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JUSTICE DELAYED IS JUSTICE DENIED: A CASE FOR A FEDERAL EMPLOYEES APPEALS COURT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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JUSTICE DELAYED IS JUSTICE DENIED: A CASE FOR A FEDERAL EMPLOYEES APPEALS COURT

WEDNESDAY, NOVEMBER 9, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FEDERAL WORKFORCE AND AGENCY ORGANIZATION,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2247, Rayburn House Office Building, Hon. Jon C. Porter (chairman of the subcommittee) presiding.

Present: Representatives Porter, Davis of Illinois, Norton, and Cummings.

Staff present: Ronald Martinson, staff director; Chad Bungard, deputy staff director; Patrick Jennings, OPM detailee; Chad Christofferson, legislative assistant/clerk; Mark Stephenson, minority professional staff Member; and Teresa Coufal, minority assistant clerk.

Mr. PORTER. Good morning, everyone. I would like to bring the meeting to order.

We do have a quorum present. We would like to welcome you all to "Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court." I would like to thank everyone for being here today, and I know that it took some change in schedule, so for those that had those challenges, I appreciate especially your ability to be here today.

Since the founding of this Nation, the bedrock principle of judicial philosophy has been "equal justice under the law." We hold this principle so dear that we have carved it into stone in front of the Supreme Court. This principle should be no less true of the Federal employee redress system as in our courts.

But does the government deliver this result through its employee appeals system? At present, jurisdiction for handling Federal employee appeals is spread amongst the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the U.S. Federal Courts and the Office of Special Counsel. Critics have argued that spreading appeals through so many agencies has inhibited the process from being as fair as it could be. Although each agency head here today deserves credit for implementing key reforms to improve their respective agencies, the very structure of the system may present challenges too great to overcome without some fundamental reform.

Proposal for reform are what we are here to discuss. Today, among others, we are going to be discussing a proposal to consolidate all employee appeal and adjudication functions under one roof, a one-stop shop for the appeals matters. Advocates of this proposal claim that consolidating all these agencies would decrease confusion for the employees, managers and agencies; increase the efficiency of the process; and most important, deliver a more fair result for all parties that are involved.

Efficiency and fairness, though, are not always the words I hear when the current appeals system is explained. Back in 1978 the GAO had this to say about the day-to-day functioning of an average Federal workplace: "Supervisors and managers instead tend to use an informal [disciplinary] system of working around, isolating, reassigning, sending to long-term training, or even promoting unsatisfactory employees."

Interestingly, GAO made this comment in the same year that our current appeals system was created. It was believed at the time that splintering all the adjudicatory agencies apart would resolve the problems with the appeals system. Unfortunately, it seems as if little has changed. Federal offices are hearing the same complaints today as we heard back then. In 1996, for example, GAO again testified regarding the problems of the Federal employee redress system, and stated: "Because of the complexity of the system and the variety of redress mechanisms it affords Federal employees, it is inefficient, expensive and time-consuming."

The latest Human Capital Survey conducted by OPM reflected this sentiment yet again, revealing that employees are still frustrated by a system that doesn't deal justly with poor managers and poor employees. Under today's system, it is a challenge to determine which agency has jurisdiction over cases that involve a mix of discrimination, mismanagement or retaliation claims. So many cases fall under two or more venues that the time it takes to receive a decision is slowed to an unacceptable pace for all parties. If we are unable to obtain timely decisions for truly aggrieved employees, then justice delayed is justice denied.

Likewise, jurisdictional confusion opens the door for a problem known as "venue shopping." Under this scenario an employee with a complaint against his or her manager is permitted to "shop around" and file a complaint with multiple agencies. Feasibly, this person can simultaneously pursue a complaint against a manager at the EEOC, MSPB and Federal District Court. While the person in this example wouldn't be held accountable if the claim is frivolous, to the accused it can be a devastating experience. Because the system permits this kind of behavior, according to an American Bar Association publication, Federal employees are reportedly five times likelier than their private sector counterparts to issue a complaint against a manager.

The sad reality is that the existence of more claims does not mean that we are better at uncovering discrimination and abuse. To the contrary, the EEOC recently reported that of the 4,748 claims made by Federal employees in 2004 that were fully adjudicated by EEOC, 96 percent were found to lack merit. Let me repeat that statistic: not 10, 20, or even 50 percent, but 96 percent of cases fully adjudicated by the EEOC—at a heavy cost to tax-

payers, and a heavy cost to the employees that need the help of the system. This demonstrates serious problems and a staggering need for reform. Today's hearing will address this and a host of other reform ideas.

In the end, it is essential that whatever system is in place, we ensure that it is fair for all people involved, employees and managers, and it is efficient in its use of our taxpayer dollars. I look forward to hearing first from our Senior Executive Association regarding its specific proposal for reforming this system. I also look forward to hearing from the other agencies that are here this morning and would be impacted by such a reform.

But before I invite our witnesses to testify, let me underscore that this hearing, first of all, is a look at the issue. We are not expecting today to come up with a final answer, but I do expect to come up with a final answer in the not-too-distant future.

I hope that everyone can take away from this hearing a point upon which we can all agree, and that is, for the sake of the employees, for the sake of the managers, for the sake of the agencies and the taxpayers, we can and must find a better way to deal with how we handle this issue. I welcome all the ideas from the panel here today, from my colleagues, from the member agencies, employee organizations, and other interested groups, to work together in a common partnership toward that good. We are privileged to have some of the most knowledgeable individuals in the field to be with us today.

The bottom line is there are folks that have been discriminated against. There are folks that have problems with managers, very legitimate problems. There are employees that have problems with other employees. There are people that are having problems that are not gaining access to the system because it is tied up in our own bureaucracy. And as I tried to state earlier in my comments, I applaud the folks that are here today, for trying to do what you can with a system that we have given you to work with.

But I would like for us to think out of the box. What can we do to help that employee or that individual that needs help the most, and to find a system that eliminates, as much as possible, frivolous lawsuits so that there can be justice for everyone involved.

[The prepared statement of Hon. Jon C. Porter follows:]

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"Justice Delayed Is Justice Denied: A Case for a Federal Employees Appeals Court"

Subcommittee on the Federal Workforce and Agency Organization
Chairman Jon C. Porter

November 9, 2005

I would like to thank everyone for being here today to discuss the important issue of fairness in the Federal Government's employee appeals system.

Since the founding of this nation, the bedrock principle of judicial philosophy has been "equal justice under law." We hold this principle so dear that we have carved it in stone on the front of the Supreme Court. This principle should be no less true of the Federal employee redress system than it is of our courts.

But does the government deliver this result through its employee appeals system? At present, jurisdiction for handling Federal employee appeals is spread amongst the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the U.S. Federal Courts and the Office of Special Counsel. Critics have argued that spreading appeals through so many agencies has inhibited the process from being as fair as it could be. Although each agency head here today deserves credit for implementing key reforms to improve their respective agencies, the very structure of the system may present challenges too great to overcome without fundamental reform.

Proposals for reform are what we are here to discuss. Today, among others, we are going to be discussing a proposal to consolidate all employee appeal and adjudication functions under one roof—a one-stop-shop for all appeals matters. Advocates of this proposal claim that consolidating all of these agencies would decrease confusion for employees, managers and agencies; increase the efficiency of the process; and, most important, deliver a more fair result for all parties concerned.

Efficiency and fairness, though, are not always the words I hear when the current appeals system is explained. Back in 1978, the GAO had this to say about the day-to-day functioning of an average Federal workplace:

> Supervisors and managers instead tend to use an informal [disciplinary] system of working around, isolating, reassigning, sending to long- term training, or even promoting unsatisfactory employees.

Interestingly, GAO made this comment in the same year that our current appeals system was created. It was believed at the time that splintering all the adjudicatory agencies apart would resolve the problems with the appeals system. Unfortunately, it seems as if little has changed. Federal offices are hearing the same complaints today they heard back then. In 1996, for example, GAO again testified regarding the problems of the Federal employee redress system and stated:

> [B]ecause of the complexity of the system and the variety of redress mechanisms it affords federal employees, it is inefficient, expensive, and time-consuming.

The latest Human Capital Survey conducted by OPM reflected this sentiment yet again revealing that employees are still frustrated by a system that doesn't deal justly with poor managers and problem employees. Under today's system, it is a challenge to determine which agency has jurisdiction over cases that involve a mix of discrimination, mismanagement or retaliation claims. So many cases fall under two or more venues that the time it takes to receive a decision is slowed to an unacceptable pace. If we are unable to obtain timely decisions for truly aggrieved employees, then justice delayed is justice denied.

Likewise, jurisdictional confusion opens the door for a problem known as "venue shopping." Under this scenario an employee with a complaint against his or her manager is permitted to "shop around" and file a complaint with multiple agencies. Feasibly, this person could simultaneously pursue a complaint against a manager at the EEOC, MSPB and Federal District Court. While the person in this example wouldn't be held accountable if the claim is frivolous, to the accused it can be a devastating experience. Because the system permits this kind of behavior, according to an American Bar Association publication, Federal employees are reportedly five times likelier than their private sector counterparts to issue a complaint against a manager.

The sad reality is that the existence of more claims does not mean that we are better at uncovering discrimination and abuse. To the contrary, the EEOC recently reported that of the 4,748 claims made by Federal employees in 2004 that were fully adjudicated by EEOC, 96% of were found to lack merit. Let me repeat that statistic: not 10%, 20% or even 50%, but 96% of cases fully adjudicated by the EEOC—at a heavy cost to taxpayers—are deemed in the end to find no discrimination. This demonstrates a serious problem and a staggering need for reform. Today's hearing will address this and a host of other reform ideas.

In the end, it is essential that whatever system is in place, we ensure that it is fair for all people involved—employees and managers—and it is efficient in its use of taxpayer dollars. I look forward to hearing first from the Senior Executives Association regarding its specific proposal for reforming this system. I also look forward to hearing from the agencies that would be affected by such a reform.

But before I invite our witnesses to testify, let me underscore that this hearing is only a first look at this issue—we are not expecting to come up with any final answers today. I hope, though, that everyone can take away from this hearing a point upon which we can all agree, and that is for the sake of employees, managers, agencies and taxpayers we can, and must, find a better way to deal with these issues. I welcome the ideas of all our Members, agencies, employee organizations, and other interested groups to work together in a common partnership toward that good.

###

Mr. PORTER. I would like to do some procedural matters, and I ask at this time that we have unanimous consent that all Members have 5 legislative days to submit written statements and questions for the record, that answers to written questions provided by the witnesses, also be included in the record.

Without objection, it is so ordered.

I ask unanimous consent that all exhibits, documents and other materials referred to by Members and the witnesses may be included in the hearing record, and all remarks by the Members be permitted to be revised and to extend them.

Without objection, it is so ordered.

And it is also the practice of the subcommittee to administer the oath to all witnesses, so if you could please all stand, I would like to administer the oath.

[Witnesses sworn.]

Mr. PORTER. Let the record reflect that the witnesses have answered in the affirmative. Please be seated.

My able-bodied counsel is asking me to share with you that you are lucky today because I am losing my voice. [Laughter.]

So today is a good day to be here. I promise not to give you too hard of a time, but again, we appreciate you being here. I would like to turn to my colleague, Mr. Davis, for any opening comments.

Mr. DAVIS OF ILLINOIS. Thank you very much, Mr. Chairman, and I don't think that with the kind of weather that you have out in Nevada that you will ever lose your voice. You just kind of slow it down when you get here.

But thank you very much, Mr. Chairman.

Today's hearing is on proposals to streamline procedures for hearing Federal employees' allegations relating to personnel practices. The Senior Executive Association has presented the most detailed of such proposals. They propose creating a Federal employee appeals court, which would combine most adjudicatory functions currently preformed by the Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and the Office of Special Counsel.

Under this proposal, the decisions of this court would be final and not subject to appeal, except in the case of employment discrimination. It strikes me from a review of the testimony that this proposal is driven in large part by dissatisfaction with the length of time the current equal employment opportunity process takes. There does not seem to be much complaint with the process at the Merit Systems Protection Board, or the Federal Labor Relations Authority, with the exception of so-called "mixed cases" which involve both the MSPB and the EEOC. If that is indeed the case, it may be that a better approach would be to focus more narrowly on the current process for resolving discrimination complaints in the Federal workplace.

While I always keep an open mind on suggestions for improving the operations of the Federal Government, I must say that the proposal from the Senior Executives Association raises some serious questions in my mind. We must tread very carefully in this to ensure that due process rights of Federal employees are not diminished in what is being presented as an administrative reorganiza-

tion. To that end I am disappointed a bit that representatives of Federal employee unions were not permitted to testify today. The National Treasury Employees Union and the American Federation of Government Employees have submitted written testimony, which I ask be made a part of the record for this hearing.

It is also my understanding that employee representatives will be permitted to testify in person at any future hearings we may have on this subject.

Of course, as always, I look forward to this group of expert witnesses. And, again, thank you, Mr. Chairman, for giving us the opportunity to review this matter.

[The prepared statement of Hon. Danny K. Davis follows:]

REP. DANNY K. DAVIS – OPENING STATEMENT
HEARING ON "JUSTICE DELAYED IS JUSTICE DENIED:
A CASE FOR A FEDERAL EMPLOYEES APPEALS COURT"

November 9, 2005

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Under the proposal, the decisions of this court would be final and not subject to appeal, except in the case of employment discrimination.

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There does not seem to be much complaint with the process at the Merit Systems Protection Board or the Federal Labor Relations Authority, with the exception of so-called "mixed cases," which involve both MSPB and the EEOC. If that is indeed the case, it may be that a better approach would be to focus more narrowly on the current process for resolving discrimination complaints in the federal workplace.

While I will always keep an open mind on suggestions for improving the operations of the federal government, I must say that the proposal from the Senior Executives Association raises some troubling questions in my mind. We must tread very carefully in this area to ensure that due process rights of federal employees are not diminished in what is being presented as an administrative reorganization.

To that end, I am disappointed that representatives of federal employee unions were not permitted to testify today. The National Treasury Employees Union and the American Federation of Government Employees have submitted written testimony, which I hope will be made part of the record for this hearing. It is also my understanding that employee representatives will be permitted to testify in person at any future hearings we may have on this subject.

I look forward to hearing from our witnesses to day. Thank you Mr. Chairman.

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Mr. PORTER. Thank you, Mr. Davis.

Congresswoman, any opening comments?

Ms. NORTON. Thank you very much, Mr. Chairman, and I thank you for tackling this issue. I think everybody ought to be forewarned that this is probably the most complicated issue in the Federal service, and I know because I was there at the birth. This I disclose as a matter of disclosure, because I was Chair of the Equal Employment Opportunity Commission when both reorganizations occurred, reorganization No. 1 and reorganization No. 2. That is what this one was.

Reorganization No. 1, I am still very proud of. It was the transfer of the civil rights functions in the Labor Department to the EEOC, that is to say, the EPA and the Age Discrimination and Employment Agent Act, as well as, of course, certain of the Civil Service Commission functions.

Reorganization Plan No. 2 created the—what do we call it—the FLRA and the OPM, etc. Recognizing that four new agencies were being set up, the President's Reorganization Plan No. 1 called for the EEOC to be the chief coordinator. I must say that we played that role when I was at the EEOC. It completely atrophied after I left EEOC. I see no evidence that EEOC has played a coordinating role involving all of the agencies involved, even though it has reached out in many ways. It would have taken very aggressive action because the coordination would have meant you would coordinate among other agencies, the Justice Department, every agency that had anything to do with civil rights matters.

We are more than 25 years later. Everybody is frustrated with the accumulated experience. I should stress that when you are dealing with four agencies and they have overlapping jurisdiction, and it is the first time that these agencies in fact are operational, there was an attempt in 1978 to make sure that everybody's jurisdiction remained intact. Actually, I am surprised that, with more than 25 years later, in looking at this again, because I believe that the experience does inform us of—and long ago informed us of where some changes might have been made.

I am going to listen very intently, because I believe in government, I believe in the EEOC and the civil rights functions, and therefore, I believe that those who believe in them ought to be at the front of the line seeking to make changes. But I think that there ought to be a fair warning to those who want change, structural change, because this is the committee that created Department of Homeland Security. I still support that idea. I do not support the way the product has in fact operated. It is still trying to get itself to look like a Federal agency. I am a major cosponsor of a bill to take FEMA out of the Department of Homeland Security. I think it needs to be nimble, to not have its funds, for example, subject to being stolen in the name of security when you get hurricanes every year, and hopefully you don't get terrorist threats, anything like that.

We have seen, with the structural reform that we have already done, the virtual destruction of collective bargaining, according to a Federal court which heard the matter. We have seen other court suits now going forward as we deal with what we did in DOD and DHS with pay.

So I am not sure about you, Mr. Chairman, but if there is to be an appetite for structural reform, it seems to me that the presumption has to be overcome that we are ready and we have such a good proposal here tested and at least proven that we should move ahead on it.

But I think that we ought to remember that September 11th led to the changes that we have made, and frankly, I believe the September 11th deserve a better response than the monster we created in Department of Homeland Security. Again, I still support the idea. I do not support what has been made of the idea, which means that coming to a committee with an idea ought to, if anything, arouse skepticism if there is no indication that the idea would work or would work better than what is there, and that is what it seems to me is the burden of those who want to change.

The need for change, interestingly, is agreed across the board, and that is not always the case when it comes to the various groups that would be involved in a matter like this. What moves me always is the word "streamline," because, see, those are magic words to me. I think that people get to hate government when it gets to be complicated. For myself, I will be remembered, if at all, not about substantive things I am proud of at the EEOC like the sexual harassment guidelines, or the affirmative action guidelines, but for eliminating the EEOC's backlog by introducing streamlined processes that focused on early settlement of individual cases at a time when ADR was not even a word. So I come prepared to hear about something that would streamline a process.

