

103D CONGRESS
1st Session

SENATE

REPT.
103-167

FEDERAL EMPLOYEE FAIRNESS ACT OF 1993

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

together with

ADDITIONAL VIEWS

TO ACCOMPANY

S. 404

TO AMEND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND
THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 TO
IMPROVE THE EFFECTIVENESS OF ADMINISTRATIVE REVIEW OF
EMPLOYMENT DISCRIMINATION CLAIMS MADE BY FEDERAL EM-
PLOYEES, AND FOR OTHER PURPOSES



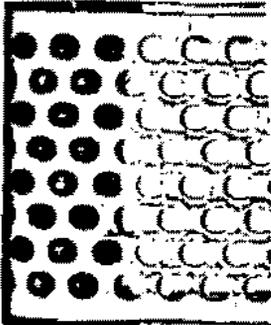
OCTOBER 27 (legislative day, OCTOBER 13), 1993.—Ordered to be printed

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Mr. GLENN, from the Committee on Governmental Affairs,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 404]

The Committee on Governmental Affairs, to which was referred the bill (S. 404) to amend title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 to improve the effectiveness of administrative review of employment discrimination claims made by Federal employees, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

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I. SUMMARY AND PURPOSE

The purpose of S. 404 is to amend Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967

to improve the effectiveness of administrative review of employment discrimination claims made by Federal employees by removing the adjudication of equal employment opportunity (EEO) claims from the agency against which the claim is made and placing the adjudication of such claims at the Equal Employment Opportunity Commission (EEOC). This proposal is to be achieved by providing an equitable time frame for the processing of such claims; providing various procedures designed to increase due process to the complainant in the adjudication of EEO claims; simplifying the procedures for the filing of adverse action claims based on discrimination; and requiring the referral of recommendations to the Office of Special Counsel (OSC) for prosecution under section 1215 of title 5 United States Code for disciplinary actions against employees found to have discriminated.

II. BACKGROUND AND NEED FOR LEGISLATION

Prior to introduction of the bill, Chairman John Glenn of the Committee on Governmental Affairs requested an investigation by the U.S. General Accounting Office (GAO) which conducted a two-year investigation into the processing of EEO complaints by the EEOC and the Federal agencies. A series of public hearings were held in response to the GAO findings. On May 16, 1991 the Honorable Evan Kemp, Chairman of the EEOC, testified on behalf of the EEOC regarding regulations implementing the new EEOC procedures, affirmative action plans filed by federal agencies with the EEOC, and the promotion, retention and recruitment of women and minorities in federal agencies.

The General Accounting Office also released the results of their report. The panel of GAO personnel testifying before the Committee on Governmental Affairs included Mr. Bernard Ungar Director, Federal Human Resources Management Issues, Mr. Clifford Douglas and Joseph Sellers, Esq. Executive Director of the Washington Lawyers Committee for Civil Rights Under Law testified regarding the barriers faced by women and minorities in attempting to break the "glass ceiling." Jane Christiansen, President of the National Federally Employed Women organization also testified on the barriers to promotions for women in the Federal sector, particularly, beyond the GS-15 level.

On October 23, 1991, testimony was presented by a panel of former and current federal employees who had filed EEO complaints and who were knowledgeable concerning systemic problems within the process. Penny Patterson an inspector with the Department of the Treasury's Bureau of Alcohol, Tobacco, and Firearms and Ms. Loretta Thomas, an auditor with the Department of Treasury, are both current employees of the Federal Government and offered testimony on problems they have experienced with the EEO complaint system. Former FBI agent, Mr. Donald Rochon, and former Department of the Navy EEO counselor, Ms. Virginia Delgado, testified concerning the wrongful discrimination they suffered because of race and gender bias, respectively. Professor David Kairys of the Temple University School of Law also testified regarding the legal processes involved in the EEO complaint system. Mr. Bernard Ungar of the GAO also gave the Committee an updated report on the results of their continuing investigation.

On May 26, 1993, testimony was presented by Senator Barbara Mikulski (D-Maryland), a cosponsor of S. 404. The GAO, represented by Nancy R. Kingsbury, accompanied by Barney Gomez, Cecelia Porter and Douglas Sloane also testified. Additionally, a panel of current federal employees testified regarding their experiences with the EEO complaint process system. This panel included the following witnesses: Diana Miller of the Department of Army; Suzane Doucette of the FBI; Marilyn Hudson of the Department of Justice, U.S. Attorney Office for Eastern Tennessee; Curtis Cooper and Internal Affairs supervisor at the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury; and Sandra Hernandez, Special Agent, Bureau of Alcohol, Tobacco and Firearms of the Department of Treasury. These witnesses eloquently related their personal stories of delay and denial of justice and retaliation by their agency as a result of entering the EEO complaint process. The consensus of this panel was that the federal EEO complaint process is fraught with unfairness, since an accused agency is allowed to investigate itself.

S. 404 as amended by the Committee, would improve the effectiveness of administrative review of employment discrimination claims. The bill requires agencies to make counseling on the EEO process available to complainants throughout the process and to establish a voluntary alternative dispute resolution process but specifies that failure to accept such arbitration or counseling is not a bar to the filing of a complaint.

The bill requires the complainant to file with the agency or EEOC within 180 days after the discriminatory event. It grants the agency 30 days commission to attempt to conciliate the claim before it allows the complainant to request review or file a civil action.

S. 404, as reported by the Committee:

Grants the Commission the power to stay personnel actions if necessary to carry out the purposes of the act. In addition, the Commission is granted subpoena power to compel the production of documents information or witnesses by federal or non-federal entities or employees.

Requires the agency to provide all relevant information to the Commission and to grant the complainant a reasonable amount of official time to prepare for an administrative or civil court proceeding related to the claim. The administrative judge (AJ) of the Commission is required to determine if the record is complete and accurate, and may within his or her discretion impose sanctions upon the agency for failure to provide information within its control. The AJ shall require the agency to obtain or correct any necessary information.

Permits parties to conduct discovery to the extent deemed appropriate by the AJ and permits the AJ to impose sanctions on parties who fail to comply to requests for information.

Provides for dismissal of frivolous claims and an opportunity for a hearing on nonfrivolous claims reasonably expected to arise from the facts on which the complaint is based. It requires the AJ to issue a decision within 210 days and provides for reasonable extensions of time in specified circumstances. It makes the order of the AJ final and enforceable with respect

to any part of relief granted which is not appealed. H.R. 3613 permits the complainant to appeal the AJ decision to the Commission or to civil court within 90 days of notice from the AJ.

Requires the Commission to affirm, reverse or modify the applicable provision of the order of the AJ within 150 days after receipt of request for review if supported by substantial evidence. It requires that the findings of fact of the AJ are conclusive unless the commission determines that they are clearly erroneous.

Allows the complainant to file a civil suit seeking de novo review within 90 days of the Commission's decision and notice. It also allows the complainant to file seeking de novo review where the commission has failed to act within 300 days of the initial filing or within 180 days after the timely request for appellate review by the commission.

Authorizes the AJ and the Commission to award reasonable attorney fees and other litigation expenses as a court has authority to award under section 706(k) of title VII of the Civil Rights Act of 1964. It allows the Commission or the complainant who prevails on a claim to bring a civil action in district court to enforce settlements or orders of the AJ or the Commission that are not on appeal. It requires any award under this section to be paid by the Federal entity that violated the act.

Requires the AJ, the Commission, or the court to make a finding identifying the person(s) who intentionally committed the wrongful discrimination. Where liability is found for intentional discrimination, it requires the deciding authority to transmit to the Office of Special Counsel (OSC), a copy of the decision and the record for investigation pursuant to 5 U.S.C. section 1214.

A. AN EFFECTIVE EEO PROCESS IS CRITICAL TO THE FUTURE OF THE FEDERAL GOVERNMENT

An effective EEO process will be increasingly critical to the operation of the Federal Government. Workforce projections for the future of America show women and minorities will become an expanding force in the workplace. Indeed, Civil Service 2000, a 1988 study by the Hudson Institute found that non-whites, women, and immigrants will make up more than 80% of applicants for Federal employment by the year 2000. In 1991, the Department of Labor issued Workforce 2000 which found that in the year 2000 the workforce will be more diverse; it will include more women, more minorities and will require more technological skills.

In October, 1992, the U.S. Merit Systems Protection Board issued its report, "A Question of Equity: Women and the Glass Ceiling in Federal Government." Findings of the report include the following:

Women do confront inequitable barriers to advancement in their Federal careers. These barriers take the form of subtle assumptions, attitude, and stereotypes which affect how managers sometimes view women's potential for advancement and, in some cases, their effectiveness on the job.

Contrary to conventional wisdom, women are not promoted at a lower rate than men at the GS/GM level and above, but rather face obstacles to advancement at lower levels in the pipeline. Women in Professional occupations are promoted at a lower rate than men at two critical grades, GS 9 and GS 11. As these grades are the gateway through which one must pass in moving from the entry level to the senior level, this disparity has the effect of reducing the number of women eligible for promotion in higher graded jobs. Results from a governmentwide survey of employees currently in grades GS 9-15 and the SES confirm that women at these levels have been promoted, on average, less often than men who have comparable amounts of formal education and experience, and who entered Government at the same grade levels as the women.

Given current trends, the percentage of Professional and Administrative jobs held by women will grow from 34 percent in 1990 to 42 percent by 2017. But even by 2017 women will remain significantly underrepresented in senior levels, holding less than one-third of senior executive positions. Unless action is taken, a dramatic increase in the representation of women in higher graded jobs will be precluded both by the slow process of advancement into higher graded jobs in general, and by the lower rate of promotion encountered by women.

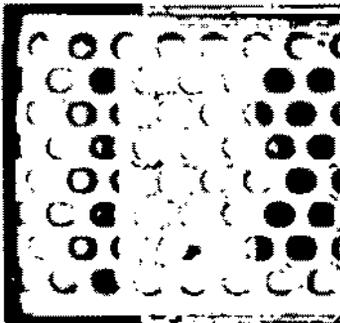
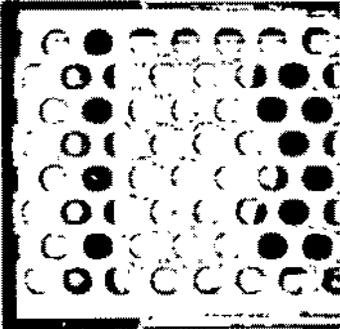
Women receive performance appraisals that are as good as or better than men's, and women surveyed expressed just as much commitment to their jobs and career advancement as men. However, there is evidence to suggest that women are often perceived to be less committed to their jobs than men. Particularly susceptible to this misperception are women in the first 5 years of their careers and, throughout their careers, women with children, who are promoted at an even lower rate than women without children.

A significant minority of women in grades GS 9 and above believe they often encounter stereotypes that cast doubts on their competence, and that attribute their advancement to factors other than their qualifications.

Minority women appear to face a double disadvantage. Their representation at top levels is even less than that of nonminority women, and minority women currently in grades GS 9 and above have been, on average, promoted less often than nonminority women with the same qualifications.

The General Accounting Office examined the existence of a glass ceiling in the federal workforce. The Governmental Affairs Committee's review of workforce demographics for 1990 from the Office of Personnel Management Annual Report found:

While men constitute 50% of the current federal workforce, they make up 81% of the General Schedule (GS) 13-15 levels, and 88% of the Senior Executive Service (SES), the highest positions in Federal Government.



Women constitute 75% of the GS 1-6 levels (mostly clerical and entry level positions), and only 11.1% of SES positions.

Minorities and women constitute 84% of the GS 1-6 levels. African Americans are 25% of the GS 1-6 levels, but only 6.5% of the GS 13-15 levels, and 4.7% of SES positions.

The average grade level for men is approximately three full grades above the average grade level for women; 10.3 for men 7.3 for women.

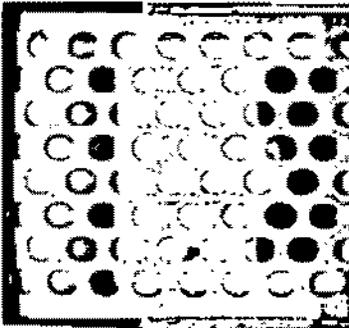
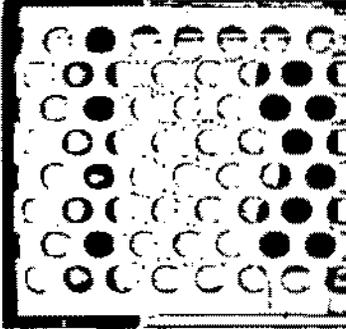
Since May 1991, the General Accounting Office (GAO) has issued a series of five reports on the government's equal employment opportunity efforts. The GAO's work in this area is important and instructive to understanding how to effectively manage the changing workforce. In its November 1991 report, GAO pointed out that even though the Federal Government has made progress towards a federal workforce that is reflective of the Nation's diverse population, some distance remains to be covered. In addition, the affirmative action planning process has lacked priority, agencies vary in their success in achieving representation and the discrimination complaint process is often reported in need of repair. GAO maintains that these areas where further improvement is necessary point to the need for continued application of a strong federal affirmative action employment program.

Meanwhile currently in the Federal Government, women and minorities are hitting a "glass ceiling" in their efforts to obtain high level positions. The glass ceiling is defined as those artificial barriers based on attitudinal or organizational bias that prevent qualified individuals from advancing upward in their organization. A 1991 Labor Department study indicates the clear presence of a glass ceiling in the private sector. Although there is no single answer to the glass ceiling dilemma, a fair and effective mechanism to redress wrongful discrimination in the workplace is essential to eliminate the glass ceiling.

As Gregory Lewis wrote in the May/June 1988 issue of Public Administration Forum, in an article submitted to the Governmental Affairs Committee:

Women and minorities made progress toward greater representation * * * the pace was not rapid. It will take another 30 years at this rate before women and minorities fill half the positions at GS-13 and above, and unexplained salary differences will still remain.

In conclusion, while statistical analysis indicates that some progress has been made, the glass ceiling remains readily apparent. Testimony before the numerous Committees of Congress who have held oversight hearings on this issue, including the House Committee on Government Operations, House Committee on Post Office and Civil Service, and the Senate Committee on the Judiciary, as well as the Senate Committee on Governmental Affairs, indicates that there are very real discriminatory practices and behavior that contribute to such ceilings. Such practices may include: subjectivity in selection process, denial of equal opportunities to acquire the requisite experience and skill, and exclusion of minorities and women from professional developmental tracks.



Attorney Joseph Sellers in testimony before Senate Committee on Governmental Affairs on May 16, 1991 stated:

As the workforce changes, strong affirmative action progresses, and a fair and effective mechanism to redress discriminatory practices will continue to be essential to the elimination of injustices in the workforce. Given that, in the Federal Government, the process established to remedy discrimination is controlled by the agencies that are alleged to have discriminated, the fact that the glass ceiling and discriminatory behavior remains after 20 years is not surprising.

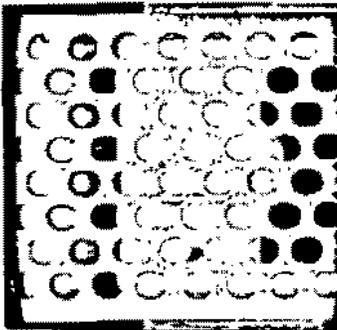
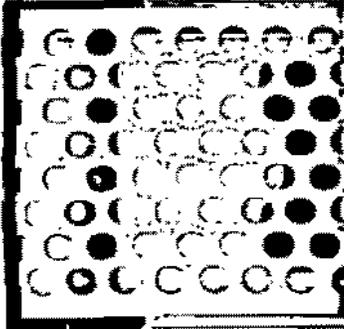
B. THE CURRENT EEO PROCESS

1. History of the Federal sector EEO process: Legislation mandating equal opportunity in Federal employment was first enacted under section 717 of title VII of the Civil Rights Act of 1964 (P.L. 88-352; 78 Stat. 253). A prohibition against discrimination by the Federal Government had been recognized judicially under the due process clause of the Fifth Amendment in 1954 under *Bolling v. Sharpe*, 347 U.S., 497, and President Eisenhower had issued an Executive order banning discrimination in employment by the Federal Government in Executive Order 10590 issued January 19, 1955.

Passage of the 1964 Civil Rights Act followed a decade of public protest over racial discrimination in such areas as voting rights, public accommodations and facilities, education, and housing, as well as employment. Title VII mandated equal employment opportunity for workers in both the public and private sectors. In 1972, statistical studies presented to Congress showed that minorities and women continued to be denied access to large numbers of Government jobs, particularly in higher grade levels. In addition, testimony critical of the complaint procedure claimed that it was weighted in favor of the agency and that the appeals process lacked adequate remedies.

The Equal Employment Opportunity Act of 1972 (P.L. 92-261; 86 Stat. 103), amending the Civil Rights Act, addressed these problems by emphasizing the ban on discrimination in Federal employment on the basis of race, color, religion, sex, or national origin and by requiring Federal departments and agencies to develop and carry out affirmative action plans to redress racial discrimination. The Civil Service Commission was authorized to enforce this policy within the Federal service, and individual Federal employees were granted the right to bring civil action in Federal court after exhausting their agency's administrative remedies. In 1978, all functions related to equal employment opportunity in Federal Government employment were transferred from the Civil Service Commission to the Equal Employment Opportunity Commission under Reorganization Plan No. 1.

In his message to Congress transmitting the plan, President Jimmy Carter cited the need for a "unified, coherent Federal structure to combat job discrimination in all its forms." Also cited by the President was "the confusion and ineffective enforcement for employees, regulatory duplication, and needless expense for employ-



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ees" brought on by fragmentation of authority among 18 governmental units and the need for uniform standards and standardized data collection procedures. (Public Papers of the Presidents of the United States. Jimmy Carter. Message to Congress Transmitting Reorganization Plan No. 1 of 1987. February 23, 1978. Washington, U.S. Govt. Print Off., p. 400.)

2. The current EEO process provides for the following steps: w/in 60 days

An applicant or an employee who believes he/she has been discriminated against takes the problem to an agency EEO counselor, who attempts to resolve it. w/in 60 days

Should the counselor's efforts fail, the person may file a formal complaint, which the agency investigates. Upon completing its investigation, the agency makes the case records available to the complainant and attempts to settle the matter.

120 days

Should the attempt at settlement fail, the agency presents the complainant with a proposed disposition of the case. The complainant requests a final agency decision or, if not satisfied with the proposal, can ask for a hearing before an EEOC administrative judge (AJ).

120 days
60 days for mediation or attempt to settle

If a hearing is requested, the case is sent to the EEOC. An AJ then holds a hearing on the matter and issues a recommended decision to the agency.

The agency then issues a decision that may or may not agree with the recommendations made by the EEOC's AJ.

If the complainant is not satisfied with the agency decision, he/she may appeal that decision to the EEOC's Office of Review and Appeals (ORA), which issues the final decision. However, EEOC is not empowered to require agencies to comply with its final decisions.

If the complainant or the agency is not satisfied with ORA's decision, either party can request reconsideration by the EEOC's commissioners.

A complainant may file a civil action in Federal district court 180 days after filing the complaint with the agency or within 30 days of receiving the final agency decision.

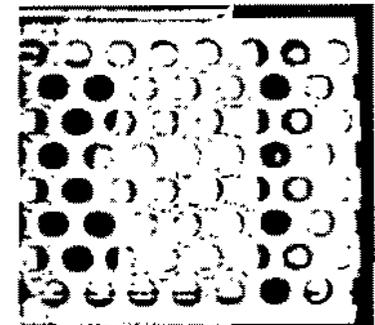
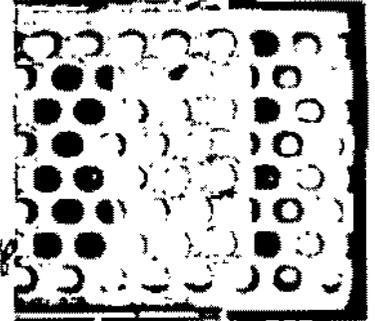
C. SPECIFIC CRITICISMS OF THE PROCESS AND THE LEGISLATIVE SOLUTIONS

1. Conflict of Interest

The EEOC has long been dissatisfied with the regulatory procedures contained within 29 CFR 1613. The agency, after negotiated rulemaking with several federal agencies, promulgated a new rule on October 1, 1992 to deal with procedural delays, published as 29 CFR 1614.

Although a slight improvement from the existing rules, the new rules do not adequately address solutions to an equal employment opportunity complaint process that is fraught with conflict of interest and insufferable delay. However, reaching that small level of success was difficult and time-consuming. S. 404 is needed to eliminate unnecessary delays in the complaint process system.

Washington Council of Lawyers Study: A study of EEO officials on the effect of the agency adjudicating the claim against itself was conducted by the Washington Council of Lawyers, a non-partisan,



voluntary bar association. This study, done in 1987, was submitted to the Committee on Governmental Affairs as a supplement to testimony offered by Attorney Joseph Sellers when he testified before the Committee on October 26, 1991.

According to Mr. Sellers, the survey of 350 EEO counselors in four federal agencies found an overwhelming majority of the EEO counselors believed that the conflict inherent in the federal EEO complaint process impaired its function. They indicated that they often had little clout to deal with the issue when the alleged discriminator held a higher position in the agency. Additionally, the EEO counselors reported that in situations where they concluded that discrimination had occurred, scrutiny of their decision and their job performance greatly increased. Such actions created an incentive for some EEO counselors to find that the agency had engaged in no discrimination.

EEO officers reported that witnesses against the agency often feel intimidated by supervisors. In some situations, the alleged discriminating official, who often views settlement as a concession of wrongdoing and opposes it for that reason, must approve the offer. At one agency, the general counsel has exclusive authority to accept or reject a complaint. That same general counsel also defends against the complainant at the hearing illustrating the dual role of the agency to defend against and to adjudicate discrimination complaints.

In addition, the study noted that most often the EEO functions are a collateral duty for the counselor or investigator, making it difficult to find the time to address each case adequately. The survey found a general lack of agency commitment to the EEO process. EEO activities had difficulty competing with programmatic priorities of the agency for staff and resources.

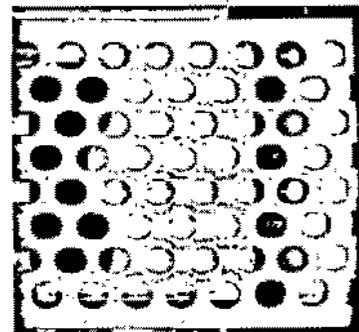
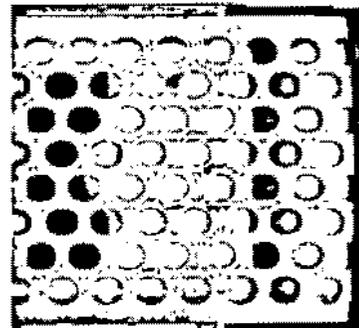
Finally, the study concluded that: "Even if one could eliminate the actual conflict, one can never eliminate the perception without an independent third party decision maker."

2. Inequitable delays

In the current process, short time limitations are imposed on the Federal employees. Section 1614 of the CFR, effective October 1, 1992, has given the agency time limits. However, the Committee feels that the time limits of S. 404 are more reasonable. Critical is the fact that the agency is still permitted to investigate itself. Additionally, an agency can control time by extending the time limits.

At every Congressional hearing on the current EEO process, the message from civil servants is clear—delays discourage employees from using the process. There are delays at the agency stage as well as at the Commission. Most agencies fail to meet regulatory time frames. Government-wide, the average time for decision on the merits by all agencies was 526 days. The worst agency was the National Security Agency which took an average of 1,467 days in FY 90 to close its cases. At the Department of State it took an average of 1,134 days to close its cases in FY 90.

Delays occur because there are no incentives for or pressures on agencies to meet regulatory deadlines or to expedite any stage of the complaint processing. Current procedures, internal to the agen-



cy, are as easily used to delay resolution as they are to mediate disputes.

The Commission is authorized to take over cases not completed within 75 days [29 CFR 1613.220(c)], but never does. The Commission may also require agencies to expedite processing in other ways but virtually never does. However, promises to do so abound in testimony on the federal sector regulations which went into effect in October of 1992. Given no action on the part of the Commission to expedite the process even after intense Congressional criticism over the last 20 years, the Committee is skeptical that the newest promises will yield more timely results.

The time delays can have a serious adverse effect on the civil servant. In essence, the complainant has been exhausted before the administration process has been exhausted.

Testimony from civil servants and their advocates revealed that short time frames lead to an increased filing of unsupported claims as complainants must file quickly just to preserve the claim. An employee must make a decision based on information available within the 30 day timeframe and may not have had time to fully consider all aspects of the claim. In addition, the discriminatory impact of an event may not be realized until after the current 30 day filing period has lapsed.

The result is that meritorious complaints are washed out unfairly and prematurely. Clearly, this process is not fair to employees. The effect of an employment practice may be far-removed from the initiation of the unlawful activity. Under the current 30-day time limitation, complaints regarding recent actions by the agency may be barred because the policy adopting the action was implemented before the unlawful effects of the policy were felt.

The consequences of the decision to file an EEO claim may be grave. The EEO process depletes complainants of financial and emotional resources. In addition, retaliation for the filing of an EEO complaint can and frequently does occur making the decision to file a serious one. In FY 1990 over 1/3 of EEO complaints were based on retaliation for use of the EEO process.

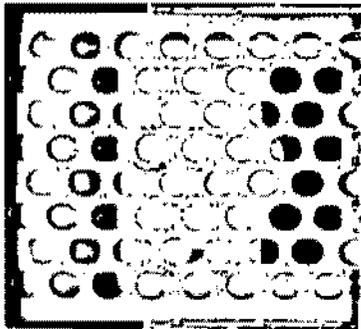
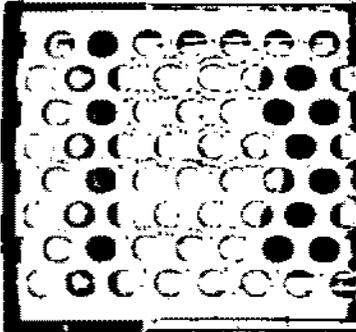
The 180 day period in S. 404 will provide sufficient time to allow employees time to file a complaint. It will give the complainant enough time to consult with an advisor or attorney to determine whether they have claims under Title VII and to determine the steps required to prosecute such cases resulting in the filing of fewer frivolous complaints.

Short time frames penalize the complainant for seeking an administrative remedy.

3. Investigations

The Committee found that the agency's ability to control the information upon which a decision is based allows the agency to control the outcome of the decision. Complainants essentially can only take information for their case from an investigation developed by the agency.

