

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Marvin to Cheryl/Donsia (1 page)	n.d.	P5
002. memo	Melissa Cook to Donsia Strong re: Federal Employee Fairness Act (2 pages)	1/4/1994	P5
003. memo	Ingrid Schroeder to Jennifer Palmieri (1 page)	7/27/1993	P5
004. draft	Chairman EEOC to The Honorable John Glenn (1 page)	7/20/1993	P5
005. letter	Jesse Brown to Leon Panetta (6 pages)	6/2/1993	P5
006. memo w/attachments	Transition Materials - Harassment (45 pages)	12/11/1992	Personal Misfile
007. letter	Edwin Dorn to Gordon Adams (2 pages)	9/21/1993	P5

COLLECTION:

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

FOLDER TITLE:

[Federal Employee Fairness Act]

ds59

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]

**Nutshell Summary of S. 404 :
Federal Employee Fairness Act of 1993**

The proposed bill amends Title VII, ADEA and the Civil Service Reform Act (CSRA) to change the federal sector complaint process. Individuals alleging discrimination must file a complaint within 180 days of the discriminatory event. Agencies must conciliate claims and offer counseling throughout the administrative process, although an employee's participation in both functions is voluntary. After attempted conciliation, an employee may elect to proceed administratively using EEOC, MSPB or negotiated grievance procedures. An administrative judge shall issue a determination on the complaint after a hearing using discovery within the judge's discretion and order necessary relief within 210 or 270 days from the filing of the complaint, the longer period applying to class complaints. Either party may appeal the administrative judge's determination to EEOC, and EEOC shall issue its decision within 150 days. The ADEA is amended to allow for administrative complaints using Title VII procedures, but there is no exhaustion requirement. The CSRA is amended to place the election requirement in section 717 of Title VII.

PHOTOCOPY
PRESERVATION

**Executive Summary of S. 404 :
Federal Employee Fairness Act of 1993**

The proposed bill overhauls the federal sector complaint process by making significant changes to Title VII, ADEA and the Civil Service Reform Act (CSRA).

The proposed bill requires agencies to make counseling available to employees throughout the administrative process, but counseling is not mandatory. It requires agencies to use alternative dispute resolution (ADR) procedures to conciliate claims during a 30 or 60 day period, although participation in ADR programs is voluntary. If conciliation proves unsuccessful, the employee has 90 days to elect to pursue administrative remedies available through EEOC, MSPB or negotiated grievance procedures. The employee may also elect at this point to file a civil action in an appropriate U.S. district court.

S. 404 substantially revises the complaint processing methods currently used by the EEOC and its administrative judges. At the pre-hearing stage, the respondent Federal entity's role is limited to providing relevant information, documents and testimony necessary for the hearing. An administrative judge is appointed by the EEOC to issue a determination on the complaint and order necessary relief within 210 or 270 days from the filing of a complaint, the longer period applying to class complaints. While a respondent would no longer be authorized to unilaterally modify or vacate a determination by an administrative judge, any party may appeal an initial determination to EEOC. The EEOC shall affirm, modify or reverse the findings of the administrative judge within 150 days of receiving the request.

A complainant may file a de novo lawsuit in U.S. district court within 90 days of receiving notice of the right to request an administrative determination. Otherwise, an employee may file suit where the applicable time limit for an administrative judge's determination or EEOC's decision on appeal has expired until 90 days after receiving a decision by the administrative judge or EEOC. A prevailing non-Federal party may collect reasonable attorney's and expert fees, costs and interest. Any amount awarded must be paid from the respondent Federal entity's appropriated funds. A complainant or EEOC may bring suit to enforce a settlement agreement, an administrative judge's order, or an order of the Commission.

The bill amends the ADEA to allow employees to file complaints with EEOC using Title VII procedures. It continues to allow employees to bypass the administrative process provided they give EEOC at least 30 days notice of their intent to sue and the suit is brought within 2 years after the alleged violation.

The CSRA is amended to place the election requirement in section 717 of Title VII. The current mixed case scheme and special panel procedures have been deleted.

**Summary of S. 404 :
Federal Employee Fairness Act of 1993**

The Federal Employee Fairness Act of 1993 proposes to amend sections 701 and 717 of Title VII of the Civil Rights Act of 1964, section 15 of the Age Discrimination in Employment Act of 1967, and sections 7121 and 7702 of the Civil Service Reform Act of 1978. The proposed effect on each of these statutes is summarized below.

Proposed Amendments to Title VII

Alternative Dispute Resolution (ADR)

Although S. 404 requires agencies to use alternative dispute resolution processes to conciliate each claim alleged in a complaint, a complainant's participation in ADR is voluntary and does not affect his rights. ADR procedures take place during a 30-day period beginning on the date respondent receives the complaint, and may be extended an additional 30 days with the complainant's consent to enable the parties to enter into a settlement agreement or otherwise resolve the complaint. If the ADR procedures require a conciliator, the conciliator shall be appointed by the EEOC.

If the parties fail to settle the complaint during the applicable ADR period, the respondent Federal entity must notify the complainant in writing, before the ADR period expires, that the employee has 90 days from receipt of such notice to make a written request with the EEOC for (1) a hearing on the claim before an EEOC administrative judge, (2) a determination by the MSPB if the claim is within the MSPB's jurisdiction, or (3) a determination under grievance procedures for claims not appealable to MSPB. A complainant may not pursue further administrative or judicial remedies until the applicable ADR period has expired.

Administrative Complaint Process

The proposed bill requires agencies to make counseling available throughout the administrative process to an employee who believes a Federal entity has discriminated against him, but such counseling is not mandatory. An agency must also assist an employee in naming the proper respondent in his complaint, and inform the employee of all applicable procedures and deadlines.

Under the proposed bill, an employee is obligated to file his complaint of discrimination with the Federal entity where the discrimination allegedly occurred or any other entity of the Federal Government, including the EEOC, within 180 days of the discriminatory event. Within 3 days after receiving the complaint, the respondent must notify the Commission of the complaint and the identity of the aggrieved employee. Within 10

days after receiving the complaint, the respondent must transmit the complaint to the Commission.

EEOC Administrative Judge Process

If, at the conclusion of the ADR process described above, the complainant files a request with EEOC for a hearing before an administrative judge, EEOC must transmit a copy of the request to the respondent and appoint an administrative judge to make a determination on the claim. Should the complainant elect to have his claim determined by MSPB or through grievance procedures, EEOC must transmit complainant's request to the appropriate agency. After receiving a copy of complainant's request for an administrative determination by the EEOC or the MSPB, the respondent must transmit a copy of all documents and information relevant to the claim to the appropriate agency.

A respondent must collect and preserve all documents and information relevant to a claim of discrimination, in accordance with rules issued by the Commission, from the time a complaint is received until all available administrative and judicial proceedings are concluded. A person who is alleged to have participated in the discrimination or who, as the complainant's supervisor, is alleged to have been aware of the discrimination but failed to take reasonable action to stop the discrimination may not fulfill the recordkeeping requirements or conduct any investigation relating to the complaint.

Upon determining that the respondent has failed to produce all relevant information in response to the complaint without good cause shown, the administrative judge shall require the respondent to provide any additional necessary information and documents and to correct any inaccuracies in the information and documents received.

An administrative judge may dismiss any frivolous claim contained in the complaint, or a complaint failing to state a claim for which relief can be granted. If a claim or complaint is dismissed by the administrative judge, the employee has 90 days from the date such notice is received either to request that the EEOC review the dismissal or to commence a civil action in U.S. district court. For those claims not dismissed, the administrative judge shall conduct a hearing and make a determination on the merits of each nonfrivolous claim including those appealable to the MSPB which arise from the factual circumstances of the complaint. Following a determination that an employee was subject to discrimination, the administrative judge shall notify the person who engaged in discrimination of the allegations raised in the complaint. The written determination of the administrative judge must generally be issued within 210 days from the filing of an individual complaint, or 270 days after the filing of a class complaint, and

may not be reviewed, modified or vacated by the respondent Federal entity.¹ Unless a civil action is brought within the 90 day period, any party may bring an appeal, requesting that EEOC review the determination of the administrative judge, and affirm, reverse or modify such determination generally within 150 days of receiving the request.²

Discovery is available to the same extent as in a civil action within the discretion of the administrative judge. Any party failing to respond completely and timely to a discovery request made or approved by the administrative judge, when the request for information or a witness is within the control of the party failing to respond, may be subject to sanctions deemed appropriate by the administrative judge. For example, the administrative judge may draw adverse inferences concerning information or testimony withheld and consider those matters to be established in favor of the opposing party, exclude evidence offered by a party failing to respond, grant relief to the employee, or take any other action considered appropriate.

Subpoenas shall be issued by the administrative judge to compel the production of information or the attendance of witnesses from the alleged discriminating Federal entity. Subpoenas shall be issued by the Commission to compel the production of information or the attendance of witnesses from other Federal and non-Federal entities. Jurisdiction is vested in the U.S. district court system to enforce non-compliance with subpoenas issued in EEOC administrative proceedings.

Remedies - Administrative Process

The administrative judge is authorized to award any and all relief contained in section 706 (g) and (k) of Title VII including equitable relief for intentional discrimination, reasonable attorney's fees for a prevailing non-Federal party, and costs.

¹ The time limit for an administrative judge to issue an order will not begin to run until 30 days after the administrative judge is assigned to the case if he or she certifies in writing that the 30 day period is necessary to complete the administrative record. The bill also contains provisions for an additional 30 day extension of the time limit and for further extension by the Commission if manifest injustice would occur without the extension.

² The bill provides an additional 30 days for the EEOC to issue its determination where it certifies in writing that an extension is necessary because of unusual circumstances that prevented the Commission from complying with the initial 150 day time limit.

The administrative judge shall decide whether the claim may be maintained as a class proceeding, and, if so, establish the relevant members of the class to the proceeding.

An EEOC administrative judge may request that a member of the Commission stay a personnel action by the respondent against the employee, such stay to exist for a maximum of 45 days, or for any period deemed appropriate by the full Commission.

Referral to Special Counsel

An order by the administrative judge or Commission finding intentional unlawful discrimination shall be referred to the Special Counsel within 30 days of the issuance of the order. The Special Counsel shall thereafter conduct an investigation and may initiate disciplinary proceedings against any person identified as engaging in intentional unlawful discrimination.

Recordkeeping and Rulemaking

Each respondent Federal entity shall submit a report to the EEOC by October 1 of each year describing the resolution of complaints during the preceding year, and the measures taken by respondent to lower the average number of days necessary to resolve such complaints. By December 1 of each year, EEOC shall submit to Congress a report summarizing the information reported by all respondents.

Within 1 year after the date of enactment of the Act, EEOC shall issue rules to assist Federal entities in complying with section 717(d) of Title VII, as amended by the Act. The rules shall establish a uniform written official notice to facilitate compliance with section 717, and requirements relating to a respondent Federal entity's collecting and preserving documents and information.

The EEOC, in coordination with Federal intelligence agencies, shall issue regulations to ensure the protection of classified and national security information used in administrative proceedings. The regulations must ensure that complaints bearing upon classified information must only be handled by personnel with appropriate security clearances.