But, Mr. Chairman, we have just participated in creating a super agency that has yet to show it can work, and the question I think for us is we want to create a super court. Maybe so, but the burden is on those who want to do it. I will want to know, is the problem in the appeals? Is that where we have to start? That is interesting. Often you have to start earlier than that to get a problem. Is the problem venue shopping? I couldn't be more in your corner. I can't go into court here in the District of Columbia and the Federal Court at the same time. That is a problem. But what does that have to do with appeals? That has to do with, forum shopping has to do with where you file in the first place.

So I am a little confused about focusing on appeals, except that this notion of mixed cases comes into play. I don't even want to go into what mixed cases is. The witnesses will testify, but a very few cases have overlap between EEOC and others. If you want to change the system because of those cases, then we need to understand if it is worth creating a whole super agency because of those cases, whether we ought to concentrate on those cases or whether we want to ask ourselves even deeper, more radical questions. What is the source of the problem? Is the source of the problem when the case gets to appeal? Fine. Then you are telling me that the cases are fine as they start. I am glad to hear that because I was not aware of that.

Very complicated issue. I think the way to go about it is the way the chairman is going about it, analytically. But I must say, Mr. Chairman, that unlike other matters before us, in order to get a hold of this issue, if you really want to deal with the super court notion, it does seem to me that you ought to prepare yourself—and

I am sure you have, Mr. Chairman—for what amounts to a mental exercise. I mean if you want to exercise it, you know, to exercise your mind is like doing a crossword puzzle, first try to understand this and then try to understand what the proponents want to do. Then perhaps we can make a decision on whether this is the right way to go or whether there are alternatives.

And I appreciate, Mr. Chairman, that you have looked at this problem. It is not a huge problem, but for Federal workers who spend a lot of time in the system, they deserve a lot better.

Thank you very much.

Mr. PORTER. Congresswoman, we are glad you are a part of this committee because we are going to need your help on this issue very, very much.

Mr. Cummings, any opening?

Mr. CUMMINGS. Yes, just very briefly, Mr. Chairman. I want to thank you for holding this critically important hearing to evaluate the restructuring proposal for the Federal employee appeals process.

For over two decades, Mr. Chairman, five distinct agencies have admirably worked to ensure that Federal employees have an appropriate forum to resolve their claims of unfair or unlawful treatment that occurs in the workplace.

As it now stands, agency involvement of the Federal employee appeals system includes: the Merit Systems Protection Board, which hears individual appeals regarding agency adverse actions; the Office of Personnel Management, OPM, which is charged with administering the Federal personnel system; the Office of Special Counsel, OSC, which investigates and prosecutes specialized cases with a focus on protecting whistleblower; the Equal Employment Opportunity Commission [EEOC], enforces the right of equal employment opportunity by hearing cases concerning discrimination; and finally, the Federal Labor Relations Authority, which adjudicates disagreements between agencies and unions.

Today's hearing presents us with the opportunity to discuss a proposal by the Senior Executives Association to streamline the Federal employee appeals system with the creation of a Federal Employee Appeals Court. Specifically the proposal calls for a single forum that would merge the appeals functions currently adjudicated by MSPB, OPM, OSC, EEOC and FLRA, into what would be considered a super agency. As the testimony of William Bransford articulates, the purpose of this new entity is to provide a simple and expeditious mechanism resulting in protection of the merit system by resolving employee concerns with relative speed, impartiality and in fairness, while preserving all employee appeals rights.

In principle, I am sure that we can all agree that we best honor our public servants by having a Federal employee appeals system that provides a just, timely and thorough resolution of employee grievances. Further, I am sure that we can all agree that the current appeals system is not perfect, and could benefit from some efforts to improve its effectiveness and efficiency.

I am expressly troubled by the lack of timeliness in the resolution of some mixed cases where there is a jurisdictional overlap between EEOC and MSPB, and the ability to continuously balance an

appeal in such a case for additional review to another adjudicative forum. However, I am not 100 percent convinced that the SEA proposal for Federal Employee Appeals Court is the best course of action. At this point it seems that the five agencies at the center of the Federal employee appeals system are able to sufficiently fulfill their unique missions.

The challenges that confront us seem largely concentrated to the extraordinary delays and disarray associated with mixed cases. With that said, the wholesale restructuring of the arbitration system seems unwarranted.

John Gage of the AFL–CIO wisely stated in his testimony that in particular, there is no need to create a system which deprives Federal employees of their fundamental civil right to challenge discriminatory employment decisions, while permitting private sector and other public sector employees to file cases in Federal courts, State courts and before State administrative agencies as they can do now. Something seems awfully wrong with that picture.

With that said, EEOC field restructuring plan that is typified by its calls for reduction of offices and staff, seems particularly unwise. No one wins if EEOC is incapable of enforcing discrimination laws, and if it is inadequately staffed to decrease backlogs and delays. Moreover, it seems appropriate that in focusing on specific challenges before us, that we look within the current system to determine how any perceived or actual inefficiencies associated with mixed cases can best be addressed.

With that, Mr. Chairman, I yield back and look forward to the testimony.

Mr. PORTER. Thank you, Mr. Cummings. I would like to respond just to a couple things. For the employees, I will be meeting with them, as I had asked, sometime before the end of the year for their assistance, as we look at the pay-for-performance proposals that has been before us, and by design my intentions were to have this discussion—and I appreciate your comment, Mr. Davis, as to why they are not here—but my goal is to actually have a personal one-on-one meeting to talk about the pay-for-performance proposal and to talk about some of their challenges in having a proper hearing. So your point is well taken, and I appreciate you bringing it up so I can make it clear that is my intention, and look forward to their input.

I thought today we should hear from the management team and some of the challenges that they have, but probably more importantly, this hearing is really being driven by the employees that are very frustrated and are looking for some help and assistance. So we are looking for ideas. I do not have an intention of creating a new bureaucracy. I believe that we have systems in place to provide input and proper litigation when necessary. But there may well be a more efficient approach for the employee, whether it be a clearinghouse or a one-stop beginning to point them to the right agency.

So I would hope as our discussions unfold, that I would not send the message that I am hoping or even intending to create additional bureaucracy or a super court system. But I do think that with the talent that we have, with the management team and the employees, we can find a system internally to make it easier for

those that have been wronged to find some relief as quickly as possible.

So appreciate my colleagues and your input, and look forward to future discussion.

So today, as in the past, know that our witnesses have 5 minutes each for their opening remarks, and after which the members of the committee will have a chance to ask questions. We only have one panel today, but I say today I am looking forward to additional hearings on this issue as we move forward. Today that panel will be comprised of Mr. William Bransford, general counsel for the Senior Executives Association; Neil McPhie, chairman of the Merit Systems Protection Board; Mr. Dale Cabaniss, chairman of the Federal Labor Relations Authority; and Cari Dominguez, Chair of the Equal Employment Opportunity Commission. And again, if I can say, Cari, I know it was a challenge and I appreciate you being here today.

Mr. Bransford, thank you for appearing before the committee. I look forward to your testimony. Please proceed.

STATEMENTS OF WILLIAM L. BRANSFORD, GENERAL COUNSEL, SENIOR EXECUTIVES ASSOCIATION; NEIL A.G. McPHIE, CHAIRMAN, U.S. MERIT SYSTEMS PROTECTION BOARD; DALE CABANISS, CHAIRMAN, U.S. FEDERAL LABOR RELATIONS AUTHORITY; AND CARI M. DOMINGUEZ, CHAIR, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

STATEMENT OF WILLIAM L. BRANSFORD

Mr. BRANSFORD. Thank you. Good morning, Mr. Chairman, and members of the subcommittee. I am William Bransford, general counsel of the Senior Executives Association, the professional association that represents the interests of career senior civil servants. We appreciate the opportunity to testify about an initiative we believe will correct the broken state of the Federal employee appeals process and improve Civil Service management. We look forward to presenting the perspective of the career Federal executive.

SEA proposes that jurisdiction for the appeals and complaints processes for Federal employees currently investigated and adjudicated by the Merit Systems Protection Board, the Federal Labor Relations Authority, labor arbitration, the Office of Special Counsel, the Office of Personnel Management, and the Federal sector EEO system, be moved to and consolidated into one independent Federal Employee Appeals Court.

The court we propose would be an Article I court similar to the U.S. Tax Court, and would have complete jurisdiction over Federal employee workplace issues, with appeals to the Circuit Court of Appeals for the Federal circuit for EEO matters. Our proposal ensures that all substantive appeal and complaint rights, including jury trials and compensatory damages for EEO cases would be preserved, and the new court would include investigative and dispute resolution functions that would employ all Federal employees whose jobs might be affected by the consolidation.

The current system serves as a barrier to Federal managers effectively managing workplace misconduct and poor performance. The simple threat of an EEO complaint by an unhappy subordi-

nate, which can hang over a manager for 3, 4, 5 or even 6 years, gives pause to even the best manager before deciding to take action against a problem employee.

Consider the EEOC's 2004 report, 601 days on average for agencies to issue a merit decision in an EEO complaint when no judge is involved. Even including cases withdrawn, settled or dismissed, average process time is 469 days. A case that goes to an EEO administrative judge lengthens these time limits considerably. This extensive process found only 321 cases of discrimination out of over 23,000 complaints closed last year, a rate of 1.3 percent. Even including cases that settle, nearly 80 percent of EEO complaints still have no merit. Of course, even one instance of discrimination is too many. We believe this new court would provide a reinvigorated system that can screen out frivolous complaints early and more effectively deal with discrimination.

One reason the current EEO system is so clogged is that it investigates every complaint, no matter how obviously specious of unconnected to actual discrimination. This is because the agencies investigate themselves, so every complaint is thoroughly reviewed to avoid accusations of conflict of interest. An independent court could take these same complaints and dismiss those with no merit, while putting resources into investigating and adjudicating viable cases. The sheer waste is reason enough to seriously examine reform of the current system.

And that is just EEO complaints. Consider labor arbitration for employees in bargaining units on adverse actions that can also be appealed to the Merit Systems Protection Board, and there is the Office of Special Counsel for Whistleblower Reprisal, and on and on.

The multitude of possibilities, the complexity of the system, and the delay, hinder good management. First level supervisors are reluctant to act, and higher level management is unsure about the level of support to give the front line manger. There is also the risk of reprisal allegations if a management decision needs to be made affecting an employee who has filed an EEO complaint. Simpler, more effective reform will help managers feel more comfortable to deal with problem employees in good faith, and will also help more quickly expose poor managers. Equally important, those with legitimate complaints and grievances will see them attended to more expeditiously.

In the meantime, and until this court is operational, Congress should provide for statutory assurances that make the manager more a part of the EEO process. We propose that agencies be required to advise management of the filing of a complaint, to provide managers with relevant documents and the right to representation during meetings and investigations, to be consulted before a case is settled, and to be reconsidered for lost awards, lowered performance ratings and other negative personnel actions that occurred because of an EEO complaint if the EEO complaint is eventually found to be without merit.

As the Merit Systems Protection Board rapidly processes cases and focuses on the statutory standard of efficiency of the service and the merit system, we believe its practices and culture would provide an excellent framework for the new court.

We hope that today's hearing will spark a debate about reform of the Federal employee appeals process, particularly the lengthy and bulky processing of EEO complaints. Tomorrow's Federal managers will face increased expectations and accountability as reform of the Federal Civil Service's performance management system takes place. These managers deserve a new appeals system that adequately protects employees and the merit system, but does so in an expeditious and understandable manner.

I have heard comments this morning attacking our proposal. I hope we can focus more on the problem the Senior Executives Association, in recognition of a serious problem, has put forth a very serious proposal that we believe will correct the matter, but more than that, we hope the debate will lead to some reform that will make a meaningful difference.

Thank you very much.

[The prepared statement of Mr. Bransford follows:]

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TESTIMONY

of

WILLIAM L. BRANSFORD

General Counsel

SENIOR EXECUTIVES ASSOCIATION

Before the

HOUSE GOVERNMENT REFORM COMMITTEE,
SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

November 9, 2005

Mr. Chairman and Members of the Subcommittee:

The Senior Executives Association appreciates the opportunity to testify today about one of its longstanding proposals for reform in the area of federal employee appeals. As you know, the Senior Executives Association (SEA) is a professional association that represents the interests of career federal executives in the Senior Executive Service (SES) and those in Senior Level (SL), Scientific and Professional (ST), and equivalent positions. This career senior executive corps which SEA represents provides the consistent leadership, skills and institutional knowledge necessary to accomplish the work of the federal government effectively and efficiently through times of crisis as well as executing the everyday functions of government that keep our nation running. On their behalf, SEA advocates for improving the efficiency, effectiveness and productivity of the federal government. It is in that spirit which we submit this testimony.

For many years, federal managers and employees have labored under a complicated and mostly broken appeals mechanism that allows employees numerous bites of the apple, a multitude of different paths to pursue, and the ability to tie up management for years with frivolous complaints. Some federal employees abuse the complaint and appeals processes with impunity, slowing down the system for those cases that truly need consideration. A process for complaints and appeals is, of course, necessary for the protection of the integrity of government because it prevents the abuse of employees and preserves the merit system. In our opinion, however, the current dysfunctional system for raising EEO complaints, adverse action appeals, whistleblower complaints and labor grievances serves as a major barrier to managers' effective handling of problem employees, and it fosters an environment in which the public gains the perception that problem employees are tolerated by federal managers. Furthermore, it is wasteful and unnecessary to have so many lengthy and redundant processes.

SEA proposes that federal employee complaints and appeals currently investigated or adjudicated by the Merit Systems Protection Board, the Federal Labor Relations Authority, the federal EEO program and the Equal Employment Opportunity Commission, the Office of Personnel Management, and the Office of Special Counsel be consolidated into an independent Federal Employee Appeals Court. This new court would replace all existing appeals systems and would provide a simple and expeditious mechanism, resulting in protection of the merit system by resolving employee concerns with relative speed, impartiality and fairness, while preserving all employee appeals rights.

Today's federal manager has become an easy and convenient target. Sometimes under fire both from higher level management and by subordinates, the federal manager is often perplexed about how and when to do the right thing.

Surveys show federal employees perceive that their agencies do a poor job in dealing with problem employees and in making meaningful distinctions in performance. Proposals for reform of the federal performance management system mention the linchpin of manager accountability and an expectation that managers will hold their employees accountable for their performance. This feedback contributes to a manager's desire to do the important things that all good

supervisors should do when managing their workforce.

But let's take a realistic look at the environment under which the federal manager actually operates in dealing with a problem employee. Assume a manager wants to give a lowered performance appraisal with some negative comments because that manager in good faith believes the employee's performance is substandard. That manager risks the employee's visit to the EEO office to complain about discrimination, which could result in a complaint naming the manager as a responsible management official, a complaint that could eventually continue on for years, tying the manager's hands with the threat of a reprisal complaint if the manager proceeds with further action.

Alternatively, the employee can file a union grievance that the union can take to arbitration for those employees in a bargaining unit. A third possibility is for the employee to claim that a performance appraisal is whistleblower reprisal if the employee has had a past disagreement with a supervisor that the employee calls a protected disclosure. This would then go the Office of Special Counsel, and the employee could eventually appeal to the Merit Systems Protection Board. All of these avenues are readily available, and often are used for just one performance appraisal.

If the manager decides that the same employee is performing or behaving so poorly that he or she should be disciplined, the appeals process becomes even more complicated. The employee can appeal directly to the Merit Systems Protection Board if the proposed discipline is removal, demotion or a suspension of more than 14 days. At the MSPB, the employee can raise EEO defenses in what is called a mixed case. As an alternative, the employee can choose to utilize the agency EEO process with an eventual appeal on an adverse action to the MSPB. The employee can then go to federal court or to the EEOC. Or, if the employee does not go through the agency EEO process, but claims discrimination, the employee can still go to the EEOC and to federal district court after the MSPB. Again, whistleblower reprisal claims can go the Office of Special Counsel or to the MSPB directly for a covered adverse action. Employees in a bargaining unit can choose to go to the MSPB or, with the consent of their labor union, to arbitration.

This complicated process gives pause to even the best manager before taking action or even engaging in frank day-to day conversations about performance and work place conduct. For a manager, the most difficult step in dealing with the problem employee is often the first step that invites adversity, the first time that the manager counsels or warns a subordinate about unacceptable conduct or performance. It is no wonder that some managers come to the unfortunate and mistaken conclusion that it is better to ignore a problem employee rather than to invite all the EEO complaints and union grievances that might follow from doing the right thing and confronting the employee. Yet, inaction is the worst course, because future action to deal with a continuing problem will be more difficult, and avoidance contributes to the workplace and public perception that problem employees are tolerated in the federal civil service.

To deal with this perception problem, the DHS and DoD reform measures have granted

those agencies the flexibility to design their own appeals systems and rules. In this reform, the EEO process has not been touched, nor have EEO reform measures been suggested. During the debate of the last three years about reform of the employee appeals process, the Senior Executives Association has been a strong supporter of the continuation of Merit Systems Protection Board appeal rights for federal employees, an option that was ultimately adopted as both departments considered their reforms.

In our opinion, the Merit Systems Protection Board has not been the problem with the federal employee appeals system. The Board has rapidly processed cases and generally is supportive of reasonable management efforts to discipline problem employees and to respond to poor performance, while at the same time preventing abuses of the merit system. In most years the MSPB upholds management actions about 80 percent of the time and decides most cases in less than 100 days.