The Governmental Affairs Committee confirmed in its investigation that where agencies are concerned, there was usually a lack of consistency and quality in investigations. Two-thirds of investigators surveyed said they would not routinely obtain the SF 171,



a personnel form, frequently critical to the defense that a person was not qualified for the job. Almost half of the investigators did not usually ask the complainant and the alleged discriminator to respond to each other's statements. This allows little opportunity to resolve inconsistencies. A significant number of EEO officials who relied on the investigations found them insufficiently probing. Additionally, investigators feel that, as a result of their lack of authority, they find it difficult to arrange meetings with witnesses and employees accused of discrimination.

4. Mixed cases

S. 404 amends title 5 U.S.C. section 7702, to revamp what is known as the "mixed case" procedure. "Mixed case" procedures are those in which an employee alleges that the prohibited personnel action to be appealed was based on illegal discrimination. The Committee found that the last 14 years have shown serious delays resulting from this complex procedure creating inequitable results for the employee. In addition, the development of discrimination case law may be adversely affected by the requirement that the MSPB make the initial determination in the "mixed cases".

Currently, an employee alleging a prohibited personnel practice under section 7702 of Title 5 must first appeal to the MSPB. After the MSPB final decision, the employee can then petition the EEOC for review on the issue of discrimination. If the MSPB and the EEOC disagree, a special panel is convened to make the final decision. Only 3 cases have gone to the special panel in 14 years. An employee may also use the negotiated grievance procedure in a mixed case.

In S. 404, the employee does not bounce between the two forums but section 4(b) requires the employee to choose either the MSPB, the EEOC, or the negotiated grievance procedure. Once a forum is chosen the employee must stay within that forum with one exception: If the EEOC dismisses the claim of discrimination, the employee has 20 days to file with the MSPB on the adverse action aspect of the complaint but may not raise the discrimination issue previously decided by EEOC. In addition, uniformity is maintained through a provision requiring the MSPB to follow EEOC substantive case law on the issue of discrimination. If EEOC is the chosen forum, EEOC must follow MSPB case law on the adverse action issue.

D. THE IMPOSITION OF SANCTIONS FOR DISCRIMINATORS

Under the current EEO process, employees who illegally discriminate are not punished for their behavior. In some cases, these employees are protected by the agency and the system. Discriminating employees are backed by a system that protects and insulates them from the consequence of discriminatory acts.

The Committee on Governmental Affairs hearings revealed that at times, even when egregious discriminatory behavior is found by the Commission, victims of discrimination do not feel that those employees and supervisors guilty of illegal discrimination receive sufficient punishment for their behavior. There is no clear message from the agency that discrimination will not be tolerated. On the contrary, some victims allege that agencies protect, even promote

managers who discriminate against and punish the victims. In testimony offered by Ms. Virginia Delgado there was a clear demonstration that although the Federal District Court rules that her supervisor created a "hostile" work environment, he was never disciplined. In fact, he was promoted. Former FBI special agent Don Rochon, in testimony before the Governmental Affairs Committee on October 23, 1991 stated "although there was no doubt that other agents clearly violated the law in harassing me, it was equally clear that the agency (Department of Justice) expressed no desire to take action against them even after the court ruled in my favor."

In testimony presented to the Committee on May 26, 1993, Ms. Diana Miller, a civil engineer from Pittsburgh, Pennsylvania who is employed by the U.S. Army Corps, told of an incident of sexual harassment by her supervisor. Ms. Miller's supervisor admitted that her description of his unwelcome and offending sexual advances was accurate. However, the legal staff at the agency moved very quickly to defend the actions of the supervisor and the legal officer stated to Governmental Affairs Committee staff that the supervisor should not be transferred because he was harder to replace than Ms. Miller would be. In fact, the legal staff seemed more intent on punishing Ms. Miller for reporting the incident than on punishing the supervisor for committing the act.

Such testimony prompted the Committee on Governmental Affairs to investigate more thoroughly the issue of sanctions against those found guilty of illegal discriminatory practices:

In 1988, the Commission signed a memorandum of understanding (MOU) with the Office of Special Counsel (OSC) in order to facilitate the referral of cases in which the Commission recommended that the agency consider discipline of the discriminating employee for prosecution under title 5, U.S.C., section 1215. Under title 5, U.S.C. section 1214, the OSC may bring action against an employee before the Merit Systems Protection Board (MSPB). Since 1988, the Commission has referred one case to OSC. OSC declined to prosecute.

The Committee requested from the Commission a copy of all cases since the 1988 MOU in which the Commission found discrimination. The Commission provided the Governmental Affairs Committee with eleven cases. Of those eleven, the Commission actually recommended that the agency consider discipline in seven cases.

Between 1988 and 1990, AJs found discrimination in 985 cases and the Commission found discrimination in 697 cases. Most cases recommended training of the discriminating employee. In seven cases, the AJ or the Commission recommended that the agency consider discipline of the person accused of discrimination. Of those seven cases, two discriminators actually received a sanction beyond sensitivity training. Based on the number of times the Commission found intentional discrimination in the last three years alone, an individual who illegally discriminates can anticipate a sanction for his or her illegal behavior 1% of the time.

The Committee finds that under the current scenario, employees who discriminate do not experience any serious consequence for their discriminatory behavior and the system has virtually no de-

terrent effect. The sanctions provisions in this bill are necessary to provide a deterrent effect.

In March of 1992 the General Accounting Office (GAO) prepared a fact sheet for the Committee on agencies' costs for discrimination complaint counseling and complaint processing. The fact sheet showed the actual and the estimated dollar costs for providing complaint processing FY 1991. The costs were reported by 13 civilian cabinet departments and 3 Department of Defense agencies.

A matter of cost

Together, these agencies reported a total cost of about \$139 million for complaint counseling and processing, most of which was for counseling individuals (about \$40 million) and performing original investigations of formal complaints of discrimination (\$39 million). Most of the reported costs were estimates. The agencies also broke the costs down into steps in the process. Among GAO's conclusion:

Agencies spent \$38 million to investigate complaints

Agencies spent \$40 million on counseling

Agencies spent \$11 million for proposed dispositions

Agencies spent \$4.2 million on final agency decisions.

The EEOC has estimated that it will need \$25 million to cover the cost of the new responsibilities it will undertake. The agencies will be losing some of their current EEO processing responsibilities and the Committee anticipates savings from this. For example, three activities the agencies will no longer perform include: 1) reviewing to accept/reject formal complaints, 2) preparing proposed and/or final decisions and 3) issuing final agency decisions.

In the GAO report, approximately \$24.9 million of the cost of agency EEO activities may not be erased, but will be diminished. The \$38 million currently spent by the agencies to investigate complaints is particularly significant because while some investigative authority may remain at the agency, most will be done at the EEOC. Even if a marginal reduction in the GAO estimate of \$139 million is experienced, it will be more than enough to make the bill budget neutral if not provide for tax savings.

The Committee urges that adequate time be allowed for transferring adequate resources to the EEOC to implement this Act. The Office of Management and Budget and the Congress should be given enough time to transfer individual agency EEO operation funds and FTE slots from other agencies to the EEOC, during the appropriations process.

III. HISTORY OF S. 404

On February 18, 1993, Senator John Glenn, along with cosponsoring Senators Ted Stevens, (R-Alaska), Barbara Mikulski, (D-Maryland), Paul Simon (D-Illinois), Dennis DeConcini (D-Arizona), Harris Wofford (D-Pennsylvania), Daniel Akaka (D-Hawaii), Russell Feingold (D-Wisconsin), Kent Conrad (D-North Dakota), John McCain (R-Arizona), Carol Moseley-Braun (D-Illinois), Joseph Lieberman (D-Connecticut), Carl Levin (D-Michigan). Additionally, Senators Barbara Boxer (D-California), John Rockefeller IV (D-West Virginia), and Paul Sarbanes (D-Maryland) have been added as cosponsors.

S. 404, if enacted, seeks to improve the effectiveness of administrative review of employment discrimination claims made by Federal employees and for other purposes. The legislation was referred to the Committee on Governmental Affairs the date of introduction.

The Committee held a hearing on S. 404, the Federal Employee Fairness Act, on May 26, 1993. On June 24, 1993, the Committee held its markup. S. 404 was favorably reported by voice vote, with one amendment offered by the Chairman Glenn on the clarification that federal employees hired under Title 38 of the United States Code are included in the definition of federal employees under the legislation.

S. 2801

During the 102nd Congress, Chairman John Glenn, along with cosponsoring Senators Ted Stevens, (R-Ak), Barbara Mikulski, (D-Md), Paul Simon (D-Il), John McCain (R-Az) and Daniel Akaka (D-Hi) on June 3, 1992, introduced S. 2801, the Federal Employee Fairness Act, a forerunner of S. 404. The bill was subsequently referred to the Committee on Governmental Affairs.

The Committee markup was held on August 5, 1992. Chairman Glenn offered S. 2801, in the nature of a substitute was favorably reported by voice vote, with two amendments, one offered by Chairman Glenn on the handling of classified documents and federal employees in the intelligence community, and one offered by Senator Stevens regarding additional due process protections.

During the markup, Senator Ted Stevens, a co-sponsor of S. 2801, offered an amendment to afford additional due process protection to permit notification to a Federal employee accused of discrimination and permit such employee the opportunity to attend the hearing before an EEOC Administrative Judge and participate throughout the hearing with counsel or a personal representative.

Chairman Glenn offered an amendment designed to protect classified information gathered by any of the intelligence agencies or their personnel who may be within any of the Federal agencies. The Committee urges the EEOC to promulgate rules to further protect such classified information and the personnel of the intelligence agencies throughout the EEO complaint process.

IV. COMMITTEE VOTE

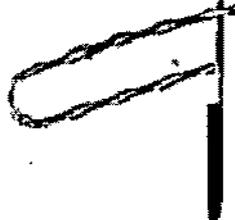
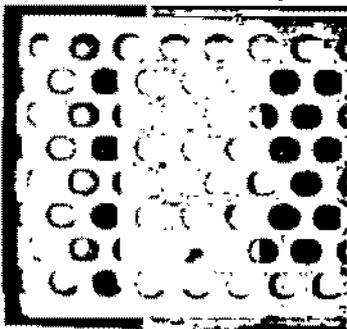
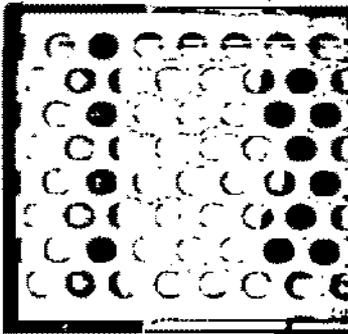
The Committee on Governmental Affairs held a markup on S. 404 on June 24, 1993. The Committee agreed by voice vote to report the bill favorably, with amendment by Chairman John Glenn. Members present included Chairman Glenn, Senator Levin, Senator Dorgan, Senator Lieberman, Senator Akaka, Senator Roth, and Senator Stevens, Senator Cohen, Senator Cochran, and Senator McCain.

The text of S. 404, as reported is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Employee Fairness Act of 1993".



SEC. 2. AMENDMENTS RELATING TO ADMINISTRATIVE DETERMINATION OF FEDERAL EMPLOYEE DISCRIMINATION CLAIMS.

(a) **DEFINITIONS.**—Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended—

(1) in paragraph (f) by striking "The term" and inserting "Except when it appears as part of the term 'Federal employee', the term"; and

(2) by adding at the end the following:

"(o) The term 'Commission' means the Equal Employment Opportunity Commission.

"(p) The term 'entity of the Federal Government' means an entity to which section 717(a) applies (including an entity to which an individual may be appointed under chapter 74 of title 38, United States Code), except that such term does not include the Library of Congress.

"(q) The term 'Federal employee' [means an individual employed by, or who applies for employment with, an entity of the Federal Government] means—

"(1) an individual employed by an entity of the Federal Government, including an individual appointed to a position under chapter 74 of title 38, United States Code; and

"(2) an individual who applies for employment with such an entity, including an individual who applies for such an appointment.

"(r) The term 'Federal employment' means employment by an entity of the Federal Government.

"(s) The terms 'government', 'government agency', and 'political subdivision' do not include an entity of the Federal Government."

(b) **EEOC DETERMINATION OF FEDERAL EMPLOYMENT DISCRIMINATION CLAIMS.**—Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended—

(1) in subsection (b)—

(A) in the second sentence, by redesignating paragraphs (1) through (3) as subparagraphs (A) through (C), respectively;

(B) in the fourth sentence, by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively;

(C) by designating the first through fifth sentences as paragraphs (1), (2), (4), (5), and (6), respectively, and indenting accordingly;

(D) in paragraph (2) (as designated by subparagraph (C) of this paragraph)—

(i) in subparagraph (B) (as redesignated by subparagraph (A) of this paragraph) by striking "and" at the end;

(ii) in subparagraph (C) (as redesignated by subparagraph (A) of this paragraph) by striking the period and inserting "; and"; and

(iii) by adding after subparagraph (C) the following:

"(D) require each entity of the Federal Government—

"(i)(I) to make counseling available to a Federal employee who chooses to notify such entity that the employee believes such entity has discriminated against the employee in violation of subsection (a), for the purpose of try-

ing to resolve the matters with respect to which such discrimination is alleged;

"(II) to assist such employee in identifying the respondent required by subsection (c)(1) to be named in a complaint alleging such violation;

"(III) to inform such employee individually of the procedures and deadlines that apply under this section to a claim alleging such discrimination; and

"(IV) to make such counseling available throughout the administrative process;

"(i) to establish a voluntary alternative dispute resolution process, as described in subsection (e)(1), to resolve complaints;

"(ii) not to discourage Federal employees from filing complaints on any matter relating to discrimination in violation of this section; and

"(iv) not to require Federal employees to participate in such counseling or dispute resolution process."; and

(E) by inserting after paragraph (2) (as designated by subparagraph (C) of this paragraph) the following:

"(3) The decision of a Federal employee to forgo such counseling or dispute resolution process shall not affect the rights of such employee under this title.";

(2) by striking subsection (c);

(3) in subsection (d)—

(A) by striking "(k)" and inserting "(j)";

(B) by striking "brought hereunder" and inserting "commenced under this section"; and

(C) by striking ", and the same" and all that follows and inserting a period and the following: "The head of the department, agency, or other entity of the Federal Government in which discrimination in violation of subsection (a) is alleged to have occurred shall be the defendant in a civil action alleging such violation. In any action or proceeding under this section, the court, in the discretion of the court, may allow the prevailing party (other than an entity of the Federal Government) a reasonable attorney's fee (including expert fees and other litigation expenses), costs, and the same interest to compensate for delay in payment as a court has authority to award under section 706(k).";

(4) by redesignating subsections (d) and (e) as subsections (m) and (n), respectively;

(5) by inserting after subsection (b) the following:

"(c)(1)(A) Except as provided in subparagraph (B), a complaint filed by or on behalf of a Federal employee or a class of Federal employees and alleging a claim of discrimination arising under subsection (a) or paragraph (4) shall—

"(i) name as the respondent the head of the department, agency, or other entity of the Federal Government in which such discrimination is alleged to have occurred (referred to in this section as the 'respondent'); and

"(ii) be filed with the respondent, or with the Commission, not later than 180 days after the alleged discrimination occurs.

"(B) A complaint described in subparagraph (A) shall be considered to be filed in compliance with subparagraph (A), if not later than 180 days after the alleged discrimination occurs, the complaint is filed—

"(i) with such department, agency, or entity; or

"(ii) if the complaint does not arise out of a dispute with an agency within the intelligence community, as defined by Executive order, with any other entity of the Federal Government, regardless of the respondent named.

"(2) If the complaint is filed with an entity of the Federal Government other than the department, agency, or entity in which such discrimination is alleged to have occurred—

"(A) the entity (other than the Commission) with whom the complaint is filed shall transmit the complaint to the Commission, not later than 15 days after receiving the complaint; and

"(B) the Commission shall transmit a copy of the complaint, not later than 10 days after receiving the complaint, to the respondent.

"(3)(A) Not later than 3 days after the respondent receives the complaint from a source other than the Commission, the respondent shall notify the Commission that the respondent has received the complaint and shall inform the Commission of the identity of the Federal employee aggrieved by the discrimination alleged in the complaint.

"(B) Not later than 10 days after the respondent or the Merit Systems Protection Board receives the complaint from a source other than the Commission, the respondent or the Board shall transmit to the Commission a copy of the complaint.

"(4)(A) No person shall, by reason of the fact that a Federal employee or an authorized representative of Federal employees has filed, instituted, or caused to be filed or instituted any proceeding under this section, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of this section—

"(i) discharge the employee or representative;

"(ii) discriminate against the employee or representative in administering a performance-rating plan under chapter 43 of title 5, United States Code;

"(iii) in any other way discriminate against the employee or representative; or

"(iv) cause another person to take an action described in clause (i), (ii), or (iii).

"(B) Any Federal employee or representative of Federal employees who believes that the employee or representative has been discharged or otherwise discriminated against by any person in violation of subparagraph (A), may file a complaint in accordance with paragraph (1).

"(d)(1) Throughout the period beginning on the date the respondent receives the complaint and ending on the latest date by which all administrative and judicial proceedings available under this section have been concluded with respect to such claim, the respondent shall collect and preserve documents and information (including the complaint) that are relevant to such claim, including not

less than the documents and information that comply with rules issued by the Commission.

"(2) If the complaint alleges that a person has—

"(A) participated in the discrimination that is the basis for the complaint; or

"(B) at the time of the discrimination—

"(i) was a supervisor of the Federal employee subject to the discrimination;

"(ii) was aware of the discrimination; and

"(iii) failed to make reasonable efforts to curtail or mitigate the discrimination,

the respondent shall ensure that the person shall not be designated to carry out the requirements of paragraph (1), or to conduct any investigation related to the complaint.

"(e)(1)(A) The respondent shall make reasonable efforts to conciliate each claim alleged in the complaint through alternative dispute resolution procedures during—

"(i) the 30-day period; or

"(ii) with the written consent of the aggrieved Federal employee, the 60-day period,

beginning on the date the respondent receives the complaint.

"(B) Alternative dispute resolution under this paragraph may include a conciliator described in subparagraph (C), the respondent, and the aggrieved Federal employee in a process involving meetings with the parties separately or jointly for the purposes of resolving the dispute between the parties.

"(C) A conciliator shall be appointed by the Commission to consider each complaint filed under this section. The Commission shall appoint a conciliator after considering any candidate who is recommended to the Director by the Federal Mediation and Conciliation Service, the Administrative Conference of the United States, or organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters.

"(2) Before the expiration of the applicable period specified in paragraph (1)(A) and with respect to such claim, the respondent shall—

"(A) enter into a settlement agreement with such Federal employee; or

"(B) give formal written notice to such Federal employee that such Federal employee may, before the expiration of the 90-day period beginning on the date such Federal employee receives such notice, either—

"(i) file with the Commission—

"(I) a written request for a determination of such claim under subsection (f) by an administrative judge of the Commission;

"(II) if such claim alleges an action appealable to the Merit System Protection Board, a written request electing that a determination of such claim be made under the procedures specified in either subparagraph (A) or (B) of section 7702(a)(2) of title 5, United States Code; or

"(III) if such claim alleges a grievance that is subject to section 7121 of title 5, United States Code but not

appealable to the Merit Systems Protection Board, a written request to raise such claim under the administrative and judicial procedures provided in such section 7121; or

"(ii) commence a civil action in an appropriate district court of the United States for de novo review of such claim.

"(3) Such Federal employee may file a written request described in paragraph (2)(B)(i), or commence a civil action described in paragraph (2)(B)(ii), at any time—

"(A) after the expiration of the applicable period specified in paragraph (1)(A); and

"(B) before the expiration of the 90-day period specified in paragraph (2).

"(f)(1)(A) If such Federal employee files a written request under subsection (e)(2)(B)(i)(I) and in accordance with subsection (e)(3) with the Commission for a determination under this subsection of the claim described in subsection (a), the Commission shall transmit a copy of such request to the respondent and shall appoint an administrative judge of the Commission to determine such claim.

"(B) If such Federal employee files a written request under subclause (II) or (III) of subsection (e)(2)(B)(i) and in accordance with section (e)(3), the Commission shall transmit, not later than 10 days after receipt of such request, the request to the appropriate agency for determination.

"(2) Immediately after receiving a copy of a request under subsection (e)(2)(B)(i), the respondent shall transmit a copy of all documents and information collected by the respondent under subsection (d) with respect to such claim—

"(A) to the Commission if such request is for a determination under this subsection; or

"(B) to the Merit Systems Protection Board if such request is for a determination under the procedures specified in section 7702(a)(2)(A) of title 5, United States Code.

"(3)(A)(i) If the administrative judge determines there are reasonable grounds to believe that to carry out the purposes of this section it is necessary to stay a personnel action by the respondent against the aggrieved Federal employee, the administrative judge may request any member of the Commission to issue a stay against such personnel action for 15 calendar days.

"(ii) A stay requested under clause (i) shall take effect on the earlier of—

"(I) the order of such member; and

"(II) the fourth calendar day (excluding Saturday, Sunday, and any legal public holiday) following the date on which such stay is requested.

"(B) The administrative judge may request any member of the Commission to extend, for a period not to exceed 30 calendar days, a stay issued under subparagraph (A).

"(C) The administrative judge may request the Commission to extend such stay for any period the Commission considers to be appropriate beyond the period in effect under subparagraph (A) or (B).

"(D) Members of the Commission shall have authority to issue and extend a stay for the periods referred to in subparagraphs (A) and (B), respectively. The Commission shall have authority to extend a stay in accordance with subparagraph (C) for any period.

"(E) The respondent shall comply with a stay in effect under this paragraph.

"(4)(A) The administrative judge shall determine whether the documents and information received under paragraph (2) comply with subsection (d) and are complete and accurate.

"(B) If the administrative judge finds that the respondent has failed to produce the documents and information necessary to comply with such subsection, the administrative judge shall, in the absence of good cause shown by the respondent, impose any of the sanctions specified in paragraph (6)(C) and shall require the respondent—

"(i) to obtain any additional documents and information necessary to comply with such subsection; and

"(ii) to correct any inaccuracy in the documents and information so received.

"(5)(A) After examining the documents and information received under paragraph (4), the administrative judge shall issue an order dismissing—

"(i) any frivolous claim alleged in the complaint; and

"(ii) the complaint if it fails to state a nonfrivolous claim for which relief may be granted under this section.

"(B)(i) If a claim or the complaint is dismissed under subparagraph (A), the administrative judge shall give formal written notice to the aggrieved Federal employee that such Federal employee may, before the expiration of the 90-day period beginning on the date such Federal employee receives such notice—

"(I) file with the Commission a written request for review of such order; or

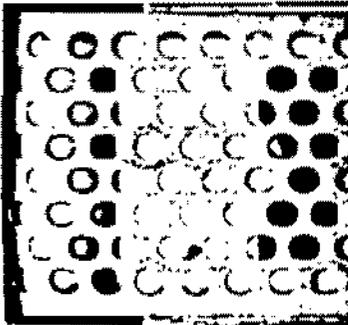
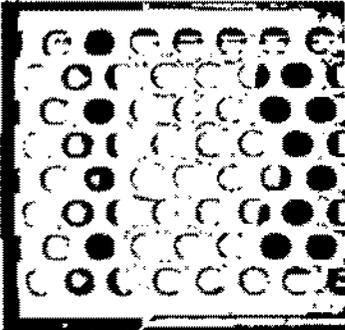
"(II) commence a civil action in an appropriate district court of the United States for de novo review of such claim or such complaint.

"(ii) Such Federal employee may commence such civil action in the 90-day period specified in clause (i).

"(6)(A)(i) If the complaint is not dismissed under paragraph (5)(A), the administrative judge shall make a determination, after an opportunity for a hearing, on the merits of each claim that is not dismissed under such paragraph. The administrative judge shall make a determination on the merits of any other nonfrivolous claim under this section, and on any action such Federal employee may appeal to the Merit Systems Protection Board, reasonably expected to arise from the facts on which the complaint is based.

"(ii) In making the determination required by clause (i), the administrative judge shall—

"(I) decide whether the aggrieved Federal employee was the subject of unlawful intentional discrimination in a department, agency, or other entity of the Federal Government under this title, section 102 of the Americans with Disabilities Act of 1990, section 501 of the Rehabilitation Act of 1973, section 4 of the Age Discrimination in Employment Act of 1967, or the Equal Pay Act of 1963;



"(II) if the employee was the subject of such discrimination, contemporaneously identify the person who engaged in such discrimination; and

"(III) notify the person identified in subclause (II) of the complaint and the allegations raised in the complaint.

"(iii) As soon as practicable, the administrative judge shall—

"(I) determine whether the administrative proceeding with respect to such claim may be maintained as a class proceeding; and

"(II) if the administrative proceeding may be so maintained, describe persons whom the administrative judge finds to be members of such class.

"(B) With respect to such claim, a party may conduct discovery by such means as may be available in a civil action to the extent determined to be appropriate by the administrative judge.

"(C) If the aggrieved Federal employee or the respondent fails without good cause to respond fully and in a timely fashion to a request made or approved by the administrative judge for information or the attendance of a witness, and if such information or such witness is solely in the control of the party who fails to respond, the administrative judge may, in appropriate circumstances—

"(i) draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party who fails to respond;

"(ii) consider the matters to which such information or such testimony pertains to be established in favor of the opposing party;

"(iii) exclude other evidence offered by the party who fails to respond;

"(iv) grant full or partial relief to the aggrieved Federal employee; or

"(v) take such other action as the administrative judge considers to be appropriate.

"(D) In a hearing on a claim, the administrative judge shall—

"(i) limit attendance to persons who have a direct connection with such claim;

"(ii) bring out pertinent facts and relevant employment practices and policies, but—

"(I) exclude irrelevant or unduly repetitious information; and

"(II) not apply the Federal Rules of Evidence strictly;

"(iii) permit all parties to examine and cross-examine witnesses;

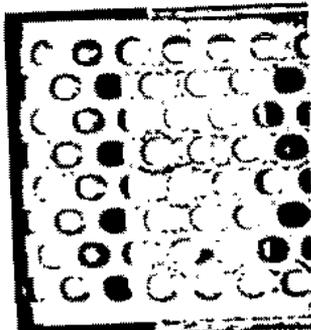
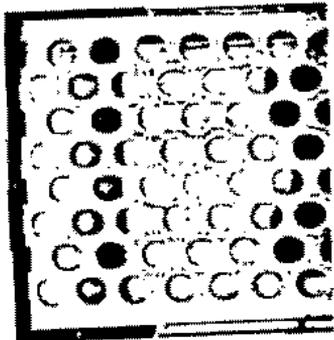
"(iv) require that testimony be given under oath or affirmation; and

"(v) permit the person notified in subparagraph (A)(ii)(III) to appear at the hearing—

"(I) in person; or

"(II) by or with counsel or another duly qualified representative.