Suit Rights

An employee may file a lawsuit in U.S. district court for de novo review of a complaint within 90 days of receiving notice from the respondent Federal entity that the employee may request an administrative determination by the EEOC, MSPB or under a negotiated grievance procedures. Moreover, an employee may commence a civil action in U.S. district court where the

applicable time period for the administrative judge's determination or EEOC's decision on appeal has expired until 90 days after receiving the administrative judge's determination or EEOC's decision. When a lawsuit is timely filed, the administrative judge's or Commission's jurisdiction over the case ceases.

Remedies - Civil Actions

The proposed bill allows a prevailing party in a civil action, except for a Federal entity, to collect reasonable attorney's and expert fees, costs, and interest. Any amount awarded must be paid from funds made available to the Federal entity by appropriation or otherwise.

A prevailing party or the Commission may bring a civil action in an appropriate U.S. district court to enforce (1) a settlement agreement, (2) the order of an administrative judge if not subject to further administrative or judicial review, or (3) an order by the Commission if not subject to further judicial review.

Effective Date

Although the proposed effective date of the Act is January 1, 1994, the amendments to section 717 of Title VII apply only to complaints filed on or after the effective date of the Act.

Proposed Amendments to the ADEA

The proposed bill amends section 15 of the Age Discrimination in Employment Act by allowing federal employees to file a complaint with EEOC using the same procedures as those under Title VII. Under the ADEA, the EEOC and its administrative judges are vested with broad authority to award legal or equitable relief to an individual as will effectuate the purposes of the ADEA. An individual alleging age discrimination may also bypass the administrative process entirely, and commence a civil action in an appropriate U.S. district court provided that EEOC is given at least 30 days notice of the intent to file suit and the suit is brought within 2 years after the alleged violation.

Proposed Amendments to Grievance Procedures

The bill proposes to amend section 7121 of the Civil Service Reform Act to delete the current provision requiring election between a statutory procedure and the negotiated grievance procedure. The bill places the election requirement currently found in section 7121(d) into section 717 of Title VII. Thus, actions appealable to MSPB or covered under laws administered by the EEOC may be raised under negotiated grievance procedures

provided that the employee makes such an election under section 717 of Title VII.

An employee or applicant who is affected by an action appealable to MSPB and who alleges that a basis for the action was discrimination prohibited by a statute or regulation enforced by EEOC shall file a complaint with EEOC and elect to pursue the negotiated grievance, MSPB or EEOC procedures. The bill proposes to eliminate the current mixed case scheme in which complainants may request EEOC review of MSPB decisions and vice versa. It also eliminates the special panel procedures currently found in section 7702. If an employee elects to follow EEOC procedures and his complaint is dismissed by the EEOC, the employee shall have 90 days to pursue the action through negotiated grievance or MSPB procedures.

An employee may commence within 120 days of a final decision on his or her grievance a civil action in an appropriate U.S. district court. If a final decision has not been made on an employee's grievance after 120 days following the election, an employee may file a civil action in an appropriate U.S. district court within an additional 120 days.

- 1 Applicant takes problem to an agency EEO counselor within 60 days of alleged discrimination.
 EEO counselor attempts to resolve ^{within 15 days} within 120 days.
 60 days. Mandatory - ^{unless request} otherwise available
- 3 IF no resolution, person may file formal complaint, ^{within 60 days of} 90 days if failed attempt.
- 4 Agency investigates for ~~90 days~~ ^{300 days}
- 5 Agency makes records available - 60 days for mediation & settle. 360 days for agency disposition final order.
- 6 Compliance order for EEO AT hearings
- 7 EEO Decision -
- 8 EEO Party reconsideration by EEO Commissioners -
- 9 Civil Action in Fed Dist Court 90 days after Reconsideration

If no resolution, ~~60 days~~ person may file formal complaint, within 60 days of failed attempt.

Within days of

complaint received, Agency must investigate, make records available -

Voluntary Binding ARB - ^{enter into}

enter into Settlement Agreement.

notice of PR to AT EEO review, within 60 days of receiving agency notice

- No notice - 30 days later - Can request commission or civil suit -

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Marvin to Cheryl/Donsia (1 page)	n.d.	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:

[Federal Employee Fairness Act]

ds59

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MEMORANDUM OF UNDERSTANDING BETWEEN THE OFFICE OF THE SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REGARDING THE REFERRAL OF MATTERS FROM EEOC TO OSC.

1. It is hereby agreed between the Equal Employment Opportunity Commission (EEOC) and the Office of the Special Counsel (OSC) of the MSPB that the EEOC shall refer to OSC, for consideration of further OSC action under 5 U.S.C. §§1206(e)(1)(E) and (g), all cases in which the EEOC finds or otherwise determines that there are reasonable grounds to believe that an agency (as defined in 5 U.S.C. §2302(a)(2)(C)) or an officer or employee thereof has discriminated against any employee or applicant for employment in violation of -

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

sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. §631, 633a)

section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. §206(d)) or

section 501 of the Rehabilitation Act of 1973 (29 U.S.C. §791),

and in which the agency fails to comply with the order of the EEOC or, in the discretion of the Commission, the violation warrants prosecution by the Office of Special Counsel.

2. In transmitting information to OSC under paragraph 1, above, the EEOC shall inform OSC of the status of any corrective or disciplinary actions ordered or recommended to the agency concerned by the EEOC, including particularly any reason the agency has provided for its failure or refusal to comply with the Commission's order.

3. If it is indicated that appropriate corrective or disciplinary action has not and will not be taken, OSC shall investigate the matter under 5 U.S.C. §1206(a) or (e)(1)(E) to the extent necessary to determine whether there is sufficient basis for initiating corrective action or, disciplinary action under §1206(g). The determination as to whether a matter has prosecutive merit and will be prosecuted before the Merit Systems Protection Board (MSPB), shall be within the sole discretion of OSC.

4. In order to aid OSC's consideration of an action on cases referred to OSC, EEOC shall make available to OSC all information and evidentiary materials pertaining to the matter referred which are held by EEOC, subject to any legal impediments (if any) to the disclosure to OSC of any such materials.

5. OSC shall notify EEOC promptly of its prosecutive decision with respect to each matter referred by EEOC to OSC when OSC's review, investigation and prosecutive decision process is completed. When it is determined that OSC will not prosecute, such notification will include a statement of the essential reasons for such determination.

Post-It™ brand fax transmittal memo 7671		# of pages >
To Cheryl Mills / Maria Kistler	From Nick INZEO	
Co. White House	Co. EEOC	
Dept. Counsel's Office	Phone # 663-4683	
Fax # 456-1647	Fax # 663-4639	

6. The following offices of the respective agencies are designated to coordinate and implement the provisions of this understanding and agreement:

EEOC

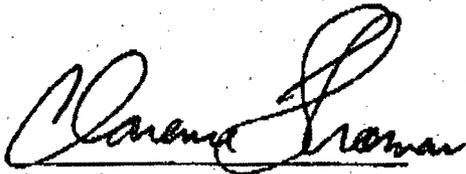
Director
Office of Review and Appeals
5203 Leesburg Pike Suite 900
Falls Church, Virginia 22041
Telephone: (703) 756-6090

OSC

Associate Special Counsel for Prosecution
Office of the Special Counsel
1120 Vermont Avenue, N.W. Suite 1100
Washington, D.C. 20005
Telephone: (202) 653-8970

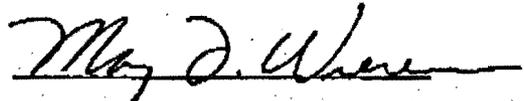
7. Either party may terminate its obligation under this Memorandum of Understanding by providing written notice to the individual listed in paragraph six.

SEEN AND AGREED TO:



Clarence Thomas
Chairman, Equal Employment
Opportunity Commission

Dated: 2/1/88



Mary F. Wieseman
Special Counsel

Dated: 2/2/88

in anti of upgrade but budget numbers do not justify this

Upgrades - Jan 11th meeting will vote on Commission's initiative -

Glenn has not provided any views

Glenn transfers all EEOC agency functions to EEOC

Glenn gives EEOC power to award damages
Hill allows punitive damages

Sentiment on the Hill is supportive -

Allows for DOJ referral

SES 48

25 headquarters

23 field offices

Sex harass

Age discrim

Civil Rts Act

150,000 projected

80,000 informal complaints

20,000 lead to non-formal cases

DOJ 952 days }
Stab 900 ↓
SBA 900 ↓

These cases will file more under Glenn -

Office of Magnet - Top fees costs

Nov 1 - Decl streamlining numbers
Used wrong projections -
straight like proj on complaints

Retreat based on directives to have Directors Run
The Agency
Chairman may not want this

In May looked at each component to streamline
June May - found waste, dup, over management
Directors rejected plan
major cut on Sr Staff -

Training Tech Asst Institute
91 Act. \$1 billion revolving fund -
This in addition to other ed efforts

DOL collapses info - overall minority employment rate - Tom Williams
OJCCP - gives false info -

GAO report - long; too complex
fine for Glenn bill -

EEO Regs at Wt Counsel - implementing -
3320 Civil Rts Law

Dec 14th Detail - Spec Assistant to Chair -
120 days no one -

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

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1993

79-010

FEDERAL EMPLOYEE FAIRNESS ACT OF 1993

FEDERAL EMPLOYEE FAIRNESS ACT OF 1993

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

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

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 404]

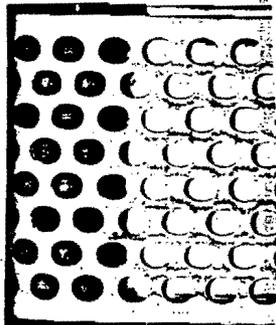
The Committee on Governmental Affairs, to which was referred the bill (S. 404) to amend title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 to improve the effectiveness of administrative review of employment discrimination claims made by Federal employees, and 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.

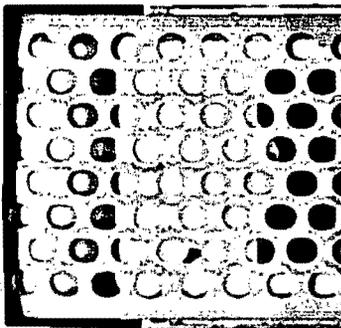
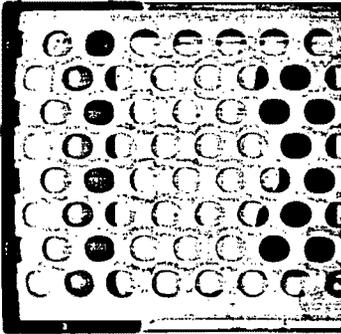
Women receive performance appraisals that are as good as or better than men's, and women surveyed expressed just as much commitment to their jobs and career advancement as men. However, there is evidence to suggest that women are often perceived to be less committed to their jobs than men. Particularly 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.