Contrast the MSPB's performance with what happens in a typical EEO case. According the 2004 Annual Report of the Equal Employment Opportunity Commission, the average processing time for a merit decision on an EEO case is 601 days when no EEOC judge is involved. Even counting cases withdrawn, dismissed, or settled, the Federal Government average for all EEO complaints not referred to an administrative judge is 469 days. A case that is refered to an EEOC judge takes even longer to adjudicate. It takes an average of 280 days to complete EEO investigations, even though regulations require they be completed in 180 days.

Of course, these are averages. There are numerous EEO complaints that are processed for four, five or six years. EEO professionals often candidly admit that employees sometimes misuse the EEO process to raise complaints of job dissatisfaction lacking evidence of discrimination because it is perceived as the only forum available in which a matter can be raised effectively and heard outside the agency.

Perhaps this is one reason the findings of discrimination in EEO cases is so low. In 2004, discrimination was found in 321 cases out of 23,153 complaints closed, or in 1.3 percent of the cases. Even considering only merit decisions and excluding cases settled, withdrawn, or dismissed, the percent of cases where discrimination is found is 2.94 percent. But the cases settled, withdrawn or dismissed were processed and did use time, energy and resources in the EEO system. About 20 percent of cases closed in 2004 were settled. This means that slightly less than 80 percent of EEO closings in 2004 were ultimately found to be without merit and that managers have had to work under the stigma of many frivolous EEO complaints for years because complaints take far too long to process.

One reason the EEO process is so clogged is that a very high percentage of those 23,153 complaints are fully investigated, even though it is apparent to any informed observer that the complaint lacks merit. Agencies do this because federal agencies investigate themselves when an EEO complaint is filed. To address concerns about a process that has inherent conflicts of interests, the federal sector EEO system responds by fully investigating and processing every EEO complaint even if it obviously lacks merit at the outset. An independent court—freed of the

conflict of interest concern—can more effectively screen EEO complaints, focusing resources on the complaints that potentially have merit. The result would be faster justice for those employees who are, in fact, victims of discrimination.

While it is true that the EEOC has developed a special expertise on employment discrimination, that expertise also exists at the Merit Systems Protection Board, where mixed cases containing EEO issues have been adjudicated for more than 25 years. In the new court, existing judges and other professionals from the MSPB and the EEOC could form a base to effectively and fairly consider discrimination cases.

From a manager's perspective, a problem employee filing an EEO complaint creates substantial challenges. The manager is not necessarily a part of the EEO process, but may spend years working with the very employee who accused the manager of illegal discrimination. Often an employee has no evidence of an improper discriminatory motive or action, but feels mistreated and sees no other avenue for recourse against perceived mistreatment. The manager, on the other hand, is concerned about the appearance of reprisal when making difficult and sometimes unpleasant personnel decisions. And, in a number of cases of which SEA has learned over the years, the mere existence of an EEO complaint can affect a manager's eligibility for awards and promotions or cause a lowered performance appraisal for the manager. Even if the complaint is later found to have no merit, the manager is left with that negative impact on his or her record, as well as lost professional opportunities. We believe that consolidating and simplifying the appeals process will relieve many of these concerns and make it easier and less risky for managers to confront work place problems readily, if for no other reason than the process will move faster.

SEA also proposes changes in the existing EEO process (to the extent a separate court is delayed in becoming a reality) so that managers are assured of rights during the process. We propose statutory assurances that managers accused of discrimination be informed of the accusation, allowed access to accusatory documents, be permitted representation during meetings and investigations, be consulted before a settlement of an EEO complaint becomes final, and be considered for reinstatement of lost promotions or awards and reconsideration of other negative personnel actions that occurred because of an EEO complaint that was ultimately found to lack merit.

Another part of our proposal is to move matters now subject to labor arbitration to this new consolidated court. We do not propose any elimination or reduction in collective bargaining, nor do we suggest changes in the use of a negotiated grievance procedure to deal with workplace concerns--other than substituting this proposed new court for the current arbitration option. All matters of contract interpretation and employee complaints or appeals could still be subject to full union representation in the grievance process and to an ultimate decision by an impartial judge. This would include matters now referred to the Federal Services Impasses Panel to resolve collective bargaining impasses. We also propose that this new court resolve unfair labor practices and other labor management disputes.

SEA foresees the possibility of federal sector labor unions raising objections to the placement of what is now labor arbitration in a separate court or agency. However, over the years, the MSPB has developed a sophisticated and relatively predictable body of law concerning the rules of the workplace. It also has gained a reputation for speedy and impartial resolution of cases. We expect this practice by the MSPB, particularly its efficiency, to be incorporated into the new court. From our perspective, there really is no good reason for arbitration to continue, especially if an independent and specialized court can hear and decide all federal employee issues.

Moreover, many managers and human resource professionals perceive that the arbitration process is unreasonably geared toward employees when compared with Merit Systems Protection Board adjudication. Typically, agencies and unions split the arbitrator's fee, and both the agency and the union have to agree on the choice of the arbitrator or the means of selecting the arbitrator. Because of this, many managers believe that arbitrators often feel some pressure to view a case through the perspective of the management and union relationship, rather than by a focus on rules of the workplace as determined by MSPB precedent. Managers frequently refer to a tendency by arbitrators to split the baby or find some means to keep both the union and management happy. While we are not aware of empirical data to support the validity of this perception, the existence of the perception as it applies to arbitration is real. We are not aware of such a perception applying to MSPB adjudications, which are generally perceived as impartial, comprehensive, fair, reasonably predictable and supportive of the merit system and the efficiency of the service.

A question SEA cannot answer based on current data, but which should be considered, is the extent to which arbitrators' tendencies to mitigate penalties contributed to the Department of Homeland Security and the National Security Personnel System regulations (and proposed in the draft Working for America Act) substantially raising the legal standard for the MSPB or an arbitrator when mitigating a penalty choice that an agency has made for an adverse action. According to its 2004 Annual Report, the MSPB mitigated only 31 cases out of more than 6,000 appeals filed that year. It hardly seems worth all the effort to rewrite the rules and invite all the litigation for a mere 31 cases government-wide, only a handful of which were at Homeland Security or Defense. Perhaps the perception of arbitrator mitigation and the desire to more effectively control those arbitrators is what is really driving the rule change. It seems easier, simpler and just as fair to the employee and the merit system to allow all of these appeals to be heard in one place and to keep the mitigation rule as it has always been, i.e., mitigating only those penalties that are beyond the most reasonable penalty that could be imposed for an offense.

Under current law, after a federal employee with an EEO complaint has exhausted the lengthy and complicated administrative process discussed above, the employee can then go to federal district court and start all over, sometimes many years later. The creation of an Article I court with judges appointed by the President and confirmed by the Senate, and hearing examiners hired by the court to adjudicate more routine matters, creates a court with the capability to fully process and hear any federal employee EEO complaint. These Article I judges can be authorized to empanel juries and to award full relief, including compensatory damages authorized by law. No rights or considerations would be lost. But the process would only happen once, with

subsequent review being limited to the traditional appellate process, but to the Circuit Court of Appeal for the Federal Circuit, to assure that a uniform body of the rules of the workplace is available to federal managers as they engage in the day to day work of running their operations.

We also envision that this court would have a division for fact finding, dispute resolution and investigations. This is particularly important in fully resolving EEO and whistleblower reprisal claims. But the difference is that only meritorious cases will be investigated under a process supervised by an independent judge. If an EEO case is dismissed, the employee can appeal to the Federal Circuit. Otherwise, we envision the court's decision to be final. The division of the court for investigations and dispute resolution could employ the many EEO professionals who might be displaced by the adoption of this new process in offices set up in different parts of the country.

We consider the current system to be redundant, wasteful and complex. But most of all, we believe it simply takes too long. There is nothing more frustrating for a federal employee than to prevail in an EEO complaint six years after it has been filed and to realize that justice cannot be attained because circumstances have so changed in the lengthy time span during which the complaint was processed. Similarly, for those managers in the approximately 17,000 EEO complaints filed annually without merit, the burden of managing those subordinate employees over the long period of the complaint lifespan is an unreasonable burden that should now be relieved.

We conclude by stating that a fair and objective review and the state of the current system points to the need for a fairer, faster and simpler solution - one place to seek redress for legitimate federal employee workplace complaints, the Federal Employees Appeals Court.

Mr. PORTER. Thank you very much, appreciate your testimony. Mr. McPhie.

STATEMENT OF NEIL A. McPHIE

Mr. MCPHIE. Thank you. Good morning, Chairman Porter, Ranking Member Davis, and members of the committee. My name is Neil McPhie. I am the chairman of the U.S. Merit Systems Protection Board. Thank you for the opportunity to appear before you today to testify about the proposal to establish a Federal Employee Appeals Court.

My comments today summarize my written statement, and I respectfully ask that my written statement be included in the record.

The Senior Executives Association advances two main reasons for consolidating the existing complaint, appeals and grievance process into a single system administered by a court. The first reason given is that the current system is complex and confusing, in that personnel actions can be challenged before multiple bodies that apply different law.

The second reason given is that under the current system it takes too long to resolve challenges to personnel actions. I believe the second reason, delayed resolution of disputes, is the greater concern. I submit, however, that the proposal ought to be subjected to fuller study.

As to the first reason to establishing a court, it appears that managers who view the current system as too complex and confusing are primarily responding to the multiplicities of our laws and regulations that govern the Federal employment relationship, and not the fact that there are multiple avenues available for challenging personnel actions.

Without providing an exhaustive list I would point out that an employee could claim that a single personnel action was improper for any or all of the following reasons: it was not taken for the efficiency of the service; it was discriminatory; it was taken in retaliation for the employee's whistleblowing; it violated the corrective bargaining agreement; or it constituted an unfair labor practice.

Under the current system each of the claims I have just described could be considered by a different body, or in some instances by an arbitrator. Nevertheless, all of the claims could still be made if those bodies were combined into a single entity. My point is that insofar as day-to-day management of the Federal work force is concerned, complexity may be an outgrowth of the numerous detailed rights that policymakers have conferred on civil servants. In general the perceived complexity of the current system does not seem to be directly caused by the availability of multiple avenues for review of personnel action.

In this connection I note that the current system has safeguards intended to prevent inconsistent decisions. For example, by statute an employee who believes that a personnel action was taken against him because of his whistleblowing must make a binding election among three possible review mechanisms: a grievance, a direct appeal to the MSPB, or a complaint for corrective action before the Office of Special Counsel. A choice of any one of these avenues forecloses the other two. Without going into further examples,

I would simply observe that the current system is not designed to reach inconsistent decisions.

As to the second main concern, lengthy delays, I note that a typical non-mixed case—that is one that does not go to EEOC—moves through the administrative system fairly quickly. In fiscal year 2005 the MSPB's administrative judges issued decisions in an average of 92 days. In over 50 percent of the cases, the administrative judges' decisions became the final decision. Based on fiscal year 2005 figures, on average it takes no more than 122 days from the date of the personnel action to the AJ's final decision. Either party may seek review of the administrative judge's decision before the full MSPB, and the Board members are striving to decide cases on average within 120 days.

In fiscal year 2005 the Board reduced its pending headquarters inventory by 38 percent, from 955 cases to 593. A smaller inventory obviously means that newly filed cases will be decided more quickly. The MSPB is firmly committed to reducing its processing time as new Department of Homeland Security and Department of Defense appeals systems go into effect, although as I have stated in the past before you all, that MSPB will treat cases from all agencies equally.

Assuming that the full MSPB can decide cases within an average of 120 days, in a typical case the total time from the date that personnel action is taken until a final judicially reviewable administrative action is rendered should be about 277 days, roughly 9 months.

The mixed case process where there is an appeal from an action that is both within the Board's jurisdiction and that the employee believes was discriminatory, presents a significant timeliness challenge. If the employee chooses to pursue every step in the process within regulatory timeframes, then approximately 695 days, or nearly 2 years, will have passed before administrative review is complete. The proposal from the Senior Executives Association would significantly modify the procedures by which discrimination claims are decided.

It comes as no surprise, when I would tell you that it is my hope that you as policymakers would exercise great caution when studying ways to modify procedures for certain discrimination claims.

In conclusion, it is possible that streamlining benefits may be achieved by consolidating current dispute resolution bodies into a single Federal Appeals Court. I would suggest, however, that the efficiencies sought by the Senior Executives Association could possibly be gained by reforming the current system. An appropriate course, in my view, would be to form a task force of the stakeholders to study possible changes and work to resolve inefficiencies in the current system. Naturally, the MSPB will be pleased to assist any such task force with its work.

Again, thank you very much for permitting me to come and make these remarks.

[The prepared statement of Mr. McPhie follows:]

Hearing Statement

Submitted by

Neil A. G. McPhie, Chairman

U. S. Merit Systems Protection Board

"Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court"

Subcommittee on the Federal Workforce and

Agency Organization

Committee on Government Reform

United States House of Representatives

The Honorable Jon Porter
Chairman

The Honorable Danny K. Davis
Ranking Member

November 9, 2005

Good morning Chairman Porter, Ranking Member Davis, and Members of the Subcommittee.

My name is Neil McPhie and I have the honor of serving as Chairman of the U.S. Merit Systems Protection Board. Thank you for the opportunity to appear before you to testify about the proposal to establish a Federal Employees Appeals Court.

The materials prepared by the Senior Executives Association identify two main reasons for consolidating the existing complaint, appeals, and grievance processes into a single system administered by a Federal Employees Appeals Court. The first reason given is that the current system is complex and confusing, in that personnel actions can be challenged before multiple bodies that apply different law. The second reason given is that, under the current system, it takes too long to resolve challenges to personnel actions. I believe that the second reason, delayed resolution of disputes, is the greater concern, although I respectfully suggest that the offered solution, a Federal Employees Appeals Court, requires further study.

As to the first main reason for establishing a Federal Employees Appeals Court, it appears that managers who view the current system as too complex and confusing are primarily responding to the multiplicity of laws and regulations that govern the federal employment relationship, and not the fact that there are multiple avenues available for challenging personnel actions. Without trying to provide an exhaustive list, I would point out that an employee could claim that a single personnel action was improper for any or all of the following reasons: It was not taken for the efficiency of the service; it was discriminatory; it was taken in retaliation for the employee's whistleblowing; it violated a collective bargaining agreement; it constituted an unfair labor practice; it violated employee protections set out in the Uniformed Services Employment and Reemployment Rights Act; it violated veterans' preference rules; or it violated classification rules.

Under the current system, each of the claims I have just described could be considered by a different body, or in some instances an arbitrator, with a specialized

role in the federal employment dispute-resolution system. Nevertheless, all of the claims could still be made if those bodies were combined into a single entity. My point is that insofar as day-to-day management of the federal workforce is concerned, complexity is an outgrowth of the numerous, detailed rights that policymakers have conferred on civil servants. In general, the perceived complexity of the current system does not seem to be directly caused by the availability of multiple avenues for review of personnel actions.

In this connection, I would point out that the current system has safeguards intended to prevent inconsistent decisions. For example, by statute, an employee who believes that a personnel action was taken against him because of his whistleblowing must make a binding election among three possible review mechanisms: A grievance; a direct appeal to the MSPB; or a complaint for corrective action before the Office of Special Counsel. A choice of any one of these avenues forecloses the other two. To take another example, an action that is pursued to a final grievance decision that is reviewable by the Federal Labor Relations Authority is excluded from MSPB jurisdiction, and conversely, an action that is appealable to the MSPB is excluded from FLRA jurisdiction. Without going into further examples, I would simply observe that the current system is not designed to reach inconsistent decisions.

As to the second main concern identified by the Senior Executives Association, lengthy delays in resolving challenges to personnel actions, I would say that a typical non-mixed case – that is, a case which does not involve a claim of discrimination – moves through the administrative system fairly quickly. After an action is taken, the employee must appeal to the MSPB within 30 days. In fiscal year 2005, the MSPB's administrative judges issued decisions in an average of 92 days. In more than half of the cases that are filed with the MSPB, neither party requests further administrative review, meaning that the administrative judge's decision becomes the final administrative decision on the personnel action. Based on FY05 figures, on average it takes no more than 122 days from the date of the personnel action to this final administrative decision.

Of course, not every case ends that quickly. Either party may seek review of the administrative judge's decision before the full MSPB, and the Board members are striving to decide cases on average within 120 days. While the full MSPB is not there yet, the trends at headquarters are positive. In fiscal year 2005 the Board reduced its pending headquarters inventory by 38%, from 955 cases to 593 cases; a smaller inventory means that newly-filed cases will be decided more quickly. The MSPB is firmly committed to reducing its processing time as the new Department of Homeland Security and Department of Defense appeals systems go into effect, although as I have stated in the past before this same committee, the MSPB will treat cases from all agencies equally. Assuming that the full MSPB can decide cases within an average of about 120 days, in a typical case the total time from the date the personnel action was taken until a final, judicially reviewable administrative decision is rendered should be about 277 days, or about nine months.

Another underlying concern with regard to lengthy delays is the "mixed case" process, where there is an appeal from an action that is both within the MSPB's jurisdiction and that the employee believes was discriminatory. If the employee chooses to pursue every step in the process, and if each step is completed within regulatory timeframes, then approximately 695 days, or nearly two years, will have passed before administrative review is complete. It is not for me, as the head of an independent, non-policy-making agency, to say whether this is an unacceptably long time. Determining what constitutes appropriate case processing timeframes remains a speculative and subjective matter ripe for debate. The proposal from the Senior Executives Association would significantly modify the procedures by which discrimination claims are decided. These established procedures evolved as a result of the civil rights movement, a long struggle that reshaped the course of our great nation. I would hope that policymakers exercise great caution when studying ways to modify procedures for asserting discrimination claims.