"(E) At the request of any party or the administrative judge, a transcript of all or part of such hearing shall be provided in a timely manner and simultaneously to the parties and the Commission. The respondent shall bear the cost of providing such transcript.



"(F) The administrative judge shall have authority—

- "(i) to administer oaths and affirmation;
- "(ii) to regulate the course of hearings;
- "(iii) to rule on offers of proof and receive evidence;
- "(iv) to issue subpoenas to compel—

"(I) the production of documents or information by the entity of the Federal Government in which discrimination is alleged to have occurred; and

"(II) the attendance of witnesses who are Federal officers or employees of such entity;

"(v) to request the Commission to issue subpoenas to compel the production of documents or information by any other entity of the Federal Government and the attendance of other witnesses, except that any witness who is not an officer or employee of an entity of the Federal Government—

"(I) may be compelled only to attend any place—

"(aa) less than 100 miles from the place where such witness resides, is employed, transacts business in person, or is served; or

"(bb) at such other convenient place as is fixed by the administrative judge; and

"(II) shall be paid fees and allowances, by the party that requests the subpoena, to the same extent that fees and allowances are paid to witnesses under chapter 119 of title 28, United States Code;

"(vi) to exclude witnesses whose testimony would be unduly repetitious;

"(vii) to exclude any person from a hearing for contumacious conduct, or for misbehavior, that obstructs such hearing; and

"(viii) to grant any and all relief of a kind described in subsections (g) and (k) of section 706.

"(G) The administrative judge and Commission shall have authority to award a reasonable attorney's fee (including expert fees and other litigation expenses), costs, and the same interest to compensate for delay in payment as a court has authority to award under section 706(k).

"(H) The Commission shall have authority to issue subpoenas described in subparagraph (F)(v).

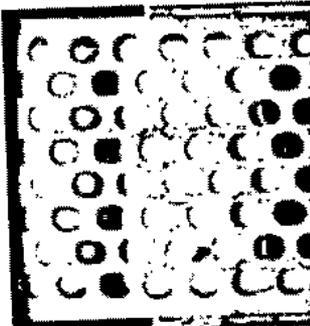
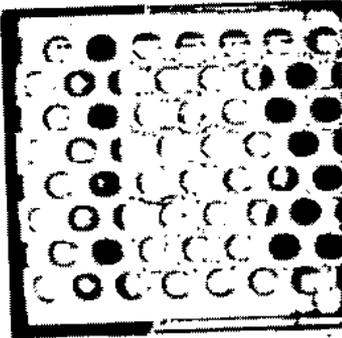
"(I) In the case of contumacy or failure to obey a subpoena issued under subparagraph (F), the United States district court for the judicial district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence.

"(7)(A)(i) The administrative judge shall issue a written order making the determination required by paragraph (6)(A), and granting or denying relief.

"(ii) The order shall not be reviewable by the respondent, and the respondent shall have no authority to modify or vacate the order.

"(iii) Except as provided in clause (iv) or subparagraph (B), the administrative judge shall issue the order not later than—

"(I) 210 days after the complaint containing such claim is filed on behalf of a Federal employee; or



"(II) 270 days after the complaint containing such claim is filed on behalf of a class of Federal employees.

"(iv) The time periods described in clause (i) shall not begin running until 30 days after the administrative judge is assigned to the case if the administrative judge certifies, in writing, that such 30-day period is needed to secure additional documents or information from the respondent to have a complete administrative record.

"(B) The administrative judge shall issue such order not later than 30 days after the applicable period specified in subparagraph (A) if the administrative judge certifies in writing, before the expiration of such applicable period—

"(i) that such 30-day period is necessary to make such determination; and

"(ii) the particular and unusual circumstances that prevent the administrative judge from complying with the applicable period specified in subparagraph (A).

"(C) The administrative judge may apply to the Commission to extend any period applicable under subparagraph (A) or (B) if manifest injustice would occur in the absence of such an extension.

"(D) If the aggrieved Federal employee shows that such extension would prejudice a claim of, or otherwise harm, such Federal employee, the Commission—

"(i) may not grant such extension; or

"(ii) shall terminate such extension.

"(E) In addition to findings of fact and conclusions of law, including findings and conclusions pertaining specifically to the decision and identification described in paragraph (6)(A)(ii), such order shall include formal written notice to each party that before the expiration of the 90-day period beginning on the date such party receives such order—

"(i) the aggrieved Federal employee may commence a civil action in an appropriate district court of the United States for de novo review of a claim with respect to which such order is issued; and

"(ii) unless a civil action is commenced in such 90-day period under clause (i) with respect to such claim, any party may file with the Commission a written request for review of the determination made, and relief granted or denied, in such order with respect to such claim.

"(F) Such Federal employee may commence such civil action at any time—

"(i) after the expiration of the applicable period specified in subparagraph (A) or (B); and

"(ii) before the expiration of the 90-day period beginning on the date such Federal employee receives an order described in subparagraph (A).

"(G) The determination made, and relief granted, in such order with respect to a particular claim shall be enforceable immediately, if such order applies to more than one claim and if such employee does not—

"(i) commence a civil action in accordance with subparagraph (E)(i) with respect to the claim; or

"(ii) request review in accordance with subparagraph (E)(ii) with respect to the claim.

"(g)(1) If a party timely files a written request in accordance with subsection (f)(5)(B)(i) or (f)(7)(E)(ii) with the Commission for review of the determination made, and relief granted or denied, with respect to a claim in such order, then the Commission shall immediately transmit a copy of such request to the other parties involved and to the administrative judge who issued such order.

"(2) Not later than 7 days after receiving a copy of such request, the administrative judge shall transmit to the Commission the record of the proceeding on which such order is based, including all documents and information collected by the respondent under subsection (d).

"(3)(A) After allowing the parties to file briefs with respect to such determination, the Commission shall issue an order applicable with respect to such claim affirming, reversing, or modifying the applicable provisions of the order of the administrative judge not later than—

"(i) 150 days after receiving such request; or

"(ii) 30 days after such 150-day period if the Commission certifies in writing, before the expiration of such 150-day period—

"(I) that such 30-day period is necessary to review such claim; and

"(II) the particular and unusual circumstances that prevent the Commission from complying with clause (i).

"(B) The Commission shall affirm the determination made, and relief granted or denied, by the administrative judge with respect to such claim if such determination and such relief are supported by substantial evidence in the record taken as a whole. The findings of fact of the administrative judge shall be conclusive unless the Commission determines that they are clearly erroneous.

"(C) In addition to findings of fact and conclusions of law, including findings and conclusions pertaining specifically to the decision and identification described in subsection (f)(6)(A)(ii), the Commission shall include in the order of the Commission formal written notice to the aggrieved Federal employee that, before the expiration of the 90-day period beginning on the date such Federal employee receives such order, such Federal employee may commence a civil action in an appropriate district court of the United States for de novo review of a claim with respect to which such order is issued.

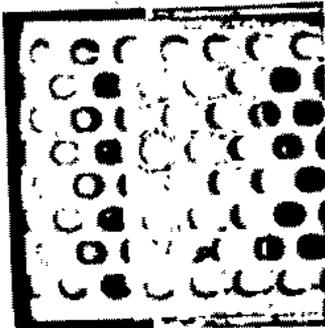
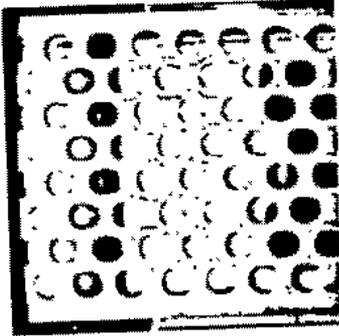
"(D) Such Federal employee may commence such civil action at any time—

"(i) after the expiration of the applicable period specified in subparagraph (A); and

"(ii) before the expiration of the 90-day period specified in subparagraph (C).

"(h)(1) In addition to the periods authorized by subsections (f)(7)(F) and (g)(3)(D), an aggrieved Federal employee may commence a civil action in an appropriate district court of the United States for de novo review of a claim—

"(A) during the period beginning 300 days after the Federal employee timely requests an administrative determination under subsection (f) with respect to such claim and ending on the date the administrative judge issues an order under such subsection with respect to such claim; and



"(B) during the period beginning 180 days after such Federal employee timely requests review under subsection (g) of such determination with respect to such claim and ending on the date the Commission issues an order under such subsection with respect to such claim.

"(2) Whenever a civil action is commenced timely and otherwise in accordance with this section to determine the merits of a claim arising under this section, the jurisdiction of the administrative judge or the Commission (as the case may be) to determine the merits of such claim shall terminate.

"(i) A Federal employee who prevails on a claim arising under this section, or the Commission, may bring a civil action in an appropriate district court of the United States to enforce—

"(1) the provisions of a settlement agreement applicable to such claim;

"(2) the provisions of an order issued by an administrative judge under subsection (f)(7)(A) applicable to such claim if—

"(A) a request is not timely filed of such claim under subsection (g)(1) for review of such claim by the Commission; and

"(B) a civil action is not timely commenced under subsection (f)(7)(F) for de novo review of such claim; or

"(3) the provisions of an order issued by the Commission under subsection (g)(3)(A) applicable to such claim if a civil action is not commenced timely under subsection (g)(3)(D) for de novo review of such claim.

"(j) Any amount awarded under this section (including fees, costs, and interest awarded under subsection (f)(6)(G)), or under title 28, United States Code, with respect to a violation of subsection (a), shall be paid by the entity of the Federal Government that violated such subsection from any funds made available to such entity by appropriation or otherwise.

"(k)(1) An entity of the Federal Government against which a claim of discrimination or retaliation is alleged under this section shall grant the aggrieved Federal employee a reasonable amount of official time, in accordance with regulations issued by the Commission, to prepare an administrative complaint based on such allegation and to participate in administrative proceedings relating to such claim.

"(2) An entity of the Federal Government against which a claim of discrimination is alleged in a complaint filed in a civil action under this section shall grant the aggrieved Federal employee paid leave for time reasonably expended to prepare for, and participate in, such civil action. Such leave shall be granted in accordance with regulations issued by the Commission, except that such leave shall include reasonable time for—

"(A) attendance at depositions;

"(B) meetings with counsel;

"(C) other ordinary and legitimate undertakings in such civil action, that require the presence of such Federal employee; and

"(D) attendance at such civil action.

"(3) If the administrative judge or the Commission (as the case may be), makes or affirms a determination of intentional unlawful discrimination as described in subsection (f)(6)(A), the administra-

tive judge or Commission, respectively, shall, not later than 30 days after issuing the order described in subsection (f)(7) or (g)(3), as appropriate, submit to the Special Counsel the order and a copy of the record compiled at any hearing on which the order is based.

"(4)(A) On receipt of the submission described in paragraph (3), the Special Counsel shall conduct an investigation in accordance with section 1214 of title 5, United States Code, and may initiate disciplinary proceedings against any person identified in a determination described in subsection (f)(6)(A)(ii)(II), if the Special Counsel finds that the requirements of section 1215 of title 5, United States Code, have been satisfied.

"(B) The Special Counsel shall conduct such proceedings in accordance with such section, and shall accord to the person described in subparagraph (A) the rights available to the person under such section, including applicable due process rights.

"(C) The Special Counsel shall impose appropriate sanctions on such person.

"(1) This section, as in effect immediately before the effective date of the Federal Employee Fairness Act of 1993, shall apply with respect to employment in the Library of Congress."; and

(6) by adding at the end the following new subsections:

"(o)(1) Each respondent that is the subject of a complaint that has not been resolved under this section, or that has been resolved under this section within the most recent calendar year, shall prepare a report. The report shall contain information regarding the complaint, including the resolution of the complaint if applicable, and the measures taken by the respondent to lower the average number of days necessary to resolve such complaints.

"(2) Not later than October 1 of each year, the respondent shall submit to the Commission the report described in paragraph (1).

"(3) Not later than December 1 of each year, the Commission shall submit to the appropriate committees of the House of Representatives and of the Senate a report summarizing the information contained in the reports submitted in accordance with paragraph (2).

"(p)(1) The Commission, in consultation with the Director of Central Intelligence, the Secretary of Defense, and the Director of the Information Security Oversight Office of the General Services Administration, shall promulgate regulations to ensure the protection of classified information and national security information in administrative proceedings under this section. Such regulations shall provide, among other things, that complaints under this section that bear upon classified information shall be handled only by such administrative judges, Commission personnel, and conciliators as have been granted appropriate security clearances.

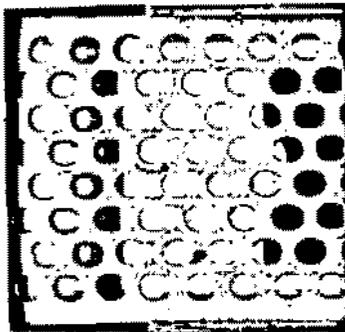
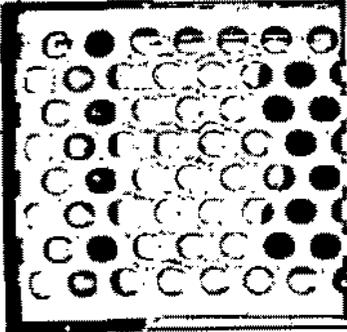
"(2) For the purposes of paragraph (1), the term 'classified information' has the meaning given the term in section 606(1) of the National Security Act of 1947 (50 U.S.C. 426(1))."

SEC. 3. AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

(a) ENFORCEMENT BY EEOC.—Section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a) is amended—

(1) by striking subsections (c) and (d); and

(2) by inserting after subsection (b) the following:



"(c)(1) Any individual aggrieved by a violation of subsection (a) may file a complaint with the Equal Employment Opportunity Commission in accordance with subsections (c) through (m), and subsections (o) and (p), of section 717 of the Civil Rights Act of 1964.

"(2) Except as provided in subsection (d) and paragraph (3), such subsections of section 717 shall apply to a violation alleged in a complaint filed under paragraph (1) in the same manner as such section applies to a claim arising under section 717 of such Act.

"(3) The Equal Employment Opportunity Commission, and the administrative judges of the Commission, shall have authority to award such legal or equitable relief as will effectuate the purposes of this Act to an individual described in paragraph (1) with respect to a complaint filed under this subsection.

"(d)(1) If an individual aggrieved by a violation of this section does not file a complaint under subsection (c)(1), such individual may commence a civil action in an appropriate district court of the United States for de novo review of such violation—

"(A) not less than 30 days after filing with the Equal Employment Opportunity Commission a notice of intent to commence such action; and

"(B) not more than 2 years after the alleged violation of this section occurs.

"(2) On receiving such notice, the Equal Employment Opportunity Commission shall—

"(A) promptly notify all persons named in such notice as prospective defendants in such action; and

"(B) take any appropriate action to ensure the elimination of any unlawful practice.

"(3) Except as provided in paragraph (4), section 717(m) of the Civil Rights Act of 1964 (as redesignated by section 2 of the Federal Employee Fairness Act of 1993) shall apply to civil actions commenced under this subsection in the same manner as such section applies to civil actions commenced under section 717 of the Civil Rights Act of 1964.

"(4) The court described in paragraph (1) shall have authority to award such legal or equitable relief as will effectuate the purposes of this Act to an individual described in paragraph (1) in an action commenced under this subsection."

(b) OPPORTUNITY TO COMMENCE CIVIL ACTION.—If a complaint filed under section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a) with the Equal Employment Opportunity Commission is pending in the period beginning on the date of the enactment of this Act and ending on December 31, 1993, the individual who filed such complaint may commence a civil action under such section not later than June 30, 1994.

SEC. 4. AMENDMENTS TO TITLE 5, UNITED STATES CODE.

(a) GRIEVANCE PROCEDURES.—Section 7121 of title 5, United States Code, is amended—

(1) in subsection (a)(1) by inserting "administrative" after "exclusive"; and

(2) in subsection (d)—

(A) by inserting "(1)" after "(d)";

(B) in the first and second sentences by striking "An" and inserting "Except as provided in paragraph (2), an"; and

(C) in the last sentence by striking "Selection" and all that follows through "any other" and inserting the following:

"(3) An employee may commence, not later than 120 days after a final decision, a civil action in an appropriate district court of the United States for de novo review of a"; and

(D) by inserting after the second sentence the following:

"(2) Matters covered under section 7702 of this title, or under a law administered by the Equal Employment Opportunity Commission, may be raised under the negotiated grievance procedure in accordance with this section only if an employee elects under subclause (II) or (III) of section 717(e)(2)(B)(i) of the Civil Rights Act of 1964 to proceed under this section."

(b) ACTIONS INVOLVING DISCRIMINATION.—Section 7702 of title 5, United States Code, is amended to read as follows:

"§ 7702. Actions involving discrimination

"(a)(1) Notwithstanding any other provision of law, in the case of any employee or applicant for employment who—

"(A) is affected by an action which the employee or applicant may appeal to the Merit System Protection Board; and

"(B) alleges that a basis for the action was discrimination prohibited by—

"(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

"(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

"(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791);

"(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631 and 633a); or

"(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the employee or applicant may raise the action as provided in paragraph (2).

"(2) For purposes of paragraph (1), the employee shall raise the action by filing a complaint with the Equal Employment Opportunity Commission in accordance with section 717 of the Civil Rights Act of 1964 and shall make a request under section 717(e)(2)(B)(i) selecting the procedures specified in one of the following subparagraphs:

"(A) The administrative and judicial procedures provided under sections 7701 and 7703.

"(B) The administrative and judicial procedures provided under section 7121.

"(C) The administrative and judicial procedures provided under section 717 of the Civil Rights Act of 1964.

"(3) The agency (including the Board and the Equal Employment Opportunity Commission) that carries out such procedures shall apply the substantive law that is applied by the agency that ad-

ministers the particular law referred to in subsection (a)(1) that prohibits the conduct alleged to be the basis of the action referred to in subsection (a)(1)(A).

"(b)(1) Except as provided in paragraph (2), the employee shall have 90 days in which to raise the action under the procedures specified in subparagraph (A) or (B) of subsection (a)(2), if—

"(A) an employee elects the procedures specified in subsection (a)(2)(C); and

"(B) the Equal Employment Opportunity Commission dismisses under section 717(f)(5)(A) of the Civil Rights Act of 1964 a claim that is based on the action raised by the employee.

"(2) No allegation of a kind described in subsection (a)(1)(B) may be raised under this subsection.

"(c) If at any time after the 120th day following an election made under section 717(e)(2)(B)(i) of the Civil Rights Act of 1964 to raise an action under the procedures specified in subsection (a)(2)(A) of this section there is no judicially reviewable action, an employee shall be entitled to file, not later than 240 days after making such election, a civil action in an appropriate district court of the United States for de novo review of the action raised under subsection (a).

"(d) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) after a judicially reviewable action."

SEC. 5. ISSUANCE OF PROCEDURAL GUIDELINES AND NOTICE RULES.

Not later than 1 year after the date of the enactment of this Act, the Equal Employment Opportunity Commission shall issue—

(1) rules to assist entities of the Federal Government in complying with section 717(d) of the Civil Rights Act of 1964, as added by section 2 of this Act, and

(2) rules establishing—

(A) a uniform written official notice to be used to comply with section 717 of such Act, as added by section 2 of this Act; and

(B) requirements applicable to collecting and preserving documents and information under section 717(d), as added by section 2 of this Act.

SEC. 6. TECHNICAL AMENDMENTS.

(a) CIVIL RIGHTS ACT OF 1964.—Subsections (b) and (c) of section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16 (b) and (c)) are amended by striking "Civil Service Commission" each place it appears and inserting "Commission".

(b) CIVIL RIGHTS ACT OF 1991.—The second sentence of section 307(h) of the Civil Rights Act of 1991 (2 U.S.C. 1207(h)) is amended by striking "section 15(c)" and all that follows and inserting "section 15(d)(4) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(d)(4))."

SEC. 7. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on January 1, 1994:

(b) APPLICATION OF AMENDMENTS.—The amendments made by this Act (other than sections 3 and 4) shall apply only with respect

the AJ to petition any member of the Commission to extend the stay for up to 30 days. Allows the AJ to petition the Commission, as a whole, to extend a stay further for any period it deems necessary. Authorizes members of the Commission and the Commission to carry out this duty.

(2) Requires the respondent to provide a copy of all the relevant information and documents collected with respect to the claim, immediately after receipt of the request, and to comply with a stay issued under this section.

(3) Requires the AJ to determine if the record is complete and accurate and to request any missing documentation. If the respondent fails to show good cause for any incomplete or inaccurate record, the AJ may issue appropriate sanctions, which may include: drawing adverse inferences, considering matters to which the missing information or testimony referred to be established in favor of the complainant, excluding other evidence offered by the party who refuses to respond, or taking other action as may be appropriate. The AJ shall require the agency to obtain any additional information and correct any inaccuracies in the information received.

(4) Requires the AJ to dismiss any frivolous claim or any claim not within the statute. Requires the AJ, if the claim is dismissed, to give notice to the complainant of the right to file civil suit to obtain de novo review of the complaint or file for review by the Office of Review and Appeal at the EEOC, within 90 days of receipt of the notice by the complainant.

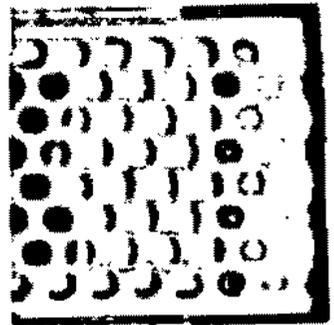
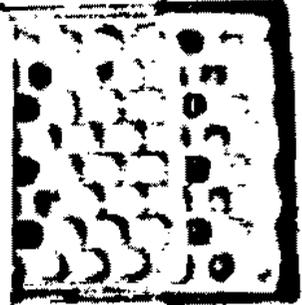
(5) Requires the AJ to make a determination, after an opportunity for a hearing, on the merits of any claim not dismissed or any other nonfrivolous claim, and any action the employee may appeal to the Merit Systems Protection Board, reasonably expected to arise from the facts on which the complaint is based. Requires the AJ to determine whether the claim is a class action and, if so, to determine the members of the class.

Allows the parties to conduct discovery by such means as available in a civil action to the extent deemed appropriate by the AJ. Allows the AJ to impose sanctions for failure to comply, within good cause and in a timely fashion, with a request if the information requested was in the sole control of the party who fails to respond.

Requires the AJ to: limit the attendance of persons, bring out relevant employment practices, exclude irrelevant or unduly repetitious information, not apply the Federal Rules of Civil Procedure strictly, permit all parties to examine and cross-examine witnesses, and require that testimony be given under oath.

Requires the respondent to pay for the cost of providing transcripts to all the parties and to the Commission, where requested by any party or the AJ.

Grants the AJ the authority to: administer oaths and affirmation; regulate the course of the hearing; rule on offers to proof and receive evidence; exclude repetitious testimony; exclude persons from the hearing for misbehavior; grant any relief of a kind described in subsections (g) and (k) of section 706; award reasonable attorney's fee (including expert fees and other litigation expenses), costs, and the same interest to compensate for delay in payment as a court has authority to award under section 706(k); issue subpoenas.



nas to compel the agency to produce documents, information or witnesses who are Federal employees of the agency; to request the Commission to issue a subpoena to compel the production of documents, information or witnesses by other Federal agencies. Non-Federal employees are required to attend only specifically designated locations and shall be paid by the party who requested the subpoena.

Authorizes the AJ and the Commission to award a reasonable attorney's fee including expert fees and other litigation expenses, costs, and interest.

Subsection (G)

This section allows the administrative judge and Commission to award a reasonable attorney's fee, and other court costs.

Subsection (H)

This section gives the Commission the authority to issue subpoenas.

Subsection (I)

In cases where there is a non-compliance or failure to obey a subpoena, the U.S. district court in which the individual lives or works is empowered to enforce the subpoena.

Requires the AJ to issue a written order granting or denying relief within 210 days after the individual complaint is originally filed or 270 days after the class complaint is originally filed. (There is a provision for a 30-day delay to time periods where initial delays occurred in obtaining information needed to make the record complete.)

Allows the AJ, by written petition, to request a 30-day extension where the particular and unusual circumstances prevent compliance with the time frame. Allows the AJ to apply to the Commission to extend any period if manifest injustice would occur in absence of an extension. Prevents the Commission from issuing or terminating extensions if the employee shows that such an extension would prejudice or harm the employee.

Requires the AJ, in addition to issuance of filings of fact and conclusions of law, to issue notice of a 90-day time frame by which the complainant may file a civil suit in the appropriate district court for de novo review or file for appellate review with the Commission.

Allows the Federal employee to file a civil suit either after the expiration of the 210 to 270 day period granted to the AJ to make a decision, or within 90 days of receiving the order of the AJ's decision. Failure by the employee to either file suit or request appellate review will result in enforcement of the AJ's order.

Requires the Commission to transmit a copy of the employee's request for appellate review by the Commission, to the parties and the AJ. Requires the AJ to turn over all records of the proceeding to the Commission within 7 days.

Requires the Commission to affirm, reverse or modify the applicable provision of the order of the AJ not later than 150 days after receipt of the request (or by written certification by the Commission, for an additional 30 days if necessary).

Requires the Commission to affirm that the determination of the AJ, and the relief granted or denied, are supported by substantial evidence in the record taken as a whole. Mandates that findings of fact of the AJ are conclusive unless the Commission determines that they are clearly erroneous.

Requires the Commission's order to the Federal employee to include findings of fact, conclusions of law and notice of a 90-day time frame (beginning on the day the employee receives such notice) by which the employee may commence a civil action in an appropriate district court for de novo review of the claim.

Allows the complainant who receives notice to file a civil suit within 90 days of receiving the Commission's order, after the expiration of the 150-day period provided for the Commission to review the order.

Subsection (J)

This section allows for the award of fees, cost and interest as a result of a successful claim.

Subsection (K)

This section provides for administrative leave or official time for employees who need sufficient time to process an administrative complaint.

This section also provides for the imposition of appropriate sanctions for Federal employees who discriminate. The Commission, if it finds that the sanctions are inadequate, may refer the matter to the Office of Special Counsel for disciplinary action.

This section also requires the Commission to issue reports to the Congress concerning executive branch agencies and their compliance with reports required under the provisions of this bill.

Subsection (L)

Allows a Federal employee (in addition to time allowed by the statute after initial determination by the AJ or the Commission), to file a civil suit for de novo review of the claim:

Beginning 300 days after filing of a timely request to the Commission for determination of the claim in section (f) and ending on the date the AJ issues an order.

Beginning 180 days after filing a timely request for appellate review and ending on the date the Commission issues an order.