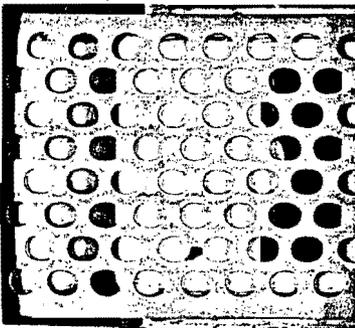
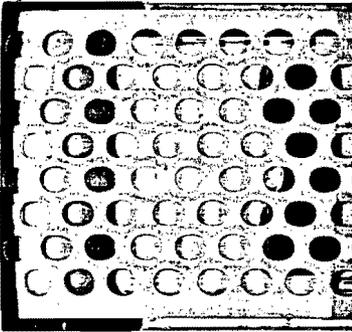
Since May 1991, the General Accounting Office (GAO) has issued a series of five reports on the government's equal employment opportunity efforts. The GAO's work in this area is important and instructive to understanding how to effectively manage the changing workforce. In its November 1991 report, GAO 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.

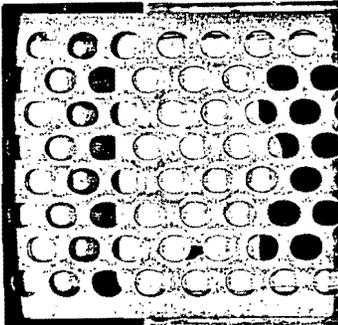
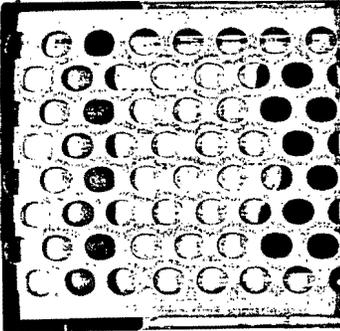
B. THE CURRENT EEO PROCESS

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).

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.

120 days
60 days for mediation or attempt to conciliate settle

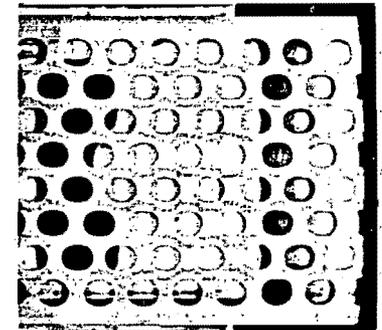
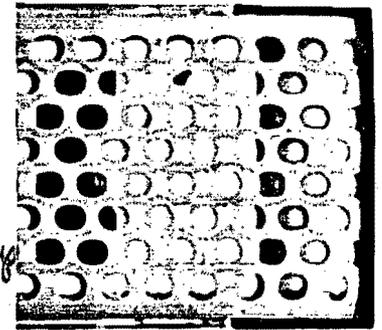
C. SPECIFIC CRITICISMS OF THE PROCESS AND THE LEGISLATIVE SOLUTIONS

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.

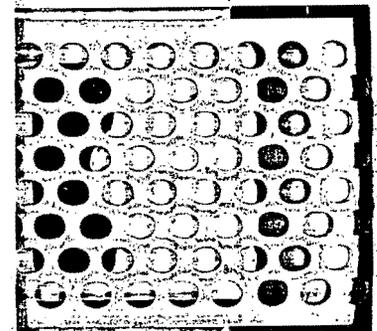
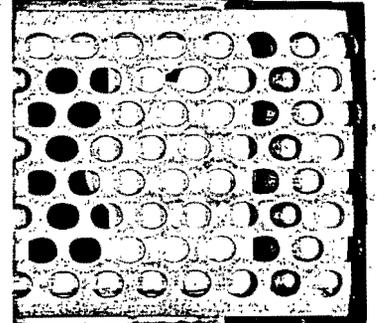
Finally, the study concluded that: "Even if one could eliminate the actual conflict, one can never eliminate the perception without an independent third party decision maker."

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.

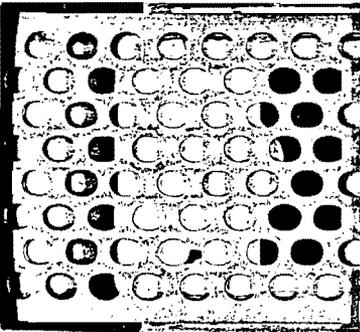
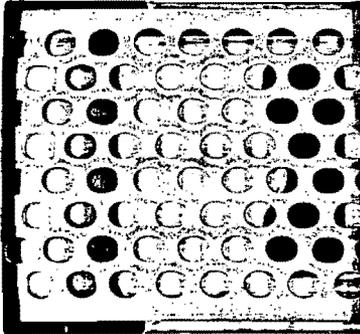
The 180 day period in S. 404 will provide sufficient time to allow employees time to file a complaint. It will give the complainant enough time to consult with an advisor or attorney to determine whether they have claims under Title VII and to determine the steps required to prosecute such cases resulting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

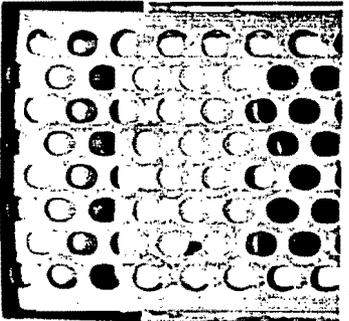
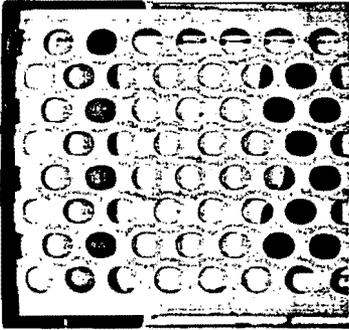
Such testimony prompted the Committee on Governmental Affairs to investigate more thoroughly the issue of sanctions against those found guilty of illegal discriminatory practices.

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-Ill), 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;

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

"(iii) 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

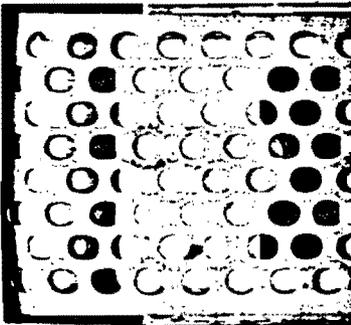
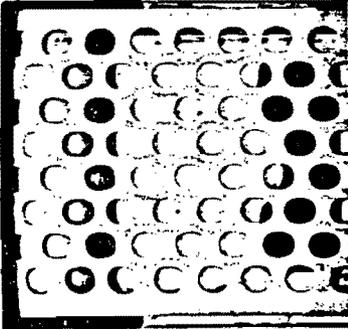
"(II) commence a civil action in an appropriate district court of the United States for de novo review of such claim or such complaint.

"(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.

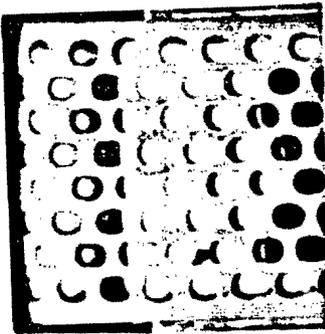
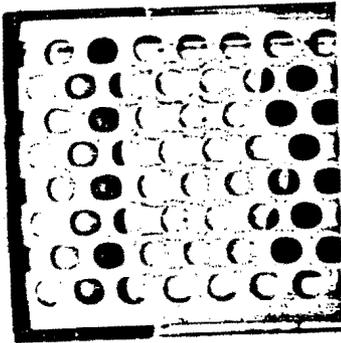
"(D) Such Federal employee may commence such civil action at any time—

"(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).

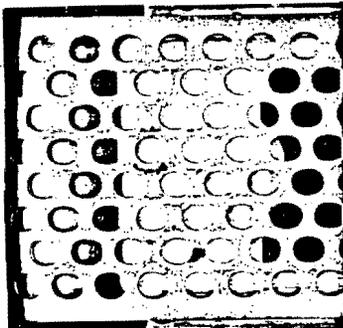
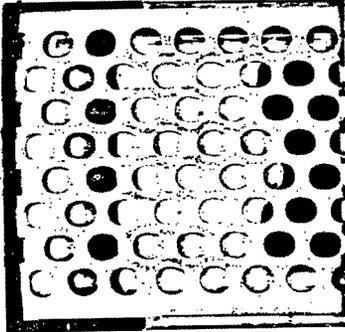
"(p)(1) The Commission, in consultation with the Director of Central Intelligence, the Secretary of Defense, and the Director of the Information Security Oversight Office of the General Services Administration, shall promulgate regulations to ensure the protection of classified information and national 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

to complaints filed under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) on or after the effective date of this Act.

V. SECTION-BY-SECTION ANALYSIS

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended (A, B, and C)

Subsection D(i)(I)

(1) Requires each agency to make counseling available throughout the EEOC process on the rights and obligations (under the process) of the individual employed by, or who applies for employment with, an entity of the Federal government, who chooses to notify the agency that they believe the agency has discriminated against them. Forbids the agency to discourage Federal employees from filing complaints.

mandatory for the

just 60 days thereafter, counseling available at employees request

(2) Requires the agency to establish a voluntary, alternative dispute resolution process to resolve the complaint. Failure to accept such arbitration or ~~counseling~~ is not a bar to the filing of a complaint.

binding

(3) Requires the Federal employee to file a complaint with the agency or EEOC within 180 days after a discriminatory event.

(90 days) (180 days) (180 days) (180 days) (180 days) (180 days)

(4) Establishes that a complaint filed without naming the correct defendant, but filed in a timely fashion, will be considered filed in compliance with the Act.

(5) Establishes a procedural pathway where claims filed with an incorrect respondent will be followed to the Commission, and the Commission will then notify the respondent.

(6) Requires the agency against whom the claim is being made, to collect and keep, from the day on which the agency receives the complaint to the end of all administrative and judicial proceedings, all information and documents pertaining to the claim.

(7) Requires the agency, within 30 days (plus a 30 day extension by written consent of the aggrieved party) of filing the complaint to either: attempt to conciliate the claim; enter into a settlement agreement; or give the complainant a written notice of the complainant's right to either petition the commission for a determination of the claim or file a civil suit seeking de novo review, within 90 days of receiving the agency's notice.

If no resolution after counseling period,

not to exceed 30 days

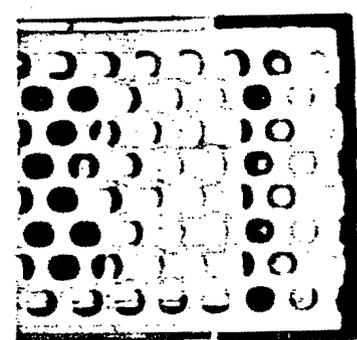
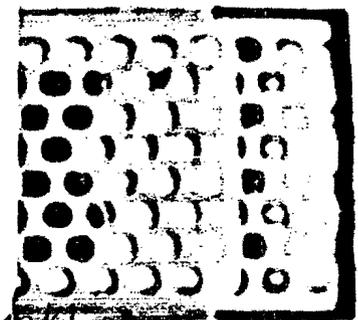
(8) Allows the complainant who does receive notice as required, to request Commission review or to file a civil action: after the 30 day (plus a 30 day extension) period allowed for conciliation or settlement, but within 90 days of receiving the notice.

Subsection (E)

Requires the Commission to transmit a copy of the complaint, where the employee has requested Commission review, to the appropriate agency and to appoint an administrative judge of the Commission to determine the claim.

Subsection (F)

(1) Allows an administrative judge ("AJ"), appointed by the Commission, to petition any member of the Commission to issue a stay against a personnel action for a period of 15 days if the AJ believes a stay is necessary to carry out the purposes of this section. Allows



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.

relevant

(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.