In conclusion, it is possible that streamlining benefits may be achieved by consolidating current dispute-resolution bodies into a single Federal Employees

Appeals Court. I would suggest, however, that the efficiencies sought by the Senior Executives Association could possibly be gained by reforming the current system. An appropriate course might be to form a task force of the stakeholders to study possible changes and work to resolve perceived inefficiencies in the current system. The MSPB would be pleased to assist any such task force with its work. Again, thank you for the opportunity to participate in this hearing and I will be happy to respond to any questions you might have at this time.

Mr. PORTER. Thank you, Mr. McPhie.
Ms. Cabaniss.

STATEMENT OF DALE CABANISS

Ms. CABANISS. Chairman Porter, Ranking Member Davis, and members of the subcommittee, my name is Dale Cabaniss. I have the honor of serving as the chairman of the Federal Labor Relations Authority. Thank you for the opportunity to appear before you this morning as you examine the idea of creating a one-stop shop for the resolution of Federal employee complaints, appeals and grievances. I appreciate your continuing interest in this topic and your efforts to evaluate ways to improve government operations, while retaining important due process rights for Federal employees.

There are a lot of comments that have been raised that have merit. I agree with Chairman McPhie that it is important to have the stakeholders involved, and I would encourage that committee to further study the idea of a Federal Employee Appeals Court.

As you know, in 1978 the Civil Service Reform Act was enacted to replace a then-existing patchwork system of Federal employment governance. Chapter 71 of the statute established the Federal Labor Relations Authority by consolidating three previously independent entities: the Federal Service's Impasses Panel, the Office of the General Counsel, and the Federal Labor Relations Authority, decisional component which was preceded by the Federal Labor Relations Council. Under our statute, our General Counsel, our Administrative Law Judges, the Authority and the Federal Service's Impasses Panel, retain their important statutory independence of their prosecutorial and adjudicative responsibilities, but we co-exist in terms of managing our administrative overhead.

From this perspective, the FLRA does represent a one-stop shop as a single point of entry for certain cases falling within our jurisdiction. During my time at the FLRA it has been my experience that each of these previously separate components has been able to successfully retain its statutory independence without the need for excessive, duplicative administrative budget, human resource or technology personnel.

As you are aware, the Federal Labor Relations Authority does not initiate cases. All proceedings before the FLRA originate from filings arising through the affirmative actions of Federal employees, Federal agencies, or Federal labor organizations. For example, an employee who believes he or she has suffered an alleged unfair labor practice may petition the FLRA General Counsel. Our General Counsel, through one of the seven regional offices nationwide, will investigate this claim. If the General Counsel ultimately issues a complaint, the case moves to the Office of Administrative Law Judges where it will either settle or be scheduled for a hearing. If a case moves to a hearing, it will either settle or the assigned judge will issue a decision. Upon issuance of an ALJ decision, the nonprevailing party may then appeal to the FLRA Authority decisional component for adjudication. The Authority will issue a decision, after which judicial review may be had in either the U.S. Court of Appeals for the circuit in which the aggrieved party resides, or the U.S. Court of Appeals for the District of Columbia.

Examining this process more closely, you will see that a ULP case can potentially route through three of our agency's four major case processing components, the OGC, the Office of the Administrative Law Judges, and the Authority. And each component engages in case processing activities that vary in complexity, time and procedures.

To address potentially lengthy case processing and to improve the agency's overall responsiveness to its customers, during the past year we began collecting baseline performance and activity costing information, and revising our internal performance standards. Consistent with all executive departments and many other small agencies, we will soon implement agency-wide processing goals that are aligned directly with our executives' and managers' performance appraisals. Thus, regardless of which component a case is currently in, we will remain cognizant that there is a customer, whether agency or union, waiting not only for a fair decision but a timely result as well.

One of the issues that has been identified with respect to the employees appeals process is the potential overlap of jurisdiction and the opportunity to raise issues in alternative forums. This is not a significant issue at the FLRA. For example, Section 7116 of our statute provides that issues which can properly be raised under an appeals procedure may not be raised as an unfair labor practice. This includes employment matters such as hiring, firing and the failure to promote. These matters are generally subjected to the jurisdiction of the MSPB.

However, there are some instances in which different independent agencies could issue rulings involving the same employee complainant. For example, if a group of employees are terminated from Federal service, they may appeal that termination to the MSPB. Depending on the factual situation, at the same time, the union representing that bargaining unit may file an unfair labor practice charge with the FLRA alleging the agency failed to follow the collective bargaining agreement in effecting the employment action. The two cases are related, but because they raise different legal issues, there is the possibility of different rulings in different forums.

In another example, where a factual situation involves multiple related actions by an agency, it would be possible to litigate the various parts separately if different legal issues can be identified. For example, a bargaining unit employee could be terminated from Federal service for insubordination resulting from his or her refusal to accept an overtime assignment. The bargaining unit employee could appeal the termination from Federal service to the MSPB, while also alleging an EEO violation for how he or she was treated during the investigation of the incident. At the same time, the union representing this particular bargaining unit could file an unfair labor practice charge alleging the employee was ordered to take the overtime assignment in reprisal for the employee's union activity. Because each piece of litigation raises a separate legal issue, each case will operate independently from each other. However, I should point out this is a rare occurrence. This is not something that you would see very often.

In conclusion, while there is presently not a great deal of overlap in jurisdictions between the FLRA and the other agencies represented here today, I am sure we would all agree there is room for continued improvement administratively and operationally.

Thank you again for the opportunity to appear this morning. I would be pleased to respond to any questions you may have or provide any additional information you seek.

[The prepared statement of Ms. Cabaniss follows:]

STATEMENT
OF
DALE CABANISS
CHAIRMAN
U.S. FEDERAL LABOR RELATIONS AUTHORITY

Before the

SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

On

Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court

November 9, 2005

Chairman Porter, Ranking Member Davis, and Members of the Subcommittee:

Thank you for the opportunity to appear before you this morning as you examine the idea of creating a one-stop shop for the resolution of Federal employee complaints, appeals, and grievances. I applaud your continuing interest and efforts to evaluate ways to improve government operations, while retaining important due process rights for Federal employees. We believe that the proposal for a Federal Employees Appeals Court requires further study.

As you know, in 1978, the Civil Service Reform Act (CSRA) was enacted to replace a then-existing patchwork system of Federal employment governance. Chapter 71 of the CSRA (Statute) established the Federal Labor Relations Authority (FLRA) by consolidating three previously independent entities: the *Office of the General Counsel*, the *Authority*, and the *Federal Service Impasses Panel* (Panel). A fourth component of importance in our case processing is the Office of Administrative Law Judges (OALJ), appointed by the Members of the Authority. Under our Statute, the General Counsel, the Administrative Law Judges, the Authority, and the Panel retain the important statutory independence of their prosecutorial and adjudicative responsibilities, but co-exist in terms of managing administrative overhead.

The FLRA has a single administrative CEO, the Chairman, who is statutorily responsible for agency-wide budgeting and finance, human resources, procurement, information technology, and performance management. From this perspective, then, the FLRA does represent a "one-stop" shop in terms of a single point of entry for certain cases falling within our jurisdiction. During my term, and before, it has been our experience that each of these previously separate components has been able to successfully retain its respective statutory independence without the need for excessive duplicative administrative, budget, human resources, or technology personnel in each component.

As you are aware, the FLRA does not initiate cases. All proceedings before the FLRA originate from filings arising through the affirmative actions of Federal employees, Federal agencies, or Federal labor organizations. For example, an employee who believes he or she has suffered an alleged unfair labor practice (ULP) may petition the FLRA General Counsel (GC). The GC, through one of seven regional offices nationwide, will investigate. If the GC ultimately issues a complaint, the case moves to the Office of Administrative Law Judges (ALJs) where it will either settle or be scheduled for hearing. If the case moves to a hearing, it will either settle or the assigned Judge will issue a decision. Upon issuance of an ALJ decision, the non-prevailing party may then appeal to the FLRA Authority decisional component for adjudication. The Authority will issue a decision, after which judicial review may be had in either the U.S. Court of Appeals for the circuit in which the aggrieved party resides or conducts business, or in the U.S. Court of Appeals for the District of Columbia. [*See generally*, 5 U.S.C.A. §§ 7116(a)(1), (a)(4), 7118; 7105(a)(2)(G); and 7123(a)]

Examining this process more closely, a ULP case could potentially route through three of our agency's four major case-processing components (the OGC, the OALJ, and the Authority). Each component engages in case-processing activities that vary in complexity, time, and procedures. For fiscal year 2005, of 4,036 ULP charges filed with the OGC, 94% were withdrawn, dismissed, or settled. Of the 206 ULP cases within the OALJ, 65% closed before the hearing with 25% (54) decisions issued. For the Authority decisional component, 52 ULPs were received during the year with 32 procedural

closures and 23 merits closings (decision issued). The median age for merits decisions within the Authority was 142 days.

To address potentially lengthy case-processing and to improve the agency's overall responsiveness to its customers, during the past year, we began collecting baseline performance and activity-costing information and revising our internal performance standards. Consistent with all executive departments and many other small agencies, we soon will implement agency-wide processing goals that are aligned directly with our executives' and managers' performance appraisals. Thus, regardless of which component a case is currently in, we will remain cognizant that there is a customer (whether agency or union) waiting for not only a fair decision, but a timely result as well.

One of the issues that has been identified with respect to the employees appeals process is the potential overlap of jurisdiction and the opportunity to raise issues in alternative forums. This is not a significant issue at the FLRA. For example, Section 7116 of our Statute provides that "issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices." [5 U.S.C.A. § 7116(d)] This includes employment matters such as hiring, firing, and the failure to promote. These matters are generally subjected to the jurisdiction of the MSPB. Thus, if a federal employee initiates an employment action, the employee must decide whether to raise that action under the grievance procedure or as a ULP. Issues, which can properly be raised under an appeals procedure, generally may not be raised as an alleged unfair labor practice.

However, there are some instances in which different independent agencies could issue rulings involving the same employee complainant. For example, if a group of employees are terminated from federal service, they may appeal that termination to the MSPB. Depending on the factual situation, at the same time, the union representing that bargaining unit may file an unfair labor practice charge with the FLRA alleging the agency failed to follow the collective bargaining agreement in effecting the employment

action. The two cases are related, but because they raise different legal issues, there is the possibility of different rulings in different forums.

In another example, where a factual situation involves multiple related actions by an agency, it would be possible to litigate the various parts separately if different legal issues can be identified. For example, a bargaining unit employee could be terminated from federal service for insubordination resulting from his or her refusal to accept an overtime assignment. The bargaining unit employee could appeal the termination from federal service to the MSPB, while at the same time alleging an EEO violation for how he or she was treated during the investigation of the incident, while at the same time have the union representing this particular bargaining unit file an unfair labor practice charge alleging the employee was ordered to take the overtime assignment in reprisal for the employee's union activity. Because each piece of litigation raises a separate legal issue, each piece of litigation will operate independently of each other.

In conclusion, while there is not presently a great deal of overlap in jurisdictions between the FLRA and the other agencies represented here today, I am sure we would all agree there is room for continuous improvement administratively and operationally. Thank you again for the opportunity to appear this morning. I would be pleased to respond to any questions that you may have at this time or provide you any additional information you may seek.

Mr. PORTER. Thank you very much.

Ms. Dominguez, appreciate you being here.

STATEMENT OF CARI DOMINGUEZ

Ms. DOMINGUEZ. Mr. Chairman, Congressman Davis, members of the subcommittee, thank you very much for inviting me to testify today on this very important topic. I am Cari Dominguez, Chair of the Equal Employment Opportunity Commission. First and foremost I want to applaud and commend this committee for allowing us this opportunity to look into ways for improving the Federal employee appeals and complaint process.

Designing a process that efficiently and effectively resolves workplace disputes is of paramount importance to the Federal Government and to taxpayers. The EEOC plays a very significant role in that process. While this hearing is focused on the multiple complaint and appeal processes that are available to Federal workers, our view is through the lens of the EEO process. That is the process that we deal with on a daily basis.

Many of the concerns that have been expressed and raised by the Senior Executives Association are concerns that we share. We recognize that reform of the Federal EEO system is warranted. Indeed, the Federal EEO process has been perennially criticized as too slow, too cumbersome, too expensive, and subject to perceived or real conflicts of interest.

Many of the critics of the system consider the current arrangement under which the same agency accused of discrimination investigating itself has a conflict of interest. The EEO process is also sometimes used to address workplace disputes that belong in another forum. Clearly, these issues raise the question as to whether agencies, employees and taxpayers are being well served.

In my view, what is needed is a better model and a more flexible system. It is critical that sufficient resources be devoted to those cases where it is likely that discrimination has occurred.

EEOC's private sector charge process serves to inform us. As you know, we were established as part of the Civil Rights Act and we have been conducting investigations filed by private sector employees in the past 40 years. Our private sector complaint processing system was at one point overburdened and very time intensive. At one point we had over 110,000 charges backlogged, and the average processing time to complete a charge was well over a year. Without any significant change, we estimated that it would take more than 16 months to even begin an investigation.

In the mid 1990's the Commission adopted a system known as Priority Charge Handling Procedures, using a similar model to the triage system that is applied in the health care field, whereby the most compelling cases are handled first.

We have found that this system has been far more efficient, responsive and fair, not to mention economical, than the previous approach, where all charges, regardless of merit, were afforded the same time and attention. The average processing time for charges filed with EEOC in the private sector is now less than half of what it was 10 years ago, and has averaged 165 days in the last 3 years.

I believe that we need to draw from lessons learned in the Commission's private sector model to design a Federal sector system that is truly the best.

One of the concerns frequently voiced is that the various processes for employee complaints and appeals are redundant and overlapping. There is a type of case that has been mentioned, where EEOC reviews decisions of the MSPB to ensure proper application of the employment discrimination laws. These are known as the mixed cases, and are frequently cited by those who raise the redundancy issue. Yet over the years, review of the MSPB decisions has constituted a very small number of appellate cases, in fact, only 1.1 percent of our 2005 receipts.

Likewise, EEOC may review certain grievance decisions from the Federal Labor Relations Authority on issues of discrimination, but again, those cases make up very little of EEOC's appellate docket, two-tenths of appellate receipts in 2005.

We believe that reform of the various complaint and appeal processes to include the Federal EEO process can be a very positive step. Although the concept of a one-stop process is worth exploring, we believe that it requires further study. We question whether the creation of an Article I Court, without any changes to the administrative agency process, would actually yield the results intended. The EEO workload alone for a new court could be significant. In fiscal year 2004, more than 19,000 EEO complaints were filed with agencies. By contrast, over the last 5 years, Federal employees have filed fewer than 1,300 lawsuits raising discrimination issues in Federal District Courts. This amounts to about a tenth of 1 percent.

Further, the proposal under consideration would place all workplace disputes into a single judicial forum, one that has potential to become more legalistic, more expensive, more intimidating, and likely more time consuming than the existing processes. It may well have the effect of discouraging employees from seeking redress for any discrimination experienced, and that should not be the goal or result of any reform proposal.

Ensuring a workplace free of discrimination is vital to our Nation's interest. Much progress has been made, but much more remains to be done. Improving on an approach that allows for the proficient resolution of workplace disputes is an objective that we all share and work diligently to meet. It is important that we and this subcommittee continue to look for ways that we can design a system that works better. We believe that reform, informed by what works well in the current administrative framework, is a good starting point, and provides the best platform for those efforts.

Thank you very much for the opportunity to comment, and I will be happy to answer questions.

[The prepared statement of Ms. Dominguez follows:]

Statement of Cari M. Dominguez, Chair

U.S. Equal Employment Opportunity Commission

Hearing before the Government Reform Subcommittee on the Federal Workforce and Agency Organization

"Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court"

November 9, 2005

Chairman Porter, Congressman Davis, Members of the Subcommittee. Thank you for inviting me to testify today on this very important topic. I am Cari M. Dominguez, Chair of the U.S. Equal Employment Opportunity Commission (EEOC). I would like to commend this Subcommittee on its laudable efforts to improve the Federal employee appeal and complaint process.

We meet today to discuss the topic *Justice Delayed is Justice Denied: A Case for a Federal Employees Appeal Court.* Designing a process that efficiently and effectively resolves workplace disputes is of paramount importance to the federal government and to taxpayers. EEOC plays a significant role in that process.

Overview of the U.S. Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission was created by Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination on the bases of race, gender, color, national origin and religion. As originally passed the Act did not cover federal government employees. In 1972, amendments to the Act extended protections to federal workers and charged the then Civil Service Commission with ministerial responsibilities. As a result of the President's Reorganization and Civil Service Reform Act of 1979, that responsibility was transferred to the EEOC. The Commission also has oversight for the Age Discrimination in Employment Act, the Equal Pay Act and the Rehabilitation Act. All of these acts extend their protection to federal employees.

Given its original mission, the Commission plays a very large role in the resolution of charges of discrimination in the private sector. In fiscal year 2004 we received approximately 79,000 charges against private sector and state and local government employers. Our role in the federal sector is quite different. The statute extending protection to federal employees against discriminatory actions creates a system whereby complaints are filed by federal employees with their agencies and investigated by their agencies. Following the protections extended by the former Civil Service Commission, EEOC's regulations then provides for administrative hearings and appeals. In FY 2004, across the government, there were 42,412 requests for counseling,

which is an informal pre-complaint stage, and 19,024 formal written complaints were filed by federal government employees. For that same period EEOC received more than 9,000 requests for hearing and over 7,800 appeals.

The Need for Reform

As noted above, EEOC's jurisdiction is derived from our nation's civil rights laws which apply to both federal and private sector employees. Ours is a complaint-driven system. That is, federal employees have the right to file EEO complaints if they believe their rights have been violated. When employees believe violations of the law have occurred, they should be able to obtain prompt corrective action.