Establishes that the timely filing of a civil action terminates the jurisdiction of the AJ or Commission to determine the merits of the claim.

Subsection (M)

Allows the Commission, or the complainant who prevails on a claim, to bring a civil action in an appropriate district court to enforce:

1. The provisions of a settlement agreement.
2. The provisions of an order issued by an AJ where no appeal to the Commission is sought and no civil action is filed.
3. The provisions of an order issued by the Commission if a civil suit is not commenced.

Subsection (N)

Requires any award under this section to be paid by the Federal entity that violated the act, from any funds made available to the entity by appropriation or otherwise.

Subsection (O)

Requires the agency to grant the aggrieved Federal employee a reasonable amount of official time to prepare for an administrative complaint and participate in an administrative proceeding related to the claim.

Requires the agency to grant the aggrieved employee paid leave for a reasonable amount of time expended to prepare for, and participate in, a civil action.

Requires the Commission to issue regulations, according to statute, regarding official time and paid leave of employees in civil and administrative process.

Requires the agency of the Federal employee accused of discrimination to impose appropriate sanctions on said employee and report the sanctions imposed to the Commission. Requires the Commission to refer the matter to the Special Counsel for disciplinary action under section 1215 of title 5, United States Code if the Commission finds that the sanctions imposed by the agency are inadequate. Requires that the referral by the Commission of such matter to the Special Counsel is deemed to be a determination by the Special Counsel that disciplinary action should be taken against the Federal employee who discriminated. (Will be amended to defer the sanctions until after the Office of Special Counsel has acted).

Subsection (R)

This section makes the existing EEO process as in effect immediately before the effective date of the Federal Employee Discrimination and Equal Opportunity Amendments of 1990 to apply to the Library of Congress. (Effective date to be January 1, 1994.)

*Section 3**Subsection (a)*

Amends the Age Discrimination in Employment Act (ADEA) to allow individuals covered by ADEA to file a complaint with the Commission in accordance with section 717 of the Civil Rights Act of 1964. Requires section 717 of the Civil Rights Act to apply to ADEA claims in the same manner as section 717 claims.

Allows the individual who does not file a complaint with the EEOC under this section to commence a civil action for de novo review within 30 days after filing a notice of intent to sue with the Commission, but not more than 2 years after the alleged violation.

Requires the Commission to notify all persons named in the "notice of intent to commence civil action" as prospective defendants, and take any appropriate action to ensure the elimination of any unlawful practice.

Subsection (b)

Allows an employee whose claim is pending before the EEOC between the effective date of this Act and December 31, 1993, to com-

mence a civil action under this section not later than June 30, 1994.

Section 4

Subsection (a)

(a) Amends section 7121 of Title 5 of the United States Code, to require that grievances involving EEO matters be filed first under the EEOC complaint process. The employee would be permitted to adjudicate EEO claims under the grievance procedure through the election of forum procedure contained at 717(e)(2)(B)(i)(I) of the amended act. Section 4 also provides for *de novo* judicial review of EEO arbitrations in district court.

(b) Amends section 7702 of title 5 to allow any employees or applicant who is affected by an action which is appealable to the Merit Systems Protection Board (MSPB), and alleges that the basis for the action was discrimination prohibited by:

- (i) 42 U.S.C. 2000A-16;
- (ii) 29 U.S.C. 206(D);
- (iii) 29 U.S.C. 791;
- (iv) 29 U.S.C. 631, 633; or

(v) any rule, regulation, or policy directive prescribed under any law described in clauses (i) through (iv), to raise the action by filing a complaint with the EEOC in accordance with section 717 of the Civil Rights Act of 1964. Requires the individual who chooses to file such an action with the EEOC to select the procedures specified in one of the following subparagraphs:

(A) The administrative and judicial procedures provided under sections 7701 and 7703 of title 5.

(B) The administrative and judicial procedures provided under section 7121 of title 5.

(C) The administrative and judicial procedures provided under section 717 of title VII of the Civil Rights Act of 1964.

Requires the agency that carries out such procedures to apply the substantive law that is applied by the agency that administers the particular law referred to.

Allows the employee who elected such procedures and whose claim was dismissed under section 717(f)(5)(A) of the Civil Rights Act, to raise the action under the administrative and judicial procedures under sections 7701, 7703, and 7121 within 90 days, except that no allegation of an action based on discrimination can be made after the claim was dismissed under section 717 of the Civil Rights Act.

Allows an employee, where there is no judicially reviewable action any time after the 129th day, but no later than 240 days after making the election, to file a civil action.

Section 5

Amends section 717(b) of the Civil Rights Act of 1964 by replacing "Civil Service Commission" with "Commission."

Section 6

Requires the EEOC to issue rules to assist entities of the Federal government to comply with section 717(d) of the Civil Rights Act, rules establishing uniform written notice, and requirements for the collection and preservation of documents and information, within one year of enactment of the Act.

Section 7

Amends Rule 15(c) of the Federal Rules of Civil Procedure to include a provision that timely service of summons and complaint upon any entity or officer of the U.S. named as defendant, satisfies both actions filed under section 717 of the Civil Rights Act of 1964 or section 15 of the Age Discrimination Employment Act of 1967.

Section 8

Requires that the amendments made to this Act shall not supersede or modify the operation of the grievance process.

Section 9

Requires that only complaints under section 717 of the Civil Rights Act of 1964 filed after January 1, 1992 shall be covered by this Act.

Requires the Commission to provide a copy of the timely request for appellate review by the Commission to all parties and to the AJ issuing the order. Requires the AJ to provide the Commission with a record of the proceeding and all relevant documents and information.

Allows the court to grant the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the cost. Requires the Commission and the United States to be liable for costs and interests the same as a private person.

VI. MATTERS REQUIRED TO BE DISCUSSED UNDER SENATE RULES**A. COMMITTEE CONSIDERATION OF S. 404**

The Committee met on June 24, 1993, to consider S. 404. Upon a motion by the Chairman, the bill was ordered reported by a voice vote, with amendments, offered by Chairman Glenn.

B. COST OF THE LEGISLATION

The Committee received a cost estimate from the Congressional Budget Office, attached to this report, which indicates that there will be no additional anticipated cost to the Federal government from the enactment of S. 404. The legislation in fact, is projected to result in a cost savings of approximately \$25 million when fully operational.

C. EVALUATION OF REGULATORY AND PAPERWORK IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory and paperwork impact of S. 404. It has also considered the impact of the bill on the privacy of individuals or firms doing business with the Federal government. The Committee's

evaluation under paragraph 11(b) must include the four elements listed below.

1. **Regulatory Impact**—The legislation will impose no regulations on individuals, consumers, or businesses;

2. **Economic Impact**—The legislation will have no economic impact on individuals, consumers, or businesses;

3. **Privacy Impact**—To the extent individuals communicate with offices or officials of the Federal government regarding investigations, those communications have traditionally been subject to public disclosure through inclusion in agency records. Accordingly, the requirements of the legislation for the disclosure of such communications would not violate any valid expectation of personal privacy; and

4. **Paperwork Impact**—The legislation will impose no paperwork burdens to anyone outside the Federal government.

VII. CBO COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 1, 1993.

Hon. JOHN GLENN,
*Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 404, the Federal Employee Fairness Act of 1993, as ordered reported by the Senate Committee on Governmental Affairs on June 24, 1993. We estimate that enactment of the bill would result in savings to the federal government of about \$25 million annually, beginning in fiscal year 1996. Enactment of the bill would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply.

S. 404 would revise the process by which the Executive Branch reviews discrimination claims filed by its civilian employees, principally by expanding the role of the Equal Employment Opportunity Commission (EEOC). Under current law, a federal employee alleging discrimination may file a complaint with his or her agency, which the agency may accept or reject. If the agency accepts the claim, it then investigates the claim—under no time limits—and issues a ruling. If the agency rules against the complainant, then the complainant may request a review of the case by an administrative judge of the EEOC. However, the agency is not obligated to accept the judge's decision. S. 404 would transfer authority to review complaints from agencies to the EEOC. All complaints would be assigned to an EEOC administrative judge, who would review the case (under a trial format) and render a decision within 270 days. Agencies could not reject the judge's decision.

The bill also would make several other changes to procedures for handling discrimination complaints, including expanding the role of the Office of Special Counsel in the disciplinary process. The bill would become effective on January 1, 1994, but full implementation by EEOC probably would not occur until late in 1995.

Enactment of S. 404 would result in a transfer of work from other federal agencies to the EEOC. We estimate that the EEOC

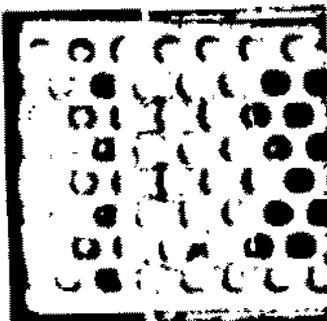
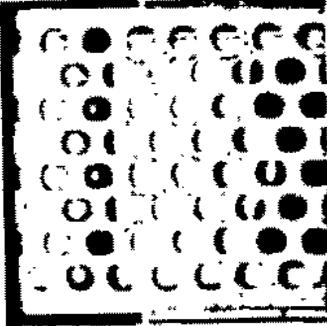
would incur additional costs of about \$70 million annually if the bill were enacted, based on information from that agency. In addition, the Office of Special Counsel estimates that it would incur additional expenditures of about \$10 million annually. These costs would be more than offset by savings to other agencies. In a recent report (GAO/GGD-92-64FS), the General Accounting Office (GAO) reported on a survey of 29 federal civilian agencies regarding the costs of the various steps in the processing discrimination complaints. These agencies estimated that they spent a total of \$139 million in fiscal year 1991 for processing complaints. Under the provisions of S. 404, the agencies would still be involved in several steps of the complaint process and would still incur many of these costs. They would nevertheless realize savings in a number of areas, including counseling complainants and investigating complaints. Based on the agencies' reported costs for steps that would shift to the EEOC, we estimate that implementing the bill would save about \$70 million annually for these 29 agencies. Because these agencies employ roughly two-thirds of all civilian employees, we expect that implementing the bill would save about \$105 million annually for the entire Executive Branch, other than EEOC and Office of Special Counsel, assuming that the appropriations for agencies were reduced accordingly. Net savings to the federal government would total about \$25 million annually, beginning in fiscal year 1996.

No costs would be incurred by state and local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

ROBERT D. REISCHAUER, *Director*.



VIII. ADDITIONAL VIEWS OF SENATORS ROTH, COHEN, AND COCHRAN

Fundamental problems plague the current discrimination complaint process within the federal government. That is why both the House and Senate are considering legislative reforms and why the Equal Employment Opportunity Commission last year executed new regulations governing the entire EEO process for federal employees.

The federal government is an equal opportunity employer. The government employs a higher percentage of women, minorities, and handicapped individuals than the private sector. While the federal government continues to make progress in this area, it is failing to provide its employees with the confidence that if they do have an employment discrimination complaint, that it will be handled fairly and expeditiously.

Two very compelling reasons to examine the current process are the time delays experienced by employees who file complaints and the authority in law which allows an agency to overrule a finding by an independent administrative judge. S. 404 attempts to rectify these problems. While the legislation addresses the latter concern, it is likely to place such an unbearable administrative burden on the process that it will die under its own weight.

We are concerned that the proposed legislation, rather than solving the problem, could very well create new delays. The legislation would transfer to the EEOC the primary responsibility to resolve an additional 17,000 cases per year. S. 404 would not require mandatory counseling, consequently, this number could reach close to 80,000. Under the current process, counseling helps to resolve almost 80% of initial disputes. In fiscal year 1990, 79,743 persons were counseled prior to filing complaints. Of this number, 17,107 complaints were filed.

This clearly would create a substantial backlog of cases. The EEOC already handles aspects of some of these cases, but the bill gives much greater responsibility to the EEOC without transferring additional resources.

This increased responsibility will come on top of the EEOC's increased caseload from the agency's enforcement of the Americans with Disabilities Act (ADA) and the Civil Rights Act (CRA) of 1991. In the nine months since the Civil Rights Act became law, claims have increased 11% according to the EEOC. The fact is that EEOC already has a burden that it is not able to fulfill. This legislation will create at a minimum an additional 17,000 investigations to be undertaken by EEOC each year.

According to statistics provided by the EEOC, each EEOC investigator resolved an average of 88.5 cases in FY 1991, which compares to 33 cases per investigator at the Department of Housing and Urban Development, the next closest agency with similar re-

sponsibilities. Clearly, this legislation would add a burden to the EEOC which it can not currently handle.

In addition, it is clear from past funding patterns that the agency's mandated workload far exceeds their budget. This bill would exacerbate that problem. The Congress has cut the President's request for the EEOC in 11 of the past 14 years.

For FY 1994, the President requested \$235 million, \$13 million over FY 1993 to handle the increased caseload that is expected from the implementation of the ADA and the CRA of 1991. The FY 1994 Commerce, State, Justice, and Judiciary Appropriations bill allocates \$227 million, \$7 million less than the President's request.

Should S. 404 become law, the Senate Appropriations Subcommittee on Commerce, State, Justice and the Judiciary directs the EEOC in conjunction with the General Accounting Office to provide to the Appropriations Committee, a report on the total cost of implementing the legislation not later than 30 days following its enactment.

At an emergency Commission meeting called by Chairman Evan Kemp Jr. on September 21, 1992 to discuss the Commission's funding for FY 1993, he stated:

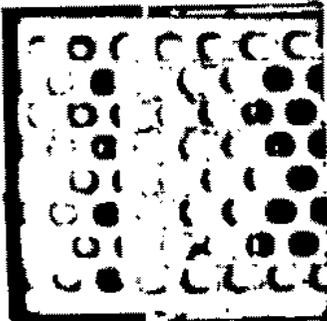
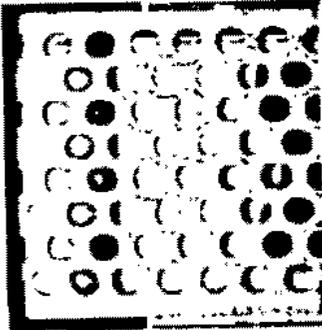
EEOC investigators already are stretched to the limit. They will break under these conditions. We are losing good staffers because of low morale. After all, who would want to stay at a job that required such a demanding workload when another agency was offering better pay for one-third of the work? We're already seeing the toll on staff. But the human fallout from the funding recommendations will be grave. Those who turn to the EEOC for relief will be forced to wait nearly three years before the agency can resolve their charges. A woman who files a charge of pregnancy discrimination, for example, will not see her case resolved until her child is in pre-school.

Clearly, if the Congress is not willing to provide funding necessary for implementation of the ADA and the CRA, it is going to be extremely difficult to obtain funding to implement this legislation.

The Committee report cites a General Accounting Office report which estimates that agencies spent \$139 million in 1991 on counseling and processing EEO complaints. Proponents of this legislation suggest that this funding can be used to increase the EEOC's budget. However, S. 404 does not provide for this transfer of resources. The bill makes no attempt to address the administrative or implementation problems associated with the enactment of this legislation. In addition, agencies will retain some EEO responsibilities, so clearly the bureaucracy is not going to forgo any resources or personnel.

While the legislation attempts to speed up the process, requiring the EEOC to investigate, process, and adjudicate an additional 17,000 cases per year without an increase in staff or resources is extremely unrealistic.

In a letter to the Committee on August 4, 1992, EEOC Chairman Kemp wrote: "Let me emphasize again, EEOC is fighting for its survival! Additional enforcement responsibilities placed on the



EEOC by this legislation would have a drastic effect on our operations and our ability to effectively enforce existing laws."

In addition to these administrative concerns, there are substantive concerns with S. 404. The legislation does not require mandatory counseling. The legislation provides that "[t]he decision of a Federal employee to forgo such (preliminary) counseling or dispute resolution shall not affect the rights of such employee under this title." This section removes a very important and practical component of the current process and will encourage adversarial stances at a very early stage, instead of promoting an environment where many claims can be resolved through counseling.

The legislation also encourages, or at least provides, greater opportunity for federal employees to go to Federal District Court at an early stage in the proceedings. This is cause for concern given the increasing burden those federal courts are experiencing.

The legislation does provide for alternative dispute resolution and this is an improvement over the current process. ADR provides for resolution of the dispute prior to an adversarial proceeding. However, ADR is not mandatory, and once again, the legislation appears to favor adversarial proceedings over dispute resolution.

Clearly there is a problem with the conflict of interest inherent in the system which allows an agency to overrule a decision by an administrative judge not employed by the agency. As an employee of the EEOC, an administrative judge serves as an independent check on agency actions. There is great merit in not having the administrative judges subject to reversal by outside agencies. While employees have the right under current law to appeal agency actions, this course is seldom taken.

On April 10, 1992, the Equal Employment Opportunity Commission published a final rule governing the process that the government will follow in processing administrative complaints and appeals of employment discrimination filed by federal employees and applicants for federal employment. Federal Regulation 1614 provides for alternative dispute resolution, so that should be given some time to work. In addition, the new regulation builds upon some of the time constraints contained in S. 404, and it might prove wise to see how the new regulation works in practice.

The effective date in S. 404 is January 1994, less than three months from now. Given the vast complexity of the problem, and our belief that S. 404 raises additional concerns which could exacerbate the problem in some areas, we urge that the Committee review the implementation of the new regulation prior to action on S. 404.

The Committee's hearing in which several federal employees testified to their frustration with the current process offered compelling evidence that there are problems with the current system. Time delays and internal conflicts are very real concerns. We are committed to seeing that these problems are addressed, yet we are concerned that unless certain changes are adopted, this bill could further complicate the complaint process instead of improving it.

It should also be noted that the administration has been asked to comment on this legislation, and it has yet to respond to congressional inquiries of last summer. Further, it is unclear as to whether or not they support the reforms in this bill.

BILL ROTH.
BILL COHEN.
THAD COCHRAN.

IX. ADDITIONAL VIEWS OF SENATOR STEVENS

I strongly support the goals of S. 404 to end discrimination in the federal workplace and strengthen the protection given to employees who have experienced discrimination. However, I am concerned that the bill may not adequately protect the rights of employees accused of discrimination.

While it is important that we move forward to improve the EEO process, progress should not come at the expense of fairness and equity. For that reason I offered an amendment during committee markup of S. 2801, the precursor to S. 404 introduced in the 102nd Congress. The amendment was intended to lend balance to the bill, providing basic protection of the rights of accused individuals. However, a modification was made in the amendment language which weakens the safeguards included for accused employees.

Under S. 404, an individual employee, rather than the employing agency, is held accountable for discrimination committed. However, the accused employee's role in the process is limited. The bill requires only that the employee receive notice of the allegations made and be allowed to appear at the EEOC hearing accompanied by counsel or a qualified representative. This is not a new right for accused employees, who currently appear at the EEOC hearing in order to be questioned.

While the accused employee is not a party to the action as defined in S. 404, fairness would dictate that the he or she be provided with protections similar to those afforded to the complainant. At a minimum, the accused employee should be given a copy of the allegations made before being interviewed and the employee should be kept informed of the progress of the investigation and hearing. Accused employees should also be given an opportunity to respond for the record to all charges made against them.

The EEOC level is integral to the complaint process which can result in disciplinary action against employees engaged in discriminatory practices. If the EEOC determines there is sufficient evidence of discrimination, the case is referred to the Office of Special Counsel (OSC). If the OSC decides to initiate action, the accused employee will obtain due process in proceedings before the Merit Systems Protection Board. Unfortunately, this due process protection may arrive too late, after the completion of the EEOC hearing and investigation, critical stages which serve as the impetus for subsequent disciplinary action.

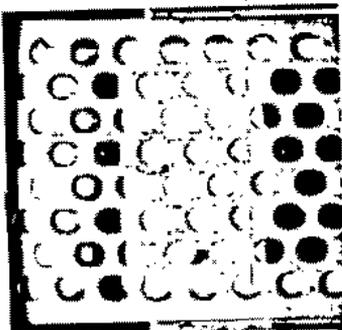
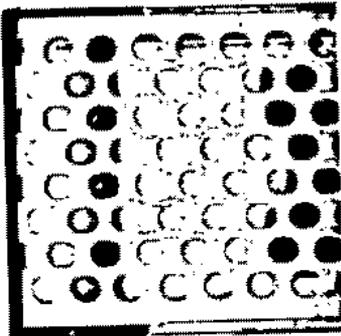
TED STEVENS.

X. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, regarding changes in existing law made by the statutory provisions of the bill, it is in the opinion of the Committee that it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

(44)

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**SECTION BY SECTION ANALYSIS
H.R. 2721 - FEDERAL EMPLOYEE FAIRNESS ACT**

Section 1 - Short Title

**Section 2 - Amendments relating to Administrative Determination
of Federal Employee Discrimination Claims**

Subsection (a)

Additional definitions.

Subsection (b)

Requires the agency to make counseling and a voluntary dispute resolution process available.

Conforms the burden of proof for retaliation claims to the Whistleblower Protection Act.

Conforms federal sector remedies to private sector remedies available under the Civil Service Reform Act.

Subsection (c)

Requires the federal employee to file the complaint no later than 180 days after the alleged discrimination occurs.

Establishes a procedural pathway where claims filed with the incorrect respondent will be forwarded to the Commission and the Commission notifies the correct respondent.

Subsection (d)

Requires the respondent to collect and preserve all information and documents relevant to the claim until the conclusion of all available administrative and judicial proceedings.

Subsection (e)

Requires the respondent, within 30 days (allows a 30 day extension by written consent of the aggrieved party) of receipt of the complaint by the respondent, to either: attempt to conciliate

the claim; enter into a settlement agreement; or give the complainant written notice of the right to file with the Commission, or commence a civil action seeking de novo review in the appropriate district court, within 90 days of receiving the agency notice.

Subsection (f)

Grants the Commission the authority to issue stays of personnel actions if there are reasonable grounds to believe a stay is necessary to carry out the purposes of this section.

Requires the AJ to determine if the record is complete, accurate, and complies with the federal employee rules issued by the Commission. If the AJ determines that the respondent has failed to provide the necessary information, the AJ, in absence of good cause shown, shall impose any of the appropriate sanctions specified.

Grants the complainant the right to a hearing on the merits of any claim not dismissed.

Allows the parties to conduct discovery by such means as available in a civil action to the extent deemed appropriate by the AJ. Requires the AJ, in the absence of good cause shown, to impose sanctions for failure to comply with discovery fully and in a timely fashion.

Grants the Commission the authority to issue subpoenas to compel the respondent to produce information or witnesses who are federal or non-federal witnesses.

Require the AJ to issue a written order granting or denying relief on any claim not dismissed within 210 days after an individual complaint is filed or 2 years after a class complaint is filed. Allows extensions under certain circumstances.

If the order of the AJ applies to more than one claim, then the determination made and relief granted with respect to any claim not appealed will be enforceable immediately.

Subsection (g)

Requires the Commission to affirm, reverse or modify the applicable provision of the order of the AJ not later than 150 days after receipt of the request. Allows extensions under certain circumstances.

Required the Commission to affirm the determination of the AJ, and the relief granted or denied, if supported by substantial evidence. Requires that the findings of fact of the AJ are conclusive unless the Commission determines that they are clearly erroneous.

Subsection (h)

Allows a federal employee to commence a civil action in the appropriate district court for de novo review of the claim where the Commission fails to act in the claim within the designated time frames.

Subsection (i)

Allows the complainant who prevails on a claim, or the Commission, to bring a civil action in an appropriate district court to enforce:

1. the provisions of a settlement agreement;
2. the provisions of an order issued by an AJ where no appeal to the Commission is sought and no civil action is filed; and
3. the provisions of an order issued by the Commission if a timely civil action for de novo review is not commenced.

Subsection (j)

Requires any award under this section to be paid by the federal entity that violated the act, from any funds made available to the entity by appropriation or otherwise.

Subsection (k)

Requires the agency grant the aggrieved federal employee a reasonable amount of paid administrative leave for time reasonably expended for, and participated in, civil and/or administrative proceedings in accordance with regulations issued by the Commission in accordance with regulations issued by the Commission.

Subsection (l)

For nonpolitical appointees, allows the Commission to withhold salary of the employee determined to be non-compliant with the order of the commission. In the case of political appointees, the Commission may notify the President that the employee has failed to obey the order of the Commission.

Subsection (m)

If an administrative or judicial proceeding in which a finding of intentional discrimination is made (other than an employee practice that is unlawful because of its disparate impact), a copy of the order or judgment shall be transmitted to the Office of Special Counsel no later than 60 days after the entry of such order or judgment.

Section 3 - Amendments to the ADEA and the Rehabilitation Act of 1973.**Subsection (a)**

Make the technical changes necessary in the ADEA and the Rehabilitation Act to require Section 717 of the Civil Rights Act to apply in the same manner as Section 717 claims.

Subsection (b)

Allows 6 month extension to bring civil action under the Act for Age discrimination claims and Rehabilitation Act claims which are pending at the time of enactment.

Section 4**Subsection (a)**

Amends Section 7121 of Title V grievance procedure to conform to Title VII changes.

Subsection (b)

Amends Section 7702 of Title V to parallel the change in administrative procedure provided for in Title VII.

Provides that agencies shall apply the substantive law that is applied by the agency that administers the particular law that is the underlying basis for the claim.

Subsection (c)

Amends Section 1214 of Title V to direct the Special Counsel in investigating and seek disciplinary action of prohibited personnel practices upon receiving notice of a discrimination claim pursuant to the Bill.

Subaaction (d)

Provides that records relating to any personnel action shall be maintained by the employing agency for 270 days.

Subsection (e)

Amends filing deadline under Title V to 90 days.

Subsection (f)

Amends section 1212 (c) (2) of Title V to allow the Office of Special Counsel to intervene in an action brought by an individual under section 1221, or 7701, where the appeal is brought by an individual pursuant to this section.

Section 5 - Minor Technical Amendments**Section 6 - Procedural Guidelines and Notice Rules****Section 7 - Rules of Construction****Section 8 - Effective Date and Application of Amendments**

LOBBY REFORM ACT OF 1977

HEARINGS BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST AND SECOND SESSIONS

ON

S. 1785

TO REQUIRE PUBLIC DISCLOSURE OF CERTAIN LOBBYING
ACTIVITIES TO INFLUENCE ISSUES BEFORE THE CON-
GRESS AND THE EXECUTIVE BRANCH, AND FOR OTHER
PURPOSES

S. 2026

ENTITLED THE "LOBBYING DISCLOSURE ACT OF 1977"

AUGUST 2, 1977, FEBRUARY 6 AND 7, 1978

Printed for the use of the Committee on Governmental Affairs



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LOBBY REFORM ACT OF 1977

TUESDAY, AUGUST 2, 1977

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 10:20 a.m., in room 3302, Dirksen Senate Office Building, Hon. Abraham A. Ribicoff (chairman) presiding.

