EMPLOYMENT DISCRIMINATION IN THE FEDERAL WORKPLACE—PARTS I AND II

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE

OF THE

COMMITTEE ON
GOVERNMENT REFORM
AND OVERSIGHT
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

SEPTEMBER 10 AND 25, 1997

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CONTENTS

Page

Hearing held on:
- September 10, 1997 1
- September 25, 1997 297

Statement of:
- Cole, Lynn, attorney; Angelo Troncoso, IRS employee; Edward Drury, FAA employee; and Ronald Steward, Deputy Chief for Programs and Legislation, U.S. Forest Service 353
- Eason, Oscar, president, Blacks In Government; A. Baltzar Baca, National Image, Inc.; Thomas Tsai, chairman, Federal Asian-Pacific-American Council; Dorothy Nelms, president, Federally Employed Women; and Howard L. Wallace, author, Federal Planation: Affirmative Inaction Within our Federal Government 63
- Herger, Hon. Wally, a Representative in Congress from the State of California; and Hon. Charles Canady, a Representative in Congress from the State of Florida 307
- Lucas, Lawrence E., Coalition of Federal Employees at the Department of Agriculture; Romella Arnold, National Association for the Advancement of Black Federal Employees; Laverne Cox, Library of Congress Class Action Plaintiffs; and Sam Wright, Federal Aviation Administration employee 139
- Shaw, G. Jerry, general counsel, Senior Executive Association; and John Fonte, American Enterprise Institute 392
- Wynn, Hon. Albert, a Representative in Congress from the State of Maryland; Hon. Steny Hoyer, a Representative in Congress from the State of Maryland; and Hon. Matthew G. Martinez, a Representative in Congress from the State of California 34

Letters, statements, etc., submitted for the record by:
- Arnold, Romella, National Association for the Advancement of Black Federal Employees, prepared statement of 155
- Baca, A. Baltzar, National Image, Inc., prepared statement of 79
- Barrett, Hon. Thomas M., a Representative in Congress from the State of Virginia:
  - Prepared statement of 25
  - Prepared statements of Mrs. Loving and Mrs. Graf 28
- Canady, Hon. Charles, a Representative in Congress from the State of Florida, prepared statement of 333
- Cole, Lynn, attorney, prepared statement of 356
- Cox, Laverne, Library of Congress Class Action Plaintiffs, prepared statement of 183
- Cummings, Hon. Elijah E., a Representative in Congress from the State of Maryland, prepared statements of 9, 379
- Drury, Edward, FAA employee, prepared statement of 366
- Eason, Oscar, president, Blacks In Government, prepared statement of 67
- Fonte, John, American Enterprise Institute, prepared statement of 407
- Ford, Hon. Harold E., Jr., a Representative in Congress from the State of Tennessee, prepared statements of 22, 341
- Herger, Hon. Wally, a Representative in Congress from the State of California, prepared statement of 310
- Hoyer, Hon. Steny, a Representative in Congress from the State of Maryland, prepared statement of 46
- Lucas, Lawrence E., Coalition of Federal Employees at the Department of Agriculture, prepared statement of 144
- Martinez, Hon. Matthew G., a Representative in Congress from the State of California, prepared statement of 51

Page

Letters, statements, etc., submitted for the record by—Continued
Mica, Hon. John L., a Representative in Congress from the State of Florida, prepared statements of 4, 300
Morella, Hon. Constance A., a Representative in Congress from the State of Maryland, prepared statement of 304
Nelms, Dorothy, president, Federally Employed Women, prepared statement of 103
Pappas, Hon. Michael, a Representative in Congress from the State of New Jersey, prepared statement of 16
Shaw, G. Jerry, general counsel, Senior Executive Association, prepared statement of 395
Steward, Ronald, Deputy Chief for Programs and Legislation, U.S. Forest Service, prepared statement of 372
Tsai, Thomas, chairman, Federal Asian-Pacific-American Council, prepared statement of 86
Wallace, Howard L., author, Federal Planation: Affirmative Inaction Within our Federal Government, prepared statement of 126
Wright, Sam, Federal Aviation Administration employee, prepared statement of 191
Wynn, Hon. Albert, a Representative in Congress from the State of Maryland, prepared statement of 38

EMPLOYMENT DISCRIMINATION IN THE FEDERAL WORKPLACE—PART I

WEDNESDAY, SEPTEMBER 10, 1997

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CIVIL SERVICE,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2154, Rayburn House Office Building, Hon. John L. Mica (chairman of the subcommittee) presiding.

