

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	John M. Harmon to James T. McIntyre, Jr. (8 pages)	2/7/1978	P5

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9589

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials]

ds78

RESTRICTION CODES**Presidential Records Act - [44 U.S.C. 2204(a)]**

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

SCHEDULE FOR GIL CASELLAS
as of 7/6/94 - 6:00 p.m.

Thursday, July 7

3:00 - 6:00 p.m. Briefing on EEOC Federal Sector Responsibilities and Age Issues

**@ Leadership Conference on Civil Rights (LCCR) Conference Room
1629 K Street, N.W.
Suite 1010
(202) 466-3311**

*** Paul Steven Miller and Ellen Vargyas will attend the briefing. Paul Igasaki will participate in the briefing by telephone.**

The first part of the briefing will be conducted by Nick Inzeo, EEOC's Associate Legal Counsel for Legal Services. The briefing will include an overview of the EEOC's role in the federal sector eeo process, recent changes to that process, and the proposed legislation (Federal Employee Fairness Act) that seeks to consolidate all federal sector eeo responsibility in the EEOC.

The second part of the briefing will be conducted by Elizabeth Thornton, EEOC's Acting Legal Counsel, and Joseph Cleary, Director of the ADEA Division of the EEOC's Office of Legal Counsel. Ms. Thornton and Mr. Cleary will provide an overview of the ADEA and the Older Workers Benefit Protection Act of 1990, and they will discuss the other related issues that are likely to be raised during the confirmation process.

These briefings are meant to be casual and interactive with a lot of time for questions and answers.

June 21, 1994

Steve,

This is to follow up on our conversation yesterday about coordination of matters related to the confirmation of Gil Casellas and the other two EEOC nominees. You asked for a list of the people from the White House who have been involved and who come to the planning meetings. The regulars are:

- Antonella Pianalto, Personnel
- Dina Kaplan, Personnel (Veronica Biggins assistant)
- Suzanna Valdez, Public Liaison (I don't know the extent of Ben Johnson's involvement, but I know that Suzanna consults him on a lot of issues.)
- Eric Senunas, Legislative Affairs (Paul Carey is also advising Eric)
- Keith Boykin, Media Affairs (Specialty Press)
- Jess Sarmiento, Media Affairs (Hispanic/Minority Press)

Additionally, Mari Carmen Aponte is very involved. I don't know if Mari Carmen still has an official affiliation with the White House, but she was very involved in the transition, particularly on issues/staffing for Justice.

At the moment, most of the activity is political, with both the interested communities and the Hill. There isn't much policy stuff* going on, but I think that will change as soon as we have a better idea of a hearing date. The minority staff from Labor & Human Resources called yesterday to request (or more like demand) a meeting with Igasaki and Miller next week. We are checking that out with Kennedy's staff. As soon as Hill meetings start, we will have to focus on the substantive preparations for the nominees. That is when I would think you or your office may be called upon for some direction. Does that make sense?

Finally, the briefing book you received is not complete and we expect to add more material as time goes by. I will send you copies of anything we add.

As always, thanks for your help.

Clare

* my mastery of the English language never ceases to amaze me

18-May-1994 07:39pm

TO: Carol H. Rasco
FROM: Donsia Strong
Domestic Policy Council

SUBJECT: eeoc

Yesterday, I got a call from Ron Brownstein, LA Times which I did not return. Today I picked his call. He was inquiring as to the process for EEOC chair nomination. I immediately referred him to Veronica and called her to tell her he would be calling. I also told her of the meeting this morning. (I had previously told her we were trying to schedule a meeting to flesh out the issues and she told me to invite Craig.) I told her that we had identified 10 issues but 4 or 5 would be critical. I also told her that the timing of the chair announcement would be key on the other nominees hearings because w/o a potential chair every hearing would have to through a "chair" hearing on management. I

Press RETURN to continue, GOLD MENU for options or EXIT to cancel

chair every hearing would have to through a "chair" hearing on management. I told her she should expect a call from Deval who was getting a lot of flack and who had some suggestions.

I have learned since I spoke to you that Public Liasion was upset that they were not invited. (Although I tried, they do not have e-mail.) They have since learned that the meeting started out as a meeting to discuss Landgraf, a case which said the Civil Rts act of 91 is not retroactive on the employment cases. We were approached in the scheduling interim by Eric Senunas, Leg Affairs to pull together those who would know the issues for a confirmation hearing. Steve and I have tried to do this over the last two weeks and were only able to schedule last night. As we discussed the issues it became increasingly clear that many of the issues--backlog; slowness of case handling were management issues which can only be addressed by a chair.

The meeting ended with Deval and I agreeing to find out where the groups would be on the ~~legislation to move the EEO offices from the Depts. to EEOC.~~ (This is the legislation we have been talking about since Nov. and which we had to meet with Lader about.) In addition, To gauge how close we would be to announcing a chair before Rep. Owen's threatened field hearing in NY regarding the agency and the Administration's lack of civil rights commitment and vision I would pass on this info onto Veronica and try to get some timing.

Press RETURN to continue, GOLD MENU for options or EXIT to cancel

pull together those who would know the issues for a confirmation hearing. Steve and I have tried to do this over the last two weeks and were only able to schedule last night. As we discussed the issues it became increasingly clear that many of the issues--backlog; slowness of case handling were management issues which can only be addressed by a chair.

The meeting ended with Deval and I agreeing to find out where the groups would be on the legislation to move the EEO offices from the Depts. to EEOC. (This is the legislation we have been talking about since Nov. and which we had to meet with Lader about.) In addition, To gauge how close we would be to announcing a chair before Rep. Owen's threatened field hearing in NY regarding the agency and the Administration's lack of civil rights commitment and vision I would pass on this info onto Veronica and try to get some timing.

In the meantime Deval would try to get in to visit with President and he would respond to Rep. Owens' request to meet with him.

No one else was "assigned" to do anything.

I think Public Liasion believes all civil rights inquiries and policies should start in that office.

----- BOTTOM -----

Press RETURN to continue, GOLD MENU for options or EXIT to cancel

FEDERAL EQUAL EMPLOYMENT OPPORTUNITY REPORTING ACT OF 1986

Legislation authorizing the Equal Employment Opportunity Commission (EEOC) to subpoena employees of federal agencies not in compliance with EEOC annual reporting requirements and to seek enforcement of such subpoenas in federal court would violate the doctrine of separation of powers by undercutting the President's power to provide a single voice for the Executive Branch in the enforcement of the laws.

One part of the Executive Branch may not sue another part, as there can be no case or controversy between agencies that are all subject to the direction and control of the President.

The proposed legislation's expansion of EEOC litigating authority would also undercut the Attorney General's ability to speak for the Executive Branch with a single voice in the courts.

August 12, 1986

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL,
CIVIL RIGHTS DIVISION

This responds to your request for comments on §§ 4 and 5 of a draft bill, the Federal Equal Employment Opportunity Reporting Act of 1986 (Act).

The bill would require federal agencies to file annual reports with the Equal Employment Opportunity Commission (EEOC) demonstrating their compliance with several equal employment opportunity laws and affirmative action requirements. Sections 4 and 5 of the bill give the EEOC new authority to compel compliance with the reporting requirements. We have three objections to § 4.

First, § 4 authorizes the EEOC to issue a subpoena to any employee of the United States government and to seek enforcement of that subpoena in court.¹ *Id.* § 4(a)(2), (4). We believe the Department should oppose this provision. The issuance of a subpoena to another federal agency raises questions both of constitutionality and propriety. Fundamentally, the Department should oppose this provision because we believe that to permit the EEOC to seek enforcement of its subpoena in court is unconstitutional. The EEOC is an agency of the federal government, whose members are appointed by the President. 42

¹ The EEOC already has the authority to subpoena individuals being investigated. 42 U.S.C. § 2000e-9 (adopting investigative powers of the National Labor Relations Board, *see* 29 U.S.C. § 161). The EEOC has independent litigating authority. 42 U.S.C. § 2000e-4(b)(2).

U.S.C. § 2000e-4(a). The Constitution provides for a tripartite system of government, with the President as the head of the Executive Branch. The President alone may speak for the unitary interests of that branch. As a result, one part of the Executive Branch may not sue another part; there can be no case or controversy between agencies that are subject to the direction and control of the same person.² Therefore, the EEOC may not be authorized to seek the aid of a court in enforcing compliance with its subpoena against another part of the Executive Branch.

As to matters of propriety, the terms of the draft bill indicate that the EEOC would most often issue these subpoenas to the heads of agencies, including, we must assume, cabinet officers. It would be awkward for such senior officials to decline to comply with an EEOC subpoena even on constitutional grounds without adverse publicity, and we do not think the Department should support a bill that would put them in that position.³

Second, we object to § 4 because it expands the EEOC's independent litigating authority by removing, for suits against federal employees, the present requirement in 42 U.S.C. § 2000e-4(b)(2) that the Attorney General conduct any EEOC litigation in the Supreme Court. Act, § 4(a)(2)(C). If the Executive Branch is to speak with a single voice to the courts, it is obviously imperative that it be represented in the Supreme Court by one individual -- the Solicitor General. The importance of having central direction and control of the government's litigation underlies the Department's traditional resistance to any efforts to erode the Attorney General's litigating authority in the lower courts. The issue becomes even more important when the question is what position the Executive Branch will take before the Supreme Court. Thus, even if there were not constitutional objections to permitting the EEOC to sue a federal employee or agency, we believe that the Department should oppose permitting the EEOC to appear in the Supreme Court without direction from the Attorney General.

Third, we object to § 4 because it provides individuals with a private right of action to compel submission of a tardy agency

² The courts have permitted a limited exception to this rule where it is clear that there is a justiciable case or controversy, usually evidenced by the presence of a truly adverse private party. "Proposed Tax Assessment Against the United States Postal Service," 1 Op. O.L.C. 79 (1977).