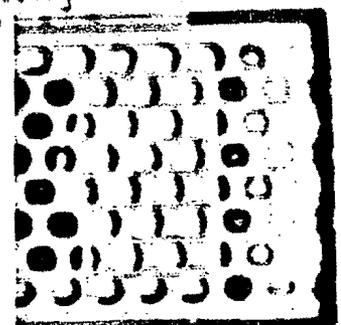
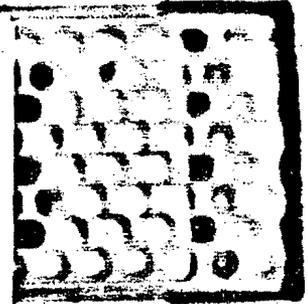
How is discovery currently available?

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 subpoe-

Is such broad authority needed - usual?



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.)

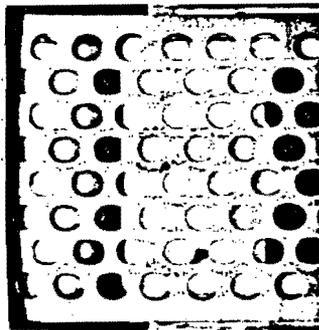
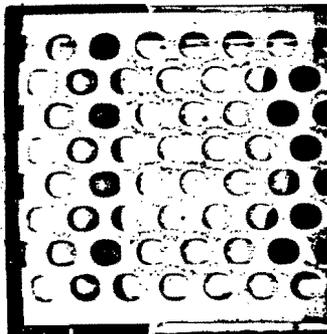
Allows the AJ, by written petition, to request a 30-day extension where the particular and unusual circumstances prevent compliance with the time frame. Allows the AJ to apply to the Commission to extend any period if manifest injustice would occur in absence of an extension. Prevents the Commission 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.

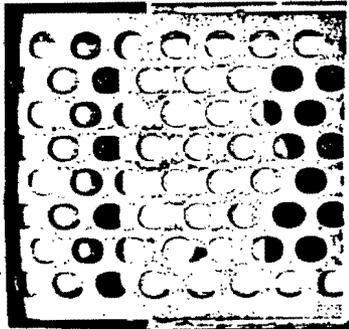
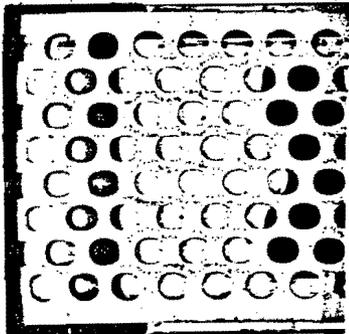
Establishes that the timely filing of a civil action terminates the jurisdiction of the AJ or Commission to determine the merits of the claim.

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.

*No
Appeal
Review
Required*



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)*

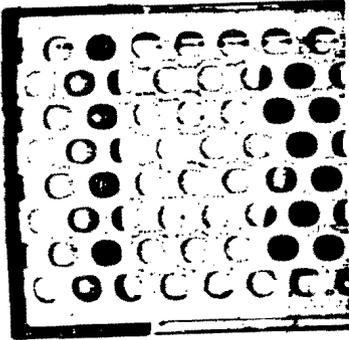
Amends the Age Discrimination in Employment Act (ADEA) to allow individuals covered by ADEA to file a complaint with the Commission in accordance with section 717 of the Civil Rights Act of 1964. Requires section 717 of the Civil Rights Act to apply to ADEA claims in the same manner as section 717 claims.

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)

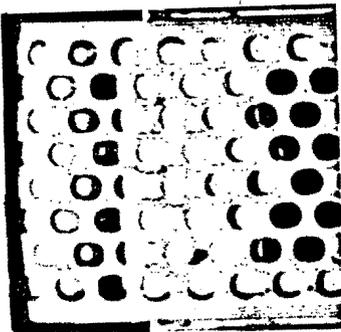
Allows an employee whose claim is pending before the EEOC between the effective date of this Act and December 31, 1993, to com-



No

no

no



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. MS

(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:

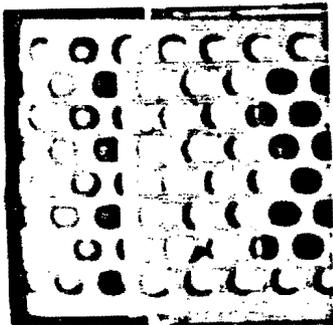
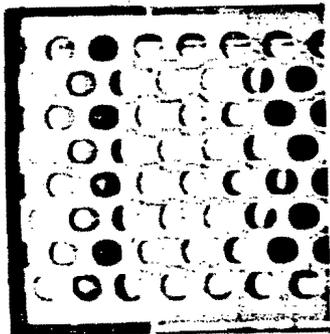
EEOC investigators already are stretched to the limit. They will break under these conditions. We are losing good staffers because of low morale. After all, who would want to stay at a job that required such a demanding workload when another agency was offering better pay for one-third of the work? We're 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.

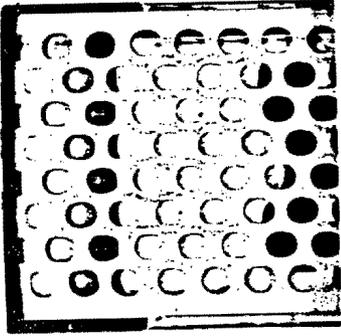
While it is important that we move forward to improve the EEO process, progress should not come at the expense of fairness and equity. For that reason I offered an amendment during committee markup of S. 2801, the precursor to S. 404 introduced in the 102nd Congress. The amendment was intended to lend 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.

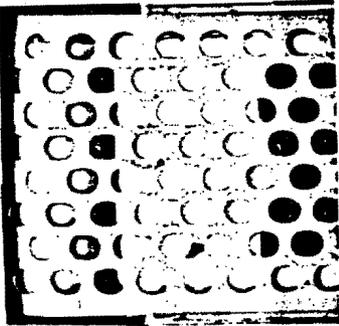


X. CHANGES IN EXISTING LAW

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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rent standards, and fair to those who need occasional help in their daily lives, will lay the groundwork for increased awareness, understanding and compliance.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 402

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

SECTION 1. SHORT TITLE, ETC.

(a) **SHORT TITLE.**—This Act may be cited as the "Occasional Employment Equity Act".

SEC. 2. INCREASE IN DOMESTIC SERVICE WAGE EXCLUSION.

(a) **IN GENERAL.**—Section 209(a)(6)(B) of the Social Security Act (42 U.S.C. 409(a)(6)(B)) is amended by striking "\$50" and inserting "\$250 for 1993 (or, in the case of any succeeding calendar year, the dollar amount for the preceding calendar year increased by the applicable adjustment determined under section 202(f)(8)(B) for such succeeding calendar year)".

(b) **CONFORMING AMENDMENT.**—Section 3121(a)(7)(B) of the Internal Revenue Code of 1986 is amended by striking "\$50" and inserting "\$250 for 1993 (or, in the case of any succeeding calendar year, the dollar amount for the preceding calendar year increased by the applicable adjustment determined under section 202(f)(8)(B) of the Social Security Act for such succeeding calendar year)".

(c) **EFFECTIVE DATE.**—The amendments made by this section shall apply to service performed in calendar quarters beginning after the date of the enactment of this Act.

By Mr. BREAUX:

S. 403. A bill to amend the Internal Revenue Code of 1986 to allow a tax credit for fuels produced from offshore deep-water projects; to the Committee on Finance.

DOMESTIC ENERGY SECURITY ACT OF 1993

Mr. BREAUX. Mr. President, I rise today to introduce the Frontier Offshore Production and Economic Enhancement Act. The bill would provide a \$5 a barrel credit for oil produced from deep water production—defined as 400 meters or more. This legislation is vitally needed to reduce our reliance on foreign oil, reduce the trade deficit, maintain a vital infrastructure, create jobs, and minimize the risk of oil spills.

Mr. President, this country continues to import an ever-increasing share of oil and petroleum products from abroad. In 1990, we spent \$65 billion on oil imports, which amounted to 64 percent of our total trade deficit.

We also spent billions and risked the lives of thousands of young Americans defending our interest in the Persian Gulf. A large part of that interest is the oil and gas that lies below the desert sands.

The domestic energy industry continues to decline. Thousands of oil industry workers have been laid off and it looks like many more may become unemployed in the near future. Over 400,000 jobs have been lost in the oil and gas industry in the last 10 years;

by some estimates, 40,000 to 50,000 may have been lost in 1992 alone.

Our national security depends on access to dependable domestic energy reserves. Unfortunately, our domestic oil and gas industry cannot turn on a dime. There is no magic spigot that can be turned on when the need for secure domestic oil reserves becomes acute. The expertise needed to develop oil and gas is highly skilled and trained, particularly now that the remaining domestic reserves are increasingly more difficult to recover.

Unless we take steps today to help preserve a viable domestic industry, the next energy crisis may be chronic and very damaging to our economy. Unless we act to preserve a core of talent and capital in the United States, the domestic industry may not be able to deploy the necessary capital investment and trained labor necessary to quickly add large increments to our overall domestic supply of oil and petroleum products.

Finally, the most recent data obtained from the minerals management survey shows that only 2 percent of the world's oil spills are the result from Outer Continental Shelf [OCS] development. In contrast, 45 percent of the world's oil spills come from transportation related, or tanker spills. The more we import, the higher risk there is of large oil spills.

An important part of our strategy to assure the availability of domestic supply is the development of the Outer Continental Shelf [OCS], in particular areas in the deep water, well over 1,200 feet. The OCS contains almost one quarter of all estimated remaining domestic oil and gas reserves; much of the reserves are in deep water. According to the Department of the Interior estimates, there are 11 billion barrels of oil equivalent in the Gulf of Mexico in waters of a depth of 200 meters or more. The costs of finding and producing oil and gas in deep water areas is astronomical; for example, a state-of-the-art rig in deep water, over 3,000 feet can cost more than \$1 billion, as opposed to \$300 million for a conventional fixed leg platform in 800 feet of water.

Based on similar large-scale projects, the development of the deep water of the Gulf of Mexico would create tens of thousands of jobs in the oil industry and a multiple of that in the general economy. The investment required to find, develop, and produce 5-10 billion barrels of oil could range from \$50-\$100 billion. Since various studies have estimated that every billion dollars worth of investment could create 20,000 jobs; a large scale effort could ultimately create up to one million jobs.

Under current economic conditions, most oil and gas potential in the deep-water Gulf of Mexico will not attract investment, due to the high cost of finding and producing hydrocarbons in a hostile deep-water environment. Therefore, I am introducing legislation to provide a \$5-per-barrel credit for production of qualified fuels, defined as

domestic crude and natural gas produced from property located under at least 400 meters of water. Unlike the general business credit, the deep-water credit cannot be carried back 3 years. Unused credits can be carried forward for 15 years. Unused credits can be carried forward for 15 years. The credit could be used to offset the corporate alternative minimum tax since many companies in the oil production and services industries are subject to the minimum tax.