While this hearing is focused on the multiple complaint and appeal processes available to federal employees, our view is through the lens of the EEOC process; the process that we deal with on a daily basis. One of my goals has been to make the federal sector complaint process more responsive, more effective and more efficient. Many of the concerns that have been raised by the Senior Executives Association, particularly as they relate to the timeliness and efficacy of the EEO process, are concerns we share. We recognize that reform of the federal EEO process is warranted – there are indeed problems that need to be addressed.

This hearing borrows as its title the adage that justice delayed is justice denied. Indeed, the federal EEO process has been perennially criticized as too slow, too cumbersome, too expensive and subject to perceived or real conflicts of interest. As currently designed, the federal process-- from contact with an EEO counselor to appellate decision -- can take years. Costs are excessive to complainants, agencies, and taxpayers. Many critics of the system consider the current arrangement, under which the same agency accused of discrimination investigates a complaint, as a conflict of interest. Because of its accessibility to employees, the EEO process is sometimes used to address workplace disputes that belong in another forum. Clearly, these issues raise the question as to whether agencies, employees, and taxpayers are being well served.

If there is no dispute that the system needs a makeover, and if it is going to be improved, the question then becomes: what is the best way to do it?

Steps Toward Improvement

The federal sector complaint process has existed for over 30 years, and during almost that entire period has been under review. At EEOC we are constantly looking for ways to address the problems and make the system better. Our regulations were amended in 1992 and 1999. The 1999 amendments most significantly placed increased emphasis on the use of alternative dispute resolution (ADR). The revised regulations encourage agencies to use ADR to resolve complaints at all stages of the process and require agencies to have ADR programs during both the pre- and formal complaint process. In our agency, I personally instituted a policy that requires managers to participate in ADR if sought by a complainant.

By increasing the ADR participation rate, we anticipate a decrease in the number of formal complaints filed. In fact, the number of formal complaints has been decreasing over the past 5

fiscal years, down by over 5,000, from 24,524 in 2000 to 19,024 in 2004. As successful ADR programs are adopted throughout the federal government and cost savings achieved, agencies will be able to shift valuable resources to proactive prevention activities that are aimed at resolving conflict in the workplace at an earlier stage to create more productive and efficient workplaces.

We have also initiated a relationship management pilot program with several federal agencies. This pilot allows us to work with agencies in a consultative manner, with the goal of improving the processes within an agency and assisting them in developing sound EEO practices. Once again, the goal is to ensure due process while promoting sound management practices. We believe that these proactive steps will serve to reduce the number of complaints being filed.

To complement our relationship management program, we have stepped up our outreach and technical assistance activities. Last year our staff participated in more than 750 outreach and technical assistance events covering federal sector programs and issues. I have personally reached out and have been meeting with Agency heads to discuss the state of EEO in their agencies. Among the issues I have addressed at these meetings is the need to improve the case management process.

A New Approach is Needed

All of these measures are designed to lead to better agency EEO programs and ultimately to fewer EEO complaints. But complaints will continue to be filed, and these initiatives don't address the heart of the subject today – how can the complaint – hearing – appeal process work better, more effectively and more efficiently? A major problem is the length of time it takes to investigate and resolve a complaint. We are encouraged by the improvement in processing EEO hearings and appeals. With significant management oversight, between FY 2003 and FY 2005, our average processing time for hearings dropped over 40% from 421 days to 249 days and our hearings inventory dropped over 30% from 8,467 to 5,896. On the appeals side, the processing time for appeals dropped 32% between FY 2003 and FY 2005 and 58% between FY 2002 and FY 2005. Our appellate inventory at the end of FY 2005 represents a 70% drop from our FY 2000 inventory. Even with significant improvements in recent years, the overall time for case processing, including the time for investigations at the agency level, continues to exceed acceptable levels - and that must be addressed. There is only so far that initiatives such as those described above can take us in resolving these issues. At some point there must be a review and assessment of the operational foundation of the process.

While more training and outreach provide opportunities for improvement in the process, in my view what is needed is a better model and a more flexible system. It is critical that sufficient resources be devoted to those cases where it is likely that discrimination has occurred. The EEOC's private sector charge process serves to inform us. Our private sector complaint processing system was overburdened and time-consuming. At one point, we had over 111,000 charges backlogged, and the average processing time to complete a charge -- about 380 days -- was well over a year. Without a significant change, we estimated that it would take more than 16 months to even begin an investigation in 1996 and the time would expand geometrically to 60 months in ten years. In the mid-nineties, the Commission adopted a system, known as Priority

Charge Handling Procedures, designed to address charges using evidence and severity of allegations as guides. It is a model similar to the "triage" system applied in the health care field, whereby the most compelling cases are handled first. We have found the system to be far more efficient, responsive and fair than the previous "first-come, first-serve" approach, where all charges, regardless of merit, were afforded the same time and attention. The average processing time for charges filed with EEOC in the private sector, including time spent exploring mediated resolutions, is less than half of what it was 10 years ago and has averaged 165 days in the last three years. I believe that we need to draw from lessons learned in the Commission's private sector model to design a federal sector system that is truly the best.

I would propose that agencies continue to use the tools at their disposal, such as counseling, training and mediation, to resolve issues prior to a formal complaint being filed. Strong alternative dispute resolution programs are needed to provide the possibility of early resolution to all types of workplace disputes.

Are the Various Appeal Systems Overlapping and Redundant?

One of the concerns frequently voiced is that the various processes for employee complaints and appeals are redundant and overlapping. Again, this is an issue that we can only address from the perspective of the EEOC process. We strongly support statutory and regulatory requirements that employees elect among various forums. Congress has provided employees rights and protections administered by several different agencies, EEOC, FLRA, OPM, and MSPB, OSC, under several different statutes, which range from protecting whistle blowing to grievances under collective bargaining agreements to civil rights. Each of the agencies cited above has expertise under various statutes and each area of law has a body of precedent that has built up over the years. In the vast majority of cases the issues raised by employees are quite different and the application of statutory law to those issues is unique to that forum.

By way of illustration, there is a type of case where EEOC reviews decisions of the MSPB to ensure proper application of the employment discrimination laws. These are known as "mixed cases" and are frequently cited by those who raise the redundancy issue. Yet, over the years, review of MSPB decisions has averaged less than 3% of our appellate cases. In 2005 review of MSPB decision amounted to only 1.1% of EEOC's total appellate receipts. In the past 5 years, EEOC has only disagreed with MSPB on a discrimination issue on 4 occasions and over the past 15 years there has only been one case where conflicting MSPB and EEOC positions resulted in a "Special Panel" being convened. Likewise, EEOC may review certain grievance decisions from the Federal Labor Relations Authority on issues of discrimination, but again, those cases make up very little of EEOC's appellate workload - 0.2% of appellate receipts in 2005.

The Federal Employees Court of Appeals

We think that reform of the various dispute resolution processes, to include the federal EEO process, can be a positive step. Any change that is advanced must be one that will truly bring about improvement. Although the concept of a "one stop process" is worth exploring, we question whether the creation of a new Article I court without any changes to the administrative process would yield the results intended. Therefore, we think that the proposal needs further

study. The workload alone for the new court would be immense – and would include EEO complaints, MSPB appeals, FLRA matters, grievances, classifications appeals, and Special Counsel investigations. As I indicated earlier, over 42,000 employees contacted an EEO counselor and more than 19,000 EEO complaints were filed with agencies in fiscal year 2004. By contrast, over the last five years federal employees filed fewer than 1,300 lawsuits raising discrimination issues in federal district courts.

Further, the proposal under consideration would place all workplace disputes into a judicial forum – one that has the potential to become more legalistic, more expensive, more intimidating, and likely more time consuming than the existing processes. It may well have the effect of discouraging employees from seeking redress for any discrimination experienced, and that should not be the goal or result of a reform proposal.

Resolution of employee disputes, and most particularly adherence to civil rights laws, are matters of importance to agency managers and executives. Indeed they are integral to good management and governance. If there is to be a level playing field in the workplace, resolution of claims of discrimination, in particular, deserve standing beyond being categorized as one of an amalgam of employee disputes.

Summary

Ensuring a workplace free of discrimination is vital to our Nation's interests. Much progress has been made, yet more remains to be done. Improving on an approach that allows for the proficient resolution of workplace disputes is an objective that we share and work diligently to meet.

It is important that we and this Subcommittee continue to look at ways that we can design a system that works better. We believe that reform, informed by what works well in the current administrative framework as the starting point, provides the best platform for those efforts.

Thank you for the opportunity to comment on this issue. I will be happy to answer any questions you might have.

Mr. PORTER. Thank you very much.

Before we get into questions, I would like to heed the request of Mr. Davis that we include statements prepared by the National Treasury Employees Union and the American Federation of Government Employees to be submitted as part of the record. So without objection, so ordered.

Thank you very much.

[The information referred to follows:]

STATEMENT OF COLLEEN M. KELLEY

NATIONAL PRESIDENT

NATIONAL TREASURY EMPLOYEES UNION

to the

Federal Workforce and Agency Organization Subcommittee

Committee on Government Reform

U.S. HOUSE OF REPRESENTATIVES

November 9, 2005

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Chairman Porter, Ranking Member Danny Davis and members of the House Government Reform Subcommittee on the Federal Workforce and Agency Operation, my name is Colleen M. Kelley and I am National President of the National Treasury Employees Union (NTEU). I appreciate the opportunity to present this statement on behalf of NTEU on the proposal for a Federal Employee Appeals Court.

The National Treasury Employees Union represents some 150,000 workers in 30 government agencies, making it the largest independent non-postal federal labor union. NTEU has worked for over 65 years to improve and defend federal employee protections, rights, and benefits. We take very seriously the proper adjudication of the statutory and contractual rights of our members and any acts of discrimination or unfair treatment towards them.

The Subcommittee is considering a proposal by the Senior Executives Association (SEA) for the establishment of a new Article I trial level court, akin, it says, to the Court of Federal Claims or the Tax Court, to be known as the Federal Employee Appeals Court. This Court is intended to combine "all" appeal processes for federal employees into one forum.

The Court would have the jurisdiction of (and thus replace) the Merit Systems Protection Board; the Federal Labor Relations Authority; the part of the EEOC that deals with federal employees; the part of OPM that handles adjudications, such as classification appeals; the Office of Special Counsel; and "the arbitration process." I understand from a communication from SEA General Counsel William Bransford that SEA's intent is to replace the grievance process for "EEO and adverse action matters." Presumably the grievance-arbitration process would remain available for all other matters that can be grieved, including contract interpretation questions and violations of law, rule and regulation that do not involve (unspecified) EEO laws. Decisions of the Court would be final and nonappealable except in the case of employment discrimination. In that instance, appeal would be to the Federal Circuit. This court would have judges appointed and confirmed by the Senate for 15-year terms.

In addition, the SEA proposes "Special Trial Judges," described as akin to those of the Tax Court, who would be "appointed by the Chief Judge to assist in the resolution of

assigned matters." It indicates that these Special Trial Judges would play a more involved (but as-yet-unspecified) role in case-handling than simply that of decision-maker.

The Court would also have "fact-finding examiners," who appear to be different than Special Trial Judges. I assume that the examiners would conduct hearings and issue interim decisions like administrative law judges, with fact-findings that would probably be entitled to great (or even conclusive) weight by the Court.

The SEA states that one arm of the Court would conduct trials; these trials appear to be different than the hearings before the examiners. SEA refers to the "possibility" of jury trials in appropriate cases under the civil rights laws. Aside from the indication that discrimination claims would be resolved in "trials," the proposal does not state what type of hearing or what type of judge would be accorded to a particular claim.

The Court would also have an investigatory arm, like the General Counsel of the FLRA and the Office of Special Counsel. Functionaries in this branch could presumably issue complaints following investigation, like the General Counsel of the FLRA or the Special Counsel. The proposal does not state whether these functionaries would also act as "prosecutors" of certain complaints such as ULPs, or whether the employee would be left to press his complaint. The SEA does indicate that the investigatory arm would allow for the "development of information which the Court could utilize in its decisions." This suggests that the Court staff would perform an information-gathering function in contrast to district courts, which rely entirely on the record created by the parties.

NTEU has several serious concerns with this proposal which I will outline for the Subcommittee:

1. The new Court is, in effect, a super-agency, folding under one umbrella the functions of several independent agencies. There is no suggestion that the substantive statutory rights or obligations would be changed; indeed, the SEA states that employees' "current job protections" are retained. Thus, the SEA contemplates an enormous unwieldy conglomerate agency, like DHS, to perform all of the diverse administrative and review functions of many separate agencies. This is a bureaucratic nightmare.

2. The Court would transform administrative functions into judicial ones. There are a number of problems with this.

-- It would be a boon for lawyers, as the process would become excessively legalistic. Many cases now are handled pro se or by non-lawyer representatives. It seems likely that individuals would feel compelled to have legal representation before the Court.

-- It is unprecedented for a court to combine investigative and prosecutorial functions with adjudicative functions. While some agencies (such as the NLRB and FLRA) have such bifurcated functions, it is an awkward structure that requires monitoring to assure there is no abuse. Containing these functions within a court would create, at a minimum, an appearance of conflict of interest and would undermine the neutrality that a court must have. It is unseemly for an adjudicator to rely on an information-developing staff or material from its investigative arm. Our judicial system is premised on the concept that the parties create the record on which the decision rests; the court does not go out to find out its own version of the facts.

-- A court is particularly ill-suited to handle thousands of complaints arising throughout the country. While the MSPB and the FLRA, for example, have regional offices to advise employees, and their adjudicators conduct hearings close to the workplace, this Court is likely to be based in Washington. Centralization would work a hardship on employees. They and their witnesses would have to travel to be heard, representing a considerable expense. In addition, they would be far removed from those able to provide guidance and investigation of their complaints.

-- The SEA does not discuss how a court is to handle the advisory functions of the independent agencies. For example, the Office of Special Counsel issues advisory opinions on the Hatch Act; the General Counsel of the FLRA issues guidance on labor-relations issues; and OPM has guidance on position classification issues. It is hard to see how a court could perform those administrative functions.

3. There is no justification for replacing agencies with specialized expertise with an entity with no particular expertise. The jurisdictions of the various affected agencies cover complex subject matters, and the career staff has built up significant expertise. This would be lost in the new

Court. For example, neither the new Court nor the Federal Circuit (which would review discrimination decisions) has any particular expertise in EEO matters. By contrast, the district courts and regional circuits have long handled these issues and have developed familiarity with them.

4. There would be a significant loss of appeal rights under the SEA scheme. The SEA tries to portray this as a "plus," stating that it would negate the "necessity" of an employee having to appeal decisions of administrative agencies to the various district courts.[1] In fact, the loss of this core right cuts to the heart of due process.

Currently, there are normally two levels of review of decisions by the employing agency, which provide important protections for employees. For example, an agency action can be reviewed by an arbitrator, and the arbitrator's decision can then be reviewed (under a deferential standard) by the FLRA or the Federal Circuit, depending on the issue. Alternatively, an agency decision in adverse action cases can be reviewed by the MSPB and then by the Federal Circuit. Decisions of the FLRA involving unfair labor practices can go to the regional circuits. There are only a few instances where there is no second level of review.

In the SEA system, this second level of scrutiny (and the protection it affords) is lost in most cases. The new Court would issue final decisions, judicially appealable only if they involved discrimination issues. There would be no possibility of circuit court review of unfair labor practices and adverse actions. While review is sought in very few cases, the possibility of review in appropriately egregious cases is essential.

5. The intended impact of the SEA proposal on the grievance-arbitration process is not perfectly clear. It appears, however, that the SEA intends to substitute the new Court for the grievance-arbitration process--at least with respect to EEO and adverse action matters. This is wholly unacceptable. The vast bulk of EEO and adverse action claims are now resolved quickly and inexpensively through the grievance-arbitration process. That process has had widespread and ever-increasing judicial approval, as a valuable (and even preferable) manner of dispute resolution.

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[1] The SEA's repeated reference to review by the federal district courts is misleading and inaccurate. Of all the matters discussed by the SEA, only discrimination issues may be heard by the district courts.

Contrary to that clear preference, the SEA would substitute a mandatory judicial procedure.

Transformation of grievances into court cases would swamp the Court. It would also lead to a dramatic increase in the cost of pressing these claims because most, if not all, employees would seek legal representation to replace their former free union representation. Finally, it would add greatly to the time required for resolution of the disputes, contrary to the SEA's professed objective of expeditious case processing.

6. The impact of the proposal on other matters (not related to discrimination or adverse actions) that are currently resolved through the grievance process is also unclear. Currently, questions of contract interpretation and violations of law, rule, and regulation (including pay claims under such statutes as the Fair Labor Standards Act) can be grieved. It does not appear as though the SEA intends to include those matters within the jurisdiction of its new Court. But, at the same time, it has eliminated the jurisdiction of the FLRA, which reviews arbitral awards on these issues. We question, therefore, whether there would be any review of arbitral awards at all, or whether exceptions would be taken to the new Court. Either outcome would be untenable. A lack of any review violates fundamental tenets of due process. Review on exceptions by the new Court would be a dramatic increase in its workload, and would require an expertise that its judges are unlikely to possess.

7. It appears as though a concern with the processing of EEO issues is at the heart of the SEA proposal. Thus, most of its justification is based on an alleged need to reform federal sector EEO, which it claims is a long and cumbersome process. In a November 2003 letter to Representative Jo Ann Davis, the SEA used the "infamous 'mixed-case' appeal" as the example of the evils to be corrected. While the SEA is correct that mixed-case processing is complex, that type of case forms a very small part of the workload of the agencies that would be affected by its proposal. In FY 2001, for example, only 2 of the 1,373 decisions issued by the MSPB involved cases where the EEOC had disagreed with the MSPB's resolution and had referred the case back to the MSPB. See the MSPB Annual Report for FY 2001. Moreover, although MSPB has the power to reaffirm its initial decision, in disagreement with the EEOC, leading in theory to resolution by a Special Panel (see 5 U.S.C. 7702(c), (d)), in reality the

Special Panel convenes only rarely. A 1995 GAO report states that the Special Panel had convened only three times in 15 years.