³ Although styled as a command, a subpoena has no effect until a court issues an order directing that the parties comply with it. W. Gellhorn, C. Byrnes, & P. Strauss, Administrative Law 553-54 (1979).

report. If the EEOC does not issue a subpoena or sue to compel compliance with its subpoena, any employee of, applicant for employment with, or recognized labor organization of the non-complying agency may sue the agency and collect attorney's fees if the suit is successful. Id. § 4(b). Normally, we would of course have no constitutional objection to a private cause of action established by law. We are concerned in this case, however, because § 4(b) essentially permits a third party to step into the EEOC's shoes to pursue a case which we believe it would be unconstitutional for the EEOC to pursue on its own. We believe the Department should oppose the proposed private right of action unless § 4 is redrafted to eliminate our objections to the EEOC's role.

Douglas W. Kmiec
Deputy Assistant Attorney General
Office of Legal Counsel

KF 5406
1986
LAW

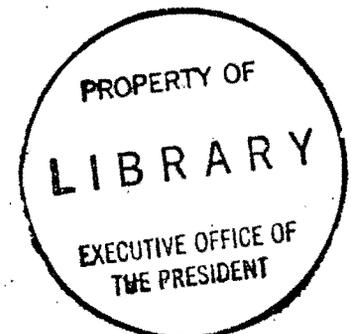
FEB 22 1993

EXECUTIVE OFFICE OF THE
PRESIDENT LAW LIBRARY
Room 528 OEOB
Washington, DC 20500

OPINIONS
OF THE
OFFICE OF LEGAL COUNSEL
OF THE
UNITED STATES DEPARTMENT OF JUSTICE
CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE
PRESIDENT OF THE UNITED STATES,
THE ATTORNEY GENERAL
AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT
IN RELATION TO
THEIR OFFICIAL DUTIES

VOLUME 10
(PRELIMINARY PRINT)

1986



AUTHORITY OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO
CONDUCT DEFENSIVE LITIGATION

In general, the Attorney General has plenary authority over the supervision and conduct of litigation to which the United States is a party. Courts have narrowly construed statutory grants of litigation authority to agencies to permit such power only when the authorizing statutes are sufficiently clear and specific to ensure that Congress intended an exception to the general rule.

The litigation authority of the Equal Employment Opportunity Commission is limited to that which is specifically provided by statute, namely, enforcement actions brought against private sector employers. 42 U.S.C. §§ 2000e-4(b), 2000e-5, 2000e-6. Accordingly, the Commission may not independently defend suits brought against it in connection with its federal sector administrative and enforcement and adjudicative functions, or actions brought against it by its own employees challenging Commission personnel decisions. Such suits are to be handled by attorneys under the supervision of the Attorney General.

June 21, 1984

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL,
CIVIL DIVISION

This responds to your memorandum seeking the views of this Office regarding the role that the Equal Employment Opportunity Commission (EEOC or Commission) plays in defending suits brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended, against the EEOC in connection with its Federal sector administrative enforcement and adjudicative responsibilities, or in actions by its own employees challenging Commission personnel decisions. You have advised us that it has been the position of the Civil Division that the EEOC lacks independent litigating authority when it is sued as a result of personnel decisions regarding Federal employment. The EEOC contends that it can represent itself in court any time it is named as defendant.

As discussed below, we conclude that, in view of the Attorney General's plenary authority over litigation on behalf of the United States and the narrow construction necessarily accorded exceptions to this authority, the EEOC's litigating authority in Title VII suits is limited to that which is specifically provided by statute, namely, enforcement actions brought against private sector employers. See 42 U.S.C. §§ 2000e-4(b), 2000e-5, 2000e-6. Likewise, the Commission's general grant of litigating authority, as set forth in § 2000e-4(b) and Reorganization Plan No. 1 of 1978, 92 Stat. 3781 (reprinted in 42 U.S.C. § 2000e-4 note (Supp. V 1981)), cannot

fairly be read to embrace litigation involving challenges to its personnel decisions.¹ Nevertheless, while we conclude that the Commission lacks the authority to litigate independently in these cases, we believe that Commission attorneys may assist Department of Justice, or other duly authorized, attorneys in such cases, or otherwise participate in such litigation under the general supervision of the Attorney General.²

I. Background

A. The Attorney General's Litigating Authority

Questions concerning the litigating authority of Executive Branch agencies necessarily must begin with a recognition of the Attorney General's plenary authority over the supervision and conduct of litigation to which the United States, its agencies and departments, or officers thereof, is party. This plenary authority is rooted historically in our common law and tradition, see Confiscation Cases, 74 U.S. (7 Wall.) 454, 458-59 (1868); The Gray Jacket, 72 U.S. (5 Wall.) 370 (1866); and, since 1870, has been given a statutory basis. See 28 U.S.C. §§ 516, 519.³

¹ Although you did not specifically request our views regarding the Commission's authority to conduct defensive litigation arising out of its enforcement responsibilities against private sector employers under Title VII, the Equal Pay Act, 29 U.S.C. § 206(d), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., because the issue appears to remain unsettled between the Department and the Commission, we have provided our views in Part II.B in an effort to provide a comprehensive analysis of the Commission's authority to conduct defensive litigation on its own behalf.

² We understand that in October 1980, the Assistant Attorney General for the Civil Division reached an agreement with the Commission's Deputy General Counsel that the Civil Division "would, as a matter of practice, permit EEOC to defend itself in these lawsuits."

³ 28 U.S.C. § 516 provides:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 519 provides:

(continued...)

See generally United States v. San Jacinto Tin Co., 125 U.S. 273 (1888). The rationales underlying this grant of plenary authority to the Attorney General are many. The most significant are the need to centralize the government's litigation functions under one authority to ensure (1) coordination in the development of positions taken by the government in litigation, and consideration of the potential impact of litigation upon the government as a whole; and (2) the ability of the President, as head of the Executive Branch, to supervise, through the Attorney General, the various policies of Executive Branch agencies and departments as they are implicated in litigation. Because of his government-wide perspective on matters affecting the conduct of litigation in the Executive Branch, the Attorney General is uniquely suited to carry out these functions. See United States v. San Jacinto Tin Co., 125 U.S. at 278-80. See also Report of the Attorney General's Task Force on Litigating Authority (Oct. 28, 1982)); "The Attorney General's Role as Chief Litigator for the United States," 6 Op. O.L.C. 47 (1982).

Notwithstanding Congress' determination that the litigating functions of the Executive Branch be centralized in the Attorney General, the Attorney General's "plenary" authority over litigation involving the United States is limited to some extent by the "except as otherwise authorized by law" provisions contained in 28 U.S.C. §§ 516, 519. Nevertheless, mindful of the considerations supporting such centralization, the courts have narrowly construed statutory grants of litigating authority to agencies in derogation of the responsibilities and functions vested in the Attorney General, and have permitted the exercise of litigating authority by agencies only when the authorizing statutes were sufficiently clear and specific to ensure that Congress indeed had intended an exception to the general rule. See, e.g., Case v. Bowles, 327 U.S. 92 (1946); ICC v. Southern Railway Co., 543 F.2d 534 (5th Cir. 1976), aff'd, 551 F.2d 95 (1977) (en banc); FTC v. Guignon, 390 F.2d 323 (8th Cir. 1968). See generally Report of the Attorney General's Task Force on Litigating Authority, supra; 6 Op. O.L.C. 47, supra.

Moreover, such exceptions are generally construed to grant litigating authority only with respect to the particular proceedings referred to in the statutory provision, and not as a broad authorization for the agency to conduct litigation in which

³ (...continued)

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States Attorneys, Assistant United States Attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

it is interested generally. Id. See also "Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Governmental Entities," 7 Op. O.L.C. ____ (1983).

In short, the general rule regarding litigating authority on behalf of the United States is that it is presumed to be vested exclusively in the Attorney General, to be exercised under the general supervision of the Attorney General or his delegees within the Department of Justice,⁴ unless such authority is clearly and unambiguously vested by statute in an officer other than the Attorney General.

B. The EEOC's General Litigating Authority

1. Title VII of the Civil Rights Act

The general litigating authority of the EEOC is set forth in Title VII of the Civil Rights Act of 1964. Section 705 provides in pertinent part:

(1) . . . The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

42 U.S.C. §§ 2000e-4(b)(1), (2). In addition, § 2000e-4(g)(6) authorizes the Commission "to intervene in a civil action brought under § 2000e-5 of this title by an aggrieved party against a respondent other than a governmental agency or political subdivision." Sections 2000e-5 and 2000e-6, referred to above, constitute the enforcement provisions for Title VII of the Act and set forth the enforcement responsibilities of the Commission and the Attorney General, respectively. Section 2000e-5

⁴ 28 U.S.C. § 510 authorizes the Attorney General "from time to time [to] make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

authorizes the Commission, after investigating allegations of unlawful employment practices, filing charges and failing "to secure from the respondent a timely conciliation agreement acceptable to the Commission," to bring civil actions "against any respondent not a government, governmental agency, or political subdivision named in the charge . . . or to intervene in such civil action upon certification that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). In cases in which the respondent is a "government, governmental agency, or political subdivision," litigation authority rests with the Attorney General. Id.⁵ In addition, § 2000e-5(i) authorizes the Commission to "commence proceedings to compel compliance" in any "case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under [§ 2000e-5]." Section 2000e-6, as amended by Reorganization Plan No. 1 of 1978, 92 Stat. 3781 (reprinted in 42 U.S.C. § 2000e-4 note (Supp. V 1981)),⁶ limits the government's authority to engage in public sector "pattern or practice" enforcement litigation to the Attorney General. See generally 7 Op. O.L.C. ____.