Mr. President, I must emphasize that I have designed the credit to minimize revenue loss to the Government. Since there is typically 5 to 8 years between discovery and production of oil and gas in commercial quantities, there will not be a negative near-term impact on tax revenues. In fact, in the first few years, the deep water credit could raise revenue. During this interim time period, significant investments will be made to assure that the oil and gas will be brought to market. Suppliers, contractors, and employees will pay taxes on the additional income generated by these development activities. Their increased spending will increase the earnings and stimulate employment in many industries throughout the United States.

I urge my colleagues to join me in supporting this important legislation.

By Mr. GLENN (for himself and Ms. MIKULSKI):

S. 404. A bill 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; to the Committee on Governmental Affairs.

FEDERAL EMPLOYEE FAIRNESS ACT OF 1993

Mr. GLENN. Mr. President, today, I am introducing legislation which is designed to drastically overhaul the Equal Employment Opportunities complaint system. If ever a system cries out for change, the present EEO system does.

Joining me in this effort are Senators STEVENS, MIKULSKI, SIMON, DECONCINI, WOFFORD, AKAKA, FEINGOLD, CONRAD, MCCAIN, MOSELEY-BRAUN, LIEBERMAN, and LEVIN. I ask unanimous consent that they be listed as cosponsors of the bill.

Although the Federal Government has made progress in the area of equal employment opportunity, more should be done and it is important that the Federal Government should take the lead in shattering the glass ceiling.

Providing for equality of opportunity simply makes good business sense. When we restrict opportunity, either in government or industry, we hurt ourselves and diminish our economic potential.

At our Governmental Affairs Committee hearing on the glass ceiling in the Federal agencies, witnesses testified that the EEO complaint process it-

self is a barrier to the advancement of women and minorities. The EEO complaint process is designed to ferret out illegal barriers to employment and promotion. Therefore, if the complaint process is flawed, the barriers can become permanent roadblocks to career advancement.

As chairman of the Governmental Affairs Committee, I ordered the first Governmentwide study of why women and minorities in the Federal workforce can't seem to rise above the so-called glass ceiling that keeps them out of top Government jobs.

During the last session of Congress the committee held hearings on the EEO complaint system. We heard compelling testimony from several witnesses who shared their first-hand accounts of the flaws in the EEO system.

The committee heard from Donald Rochon, a former FBI agent, who gave an eloquent account of the 4½ years he spent trying to get the system to respond to his request for relief from the racist situation confronting him in the FBI. To say the system failed him would be a gross understatement. In fact, the person charged with deciding his fate was also named in his complaint. So, he was in effect required to ask for relief from the very people who were implicated in the complaint. The FBI in investigating itself, held itself blameless. That is the outcome of most of the cases not only in the FBI, but in many other Federal agencies.

Virginia Delgado testified that she ran into much the same problem. She was an EEO counselor in the Department of the Navy, and the system again failed when she tried to seek some sort of redress from the environment that she considered to be hostile and sexist. Five years after she filed the suit, the U.S. District Court agreed with her. However, in retaliation for her complaint she was fired. Her supervisor was found by a Federal district judge to have illegally created a hostile environment, but the Navy later promoted him and he became one of their top experts on sexual harassment. The level of retaliation illustrated in the case of Mrs. Delgado is an example of what Federal employees may face who file EEO complaints.

In a program aired in January of this year by CBS's "Sixty Minutes," several female agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) spoke out on sexual harassment and the resulting retaliation they suffered because they filed a complaint. According to many of the employees interviewed by my staff, the retaliation was often worse than the original complaint.

Ms. Penny Patterson, an ATF inspector, who testified at the Governmental Affairs Committee's hearings in October 1991 described the same kind of "good ole boy" network that the Washington Post reporter Lynne Duke described in an article which appeared in the Washington Post on January 27, 1993.

I believe this legislation will move us toward a system that will be fair and responsive to the individual employee, instead of favoring the agency, which is now the case. Federal agencies are playing fast and loose with the rules because they make up the rules. According to one Federal enforcement agent, "common criminals are entitled to more due process than a Federal employee who files a complaint."

Mr. President, that is a sad commentary on the present EEO system.

The Federal Employee Fairness Act will provide the statutory base for revising procedures that govern the process of EEO claims, a process which has not been revised since 1972.

First of all this legislation would take agencies out of the business of judging themselves. It would transfer the authority for determining the merits of EEO claims from the agencies against which the claims have been filed to the EEOC, an independent agency with expertise in investigating and evaluating employment discrimination claims.

Mr. President, the staff of the Governmental Affairs Committee has received many items of mail detailing case after case of agencies conducting their own investigations with predictable results 99 percent of the time; the agency finds itself not guilty.

Second, this legislation would eliminate duplication in the processing of EEO claims. The bill would eliminate the duplication that currently occurs when more than 120 different agencies each investigate claims and attempt to keep their EEO staff trained in the latest legal developments by transferring to the EEOC the authority for ensuring that claims are properly investigated and adjudicated. The agencies would still retain critical responsibilities for counseling complainants, attempting to resolve the claims and gathering relevant records. But, the bill would greatly increase the accountability for managing the processing of EEO claims by placing principal responsibility in one agency, not many agencies.

In fact in a report issued by the GAO entitled "Agencies Estimated Costs for Counseling and Processing Discrimination Complaints" we would actually save money by consolidating the complaint process in a single agency. In fact, the CBO estimates that savings could be as much as \$25 million yearly, once provisions of the legislation are fully operational.

Further, Mr. President, the bill would impose strict time limitations on the complainants, on the Federal agencies against which claims have been filed and the EEOC which would adjudicate the claims.

The EEOC made a long-awaited change in its regulation when section 1613 went into effect in October 1992. Our legislation will statutorily reduce the excessive delays currently confronting the parties to Federal sector EEO claims. The average time to fully adjudicate EEO claims in the Federal

sector was 338 days in fiscal year 1990 rather than the recommended 180 days, the most recent year for which figures are available. Some agencies process the claims much more slowly, such as the Department of Justice which averaged 841 days, over 2 years and the Department of State which averaged 1,134 days.

Under existing law, the complainant must file his or her EEO claim within 30 days. Often, this stringent time limit does not allow the Federal employee to determine if a claim should be filed. The Federal Employee Fairness Act would extend the time within which EEO claims can be filed from 30 days, at present, to 180 days which is currently available in the private sector, affording Federal employees time to think before they act.

The bill would provide Federal employees who eventually prevail in the system with interest on their awards of back pay to compensate for delay, just as employees in the private sector have recovered for years.

Another feature of the bill is that it ensures that hearings will be based on a complete and fair record. The bill would provide the parties with the right to conduct limited discovery of each other's position and authorize the administrative judges to ensure that the record is complete. Hearings would be based largely on a record compiled by the parties, with assistance from the judges where a party needs assistance and not, as is the current practice, on a record largely prepared from investigations that the agencies conduct of themselves.

The legislation further provides these same procedural improvements to victims of age discrimination. The bill would amend the Age Discrimination in Employment Act to adopt the same procedural improvements that would be made to title VII. In addition, the bill would allow employees to file within the same 2-year period that is available to employees in the private sector. And finally, it simplifies and streamlines the processing of mixed cases where civil service and employment discrimination claims are mixed together, rather than the current system that requires separate consideration.

Mr. President, the U.S. Comptroller General, Charles Bowsher, testified before the Governmental Affairs Committee on January 8, 1993, concerning the GAO transition series and critical issues facing the Federal Government. He told us that investment in human resources for Government operations is one of those critical issues. And GAO found that "the President and the Congress need to emphasize to agency heads that they must have programs in place and hold their senior managers accountable for achieving a representative work force, particularly at higher grade levels."

According to census figures and the Department of Labor's Workforce 2000 report, our Federal work force will be different in 7 years. It will be more di-

verse; it will contain more women; it will contain more minorities; and it will require more technological expertise. We must ensure that the work force is well-trained and efficient. And we must ensure that Federal employees are secure in the knowledge that they will be treated fairly in the workplace, and that talent and performance will be rewarded.

Mr. President, the Federal Employee Fairness Act will help to remove the obstacles now experienced in the current EEO complaint process and restore employee confidence in the system.

That is the very least we must do.

I ask unanimous consent that a copy of the legislation and the Washington Post article of Lynn Duke be printed in the RECORD immediately after my remarks.

Additionally, I ask unanimous consent that the statement of Senator BARBARA MIKULSKI of Maryland be printed in the RECORD immediately following these remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 404

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, 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.

"(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) 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 trying 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.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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002. memo	Melissa Cook to Donsia Strong re: Federal Employee Fairness Act (2 pages)	1/4/1994	P5
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**This marker identifies the original location of the withdrawn item listed above.
For a complete list of items withdrawn from this folder, see the
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COLLECTION:

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

FOLDER TITLE:

[Federal Employee Fairness Act]

ds59

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
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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)]

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003. memo	Ingrid Schroeder to Jennifer Palmieri (1 page)	7/27/1993	P5
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COLLECTION:

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

FOLDER TITLE:

[Federal Employee Fairness Act]

ds59

RESTRICTION CODES

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

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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004. draft	Chairman EEOC to The Honorable John Glenn (1 page)	7/20/1993	P5
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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

June 10, 1993

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Glenn:

Thank you for your letter of May 17, 1993 to the Chairman of the U.S. Equal Employment Opportunity Commission requesting comments on S. 404, the "Federal Employees Fairness Act."

The Administration appreciates the Committee's interest in this important issue and shares the Committee's goal of improving the administrative process for the review of Federal equal employment opportunity complaints.

The Administration is currently in the process of examining issues relating to the way in which Federal equal employment opportunity complaints are handled. As you know, these issues are broad in scope, affecting almost all Federal Executive branch agencies. We look forward to sharing our thoughts with you when the Administration has completed the review.

Sincerely,

Philip B. Calkins
Acting Director of Communications
and Legislative Affairs

LABOR

The Department of Labor has the following comments on EEOC's proposed report regarding S. 404.

COUNSELING

Counseling should continue to be mandatory in the EEO Complaint process. Counseling is a very effective mechanism for eliminating the costs of litigation, avoiding lost productivity time of employees who must participate in the formal complaint process, as well as mitigating the potential liability exposure of the agency for compensatory damages. Making counseling optional in the process will result in additional formal complaints being filed and subsequently place an additional workload burden on the agency.

AGENCY RESOURCES

EEOC's proposed report makes it clear that the EEO complaint process proposed by S. 404 can only be effective if adequate resources are provided to EEOC to support the structure. EEOC does not address the fact, however, that adequate resources must also be maintained in the agencies to support that process. For example, although the investigation of the complaint will be done outside an agency, there continues to be a workload requirement related to document production and testimony. An agency must also maintain a structure to coordinate and act as a liaison with EEOC during the administrative processing of the complaint. Additionally, increased litigation support in an agency will be required due to the increase in the number of hearing and appeals that will result under this structure. Accordingly, we believe that the EEOC's proposed report should better define the agency role in the proposed process and discuss the extent of agency support that will be required to effectively implement this proposed legislation.