Present: Senator Ribicoff.

Staff present: Richard A. Wegman, chief counsel and staff director; Paul Hoff, counsel; Paul C. Rosenthal, counsel; Constance B. Evans, counsel to the minority; and Elizabeth A. Preact, chief clerk.

Chairman RIBICOFF. The committee will be in order.

OPENING STATEMENT OF SENATOR RIBICOFF

Today we begin hearings on lobbying reform legislation. This committee held 6 days of hearings on lobbying legislation in the last Congress before reporting a bill to the Senate. The Senate overwhelmingly approved that bill 82 to 9. The House, too, passed a lobbying disclosure bill, but unfortunately it was too late in the session to reconcile the versions of the two Houses.

The vast majority of witnesses at the committee's prior hearings agreed that the present 1946 act is too limited in scope, vague, and unenforceable. As a result, under the present law large and sophisticated direct and indirect lobbying efforts go unreported. For example, one company recently reported spending over \$1 million in 1976 in lobbying on a single bill yet no reports of this lobbying activity were required by the present law. In addition, grassroots lobbying solicitation campaigns, which can result in a flood of letters and telegrams to Members of Congress also go unreported. Well organized groups can use their computerized membership lists to solicit great numbers of people in a short amount of time—as the Congress has seen most vividly in the past few months.

Lobbying is an essential part of the legislative process. Indeed, the democratic process depends on lobbyists to help achieve balanced and effective legislation.

Yet if people are to have faith in the democratic process, that process cannot remain shrouded in secrecy. The people have a right to know who is conducting the public's business and by what means it is being conducted.

Lobbying reform legislation is based on the same objectives which were behind the passage of the Freedom of Information Act and the sunshine law; that is, a strongly felt need to open up the processes of Government to public scrutiny.

The recently passed ethics legislation was an important step toward improving public confidence in the Congress. Passage of effective lobbying legislation is needed to complete that restoration of confidence. But if we pass lobbying reform legislation that does not cover significant lobbying activities it will be no reform at all.

Any new legislation must be effective while at the same time not infringe on first amendment rights. Any new legislation must be fair; it must apply evenhandedly to all interest groups which engage in significant efforts to influence the decisions the Government makes.

Enacting a new lobbying law will not be easy, but it must be done if we are to continue to restore the faith of the American people in their Government.

Our first witnesses will be Senators Kennedy and Stafford. No two Senators have spent so much constructive time in shaping this important legislation. And I do hope that today, as we begin hearings on this bill, that those of us who are interested in effective lobbying legislation will see a bill passed that has some meaning.

Thank you very much, Senator Kennedy and Senator Stafford. We welcome your testimony and you may proceed as you wish.

**TESTIMONY OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM
THE STATE OF MASSACHUSETTS, AND HON. ROBERT T. STAFFORD,
A U.S. SENATOR FROM THE STATE OF VERMONT**

Senator KENNEDY. Thank you very much, Mr. Chairman.

I would like unanimous consent to be able to file our statement as printed in its entirety.

Chairman RIBICOFF. Without objection the entire statement will go in as if read.

Senator KENNEDY. I will summarize the points included in the statement. I offer it on behalf of myself, the Senator from Iowa, Mr. Clark, and the Senator from Vermont, Senator Stafford. Senator Stafford has been working in this area perhaps longer than any Member of the Congress. He had a very active record in the House of Representatives on this issue before coming to the Senate. Senator Clark and I have introduced different pieces of legislation over the last 7 years.

First of all, I want to thank you, Mr. Chairman, for conducting these hearings and focusing on this issue. We acknowledge your leadership and the leadership of the other members of the committee. We were enormously pleased by the legislation that was reported out of this committee in the last session and that passed the Senate. We are mindful as well of the fact that it got caught up in the rush for adjournment. Legislation was approved by the House of Representatives, as you mentioned, as well as by the Senate, and it just failed because of the shortage of time. But that has not made the importance of this issue any less. It is even more appropriate today than before.

We have taken a series of other actions in the Congress to bring a restoration of integrity into the whole legislative process. Earlier this year we passed the ethics code. We passed Senate Resolution 4, to try and provide more careful allocation of responsibility within the committee system. On the floor we are now debating election reform

and the public financing of elections. And one of the most effective reform steps taken by the Congress was the Budget Reform Act for greater accountability in the allocation of scarce resources.

If there has been one missing link in the attention of Congress to reform, it has been in the area of lobbying. That is the basis for the legislation on which we are testifying here today. You are very familiar, Mr. Chairman, with the serious weaknesses of the current law—the fact that it only covers those whose principal purpose is lobbying. And you are familiar with the fact that A.T. & T. expended more than \$1 million in terms of the Bell legislation, as reported to the FCC, but the expenditures were not reported under the Lobbying Act.

The El Paso Natural Gas Co. spent close to \$1 million on the divestiture issue, but was able to escape the purview of the existing Lobbying Act because it was not the company's principal purpose. That issue has to be addressed—the principal purpose issue.

Second, the current legislation does not apply to lobbying within the executive branch. Obviously, that is an important omission which has to be addressed, and our legislation addresses that issue.

Third, present law does not cover grassroot lobbying campaigns, which I think all of us in the legislative process are familiar with. The stirring up and drumming up of lobbying activities at the grass-roots level in local constituencies is something that should be covered.

Finally, the enforcement mechanisms in current laws are a sham. They are extremely weak. The Secretary of the Senate and the Clerk of the House have weak authority to enforce the legislation.

A basic provision of our proposed legislation is to provide a two-tier system of registration and reporting, in order to minimize the burden on relatively minor lobbyists. The two-tier approach is comparable to that in the Internal Revenue Code, which uses a short form and a long form. We have tried to be sensitive to the requirements of reporting in a way which will make it easy for those who only have a casual lobbying interest. The longer form will provide the kind of needed information for groups which have more intense and persistent lobbying activities. The tests of coverage that we propose would require extensive reporting only by major lobbyists.

Second, our bill covers only organizations, not individuals; in general it covers paid employees, not volunteers. I think that is an important distinction. But volunteers, themselves, as officers of lobbying organizations, might be covered, if the organization also had paid workers.

Chairman RIBICOFF. Let me ask you, Senator Kennedy, do you think that public interest lobbyists should be treated any differently than any other kind of lobbyists?

Senator KENNEDY. No. I think if the legislation is going to have credibility, they have to be included. We have devised a test that would reach the principal lobbyists. Under the tests that we have proposed the coverage would include Common Cause, Ralph Nadar, and other public interest lobbying organizations, as well as other lobbyists.

Chairman RIBICOFF. I think it is important for the public to know who is in back of every piece of legislation. I am always puzzled why public interest groups do not want to come into the sunshine, and want to stay in the shadows. That always puzzles me. If they are public interest groups, they ought to be proud to be advocating their causes

and let the public know who they represent. But personally I could never go for a bill that exempted public interest groups. I think public interest groups, chambers of commerce, manufacturers associations, labor unions, the AMA—every group in society should be treated the same when it comes to this type of legislation. I am glad that you two gentlemen agree with me.

Senator KENNEDY. Of course, you know that the public interest group, Common Cause, supports the legislation. That is one major public interest group that supports this legislation and that would be covered. Their support for the legislation is useful and worthwhile, and they would be included in the coverage.

Chairman RIBICOFF. As you analyze this legislation, do you see where this legislation would have an adverse impact on small, grassroots lobbying organizations?

Senator KENNEDY. No. The answer would be no, Mr. Chairman. We have been extremely careful in the drafting, as the results of your hearings last year and your own sensitivities on these issues, to address that issue. There are a number of Supreme Court opinions that provide general guidelines for congressional action in this area. In general, those guidelines allow extensive disclosure and reporting. I think we conform with those guidelines, and that the requirements will not have a chilling effect.

We have also recognized the importance of lobbying activities. It is a right protected by the Constitution of the United States. It should be understood that those who are the strongest supporters of this reform also believe deeply in the constitutional right to lobby, as an expression of free speech under the first amendment. The same applies to grassroots lobbying. But in the case of massive solicitation campaigns to influence legislation, we also need to have reporting and the disclosure. Under the *Valeo* case in 1976 and other Supreme Court rulings, we believe that reasonable reporting and disclosure requirements may be enacted, without interfering with rights protected by the Constitution.

Chairman RIBICOFF. Also, I think what is important to realize that we have been very careful to assure every citizen, and every group of citizens, the right to contact their own Congressmen and Senators of their State. This is a right that they have, and in no way are there any restrictions upon people from your State or district to legitimately and properly—whether they are for or against a piece of legislation—speak and write as many times as possible to their own duly elected Representatives and Senators. Is that not so?

Senator STAFFORD. Mr. Chairman, our bill, in the exceptions in the synopsis of the bill on page 7 of our statement indicates that contacts with Senators or Congressmen representing the home State of the organization or the SMSA in which the organization is located are among the exceptions, and I think that is wisdom we developed from last year's bill.

Senator KENNEDY. Mr. Chairman, just finally the enforcement through the General Accounting Office, I think, strengthens the enforcement mechanism and is extremely desirable in the legislation. Overall, we think that this piece of legislation is an essential part of the ongoing reform effort within the Congress in many different areas. We want to bring the sunshine and sunlight in. We want to increase the awareness

of the American public of the way groups attempt to influence the legislative process. We subscribe strongly to the constitutionally protected right for lobbying activity. We believe in it, and I think all of us have benefited from it. So has the country in many instances. But it is absolutely essential, we believe, that those who do attempt to influence legislation should be subject to reasonable reporting and disclosure requirements. We believe that the legislation we have introduced remedies the weaknesses of the 1946 act. These reforms will serve us well in the future.

I might just touch briefly on some of the issues that have been raised in terms of this legislation, and that I hope this committee will consider.

One issue involves the coverage of the executive branch. We feel there ought to be coverage of grants or contracts worth \$1 million or more. The administration suggests a \$10 million cutoff, applied only to contracts. On the question of the application to grants as well, we are basically open. We would like to have grants included, but the point is made that since grants mostly go to States and local communities, coverage might not be necessary. I think the record ought to be established in these hearings, but we are really quite flexible, based upon the information that is developed.

We are also mindful of the *NAACP v. Alabama* decision of the Supreme Court, as it relates to the issue of disclosure of contributors to lobbying organizations. We favor disclosure. The Supreme Court allows disclosure unless there may be some degree of harassment. We have tried to be sensitive to the issue, by requiring disclosure only of large contributions to lobbying organizations. We have set thresholds on that—\$3,000 of contributions to organizations where lobbying is 1 percent or more of the total budget. The threshold is high enough to exempt the smaller givers.

On the question of grassroots lobbying, Senator Stafford has talked about this issue. I think it is extremely important to cover such lobbying. It is obviously a major method of influencing legislation.

On the threshold for the two-tier system, the test of 15 contracts a quarter is relatively arbitrary and could be adjusted. But I would hope that the committee would retain the concept of the two-tier system. It reduces significantly the compliance burden of many lobbyists, without exempting them completely from the act.

Just one or two additional points—in the ethics code that we passed, the reporting provisions are annual. We think that reporting by lobbyists should be quarterly, so that Congress can have the benefit of the reports while the legislation is still being considered.

Another issue is the question of logging of contacts with the executive branch. I have other legislation in the Judiciary Committee on this. I am also working closely with the administration to see whether such a provision could be implemented by Executive order. So no such provision is included in our bill at this time.

Chairman Ribicoff. Thank you very much, Senator.

Senator Stafford, do you want to supplement that?

Senator STAFFORD. Thank you, Mr. Chairman. I do not think I should take much of the committee's time. I join of course in what Senator Kennedy has said and I feel a little bit that we are carrying coals to Newcastle, because I know of your distinguished record in

managing a bill on lobbying reform last year. Much of what we have placed in this bill this year is the result of the work which you developed—the bill which came out of this committee last year.

I agree very heartily that this is a highly desirable move. It would be the fourth or fifth element in the various steps we have taken or can take to bring sunshine to the operations of our Government and by that means, as Senator Kennedy has said, to move effectively, I think, to restore confidence of the American people in their Federal Government.

Chairman RIBICOFF. Thank you very much, gentlemen. We will need your help on the floor and I do appreciate your coming here to give us your views.

[The prepared statement of Senator Kennedy, Senator Clark, and Senator Stafford follows:]

JOINT TESTIMONY OF SENATOR KENNEDY, SENATOR CLARK, AND SENATOR STAFFORD

We are pleased to appear before the committee this morning to present our views on the need for reform of the Federal lobbying laws and to urge the Committee to support S. 1785, the bill we have introduced to achieve such reform.

At the outset, Mr. Chairman, we commend your own commitment to lobbying reform and the commitment of the other members of this committee.

In a sense, as these hearings begin this morning, we are picking up today where we left off last year. Congress came close in 1976 to accomplishing the goal of lobbying reform. Both the Senate and the House passed separate bills to achieve such reform last year, but the end of the session was near, and time ran out before a conference could be held to reconcile the Senate and House bills.

We hope that the current Congress will complete the job. We are pleased with the progress now being made on the issue in the House of Representatives, and we are hopeful that the Senate will act promptly, so that lobbying reform can take its place among the other major institutional reforms that are helping to restore public confidence in the integrity of government.

In recent years, Congress has taken important steps toward reform in a variety of areas. The Budget Reform Act has brought a new measure of control and discipline to the Federal budget, Public financing has ended the corruption and the appearance of corruption of large special interest money in Presidential election campaigns, and a major reform bill is now being debated on the Senate floor for Congressional elections. Both the Senate and House have adopted strict new codes of ethics, and have reorganized their archaic committee systems to deal more effectively with modern issues. In these and other ways, Congress has established a significant record of worthwhile reforms in many different areas.

But so far, lobbying reform has been the missing link. It is perhaps the most important remaining item on the unfinished agenda of government reform. We urge the Senate and the House to close the gap by enacting effective lobbying reform legislation.

In approaching such reform, we emphasize the valuable and indispensable role that lobbying plays in both the legislative and executive branches. Lobbying is a basic constitutional right, protected by the First Amendment. The flow of information to Congress and to every Federal agency is a vital part of our democratic system. Without it, government could not function. Nothing that we propose would inhibit or diminish the key role that lobbyists must necessarily perform if government is to be genuinely responsive to the people.

But there is a darker side to lobbying, a side that is responsible for the sinister connotation that lobbying often has. In large part, the connotation derives from the secrecy of lobbying and the widespread suspicion, even when totally unjustified, that secrecy breeds undue influence and corruption. It is but a short step from there to the cynical and undeserved view that government itself is the captive of wealthy citizens and powerful interest groups with special access to Congress and the Executive Branch.

The current law, the Federally Regulation of Lobbying Act of 1946, is so weak as to be almost totally ineffective. In part, the 1946 Act was flawed from the beginning, because it was a timid approach to a major growing problem. In part,

however, its ineffectiveness is also the result of the Supreme Court's decision in *United States v. Harris*, 347 U.S. 612 (1954) which narrowly construed the ambiguous provisions of the Act. For over twenty years, Congress has acquiesced in the Court's decision, content to let this tame and toothless, paper tiger patrol the lobbying jungle, rather than give it the teeth and strength and muscle and roar it ought to have.

We find five serious defects in the current law:

First, the current law is applicable only to those whose "principal" purpose is lobbying. As a result, many organizations have been able to mount massive lobbying campaigns outside the law's requirements, because lobbying is not the organization's principal purpose.

Second, the current law is applicable only to a person who "solicits, collects, or receives" money or any other thing of value for lobbying activities. Persons who merely expend their own funds are not covered by the Act. They are lobbyists only if they receive funds from others and spend them for lobbying.

The Supreme Court's opinion by Chief Justice Earl Warren in the *Harris* case contained an explicit invitation to Congress to close the loophole in this area. As the Court stated, if a broader construction of the Act is to become law, it "is for Congress to accomplish by further legislation."

The invitation is more timely than ever now, because, as Mr. Justice Jackson stated in his dissent in the *Harris* case:

More serious evils affecting the public interest are to be found in the ways lobbyists spend their money than in the ways they obtain it.

Third, the current law is applicable only to "direct" communications with Congress—that is, lobbying that involves "button-holing" of members of the Senate or House. It does not apply to "indirect" or "grass roots" lobbying, by which organizations solicit others to communicate with Congress. But some of the most widespread and effective lobbying campaigns are carried out in this way, using computerized direct mailings, newspaper advertisements, radio or TV broadcasts, or other modern techniques of mass communications.

Fourth, the current law is applicable only to lobbying of Congress. It entirely omits any coverage of lobbying of the Executive Branch, even though massive lobbying campaigns are frequently aimed at executive decisions, especially in the area of lucrative government grants and contracts.

Fifth, the current law has a weak and inadequate enforcement mechanism, with enforcement lodged in the Secretary of the Senate and the Clerk of the House. One of the major defects of the 1946 Act is its failure to establish clear cut responsibilities for administration, enforcement and analysis of lobbying activities. As a result, much of the information available under the present Act is unusable and its provisions are largely unenforceable. A much more effective procedure is needed to coordinate the requirements of disclosure and to police the law.

As a result of these and other defects in the 1946 Act, vast amounts of lobbying activity go unreported and undisclosed; vast unseen resources are spent by special interest groups anxious to win the rich favors that government can bestow. Vast underground rivers of influence money quietly seep into the foundation of our system of representative government.

Recently, for example, AT & T reported to the Federal Communications Commission that it spent over \$1 million in a single calendar quarter in 1976 in lobbying for a communications bill—the so-called "Bell Bill"—which would enhance AT & T's dominance in the field making it more difficult for other firms to compete, and reverse the FCC's current policy for promoting competition in communications. Yet no reports of this lobbying activity were filed under the Lobbying Act.

Earlier, El Paso Natural Gas had reported to the Federal Power Commission that it spent nearly \$900,000 in 1971, including a \$350,000 fee to a Washington, D.C. law firm, in lobbying for a bill involving divestiture of a pipeline company. But El Paso filed no report under the Lobbying Act covering these activities.

On many other issues, the current Lobbying Act has become a caricature of proper legislation. Huge amounts of lobbying money are being spent to influence decisions by Congress and the Executive Branch. The daily headlines describe hotly contested battles over deregulation of natural gas and other issues involving the President's energy plan, with literally tens of billions of dollars at stake. A large coalition of business groups is opposing the creation of a Consumer Protection Agency. The American Trial Lawyers Association is vigorously resisting the enactment of a no-fault auto insurance bill. Health associations and hospital groups are opposing the President's hospital cost control proposal.

The airline industry is opposing the President's proposals for deregulation. And it is obvious that the President's comprehensive tax reform proposals will meet serious resistance from well-heeled special interest groups anxious to keep their loopholes. Conversely, on many of these issues, well-financed lobbying campaigns in support of these initiatives are being organized by labor unions, consumer groups and other influential entities.

To some extent, the balance is being redressed today in favor of the ordinary citizen by the rise of public interest lobbies like John Gardner's Common Cause and Ralph Nader's Public Citizen. These public interest groups have now developed to a point where on particular issues they are a genuine source of countervailing power against the entrenched special interest groups. They are performing an outstanding public service. But the rise of public interest lobbies in no way reduces the need for effective lobbying reform.

The existing disclosure law is an empty promise: Written for another and quieter era of our national life, it is a generation out of date. It has now become a scandal and a national disgrace.

Few, if any, of the enormous current lobbying activities will be disclosed under the existing law. The 1946 Act does not even reveal the tip of the iceberg of modern lobbying. It would be more accurate to say that the iceberg is completely submerged where lobbying is concerned.

The reforms we propose are designed to dispel the secrecy and suspicion surrounding lobbying, by opening up the practices of lobbyists to full public view. The proposals are based on the straight-forward rationale that sunlight is the best disinfectant, that disclosure is the most suitable antidote to lobbying abuses, and that lobbying laws should identify pressures, not restrict them.

The bill we have introduced is intended to eliminate each of major defects of the present law. It will apply the same evenhanded standard to all lobbyists. Those engaged in lobbying for business, labor, public interest groups, and special interest groups will all be subject to the same requirements of reporting and disclosure. All we ask is that their major lobbying activities should be open to public view. Congress and the country deserve to obtain accurate and useful information on the principal lobbying activities that seek to influence legislative and executive actions.

As an attachment to our testimony, we have included a detailed summary of our bill. In essence, the proposed legislation is a compromise version that attempts to build on the experience of the Senate and House debates in 1976 and the bills we passed last year. Our goal is to preserve the key reporting and disclosure requirements for Congressional and executive lobbying activities, while avoiding burdensome provisions on individuals and organizations who are not intensive lobbyists.

The principal aspects of the legislation are as follows:

1. **Two-Tier Threshold**—As a new concept in the legislation, we support the establishment of a two-tier system for reporting and disclosure of lobbying activities. Those who engage in relatively minor lobbying will be required to file only a "short form"—usually a page in length—identifying their lobbying activities. Organizations engaged in more extensive lobbying will file a "long form," giving a more detailed picture of their activities and expenditures, as well as disclosure of their principal lobbyists and contributors.

2. **Grass Roots Lobbying**—The bill would require reporting and disclosure of substantial grass roots lobbying—that is, large scale solicitations by lobbyists designed to stimulate others to communicate directly with Congress. The threshold for application of the bill—\$5,000 a quarter in expenditures for such solicitations—is intended to avoid the application of the requirements to modest "indirect" lobbying activities, but to require disclosure when these grass roots campaigns become substantial. We believe that the application of the reporting and disclosure requirements to grass roots lobbyists is consistent with the First Amendment and constitutional under the *Harriss* decision. It is also supported by the Supreme Court's more recent decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which sustained the reporting and disclosure requirements for campaign contributions and expenditures under the Federal election laws, including the requirements applicable to independent expenditures and to internal communications by membership organizations.

3. **Government Grants and Contracts**—The bill would also require reporting and disclosure of lobbying directed toward employees of the Executive Branch, in circumstances involving grants or contracts worth \$1 million or more. By limiting the application of the bill to this area, the legislation will cover lobbying

involving major financial benefits conferred by the Federal agencies, without unnecessarily burdening the large number of firms which maintain contacts with Federal agencies as part of the regulatory process.

Whatever merit there may have been in 1946 in the law which was then enacted, it is no longer valid today. Actions of the Executive Branch affect virtually every area of national life. It is essential that the country be aware of the pressures that are being brought to bear on its decisions.

UFGAO Administration--Finally, the bill places the enforcement of the lobbying reforms in the General Accounting Office under the authority of the Comptroller General. The proposal gives the GAO enforcement powers to carry out the act and to require the disclosure of information received on lobbying activities under the reporting requirements.

We also emphasize that, in order to minimize the burden on organizations with paid employees or with paid outside consultants, individual lobbyists will not be required to report their activities will be included in the reports of the organizations.

We believe these measures are workable and offer a reasonable reform of the lobbying laws. In proposing these changes, we recognize the valuable and essential role that lobbying plays in the Executive Branches of government. But the public interest in lobbying activities is disclosed to public view.

We do not seek to prohibit or curtail the activities of lobbyists, however, to end the secrecy in which lobbying is often done, to end cynicism and suspicion—if not outright corruption—the public is entitled to know the source and scope of the major influences brought to bear on Congressional and Executive decisions.

As we have indicated, we do not believe the definitions and the duly burdensome requirements on lobbyists or inhibit the Government's right to petition the Government. The people's right to know is consistent with the public's right to know.

If we are serious about reporting and disclosure of lobbying activities, we must set levels of coverage commensurate with the significance of the activities which all of us are familiar. We believe the definitions will strike a reasonable balance between excessive burdens on lobbyists and the public's right to know the way their government functions. The proposal covers the vast majority of lobbyists whose activities are substantial, who have special influence, while exempting the countless other contacts with Congress and government that do not meet these tests and that are not fairly covered.

Overall, the various reforms in the bill we are proposing are improvements over existing law. These reforms will bring the Lobbying Act a significant number of organizations engaged in lobbying activities, and will provide important new information on the efforts to influence both legislative and executive action.

In recent years, Congress has overwhelmingly approved legislation requiring comprehensive reporting and disclosure of gifts and expenditures. The time is long overdue for us to apply the same principle to lobbying activities.

That rationale applies equally to all persons engaged in substantial lobbying activities, whatever the source of the funds. It does not interfere with the fundamental right of the people, under the First Amendment, "to petition the Government for redress of grievances."

The purpose of a lobbying law was eloquently summarized by Justice Warren in the Harris case:

Present-day legislative complexities are such that the citizen's voice cannot be expected to explore the myriad of issues which are regularly subjected. Yet full realization of the American ideal of elected representatives depends in no small extent on the absence of such pressures. Otherwise, the voice of the citizen is drowned out by the voice of special interest groups, while masquerading as proponents of the public good. The Lobbying Act was designed to help prevent.

Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose.

Over thirty years have passed since Congress last acted to require information about lobbying pressures. More than twenty years have passed since the *Harris* case, in which the Supreme Court invited Congress to take more effective action. In the intervening years, there has been a revolution in the role of Congress and in the way lobbyists operate. It is time to meet the modern challenge of reform. Congress and the American people are entitled to know the ways our laws are made and carried out.

SUMMARY OF KENNEDY-CLARK-STAFFORD LOBBYING BILL, S. 1735

WHO MUST REGISTER

Organizations with paid employees, not individuals or organizations composed of volunteers.

Lobbyists required to register will use either a "short form" or a "long form" for registration and disclosure, depending on the degree of lobbying activity.

"SHORT FORM" LOBBYISTS

Organization makes 15 or more oral lobbying contacts in a quarter.

Registration Form:

Identification of the organization.

Approximate number of member individuals and organizations.

Quarterly Disclosure Requirements:

Gifts over \$35.

Receptions costing over \$500.

Description of the organization's ten most important lobbying issues.

Grass roots solicitations reaching 500 persons, 25 officers or directors, 100 employees, or 12 affiliates.

"LONG FORM" LOBBYISTS

Tests for coverage of organization:

Spends \$1250 or more a quarter to retain outside lobbyists.

At least one employee spends 24 hours a quarter in lobbying, or two employees spend 12 hours or more in lobbying.

Spends \$5,000 or more a quarter in soliciting others to lobby.

Registration Form:

Same as short form, plus:

Identification of retained lobbyists and associates.

Identification of employees who spend 12 hours or more a quarter in lobbying.

Disclosure of dues or contributions of \$3,000 or more a year, if lobbying expenses exceed 1% of the organization's budget; disclosure by categories of value.

Description of the methods by which the organization decides its lobbying positions.

Quarterly Disclosure Requirements:

Same as short form, plus:

Total expenditures for lobbying, with percentages for direct lobbying and grass roots lobbying.