In a 1983 memorandum to the Civil Rights Division, we opined that the limitations on the General Counsel's authority which are set forth in § 2000e-4(b)(1) necessarily are incorporated into the "litigating authority" granted Commission attorneys in

⁵ As noted above, the Commission retains authority to perform pre-litigation functions, e.g., investigations, the filing of charges, and the securing of voluntary compliance and conciliation measures, with respect to public sector employers.

⁶ Although the transfer of litigation authority in public sector "pattern or practice" suits from the EEOC to the Attorney General was accomplished pursuant to the President's authority under the Reorganization Act of 1977, 5 U.S.C. § 901, an Act which contains an unconstitutional legislative veto provision, see INS v. Chadha, 462 U.S. 919 (1983), the Department has taken the position that the legislative veto provision is severable from the remaining provisions of the Act granting the President reorganization authority. See EEOC v. Hernando Bank, 724 F.2d 1188 (5th Cir. 1984); EEOC v. Jackson County, No. 83-1118 (W.D. Mo. Dec. 13, 1983); Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Tenn. 1983), appeal pending, No. 83-5889. See also EEOC v. City of Memphis, 581 F. Supp. 179 (W.D. Tenn. 1983) (holding that Congress has ratified the EEOC's authority under Reorganization Plan No. 1 of 1978). But see EEOC v. Westinghouse Electric Co., No. 83-1209 (W.D. Pa. Jan. 5, 1984); EEOC v. Allstate Insurance Co., 570 F. Supp. 1224 (S.D. Miss. 1983), appeal dismissed, No. 83-1021, 52 U.S.L.W. 3889 (June 11, 1984), appeal pending, No. 83-4652 (5th Cir.). See also EEOC v. Pan American World Airways, 576 F. Supp. 1530 (S.D.N.Y. 1984).

§ 2000e-4(b)(2). See 7 Op. O.L.C. at _____. We concluded that to construe § 2000e-4(b)(2) without regard to § 2000e-4(b)(1) would grant Commission attorneys authority which supersedes that of the General Counsel, under whose supervision they work, pursuant to § 2000e-4(b)(1) and, moreover, that such a construction would be contrary to the general rule that exceptions to the Attorney General's plenary litigating authority are to be narrowly construed. See also Report of the Attorney General's Task Force on Litigating Authority, supra.

In a memorandum to this Office, the Legal Counsel to the Commission disputed this analysis.⁷ Although the Legal Counsel's argument is not entirely clear, she appears to contend that the Commission was granted broad litigating authority when it was created by Title VII of the Civil Rights Act in 1964, which has not been diminished by subsequent amendments, *i.e.*, § 2000e-4(b)(1), to the Act. Regarding the limitations on the General Counsel's authority which are set forth in § 2000e-4(b)(1), the Legal Counsel opined that "section [2000e-4](b)(1) involves a different matter than section [2000e-4](b)(2), *i.e.*, the enforcement function the Commission acquired in 1972," adding that "[n]o support appears in the legislative history for the argument that [§ 2000e-4](b)(1) was intended to limit the broad grant of authority contained in [§ 2000e-4](b)(2)."

The Legal Counsel correctly notes that in 1964, the newly created Commission was granted authority to appoint attorneys who "may, at the direction of the Commission, appear for and represent the Commission in any case in court," Pub. L. No. 88-352, § 705(h), 78 Stat. 241, 259 (1964), but at that time the only matters on which the Commission was authorized to appear in court were those in which it commenced proceedings against private-sector employers to compel compliance with court orders issued in civil actions brought by aggrieved parties under § 2000e-5, see

⁷ Until recently, the EEOC's Office of the Legal Counsel was a subdivision of the Office of the General Counsel, headed by the "Associate General Counsel, Legal Counsel Division." We understand that, pursuant to a reorganization, the Legal Counsel Division has been removed from the General Counsel's Office, establishing it as a separate office under the Chairman's control. Although we take no position on the Commission's authority to effect such a reorganization, we do not believe that through such a reorganization, litigating authority vested by statute in the General Counsel could be transferred to an official outside of the General Counsel's control. Nor do we believe that such authority could be "created" or "inferred," if previously nonexistent, and vested in the newly constituted Legal Counsel Division.

§ 706(i), 78 Stat. at 261 (codified at 42 U.S.C. § 2000e-5(i)).⁸ Thus, although the Commission was given broad "enforcement" authority under the Act, including the authority to investigate allegations of unlawful employment practices and to undertake efforts to secure voluntary compliance, with the exception noted above of suits to compel compliance with court orders secured by aggrieved parties, none of the Commission's powers under the Act at the time of its creation in 1964 entitled the Commission to conduct on its own behalf. Rather, the Commission's involvement in litigation under the Act was limited to "refer[ring] matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706 [42 U.S.C. § 2000e-5], or for the institution of a civil action by the Attorney General under section 707 [42 U.S.C. § 2000e-6, in cases involving allegations of a 'pattern or practice' of unlawful conduct], and to advis[ing], consult[ing] and assist[ing] the Attorney General on such matters." § 705(g)(6), 78 Stat. at 259.

In 1972, the Act was amended to strengthen the Commission's enforcement authority by establishing a General Counsel and authorizing him to bring actions in federal courts under certain provisions of the Act against private sector employees. See generally Pub. L. No. 92-261, 86 Stat. 103 (1972).⁹ Section 706.

⁸ Although the 1964 Act authorized only aggrieved parties to bring unlawful employment discrimination suits under § 2000e-5, subsection (e) of that provision (presently 42 U.S.C. § 2000e-5(f)) did authorize the court, "in its discretion, [to] permit the Attorney General[, upon timely application,] to intervene in such civil action if he certifies that the case is of general public importance."

⁹ Prior to 1972, the position of General Counsel was not specifically provided for by statute, although the Commission generally appointed an attorney to assume the role of supervising the Commission's legal staff in the performance of its legal duties. During consideration of the 1972 amendments, several bills to empower the Commission to issue cease and desist orders, and to create an "independent" General Counsel, who would be appointed by the President and be outside of the control of the Chairman and the Commission, and who would perform prosecutorial functions before such a quasi-adjudicative Commission, were debated at length. Although the bills to vest the Commission with quasi-adjudicative authority were defeated in favor of those granting the Commission authority to file civil actions in federal court, the provisions for a Presidentially appointed General Counsel remained. See generally Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 (1972).

of the Act, 42 U.S.C. § 2000e-5, was amended to grant the Commission authority to "bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge," and to intervene, at the court's discretion, in an action brought by an aggrieved party against a nongovernmental employer "upon certification that the case is of general public importance." See 42 U.S.C. § 2000e-5(f). In addition, enforcement authority in "pattern or practice" litigation pursuant to § 707 of the Act, 42 U.S.C. § 2000e-6, was transferred from the Attorney General to the Commission, effective March 24, 1974, by the 1972 amendments.¹⁰

To assist the Commission in the performance of these expanded enforcement functions, Congress provided for the appointment, by the President, of a General Counsel, whose responsibilities would include "the conduct of litigation as provided in 42 U.S.C. sections 2000e-5 and 2000e-6 . . . [and] such other duties as the Commission may prescribe or as may be provided by law." 42 U.S.C. § 2000e-4(b)(1). See also S. Rep. No. 681, 92d Cong., 2d Sess. 20 (1972). It is clear from the legislative history of the 1972 amendments that Congress intended to commit all litigating functions of the agency to the supervision of the General Counsel, and moreover, that the General Counsel's litigating functions were to be "as provided in sections 706 and 707 of the Act." 118 Cong. Rec. 7169 (1972) (section-by-section analysis of H.R. 1746). Thus, to construe § 2000e-4(b)(2) as providing a residual source of litigating authority, unrelated to § 2000e-4(b)(1), which either expands upon the General Counsel's limited authority provided in § 2000e-4(b)(1) or constitutes an independent grant of litigating authority to Commission attorneys without regard to the General Counsel, would fly in the face of well-established rules of statutory construction¹¹ as well as the general statutory and

¹⁰ Section 5 of Reorganization Plan No. 1 of 1978, supra, transferred enforcement authority under § 707 in public sector cases back to the Attorney General.

¹¹ The Legal Counsel's interpretation is inconsistent with several general rules of statutory construction, including the rules (1) that sections of a statute should be construed "in connection with every other part or section so as to produce a harmonious whole," 2A Sutherland Statutory Construction § 46.05 (4th ed. 1973); (2) that adoption of an amendment is evidence that the legislature intends to change the provisions of the original bill, see 2A Sutherland, supra, § 48.18; and (3) that statutes in pari materia should be construed together, and if there exists "an irreconcilable conflict between the new provision and the prior statutes . . . the new provision will control as it is the better expression of the legislature," 2A (continued...)

policy constraints discussed above on construing grants of litigating authority.¹²

11 (...continued)

Sutherland, supra, § 51.02. See generally Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247 (1953); Bindczyck v. Finucane, 342 U.S. 76 (1951).

¹² The Legal Counsel has cited two cases in support of the argument that § 2000e-4(b)(2) constitutes a general grant of litigating authority to Commission attorneys to conduct defensive litigation on the Commission's behalf, notwithstanding the limitations on the General Counsel's authority in § 2000e-4(b)(1).

The first case, Falkowski v. EEOC, 719 F.2d 470 (D.C. Cir. 1983), is an action brought against the Commission and the Department of Justice by a disgruntled former EEOC employee seeking reimbursement for past legal expenses and a guarantee of future legal representation in two suits brought against her by a subordinate during her tenure as director of one of the Commission's field offices. In granting the government's motion for summary judgment -- the government was represented by Department of Justice attorneys, with EEOC attorneys on the brief -- the court stated in a footnote that EEOC attorneys could not have represented the employee, Falkowski, in the earlier litigation because of "the irreconcilable conflict of interest that existed between the agency and Ms. Falkowski in that case." 719 F.2d at 478 n.14. The court noted that the Commission and Falkowski were adverse parties in litigation arising out of the same underlying dispute, and that it would have been "highly improper for EEOC attorneys to undertake such dual representation." Id. That the court appears to assume that EEOC attorneys would be representing the Commission in such litigation does not in any way negate Department of Justice participation in and supervision of the litigation on behalf of the Commission. The conflict of interest arises simply from the fact of the EEOC attorneys' involvement in the Commission's defense, i.e., from having participated in the case's preparation. Thus, it can hardly be said that the Falkowski case stands for the proposition that the Commission's attorneys are statutorily authorized to conduct defensive litigation, independently of the Attorney General, on the Commission's behalf.

