could that be it? You also went to dinner last month with a contractor who's done work for your department in the past, but you are pretty sure you went Dutch. (Didn't you?)

What did you do? What do they *think* you did? Should you talk? Should you ask for time to get a lawyer? Or will that just make you look guilty? You know you better figure it out because one thing is certain: If the OIG thinks you lied to its agents, you could face termination or even a criminal false-statements charge.

If you've spent any time watching cop shows, you'd think the answer must be to keep quiet, right? But the short answer is — as with so many things in life — it depends.

Generally, government employees owe a duty to comply with internal investigations that are purely administrative. Refusing to participate in them can have negative consequences, including termination.

But employees *don't* have to answer questions if doing so might incriminate them. The problem is figuring out which bucket this investigation falls into: Is it administrative, or is it criminal? And if it's the former, does it have any chance to become the latter? Sometimes, as the facts change, so does the government's assessment about the case. And once you've talked, the cat is out of the bag, for better or for worse.

So, back to our scenario where you're approached by the OIG. Do you keep quiet, potentially risking an adverse employment action? Or do you talk, potentially risking a criminal charge if this breaks the wrong way? As you might imagine, there are often no easy answers to these questions.

Before you decide what to do, it's important to understand what protections — if any — you will have if you talk. Because just as a *Miranda* warning ("You have the right to remain silent. ...") is required before the government can question a suspect who's in custody, government agents are required in internal investigations to give certain warnings, too. Those warnings are called *Garrity* warnings and *Kalkines* warnings. And they have very different purposes.

> "Unless you have those two things — "witness" plus "clearly not criminal" — it is almost always a bad idea to talk right away."

Garrity Warnings

The most common warning is the *Garrity* warning. It doesn't offer you much protection. A *Garrity* warning will advise you that although you can refuse to participate in the investigation if doing so would result in self-incrimination, such refusal may be used against you in any underlying administrative proceeding. That's right: This means that anything you say — or don't say — can be held against you.

A *Garrity* warning may look like this:

> You are being asked to provide information as part of an internal and/or administrative investigation. This is a voluntary interview and you do not have to answer questions if your answers would tend to implicate you in a crime. No disciplinary action will be taken against you solely for refusing to answer questions. However, the evidentiary value of your silence may be considered in administrative proceedings as part of the facts surrounding your case. Any statement you do choose to provide may be used as evidence in criminal and/or administrative proceedings.[1]

The unabashedly pro-government *Garrity* warning comes from the Supreme Court case *Garrity v. New Jersey*.[2] In that case, the New Jersey attorney general was tasked with internally investigating the conduct of several police officers.[3] Before questioning the officers, the attorney general gave a similar warning as above but also told them that if they refused to cooperate, they would be removed from office.

In a 5-4 decision, the Court ruled that the Constitution protects against the use of coerced statements when obtained under threat of removal from office. The Court compared this to a choice between "the rock and the whirlpool."[4] And it ultimately reasoned that public employees are "not relegated to a watered-down version of constitutional rights."[5] Therefore, they cannot be forced to testify out of fear of losing their jobs.

To get around this, the government often uses *solely* in the warnings. Many *Garrity* warnings indicate that "you cannot be terminated 'solely' for not cooperating in the investigation." This means that even though the government can't fire or retaliate against you "solely" for not cooperating, such refusal (along with other factors) may

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result in an administrative finding of insubordination. This allows the government to include refusals to cooperate in an employee's job record, and if that employee has another warning or infraction, he may be fired for insubordination.

The most stinging effect of a *Garrity* warning comes from the government's ability to use even your *silence* against you. Take an example of a sexual harassment incident in the workplace. Suppose you sit six feet from the elevator — the epicenter of office gossip — and as you wrap up for the day, you hear a group of coworkers outside making a sexual joke about your supervisor. The incident gets reported, and the OIG investigates.

An agent gives you a *Garrity* warning and tells you that you are being investigated as a witness of the sexual harassment incident. But you refuse to participate. An administrative hearing ensues, and your silence, either alone or when taken together with your close proximity to the incident, implicates you in the joke. As a result, you are suspended without pay and forced to attend sexual harassment workplace training.

This hypothetical is probably extreme, but it isn't hard to imagine scenarios in which not talking can get you into just as much trouble as talking. In effect, the *Garrity* warning provides almost no protection for government employees — which is why, if you can get it, you want a *Kalkines* warning.[6]

Kalkines Warnings

The *Kalkines* warning grants you immunity in exchange for cooperation in the investigation. It provides immunity not only for what you say but also for any evidence *derived* from what you say — so-called derivative-use immunity. A typical *Kalkines* warning looks like this:

> You are being questioned as part of an internal and/or administrative investigation. You will be asked a number of specific questions concerning your official duties, and you must answer these questions to the best of your ability. Failure to answer completely and truthfully may result in disciplinary action, including dismissal. Your answers and any information derived from them may be used against you in administrative proceedings. However, neither your answers nor any information derived from them may be used against you in criminal proceedings, except if you knowingly and willfully make false statements.[7]

To help clarify the difference between use immunity and derivative-use immunity, assume that you're being investigated for murder. If you tell the agents, "I shot the guy, and the gun is in the backyard," use immunity would prevent them from using your confession against you — but they can go dig up the gun and use *that* against you. In other words, they can't *use* your confession, but they can use evidence they *derive* from it.