Lobbyists retained by the organization for each issue and the fees paid.

Description of the organization's 30 most important issues and the officers and employees who lobbied on each.

EXECUTIVE BRANCH LOBBYING

Applicable to grants or contracts of \$1 million or more.

Disclosure requirements similar to those for "long form" lobbyists.

EXCEPTIONS

Contracts with Senators or Congressmen representing the home state of the organization or the EMSA in which the organization is located.

Communications by Federal employees or State and local officials.

Public testimony to Congress.

Public speeches, articles or broadcasts other than paid advertisements.

Individuals acting to redress personal grievances or express opinions.

Activities covered by Federal election laws.
 Communications made in person by one registered organization to an affiliated organization which is registered under the Act.
 Personal travel expenses up to the Federal per diem.
 Regular publications of voluntary membership organizations, where the publication is not primarily devoted to lobbying.

ENFORCEMENT

By Comptroller General and General Accounting Office.
 Compile and cross-index reports.
 Investigate violations.
 Issue advisory opinions.
 Initiate civil proceedings to compel compliance.

PENALTIES

Civil penalties up to \$5,000.
 Criminal penalties up to \$10,000/2 years.

Chairman RIBICOFF. Patricia Wald, please?
 Thank you, Ms. Wald. Will you introduce the member of your staff who is here with you?

TESTIMONY OF MS. PATRICIA M. WALD, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE

Ms. WALD. Yes, Senator.

If I may I will introduce my relatively lengthy prepared statement for the record.

Chairman RIBICOFF. Without objection the entire statement will go into the record as if read.

Ms. WALD. I will summarize it very briefly.

I would also at this time like to introduce into the record a shorter statement by the Deputy Attorney General, Peter Flaherty, endorsing and underscoring his commitment to the bill.

Chairman RIBICOFF. Thank you. Without objection the statement will go into the record.

[The statement follows:]

STATEMENT OF PETER F. FLAHERTY, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

S. 1755, the proposed "Lobbying Reform Act of 1977," is an important step in the continuing efforts of the Congress and of this Administration to make available to the public significant information on the sources of influence on the legislative process. I regret that I cannot be present at today's hearing, but wish to express both the Administration's and my own enthusiasm for efforts to make more effective provision for registration and disclosure by organizations engaged in systematic attempts to influence the content or disposition of legislation.

The shortcomings of existing law in this area need not be repeated here. It suffices to say that we need a new statute which will expand the types of lobbying organizations covered, the kinds of contacts they make with members of Congress and their staffs, and provide a more flexible set of sanctions against violations of law. We face the difficult task of accomplishing these and other goals without inhibiting the willingness of citizen groups to petition the Congress on issues of importance to them, as they are entitled to do under the First Amendment to the Constitution.

Each of the threshold tests which might be used in triggering the registration and reporting requirements of a lobbying bill such as S. 1755 presents both advantages and disadvantages. All of the tests proposed in S. 1755 are reasonable

*In addition,
 the Administration
 understands we
 must achieve these*

covered

ones, except that we do not favor the establishment of any independent triggering device based solely upon lobbying solicitations as defined in the bill. As a practical matter, it is very doubtful that any lobbying group could be effective without, at some point, engaging in direct lobbying communications with Congress. Organizations which decide not to engage in such direct contacts should not be forced to cope with a new set of reporting and disclosure requirements despite their distance from the actual legislative process.

The administration supports, in addition, the principle that contacts by lobbying organizations with high Executive Branch officials on legislative matters should also be disclosed. But here we must keep in mind an important distinction between the Executive and Legislative Branches. When Congress decides to consider how a problem of public policy might best be resolved, it must reach a solution solely in terms of whether or not legislation is appropriate. In the Executive Branch, on the other hand, a problem may be resolved by the administrative promulgation of regulations, by litigation in the courts, or by the proposal to Congress of legislation. In many cases, a combination of these strategies will be selected. It is clear that bills such as S. 1785 should only require the reporting of contacts with the Executive Branch which deal directly with legislation; contacts in connection with the other activities of the Executive Branch described above should not be subject to disclosure because of our desire to regulate legislative lobbying. If this change is not made, covered organizations will be forced to file reports on contacts which ultimately may not result in any influence on the legislative provisions, and will be hard pressed to determine which Executive Branch contacts must in fact be reported at all.

We also support the requirement that disclosures be made regarding substantial government contracts. We urge, however, that the threshold for this reporting requirement be raised from \$1 million to \$10 million, so that unnecessary additional red tape is avoided and the majority of competitively awarded contracts are not included. Moreover, because of the possible accounting problems that would be faced by many firms in reporting expenditures made to influence the award of contracts, we do not favor at this time the proposed requirement that such expenditures be isolated and reported. We believe that a decision on this matter should be postponed until the Office of Federal Procurement Policy has had a chance to determine whether such a requirement is workable or advisable.

Finally, we do not favor a statutory provision requiring the reporting of gifts and entertainment furnished by organizations to agency employees in connection with contracts. We believe that if legislation is to be enacted in this area, it should be limited to a simple ban on the acceptance of such gifts or entertainment by agency employees, as is currently the rule under Executive Order 11222.

The Administration looks forward to continuing collaboration with the Committee in its efforts to report out legislation regulating lobbying thoroughly but equitably.

Ms. WALD. I am accompanied by Mr. Robert Bedell, who is the Associate General Counsel of the Office of Management and Budget. He has worked extensively on the development of the administration's position on executive branch lobbying. If there are particular questions about the administration's position vis-a-vis the lobbying of governmental contracts in the executive branch, you may wish to address some of those to Mr. Bedell.

The administration strongly supports the enactment of comprehensive, evenhanded, easily enforceable and effective lobbying regulation that will allow Congress and the public to know the essential facts about organizations which engage in significant efforts to influence legislation or executive branch positions on such legislation.

We also endorse legislation that requires disclosure of such efforts as to major governmental contracts.

The administration, at the same time, is acutely concerned that such legislation, long overdue in our view, not inhibit the participation of small, unsophisticated grassroots groups in the legislative process. Lobbying is a time-honored and an honorable undertaking reflecting free exercise of first amendment rights to petition the Government for redress of grievances. It is to be encouraged, not discouraged.

Hence, legislation must strike a delicate balance with such groups between needed disclosure and avoidance of chilling effects. I am not going to detail here—Senator Kennedy did that ably—the inadequacies of past lobbying laws.

The 1946 law covers only lobbyists whose principal purpose is lobbying. It does not cover contacts with staff, but only with Members. It requires lobbyists to participate in fundraising or receipt of money as well as lobbying and the enforcement provisions are totally inadequate.

The critical elements of an effective yet nonintimidating lobbying law in our view are three: Its threshold test for coverage, its requirements for disclosure by organizations, and its enforcement sanctions.

With a few specific reservations, we have concluded that S. 1785 meets these three criteria in all regards.

S. 1785 employs a dual threshold test. If an organization makes 15 oral contacts with congressional Members or staff in a quarter, it must register. If, however, that is the only test it meets, it may file an abbreviated lobbying report consisting primarily of identifying the organization and its approximate number of members, expenditures made for Federal employees, 10 issues on which it principally lobbies, and an identification of any significant lobbying solicitation.

I might say, Senator, that as somebody who has worked a long time with public interest groups and with smaller groups, I looked at those reporting requirements fairly carefully in light of my own experience, and I do not honestly find them to be onerous. I do not think that they would unduly inhibit small groups engaged in ad hoc lobbying efforts.

Organizations which meet a higher threshold test set out in the bill would have to report more extensively. If an organization spends \$1,250 a quarter on outside lobbyists or pays any one of its own employees or officers to work 24 hours on lobbying communications or any two of its employees to work 12 hours in a quarter the bill requires them to be registered. These organizations must disclose not only the identity of the organization and its expenditures on Federal employees, but also its general internal policymaking decision mechanisms, its total expenditures on lobbying, communications and solicitations, an identification of outside and inside lobbyists, the 30 issues that they have mainly lobbied on and the amount they have been paid for such work.

Perhaps the most controversial feature of the bill is that lobbying organizations meeting the second threshold test must also disclose contributors by the range of contributions, over \$3,000, though not the exact amount of the contribution, if the organization devotes 1 percent or more of its budget to lobbying.

We find that both the dual threshold and the reporting requirements are reasonable except for one caveat that we would point out. Given the high priority we accord to protecting grassroots ad hoc lobbying efforts, we do recommend raising the number of initial contacts, perhaps to the range of 25 to 50, before an organization which does not meet the "hours spent" test for outside lobbying expenditures would be required to register. We make this recommendation because we are concerned that single ventures into lobbying by an organization consisting of a few hours phone calling or a half day on the Hill, might

bring a small organization under the act without any further engagement.

We do however find that the oral contacts test itself is a reasonable and an enforceable one. The hours spent and the dollars spent tests are also enforceable. We have talked to our Criminal Division lawyers in the Department of Justice, and we have ascertained that they believe that all three of these tests can in fact provide the basis for an enforceable law.

We do note, of course, that as far as recordkeeping is concerned with small organizations, an organization which engages in limited lobbying in order to meet the lower threshold will have to be constantly alert that it does not cross the higher threshold with its more extensive reporting requirements.

We also have some concern about the contributor requirement. As now drafted it requires disclosure of any contributor above \$3,000, if the contribution in whole or in part is used in lobbying. We are aware that constitutional questions have been raised about any disclosure of contributors because of the potentially chilling effect on freedom of association.

Our research of the relevant cases, particularly *Buckley v. Valeo* however, has convinced us that where the disclosure is related to a strong governmental interest, it may properly be required. Here that interest is protection of the legislative process from unseen and undisclosed influence. There is furthermore no recorded evidence of a widespread threat of retaliation by the Government or others against contributors to organizations which lobby such as has existed in several cases where a membership disclosure requirement was feared to be in violation of the first amendment. Disclosure is therefore legitimate and constitutional.

We do, however, feel slightly uneasy about the lack of any nexus in the test as presently drafted between the amount of the contribution and the amount actually used in lobbying—conceivably it might only be a few pennies of the contribution—or in the alternative, a nexus between the amount of the contribution and the total budget of the organization, so that a presumption of control or clout by the donor in setting overall priorities for the organization including lobbying priorities would be reasonable.

In other words, in the *Buckley* case there is a great deal of language about making sure that the nexus between the governmental interests and the required disclosure is a reasonable one. We suggest at least consideration by the committee of one or the other of these two tests which we think would add an extra and desirable element to produce that nexus.

Another of the relatively few serious concerns that we have with S. 1785 includes the use of lobbying solicitations as a separate and independent threshold for the applicability of registration and reporting requirements.

In short, an organization which has no direct contacts with Congress might still be covered if it spent over \$5,000 in efforts to convince others to make direct contacts with Congress through letterwriting campaigns or paid advertisements.

On balance we come down against such an independent threshold, although we do feel that the bill is very legitimate in requiring re-

porting of all such solicitation efforts by organizations which meet the three direct communication thresholds.

Admittedly there are very few clear and bright lines in this area. Nonetheless we worry that regulation of organizations which confine themselves solely to exhorting others to communicate with Congress approaches more closely the edge of constitutionally protected rights.

In addition, on a practical level we believe that most organized and substantial lobbying efforts will qualify under the other three direct communication tests and will consequently, in their reporting disclose these lobbying solicitation efforts.

Since the disclosure requirements in the reporting parts of the bill are confined to solicitations that explicitly ask others to communicate with Congressmen on a particular bill or issue, we believe that they do survive constitutional challenge, and moreover that there are sound reasons for requiring that disclosure to enable the public to examine multifaceted strategies which lobbying organizations use to affect the course of legislation.

Finally, with respect to executive branch lobbying, the administration does have its own proposal which is at variance in some respects with that in the bill, which we have submitted as an appendix to our testimony. Mr. Bedell would be glad to expand upon this proposal at greater length.

Our proposal contains a basic difference from provisions of S. 1785 in that it would apply to lobbying of executive officials only in executive level positions rather than GS-15's through GS-18's and levels O-6 and above, of which there are some 45,000 in the Government. Also, the administration would not cover lobbying with respect to future bills. We feel that the indefiniteness of that term would invite unnecessary intrusion into executive policy deliberations that may never result in any kind of legislative proposal.

As far as large Government contracts are concerned, we would include lobbying with respect to those whose value was \$10 million rather than \$1 million. Briefly the reasons are these—the majority of negotiated contracts where outside influence is most likely to effect a result fall in this range. Below \$10 million most contracts are done by sealed competitive bids. The difference in the floor means approximately 3,600 quarterly reports versus an approximated 80,000 per annum.

There are other variations between the administration proposal and S. 1785 which because of the shortness of time I will not go into with regard to the kinds of information which we would have executive branch Government contract lobbying organizations report.

Basically, however, we do support with these differences, registration and reporting requirements for governmental contract lobbying and executive branch lobbying with regard to legislative matters.

We do not, however, think that grants should be included under the same regulatory program as contracts because of the very different hypotheses and considerations that go into grant making.

Lastly, a word on the enforcement and sanction provisions of the bill. The Comptroller General would have power to investigate violations, attempt to conciliate civil violations, issue advisory opinions and refer civil and criminal violations to the Attorney General. We endorse this general plan of enforcement that allows alternatives to

criminal prosecution for inadvertent violation. We do have objections to section 14(e), however, which would allow the Comptroller General to bring a civil enforcement action to court by himself if the Attorney General did not act within 60 days of referral. We believe that exclusive authority to bring civil and criminal action under the act should be vested in the Attorney General, and we feel that the committee should make clear that the Attorney General can proceed either civilly or criminally when he discovers evidence of violations either independently or in the course of other related investigations. We point out that our Criminal Division already has jurisdiction over the Foreign Agents Registration Act, and in many cases during the course of investigations into that act may find violations of this act when it emerges into law. We feel that they should not be stopped from going forward, investigating and proceeding with those violations.

Also, if we are proceeding on a criminal violation, it is unreasonable to expect an indictment within 60 days under pain of having the Comptroller General proceed civilly even though the violation deserves criminal sanctions. Even the prosecution of civil violations often has to be coordinated with other investigations and prosecutions so that a 60-day deadline is unrealistic. Therefore we urge the deletion of 14(e).

We assure you that civil and criminal violations of this law will be expeditiously and vigorously prosecuted by the Attorney General.

We believe, finally, that properly enforced and with a few modifications, S. 1785 can be a milestone in the restoration of public confidence in good and public government.

Thank you.

Chairman Ribicoff. Thank you very much.

You know, we started off with this legislation by requiring for the first-tier threshold eight oral communications. Then we went to 12. Then we went in this bill to 15. Now you suggest a qualifying number between 25 and 50. This is in addition to the unlimited number of oral contracts which members can make with their own Congressmen and their own Senators.

What evidence do you have to suggest that 25 to 50 contacts is a good threshold for a first-tier lobbying organization? Why should they be able to make all of those communications without being covered by this legislation?

Ms. WALD. Senator, let me say, that I feel that numbers are bound to be arbitrary in this area. Certainly we have had no experience with the administration of a particular act like this because no such act has heretofore existed.

Our conclusion has come from the experience of people in the Department and from talking to other groups, and, quite frankly, from our belief that a balance should be drawn in a way which will not deter organizations which do not meet the other threshold tests. In short, if an organization does not even spend 24 hours of one employee's time during a quarter or expend 1,250 for any outside lobbyists, but rather relies solely on oral contacts made with members, then we really do not feel that we want to bring under that act the 1-day visit up to the Hill which can well involve 15 contacts. We would like to raise the threshold to the point where that organization is

engaged in what we think is significant enough or substantial enough lobbying so that we do want to bring it in. In other words, if a particular grassroots organization wants to spend 1 day in the year contacting people on a particular issue which could easily be done in a couple of hours phoning involving the 15 contacts, that organization should not be covered. We think we ought to make reasonable attempts to allay the fears of smaller organizations that they will be caught up by the bill and thereby decide that they will not do any lobbying at all. We do not think that you are going to miss many significant lobbying efforts if they do not amount to even 24 hours of an employee's time in a quarter.

Chairman RIBICOFF. Your concern with the separate solicitation threshold seems to be that a small grassroots organization might inadvertently become a lobbyist. Is not it unlikely that a small organization will spend \$5,000 on a single solicitation in the first place?

Ms. WALD. Well, I am not sure that is necessarily true, Senator. I think the farther away you get from Washington, the more likely it becomes that you would find a particular organization which does not have any consultants, does not have any staff in Washington, but which suddenly finds that it is indeed involved in a particular issue that fits in with its general organization agenda, and that it wants to affect the people in its immediate environment, in the town. Its natural inclination is to say, we feel strongly about this and you ought to write your Congressmen. I am thinking about such organizations, whether they end up distributing pamphlets or taking out paid ads—it does not take very many paid ads to amount to \$5,000.

Chairman RIBICOFF. Do you have an example where, in the last 10 years, a small organization such as you describe spent \$5,000?

Ms. WALD. I do not have one right here, but I can supply that for the record, Senator.¹

Chairman RIBICOFF. Please supply that for the record. I am very curious to see what examples there are.

Would you agree that an important lobbying effort can be directed toward employees below the executive level? If a lobbying organization believes lobbying of these employees on issues before Congress can be effective, why should these efforts not be covered?

Ms. WALD. Let me answer that from my own experience of 6 months in the Department of Justice; in our own Office of Legislative Affairs, of course, and the experience of people in the other divisions of the Department that may be concerned with legislation. It is of course quite possible that a phone call can be made to a person below the executive level. It is certainly my experience, however, that before any policy is set vis-a-vis legislation, or even any input made into the final Justice Department position by a particular division, that that particular policy must be passed on and finally approved by an executive level policy making official. We think that that is a reasonable place to make the cut-off.

Chairman RIBICOFF. If you follow that philosophy, you would not be covering lobbying of congressional staff, but just Senators and Congressmen.

Ms. WALD. Well, I think not, Senator. I realize that the analogy is imperfect, but I think that the relationship between a congressional Member and his or her staff are certainly the equivalent of those be-

¹ See p. 72.

tween the executive level positions going all the way from Attorney General, Deputy Attorney General or Under Secretary through Assistant Attorneys General and their deputies. And the numbers of persons involved in the staff of Congress and the Congressmen and the availability of contacts between them is very much different than those applying between an agency head and all the people in his/her Divisions with a rating of GS-15 or above—the Justice Department alone has a total of 53,000 employees.

[Turning to Mr. Bedell.]

Do you have a rough idea of how many of those would be covered by the GS-15?

Mr. BEDELL. Not within the Department of Justice, but I think the prepared statement points out that there are about 45,000 GS-15's and above governmentwide which exacerbates the problem from a reporting standpoint as well. Also when you get down to the GS-15 level you are more likely to run into administrative personnel and personnel not involved with legislative matters as opposed to policy-making personnel. That also presents another problem. How does an organization know to whom it is talking? How does it know that the person is an executive level or a GS-15 or a 14?

Ms. WALD. I might point out, too, Senator, that this bill has to do with a great many things. I think all of them are good. But it will be the first excursion into executive branch lobbying. I would suggest therefore, that enforcement-wise, we might well use the cut off that we suggest. I think that we will find the most significant executive contacts are being covered by such a standard. In the event that it is proved wrong, I am sure Congress will take another bite.

Chairman RIBICOFF. How many people are involved in your definition of executive level 5 and below? How many people are there involved governmentwide?

Mr. BEDELL. I am not sure of the exact number, sir. They are all listed—

Chairman RIBICOFF. Would you get it for the record?

Ms. WALD. We will supply that for the record.¹ They are a matter of public record which of course is a matter of public notice to anybody who is making contact with them.

Chairman RIBICOFF. Any in level 5, on down.

You suggest that subsection 16(c), which disallows any civil sanction for a first violation for failing to register, eliminates the effectiveness of the civil sanctions provision? Could you elaborate on that statement, please?

Ms. WALD. I think that what we are saying there is that the first bite of the apple theory; namely, that a first nonwillful civil violation would not result in any enforcement action, would be an unnecessary impediment upon the flexibility of both the Comptroller General and the Department of Justice in enforcing the law. Our feeling is that with the conciliation and mediation powers of the Comptroller General he can certainly have discretion under the act to use those for flexible enforcement. I think this discretion, incidentally, is a very wise measure. He can take the choice under your version of the bill in conciliating or mediating or going to a civil enforcement action.

¹ See p. 73.

We would suggest that there may indeed be cases where the first violation, although again not so willful as to involve criminal sanctions, may still be so serious, so substantial, involve such large amounts or expenditures that we would not want to see the discretion or any of the enforcement powers under the act arbitrarily stopped by saying you may not bring a civil proceeding simply because it is a first violation. We do not see the necessity for that and we think there may be cases where one would be sorry if that provision were in place. For a small inadvertent violation by small groups which we are all anxious to protect, there is ample power under the act for the Comptroller General to mediate out that particular group.

Chairman RIBICOFF. Thank you very much.
[The prepared statement of Ms. Wald follows.]



Department of Justice

STATEMENT

OF

PATRICIA M. WALD
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

BEFORE

THE

GOVERNMENTAL AFFAIRS COMMITTEE
UNITED STATES SENATE

CONCERNING

S. 1785 - LOBBYING REFORM

ON

AUGUST 2, 1977

Mr. Chairman and members of the Committee, I appreciate this opportunity to appear before you today for the purpose of presenting the views of the Department of Justice on S. 1785, the "Lobbying Reform Act of 1977."

As the Deputy Attorney General, Peter Flaherty, stated in testimony on lobbying legislation in the House earlier this year, the Administration supports the enactment of a lobbying bill which would be comprehensive, evenhanded, easily enforceable, and which would effectively open to public view significant aspects of how the congressional process is influenced by outside groups. At the same time, we do not underestimate the delicacy of formulating effective legislation in this area which touches so directly upon fundamental First Amendment freedoms of the American people.

We believe that the competing public interests of disclosing systematic and organized lobbying efforts and protecting the right of the people to petition the Congress for redress of grievances can be successfully balanced, and that S. 1785 would, with some modifications, serve as an effective vehicle for this resolution. The Administration shares with the Committee the goal of encouraging, rather than discouraging, citizen and grass roots organization participation in government through the exercise of fundamental constitutional rights to associate and petition for the redress of grievances.

INADEQUACY OF EXISTING LAW

The importance of reform in the regulation of lobbying activities is underscored by the serious inadequacies of the 1946 Lobbying Act, 2 U.S.C. §§ 261-276. The existing statute is inadequate in a number of respects.

First, the 1946 Act covers only lobbyists and the organizations employing them whose "principal purpose" is to engage in activities covered by the statute. Not only is the determination of an individual's or organization's "principal purpose" obviously an extremely difficult one, particularly where the applicable statute provides criminal prosecution as the only remedy for violations, but important lobbying occurs even when it is not the principal purpose of the organization.

Second, in United States v. Harriss, 347 U.S. 612 (1954), the Supreme Court construed the 1946 Act as governing only lobbying activities involving contacts with Members of Congress themselves. As the Committee is aware, any effective lobbying effort must also concentrate on congressional staff members, and any statute which fails to regulate this aspect of lobbying activities is doomed to ineffectiveness.

Third, the Supreme Court held in the Harriss case that Section 266 of Title 2 of the United States Code should be

constructed so as to require disclosure of funds raised not only by those lobbyists who personally participate in solicitation, acceptance or receipt of contributions for lobbying purposes. This interpretation excludes from the coverage of the 1946 Act the activities of lobbyists who do not personally participate in fund raising but whose activities are financed by earned income of other persons. This distinction should be changed.

Fourth, the 1946 Act does not provide the Speaker of the House or the Secretary of the Senate with authority to audit lobbying reports which must be filed with the House or to refer suspected violations to the Department of Justice. This omission has not resulted in detection of violations in a systematic manner, but rather on the basis of information provided by lobbyists with opposing interests, by Members, and, from time to time, by other Members of Congress. More effective enforcement provisions are necessary.

Fifth, because the 1946 Act provides only criminal sanctions against violations of the statute, enforcement of violations of the law have been difficult for the Department of Justice to dispose of in an equitable manner. Criminal prosecution is obviously a severe penalty, and the Department is reluctant to impose it in case of unimportant violations. What is needed is administrative or civil penalties which can be used in such cases.

S. 1785 would eliminate the problems that I have described. It would, among other things, regulate not only contacts with Members of Congress themselves, but also with members of the congressional staff. Further, it would provide for auditing of reports by the Comptroller General, and would provide civil penalties which would be appropriate for cases of unintentional violations of the Act. We enthusiastically endorse these features of the bill.

THRESHOLD TESTS

Any comprehensive legislation regulating lobbying raises two fundamental questions. The first question is who should be and who should not be covered by any disclosure provisions at all; the second question is the nature and extent of the disclosure that is required if an organization is covered. S. 1785 does not, of course, prohibit any activities at all, but rather solely requires disclosure of essential information so that Congress and the public can evaluate these activities. Nevertheless, no one wishes to impose impossible burdens on small organizations which engage in the ad hoc lobbying efforts which are a vital part of our system of free debate or to inhibit the willingness of grass roots organizations to participate in the legislative process. We must be cautious not to create impossible administrative tasks

for small organizations which lobby intermittently and to avoid disclosures that will discourage individuals from supporting organizations who do such lobbying on behalf of causes that they support.

The first question - who should be covered - is addressed by the various triggering criteria which would bring S. 1785 into play. S. 1785 contains a dual threshold test, under which certain minimal reporting would be required for organizations engaging in fifteen or more oral lobbying communications in a quarterly filing period. More extensive reporting requirements would be established for organizations meeting other criteria relating to expenditures for outside lobbyists or hours spent by paid officers, directors, and employees engaged in lobbying. In general, we believe that a dual threshold test is one reasonable approach toward the goal of assuring that regular extensive and well-financed lobbying will be the subject of detailed public disclosure, without placing impossible paperwork burdens on more amateurish or less organized and well-funded organizations.

Each of the three threshold tests in S. 1785 which applies to direct lobbying activities, and their use in conjunction with one another is acceptable. The initial threshold test for minimal reporting contained in S. 1785 is the number of contacts between representatives or organizations and the federal officers and employees covered

by the bill. Direct contacts with Congressional Members or staff obviously constitute reliable indicia of the extent of active lobbying carried on by an organization. The existence of such contacts must be proven by witness testimony although many Congressmen or staff maintain some form of contact file.