In short, the SEA is relying on one narrow issue to justify breathtakingly expansive revisions to federal sector appeal rights on a host of issues. It would be far more appropriate to concentrate on exploring proposals to streamline the federal sector EEO process without also affecting unfair labor practice processing, the grievance-arbitration process, the investigation of whistle-blowing, and the resolution of adverse actions not related to EEO issues.

Mr. Chairman, NTEU appreciates the consideration of our viewpoint and we are happy to assist you and the other members of the Subcommittee regarding this matter in any way we can. Thank you.

STATEMENT BY

JOHN GAGE
NATIONAL PRESIDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE

THE SUBCOMMITTEE ON FEDERAL WORKFORCE
AND AGENCY ORGANIZATION

HOUSE COMMITTEE ON GOVERNMENT REFORM

ON

STREAMLINING EMPLOYEE APPEALS

NOVEMBER 9, 2005

Mr. Chairman and members of the Subcommittee, my name is John Gage and I am the National President of the American Federation of Government Employees, AFL-CIO. On behalf of the 600,000 employees represented by AFGE, I want to thank you for the opportunity to submit our views on the issue of streamlining employee appeals.

It seems to me that any employee-oriented organization, regardless of its particular constituency, would be supportive of the broad, general goal of streamlining employee appeals. This is particularly true in the federal sector, where the fired employee is off the payroll and out the door and the suspended employee serves the suspension long before the appeals procedures run their course. In this context, it is in the employee's interest to have a fair, straightforward, and expeditious appeal process that does not consume the employee and his or her limited resources in years of expensive litigation. Streamlining the employee appeals processes is a laudable goal for the subcommittee.

Of course, the devil is in the details. For example, there have been many proposals over the years to merge the Merit Systems Protection Board (MSPB) and Federal Labor Relations Authority (FLRA), the Federal Service Impasses Panel (FSIP), the Office of Personnel Management (OPM), the federal sector functions of the Equal Employment Opportunity Commission (EEOC), and certain functions of the Office of Special Counsel (OSC).

Others have proposed eliminating EEOC hearings and/or arbitrations for federal employees altogether, placing all such matters in the federal courts, or even creating a special federal court to hear issues involving federal employees, as now proposed by the Senior Executives Association.

While we admit there is room for some improvement in the present system, AFGE does not support the proposed merger of the MSPB, EEOC, FLRA, OPM

and OSC into a single "superagency" nor can we support limiting the civil rights of federal employees by taking away BOTH their right to an EEOC hearing and their right to redress discrimination in federal court, as well as their right to submit grievances to a neutral, independent arbitrator. The fact is that for the last 25 years, since the passage of the Civil Service Reform Act (CSRA) and the establishment of the federal employee appeals system, there has been a clear, significant, and valid jurisdictional distinction between the cases heard by these five agencies. The MSPB hears individual employee appeals from agency personnel actions. Employees have the right to appeal to the Board if they are removed, demoted or suspended for misconduct or poor performance, subject to certain Reductions in Force (RIF) actions, or denied retirement or certain insurance benefits. The EEOC hears only cases involving discrimination on the basis of race, color, sex, national origin, religion, age or handicap. OPM is responsible for a number of administrative functions, including retirement and benefits decisions and classification appeals, while OSC investigates and sometimes enforces whistleblower cases, Uniformed Services, Hatch Act, and other very specialized cases.

In contrast, the FLRA, unlike these other agencies, is not a "personnel" agency. The FLRA handles representation issues and labor-management disputes between agencies and unions (and between unions and employees, or other unions), not disputes between employees and their employing agencies. Like the National Labor Relations Board in the private sector, the FLRA has specialized expertise in complex bargaining issues, unit representation issues, negotiations, labor unions, review of arbitration awards, and cooperative labor-relations programs. No other federal agency has the experience or capacity to handle such labor-management matters.

The solution to the problems identified in the government's employee appeals processes is not to merge these five highly dissimilar agencies into a single "super-agency." Nor is it to make federal employees second-class citizens by removing their rights to bring disputes to a neutral arbitrator, a proposal that would result in huge increases in the filing of cases in the federal courts.

Instead, the real challenge is to cut down on the number of multiple forums or steps that employees can or, in some cases must, avail themselves of in attempting to process a single appeal to finality, especially the dreaded "mixed case." The simultaneous and overlapping jurisdiction of the EEOC and MSPB creates a situation where multiple steps are required to process some appeals.

For example, in a "mixed" case -- by definition, an appeal of an adverse action (or serious discipline) coupled with a claim that the agency action was motivated by discrimination -- an employee can file either an EEO charge, an MSPB appeal, or if he or she is a member of a recognized bargaining unit, a grievance under the negotiated procedure. The problem, as we see it, occurs after the original forum issues its decision. Rather than being "bound" by a final decision of the selected administrative tribunal, dissatisfied employees may "bounce" over to other administrative tribunals for seemingly endless appeals.

Thus, when critics complain about the confusing and circuitous path that an employee appeal can take as it winds its way to a final decision, and the lengthy time such appeals may take, they are normally addressing an appeal grounded at least in part in a discrimination defense. With respect to all other employee appeals, at least those brought by bargaining unit employees under their collective bargaining agreement, even the Courts have recognized that "[t]he negotiated grievance procedure is much simpler." AFGE Local 2052 v. Reno, 992 F.2d 331, 333 (D.C. Cir. 1993).

Under the CSRA, the negotiated grievance procedure prescribed in a collective bargaining agreement is generally the exclusive procedure for any bargaining unit federal employee to resolve a grievance. 5 U.S.C. § 7121(a). Exceptions to this general rule, however, do exist, such as cases involving separate statutory rights such as the right to be free of employment discrimination and the right to be free of "prohibited personnel practices," such as retaliation, favoritism, and cronyism. Cases presenting both kinds of allegations are commonly called "mixed" cases.

Most federal employees have three alternative avenues for pursuing claims of unfair or illegal treatment in the workplace. However, they cannot complain about the same issue both through the grievance process and in a statutory process such as the EEO or MSPB -- electing one forum operates as a waiver of the other. 5 U.S.C. § 7121(d); 29 C.F.R. 1614.301(a).

1. *Grievance/arbitration:* First, 5 U.S.C. Section 7121 requires that all collective bargaining agreements must contain negotiated grievance procedures providing for binding arbitration of matters raised therein. A typical collective bargaining agreement defines a grievance as "a complaint . . . concerning his or her conditions of employment," and may assert a violation of the contract itself or of "any law, rule or regulation affecting conditions of employment." Many contracts also contain broad Equal Employment Opportunity obligations which prohibit discrimination on the basis of age, sex, race, religion, physical handicap, color or national origin. In such cases, a claim of illegal action or discrimination can be filed as a grievance (by either the employee or by the Union) and resolved by an arbitrator.

Normally, the arbitrator's decision is final and binding, and the case will end there. A grievant cannot also challenge the same incident before the EEOC or MSPB after choosing to proceed under the grievance procedure. However, he or

she retains the right to request review of the arbitrator's final decision from either the EEOC or the MSPB, if the actions could have been filed with that agency in the first instance. See 5 U.S.C. § 7121(d) ("mixed cases"), (e) (adverse actions), (f) (other prohibited personnel practices, whistleblowing).

2. *EEOC route*: In the alternative (but not at the same time), the employee also has a right to file a complaint with his or her agency and then seek a hearing before the EEOC, as set forth in 42 U.S.C. Sec. 2000e-16 and 29 C.F.R.1614, with or without Union assistance. In brief, an employee choosing this route must first seek "EEO counseling" within 45 days of the allegedly discriminatory event, then normally must file a "formal complaint" within 15 days after the end of the counseling period, after which the agency must investigate. After waiting at least six months, the employee may request a hearing before an EEOC administrative judge, after which the judge will issue a tentative decision, which the agency can accept or appeal.

The employee may also choose to appeal an adverse decision in one of two ways – either an appeal to the EEOC's Office of Federal Operations, which acts as an appellate review body, or she may bypass further administrative procedures and seek *de novo* review by filing a lawsuit in district court. 42 U.S.C. § 20003-16(c); 29 C.F.R. § 1614.401. The EEOC process was improved and simplified in 1999, so that an Administrative Judge may now award compensatory damages in addition to back pay, front pay, reinstatement and other "appropriate remedies," even if the plaintiff chooses not to file in court.[1]

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[1] *West v. Gibson*, 527 U.S. 212; 119 S. Ct. 1906; 144 L. Ed. 2d 196 (1999). Before passage of the 1991 Civil Rights Act, private and federal employees' compensatory damages for Title VII, the ADA and Rehabilitation Act violations were limited to back pay. The CRA expanded these damages to include full compensatory damages, including pain and suffering, for both federal and private plaintiffs. Revisions to the federal sector appeals process in 1999 also improved case processing times and efficiency and encouraged settlement.

3. *MSPB route*: The third venue for federal employees to raise claims of unfair treatment, retaliation and/or discrimination claims is as a challenge to an adverse action such as a suspension, reduction in grade, or removal with the Merit Systems Protection Board. If the employee asserts that the action was taken as a result of discrimination, the case is treated as a "mixed case." See 5 U.S.C. § 4303 (performance-based actions), 5 U.S.C. § 7512 (actions to promote the efficiency of the service); 5 U.S.C. § 7701 (MSPB jurisdiction). As with the EEOC procedures described above, an employee may challenge such an action through the grievance procedure instead of appealing to the MSPB, but may not do both. 5 C.F.R. 1201.3 (c).

The MIXED CASE PROBLEM

Most of the time, the employee must make a binding choice and can only file one case, in one forum. In other words, they can file "under the statutory procedure or the negotiated procedure but not both." 5 U.S.C. § 7121(d). However, arbitration of discrimination cases and "mixed cases" present additional hurdles.

Discrimination Arbitrations

For example, if the employee selects the grievance/arbitration route for a case which includes a claim of discrimination, his or her appeal route case differs. Rather than proceeding directly into court, the employee must exhaust another administrative appeal by proceeding first to the EEOC, then to court. The absurdity of requiring an employee to file a costly and duplicative administrative appeal with the EEOC from an arbitration decision prior to proceeding with *de novo* judicial review was the subject of a court case in Johnson v. Peterson, 996 F.2d 397 (D.C. Cir. 1993).

In Johnson, AFGE argued that the passage of the CSRA was intended to streamline the many various administrative appeals. However, the U.S. Attorney's

Office was able to convince the U.S. Court of Appeals for the D.C. Circuit that Congress intended to require employees to exhaust an EEOC appeal after completing their arbitration case, and before proceeding to court. Johnson, 996 F.2d at 399-400, citing 5 U.S.C. § 7121(d).

Mixed Cases

For a "mixed case" (appeals of removals or suspensions greater than 14 days coupled with a claim of discrimination), the CSRA establishes a special, even more complex procedure. See 5 U.S.C. § 7702(a)(1). As noted above, the aggrieved employee must make an initial, binding choice. He may seek relief either under a statutory procedure (MSPB or EEOC) or under the negotiated grievance procedure, but not under both. 5 U.S.C. § 7121(d).

Under the statutory procedure, the employee may first raise the complaint with his employing agency which has 120 days to reach a decision. 5 U.S.C. § 7702(a)(2). If the agency decides against the employee, the employee may either appeal to the MSPB or seek direct judicial review. 5 U.S.C. § 7702(a). If an employee appeals to the MSPB, it must reach a decision within 120 days, at the end of which period the employee may either proceed directly to court or seek further administrative review. 5 U.S.C. § 7702(a)(3). An employee who wishes to follow the administrative route may appeal the MSPB's decision to the EEOC which, under the statute, has 30 days to decide whether to hear the case. 5 U.S.C. § 7702(b)(1).

If the EEOC rejects the case or if it accepts the case and agrees with the MSPB's decision, the employee may then proceed to court. 5 U.S.C. § 7702(b)(5)(A). If the EEOC accepts the case but disagrees with the MSPB, however, it must remand the case to the MSPB for further consideration. 5 U.S.C. §§ 7702(b)(3)(B), (b)(5)(B). Upon reconsidering the case, the MSPB issues an opinion that either agrees with the EEOC or rejects the EEOC's findings. If the

MSPB agrees with the EEOC, the employee may seek judicial review. 5 U.S.C. § 7702(c). If the MSPB rejects the EEOC's findings, however, the statute calls for the creation of a special panel to make a final decision. 5 U.S.C. § 7702(d)(1). The special panel's final decision is then subject to judicial review. 5 U.S.C. § 7702(d)(2)(A).

Such a tortuous path is both bizarre and inefficient, and benefits neither the employee nor the agency. Nevertheless, in AFGE Local 2052 v. Reno, 992 F.2d 331, 333 (D.C. Cir. 1993), which involved a "mixed case" brought under the negotiated grievance procedure and heard by an arbitrator, the U.S. Attorney's Office was once again able to convince the U.S. Court of Appeals for the D.C. Circuit, over AFGE's strenuous objections, that such an appellant had to file a costly and duplicative administrative appeal, this time with the MSPB, prior to seeking judicial review. In particular, the Court criticizes "the complex yet ultimately ascertainable procedural scheme that emerges from the language of the CSRA," and notes that there are six different administrative stages prior to a final decision in the processing of a mixed case that provide employees with an opportunity to go directly to court with their appeal. AFGE Local 2052, 992 F.2d at 336. In the end, this case made it more difficult for employees to navigate the system, over this Union's objection and at the Government's successful urging.

To rectify these extraordinary delays and procedural confusion which characterize the processing of mixed cases, AFGE has supported a number of reforms and improvements.

First, we have recently testified before the EEOC regarding its proposed "field restructuring plan," in which the agency plans to spend substantial sums of money to downgrade certain offices and reduce its case-handling staff, while refusing to fill attorney and support positions, and contracting out jobs to a privatized call center. The plan greatly expands territories to be served by each

office, but does not call for hiring staff to handle the expanded coverage or for addressing the EEOC's drop-off in enforcement of discrimination cases. EEOC says the plan will save money, but it will instead result in short-staffing and increases in case backlogs and delays. AFGE recommends that the EEOC be fully funded, so that employees can count on a meaningful forum to eliminate and eradicate discrimination in their workplaces.

Second, AFGE has supported proposals which would simplify the federal appeals process by permitting employees to choose the forum they prefer (MSPB, EEOC, or arbitration) to decide all issues in accordance with established case law. The hopelessly complex and lengthy appeal routes of our current system, which splits jurisdiction and requires overlapping review, was rooted in an uncertainty over how well the newly created EEOC and MSPB would do their jobs, and a fear of conflicting decisions. Fortunately, these concerns have proven to be largely misplaced. Experience has shown that employees may properly select a single, appropriate forum in which to pursue their discrimination claims for a particular case, and bring to an end the labyrinthine process that currently exists.

Finally, AFGE has worked with both the Department of Homeland Security and the Department of Defense, in developing and fine-tuning speedy, simplified procedures for employee appeals, which preserve due process and fairness, while preserving the ability of the employee to seek review from an independent third party, such as an arbitrator or an MSPB or EEOC Administrative Judge. It is absolutely critical that any such system remain fair and independent, both in perception and in reality, so that it may continue to serve the essential purpose of safeguarding and protecting the merit system from discrimination and abuse, and so that it retains the trust and confidence of employees, managers and agencies and unions alike.

Mr. Chairman, let me conclude my remarks by emphasizing that the Committee needs to redirect its streamlining efforts: (1) away from the proposals to consolidate agencies like the MSPB, EEOC, FLRA, OPM and OSC -- five agencies which function well, have little or no overlap of jurisdiction and who carry out wholly separate statutory missions; and (2) toward the heart of the confusion -- the overlapping jurisdiction of the MSPB and EEOC, where simple discrimination cases can languish for years, and where employees are forced to file numerous appeals of the same case. Once an employee and an agency get wrapped up in a mixed case, it may be years before they see the light of day. Mixed cases are the black holes of employee appeals. The federal courts and arbitration systems, by contrast, are functioning well and do not require intervention by this Committee at this time. In particular, there is no need to create a system which deprives federal employees of their fundamental civil right to challenge discriminatory employment decisions, while permitting private sector and other public sector employees to file cases in federal courts, state courts, and before state administrative agencies, as they can do now.

Instead, a better step in the right direction would be to revisit the Court's decisions in Johnson and AFGE Local 2052 and expressly eliminate any layer of cross-appeal that requires employees to appeal adverse arbitration decisions to the EEOC or MSPB prior to seeking what is, in any event, a *de novo* judicial review. Similarly, employees who elect to file cases with MSPB or EEOC, instead of filing grievances should expect finality in their administrative appeals, while retaining the right to seek *de novo* judicial review in appropriate cases.

Mr. PORTER. I have a few questions for the EEOC. Where do you think the delays are occurring in the Federal sector, EEO processing, and what suggestions do you have to make it more fair and more efficient and effective?

Ms. DOMINGUEZ. Thank you, Mr. Chairman. Since joining the Commission, we have looked at this issue very carefully and deliberately, and I am convinced that the greatest delay occurs during the investigative process conducted by Federal agencies.

There is a reluctance to look at the merits of the case and then apply some judgment, primarily because of fear that at some level in the process the case will be reversed. So I think there is a reluctance by Federal agencies to conduct anything less than a thorough and full investigation, even when the allegations do not warrant such a lengthy review.