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005. letter	Jesse Brown to Leon Panetta (6 pages)	6/2/1993	P5
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Statement of

American Association of Retired Persons
American Federation of Government Employees
Blacks in Government
Federally Employed Women, Inc.
Federally Employed Women Legal & Education Fund
George Chuzi of Kalijarvi & Chuzi
IMAGE
Mexican-American Legal Defense & Education Fund
NAACP Legal Defense & Educational Fund, Inc.
National Federation of Federal Employees
National Treasury Employees Union
National Women's Law Center
Terris, Pravlik & Wagner
Washington Lawyers Committee for Civil Rights Under the Law
Women's Legal Defense Fund

Before

The Subcommittee on Employment Opportunities
of the
House Committee on Education and Labor

and

The Subcommittee on Civil Service
of the
House Committee on Post Office and Civil Service

April 9, 1992

We are pleased to appear before the Subcommittee on Employment Opportunities and the Subcommittee on Civil Service to comment upon the Federal Employee Fairness Act and upon the urgent need for such legislation. There should be no question that the existing administrative process, by which federal workers may challenge employment discrimination to which they have been exposed, is fundamentally flawed. This process was designed to cover workers in all protected categories -- race, color, sex, ethnicity, religion, age, and disability. Unfortunately, for years this system has poorly served the federal government and its employees. While we applaud the EEOC's efforts, spanning more than a decade, to address these problems, we must conclude that the regulations that its 29 C.F.R. § 1614 will fail to correct many of the existing flaws in this system.¹ While we believe that some provisions of the Federal Employee Fairness Act require reexamination, we fully support this Bill.

I. The Federal EEO Administrative Process
Remains Fundamentally Flawed

We need not look far or hard to find compelling evidence that the existing EEO administrative process is riddled with defects. The Congress, including these subcommittees, has compiled an extensive record from a parade of witnesses, including victims and

¹ These regulations, scheduled to become effective on October 1, 1992, will be codified at 29 C.F.R. § 1614 and have not yet been formally published. Therefore, we will refer to them as the § 1614 regulations and to the appropriate subparts.

professionals intimately acquainted with this process, which demonstrates that this system needs to be fundamentally overhauled. And, virtually every Chair of the EEOC since 1972, when the protections against employment discrimination were extended to federal employees,² has recognized that this system has fallen far short of the high expectations that Congress has had for this system. Not surprisingly, therefore, bipartisan support exists to refashion this system. At the hearing jointly held before these subcommittees on March 1, 1990, extensive evidence was presented for the record of the deficiencies of the federal sector EEO administrative process.³ Since then, these subcommittees have also heard from victims of this process at hearings held on August 1, 1990 and November 20, 1991, at which time we were reminded of the high price that is daily paid in pain and suffering by those victims of discrimination for whom the noble promise of this system is really a cruel hoax.⁴ And, years before then, the Subcommittee on Employment and Housing of the House Government Operations

² The Age Discrimination in Employment Act (ADEA) was extended to federal employees in 1974. See Pub. L. 93-259, 88 Stat. 74 (1974).

³ See Subcommittees on Employment Opportunities & Civil Service, Joint Oversight Hearing on Equal Employment Opportunity Commission's Proposed Reform of Federal Regulations, 101st Cong., 2d Sess. (1990) ("Joint Oversight Hearing").

⁴ The first hearing was conducted on August 1, 1990 and the proceedings are reported in Subcommittees on Employment Opportunities & Civil Service, Joint Oversight Hearing on Equal Employment Opportunity Complaint Process, 101st Cong., 2d Sess. (1990). The second hearing was held on November 20, 1991 and the proceedings are reported in Subcommittees on Employment Opportunities & Civil Service, Joint Oversight Hearing on Victims of EEO Complaints Process, 102nd Cong., 1st Sess. (1991).

Committee conducted a series of four hearings on the shortcomings of this process.⁵ Together, these hearing records and reports comprise hundreds of pages of documentation in painful detail of the extensive and entrenched problems that have for years undermined the legitimacy and effectiveness of this system.

In addition, the remarks of the Chairs of the EEOC, the agency entrusted with responsibility for administering this process, confirm that this system is badly in need of repair. Chairman Evan J. Kemp, Jr. testified two years ago before these subcommittees that:

As a former federal employee who filed a complaint of discrimination against my agency, I know well the shortcomings of the current system from a complainant's point of view. The criticisms heard most often are:

1. ~~The system is too complex~~; there are too many steps and pitfalls for the unwary;

⁵ The first hearing was conducted on October 8, 1985 and the proceedings are reported in Subcommittee on Employment and Housing, Processing EEO Complaints in the Federal Sector--Problems and Solutions, 99th Cong., 1st Sess. (1985). The second hearing was held on June 17, 1986 and its proceedings are reported in Subcommittee on Employment and Housing, Processing EEO Complaints in the Federal Sector--Problems and Solutions (Part 2), 99th Cong., 2d Sess. (1986). The third hearing was held on September 25, 1986 and its proceedings are reported in Subcommittee on Employment and Housing, Processing EEO Complaints in the Federal Sector--Problems and Solutions (Part 3), 99th Cong., 2d Sess. (1986). The fourth hearing was held on June 25, 1987 and its proceedings are reported in Subcommittee on Employment and Housing, Processing of EEO Complaints in the Federal Sector: Problems and Solutions, 100th Cong., 1st Sess. (1987) ("Fourth Hearing").

The findings and recommendations from these hearings were reported on November 23, 1987 and appear in Committee on Government Operations, Overhauling the Federal Complaint Processing System: A New Look at a Persistent Problem, H.R. Doc. NO. 100-456, 100th Cong., 1st Sess. (1987).

2. There is a ~~perceived conflict of interest~~ in having the accused agency control the development of the record;
3. There are inordinate delays to get to a final decision; and
4. There is a lack of sanctions against agencies for inadequate investigations and inexcusable delay.

These problems with the process disadvantage everyone involved, most particularly federal workers.⁶

Before him, Clarence Thomas, who was then Chairman of the EEOC, repudiated this administrative process. Chairman Thomas was asked: "[I]s the message to Federal workers that if you can afford to hire an attorney you're better off doing so and going to court right away?" He replied:

The amount of time that it takes for that process to end and then be reviewed by EEOC admittedly -- I think there is enough blame to go around for everybody -- it takes too long. If there is a way to circumvent that process -- and that includes going to Federal court -- until that is corrected, then I would have to suggest that would be the best way to go.⁷

~~This fundamental lack of confidence from the Chairman of the agency charged with overseeing this process is a profound indictment of this system.~~

And, Eleanor Holmes Norton, who has been the Chair of the EEOC and is a now member of the Civil Service Subcommittee, commented at an earlier hearing before these Subcommittees that:

The inherent conflicts of interest, the time delays, the complexity of the machinery, and the lack of sanctions have produced a situation in which government workers are not afforded the rights that are available to workers in

⁶ See Joint Oversight Hearing, at 7 (Statement of Evan J. Kemp, Jr.).

⁷ Fourth Hearing, at 59-60.

the private sector. The irony is that Federal employees are second-class citizens in a complaint system that is supposed to eliminate second-class status. . . . I cannot overestimate the urgency of change. It is appalling that the government allows for itself what it does not permit or countenance in the private sector.

Together, this documentation and these disturbing observations from Chairs of the EEOC spanning the political spectrum compel the conclusion that there are common and enduring problems afflicting the EEO complaints adjudication process which require an immediate legislative solution.

And, these problems, documented over more than a decade, continue to plague this system. Although there are many ways to demonstrate the currency of the defects in this system, two examples should suffice.

First, the pace at which complaints are adjudicated in this system continues to be intolerably slow. In Fiscal Year 1990, the most recent year for which data is publicly available from the EEOC, the average time consumed in adjudicating EEO claims on the merits was 526 days.⁸ And, some agencies operated much more slowly than at even this unacceptable rate. The Department of Justice took 1083 days -- nearly three years -- to decide these claims on the merits⁹, while the Department of Housing and Urban Development took 1002 days¹⁰ and the Department of State took 1466 days to

⁸ See EEOC, Report on Pre-Complaint Counseling & Complaint Processing for FY 1990, at 39 (1990) ("EEOC Report for FY 1990").

⁹ See id. at A-16.

¹⁰ See id.

adjudicate these claims administratively.¹¹

And, the pace has not improved over time. The average time to adjudicate claims on the merits in FY 1988 was 607 days and in FY 1983 was 524 days.¹² Although the intolerably slow speed with which these claims are processed has been recognized as a problem for years, the pace has not improved.

These time delays are simply intolerable, robbing the complaints processing system of any legitimacy as an effective means to resolve EEO claims. And, these delays are a product of a systems with many steps, administered by different staff at different stages, in which there have been no deadlines requiring the agencies to complete the processing of claims in a timely fashion. In addition, since the complaints processing is conducted separately at each agency, there are complaints adjudication systems operating simultaneously at nearly 120 agencies, some more efficiently than others, but none operate with any real accountability to the EEOC or to the Congress.

Second, the current system entrusts to the agencies the investigation and adjudication of the claims brought against them, creating the perception, and unfortunately the reality at times, of a serious and debilitating conflict of interest. Even though claimants may elect to have their claims tried before independent administrative judges at the EEOC, those judges issue decisions that are merely recommendations that the agencies are free to

¹¹ See id. at A-17.

¹² See EEOC Report for FY-1989, at 34.

to findings that they hadn't discriminated than that they had committed discrimination.¹⁵

No legal system can achieve legitimacy, even if it had no other afflictions, with disparities in treatment of this enormity.

It's not surprising, then, that complainants report an overwhelming desire to avoid this complaints adjudication process and either proceed through the negotiated grievance process, when they are covered by a collective bargaining agreement, or go to the courts at the earliest possible time. Few, however, have the benefit of legal representation or the resources to engage in protracted and expensive litigation. To most complainants, therefore, this process affords the only forum in which their claims of discrimination can be heard. And these victims deserve a level field.

Conflicts of interest and time delays are but two of the many shortcomings of the present EEO complaints adjudication systems through which federal employees with equal employment claims are required by statute to proceed. Other problems with the system range from the inadequacy of the factual records compiled by the agency-conducted investigations and the limited authority of administrative judges to compel the attendance of witnesses at hearings of these claims, to the overly complex and slow system for

¹⁵ Disparities of comparable magnitude have appeared every year for which this data has been published. In FY 1983, for example, agencies rejected 39.4% of the findings of discrimination while rejecting only 0.4% of the findings of no discrimination and in FY 1985, agencies rejected 45.5% of the findings of discrimination while rejecting only 1.3% of the findings of no discrimination. See EEOC Report for FY 1990, at 50-51.

reject or modify. Therefore, the agencies decide the cases that are brought against them, relying largely upon evidence obtained from investigations that the same agencies also conduct.

The extent of this conflict of interest can be measured by comparing the receptivity of the agencies to findings of discrimination, recommended by the EEOC administrative judges, with their receptivity to recommended findings of no discrimination. Agencies that approach discrimination claims with impartiality would be expected to treat these findings alike, rejecting and accepting these findings with comparable frequency. The reality, however, falls far short of this expectation. In Fiscal Year 1990, for example, executive agencies as a group rejected 60% of the recommended findings of discrimination while rejecting only 0.5% of the recommended findings of no discrimination.¹³ This disparity is of a staggering significance. It reflects that executive agencies are nearly 120 times more willing to reject a finding of discrimination than a finding of no discrimination.