The second case cited by the Legal Counsel is Dormu v. Walsh, No. 73-2014 (D.D.C. Mar. 5, 1975), aff'd mem. sub nom. Dormu v. Perry, 530 F.2d 1093 (D.C. Cir.), cert. denied, 429 U.S. 849 (1976). Dormu involved a series of cases filed by a former EEOC employee alleging, inter alia, Title VII violations, 42 U.S.C. § 2000e-16, by the Commission. In the particular case

(continued...)

2. Litigating Authority Acquired by the EEOC Under Reorganization Plan No. 1 of 1978

In addition to its enforcement responsibilities under Title VII, in 1978 the EEOC assumed enforcement responsibilities relative to several additional fair employment laws -- the Equal Pay Act (EPA), 29 U.S.C. § 206(d), the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq., the Rehabilitation Act, 29 U.S.C. § 791, and Title VII of the Civil

12 (...continued)

cited by the Commission, Dormu sought, and was denied, preliminary injunctive relief restraining the Commission from discharging him, pending the resolution of his claims on the merits. Dormu moved to disqualify the EEOC General Counsel from representing the Commission, on the ground that "[u]nder 28 U.S.C. § 516 only the Department of Justice can conduct any litigations [sic] in which the United States, an agency, or officer thereof is a party." The General Counsel opposed the motion, citing his authority "to represent the Commission in any case in court, 42 U.S.C. § 2000e-4(b)(2)" and the fact that the Department of Justice had referred the case to the Commission, as it was "the practice of the [Department] when the Attorney General [was] served, to refer Title VII cases filed against the Commission to the Commission so that the Commission's Office of General Counsel may defend the suit." The district court denied Dormu's motion and, on appeal, the court in a footnote of its memorandum opinion stated that "[a] ruling on the motion was deferred and the issue was reserved for the merits panel. The statute referred to in the text [42 U.S.C. § 2000e-16(c)] and 42 U.S.C. § 2000e-4(b) rebut appellant's contention on this matter." The merits panel, by order, and without a published opinion, dismissed Dormu's action.

We do not believe that the Dormu case provides any credible support for the Legal Counsel's argument. First, Commission attorneys, as the General Counsel acknowledged, were defending the suit, "as was the practice," pursuant to a specific "delegation" of litigation authority from the Department of Justice -- the Commission did not purport to rely solely on its statutory authorization. Equally significant is the fact that the court, although ruling against Dormu's motion, did not, in a published opinion, indicate the reasons for its ruling, so that its precedential value is extremely limited. Finally, we cannot fail to note that in the papers filed by the Commission in Dormu, the General Counsel did not proffer a distinction, pressed upon us now by the Legal Counsel, between his authority under § 2000e-4(b)(1) and that of Commission attorneys under § 2000e-4(b)(2). Rather, the General Counsel, albeit erroneously, considered himself, as the chief attorney for the Commission, as deriving authority from both §§ 2000e-4(b)(1) and (b)(2).

Rights Act as applied to federal workers, 42 U.S.C. § 2000e-16. Pursuant to Reorganization Plan No. 1 of 1978, all enforcement authority which had been vested previously in the Administrator of the Wage and Hour Division of the Department of Labor, the Secretary of Labor, and the Civil Service Commission regarding enforcement of the EPA, the ADEA, the Rehabilitation Act, and Title VII of the Civil Rights Act was transferred to the EEOC. See Reorganization Plan No. 1 of 1978, 42 U.S.C. § 2000e-4 note, supra. To the extent that any of those statutes granted independent litigating authority to the persons or agencies charged with their enforcement, a proposition which is the subject of considerable disagreement between the Department of Justice and the EEOC,¹³ such authority was transferred to the Commission by the 1978 Reorganization Plan.

With this understanding of the EEOC's general litigating authority, we turn now to the specific questions raised in your memorandum to us.

II. EEOC'S Authority to Conduct Defensive Litigation

You have asked us to examine the Commission's role in defending suits brought "in connection with [the Commission's] Federal sector administrative enforcement and adjudicative responsibilities" under Title VII of the Civil Rights Act, and in actions brought "by its own employees challenging Commission personnel decisions." As noted above, the Commission's general litigating authority is derived from two sources: § 705 of Title VII, 42 U.S.C. § 2000e-4(b), and Reorganization Plan No. 1 of 1978, supra. Because the Commission's Federal sector enforcement authority under Title VII, the EPA, the ADEA, and the Rehabilitation Act was transferred to the EEOC from the Civil Service Commission by the 1978 Reorganization, we must examine the Civil Service Commission's litigation authority regarding these statutes prior to the Reorganization.

A. Litigation Authority Inherited from the Civil Service Commission

Although the 1978 Reorganization Plan transferred to the EEOC all functions related to the enforcement of Title VII of the Civil Rights Act against federal government employers which were previously vested in the Civil Commission, see 42 U.S.C. § 2000e-16, litigation was not among the Civil Service Commission's

¹³ See Report of the Attorney General's Task Force on Litigating Authority, supra, Compendium at 40 ("[f]or the present time, the Civil Division and the Commission have 'agreed to disagree' [about the Commission's independent litigating authority post-1978]").

functions under § 2000e-16.¹⁴ Enforcement litigation authority pursuant to § 2000e-16 was retained by the Attorney General.¹⁵ Although § 2000e-16(c) provides that "an employee . . . aggrieved by the final disposition of his complaint . . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant," whether an agency may represent itself in such an action depends upon the nature and scope of the particular defendant agency's litigating authority.¹⁶ As noted above in Part I.A., statutory grants of litigating authority to agencies, in derogation of the Attorney General's plenary authority, must be construed narrowly to permit the exercise of such authority only when clearly and specifically provided for. The EEOC's litigating authority under its authorizing statute, 42 U.S.C. § 2000e-4, is limited, as

¹⁴ The Civil Service Commission's functions under § 2000e-16 included, inter alia, the review of agencies' national and regional equal employment opportunity plans, the promulgation of rules and regulations "as it deems necessary and appropriate to carry out its responsibilities under this section," and the issuance of final agency orders and appropriate remedies regarding discrimination complaints by federal employees.

¹⁵ Section 2000e-16(d) provides that "[t]he provisions of sections 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder." As discussed above, § 2000e-5 vests litigation authority regarding public sector employers, including the federal government, in the Attorney General. This vesting of authority in the Attorney General facilitates the enforcement process by allowing the Attorney General, if the EEOC is unsuccessful in reaching a satisfactory conciliation agreement, to perform the dispute-resolution functions delegated to him by the President in Executive Order 12146, reprinted in 28 U.S.C. § 509 note, in lieu of suing other Executive Branch agencies in court. With respect to independent agencies, and other governmental entities within the scope of § 2000e-16's coverage which are not a part of the Executive Branch, the Attorney General may, in his discretion, sue if necessary to achieve a satisfactory result.

¹⁶ We recognize that in such actions by federal employees, the EEOC, whether or not it is the defendant employer agency, may be named as a co-defendant because of its role in processing employee complaints in the administrative process. In such cases the Attorney General is most likely to be representing the defendant agency; to permit the Commission to represent itself in such circumstances, independently of the Attorney General, would create the risk of conflict in the courts as to the position of the United States in such litigation, i.e., the Executive speaking with two conflicting voices.

discussed above, to the initiation of, and intervention in, civil actions against private sector employers.

Likewise, the Civil Service Commission's functions under the ADEA and the Rehabilitation Act, presently vested by statute in the Equal Employment Opportunity Commission, did not include litigation on its own behalf of either an enforcement or a defensive nature. Section 633a(b) of Title 29 authorizes the Equal Employment Opportunity Commission

to enforce the provisions of [29 U.S.C. § 633a] (a) [the ADEA as applied to federal employees] through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under section.

(Emphasis added.) In addition, the EEOC is required to "provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age," to receive notices of intent to sue by aggrieved individuals prior to their filing a civil action in federal district court, and to "promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice." 29 U.S.C. §§ 633a(b)(3), (d). The EEOC's functions under the Rehabilitation Act are similarly limited to voluntary conciliation and compliance measures. See id. § 791.

We thus conclude that the Commission lacks the authority to defend itself, independently of the Attorney General, against suits brought under Title VII, the ADEA, and the Rehabilitation Act in connection with its federal sector administrative enforcement and adjudicative responsibilities, including suits brought under those provisions by its own employees challenging Commission personnel decisions. However, this conclusion does not preclude Commission attorneys from appearing as co-counsel with Department of Justice Attorneys, as is the case with attorneys from other "client" agencies, filing joint briefs, or otherwise actively participating in the Commission's defense, so long as such activities are carried out under the general supervisory authority of the Attorney General or his delegates within the Department of Justice.