Not so with derivative-use immunity. Derivative-use immunity would, as the name suggests, also prevent the government from using evidence *derived* from your confession against you. So, in this example, they couldn't use your confession or the gun. That's how powerful it is.

The *Kalkines* warning comes from *Kalkines v. United States*,[8] in which an agent internally investigated a $200 personal transaction secured by Kalkines for preferential work treatment. At the same time, Kalkines, although never indicted, knew that prosecutors were subpoenaing witnesses for a possible criminal charge related to the deposit.[9] The agent assured Kalkines that the inquiry was purely administrative and even told him

> that the following interview is administrative in nature, that it is not criminal, that there is no criminal action pending against you and that the purpose of this interview is entirely on an employer-employee basis and that furthermore any answers given to questions put to you in the interview cannot and will not be used against you in any criminal action.[10]

But the agent's actual line of questioning suggested otherwise. So Kalkines refused to cooperate out of fear of that the fruits of his testimony could be used against him criminally. As a result, he was fired for violating the terms of his employment requiring compliance in internal investigations.

Ruling in his favor, the Court concluded that Kalkines could not be subject to adverse action for refusing to testify when facing a reasonable risk of prosecution. Specifically, Kalkines knew of a criminal investigation pending against him and feared that his testimony (and its fruits) could be used against him.[11] Because the agent warned that only his testimony would be protected, but not its fruits, the agent did not sufficiently meet his burden to warn. Accordingly, Kalkines' termination was invalid.

So, what's the catch? Why doesn't everyone refuse to talk until they get a *Kalkines* warning?

Because the government hates giving them. Giving someone immunity, especially at the early stages of an investigation, can limit the government's options down the road. To convince an agent to give you a *Kalkines* warning, you need to convince him that you have a reasonable fear of criminal prosecution — that you're not insisting on immunity just to be ornery.

That can be hard to do, and if the government refuses and insists on giving you the nonprotection of a *Garrity* warning, which it often will, then you are left with a hard choice. Talk, and risk prosecution. Or don't talk, and risk getting fired.

What Are My Options?

The first thing you should do if you find yourself in this situation is request a written statement from the interrogating official regarding the nature and purpose of the investigation. If the official won't give you a written statement, ask for an oral one, and take good notes about what the official says.

Second, ask whether you're considered a witness, a subject or a target. Witnesses are people whom the government believes have done nothing wrong, targets are the people in the crosshairs, and subjects are the noncommittal "mushy middle" that the government likes to use when it isn't sure whether someone is a witness or a target.

If the agent tells you that you're just a witness and describes a matter that you know could not possibly result in criminal charges — say, in the sexual harassment example above, where the worst thing you might have done is not report an overheard, inappropriate comment up the chain — you might feel comfortable talking.

But unless you have those two things — "witness" plus "clearly not criminal" — it is almost always a bad idea to talk right away. Instead, the best approach is usually to take the agent's card, promise to get back to the agent promptly and immediately call a lawyer.

Why "promptly"? Because some agents can be deeply unreasonable and may threaten to take immediate, interim action — such as a temporary suspension — if you don't respond quickly. We have seen this happen. It is an ugly way to do things, but some agents do ugly things.

Conclusion

Once you have counsel, your lawyer can reach out to the agent — or a prosecutor, if one has been assigned — and help you decide whether or not to talk. That discussion will, of course, include whether to accept a mere *Garrity* warning or insist on a *Kalkines* warning. And what you decide to do will ultimately turn on some combination of whether you actually might be in criminal trouble, what your risk tolerance is — and how much you like your job.

Endnotes

1. Garrity *Warning*, Wikipedia, https://en.wikipedia.org/wiki/Garrity_warning (last visited Oct. 25, 2020).

2. Garrity v. New Jersey, 385 U.S. 493 (1967).

3. The police officers were allegedly engaged in traffic ticket fixing in New Jersey's municipal courts. *Id.* at 494.

4. *Id.* at 496.

5. *Id.* at 500.

6. For practical hypotheticals applying and explaining *Garrity*, see *Garrity Basics*, Garrity Rights, www.Garrityrights.org/basics.html (last visited Oct. 25, 2020).

7. Kalkines *Warning*, Wikipedia, https://en.wikipedia.org/wiki/Kalkines_warning (last visited Oct. 25, 2020).

8. Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973).

9. The witnesses were subpoenaed and even testified before a grand jury. Even though the U.S. attorney general ultimately decided not to prosecute Kalkines' case, the Court concluded that "Mr. Kalkines saw the Damoclean sword poised overhead during the entire period with which we are concerned." *Id.* at 1392.

10. *Id.* at 1396.

11. *See id.* at 1394 ("The record shows conclusively that at this interview Mr. Kalkines was keenly aware of, and troubled by, the possible criminal implications, and that his failure to respond stemmed, at least in very substantial part, from this anxiety.").