This problem too appears entrenched. Disparities of dramatic proportions have recurred each year for which the EEOC has made this data publicly available. In Fiscal Year 1989, for example, executive agencies rejected 58.5% of the findings of discrimination recommended by EEOC Administrative Judges while rejecting only 0.2% of the recommended findings of no discrimination.¹⁴ In FY 1989, therefore, executive agencies were about 290 times more receptive

¹³ See EEOC Report for FY 1990, at 50-51.

¹⁴ See EEOC Report for FY 1990, at 50-51.

the adjudication of EEO claims mixed with alleged civil service violations, to the frequent reluctance of agencies to punish managers whose conduct has been proved to be discriminatory. Together, these obvious weaknesses in the current system, and the broad, bipartisan consensus that this system poorly serves our government, should ring a clarion call for fundamental change.

II. The EEOC's New § 1614 Regulations
Do Little to Remedy These Persistent Problems

Recently, the EEOC issued new rules that will supplant the existing system for adjudicating EEO complaints in the federal sector.¹⁶ These regulations, which will be codified at 29 C.F.R. § 1614, have been under consideration and review at the EEOC for more than a decade.¹⁷ While they may address some of the defects afflicting the administrative process, there is much that regulatory change, constrained as it is by political and statutory limitations, cannot change. Even the Chairman of the EEOC acknowledged last month, when the final version of the § 1614 regulations were issued, that the final solution to the problems afflicting this process must be addressed by Congress.¹⁸ Accordingly, while we commend the EEOC for its efforts to address the faults of the complaints adjudication system, the regulations that it has issued are more noteworthy for the areas they do not,

¹⁶ The current system is governed by regulations found at 29 C.F.R. § 1613.

¹⁷ Since these rules will appear at 29 C.F.R. § 1614, we will refer to them as the § 1614 regulations.

¹⁸ See Priest, "EEOC Revises Bias, Disability Rules," The Washington Post (March 5, 1992).

and probably cannot, address than for the improvements that are accomplished.

The most significant development achieved by these new regulations is the establishment of fixed periods within which agencies must conduct investigations of EEO claims and within which Administrative Judges at the EEOC must issue their decisions.¹⁹ In the past, only the complainant was subject to time limitations within which he or she was required to act, leaving the agency and the EEOC unconstrained by any time limitations within which each must perform its duties. These new rules will bring some measure of parity between the parties to act in a timely fashion and may speed up the processing of some claims. Change in these areas is a welcome development.

But, we remain concerned that even these modest improvements will have limited success. In order for these reforms, particularly the deadline for completing investigations, to have any significant impact, there must be an enforcement mechanism that will impose real consequences if an agency fails to act in a timely fashion. Only then will agencies devote the necessary resources and attention to the vigorous and expeditious completion of investigations.

As the teeth behind this time limitation, however, the regulations simply authorize Administrative Judges to draw adverse inferences from the absence of materials that should have been included within an unfinished investigation. But, Administrative

¹⁹ See 29 C.F.R. §§ 1614.108.(f), .109 (g).

Judges have had such authority in the past and failed to exercise it with the frequency that seems warranted. More importantly, the regulations continue, as Title VII requires, to entrust to the agencies the discretion to reject or modify the recommended decisions issued by Administrative Judges. Accordingly, the agencies may repudiate a judge's reliance upon such adverse inferences in rendering the recommended decision. The sanction that may be imposed for failing to conduct a proper and complete investigation in a timely fashion, therefore, lacks any real teeth as long as the agencies retain final decisionmaking authority. Since this time limitation for the completion of investigations is only as effective as the sanctions which may be imposed for noncompliance, we have little hope that real expedition will be achieved by this rule.²⁰

While the regulations achieve other healthy changes, including a brief expansion of the time within which to initiate the complaints adjudication process and the more direct involvement by the Administrative Judges in overseeing discovery by the parties, they are modest departures from the cumbersome, ineffective system that is currently in use. Indeed, what is most striking about these new regulations is that they change little of consequence in the current system. As a press account issued at the time that the section 1614 regulations were issued confirms, the EEOC had more

²⁰ Even if investigations are conducted more rapidly, the § 1614 regulations maintain the practice of the agencies investigating themselves, perpetuating a longstanding conflict of interest and leaving unaddressed the inadequacies of many investigations that agencies conduct.

ambitious plans for these rules but they foundered at the Office of Management and Budget.²¹ Between the constraints imposed by the patchwork of statutes governing this system and the political hurdles that regulatory changes must surmount, it is not surprising that these new regulations leave the status quo largely intact.

III. The Federal Employee Fairness Act

The profound and intractable defects afflicting the current complaints adjudication process and the modest impact of the new EEOC regulations compel the conclusion that comprehensive reform of this system is needed and it is needed now. While some regulatory improvements in the system have occurred, many of the problems with the current system are rooted in a flawed structure that is created by statute. Accordingly, we believe that only legislation holds any promise of ultimately remedying the many defects of this system.

A list of these fundamental and persistent defects, which the EEOC's new regulations fail to address, confirms the need for legislation.

1. It is fundamentally unfair for agencies, against which EEO claims are pending, to investigate and adjudicate those claims themselves. Therefore, it is necessary for the factual development and the adjudication of these claims to be conducted by some other means.

2. The investigations that the agencies have conducted have often created files that, although voluminous, omit information that is critical to the full and fair adjudication of the EEO claims. Therefore, it is necessary to devise another way to develop the facts with

²¹ See Priest, "EEOC Revises Bias, Disability Rules," The Washington Post (March 5, 1992).

which the parties may present their positions at hearings on the EEO claims.

3. The time period within which complainants may initiate the process for pursuing an EEO claim should be expanded to permit reflection and an opportunity to look into their suspicions of discrimination before any action is taken. The EEOC regulations expand from 30 to 45 days the time from the last discriminatory incident within which complainants must contact an agency counselor to begin pursuing a claim. This time period must be considerably expanded.

4. Deadlines are needed within which the agency, the EEOC, as well as the complainant must discharge their respective responsibilities within the complaints adjudication system. The deadlines established by the section 1614 regulations are a good start but fail to create any real incentive for agency compliance.

5. Although the Civil Rights Act of 1991 clearly provided for the award of compensatory damages to Title VII claimants who proved that their employers intentionally discriminated against them, the section 1614 regulations do not authorize Administrative Judges to award such relief. Legislation would clarify that the mandate of the Congress is reflected in that Act.

6. Employees whose claims encompass both an EEO claim and a challenge under the civil service rules, and who therefore present a "mixed case," are compelled to proceed before another agency, the Merit Systems Protection Board, and then may present their EEO claim to the EEOC. Where those agencies differ, the claim is submitted to a special panel. This system is enormously complex and time consuming and requires modification.

7. Too often, employees who commit discrimination do so with impunity, retaining their employment and sometimes reaping promotions instead of receiving punishment for illegal conduct. Legislation is needed to ensure that persons found to have committed discrimination are subject to appropriate sanctions.

8. There are several judicial interpretations given the statutes and rules governing this system that have warranted revision for years and which legislation must address.

We endorse the Federal Employee Fairness Act because it offers fundamental revisions to the current complaints processing system

and regard its approach as providing the best hope of transforming this system into one that will fairly and promptly address the federal sector claims of discrimination. While there are many facets of this legislation that warrant its commendation, several should be noted here.

First, we applaud the removal from the executive agencies of the responsibility for investigating and adjudicating complaints of discrimination.²² For the first time since 1972, when Title VII coverage was extended to federal employees, the fox would no longer guard the chicken coop; the stain from the conflict of interest which inevitably taints the complaints adjudication system would finally be removed. The Act would entrust authority to issue final decisions, rather than simply recommendations, to the Administrative Judges of the EEOC.²³

We also endorse the Act's consolidation of much of this complaints adjudication process into one agency, the EEOC, which operates independently of the other executive agencies against which EEO claims are lodged.²⁴ In addition, we expect that this centralization of the complaints adjudication process will yield

²² Since Title VII expressly entrusts final action on complaints of discrimination to the executive agencies, removal of this function from those agencies requires legislation. See 42 U.S.C. § 2000e-16 (c).

²³ Of course, either party should be entitled, and the Act provides for appeals from the judges' final decisions to the EEOC.

²⁴ Of course, the Act must afford employees of the EEOC with discrimination claims the opportunity, if they so choose, to have the factual development and adjudication of those claims conducted by another agency.

other significant benefits. We expect that the staff handling these claims can, and will, be regularly and properly trained.²⁵ The assignment of these functions to a single agency also should increase the accountability for the operation of this system to the Congress and the public. And, we are hopeful that the Act will create economies of scale which ensure that the complaints adjudication system can be fully and properly funded.

The General Accounting Office (GAO) has computed the costs associated with counseling and processing of discrimination complaints at 29 Federal agencies.²⁶ In a report issued last month, GAO concluded that those agencies alone expended \$139 million on this complaints adjudication process.²⁷ Even modest reforms of the existing system will inevitably result in cost savings that will more than offset any new funds required to implement the Act.

Second, we endorse the Act's creation of a new system by which the facts relating to claims of discrimination, and the defenses to such claims, are discovered and collected. Under the current rules, the agencies conduct investigations of themselves, creating

²⁵ Toward that end, we endorse any enhancement in the grade levels for Administrative Judges and other staff affiliated with the federal complaints adjudication system that will ensure that the EEOC can attract and retain qualified staff.

²⁶ There are about 90 Federal agencies that the GAO has not yet examined. The total cost of the complaints adjudication process throughout the Federal government is undoubtedly much higher.

²⁷ See GAO, Federal Workforce: Agencies' Estimated Costs for Counseling and Processing Discrimination Complaints (March, 1992).

another conflict of interest that the EEOC's section 1614 rules do not eliminate. The current process for conducting investigations also suffers from another serious defect that the Act addresses. Investigations often result in the compilation of files which, although voluminous, omit facts that in the preparation for the hearing the parties or the Administrative Judge discover are relevant and should have been collected. Moreover, the quality of the investigations vary significantly; some are conducted more vigorously than others.

The Act, as we understand it, would transfer the principal fact gathering responsibility from the agencies alone to the parties under the supervision of the Administrative Judge.²⁸ We applaud this approach since it entrusts this important responsibility to the parties who have the greatest interest in seeing it conducted properly. And, it permits the parties, with involvement from the judge who will hear the claim, to define the scope of the discovery and to identify the facts that are needed to prove and rebut the claims.

We understand that, when a complainant is unrepresented, the Act contemplates that the Administrative Judge will require that

²⁸ We also believe, and the Act seems to recognize, that the agencies should continue to play an important role in the fact finding process. The agencies are necessarily more familiar with the documents created in connection with any challenged personnel action. It is important, therefore, that the agencies continue to have responsibility for the collection of documents relevant to proving, and rebutting, claims of discrimination. In addition, the agencies should retain, and we read the Act as providing, the opportunity for brief investigation of the allegations that may facilitate the conciliation of those claims.

the record be sufficiently developed and, if necessary, will identify the discovery needed by the complainant to ensure that a full and fair hearing is conducted. This provision for the discovery of facts where the complainant is unrepresented is critical to the protection of these rights guaranteed by the federal equal employment laws. We are hopeful that the discovery process provided by the Act will improve the quality of the factfinding upon which the hearings must rely.