B. Litigation Authority Inherited From the Secretary of Labor and the Administrator of the Wage and Hour Division, Department of Labor

Having addressed the question of the Commission's authority to defend itself against suits brought under Title VII, the ADEA

and the Rehabilitation Act in connection with its federal sector administrative enforcement and adjudicative responsibilities, including suits initiated by its own employees, we now consider the remaining issue of the EEOC's authority to defend itself in suits arising in connection with its newly acquired enforcement responsibility in the private sector under the EPA and the ADEA. As we have seen in the context of the EEOC's general litigating authority statute, 42 U.S.C. § 2000e-4, and the authority transferred to the EEOC from the Civil Service Commission pursuant to Reorganization Plan No. 1 of 1978, supra, the Commission's authority to litigate on its own behalf is limited to certain types of enforcement actions, as distinguished from matters involving defensive litigation. Likewise, to the extent that "litigating authority" was vested in the Secretary of Labor and the Administrator of the Wage and Hour Division by the EPA and the ADEA and transferred to the Commission by the 1978 Reorganization Plan, a proposition regarding which the Department has expressed serious doubts, it was strictly of an offensive enforcement nature and cannot fairly be construed to encompass defensive litigation.

The Secretary of Labor's "litigation" authority under the EPA and the ADEA was limited to "the filing of a complaint" and to "bring[ing] [] action[s]" under 29 U.S.C. §§ 206, 207, 215 and 217 to redress violations of the Acts on behalf of aggrieved complainants. 29 U.S.C. §§ 216(b), (c), 626(b). This Department has consistently taken the position, however, that such language, simply authorizing an agency to "file a complaint," or to "bring an action" is insufficient to establish independent litigating authority. See Report of the Attorney General's Task Force on Litigating Authority, supra; 6 Op. O.L.C. 47, supra. See also ICC v. Southern Railway Co., 543 F.2d 534 (5th Cir. 1976), aff'd, 551 F.2d 95 (1977) (en banc). Even if these provisions had vested litigating authority in the Secretary of Labor, and by reference, in the EEOC, such "authority" would be limited to litigation of an offensive, rather than a defensive, nature. Moreover, whatever "litigation authority" the Commission inherited from the Administrator of the Wage and Hour Division was limited to "appear[ing] for and represent[ing] the [Commission] in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General." 29 U.S.C. § 204(b) (emphasis added).¹⁷

¹⁷ Notwithstanding our view that the EEOC did not acquire any litigating authority from the Civil Service Commission, the Secretary of Labor or the Administrator of the Wage and Hour Division under these statutes by operation of the 1978 Reorganization Plan, the EEOC has consistently maintained that it has authority to conduct both offensive and defensive litigation on its own behalf under the statutes for which it acquired

(continued...)

Conclusion

After carefully reviewing the EEOC's authority pursuant to its general authorizing statutes and those pursuant to which it inherited authority from the Secretary of Labor, the Administrator of the Wage and Hour Division and the Civil Service Commission, we conclude that the Equal Employment Opportunity Commission lacks the authority to defend itself, independently of the Attorney General, in suits brought under Title VII of the Civil Rights Act in connection with its federal sector administrative enforcement and adjudicative responsibilities, as well as in suits brought by its own employees challenging Commission personnel decisions. Our conclusion is compelled by the language of the statutes authorizing the Commission's fair employment enforcement activities, as well as the general reservation of litigating authority on behalf of the United States, unless otherwise expressly provided for, to the Attorney General, which is mandated by 28 U.S.C. §§ 516, 519.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

17 (...continued)

enforcement responsibilities. Although the Department of Justice has continued to oppose EEOC's assertions of such claims, an agreement was reached in 1979 between the Department's Civil Division and the Commission whereby the Department would continue to conduct the defensive litigation on behalf of the Commission, with appropriate input from Commission attorneys.

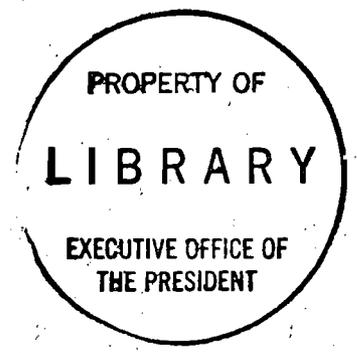
RF 5406
A66
1984
LAW

FEB 22 1993

EXECUTIVE OFFICE OF THE
PRESIDENT LAW LIBRARY
Room 528 OEOB
Washington, DC 20500

OPINIONS
OF THE
OFFICE OF LEGAL COUNSEL
OF THE
UNITED STATES DEPARTMENT OF JUSTICE
CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE
PRESIDENT OF THE UNITED STATES,
THE ATTORNEY GENERAL
AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT
IN RELATION TO
THEIR OFFICIAL DUTIES

VOLUME 8
(PRELIMINARY PRINT)
1984



statement embodied in the Attorney General's Order No. 687-77 dated January 19, 1977.

In certain circumstances, the courts have held that providing appropriations for an activity of the executive branch constitutes ratification by Congress of that action. *See, e.g., Brooks v. Dewar*, 313 U.S. 354 (1941) (issuance by Secretary of the Interior of temporary grazing permits). Care must be used in relying on this doctrine, however.⁶ In our opinion, it is applicable here notwithstanding the language of the Senate report.⁷ Congressional acquiescence in the Department's policy may be tentative or qualified. Nonetheless, funds to carry out that policy were provided in the Supplemental Appropriations Act for Fiscal Year 1977.⁸ Thus, to that extent, the legislative action supports our view that authority exists for the Department's policy.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

Steve,
This is the farthest
back we would trace.
Maybe you have other
suggestions.

- Brandon

⁶*See, e.g., Committee for Nuclear Responsibility, Inc. v. Seaborg*, 465 F. (2d) 783, 785 (D.C. Cir. 1971) (question of compliance with National Environmental Policy Act).

⁷*See* footnote 4, *supra*.

⁸Pub. L. No. 95-26, 91 Stat. 61, 106 (1977).

CLINTON LIBRARY PHOTOCOPY

March 16, 1978

78-17 MEMORANDUM OPINION FOR THE
ACTING DIRECTOR, OFFICE OF
MANAGEMENT AND BUDGET

Reorganization Plan No. 1 of 1978—Equal
Employment Opportunity Commission—
Transfer of Function

This responds to your request for our opinion concerning two legal questions raised by § 3(b) of Reorganization Plan No. 1 of 1978, 14 Weekly Comp. Pres. Doc. 398, 43 F.R. 19807.

Under § 3(a) of the Plan, the responsibility for enforcement of equal opportunity in Federal employment, presently lodged in the Civil Service Commission (CSC), would be transferred to the Equal Employment Opportunity Commission (EEOC), an executive branch agency.¹ Section 3(b) of the Plan would empower the EEOC to delegate to the CSC or a successor agency "the function of making a preliminary determination on the issue of discrimination," whenever a Federal employee has alleged in a proceeding before the EEOC that his rights under § 717 of the Civil Rights Act of 1964 have been violated.² Your questions arise because it is contemplated that the CSC's successor agency for these purposes would be an independent regulatory agency exercising quasi-judicial powers whose members would not serve at the pleasure of the President.

The first question is whether the independence of the successor agency would be affected by the transfer to it of the responsibility for making a preliminary determination of the merits of a Federal employee's allegation. The task of making such determinations is purely adjudicatory. Under the rationale of the most recent Supreme Court decisions dealing with this general question,

¹This office has taken the position, most recently in our letter to you of February 7, 1978, that commissioners of the EEOC serve at the pleasure of the President and that the Agency is an executive—as opposed to an independent regulatory—agency.

²(b) The Equal Employment Opportunity Commission may delegate to the Civil Service Commission or its successor the function of making a preliminary determination on the issue of discrimination whenever, as a part of a complaint or appeal before the Civil Service Commission on other grounds, a Federal employee alleges a violation of § 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16), provided that the Equal Employment Opportunity Commission retains the function of making the final determination.

assignment of an adjudicatory function to an agency then recognized to be "independent" would not alter its independent status in any way. *Cf., Wiener v. United States*, 357 U.S. 349 (1958). We see no basis for a different conclusion here.³

The second question is whether limiting the successor agency to making a preliminary determination on the merits of the employee's allegation while retaining in the EEOC the "function of making the final determination concerning such issue of discrimination . . ." would affect the independence of the successor agency. In other words, does the placement of power in an executive agency to review and overturn a preliminary decision reached by an independent agency impinge on the independent status of the latter? We think the answer to this question is "no."

The proposition that executive agencies may be empowered by Congress to review and adopt or overturn decisions made by "independent" agencies or hearing examiners without affecting the independent status of either is well established. For example, the President is authorized by statute to review and reverse certain decisions made by the Civil Aeronautics Board; yet we have no doubt that members of that Board may be removed only for cause under 49 U.S.C. § 1321. More recently, Congress has given the Secretary of Energy the power to implement or reject certain regulatory actions formulated by the Federal Energy Regulatory Commission, an independent agency.⁴ The conference report indicates that Congress believed that such review power in the Secretary would not affect the independent status of the Commission. *See H. Rept. No. 539, 95th Cong., 1st sess., at 78 (1977).*

Given the adjudicatory nature of the decisions to be reviewed by the EEOC under § 3(b), we think the history of the use of independent administrative law judges and hearing examiners under the Administrative Procedure Act (APA) of 1946 supports our position. Under § 11 of that Act,⁵ these officers were specifically made "independent . . . in their tenure and compensation."⁶ One of the major functions performed by administrative law judges is to preside over formal APA proceedings, 5 U.S.C. § 556(c), and then to make the initial decision or recommendation regarding the disposition of the matter before them, 5 U.S.C. §§ 554(d) and 557(b). This decision may then be reviewed by the agency, often an executive agency, which has "all the powers which it would have in making the initial decision . . ." 5 U.S.C. § 557(b).

Thus, to conclude that EEOC review of preliminary decisions made by a successor agency pursuant to § 3(b) of the Plan would jeopardize the independence of the latter agency would cast grave doubt on the principle under which

³We drew the same conclusion with regard to this question in our memorandum to W. Harrison Wellford of February 23, 1978.

⁴Department of Energy Organization Act, § 402(c), Pub. L. No. 95-91, 91 Stat. 565.