Present: Representatives Pappas, Sessions, Morella, Cummings, Norton, Ford, Barrett, and Wynn.

Staff present: George Nesterczuk, staff director; Ned Lynch, professional staff member; Caroline Fiel, clerk; and Cedric Hendricks, and Ron Stroman, minority counsel.

Mr. MICA [presiding]. Good morning. I would like to call this meeting of the House subcommittee to order. The title of the hearing this morning is "Employment Discrimination in the Federal Workplace." I would like to open with my statement and then I will yield to our ranking member and other Members who have opening statements.

I would like to welcome you this morning. We have tried to accommodate as many folks as we can with seats. We appreciate your attendance and interest.

Today, our Civil Service Subcommittee begins a two-part hearing on discrimination in the Federal workplace. During the course of these hearings, the subcommittee will examine two distinct but very closely related issues. We will examine the various forms of discrimination against Federal workers, and we will also examine the procedures available to Federal workers who have been victims of discrimination.

I would like to take just a moment and thank our ranking member, Mr. Cummings, who has worked very closely with me on putting this hearing together, both today and the second part next week, and also recognize him for his leadership, and others on the panel for bringing this matter before the attention of the Civil Service Subcommittee.

Discrimination against individuals because of their race, sex, national origin, or other proscribed characteristics has no place in our Federal work force. It cannot, and must not, be tolerated. Each and every individual Federal employee, and each and every person who applies for Federal employment, is entitled to equal treatment. There is no place in the Federal work force for a caste system or

for policies that divide workers into favored or disfavored groups based on race, sex, or national origin.

Unfortunately, it is too often the policy of Government to encourage—if not mandate—discrimination against some individuals simply because of their race, sex, or national origin. Today, Government employment practices sanction race- or sex-based preferences, and different treatment of individuals based upon their race, sex, or national origin.

Like all forms of collectivism, these practices subjugate the rights of individuals to group interests. Whether we call it reverse discrimination or affirmative action, the effects on individual victims can be no less devastating. Eliminating all forms of preference based on race, sex, and national origin in the Federal workplace will not in itself usher in a colorblind society, but it will help attain a colorblind government, without which a colorblind society will always remain beyond our grasp.

Congress must also recognize that even the best laws and policies will not eliminate all discrimination in a work force that is now in the range of 2 million employees. We must ensure then that an effective and efficient method for resolving discrimination complaints is available to all of our Federal workers.

Unfortunately, hearings held by this subcommittee during the last Congress revealed a widespread consensus that the current procedures for resolving complaints of discrimination and all other work force disputes are broken. The procedures are too complicated; they are too bureaucratic; they are too slow, and they are too costly.

Federal employees, according to the GAO, file discrimination complaints at five times the rate of private sector workers, and often over less serious matters. Data also provided by the Equal Employment Opportunity Commission [EEOC], shows that the number of cases filed each year with agencies and with the EEOC have increased substantially since 1993. Yet the portion of cases where EEOC finds discrimination has, in fact, declined.

Unfortunately, there are what I will call frequent filers, who jam up the system with frivolous complaints. Many have told me that employees who frequently file resort to the discrimination complaint procedure because of personality clashes with managers, or because they simply believe they have been treated unfairly. These employees use the EEOC processes as an all-purpose grievance procedure, because they have no confidence in other alternatives. The casualties of these abuses are those who have, in fact, well-founded claims of discrimination who must wait inordinately long for relief, and the American taxpayers who must foot the bill.

Since assuming the chairmanship of this subcommittee, I have worked hard to reform these appellate procedures. Reform is badly needed, and I believe it is needed now. Unfortunately, the reforms I proposed in the last Congress were defeated.

I would, however, emphasize that we cannot view the complaint procedures for discrimination in isolation. Reforms to that system must be integrated with reforms to the overall appellate procedures. These procedures must be simplified and be made user-friendly.

But, perhaps most importantly, Congress should do everything in its power to encourage the use of alternative dispute resolution procedures. Workplace disputes of every kind are best resolved in the workplace, and by the agencies, and, I strongly believe, by the employees who are involved. Litigation, whether in court or in administrative proceedings, should generally be the last resort, not the first choice and not the only choice.

I look forward to the testimony of our witnesses today and at next week's hearing in the hope that they will provide guidance for a more effective way to deal with our workplace conflicts and disputes and also the problem of discrimination.

I am very pleased at this time to yield to our ranking member, and again to thank him for his leadership on this issue and how to bring this matter before our subcommittee and the Congress. Our ranking member, the gentleman from Maryland, Mr. Cummings. You are recognized, sir.