Third, the Act expands the time period within which claimants must initiate the complaint process. Under current rules, claimants must initiate the process within 30 days of the last incident of discrimination that is alleged.²⁹ The EEOC's new regulations would extend that period to 45 days.³⁰ Employees in the private sector, however, are entitled to a minimum of 180 days within which to initiate the process available to them.³¹ And, even more closely related, the Civil Rights Act of 1991 affords employees of the U.S. Senate 180 days before they must initiate the complaints adjudication process available to them.³² Employees of executive agencies should be accorded, and the Act provides, the same time period of 180 days within which to initiate the complaint process. This additional time affords employees the opportunity to deliberate, to consult legal counsel, and to informally investigate

²⁹ See 29 C.F.R. § 1613.214 (a)(1)(i).

³⁰ See 29 C.F.R. § 1614.105.

³¹ See 42 U.S.C. § 20003-5 (e); 29 U.S.C. § 626(d).

³² See Pub. L. No. 102-166, 105 Stat. 1071, (Nov. 1991).

the circumstances surrounding the incident that they may challenge.

Fourth, deadlines are needed within which the agency and the EEOC as well as the complainant will be obligated to complete the tasks assigned to them by the complaints adjudication system. Here, the EEOC's new regulations make a significant contribution, creating for the first time limitations applicable to the agencies and to the EEOC.³³ But, as we observed earlier, as long as the agencies retain final decisionmaking authority, they remain at liberty to reject any sanctions that an Administrative Judge might impose for noncompliance with the time deadlines. By entrusting the authority to render final decisions to the Administrative Judges, as well as prescribing the consequences that would flow from noncompliance with the deadlines, the Act would substantially increase the likelihood that the deadlines would be honored.

Fifth, the Civil Rights Act of 1991 expressly extends to employees of governments and the private sector alike the opportunity to recover compensatory damages for intentional discrimination prohibited by Title VII and the Americans With Disabilities Act.³⁴ In its new regulations, the EEOC has apparently failed to permit the award of such damages in the administrative process.³⁵ In the Civil Rights Act of 1991,

³³ See 29 C.F.R. §§ 1614.105, .106, .108, .109, .110.

³⁴ See Pub. L. No. 102-66, 105 Stat. 1071, § 102 (a) (1) & (2)

³⁵ The EEOC's definition of remedies that comprise full relief does not include any reference to damages. 29 C.F.R. § 1614.501.

Congress failed to make any distinction between the award of damages in the courts and in the administrative process. Nor would such a distinction be wise. If damages cannot be awarded through the administrative process, this deficiency will quickly and dramatically diminish the value and attractiveness of this process to complainants. The availability of damages in the courts will create just the kind of incentive to proceed to that forum that this Act is designed to moderate. The same remedies must be available in the administrative and judicial forums. This Act should clarify Congress' intent to achieve such parity.

Sixth, the current system for handling mixed cases, by which claims of discrimination are joined with challenges arising under the civil service rules, is hopelessly complex and long. Employees, agency employers, and the administrative agencies involved in the mixed case procedure spend a great deal of time and effort attempting to resolve often simple cases, with inconclusive results. The central idea of the mixed case procedure, that the EEOC and Merit Systems Protection Board (MSPB) could both resolve the same case, with each having parity with the other, seems in retrospect to have been doomed from the start. This splitting of jurisdiction was rooted in uncertainty over how well the newly created institutions would do their jobs, and a mistrust of the ability of EEOC and MSPB to decide matters outside their own jurisdiction. Fortunately, these concerns have proven to be largely misplaced, and the track records of these decision-making entities provides a basis for employees to evaluate the appropriate

forum for a particular case.

To rectify the extraordinary delays and procedural confusion which now characterizes the processing of mixed cases, the Act permits employees to choose the forum -- MSPB, EEOC, or grievance arbitration -- in which they wish to proceed. Rather than have several different agencies engage in separate and time-consuming review of each other's decisions, the Act allows the chosen forum to decide all of the issues -- civil service, discrimination, or contractual -- presented to it in accordance with established case law.³⁶ At the end of the process, employees alleging discrimination retain the right to de novo review of that claim.

The Act will resolve mixed cases far faster than under the old system, and allow for more consistency in the adjudication of discrimination claims.

Seventh, agencies are often reluctant to punish employees who are found by either an administrative or judicial forum to have committed discrimination. The witnesses who testified at an earlier hearing before these Subcommittees confirmed a suspicion which many have held that managers who commit discrimination are rarely punished. Not surprisingly, the failure to discipline proven discriminators breeds contempt, or at least disregard, for the EEO laws. Managers are left with the impression that they can commit discrimination with impunity and the employees they

³⁶ Of course, the EEOC will be obligated to defer to the interpretations of civil service law construed by the MSPB, while the MSPB will be obligated to defer to the interpretations of equal employment laws given by the EEOC. *

supervise become demoralized and reluctant to exercise their rights under the equal employment laws on the belief that no improvements will ensue. While some agencies are undoubtedly diligent in imposing penalties where the commission of discrimination has been proved, there are enough occasions when this does not occur to warrant a change.

The Act would create a system by which employees who are found in a final order, in either an administrative or judicial forum, to have committed discrimination would be subject to appropriate sanctions. Any such system, of course, must ensure that the proven discriminators are afforded whatever process they may be due to challenge the sanctions that are imposed. Whether or not the precise approach set forth in the Act is the optimal approach, some system is necessary to ensure that agencies are accountable for the treatment they afford employees found to have committed discrimination. Since agencies typically deny the existence of discrimination in their workforce, they may be reluctant to punish managers later found to have committed such conduct in an administrative or judicial proceeding that ruled against the agency. Accordingly, the Act should provide for a system by which agencies are obligated to consider and impose punishment appropriate to the nature and severity of the discriminatory conduct committed. And, the Act should require that the agencies be readily accountable for the decisions they render regarding such sanctions and that such decisions will be scrutinized to ensure they are supported by the record.

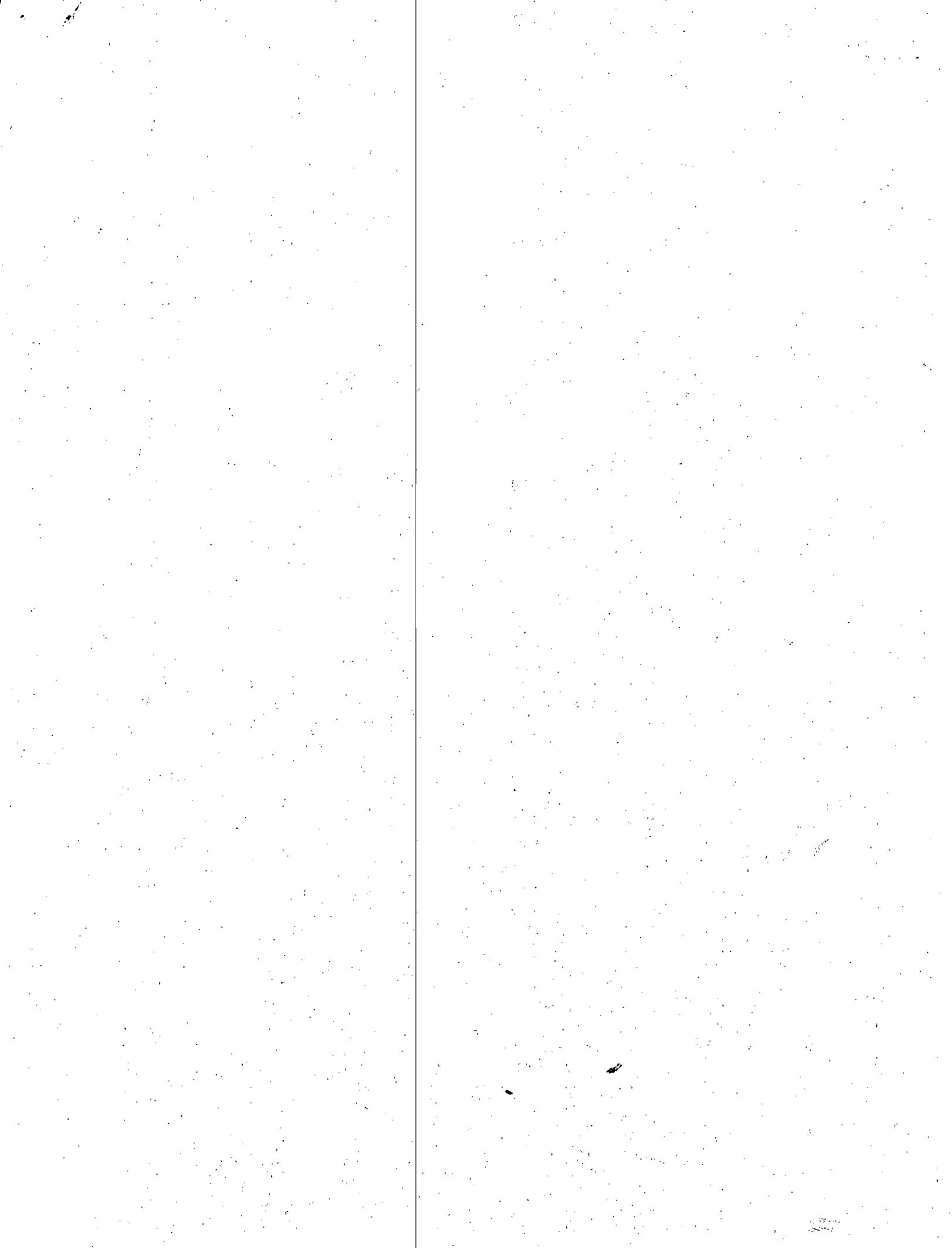
Eighth, the Act provides for a number of minor revisions to the existing complaints adjudication system, each of which addresses an important shortcoming. As an example, claimants who fail within the time allowed to name the head of their agency as the defendant in actions filed in the courts will have their case dismissed.³⁷ Simple lapses committed by unwary complainants, particularly those unable to retain legal counsel, therefore lead to draconian results. The Act should, and does, provide for amendment to this technical defect as it does for other such obstacles that have arisen in the interpretation and application of the federal equal employment laws.

IV. Conclusion

This year marks the twentieth anniversary of the amendment of Title VII that extended to federal employees the full protections against employment discrimination. The complaints adjudication system, which was created with the noble ambition that it afford an inexpensive, speedy and fair means of resolving EEO claims, has fallen far short of each of these goals. We have the benefit of an extensive record that documents the nature and extent of the entrenched defects in this system. And, we believe the Federal Employee Fairness Act offers the first opportunity for the

³⁷ This result occurs because Title VII provides that the head of the agency shall be named as the defendant in judicial actions and requires that such actions be filed within 90 days of final agency action. See 42 U.S.C. § 2000e-16 (c), as amended by the Civil Rights Act of 1991. The failure to name the agency head, or otherwise put the agency head on notice of the action, within the 90 day allotted period has been grounds for dismissal of the action. See, e.g., Johnson v. Burnley, 887 F.2d 471 (4th Cir. 1989); Johnston v. Horne, 875 F.2d 1415 (9th Cir. 1989).

fundamental reform of this system that is so sorely needed. We urge these Subcommittees to revise the bill where it is needed and report it for passage in this Congress. We look forward to working with you in this important effort.



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