The drafters of the bill, however, chose 15 contacts as the threshold. While we understand the rationale for the choice of the number 15, which would allow for approximately one contact per week in each quarterly filing period, we believe that this number is too low. We would find any number in the range of 25 - 50 contacts preferable for the lower threshold test and the choice of a number in that range would help assure that small and sporadic lobbying groups will not be discouraged from making communications by this reporting requirement. Almost any grass roots organization which does not normally engage in lobbying can meet the 15 contacts test in a half day of intensive lobbying on one individual issue or even in an hour or two of phone calling. Assuming we are sensitive to the need to foster rather than discourage small

grass roots organizations from engaging in these activities, even four contacts a week where they did not amount to 24 hours of an employee's time seems to us a low enough threshold to capture lobbying efforts of sufficient consequence to require public airing.

More extensive registration and reporting would be required for organizations in three circumstances. The first instance is when an organization may spend \$1,250 or more in any quarterly filing period for the retention of outside lobbyists. We feel that this figure is within a reasonable range as a coverage threshold for an organization hiring outside lobbyists although we would also find acceptable the higher standard of \$2,500 in the House bill. The use of a dollar threshold test allows for easier proof and is also closely tied to the significance and extensiveness of an organized lobbying effort.

The next threshold test established for extensive reporting requirements is an "hours spent" test, for organizations whose paid representatives spend a total of 24 hours in any quarterly filing period, or where two or more representatives spend 12 or more hours in any quarterly filing period. While the inclusion of the "hours spent" standard will require lobbying organizations to maintain some additional records and to remain alert to detect the

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point at which they meet the threshold. I am advised by the Criminal Division -- which will of course have the responsibility of enforcing this legislation in court -- that this test is an enforceable one. It should be possible by consulting time sheets or by interviewing co-workers to verify "hours spent" on lobbying activities. We note that the Comptroller General may prescribe under Section 11 minimum segments of an hour for recording the length of any lobbying activity, i.e., a call or a visit. Such regulations will enhance the enforceability of the Act and avoid interminable bickering about how many minutes each activity takes. But the minimum time unit prescribed in such regulations should be taken into consideration by Congress in setting the "hours spent" threshold since it may require an escalation of the number of hours permitted each employee before he/she meets the threshold test.

S. 1785 also contains an independent threshold test based upon "lobbying solicitations." I will discuss our objections to this test in more detail below.

We note, finally, that the benefit of a lower threshold test may in some respects be diluted by the possibility that an organization may become eligible for the higher threshold. Thus, records may have to be kept to satisfy the more extensive reporting requirements because of the constant possibility that a higher threshold may be crossed sometime during the reporting quarter. Furthermore,

the seeming simplicity of the "number of contacts" test can be complicated by reporting requirements which require more extensive record keeping. In other words, while the record keeping necessary to determine the number of contacts within a quarter may be relatively simple, the reporting of lobbying expenditures that follows coverage will inevitably require more complex record keeping.

Our caveat is simply that any dual-threshold test should be not only simple and understandable in itself, but that the reporting and record keeping burdens should also be sensible if it is to work in not discouraging small lobbying efforts.

REPORTING REQUIREMENTS

Once an organization is determined to be within the coverage of S. 1785, the equally vital question arises of how extensive the disclosures that it is required to make should be. As I stated earlier, the idea of requiring organizations engaged in only incidental lobbying to file less elaborate reports than major lobbying organizations is reasonable. As a general principal, we also feel that all reporting requirements should be guided by the goal of simplicity, so that lobbying organizations, of whatever size, are not overburdened with detailed paper work every quarter.

Small lobbying efforts which fall under the lower threshold test of S. 1785 would be required to register their representatives and state the approximate number of individuals and organizations that are members of the lobbying organization itself, as well as the names of any affiliates of the organization. Compelled disclosure of the identities of members is specifically forbidden. In the "Abbreviated Lobbying Reports" provided for in section 6 of the bill, the organization would be required to report gifts in excess of \$35.00, expenditures for receptions, dinners, and similar events for Federal officers or employees where the cost exceeds \$500.00, ^{1/} a description of the ten issues concerning any paid employee of the organization who has engaged in lobbying communications, and a description of the means and content of lobbying solicitations intended to reach specified numbers of persons. These requirements seem to us to be reasonable, and require only the maintenance of relatively simple time or accounting records provided, however, that the organization knows at the beginning of the quarter that it will not pass through the second threshold.

^{1/} We have some reservations concerning the \$500.00 criterion for receptions, dinners, and similar events. If two Federal employees consumed two hamburgers at a picnic held by a covered organization, that fact would have to be disclosed even though the Federal employees were among dozens or hundreds of participants and thus only a minuscule portion of the cost of the event was attributable to their presence. Consideration should be given to requiring disclosure of such expenditures only where a certain minimal percentage of the cost of the event is attributable to the presence of the Federal employees.

In the case of organizations meeting the higher threshold of S. 1785, additional information would have to be filed both as part of registration procedures and actual reporting procedures. The organization would be required to report the name and address of each organization or individual from which it had received \$3,000 or more in dues or contributions. Most significantly, each such contribution would have to be reported if the contribution was spent in whole or in part by the organization for lobbying activities. This may result in the need for lobbying organizations to establish much more elaborate accounting procedures than already exist. But more basically, this provision has been criticized as violating the right of individuals to remain anonymous in their political associations, and to support political causes without fear of ostracism which might result from mandatory public disclosure of their support.

We believe, however, that disclosure of significant contributors to a covered organization is consistent with a careful reading of the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1975). In that case, the court acknowledged that public disclosure of the identities of individuals who had contributed to election campaign funds might result in some deterrence of the exercise of First Amendment freedoms. The court held, however, that the public

disclosure provisions of the Federal Election Campaign Act of 1971 (FECA) served such important governmental interests that they survived exacting scrutiny under the Constitution. The governmental interests served by the FECA consisted of the fact that disclosure would help voters to evaluate candidates for federal office by permitting the voters "to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." Ibid. at 67. In addition, the court recognized that disclosure would deter corruption and the appearance of corruption in the campaign process by making obvious any special favors that a successful candidate might give to his contributors. Ibid. The court cited with approval the famous statement of Mr. Justice Brandeis in Other People's Money (1933), at p. 62:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

We do, however, have some concern for the requirement of disclosure of contributions based on the fact that any portion of the contribution is spent on lobbying, and the total lobbying expenditures of the organization exceed 1 percent of its budget. The constitutional test such a provision must meet is laid out in Buckley v. Valeo where disclosure of contributions of \$10.00 or more to political committees to influence elections was upheld. 424 U.S. 62. The Court stated:

... we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. E.g., Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since Alabama we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a "relevant correlation" or "substantial relations" between the governmental interest and the information required to be disclosed. See Pollard v. Roberts, 283 F. Supp. 248, 257 (ED Ark.) (three-judge court), aff'd, 391 U.S. 14 (1968) (per curiam).

We are concerned that where a contribution is made to an organization devoting only 1 percent of its budget to lobbying, and even a few pennies of the contributed funds may be spent on lobbying, the nexus between the governmental interest in disclosure and the contribution may be so attenuated that we are approaching the outer limits of constitutionality. We believe that either a specified percentage of the contributed funds must be allocable to the lobbying efforts or the amount of the contribution must itself constitute a substantial enough percentage of the organization's total budget so that a rational basis exists for assuming power or control over the general

policies of the organization including its lobbying effort. We endorse the provision that requires disclosure of contributions by ranges of contribution rather than the precise amount. 2/

The registration section of S. 1785 further requires a general description of the methods by which voluntary membership organizations which meet the higher threshold arrive at their positions with respect to legislation. We assume that this requirement is only meant to ask for a very general description of whether such decisions are made through such means as vote of the membership, vote of the board of directors, or through the discretion of the organization's paid employees. If this understanding is accurate, the section is not objectionable. We feel, however, that this interpretation should be explicit in the Committee report on the bill.

As part of their quarterly reports, major lobbying organizations would also be required to state the approximate amount of their total expenditures on lobbying communications and solicitations. Further, the organization

2/ The disclosure of contributors' names has been challenged as unconstitutional due to the chilling effect of possible harassment from their publication. In Buckley v. Valeo, 424 U.S. 1 (1975), the Supreme Court rejected a similar contention on behalf of contributors to Federal election committees. It did, however, warn that if actual harm could be shown stemming from the disclosure of such contributions, it would be prepared to tip the constitutional basis against disclosure. 424 U.S. at 72.

would be obliged to report what issues its individual representatives had been concerned with during the preceding quarter, and information as to the compensation received by each of these individuals. ^{3/} In addition, the organization would have to provide a description of up to 10 specific issues on which it had lobbied, and a general description of any additional categories of issues. Some additional record keeping would undoubtedly be mandated for major lobbying organizations by these provisions, but they appear to us not unduly onerous in order to assure that the public will be provided with full information on organized efforts to affect the course of legislation.

LOBBYING SOLICITATIONS

Three more controversial issues remain for discussion. The first of these is the bill's coverage of "indirect lobbying," that is, attempts by lobbyists to organize persons outside the Congress into a campaign for or against certain legislation. The bill provides that such solicitation

^{3/} We suggest that it might be sufficient and less invasive on individual privacy to require that the salary of any employee engaged in lobbying be reported within a range, rather than the exact amount.

campaigns would independently trigger registration and reporting requirements if they cost over \$5,000. In addition, the bill provides for mandatory disclosure of such campaigns if an organization meets any of the other triggering criteria.

We strongly oppose the adoption of an independent threshold test based on lobbying solicitations alone. We are acutely concerned about the effect on First Amendment rights of regulated groups whose sole function is to urge others to exercise their rights to petition Congress. Thus, some group which took out a single paid advertisement (costing over \$5,000) in a newspaper expressing its opinion and exhorting readers to write their Congressmen on the subject would be required to register while the owners or writers of the paper itself could express similar sentiments on the opposite page protected by traditional First Amendment values without incurring any such obligation. We feel that this threshold would be especially chilling for small, grass roots organizations used to proclaiming their views to small immediate audiences thousands of miles away from Washington, D.C.

On a more practical level, any organization so far removed from the legislative arena as not to make any direct lobbying contacts on its own -- if only to monitor the progress of its

'letter writing campaign -- cannot be realistically viewed as a significant threat to the integrity of the process. Organizations engaging in significant lobbying efforts will be required to disclose these efforts anyway, and they will be covered by the other threshold tests.

We are not, however, opposed to the requirement of lobbying solicitations where an organization meets the other threshold tests in the bill. We are aware that constitutional objections have been made to similar provisions. And we agree that if Congress were to regulate lobbying by providing that all communications to the general public which might have the effect of legislation could only be made after certain disclosures had been made to the government, it would probably be within its constitutional powers. But without an independent threshold of "lobbying solicitations" as an independent threshold, the "lobbying" disclosure provisions of S. 1785 would not be carefully enough drafted to avoid the constitutional problems in this area. The "lobbying solicitation" must not be intended to influence legislation, but it must urge, request, or require the recipient or the staffer to communicate with a federal officer or employee as set forth in the bill. Communications with Congress by individuals seeking redress of their personal grievances or other

their personal opinions, as well as communications through books, newspapers and other print or broadcast media, other than paid advertisements, are not covered. Thus, the range of solicitations which is covered is narrow, and is limited to those in which the government has a direct and important interest in regulation.

It has been suggested that the case of United States v. Harris, 347 U.S. 612 (1954), holds that regulation of lobbying solicitations is not constitutionally permissible. A closer reading of the case, however, will reveal that the Supreme Court never reached the question of whether this type of regulation contravenes the First Amendment to the Constitution.

Further, the court discounted the possibility that, through a kind of self-censorship, some individuals would be deterred from exercising their first Amendment rights by regulation of lobbying. In the words of the Court:

The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.

Ibid. at 626. It is noteworthy that the Court made this observation in a case in which the facts included a letter writing campaign that would have met the definition of

"lobbying solicitation" in S. 1785.

It has also been argued that those portions of the opinion of the Court of Appeals in Buckley v. Valeo dealing with section 308 of FECA give support to the view that Congress cannot regulate indirect lobbying. See 519 F.2d 821, 869-878 (1975). In our view, this argument is incorrect. In fact, the Court of Appeals in Buckley stated:

The Supreme Court has indicated quite plainly that groups seeking only to advance discussion of public issues or to influence public opinion cannot be equated to groups whose relation to political processes is direct and intimate.

In S. 1785, we are dealing precisely with groups whose relation to the political process is entirely direct and intimate. The solicitations regulated are only those urging direct contacts with Congress, and only those which, far from being non-partisan, are calculated to cause or prevent the enactment of legislation.

Thus, we believe that required disclosure of "lobbying solicitations" is not only constitutional but practically indispensable to an effective bill. If an organization is in the direct lobbying business, there is every reason to want to know all the facts -- direct and indirect -- of its lobbying efforts and strategies. Carefully coordinated grassroots solicitations -- as anyone who reads the Washington newspapers knows -- are a familiar aspect of large scale

lobbying operations, often characterized as the "growth area" of lobbying. Thus, while opposing the use of lobbying solicitations as an independent triggering device, we find no constitutional prohibition in requiring their disclosure.

Let me turn now to two final and related issues: The applicability of the bill to lobbying activities directed at officials of the Executive Branch who are involved with the formulation of positions on legislation, and the provisions of the bill relating to government contracts.

EXECUTIVE BRANCH LOBBYING

Legislative Matters

Contacts by outside organizations with Executive Branch officials classified at GS-15 or above to influence the disposition of any issue before Congress are included among the lobbying communications covered by the registration and reporting requirements of the bill. These communications and related expenditures are counted toward the threshold tests in sections 4(a) and (b), and gifts and entertainment for these officials and expenditures must be reported under sections 5 and 7.

The Department of Justice favors the reporting of Executive Branch lobbying that relates to pending legislative matters.

However, the term "lobbying communication" is defined to include communications to influence the content or disposition of any issue before Congress "including any pending or future bill, resolution, treaty, nomination, hearing, report or investigation . . ." § 3(g) (emphasis added). Many policy issues under consideration in the Executive Branch have the potential for giving rise to legislative proposals at some point, and it will therefore be difficult to determine what (and at what point) contacts with the Executive Branch are covered. Even where the submission of proposed legislation seems likely at the outset, a determination might later be made not to submit legislation on the subject. We do not believe a lobbying bill designed to disclose the sources of influence on congressional decision-making should apply to matters relating essentially to deliberations within the Executive Branch. Any such extensive Executive Branch coverage should be the subject of separate legislation.

Indeed, even under § 3(g), if a bill is being drafted within the Executive Branch and no similar legislation has already been introduced in Congress, it is logically difficult to consider the matter an "issue before Congress."

But, an even more difficult question is presented where officials of the Executive Branch begin drafting proposed legislation in an area of policy as to which other bills are pending, or are being drafted, in Congress. Under S. 1785, as presently drafted, private organizations who contacted the executive agency in connection with the possible legislative initiative would have to count their contacts, hours and dollars spent toward the threshold tests in S. 1785. They might be required to register and report on these contacts even though the bills already in Congress may have no realistic chance of passage or differ radically from the proposal contemplated in the Executive Branch. This would be the case even if the Administration ultimately decided not to propose any legislation. It is true that the discussions in the Executive Branch may touch incidentally on the existing congressional proposals, but the primary emphasis of these discussions would be the possible Executive Branch initiative. In such circumstances, the nexus with the legislative process is minimal.

These problems can be eliminated by defining "lobbying communication" as "an oral or written communication directed to a Federal officer or employee to influence the content or disposition of any pending bill, resolution, treaty, hearing, report, investigation, or pending or future nomination . . ."

It would be entirely reasonable for the coverage of Executive and Legislative Branch lobbying to differ. When an organization communicates with a Member of Congress or key staff member on policy matters prior to introduction of a specific bill, the communication is nevertheless with the individuals who will vote or advise with respect to whatever bill emerges. Communication with Executive Branch officials at an early stage does not have this effect. Only if Executive Branch officials later contact Members of Congress or staff personnel will influence be exerted on those who will ultimately pass on the legislation, and this ordinarily will not occur until after a bill has been introduced. We would not object, however, to coverage of lobbying in connection with Presidential nominations prior to their submission to the Senate.

We also oppose extending the coverage of Executive Branch lobbying to contacts with the approximately 45,000 thousand employees classified at GS-15 or 0-6 and above. Official agency contacts with Members of Congress and their staffs with respect to pending legislative matters must almost invariably be approved by Executive Level appointees, and for that reason it is our opinion that the purposes of reporting Executive Branch lobbying will be effectively served by covering only contacts with Executive Level appointees. This approach will make it easier for lobbying organizations to determine whether certain communications are covered by the

bill without having to inquire about a government employee's salary grade, since Executive Level positions are enumerated in 5 U.S.C. §§ 5312 through 5316.

Government Contracts

The second type of Executive Branch "lobbying" covered by the bill concerns communications to influence the award of government contracts and grants in excess of \$1,000,000. Section 8 requires any organization that submits a written bid on a government contract or grant or seeks to modify an existing contract or grant to submit a report to the agency involved at the time the bid is submitted (or presumably at the time a modification is sought) and quarterly reports thereafter until the contract or grant is awarded or the modification is or is not made.

The report must include a description of the contract, an identification of certain paid officers, employees, and agents of the organization who sought to influence the award of the contract or grant, and an indication of the government position most recently held by any former employees of the contracting agency who sought to influence the award on behalf of the organization. In addition, the organization must report its expenditures made to influence the award of the specific contract or grant, gratuities paid to any Federal

officer or employee responsible for awarding the contract or grant, and expenditures for any entertainment costing more than \$500 for officers or employees of the agency responsible for the award of the contract or grant.

We agree that it is appropriate to require some type of reporting by organizations on their efforts to influence the award of substantial government contracts. But we believe that the effort at the present time should be focused on major contracts and the types of information that will be the most meaningful to those who review the reports, while at the same time keeping the paperwork burden and expense of the contractors and government agencies to a minimum.

The Administration developed a proposal for reporting by government contractors embodying these principles in connection with the House Judiciary Committee's consideration of H.R. 1180. A copy of that proposal is attached as an Appendix. If I may, I would like to highlight several differences between S. 1785 and the Administration proposal.

One key difference is in the number of contractors who must report. The Administration proposal uses a \$10,000,000 threshold for the reporting requirement. It is estimated that there are 600 contract actions of \$10,000,000 or more

each year, covering about 40 percent of all contract dollars. The effect of this floor on these actions would have been to require the filing of about 3,600 quarterly reports last year. When the threshold is reduced to \$1,000,000 as it is under S. 1785, the estimated number of required reports each year increases to 90,000, and a much greater proportion of the actions are entered into through competitive bid procedures, for which the reporting of "lobbying" contacts is unlikely to be useful. It does not seem advisable to cover so many additional contract actions (and an even greater number of contractors who may be competing on these actions) for this marginal gain.

The Department of Justice also takes the position that grants should not be covered by the legislation at the present time. We are convinced that the grant-making process involves so different and varied a set of considerations that it must be studied at greater length in order to arrive at appropriate and equitable principles for regulation. At any rate, a very sizable number of grants are to State and local governments which are already excluded from coverage under the bill. We do not doubt that there may be situations in which reporting by prospective grantees would be desirable, but we do not believe it is appropriate to lump grants together with contracts.

Another difference in the two proposals on government contracting is in the type of information that must be reported. Both S. 1785 and the Administration proposal require the identification of persons who contact agency officials to influence the award of government contracts and exclude purely technical or administrative communications. 4/ Both also require the identification of former agency employees now working for a contractor submitting an agency bid or proposal. The Administration proposal does go further in providing meaningful information in that it requires an indication of the degree of contacts between the contractor and agency personnel and a brief description of contract employee duties. It also requires a more comprehensive reporting of the duties of former agency employees.

S. 1785 goes further than the Administration's proposal, however, in requiring the reporting of expenditures made to influence the award of the contract and gifts and entertainment

4/ S. 1785 requires the reporting of all persons who engage in communications to influence the award of the contract, thereby implicitly excluding technical or administrative communications. The problem with this approach is that the reporting requirement depends on the individual's subjective intent to influence the award. The Administration approach avoids this problem and is more inclusive, because it requires the identification of all company representatives who have contacts with the agency except those of a purely technical or administrative nature.

furnished to agency employees. We foresee considerable difficulties in isolating meaningful figures on expenditures. For example, are bid preparation costs included? And how are a company's marketing expenses to be allocated among a number of government and non-government contracts? Because any allocation formulation under S. 1785 will necessarily be arbitrary, the expenditure figure is likely to be artificial and of little value. In addition any such expenditure reporting would require a costly separate accounting system to be created by the contractor. The Administration proposal does not require the reporting of expenditures, but section 203(b) of the proposal directs the Office of Federal Procurement Policy to study what additional information, including expenditures, should be reported.

In the area of gifts to agency employees, Executive Order 11222 and implementing agency regulations currently prohibit government employees from accepting any gifts from individuals or companies that have or are seeking business or contractual relations with their agency. The Executive Order and regulations apply only to the employees who receive gifts, not to those who give them. In our view, if legislation is deemed necessary at the present time, it would be preferable to prohibit companies from making gifts and entertaining employees altogether, rather than requiring disclosure. The problem is not unique to the contracting area, however, and

should be addressed in the broader context of all companies that are regulated by or have other dealings with government agencies. ^{5/} The Department of Justice is studying this problem and hopes to have recommendations in this area in the near future.

Finally, we do not believe there is any need for quarterly reports after a contract bid has been submitted. The paperwork would be substantial with little incremental gain. Section 20(b)(1) of the Administration proposal requires only two reports -- at the time the bid is submitted and again immediately prior to award -- although there is a provision for annual reports if the bidding process should become protracted in a particular situation.

ENFORCEMENT AND SANCTIONS PROVISIONS

The Comptroller General is given extensive powers under Sections 13 and 14 of the bill to monitor and to investigate compliance with the Act, and to impose certain administrative penalties for non-wilful violations. He is given power to issue subpoenas, administer oaths, hold investigatory hearings,

^{5/} We have similar reservations about the reporting of gifts and entertainment under sections 6(b)(2) and (3) to the extent they apply to lobbying of Executive Branch officials on legislative matters.

and issue regulations as well as "Advisory Opinions" interpreting substantive provisions of the Act at the request of any individual. If the Comptroller General determines that there is a civil violation, not "wilful" in nature, he can attempt to obtain voluntary compliance through informal conference or consideration or he may refer such violations to the Attorney General who can seek mandatory injunctive and other appropriate relief. All criminal (i.e., "wilful") violations must be referred to the Criminal Division of the Department of Justice for appropriate prosecutive action.

Although we are in agreement with most of these enforcement procedures and sanctions, we do have some serious problems with several parts of Section 14. The Department is strongly opposed to subsection 14(e) of S. 1785, which authorizes the Comptroller General to bring a civil enforcement action if the Attorney General has failed to bring a civil or criminal enforcement action within sixty days of the Comptroller General's referral. This provision in our opinion unjustifiably invades the Attorney General's traditional control of government litigation.

Section 14, first of all, raises the question as to whether the Attorney General can proceed with litigation

without a Comptroller General referral when the Department discovers civil or criminal violations of the Act either during the course of an investigation of a violation of a different statute, for example, the Foreign Agents Registration Act or the anti-bribery statutes, or upon independent discovery of evidence of violations of the Act itself. We urge the Committee, or the Committee report, to give clearer effect to the principle that the Attorney General has the power to continue investigation of such violations and to take appropriate civil or criminal action with, of course, notification to the Comptroller General.

Our second concern is that subsection 14(e) could be interpreted as authorizing the Comptroller General to bring civil actions even when the Attorney General has already determined that the violation is criminal. It is frankly unrealistic to expect the government to prepare, research and file criminal or complicated civil cases within sixty days, as subsection 14(e) requires. Such a limitation will seriously frustrate coordination of the government's response to violations of the Act by unduly restricting the time available to the Attorney General to assess the impact of the proposed litigation on other activities of the government which might include investigations or prosecutions of the same parties under other statutes. Indeed, in a criminal

c. e., the government would presumably have to present the case to a grand jury and receive an indictment within the sixty days, or risk the case being compromised by a related civil suit brought by the Comptroller General. Therefore, the Department would recommend the deletion of subsection 14(d). We also note that subsection 16(c) which disallows any civil sanction for a first violation of failing to register eliminates the effectiveness of the civil sanctions set forth in subsections 16(a) and 14(c) for even major lobbyists. In view of the discretion vested in the Comptroller General by subsection 14(b)(1) to conciliate lesser offenses, it would appear that subsection 16(c) is unnecessary and undesirable.

Just as we believe that the Comptroller General should not be granted authority to litigate cases because of the potential conflict with the Attorney General's responsibilities, we recognize that the Department of Justice will have a responsibility to respect the Comptroller General's conciliation efforts. In those cases where conciliation is most likely -- namely, those in which there has been an inadvertent violation of the law by a relatively unsophisticated organization -- we anticipate that the Department will generally defer to the Comptroller General while such efforts continue and will refrain from instituting legal proceedings until conciliation has failed.

Finally, while the Department agrees that organizations should not be subjected to unduly burdensome recordkeeping requirements which might otherwise be established by the Comptroller General through regulations, we do feel that existing records or those records maintained by an organization in the ordinary course of business should be preserved. It is therefore proposed that the words "or maintain" appearing on lines 11 and 12 of page 24 of the bill, and the words "or maintained" on line 13 of the same page be stricken. Subsection 9(a) then would not foreclose the Comptroller General from promulgating a regulation requiring the preservation of existing records or those records kept in the "ordinary course of business" for a longer period than the organization would otherwise keep such records.

Conclusion

In the final analysis, the question of whether S. 1785 functions, after enactment, as a valuable tool in protecting the integrity of the legislative process without impinging on First Amendment freedoms will depend largely on the sense with which it is enforced. If this legislation results in the issuance of dragnet subpoenas to small, ill-funded, non-profit organizations, then the statute will probably

do some harm to the quality of public debate. On the other hand, we firmly believe that the Comptroller General and the Justice Department are fully cognizant of how tenuous the existence of such organizations sometimes is, how difficult it is for them to cope with complicated reporting requirements given the limitations on their budget and manpower, and how important their contribution to congressional resolution of complicated issues is, and that they will enforce the law with these considerations in mind. The statute, if changed in the ways that we have suggested, then can become a milestone in the restoration of public confidence in the government.

I appreciate this opportunity to convey to the Committee the Administration's views on this very important piece of legislation.

APPENDIX

Attached are the Administration's suggested amendments to H.R. 1180, the proposed "Public Disclosure of Lobbying Act of 1977," on the subject of government contracts.

A section-by-section analysis of the amendments is also attached.