[The prepared statement of Hon. John L. Mica follows:]

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Opening Statement of Representative John L. Mica
Chairman, Civil Service Subcommittee
Employment Discrimination in the federal workplace - Part I
September 10, 1997

Today the civil service subcommittee begins a two-part hearing on discrimination in the federal workplace. During the course of these hearings, the subcommittee will examine two distinct, but closely related, issues. We will examine the various forms of discrimination against federal workers. We will also examine the procedures available to federal workers who have been the victims of discrimination.

Discrimination against individuals because of their race, sex, national origin, or other proscribed characteristics has no place in federal employment policies. It must not be tolerated. Each and every federal employee, and each and every person who applies for federal employment, is entitled to equal treatment. There is no place in the federal workplace for a caste system or for policies that divide workers into favored or disfavored groups based on race, sex, or national origin.

Unfortunately, it is too often the policy of the government to encourage, if not mandate, discrimination against some individuals simply because of their race, sex, or national origin. Today, government employment practices sanction race or sex-based preferences and the disparate treatment of individuals based upon their race, sex, or national origin. Like all forms of collectivism, these practices subjugate the rights of individuals to group interests. Whether we call it "reverse discrimination" or "affirmative action," the effects on individual victims are no less devastating.

Eliminating all forms of preferences based on race, sex, or national origin in the federal workplace will not in itself usher in a color-blind society. But it will help attain the color-blind government without which a color-blind society will always remain beyond our grasp.

Congress must also recognize that even the best laws and policies will not eliminate all discrimination in a workforce of 2 million. We must ensure that an effective and efficient method for resolving discrimination complaints is available to all federal workers. Unfortunately,

hearings held by this subcommittee during the last Congress revealed a wide spread consensus that the current procedures for resolving complaints of discrimination and all other workplace disputes are broken. The procedures are too complicated, too bureaucratic, too slow, and too costly.

Federal employees, according to GAO, file discrimination complaints at five times the rate of private sector workers, and often over less serious matters. Data provided by the Equal Employment Opportunity Commission show that the number of cases filed each year with agencies and with the EEOC have increased substantially since 1993. Yet the portion of cases where EEOC finds discrimination has declined. There are "frequent filers" who jam up the system with frivolous complaints. Many have told me that employees who frequently file resort to the discrimination complaint procedure because of personality clashes with managers or because they simply believe they have been treated unfairly. These employees use the EEO process as an all purpose grievance procedure because they have no confidence in other alternatives.

The casualties of these abuses are those who have well-founded claims of discrimination, who must wait inordinately long for relief, and the American taxpayers who must foot the bill.

Since assuming the chairmanship of this subcommittee, I have worked hard to reform the appellate procedures. Reform is badly needed, and it is needed now. Unfortunately, the reforms I proposed in the last Congress were defeated. I would, however, emphasize that we cannot view the complaint procedures for discrimination in isolation. Reforms to that system must be integrated with reforms to the overall appellate procedures. These procedures must be simplified and made user-friendly.

But perhaps most importantly, Congress should do everything in its power to encourage the use of alternative dispute resolution procedures. Workplace disputes of every kind are best resolved in the workplace itself and by the agencies and employees involved. Litigation, whether in court or in administrative proceedings, should generally be the last resort, not the first choice.

I look forward to the testimony of our witnesses today and at next week's hearing in the hope that they will provide guidance for more effective ways of dealing with workplace conflicts and disputes.

###

Mr. CUMMINGS. Thank you very much, Mr. Chairman, and good morning to all of you.

Work force discrimination is an issue that is vitally important to all Americans, not just people of color and other minorities who are employed by the Federal Government. And as such, Mr. Chairman, I am extremely pleased that you agreed to my request to hold today's hearing on the subject.

I send my thanks to you, again, for your courtesy. I also thank my colleagues from Maryland, Representative Albert Wynn, for his leadership on this issue over the past several years; and Representative Steny Hoyer, for his untiring leadership on a wide array of civil service matters. Finally, I commend Representative Martinez and Delegate Eleanor Holmes-Norton for their efforts to improve the process for resolving discrimination complaints through the introduction of a bill I have cosponsored, the Federal Employees Fairness Act.

I, like all Members of Congress here, represent thousands of Federal employees. And I have been disturbed by the number of African-American, Hispanic, Latino, and Asian Federal employees who have contacted my office with charges of discrimination against various Government agencies.