⁵Section 11 is now codified in various sections of 5 U.S.C., namely, §§ 1305, 3105, 3344, 4301(2)(E), 5362, and 7521.

⁶Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d sess., at 215 (1946).

administrative law judges and similar hearing officers have performed equivalent adjudicatory functions for more than three decades during which their independence has never been doubted, although subject to administrative review.

Thus, we conclude that the delegation under § 3(b) of the Plan will not raise questions as to the independent status of the CSC successor agency.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

October 20, 1977

77-61 MEMORANDUM OPINION FOR THE
COUNSEL TO THE PRESIDENT

**President's Authority To Promulgate a
Reorganization Plan Involving the Equal
Employment Opportunity Commission**

This is in response to your request for the opinion of this Office on two questions pertaining to the President's authority to promulgate a reorganization plan involving the Equal Employment Opportunity Commission (EEOC). You have asked, first, whether EEOC is an Agency in the executive branch so as to come within the President's authority under the Reorganization Act of 1977; second, whether a reorganization plan can vest in EEOC functions which are presently lodged in the Department of Labor. For the reasons that follow, we answer the first question in the affirmative; your second question may also be answered in the affirmative, provided certain other conditions of the Reorganization Act of 1977 are met.

EEOC as an Executive Branch Agency

Under the current Reorganization Act, the President may provide for the transfer of functions only for present purposes, with respect to "an Executive agency or part thereof." See 5 U.S.C.A. §§ 902-3 (1977). One prerequisite of a transfer of functions to EEOC is thus a determination that the agency is an "Executive agency." We believe that there is little doubt that it is such an "Executive agency."

This result can be reached by two different rationales. First, even the so-called independent regulatory agencies have been considered "Executive" agencies for purposes of the Reorganization Acts. For example, even though previous such Acts have provided that reorganization plans could pertain only to agencies "in the executive branch of the Government," see Reorganization Act of 1949, §7, 63 Stat. 203, reorganization plans have been proposed by the President, and allowed by Congress, which involved the independent regulatory commissions. See Reorganization Plan No. 3 of 1961, 75 Stat. 837 (CAB); Reorganization Plan No. 4 of 1961, 75 Stat. 838 (FTC). The fact that EEOC would

similarly come within the present Reorganization Act is demonstrated by a provision, enacted in 1972 with reference to a Reorganization Act containing provisions similar to those pertinent here, which indicated that a statutory transfer of functions to EEOC could be aborted by a reorganization plan. Equal Employment Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 107, 42 U.S.C. (Supp. V) § 2000e-6(c).

Under this rationale, however, a reorganization plan affecting the EEOC could still be subject to certain restrictions if the EEOC were deemed to be an "independent regulatory agency." See 5 U.S.C.A. § 905(a)(1). We do not believe this to be the case. EEOC was created by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 *et seq.* Its five members are appointed by the President with the advice and consent of the Senate, to staggered 5-year terms; no provision is made for the removal of the members from office. EEOC's functions, as contemplated in the 1964 Civil Rights Act, were largely to investigate and to conciliate.¹ See 110 Cong. Rec. 7242 (1964) (remarks of Senator Case); see, also, *McGriff v. A. O. Smith Corporation*, 51 F.R.D. 479, 482-83 (D.S. Cir. 1971). Congress clearly intended that EEOC should not be vested with any power to adjudicate or to issue enforcement orders. See 110 Cong. Rec. 6543 (1964) (remarks of Senator Humphrey); *Fekete v. United States Steel Corporation*, 424 F. 2d 331, 336 (3rd Cir. 1970). Moreover, while EEOC is empowered to issue guidelines, they are not regarded as regulations having the force of law. See, *General Electric Company v. Gilbert*, 97 S. Ct. 401, 410-11 (1976).

The lack of any quasi-adjudicatory or quasi-legislative functions vested in EEOC leads, in our view, to a conclusion that it is a part of the executive branch. As the Supreme Court indicated in *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), and *Wiener v. United States*, 357 U.S. 349, 353-354 (1958), the inferences to be drawn as to congressional intent on this matter rest largely on the functions that the Agency is to perform. In those cases the quasi-legislative or quasi-judicial functions lodged by Congress in the particular agencies led to a conclusion by the Court that Congress meant for the agencies to be independent; otherwise, the agencies could not perform their required duties free of Executive influence. The lack of such functions in EEOC and the consequent absence of any need to be independent of the Executive suggests that Congress meant for EEOC to be subject to Executive control.

Other considerations support this result. First, it would raise serious constitutional problems for an agency, shorn of any quasi-judicial or quasi-legislative authority, to be set apart from the Executive; it cannot be assumed that Congress would lightly intend such a result. Moreover, there is no provision in the 1964 Civil Rights Act for the removal of EEOC members for neglect of duty or malfeasance in office. Such a

¹ In 1972 Congress expanded EEOC's powers by allowing it to bring certain enforcement actions. See 42 U.S.C. (Supp. V) § 2000e-5.

provision has been customarily included in statutes setting up regulatory agencies intended to be independent of Executive control, *See, e.g.*, 29 U.S.C. § 153(a) (NLRB); 49 U.S.C. § 1321(a)(2)(CAB), except for those statutes passed in the interval between *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey*, *see* 15 U.S.C. 78d (SEC); 47 U.S.C. 154 (FCC). While *Wiener v. United States*, *supra*, held that the absence of a specific provision for removal for cause does not necessarily imply that the officer is subject to Executive control, the fact that such a provision is not contained in Title VII of the Civil Rights Act seriously weakens that argument when compared to the statutes creating other regulatory agencies.

The legislative history of the 1964 Civil Rights Act does not suggest a contrary result. Albeit, there are references in the history which could be taken to indicate a legislative belief that EEOC was to be an independent Agency. For example, the House committee report states that the "Commission will receive the usual salaries of members of independent regulatory agencies." H.R. Rep. No. 914, 88th Cong., 1st Sess. 28 (1963). Senator Humphrey also stated that the EEOC statute would be a "departure from the usual statutory scheme for independent regulatory agencies." 110 Cong. Rec. 6548 (1964). These limited remarks, however, do not shed any additional light on an intent that EEOC was to be an independent Agency. If Congress had intended this result, it presumably would have so indicated more clearly and explicitly, particularly since it must have been aware that the "most reliable factor" for drawing inferences as to independence—that of the agency's functions—would lead to a contrary conclusion. *Wiener v. United States*, *supra*, at 353. In addition, it is not without significance that those opposed to the Civil Rights Act referred, without rebuttal, to EEOC as part of the executive branch. *See* 110 Cong. Rec. 7561, 7776, 8442 (1964) (remarks of Senators Thurmond, Tower, and Hill).

We thus conclude that EEOC is an Agency within the executive branch. This conclusion is consistent with earlier opinions of this Office as to the status of EEOC.

Transfer of Functions from the Department of Labor

The conclusion that EEOC is subject to the President's authority under the Reorganization Act of 1977 is not the only condition for a transfer of functions from the Department of Labor to EEOC. One other prerequisite is that the Department of Labor must be an Executive agency—which, of course, it is. Two other general substantive limitations must also be met before a transfer of functions can be accomplished. First, the President must find that changes in the organization of agencies are necessary to carry out the policies set forth in 5 U.S.C. § 901(a); this is not so much a legal determination as it is a practical one. Second, a reorganization plan may not transgress the limitations set forth in 5 U.S.C. § 905. While some legal issues may be

presented here, they can properly be analyzed only in light of the particular changes which are proposed. If you desire further advice on this matter, we will be happy to evaluate any plan's conformance to the provisions in 5 U.S.C. § 905.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

*START*START*START*START*START*START*START*START*START*START*START*START*

69002-EXEC OFF OF PRES

NUMBER OF REQUESTS IN GROUP: 1
APPROXIMATE NUMBER OF LINES: 50
DATE AND TIME PRINTING STARTED: 07/05/94 11:55:58 am (Eastern)

Copyright (C) 1994 by West Publishing Company. Copyright is not claimed as to any part of the original work prepared by a U.S. Government officer or employee as part of that person's official duties. All rights reserved. No part of a WESTLAW transmission may be copied, downloaded, stored in a retrieval system, further transmitted or otherwise reproduced, stored, disseminated, transferred or used, in any form or by any means, except as permitted in the WESTLAW Subscriber Agreement or with West's prior written agreement. Each reproduction of any part of a WESTLAW transmission must contain notice of West's copyright as follows: "Copr. (C) West 1994 No claim to orig. U.S. Govt. works". Registered U.S. Patent and Trademark Office: WESTLAW, WIN, WESTNET, EZ ACCESS and Insta-Cite. WIN Natural Language is protected by U.S. Patent No. 5,265,065.

CLIENT IDENTIFIER: OPD
DATE OF REQUEST: 07/05/94
THE CURRENT DATABASE IS USAG
YOUR TERMS AND CONNECTORS QUERY:

SO("LEGAL COUNSEL") & "EQUAL EMPLOYMENT OPPORTUNITY COMMISSION" /P AGENCY

*START*START*START*START*START*START*START*START*START*START*START*START*

CITATIONS LIST
Database: USAG

Search Result Documents: 10

1. (Preliminary Print) NUCLEAR REGULATORY COMMISSION'S IMPOSITION OF CIVIL PENALTIES ON THE AIR FORCE June 8, 1989 13 U.S. Op. OLC 157, 13 U.S. Op. Off. Legal Counsel 157, 1989 WL 418307 (O.L.C.)
2. FEDERAL EQUAL EMPLOYMENT OPPORTUNITY REPORTING ACT OF 1986 August 12, 1986 10 U.S. Op. OLC 112, 10 U.S. Op. Off. Legal Counsel 112, 1986 WL 213244 (O.L.C.)
3. AUTHORITY OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO CONDUCT DEFENSIVE LITIGATION June 21, 1984 8 U.S. Op. OLC 146, 8 U.S. Op. Off. Legal Counsel 146, 1984 WL 178360 (O.L.C.)
4. APPLICABILITY OF SECTION 504 OF THE REHABILITATION ACT TO CERTAIN GOVERNMENTAL ENTITIES May 3, 1983 7 U.S. Op. OLC 110, 7 U.S. Op. Off. Legal Counsel 110, 1983 WL 160496 (O.L.C.)
5. REMOVAL OF MEMBERS OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION March 11, 1982 6 U.S. Op. OLC 180, 6 U.S. Op. Off. Legal Counsel 180, 1982 WL 170686 (O.L.C.)
6. THE ATTORNEY GENERAL'S ROLE AS CHIEF LITIGATOR FOR THE UNITED STATES January 4, 1982 6 U.S. Op. OLC 47, 6 U.S. Op. Off. Legal Counsel 47, 1982 WL 170670 (O.L.C.)
7. Appropriations Limitation for Rules Vetoed by Congress August 13, 1980 4B U.S. Op. OLC 731, 4B U.S. Op. Off. Legal Counsel 731, 1980 WL 20979 (O.L.C.)