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AMENDMENTS TO H.R. 1180

1. Add the words "Title I" between lines 4 and 5 on page 1.
2. (1) Delete the words "Federal officer or employee" on line 9, page 4, and at every other place where it appears in the Act, and insert in lieu thereof the words "Congressional member or employees";
- (2) Add the word "and" after the semicolon on line 14, page 4;
- (3) Delete the semicolon on line 17, page 4, and insert in lieu thereof a period;
- (4) Delete lines 18 through 21, page 4;
- (5) Section 2(B) is amended to read as follows:

"The term 'lobbying communication' means an oral or written communication directed to (A) a congressional member or employee to influence the content or disposition of any bill, resolution, treaty, nomination, hearing, report, investigation

and any

investigation by the Comptroller General authorized by the provisions of this Act; or (B) to any officer of the executive branch of the Government listed in sections 5312 through 5316 of Title 5, United States Code, to influence the content or disposition of (i) any bill, resolution or treaty which has been introduced or submitted in either House of Congress or any report of a committee of Congress thereon; (ii) any nomination submitted or to be submitted to the Senate of the United States or (iii) any hearing or investigation being conducted by the Congress or any authorized committee or subcommittee thereof."
3. Except as the word appears on line 5, page 1, delete the word "Act" wherever it appears and insert in lieu thereof the words "Title I".
4. Delete the word "or" where it first appears on line 12 and 16 on page 13 and add the words ", 201 or 202 or the rules issued pursuant to section 203" after "b" on those same lines.
5. Add the following after section 17 on page 25:

TITLE II

SECTION 201.

(a) Every organization that submits to an executive agency a bid or proposal on a contract that may reasonably be expected to have a value of \$10,000,000 or more shall file with the Administrator and with the agency concerned reports with respect to such contract that shall contain:

(1) an identification of the organization filing the report;

(2) a description of the contract and an indication of its estimated value;

(3) an identification of and a brief description of the duties with regard to the contract of each officer, director, employee, agent and representative of the organization, and any other person and organization acting on behalf of the organization or of an affiliate of an organization, who engages in one or more communications concerning the contract with an officer, employee, consultant or member of an advisory committee of the executive agency who is involved with the award or administration of the contract, provided that, communications for purposes of this section shall include both written and oral communications but shall not include communications addressed exclusively to technical or administrative matters;

(4) an identification of those persons who made more than 5 but less than 20 communications described in (3), and, in addition, an identification of those persons who made 20 or more such communications; and

(3) a description of any position and duties which a person identified under section 201(a)(3) held in the executive agency to which the bid or proposal was submitted/agency if within the three preceding the bid or proposal submission calendar years/such person had at any time been an employee or officer of the executive agency and occupied a civilian position there at grade GS-11 or above, or a military position in pay grade O-2 or above, or, in the case of a former consultant or a member of an advisory committee, if the salary rate at the time of such service was equal to or greater than the minimum salary rate for GS-11.

(b) The reports required by subsection (a) shall--

(1) be filed in such form and manner and at such times as the Administrator shall by rule determine, but the reports shall be filed at least at the time the organization submits a bid or proposal, annually until award or cancellation after the first report/and again prior to the award of the contract;

(2) be certified as a true and accurate report of the information required by this Title by the executive of the organization responsible for the contract;

(3) be retained by the Administrator for a minimum of five years following the end of the calendar year ending December 31 in which the reports were received; and

(4) be available to any person upon request subject to such reasonable terms and conditions pertaining to access as the Administrator may by rule prescribe. Copies shall be furnished at the actual cost of duplication as determined by the Administrator by rule.

SECTION 201(c).

If the executive agency requests bids or proposals on a contract

(1) which, in whole or in part, is (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) is in fact properly classified pursuant to such Executive order; or

(2) which would disclose intelligence sources and methods,

the reports required by this section shall be submitted to the executive agency concerned. The executive agency shall file such reports with the Director of the Office of Management and Budget.

SECTION 202.

Organizations shall maintain or cause to be maintained records sufficient to meet the reporting requirements of this Title as determined by the Administrator. Such records shall be maintained for a period of at least five years following the end of the calendar year ending December 31 in which the reports required by this Title were or should have been filed. This requirement, however, shall not supersede any longer record retention requirements established under other authority.

SECTION 203.

(a) The Administrator shall--

(1) issue guidelines and rules to interpret and implement the provisions of this Title in accordance with the provisions of subchapter II of Chapter 5 of Title 5, United States Code; and

(2) provide continuing assistance and oversight of agency implementation of the provisions of this Title.

(b) The Administrator shall study to determine what, if any, additional information might appropriately be reported by those parties who must file reports under this Title. The Administrator shall report the results of this study to the President who shall report to Congress within one year of the effective date of this Act.

SECTION 204.

Any information, allegation, or complaint received by the Administrator of the executive agency concerned regarding a violation of sections 201 or 202 or of the regulations promulgated pursuant to section 201 shall be expeditiously reported to the Attorney General by the Administrator or the head of the agency. This section shall not prohibit the Attorney General from authorizing the Administrator to seek voluntary compliance with this Title prior to the referral of an alleged violation to the Attorney General where it appears that the alleged violation was not knowing or willful.

SECTION 205.

The Administrator shall report annually to the President who shall submit the report to the Congress by March 30 on the reports received during the preceding calendar year ending December 31, and upon the activities of the Office of Federal Procurement Policy with regard to this Act. The report shall be in such form as the Administrator determines is consistent with the need for a full and meaningful presentation.

SECTION 206.

For purposes of this Title--

(1) the term "contract" means any agreement for the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government. The term includes, but is not limited to, contracts, options, claims, bilateral agreements and change orders:

(2) the term "Administrator" means the Administrator of Federal Procurement Policy as set forth in Public Law 93-400; and

(3) the term "executive agency" shall have the meaning given it by Section 105 of Title 5, United States Code, and shall also include the United States Postal Service and the Postal Rate Commission.

SECTION 207.

(a) Except as provided in subsection (b) the provisions of this Title shall take effect on the date of enactment.

(b) The reporting requirements of section 201 and the record keeping requirements of section 202 shall take effect on October 1, 1978.

SECTION 208.

The provisions of this Title shall terminate at the end of five years from the effective date of this Title.

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SECTION BY SECTION ANALYSIS

The proposed amendments to H.R. 1180 are addressed to the bill as it is currently amended in the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee.

Amendment No. 1. This amendment makes the lobbying portion of H.R. 1180 Title I (Amendment No. 5, concerning Government contract activities adds Title III).

Amendment No. 2. This amendment redefines the term "lobbying communications". The amendment restructures the current definition in H.R. 1180 and makes clear that in order for a communication to be a "lobbying communication" with respect to an executive branch official, it must be directed to that official to influence a matter before Congress. A "lobbying communication" could concern any bill, resolution or treaty which has been introduced in either House of Congress, or in the case of a treaty, which has been submitted to Congress and any report of a committee of Congress.

Although we continue to explore the issue, it is our judgment at this time that with respect to contact with covered executive branch officials (but not necessarily with congressional personnel) communications prior to introduction or submission should not be a "lobbying communication". The primary reason for this position is that such pre-introduction contacts with executive branch officials would greatly expand coverage of executive branch contacts into areas that should be the focus of a separate bill or Executive order. Limiting the coverage of those officers paid in accordance with the executive schedule in H.R. 1180 to bills, resolutions and treaties after introduction or submission (1) draws a clear line marking the time at which "lobbying communications" will begin, (2) includes the most influential executive branch communications without general executive branch coverage and (3) because of the extensive review the bills, resolutions and treaties receive after introduction or submission by the Congress, does not exclude significant communications.

The amendment would cover nominations after submission to the Senate and also during the development of the nomination within the executive branch since in this unique area contacts prior to the submission of the nomination to the Senate are critical and ordinarily within a limited time frame. The amendment would also cover hearings and investigations being conducted in Congress, but not those conducted in the executive branch.

Executive branch rulemaking, hearings, investigations, adjudications and similar exclusive executive branch activities are not covered under the definition of "lobbying communications." An entirely different set of considerations is relevant to what lobbying disclosure and registration provision may be appropriate to cover communications to influence those activities. It is strongly felt that they should be the subject of a separate bill.

Amendment No. 3. This amendment makes the definitions contained in section 2 of H.R. 1180 applicable to the entire Act and changes the word "Act" where it otherwise appears in Title I to "Title I". Additional definitions for Title II appear in section 206.

Amendment No. 4. This amendment makes the civil and criminal provisions of section 13(a) and (b) of Title I applicable to the requirements for reports in section 201, the record keeping requirements of section 202 and the regulations promulgated under section 203.

Amendment No. 5. This amendment adds Title II to H.R. 1180 providing coverage of Government contracts.

The provisions concerning Government contracts have been made a separate Title because the efforts of Government contractors to obtain Government contracts are fundamentally different from the lobbying of members of the legislative branch concerning matters before Congress. The objectives of these activities are different, different people are involved with these activities, the costs associated with the marketing of goods and services are different from "lobbying" expenses, and the preparation of bids and proposals and the administration of contracts are not typically considered lobbying activities. It would therefore be misleading to include contracting activities with the lobbying activities of a corporation. Title II does not cover grants by the executive agencies. This does not mean that grants should not be covered, but recognizes that grants cannot be covered in the same manner as Government contracts. Further study is necessary, however, before provisions covering grants can be devised. It should be noted that the segments of grant making upon which disclosures could practically be required may be relatively small if grants to State and local governments, to State educational institutions and nondiscretionary grants are excluded.

Section 201(a) requires that every organization which submits a bid or proposal to an executive agency on a contract which could reasonably be expected to have a value of \$10,000,000 or more shall file a report with the Administrator of the Office of Federal Procurement Policy with respect to that contract. This means that every organization shall submit a report covering its own activities and the activities of each of its affiliates, officials, or agents unless that affiliate, official or agent has filed a report under this section of which a further report would be duplicative. This applies to each contract modification, claim change order, or option which equals or exceeds \$10,000,000. For example, a report would be required for a contract of \$15,000,000, and for a \$12,000,000 supplemental agreement to the contract, but a report would not be required (and the Administrator could not separately require under section 201(b)(1)) for an amendment to the contract of less than \$10,000,000. This section would be applicable to each executive agency within the meaning of section 105 of Title 5, United States Code. The definitions contained in section 2 would be applicable to this Title.

Each report shall contain an identification of the organization making the bid or proposal and a description of the contract. The report shall also indicate the estimated value of the contract but it is not intended to result in the disclosure of confidential financial information or other information which would be prejudicial to the objectivity or fairness of the bid process. In a situation where the reporting organization believes that the filing would require the disclosure of confidential information and when permitted by regulations of the Administrator, the organization may report the estimated value of the contract in ranges.

Section 201(a)(3) requires that each report identify every officer, director, employee, affiliate, or agent of the organization or any other person or organization acting on behalf of the organization who communicates with an officer or employee of the executive agency or any consultant or member of any advisory committee of the executive agency if they are involved with the award or administration of the contract. (The term officer and employee of the executive agency are intended to have the meaning set forth in section 2104 and 2105 of Title 5, United States Code.) Communications which exclusively concern technical or administrative aspects of the contract are not communications which would require the identification of the organization's employees or which would count in the totals required by section 201(a)(4). The technical or administrative matters

would include discussions of contract specifications and requirements, payment and delivery provisions, quality assurance requirements, etc., as distinguished from marketing, adjustment seeking, promotional or similar discussions. Within these parameters and under the provisions of the Administrative Procedures Act, the Administrator pursuant to section 203(b) is expected to completely define the type of technical and administrative matters exempted from this section.

It is recognized that the date when the reporting period begins will not be obvious in all situations. However, the period ends with the conclusion of the \$10,000,000 contract action. We believe that the Administrator will be able to rulemaking to more surely and meaningfully establish the beginning time periods than can be done by legislative provision. We would expect the Administrator to promulgate rules under section 203(b) which are consistent with the disclosure purposes of this Title and with the desire to keep the reporting burden to a minimum.

In addition to identifying any officer, director, or affiliate, and agent of the organization and any other person and organization acting on behalf of the organization, section 201(a)(3) the organization must provide a brief description of the duties of these persons and their relationship with respect to the contract. It is intended that the description of the duties be sufficiently detailed to permit an understanding of the responsibilities of the person and organization with regard to the contract. This requirement should not require a detailed or burdensome listing of communications to indicate the purpose of the communication or the person to whom the communication was directed. Where an organization is retained by the reporting organization, the organization makes communications with contracting personnel of the executive agency, the organization must be identified and its duties explained as well as the employees of the organization who made the communications.

The overwhelming majority of contracts which have a value in excess of \$10,000,000 are entered into pursuant to competitive contracting procedures. Formal advertising procedures are used for contract actions of \$10,000,000 or more in about 34 of these procurements. Because the award of a contract occurs by a public opening of sealed bids, the

award is ordinarily made to the lowest responsive, responsible bidder and because improprieties are carefully watched by the competitors for such awards, the potentially useful impact of this legislation upon formally advertised procurements is significantly less than in negotiated procurements. Negotiated procurement procedures encourage and indeed are dependent upon thorough and completed discussions between contractor personnel and contracting personnel of the executive agencies. These communications are crucial to the success of negotiated procurements and it is not the intention of these provisions to chill, disparage or make these communications suspect. It is, however, the intention of these provisions on these high value government contracts to disclose who it is that communicates with Government contracting officials and what these persons' responsibilities are in the process. These requirements are intended to be complementary to the existing body of law and regulations designed to ensure the fairness and competitive nature of government procurement.

Section 201(a)(4) requires that in addition to the requirements of section 201(a)(3), those persons identified in section 201(a)(3) report if they have had during the same reporting period more than five but less than twenty communications and also whether they have had more than twenty communications. The purpose of this requirement is to more fully disclose the degree of contact in broad range these individuals had during the contracting award process. As in section 201(a)(3), contracts of an exclusively technical or administrative nature need not be counted.

Section 201(a)(5) recognizes the existence of and seeks to identify and quantify what can be a special relationship between contracting personnel of an executive agency and former employees of that same agency. The section requires a description of the position and duties which any officer, director, employee, affiliate or agent or other person identified in section 201(a)(3) held during this last three years of employment in an executive agency to which the bid or proposal has been submitted. This reporting requirement is activated if such person was employed with the executive agency within three calendar years preceding bid or proposal submission and if the prior position was at or above grade GS-11 of the General Schedule if the position was a civilian position, or if the position was a military position, if the position was at or above pay grade 0-2. A report

would be required under this section for a contractor's employees who, although they may not have been full-time members of the competitive civil service, were an employee, a consultant or a member of an advisory committee of an executive agency within the past three calendar years and who received a salary at a rate in excess of a minimum rate at the time of such employment which rate was greater than that of a GS-11 or G-7.

The best estimate is that there are approximately 600 contract actions annually of \$10,000,000 or more. These procurements account for approximately 40% of all contract dollars expended. We believe that the use of the \$10,000,000 threshold maximizes effective reporting under this Title without placing a significant reporting and record keeping requirement on those contractors who are most likely to be unable to respond efficiently to them.

It is expected that the Comptroller General and other agencies of Government who have access to the records and reports of these organizations, as well as members of the public, will be alert to and report to the Administrator and the concerned agencies appearances of inappropriate activities on behalf of or by the organization.

Section 201(b) requires that the reports required by Section 201(a) be filed at such time and in such manner as the Administrator of the Office of Federal Procurement Policy prescribed in regulations, which must be issued in conformity with subchapter 2 of Chapter 5 of Title 5, the United States Code. The reports at a minimum should be filed by all bidders or offerors at the time they submit a bid or proposal, at the end of each twelve-month period after the first report if an award has not been made or the procurement canceled and again immediately prior to the award of the contract. It is the intent of this section that the Administrator minimize the period between the latter report and the award of the contract during which additional contacts might be made. The content of the report should be considered in the awards process by the executive agency. However, it is not the intent of this title to establish that a report indicating questionable activity will necessarily result in the cancellation or other adverse action with regard to an award of a contract. While the Administrator may require reports in addition to those required at the time of bid or offering and immediately prior to award, such requirements should be invoked only for the most compelling and unusual circumstances to avoid the resulting record keeping burden.

Section 201(b)(2) requires that the report be signed by the officer of the organization responsible for the contract and that he certify that it is a true and accurate report. It is intended that such certification be covered by 18 U.S.C. 1001. The Administrator is required by Section 201(b)(3) to retain a copy of each report for a minimum of five years from the end of a calendar year ending December 31 in which the report was received. Section 201(b)(4) requires that all reports be made available by the Administrator to any person who so requests. The Administrator is given the authority to issue rules defining the terms and the conditions of access for such individuals. Copies of such reports will be furnished at the actual cost of duplication.

Section 201(c) requires that when an executive agency undertakes a contract action which would result in reports under this section and the contract is, in whole or in part, properly classified under Executive Order No. 11652 or would disclose intelligence sources and methods which the Director of Central Intelligence is responsible to protect under 50 U.S.C. 403g, the reports required by this section are to be filed with the procuring agency. The agency shall then submit the report to the Director of the Office of Management and Budget. If the agency or the Director believes that any part of the report does not meet classification or nondisclosure criteria, the appropriate procedures should be followed to make the information available to the public. Copies of the reports may be requested under the Freedom of Information Act, 5 U.S.C. 552.

Section 202 requires that organizations keep records sufficient to satisfy the reporting requirements of the Title. The Administrator may by rule determine or supplement these record keeping requirements. These records shall be maintained for a period of five years following the end of the calendar year ending December 31 in which the reports were required to be filed. If other law or regulation requires a longer record retention period, this provision shall not supersede that longer requirement. Organizations are also required to provide that those upon whom organizations must report also keep the

necessary records. For example, if an organization retains an organization to make communications required to be reported by this title, that organization is also required by this section to provide that the retained organization keep the necessary records.

Section 203 requires that the Administrator develop interpretative guidelines within the meaning of Section 553 of Title 5, United States Code and that the Administrator issue rules pursuant to the informal rulemaking provisions of subchapter 2 of Chapter 5 of Title 5, the United States Code. The Administrator is given the responsibility to provide assistance to and oversight of the implementation of the provisions of this title by the executive agencies and the contractors. The Administrator is also given the responsibility to study what, if any, other information might appropriately be the subject of a requirement for reporting by government contractors, consistent with the disclosure purposes of this title and with the intention to minimize the reporting burden upon organizations. This study should attempt to isolate other information such as expenditures by the organization the disclosure of which on the part of government contractors will enhance the public perception of a fair, open and objective procurement process.

Section 204 provides the enforcement provisions in addition to the criminal penalties which would be applicable to Section 201 and 202 and the regulations of Section 203. Section 204 requires that any information alleging violations of Section 201 and 202 and the regulations of Section 203 or any complaints received concerning such violations by the Administrator or agency head concerned be reported to the Attorney General. This section does not prohibit the Attorney General from authorizing the Administrator to seek voluntary compliance with this title prior to the referral of the allegations and complaints to the Attorney General when it appears that the alleged action is not knowing or willful. It is anticipated that the Attorney General will enter into agreements to this effect with the Administrator. In addition, the certifications required by Section 201(b)(2) shall be covered by 18 U.S.C. 1001.

Section 205 requires that the Administrator report annually to the President who in turn shall report to the Congress by March 31 of each year on the activities of the Administrator during the calendar year ending December 31.

Section 206 defines the term "contract", "Administrator" and "executive agency". The definition of "contract" parallels the definition in the legislation now pending pertaining to the distinction between contracts, grants and cooperative agreements.

Section 207 makes the reporting requirements of Section 201 applicable as of October 1, 1978. In the interim, the Administrator should promulgate and finalize the guidelines and regulations required by this title.

Section 208 makes the "sun set" on the provisions of this title subject, of course, to extension and/or amendment prior thereto. In other words, unless the provisions of this title are extended by statute, they will lapse and have no further force and effect at the end of five calendar years from the effective date of this title.

Consideration was initially given to a requirement upon government contractors to report certain gifts and certain other entertainment given by contractors to government employees concerned with the award of contracts. Coverage of gifts and entertainment expenses are not, however, provided by this title. These expenses are not included in part because Executive Order No. 11222 and agency regulations implementing that Order and other provisions generally make unlawful the receipt by any government employee of gifts from any organization which is seeking contractual or business relations with the agency. Therefore, a provision for the reporting of gifts by organizations covered by this title would almost seem to countenance the receipt of such gifts by requiring the reporting of them when other law makes it unlawful for government employees to receive them. Furthermore, a general review of standards of conduct provisions by the Department of Justice is under way. In these circumstances it would be improvident to proceed with piecemeal coverage of government contractors.

Consideration was also given to procedures which would require disclosure of other areas of questionable expenditures and activities by organizations seeking or having contractual relationships with executive agencies. However, meaningful expenditures to influence a contract award are not easily identified. Any such identification involves potentially staggering reporting and record keeping requirements which would be placed upon these organizations. Furthermore, there are a significant number of requirements currently required of government contractors permitting access to information about expenditures by organizations to acquire government contracts. The complexity of these existing requirements and the paucity of information concerning the particular expenditures

about which meaningful disclosures could be made has led to the study requirement of Section 203(c) of this title. It is also believed that the reporting requirement with regard to contacts between government contractors and contracting personnel of the executive agencies and specifically the activities of former employees of executive agencies with regard to contracting activities subsequent to their departure should provide a basis for a better factual understanding of the seriousness and the impact of such activities in the procurement process. Such information can also be a basis for evaluating the impact of limitations on post-government employment of contracting personnel.

DEPARTMENT OF JUSTICE
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

September 14, 1977

Honorable Abraham Ribicoff
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During my testimony before your Committee on August 2, 1977, on the subject of S. 1785, you requested that I supply the Committee with certain additional information. This letter will respond to your requests.

First, you may recall that when I expressed the Administration's opposition to the use of "lobbying solicitations" as an independent threshold test for the applicability of the bill's registration and reporting requirements, you requested that I supply examples of organizations that would meet the \$5,000 minimum expenditure test for lobbying solicitations alone contained in Section 4(b)(3) of the bill. As you know, past lobbying laws have not required that lobbying organizations register or disclose any information concerning lobbying solicitations as defined in S. 1785. Consequently, no government records exist which would permit an authoritative identification of individual organizations which would meet the test in Section 4(b)(3). Nevertheless, it is easy to hypothesize cases in which groups of citizens with strong feelings about a particular issue before Congress and carrying on their activities far from Washington might place a single advertisement in a newspaper or magazine which would cost more than \$5,000. We are advised, for instance, that the cost of a half-page advertisement in the daily edition of the Los Angeles Times is \$5,280.00. In the New York Times the cost is \$7,468.00, while in the Washington Post it is \$5,562.00 and in Time magazine it is \$20,590.00. If the advertisement urged members of the community to write to their representatives in Congress, the sponsoring



organizations would be subjected to the registration and reporting requirements of the bill. That this would be the case might never occur to the members of an organization which had never sent any members or paid lobbyists to Washington for the purpose of contacting Congress directly. Moreover, editorials in the same publication taking the same position as the advertisement and also urging citizens to write to Congress would not be subject to the bill's provisions.

In the final analysis, however, we believe that when proposed legislation threatens to intrude on sensitive activities which are at the heart of the protections afforded by the First Amendment, the proponents of the potentially inhibiting regulatory program should bear the burden of producing clear and convincing evidence that compels enactment of the legislation's more dangerous features.

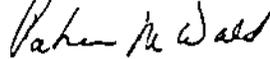
You may also recall that I expressed the Administration's view that any legislation governing lobbying communications directed at the Executive Branch should only include within the definition of "Federal officer or employee" those individuals holding positions at Executive Level V or above. At present, the definition set forth in Section 3(e)(3) of S. 1785 includes all employees at GS levels 15-18 and pay grades 0-6 and above as well. I noted in my testimony that there are approximately 45,000 Federal employees at GS levels 15-18 and pay grade levels 0-6 and above. You asked for information on the number of Executive Branch employees at Executive Level V and above.

The Office of Management and Budget has been in contact with the U.S. Civil Service Commission on this question, and we are advised that, as of June 30, 1977, there were 701 such employees working full-time and 32 such employees whose employment was intermittent. These figures confirm our belief that the administrative burden on lobbying organizations would be significantly reduced by covering only employees at Executive Level V and above while significant lobbying of the Executive Branch would remain subject to effective registration and reporting requirements.

- 1 -

I trust that this information will be of use to the Committee in the important task of reforming the lobbying law, an effort which the Administration continues to endorse enthusiastically. Please contact us if we can be of any further assistance.

Sincerely,



Patricia M. Wald
Assistant Attorney General
Office of Legislative Affairs

Chairman RIBICOFF. Mr. Keller, please?

Mr. KELLER, Congressman Edwards is here. Would you stay at the table. Mr. Edwards only has a brief statement.

Congressman Edwards, Mr. Keller would be more than pleased to sit aside for a few minutes and give you an opportunity, if you would like, to be heard now. I know you are busy on the floor.

**TESTIMONY OF HON. DON EDWARDS, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. EDWARDS. Thank you, Mr. Chairman.
May I put my statement in the record?

Chairman RIBICOFF. The entire statement will go in the record as if read.

Mr. EDWARDS. Thank you.

Mr. Chairman, if there is going to be legislation in this area, I hope that it is going to be very carefully drawn because we are dealing with constitutional rights which we have always tried to encourage the exercise of. It would be a shame if the lobby bill caused people to be frightened of exercising their constitutional rights. I presume that the proponents of this legislation have some sound reasons to urge its enactment. I suppose from the newspaper accounts that there are lobbyists who improperly influence Members of Congress without the public's knowledge—providing trips, meals, booze, or whatever. But I think if this is true, the proponents should present testimony describing these outrages and present legislation to prevent this kind of abuse.

Furthermore, the legislation must be very carefully drawn. It should require public disclosure by professional lobbyists, but not discourage the exercise of constitutional rights by scaring off citizen groups with mountains of paperwork plus the possibility of civil and criminal sanctions if they do not register correctly.

I suggest, Mr. Chairman, that this bill, S. 1795, and all of the sister bills in the Senate and the House fail this modest test.

Let me just give you some examples. Suppose there was in Hartford the Hartford Bird Watching Society consisting of 10 or 20 people who were interested in some game refuge bill in Washington. They hired some local person for \$20 a week to do some lobbying and this particular person telephoned 15 offices and dealt with staff members in Congress. Under this bill the organization must register as a lobbyist, file quarterly reports and be subject to criminal sanctions. Suppose also that a mom and pop real estate firm of just two people, is interested in a bill before a housing committee. Each husband and wife calls eight offices. They are lobbyists, they must register and file quarterly reports. Now neither organization is going to do this when they hear that they are going to go into the computer in Washington, that they are registered lobbyists and that there are civil and criminal penalties involved.

Our experience in California illustrates the unfortunate affect of such a law on small grassroots neighborhood organizations. Since 1974 we have had proposition 9 as part of our constitution, and a big lobbyist, Allen Tebbits summed it up the other day, "The greatest irony of all in the operation of proposition 9 is that the endangered