Mr. PORTER. You mentioned that the system, 96 percent of the cases are fully adjudicated, and of course, at heavy costs to taxpayers because of purely the manpower and the time. And 96 percent are of course deemed to be without merit. Is that indicative that the system is working because 96 percent are without merit? Does that mean the system is working?

Ms. DOMINGUEZ. We believe that what it tells us is that 96 percent of the issues in which we found no discriminatory findings may relate to other management issues or other kinds of issues that cannot be substantiated through our discrimination analysis. We have put a lot of other things in place. One of the things we have encouraged agencies to do—and I have been personally meeting with agency heads—has been to engage more in the precomplaint counseling process. This is the time right before someone files a complaint, to do more mediation, to do more counseling, to do more outreach and training. We believe those are the tools that Federal agencies should continue to strengthen. We still have a very high conversion rate between the precomplaint counseling stage and the actual filing of a complaint. Government-wide it is about a 45 percent conversion rate. We think we can drive that down and keep complaints from being filed if each agency continues to engage much more aggressively in dispute resolution administrative processes.

However, I do think that once a formal complaint is filed, it is the old adage of, you know, there is a perception that the fox is guarding the hen house, and I believe that we need to remove that responsibility. It would be better for the agency. It would engender greater trust, and I think we could see dramatic improvement in the efficiency of the process.

Mr. PORTER. Thank you.

I would like to remind my colleagues, if we can keep our questions to approximately 5 minutes, I am happy to do additional rounds if necessary. Mr. Davis, any questions?

Mr. DAVIS OF ILLINOIS. Thank you, Mr. Chairman.

Mr. McPhie, both you and Ms. Dominguez, what is it about the mixed cases that cause so much delay, and which makes it more difficult to process those in a more timely manner?

Mr. MCPHIE. You want me to go first?

Mr. DAVIS OF ILLINOIS. Yes.

Mr. MCPHIE. The way the regulations are set up, a person has a right, if they are dissatisfied with an MSPB decision on discrimination, to seek review before the EEOC. And we get our agency decision very, very quickly. And it leaves our hands, it is at the EEOC. We have no control over the process, and then it would come back to us at some point in time in the distant future. It goes back and forth, and I have always wondered why, unlike other provisions described here this morning, people couldn't elect a remedy. Once they elect, they have to stay with that process. If they elected the Board remedy, for example, the case would be finished.

Mr. DAVIS OF ILLINOIS. So the joint action is not so much the problem as the regs governing EEOC becomes more of a problem than any difficulty of the two agencies concurrently working together?

Mr. MCPHIE. Oh, yes. EEOC is the expert, there is no question about that. And the Board, over 25 years, has developed a history that is quite good. EEOC has said that. But the process, I mean the regulation gives the person an unfettered right, if they don't like what they get from the Board, to take it over to the EEOC. Unless the regulations are changed, then you have to respect that right.

Ms. DOMINGUEZ. I fully agree with that. I believe that there is access to review on the discrimination aspects of the claim by the Commission, and while as I mentioned, it makes up about 1 percent of all of the appellate reviews, there is that component.

Mr. DAVIS OF ILLINOIS. Thank you very much.

Mr. Bransford, I would hope that certainly my comments were not part of the notion of opposition to or attacking the proposal. I think I have a very open mind about this, and I am trying to arrive at what will get the best protection as expeditiously as possible, certainly for those employees who feel that somehow or another, they are just not getting a fair shake. I mean I get people who call me and who come by my office, and there are times when I think we are going to have to call a psychiatrist—[laughter]—or somebody to keep them from going berserk, in terms of what they express about the process and whether or not they are going to ever get fairness. You indicated that your most serious concern is the length of time that it takes to resolve discrimination complaints and mixed cases. We have heard some information relative to the mixed cases. What is there about the discrimination complaints that makes it so difficult?

Mr. BRANSFORD. There are, Congressman Davis, two things about them I think from a manager's perspective. First, the manager is not a part of the process. The EEO process in the agency works separately and it is supposed to do that. And I think to a certain extent when the agency is investigating itself, it should be free from management influence, but the manager doesn't feel like they are part of the process.

And second, it goes on for so long, years. And the manager has to continue to work on a day-to-day basis with that employee who is unhappy with the manager, and very often that employee is a problem employee, is a poor performer or is engaging in workplace misconduct. The employee has filed an EEO complaint. The manager must then manage and make tough decisions and face a re-

prisal complaint because of an EEO complaint that has no end, all of this in a process where the manager is not a part. I think it creates difficulty for the manager.

And then from the employee's perspective, because I have also been involved in these cases from the employee's perspective, when a case takes so long to resolve and there is a finding of discrimination, it is very difficult to give meaningful justice to an employee who has been wronged after 3 or 4 or 5 years.

Mr. DAVIS OF ILLINOIS. Thank you very much, Mr. Chairman.

Mr. PORTER. Congresswoman, do you have any questions at this point?

Ms. NORTON. Thank you very much, Mr. Chairman.

I want to say to you, Mr. Bransford, that I am very sympathetic with what you go through. I mean I had to live with this system. I had to live with a system where people found multiple charges at a time, frankly, when we were trying to bring the agency, which had been a scandal, back to life. And so I hope you won't take our questions as meaning we don't see the problem. I lived with it. It is a terrible problem, about having someone who just lingers, and understands the system well enough to find ways to linger.

Could I ask you, did you, in designing this idea, speak with or consult with the unions who are apparently just, perhaps even more frustrated with the present system as you are?

Mr. BRANSFORD. I have not had discussions with unions about this specific proposal. I have had numerous discussions with union officials over the years about the basic problem. This proposal, I would point out, was first designed about 10 years ago, and studied at that point. We have since revised it and developed it and have continued to push for it, and I think within the last 3 years, particularly in what has happened with Department of Homeland Security and the National Security Personnel System. I think the debate becomes even more necessary because the focus has been on reforming MSPB appeal rights, and I think the problem is actually broader.

Ms. NORTON. The reason I asked the question——

Mr. BRANSFORD. But I have not consulted with them on this proposal.

Ms. NORTON. The reason I ask the question, Mr. Bransford, is that where management and labor have the same basic criticism, one would think that is an opportunity for them to take at least a go-round at seeing if they could together come up with an answer even if they had basic differences. Someone—I don't know if it was you, Mr. Chairman, or someone in their testimony—indicated that it would be advisable for there to be a task force of the stakeholders, as say, kind of a beginning point.

Mr. Bransford, would you disagree with that as one way to proceed?

Mr. BRANSFORD. I think that is a very good way to proceed, and I think that task force of stakeholders should include the labor unions.

Mr. PORTER. Excuse me, Congresswoman, I am not sure who said it, but we will give you credit if you like. It is a good idea. [Laughter.]

Ms. NORTON. I mean it may have been in someone's testimony, Mr. Chairman. I got it from—oh, it was Mr. McPhie. And particularly since very often management and labor don't agree that there is even a problem, boy, that is a good head start it seems to me.

I was a little puzzled by the very informative sheet that the SEA put out on the Federal Employee Court of Appeals. In talking about the need for reform, Mr. Bransford, you have a section here about the number of days it takes for various parts of the system to proceed, and you start with the 601 days for the agencies to decide a discrimination case, and you say, "when no judge is involved."

Mr. BRANSFORD. That is right.

Ms. NORTON. So that means we haven't even gotten to the appeal process yet. Then you go on, 280 days for agencies just to complete investigations. Here, we are not to appeal yet.

Mr. BRANSFORD. That is right.

Ms. NORTON. We are still on the ground.

Mr. BRANSFORD. We are still in the agency.

Ms. NORTON. And even in the agency, in a real sense we really may be hopping—I mean there is something called bottom-up and top-down. Then you go on that the EEOC judge takes 463 days. Well, if you combine the number of days before you even get out of the agency, you have about twice as many days as it takes for the EEOC judge to be involved in the case. And of course, no appeals court touches that, I take it?

Mr. BRANSFORD. Well, it has not gone to Federal Court yet. At that point it can go—then after that, it can go to Federal Court.

Ms. NORTON. After that. So we are still left with the employee down there not knowing whether or not there is any cognizable claim even. I am wondering whether or not we want to nip the problem in the bud, as they say, because I go on again with your sheet, because you complain, I think quite rightly, that the process, this process, this process that doesn't get to appeal—so few cases get to appeal. You say the process rarely finds discrimination, meaning that managers are often unfairly labeled as discriminating officials.

And then you go on to cite how few cases find discrimination. One of the reasons for that, Mr. Chairman, is that this is a free system. These are well-educated employees, and whatever message you send, they are going to receive. And by the way, if you send a message that there is an appeals court, a brand new nice appeals court, don't underestimate Federal employees, please. I am sure that will be just where everybody tries to get. I just want you to keep that in mind. But again, here we have very few cases.

Now, Ms. Dominguez testified about ways that the EEOC is trying to reach out to help these agencies get through that process. I would like to know whether or not you think that given the resources that go into this system, even before any appeals judge get a hold of it, whether it wouldn't be wise for the committee to concentrate on carrying out the Federal mandate that is now law, that every agency has to have a viable ADR process, because I think that if anything, this means that whatever version of ADR we are using, is failing, and you, therefore, after it has failed, are trying to get hold of the few cases that make it to the appeals system with

good reason, but leaving the process as it is where all of the delay really is.

So I am asking you whether or not your employee, you who are the manager, wouldn't be better off if there were a way to settle this case or to negotiate the case early on, and then if it can't be negotiated, and the employee wants to go on up, that is another problem. But isn't our time better put into—given what appeals are going to produce, isn't it better put into trying to get rid of frivolous cases, cases that might be easily settled, because you say right here, 20 percent of the cases settle but many result in small significant benefit for the complainant, meaning that the complainant is willing to take a small benefit. So I am asking you aren't we kind of putting the cart before the horse and wouldn't it be better for the committee to focus on trying to get these cases resolved early so that whatever appeals process we decide upon has very few cases in the first place.

Mr. BRANSFORD. The short answer is, yes, I believe that there should be more effort made to alternative dispute resolution and mediation. However, I don't think that would solve the problem.

The Senior Executives Association supports requiring managers to actually participate in alternative dispute resolution. The EEO does—and it is one of the significant improvements of the last 4 or 5 years—require ADR programs in agency EEO systems, which I believe has actually resulted in a reduction of many complaints that could have gone forward. But the problem is——

Ms. NORTON. That is one agency. We are dealing with five agencies, all of which were created because they have very distinct expertise. I mean the reason that in 1978 this happened in the first place was because the government found, the Congress found, that the specific missions of these agencies were so dissimilar, so dissimilar that they warranted actually setting up different agencies. That took a whole lot to do.

Now, essentially you come back and you put them all together again, at least up at the top. There has to be a very good reason for doing that, Mr. Bransford.

Mr. BRANSFORD. And the basic reason for doing it is to recognize that it is all about the Federal employee complaint system that very often has overlapping concerns, overlapping issues. Under the current system if you go to the EEOC on an issue and you want to take it to Federal Court on discrimination, you have to go through the discrimination route. If you want to argue Federal Civil Service, you take it through the MSPB and the Federal Circuit.

Ms. NORTON. Would you be in favor of what we have in the Federal court system or in most court systems, you choose your forum?

Mr. BRANSFORD. You choose your forum, that is right, and——

Ms. NORTON. I am sorry. Would you be in favor of that as one way to deal with this problem, so that you wouldn't then say, oh, I chose my forum, but here I am going to relitigate it in another forum.

Mr. BRANSFORD. But you would still have multiple ways of attacking a problem, and I think tighter rules on choosing your forum would be a positive reform, but I don't think it takes care

of the compete problem because you still have a very lengthy delay in the EEO processing that is not being addressed.

Ms. NORTON. Mr. Chairman, I can stop here if you want to go to other people.

But again, you keep going back to a delay in the EEO processing. Therefore I want to focus you on the EEO processing. If the delay is there, then the question for the committee is why don't we tackle where the biggest delay is? We may still find we have delays in the appeal process. That is on the table as far as I am concerned, but the notion of not tackling where the real delay is, that is where the employee is encountering problems. Where is your little sheet that I had? Your employee, and if you say that is who you are doing this for, your employee that you are so concerned about, and your manager, at 601 days for the agency. That is the agency where you are, Mr. Bransford.

Mr. BRANSFORD. That is correct.

Ms. NORTON. For the agency to decide a discrimination case. You still got it at that point, you, the agency. And then 280 days for the investigation. I am just perplexed, Mr. Chairman, why I would want to leap over to the appeals process without tackling this and finding ways to make this—to reduce this process, given the results you, yourself point out here. Most of these cases are going to wash out in the first place, so we are interested in the tiny, tiny number that don't wash out.

Mr. PORTER. Congresswoman, that is why we are here today, and I think your point is well taken.

Mr. BRANSFORD. Our proposal would actually start the process in the court on day 1, not day 601, and the investigation, the consideration of the complaint would be done by the independent Court of Appeals, the Federal Employee——

Ms. NORTON. Then I have to have a followup question. Then what you are suggesting, Mr. Bransford, is we have a court where we transfer the complexity in the administrative process now to, of all places, what is always a more costly process, a court process. You do say in your sheet that the Court's jurisdiction would encompass duties the Office of Special Counsel, the General Counsel's Office of the FLRA. The court—imagine this now—the court would have an investigatory arm. In America we are used to agencies investigating. Encompassing the duties of the OSC, the Office of Special Counsel and the General Counsel of the FLRA. This transfer of jurisdiction, it seems to me, doesn't do anything about the number of days, doesn't do anything about the delays. What it does do is pile them all up in one agency, and we know from experience that if you want to make a problem worse, create a big bureaucracy and say, now all of the problems are yours, all the delays are yours, all of the jurisdiction, including jurisdiction that a court has never had, which is jurisdiction over investigations, that is all yours. And somehow if we put all of that in a court, simply because it is under the same roof, everything is going to be done more quickly than it is done now.

I don't know, Mr. Chairman, I remain to be convinced.

Mr. PORTER. Thank you, Congresswoman, appreciate it.

Mr. Cummings.

Mr. CUMMINGS. I am just going to be very brief because I think Ms. Norton pretty much expressed my frustrations here.

But I just want to just bring some of the—you know, Mr. Bransford, and I think it was Mr. McPhie, I understand you are trying to do something to help employees, and particularly employees that find themselves in a situation where they need a remedy for what they at least perceive to be a problem. I am just wondering, you know, I have read a statement from Colleen Kelley, the president of the National Treasury Employees Union, who seems to think that this is not the greatest idea. I guess when I am trying to help somebody, I would kind of like to know that the help that I am offering them is truly help and not something that they would deem is not helpful. So I am just wondering—and then I want to put alongside of that, when we did the Department of Homeland Security, we combined some 22, put together 22 agencies and created a super agency. When we look at what happened with Katrina, there is not one human being that cannot say that there was a failure on the part of a lot of folks, local, State and definitely Federal.

So I am trying to figure out. She claims, that is, Ms. Kelley claims that this is a bureaucratic nightmare, and I think that is to some degree what Ms. Norton was kind of getting at. I just want to make sure—first of all, have you been in contact with any of the union folk?

Mr. BRANSFORD. I discussed the broad problem with the unions. I have not discussed with them or had a debate with them about this specific proposal, nor have I attempted to get their buy-in to it.

Mr. CUMMINGS. Not necessarily buy-in. I tell my staff, in dealing with people, one of the best things that you can do is consult with people, at least talk to them, because the person who could be your greatest advocate can become your worst enemy if they are not at least in some way included in the process. It seems to me that if I am trying to create something and redo something to help someone, it just seems to me—you don't have to have a buy-in, but at least consultation, because I am sure the unions catch a lot of the flack when these problems come up. I was just curious as to what your process was, that is all.

Mr. BRANSFORD. What our process was in developing this proposal?

Mr. CUMMINGS. Yes.

Mr. BRANSFORD. We talked to quite a few officials and ex-officials at the various agencies that do this, and we talked to many managers, and received feedback from them about their concern, and in addition to that, we talked to a lot of employee advocates about how these different agencies actually work.

I have discussed with AFGE and NTEU and other labor unions the basic problem of the employee appeals system, including the efforts of the last 3 years to diminish the authority and use of the Merit Systems Protection Board, and I am well aware of their position on that. I am also well aware, Congressman Cummings, that the unions would probably be very much against my proposal because of its provision to eliminate labor arbitration.

Nonetheless, we believe that it is the best avenue, it makes the most sense. The Merit Systems Protection Board was created to hear the very same cases that labor arbitrators also hear, and it makes no sense to have a Board that is accountable to Congress and to the courts, and labor arbitrators that are not nearly as accountable, and a perception of managers—and the employee advocates, I might also add—that in general arbitrators often unreasonably favor the employee in their decisions. It seems to me to be, when you look at it, an option that is unnecessary, especially considering the Board, but one that is very much cherished by the union, and it goes back a long way, and I would expect them to oppose our proposal on that basis alone.

Mr. CUMMINGS. Where would the court be centralized? I mean where would it be? Would it be regional? I mean would we have courts around the country? I take it that MSPB and the FLRA maintain some kind of regional agencies throughout, or umbrellas out there, and I am just wondering first of all, where do you propose this court being?

Mr. BRANSFORD. I think those details need to be worked out as the legislative process unfolds, but I would imagine like most Title I courts, it would be headquartered in Washington, but I would assume it would have offices throughout the country. The MSPB has I think five or seven regional offices. The FLRA has offices that deal with Federal employee issues, and the EEOC has quite a few offices. So I would think you would have to set up offices in every place where currently to Federal agencies deal with Federal employee complaint issues.

Mr. CUMMINGS. And offices meaning that they would also be places where matters could be adjudicated. Is that what you are saying?