8. Reorganization Plan No. 1 of 1978--Equal Employment Opportunity Commission--Transfer of Function March 16, 1978 2 U.S. Op. OLC 69, 2 U.S. Op. Off. Legal Counsel 69, 1978 WL 15269 (O.L.C.)
9. Federal Reserve Board--Vacancy With the Office of the Chairman--Status of the Vice Chairman (12 U.S.C. ss 242, 244) January 31, 1978 2 U.S. Op. OLC 394, 2 U.S. Op. Off. Legal Counsel 394, 1978 WL 15323 (O.L.C.)
10. President's Authority To Promulgate a Reorganization Plan Involving the Equal Employment Opportunity Commission October 20, 1977 1 U.S. Op. OLC 248, 1 U.S. Op. Off. Legal Counsel 248, 1977 WL 18064 (O.L.C.)

END OF CITATIONS LIST

EEOC EEO DATA

The following is the most recent information on the employment of minorities and women at EEOC.

ANNUAL AFFIRMATIVE EMPLOYMENT PROGRAM ACCOMPLISHMENT REPORT

SUMMARY ANALYSIS OF WORK FORCE

The analysis of the agency's work force as it relates to the representation of minorities and women for FY 1993 is based on data from the Personnel Information Resource System as of September 30, 1993. The data cover the total work force, PATCOB categories, grade groupings, major occupations, accessions, separations and promotions. The summaries provide detailed information on employment trends and changes within the agency work force during FY 1993.

In FY 1993, the agency's work force decreased slightly. The decrease was four (4) employees (0.14%), from 2,802 to 2,798. However, all targeted EEO groups remain fully represented in the agency's overall work force. The following table compares the overall representation of EEO groups at the end of FY 1993 with the previous year and with the civilian labor force (CLF).

EEO Group	FY 1992 Representation	FY 1993 Representation	CLF
Females	65.20%	65.37%	45.70%
Blacks	49.71%	49.50%	10.70%
Hispanics	9.85%	10.33%	8.10%
AA/PIs	2.22%	2.22%	2.80%
AI/AN	0.68%	0.71%	0.60%
Whites	37.65%	37.24%	77.90%

In order to have full representation of all targeted EEO groups in all grade groups, one additional American Indian/Alaskan Native and one additional Asian American/Pacific Islander is needed in grades 13-15. Also, one additional Asian American/Pacific Islander is needed in grades 9-12.

The major occupations in the agency are general attorney, GS-905; equal employment specialist/investigator, GS-260/1810; clerk-typist, GS-322; and secretary, GS-318. The analysis by PATCOB categories shows underrepresentation in the following targeted EEO groups: professional (Asian American/Pacific Islanders and American Indian/Alaskan Native), administrative (Asian American/Pacific Islanders), and technical (Asian American/Pacific Islanders). In the professional category, 15 Asian American/Pacific Islanders and 1 American Indian/Alaskan Native would be needed to achieve full representation. In the Administrative category, 16 Asian American/Pacific Islanders are needed and 5 Asian American/Pacific Islanders are needed in the Technical category.

**AGENCY TOTAL DISTRIBUTION OF EEO GROUPS AND COMPARISON BY PATCOB
AS OF SEPTEMBER 30, 1993**

OCCUPATIONAL CATEGORY AND SES	TOTAL ALL ‡	WHITE		BLACK		HISPANIC		ASIAN AMERICAN/ PACIFIC ISLANDER		AMERICAN INDIAN ALASKAN NATIVE	
		MALE ‡	FEMALE ‡	MALE ‡	FEMALE ‡	MALE ‡	FEMALE ‡	MALE ‡	FEMALE ‡	MALE ‡	FEMALE ‡
AGENCY PROFESSIONAL	498 100	150 30.12	168 33.73	48 9.64	83 16.67	20 4.01	16 3.21	9 1.81	3 0.60	1 0.20	0 0.00
CIVILIAN LABOR FORCE	100	54.70	30.30	2.40	3.20	2.10	1.40	3.50	1.90	0.20	0.20
AGENCY ADMINISTRATIVE	1601 100	270 16.86	287 17.93	277 17.30	534 33.35	100 6.25	92 5.75	14 0.87	16 1.00	4 0.25	7 0.44
CIVILIAN LABOR FORCE	100	42.10	40.40	3.60	5.30	2.60	2.60	1.40	1.40	0.30	0.30
AGENCY TECHNICAL	359 100	11 3.06	76 21.17	15 4.18	211 58.77	4 1.11	28 7.80	1 0.28	6 1.67	0 0.00	7 1.95
CIVILIAN LABOR FORCE	100	36.10	42.90	3.60	6.60	3.20	3.40	1.90	1.60	0.40	0.40
AGENCY CLERICAL	332 100	15 4.52	63 18.98	17 5.12	194 58.43	4 1.20	25 7.53	3 0.90	10 3.01	0 0.00	1 0.30
CIVILIAN LABOR FORCE	100	14.00	63.40	2.80	9.60	1.70	5.20	0.80	1.90	0.10	0.50
AGENCY OTHER	4 100	1 25.00	1 25.00	1 25.00	1 25.00	0 0.00	0 0.00	0 0.00	0 0.00	0 0.00	0 0.00
CIVILIAN LABOR FORCE	100	67.60	11.20	2.80	9.60	1.70	5.20	1.20	0.30	0.90	0.20
AGENCY BLUE COLLAR	4 100	0 0.00	0 0.00	4 100.00	0 0.00	0 0.00	0 0.00	0 0.00	0 0.00	0 0.00	0 0.00
CIVILIAN LABOR FORCE	100	65.40	9.80	9.10	2.20	8.70	1.50	1.70	0.50	0.80	0.20

**DISTRIBUTION OF EEO GROUPS AND COMPARISON BY MAJOR OCCUPATIONS
AS OF SEPTEMBER 30, 1993**

SERIES NAME CATEGORY		TOTAL ALL	WHITE		BLACK		HISPANIC		ASIAN AMERICAN/ PACIFIC ISLANDER		AMERICAN INDIAN ALASKAN NATIVE	
			MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
GS-905 General Attorney	AGENCY	462 100	137 29.65	159 34.42	44 9.52	74 16.02	20 4.33	15 3.25	9 1.95	3 0.65	1 0.22	0 0.00
Professional	CIVILIAN LABOR FORCE	100	54.70	30.30	2.40	3.20	2.10	1.40	3.50	1.90	0.20	0.20
GS-260/1810 EES/ Investigator	AGENCY	1153 100	197 17.09	202 17.52	213 18.47	356 30.88	84 7.29	76 6.59	6 0.52	10 0.87	3 0.26	6 0.52
Administrative	CIVILIAN LABOR FORCE	100	42.10	40.40	3.60	5.30	2.60	2.60	1.40	1.40	0.30	0.30
GS-322 Clerk Typist	AGENCY	24 100	2 8.33	3 12.50	0 0.00	13 54.17	1 4.17	2 8.33	0 0.00	3 12.50	0 0.00	0 0.00
GS-318 Secretary	AGENCY	159 100	4 2.52	30 18.87	3 1.89	104 65.41	0 0.00	14 8.81	0 0.00	3 1.89	0 0.00	1 0.63
Clerical	CIVILIAN LABOR FORCE	100	14.00	63.40	2.80	9.60	1.70	5.20	0.80	1.90	0.10	0.50

AS OF SEPTEMBER 30, 1993

GRADE GROUPING	TOTAL	WHITE		BLACK		HISPANIC		ASIAN AMERICAN/ PACIFIC ISLANDER		AMERICAN INDIAN ALASKAN NATIVE	
	ALL %	MALE %	FEMALE %	MALE %	FEMALE %	MALE %	FEMALE %	MALE %	FEMALE %	MALE %	FEMALE %
SES	43 100	9 20.93	8 18.60	10 23.26	10 6.98	3 6.98	2 4.65	1 2.33	0 0.00	0 0.00	0 0.00
GS/GW 13-15	876 100	241 27.51	2.15 24.54	140 15.98	187 21.35	45 5.14	26 2.97	13 1.48	6 0.68	2 0.23	1 0.11
GS 9-12	1107 100	162 14.63	211 19.06	164 14.82	406 36.68	64 5.78	72 6.50	9 0.81	11 0.99	3 0.27	5 0.45
GS 5-8	704 100	32 4.55	149 21.16	41 5.82	384 54.55	14 1.99	58 8.24	3 0.43	14 1.99	0 0.00	9 1.29
GS/GW 1-4	64 100	3 4.69	12 18.75	3 4.69	36 56.25	2 3.13	3 4.69	1 1.56	4 6.25	0 0.00	0 0.00
GRAND TOTAL	2798 100	447 15.98	595 21.27	362 12.94	1023 36.56	128 4.57	161 5.75	27 0.96	35 1.25	5 0.18	15 0.54
National CLF		42.60	35.30	4.90	5.40	4.80	3.30	1.50	1.30	0.30	0.30

6/13/94

**CONGRESSIONAL HEARINGS
AT WHICH EEOC TESTIFIED**

1988 - 1994

1988

- o House Select Committee on Aging (Roybal)
RE: Age Discrimination: The Quality of Enforcement by EEOC
January 28, 1988 (Chairman Thomas testified)
- o Subcommittee on Employment Opportunities of the House Committee on Education and Labor (Martinez)
RE: H.R. 3330 (Federal Equal Opportunity Reporting Act of 1987)
February 9, 1988 (Chairman Thomas testified)
- o Subcommittee on Commerce, Justice, State and Judiciary (Smith) of the House Committee on Appropriations
RE: EEOC's FY '89 Budget Request
March 7, 1988 (Chairman Thomas testified)
- o Subcommittee on Employment Opportunities of the House Committee on Education and Labor (Martinez)
RE: Waivers Under ADEA
March 17, 1988 (Chairman Thomas and Vice Chairman Silberman testified)
- o Subcommittee on Employment and Housing of the House Committee on Government Operations (Lantos)
RE: ADEA Charges Expired the Statute of Limitations
March 29, 1988 (Chairman Thomas, Vice Chairman Silberman, Commissioners Gallegos, Kemp, Cherian, and General Counsel Shanor testified)
- o Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce (Markey)
RE: Women and Minorities in the Telecommunications Industry
May 17, 1988 (Chairman Thomas testified)
- o Subcommittee on Employment Opportunities of the House Committee on Education and Labor (Martinez)
RE: Employment Practices of the FBI
May 20, 1988 (Judith Keeler, Los Angeles Office District Director, testified)

1989

- o House Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies (Mollohan-chaired)
RE: EEOC's 1990 Budget Request
February 21, 1989 (Chairman Thomas testified)
- o Senate Subcommittee on Labor (Metzenbaum)
RE: S. 54, the Age Discrimination in Employment Waiver Protection Act of 1989
March 16, 1989 (Chairman Thomas testified)
- o House Subcommittee on Employment and Housing (Lantos)
RE: The demotion and transfer of Lynn Bruner and EEOC's mishandling of age discrimination charges
March 20, 1989 (Chairman Thomas testified)
- o House Select Committee on Aging (Roybal) and House Subcommittee on Employment Opportunities (Martinez)
RE: H.R. 1432 and S. 54, the Age Discrimination in Employment Waiver Protection Act of 1989
April 18, 1989 (Chairman Thomas testified)
- o House Subcommittee on Select Education (Owens) and House Subcommittee on Employment Opportunities (Martinez)
RE: H.R. 2273, "Americans with Disabilities Act of 1989."
September 13, 1989 (Commissioner Kemp testified)
- o Senate Committee on Governmental Affairs (Glenn)
RE: S. 1165, "Congressional Fair Employment Practices Act."
September 14, 1989 (Jim Troy, Director of Program Operations, testified)
- o House Select Committee on Aging (Roybal), House Subcommittee on Employment Opportunities (Martinez) and House Subcommittee on Labor-Management Relations (Clay)
RE: H.R. 3200, the "Older Workers Benefit Protection Act."
September 21, 1989 (Vice Chairman Silberman and General Counsel Shanor testified)
- o Senate Special Committee on Aging (Pryor) and Senate Labor Subcommittee (Metzenbaum)
RE: S. 1511 and S. 1293, legislation pertaining to the Supreme Court decision on Betts.
September 27, 1989 (Vice Chairman Silberman and General Counsel Shanor testified)

1992

- o House Subcommittee on Commerce, Justice State and Judiciary of the Committee on Appropriations (Smith)
RE: EEOC's FY 93 Budget Request
February 20, 1992 (Chairman Kemp testified)
- o House Subcommittee on Civil Service (Sikorski) and Subcommittee on Employment Opportunities (Perkins)
RE: Federal Employee Fairness Act of 1991, H.R. 3613
April 9, 1992 (Chairman Kemp testified)
- o Senate Subcommittee on Employment and Productivity (Simon) of the Committee on Labor and Human Resources
RE: Enforcement Efforts of the U.S. Equal Employment Opportunity Commission
April 28, 1992 (Chairman Kemp testified)

1993

- o House Subcommittee on Commerce, Justice, State, the Judiciary (Neal Smith) of the Appropriations Committee
Re: EEOC's FY 1993 Supplemental Budget Request
February 23, 1993 (Commissioner Tony E. Gallegos testified)
- o House Subcommittee on Commerce, Justice, State, the Judiciary (Neal Smith) of the Appropriations Committee
Re: EEOC's FY 1994 Budget Request
March 31, 1993 (Commissioner Tony E. Gallegos testified)
- o House Subcommittee on Select Education and Civil Rights (Owens) of the Committee on Education and Labor
Re: EEOC Oversight - summary of GAO reports
July 27, 1993 (no testimony by EEOC)
- o House Subcommittee on Select Education and Civil Rights (Owens) of the Committee on Education and Labor
Re: EEOC Oversight - EEO in the federal workforce
October 13, 1993 (no testimony by EEOC)
- o House Subcommittee on Census, Statistics and Postal Personnel (Sawyer) of the Committee on Post Office and Civil Service
Re: the Review of Federal Measurements of Race and Ethnicity
November 3, 1993 (Commissioner Tony Gallegos submitted a statement for the record).

Executive Summary of H.R. 2721

The proposed bill amends Title VII, the ADEA, the Rehabilitation Act of 1973 and Title V of the U.S. Code to change the federal sector complaint process. The effective date is Jan. 1, 1997. The EEOC must issue regulations within 1 year of enactment. Aggrieved individuals must file a complaint within 180 days. The respondent agency must provide counseling and have a voluntary alternative dispute resolution process available to the complainant. Where the respondent agency has an ADR process approved by the EEOC, there is a mandatory 20-day conciliation period, during which the complainant and an agency representative must meet once. The agency must notify the complainant in writing that he or she may, within 90 days, request a determination by the MSPB, the EEOC, through the negotiated grievance process, or file a civil action. The agency is required to collect and preserve information relevant to the complaint throughout the administrative and judicial process.

When the EEOC process is chosen, an AJ reviews the information collected by the respondent agency. A complainant or an AJ may request that a member of the Commission stay a discriminatory personnel action for 45 days (extendable). The AJ may order the respondent to produce information, issue subpoenas to compel the production of documents or information, or the attendance of witnesses, and issue adverse inferences against either party for failure to produce documents or information. The AJ may dismiss frivolous claims prior to hearing. The AJ must make a determination on all claims not dismissed, after an opportunity for a hearing, within 210 days of the date the complaint was filed (760 days for class complaints). Either party may appeal the AJ decision to the EEOC within 90 days. On appeal, the EEOC must accord substantial deference to the AJ's findings of fact, and shall affirm the AJ's determination if it is supported by a preponderance of the evidence and in accordance with the law. The appeal decision must be rendered by the EEOC within 150 days.

The complainant may file a civil action within 90 days of receiving: notice of right to request an administrative determination; the AJ's determination; or the EEOC decision on appeal. The complainant may also file suit 20 days after the expiration of the time for an AJ or EEOC determination if no decision has been rendered. The filing of a civil action terminates the administrative process. A complainant may file a civil action to enforce settlement agreements, AJ and EEOC orders. The EEOC may determine that a federal employee who fails to comply with an AJ or EEOC order may not be paid a salary during the period of non-compliance. Where discrimination is found, a copy of the order shall be sent to the Office of Special Counsel for a determination as to whether disciplinary action is appropriate.

The ADEA is amended to provide that age discrimination complaints are processed like other complaints filed under section 717 of Title VII, while preserving the right to bypass the administrative process and file suit after giving notice to the EEOC. Title V is amended to eliminate mixed-case procedures, and provides that a complainant must elect either the MSPB process, the grievance process, or the Title VII process, by filing a complaint under Section 717 of Title VII.

A total workload of 45,730 complaints and 16,117 appeals is projected in the first year of enforcement. AJs are estimated to process an average of 65 complaint resolutions per year under the new procedures, and appeals attorneys are estimated to process 130 decisions per year. Total cost impact is estimated at \$98,194,450 above current EEOC federal sector expenditures with a one-year implementation period, or \$69,927,878 above current expenditures with a three-year implementation period.

**U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, NW, Room 9024
Washington, DC 20507
FAX # (202) 663-4912**

FAX TRANSMITTAL FORM

DATE : 6/28/94

TIME: _____

TO : Steve Wannath

FAX TELEPHONE NUMBER: 456-7028

SENDER: Clare Gonzales

CHECK ONE:

OCLA
(202) 663-4900

SURVEYS
(202) 663 - _____

OFO
(202) 663- _____

OM
(202) 663- _____

OGC
(202) 663 - _____

OLC
(202) 663- _____

OCEO
(202) 663- _____

DOCUMENT: _____

NUMBER OF PAGES TRANSMITTED (INCLUDING COVERSHEET): 9

SPECIAL INSTRUCTIONS: _____

Steve - This is the memorandum upon which EEOC's
Legal Council relies with regard to the Agency's status
vis-a-vis the Administration. Please let me know what
you think when you get around to reading it. Clare.

(Do you like that fancy term?)

Please telephone the appropriate office above if you do not receive all documents.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	John M. Harmon to James T. McIntyre, Jr. (8 pages)	2/7/1978	P5

**This marker identifies the original location of the withdrawn item listed above.
For a complete list of items withdrawn from this folder, see the
Withdrawal/Redaction Sheet at the front of the folder.**

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9589

FOLDER TITLE:

[Equal Employment Opportunity Commission Confirmation Briefing Materials]

ds78

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]