Mr. BRANSFORD. Matters would be adjudicated. Hearing examiners and judges would be housed in those offices, and court staff to investigate and do dispute resolution.

Mr. CUMMINGS. Well, the jury is still out. Thank you.

Mr. PORTER. Thank you, Mr. Cummings.

We are going to be voting on the House floor in about 10 minutes, and I am willing to have another round of questions if the committee would like. Congresswoman.

Ms. NORTON. Commissioner Dominguez, wouldn't some of this problem go away if the EEOC had the same kind of enforcement authority in the Federal sector that it has in the private sector?

Ms. DOMINGUEZ. Congresswoman Norton, certainly it would improve. We are often frustrated because there is oftentimes a resistance to provide necessary data during the hearings process, and of course, the Commission doesn't have any kind of sanctioning powers to impose submission of that data.

Let me just for the record—I know that SEA provided the data for 2004 in terms of hearings, but I am just very proud to report that in 2005 we have gone from 421 days to 249 days, so we are trying to squeeze out the efficiencies, but there is a point where you have to look at the foundation of the process, not necessarily what the current process is, but how are we organized. And that I think was really the key part here.

Ms. NORTON. I think first things first. We may have problems in the appeal process, but I am yet to understand why it would begin there rather than where all the delay is.

Mr. Bransford, for as long as—and there has been Federal law and administrative process, it has been Federal process to keep people out of court. That is why you have all of these decisions, some of them counter-intuitive in this process, but have all these decisions saying exhaust your remedies, exhaust your remedies.

Your proposal would actually make what are now administrative functions into judicial functions, functions literally of a court. Isn't that turning the whole notion of keeping people out of court on its head, and reversing what has been Federal policy for decades? Why would we want to do that?

Mr. BRANSFORD. Well, we would want to do it for two reasons. One is, by creating a Title I court like this, I think you are creating an organization that would have a tremendous degree of independence and integrity, sufficient, for the second reason, to remove these Federal employee cases from Federal District Court and actually putting them in this Title I court, where employees would have——

Ms. NORTON. I am talking about the administrative function.

Mr. BRANSFORD [continuing]. One shot at it. We think by creating a specialized court that was focusing only on Federal employee issues, you could do this effectively without having an administrative process, and that administrative process that you are discussing is quasi-judicial already, the MSPB and the FLRA and the EEOC and the Office of Special Counsel, which we think this court——

Ms. NORTON. Mr. Bransford, are you aware that in the processes right here, most employees don't get a lawyer. Once you say you are going into some kind of court, most—many cases are handled by people themselves, pro se, by non-lawyers, by union representatives who aren't lawyers, by friends who come in to help them. Now we are creating, under your proposal, an administrative court, a lot of complexity in it, complexity that is now in the administrative process. Wouldn't there be a need for a lawyer in this court process?

Mr. BRANSFORD. Well, there are also people who go to Federal District Court pro se.

Ms. NORTON. Very few. That is no answer to my question.

Mr. BRANSFORD. I would agree. I would agree with that, but——

Ms. NORTON. The question here is, do you envision that people would be able to go into this process without a lawyer, or would feel that perhaps before an Article I court, they best have a lawyer?

Mr. BRANSFORD. I feel that this process could be set up specifically to handle pro se cases exactly like they are handled at the MSPB or the EEOC——

Ms. NORTON. So here we have then a court doing what the administrative process does, only we call it a court and we send a signal that it should be treated like a court. There are a lot of mixed functions in here. One of the great debates of the administrative process when the NLRB was set up was about firewalls and fairness. One thing that having separate agencies does is to at least make it clear that notion of fairness isn't being violated because it

is all mixed up in the same agency. I regard that as a problem that needs to be dealt with.

You have the court handling advisory functions of independent agencies. You have things in this court that no court has ever had anything to do with, functions like issuance of guidance on labor relations issues. It doesn't sound to me like this is a court at all, but a combination agency and court, some kind of hybrid, that transfers a lot of complexity now in the administrative process upward.

I do have a question for Ms. Cabaniss. Ms. Cabaniss, you are aware that we have before us not as a piece of formal legislation, but what has been outlined certainly in a form which could become legislative, a proposal called "Working for America Act." So in viewing this proposal, I have had to look at it in light of that proposal because—and to ask you what would be left of the FLRA if on the one hand you get the Working for America Act, on the other hand you get this act?

For example, under the proposed Working for America Act—I am looking here at the executive summary—the unions would lose certain rights that now apparently are before you, the right to attend formal discussions between management and employees. You handle I guess such grievances. Existing union right to attend formal discussions between management employees on any personnel matter. There is, you know, emergencies. An agency could declare emergency whenever it—excuse me—damn well pleased, and there goes consultation and a whole lot of things that by fiat don't come any longer if we were to pass this act, and the Working for America Act.

And so this needs—you are very modest here—you kind of say, this needs a little study. I am asking you if we pass both of these things, the Working for America Act and this proposal, whether or not there is any need for an FLRA, or whether we shouldn't just streamline government all together, and eliminate the FLRA?

Ms. CABANISS. That is a very good question. I see the proposals as being distinct. The SEA proposal clearly looks as if it would take the place of the FLRA. The Working for America Act, as I understand it, would limit the scope of bargaining. It doesn't necessarily take away any of the responsibilities of the FLRA. It might change the type of cases that come before the FLRA, which certainly could have an impact on the number of cases, depending on what the ultimate scope of bargaining is, and how many times, you know, unions take to have those cases come before the FLRA. So it certainly would have an impact on our jurisdiction.

Ms. NORTON. But there wouldn't be much left of the FLRA if we had this proposal.

Ms. CABANISS. As I understand it, it looks like it would largely take the place of——

Ms. NORTON. Just as well abolish the FLRA.

Mr. PORTER. Thank you.

Ms. NORTON. I think that is a very weighty and heavy notion to bear in mind here, and if it is that easy, Mr. Chairman, fine, but it hasn't seemed that easy to me.

Thank you very much, Mr. Chairman.

Mr. PORTER. Thank you for your comments.

Mr. Davis, any questions?

Mr. DAVIS OF ILLINOIS. Yes.

Mr. Bransford, if we could go back. It seems that I remember at a point you suggested that part of the problem with the EEO process was that managers were not really integrated into that process. If that is the case, could there not be some way to correct or fix that to the extent that input from managers could be a part, and would that not maybe help to streamline the process a bit?

Mr. BRANSFORD. Yes, it would. I believe that managers should be more a part of the process, and the Senior Executives Association has a legislative proposal that we have entitled the Federal Managers Fairness Act to do exactly that, to make managers more a part of the process. And to the extent that this independent court does not become a reality or is delayed in becoming a reality, we think it is important that managers are brought into the EEO process, that they be informed when a complaint is filed, that they be entitled to representation during investigations, that they be provided with relevant documents, that they be consulted, not necessarily in any authoritative way, but at least advised before a case is settled so that their input could be obtained, and that they be reconsidered for lost awards, lost promotions, lowered performance appraisals if an EEO complaint is later found to not have merit.

We think that is important, and I suspect that the SEA's proposal on this court would be studied for some period of time. We hope that the other reform would take place in the interim, would be less necessary if an independent court were set up because we think these cases would move through it rapidly.

Mr. DAVIS OF ILLINOIS. Representative Norton has sort of indicated that this would be a different kind of court, sort of a hybrid, something different than what individuals are generally accustomed to. Do you think that employees might end up feeling that they were shortchanged if they now are blocked from moving to Federal court in the traditional sense, or that they now can't go anyplace else, that this is it, and other people have the chance to go to Federal Court, maybe even to the Supreme Court, if necessary, that someone might feel that their rights had been diminished or taken away?

Mr. BRANSFORD. I have thought a lot about that because I think that is a very important question. Where I come down on it is by creating an Article I court you are going to give the court I think sufficient prestige and credibility that it will be able to fairly, fully decide these cases. They would be appealable to the Federal Circuit and then ultimately to the Supreme Court for EEO cases, so they would be fully appealed.

The current system is to some extent clogging the Federal Courts. The data that was thrown out here this morning is only 1,300 cases, but there are still quite a few in Federal Court, and these are cases that have already gone through the administrative process. Unlike in the private sector, where an employee goes through the EEOC process in a less intensive way and faster, and they can go to Federal District Court, there's no separate mechanism.

It seems to me that the Federal employee appeals and complaints system has learned enough to be able to set up this type

of a court to give it sufficient significance so that Federal employees would accept it, decide cases rapidly, and also deal with cases as far as the input in a less formal way, so that employees could feel comfortable doing that without having a lawyer if they chose to.

Mr. DAVIS OF ILLINOIS. And finally, anyone who would respond, is there any way that you can think of that would just simply shorten for people the process? I mean the title I think "Justice Delayed, Justice Denied." I mean there are people who obviously just simply feel their cases will never get adjudicated, that they will just hang forever and forever and forever and forever, and they will never know. Does that do an injustice to our judicial notions and our judicial system, and is there a way to really kind of speed that up?

Ms. CABANISS. I know, at least in the FLRA's experience, in our statute Congress required us to do a certain type of case within a specific time deadline. Perhaps Congresswoman Norton has a better sense than I do of why that was the case. When the decision was made that the FLRA has to act on cases involving issues of representation, we have to act as the Authority within 60 days. Those kind of time limits were not imposed in our statute for other types of cases. That is the only issue that I would option—suggestion that I would make, if Congress makes a determination that the cases should be done within a specific amount of time, you might look to that, and the history behind it as a model.

Mr. BRANSFORD. Congressman Davis, if I could address your point. Current law does impose time limits, but the time limits don't have meaningful sanctions because when the time limit expires, the employee then has a right to move on to the next phase, and they can choose where to go. And very often, when you are representing an employee, as I have had the occasion to do over the years, and you get to that 180 days, you are left with a choice of, well, do I go to Federal Court and its very expensive process, do I go to the EEOC which is a less expensive but still expensive process, or do I wait for the agency to finish the investigation and learn a great deal of useful information? Usually you decide to wait, and the agency just takes off and takes its time.

So if the time limits had more meaningful sanctions, perhaps that could speed the process up.

Mr. DAVIS OF ILLINOIS. Thank you very much, Mr. Chairman.

Mr. PORTER. Thank you.

A lot of good people that have real problems won't enter the system because they are afraid it is going to take so long or that they are wasting their time or have some of that intimidation. I would like to note for the record that members can submit additional questions.

Ms. NORTON. Mr. Chairman, could I just—irresistibly because we have had a hearing on the Working for America Act, where you were just seeking reactions to it, and here—my recollection is that Ms. Cabaniss did not appear at that hearing and I am not sure anybody from the FLRA appeared at that hearing. I would like to know whether she supports the Working for America Act proposal?

Ms. CABANISS. I don't really think that it is appropriate. You all had the opportunity to talk to all the stakeholders, see where they

are. The one thing I do support and I think is appropriate, is that you all are having this discussion. Unlike, for example, Superfund or the Clean Air Act, so many of these statutes come up for reauthorization that Congress has an opportunity to bring in all the stakeholders, those who are affected, have the hearing, and discuss is this where we want to be? Where do we want to go?

I don't know that conversation has really taken place wholesale on the statute governing the FLRA. Obviously, there have been changes over the years, amendments through the appropriations process, but I don't know that anyone has really taken a hard look or whether or not the statute best serves the interest of the agencies, but more importantly the interest of the employees. We are a complex statute. Generally you do need a lawyer to come before the FLRA. I think it is always appropriate to have that discussion whether or not our statute is best serving the needs of our customers.

Ms. NORTON. But you are not prepared to endorse that proposal at this time?

Ms. CABANISS. No, ma'am, I am not, just because it is not a piece of legislation yet. We haven't been involved.

Ms. NORTON. But for us to be doing a piece of legislation that affects primarily your agency, it seems to me that you would be the first to want to have something to say about it.

Ms. CABANISS. Well, if given the opportunity to formally engage on that, we would certainly be happy to.

Ms. NORTON. You hear her, Mr. Chairman? She would be happy to engage in it. She is not engaging right now when I ask her questions, but perhaps you can engage Ms. Cabaniss later.

Mr. PORTER. Thank you for your questions, and thank you for your testimony. I appreciate you all being here. Members do have time to submit for the record additional questions.

Thank you all for being here. Have a good day.

[Whereupon, at 11:53 a.m., the subcommittee was adjourned.]

[The prepared statement of Hon. Elijah E. Cummings and additional information submitted for the hearing record follow:]

Opening Statement

Representative Elijah E. Cummings, D-Maryland

Subcommittee on Federal Workforce and Agency Organization Hearing: "Justice Delayed is Justice Denied: A Case for a Federal Employees Appeal Court."

Committee on Government Reform
U.S. House of Representatives
109th Congress

November 9, 2005

Mr. Chairman,

Thank you for holding this critically important hearing to evaluate a restructuring proposal for the federal employee appeals process. For over two decades, five distinct agencies have admirably worked to ensure that federal employees have an appropriate forum to resolve their claims of unfair or unlawful treatment that occurs in the workplace.

As it now stands, agency involvement of the federal employee appeals system includes: the Merit System Protection Board (MSPB), which hears individual appeals regarding agency adverse actions; the Office of Personnel Management (OPM), which is charged with administering the federal personnel system; the Office of Special Counsel (OSC), which investigates and prosecutes specialized cases with an focus on protecting whistleblowers; the Equal Employment Opportunity Commission

(EEOC) enforces the right of equal employment opportunity by hearing cases concerning discrimination; and finally, the Federal Labor Relations Authority (FLRA) adjudicates disagreements between agencies and unions.

Today's hearing presents us with the opportunity to discuss a proposal by the Senior Executive Association (SEA) to streamline the federal employee appeals system with the creation of a Federal Employee Appeals Court. Specifically, the proposal calls for a single forum that would merge the appeals functions currently adjudicated by MSPB, OPM, OSC, EEOC, and FLRA into what could be considered a "super-agency." As the testimony of William Bransford articulates, the purpose of this new entity is to "provide a simple and expeditious mechanism, resulting in protection of the merit system by resolving employee concerns with relative speed, impartiality, and fairness, while preserving all employee appeals rights."

In principle, I am sure we can all agree that we best honor our civil servants by having a federal employee appeals system that provides a just, timely, and thorough resolution of employee grievances. Further, I am sure we can all agree that the current appeals system is not perfect and could benefit from some efforts to improve its effectiveness and efficiency. I am especially

troubled by the lack of timeliness in the resolution of some mixed cases where there is a jurisdictional overlap between EEOC and MSPB and the ability to continuously "bounce" an appeal in such a case for additional review to another adjudicative forum. However, I am not 100% convinced that the SEA proposal for a Federal Employee Appeals Court is the best course of action. At this point, it seems that the five agencies at the center of the federal employee appeals system are able to sufficiently fulfill their unique missions.

The challenges that confront us seem largely concentrated to the extraordinary delays and disarray associated with mixed cases. With that said, wholesale restructuring of the arbitration system seems unwarranted. John Gage of the AFL-CIO wisely stated in his testimony that "in particular, there is no need to create a system which deprives federal employees of their fundamental civil right to challenge discriminatory employment decisions, while permitting private sector and other public sector employees to file cases in federal courts, state courts, and before state administrative agencies as they can do now."

With that said, EEOC's field restructuring plan that is typified by its calls for a reduction of offices and staff seems particularly unwise. No one wins if EEOC is incapable of

enforcing discrimination laws and if it is inadequately staffed to decrease backlogs and delays. Moreover, it seems appropriate that in focusing on the specific challenges before us that we look within the current system to determine how any perceived or actual inefficiencies associated with mixed cases can be best addressed.

I yield back the balance of my time and look forward to the testimony of today's witnesses regarding SEA's proposal.

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The Federal Employee Court of Appeals

A proposal by the Senior Executives Association

The Problem:

- The federal employee appeal and complaint process is complicated and heard in numerous agencies and forums.
- The currently clogged system delays justice and a fair resolution for those with legitimate complaints.
- Federal managers are reluctant to act because the multiple forums and processes mean that the rules are complex and confusing.
- The separate EEO system means that cases hang over managers for years without resolution and then are often resolved in favor of the manager. Those employees who win cases wait years for justice. The overlaying of EEO onto the employee adverse action and grievance process has unnecessarily delayed and complicated the entire dispute resolution process.
- Managers perceive that labor arbitration is unnecessarily weighed in favor of union employees and the availability of two different forums for employee adverse action appeals complicates the manager's decision making process for dealing with poor performers and employee misconduct.

Need to Reform Federal Sector EEO:

The current process is long and cumbersome. Look at the averages for 2004:

- **601** days for agencies to decide discrimination cases when no Judge is involved
- **280** days for agencies just to complete investigations
- An additional **463** days to receive a decision from an EEOC Judge

The process rarely finds discrimination meaning that managers are often unfairly labeled as discriminating officials, while meaningful relief is substantially delayed for those who are victims of discrimination. Look again at the 2004 statistics:

- **321 out of 23,153** complaints found discrimination, or **1.3%**
- Approximately 20% of cases settle, but many result in small or insignificant benefit for the complainant.

Professionals in the EEO community widely view the EEO process as an employee grievance forum because employees have no other meaningful way to complain about work place grievances.

The Solution:

- Create one forum for the resolution of all employee complaints, including EEO and labor arbitration.
- The Court would function independently and with sufficient resources to resolve all complaints.
- Capable processing would dispose of frivolous cases early, thus easing the backlog which prevents meritorious cases from being resolved more expeditiously.
- Both employees and managers would have a sense of where justice could be obtained quickly, giving earned and needed credibility to managers whose decisions will not be subject to uncertainty and questioning for years, and employees will receive a fair and speedy resolution.

Updated: September 26, 2005