An example of one group making such a contact is Black Males for Justice at the Social Security Administration, which is located in the Seventh Congressional District of Maryland, which I represent. This organization presented to me data that shows that, both at its headquarters in Baltimore and nationwide, the Social Security Administration hired very few black males. While males comprise approximately 13 percent of the civilian labor force in the Baltimore metropolitan area, they make up only 5.7 percent of the headquarter staff. This gross underrepresentation is compounded by allegations that black males receive unfair and negative performance appraisals, are denied promotional opportunities, and are largely concentrated in lower grade positions. Two years ago, the situation came to a head when a formal complaint was filed with the EEOC on behalf of this class of agency employees. It remains pending at this time.

Mr. Chairman, beyond the one situation I have described at the Social Security Administration, there appears to be abundant evidence that people of color and other minorities are being subjected to verbal and psychological abuse, unfairly evaluated, and denied opportunities for advancement throughout the Federal work force.

There is also abundant evidence that the existing process for resolving these problems is not working effectively. Reports of excessive delays, with some cases languishing for years within the agencies and within EEOC, are common.

This hearing provides the opportunity to examine just how employing agencies, the EEOC, and the Merit Systems Protection Board, are investigating and resolving discrimination complaints. The testimony should help to determine what, if any, congressional action is needed to improved this process.

I should point out, Mr. Chairman, that officials at the EEOC are not unaware, or unconcerned, about this situation. Last year, Chairman Gilbert Casellas initiated a comprehensive review of the Federal sector process. This past May, the working group that un-

dertook this task presented a comprehensive set of recommendations to the chairman to improve the efficiency and effectiveness of the complaint process. Steps are now being taken to require agencies to offer alternative dispute resolution to complaining parties at the beginning of the EEOC process, eliminate unnecessary layers of complaint review, decrease the filing of multiple complaints, and improve the process by handling multiple complaints.

I plan to closely monitor the implementation of these reforms. I hope they result in a dramatic reduction of pending cases.

Data contained in EEOC's "Federal Sector Report on EEO Complaints Processing and Appeals for Fiscal Year 1995" indicates that there continues to be significant employment discrimination within the Federal workplace. At the beginning of fiscal year 1995, the governmentwide EEO complaint inventory totaled more than 25,000 complaints. At the end of the fiscal year, more than 30,600 complaints remained open. In addition, the number of EEO complaints filed continued to increase in fiscal year 1994 and fiscal year 1995. Agencies reported an overall increase of almost 3,000 complaints filed.

The EEOC hearings program received 10,515 requests for administrative hearings in fiscal year 1995, slightly below the 10,712 requests received the previous fiscal year. The EEOC appellate review program received 8,152 cases for review in fiscal year 1995, up from 7,141 the previous fiscal year.

Race and reprisal were the leading basis on which Federal EEO complaints were filed during fiscal year 1995. A total of 13,869 were based on race, while 11,230 involved reprisal.

"The Annual Report on the Employment of Minorities, Women, and People with Disabilities in the Federal Government for Fiscal Year 1995," issued by EEOC, indicates that while the presence of minorities in the permanent work force increased slightly from 29 percent in fiscal year 1994 to 30 percent in fiscal year 1995, and minorities, with the exception of Hispanics and women, were represented at a higher level than their presence in the civilian work force, they continue to be represented in senior-pay level positions well below their presence in the labor force.

A new report being issued by the MSPB entitled "Achieving a Representative Federal Workforce" points to some of the reasons why the level of Hispanic employment remains below what it should be. MSPB found that managerial attitudes adversely affected the commitment to Hispanic recruitment. In addition, geographic obstacles were also found to hamper recruitment efforts. The report recommends an integrated strategy for addressing these problems which includes devoting more resources toward finding well-qualified Hispanic job applicants, and establishing more entry-level jobs in locations with large Hispanic populations.

A report issued in August 1996 by MSPB entitled "Fair and Equitable Treatment," states that minorities tend to be concentrated in lower-paying occupations or in lower grades of higher-paying occupations. In addition, the report states that even when differences in education, experience, and other advancement-related factors are statistically controlled for, minorities occupy a lower average wage than white men, suggesting that the careers of some minorities have been hindered by their race or national origin. This is fur-

ther evidence that bias attitudes obstruct the advancement of qualified applicants.

Furthermore, in April 1995, the Office of Personnel Management final report, entitled "Minority, Non-minority Discharge Rates," states that black and native Americans are discharged at significantly higher rates than others. Congressman Wynn has spent a lot of time on this issue.

The report states further that black Americans were 2.4 percent more likely to be fired than whites, Hispanics, and Asians. Even more distressing was the data in the report that demonstrated that black professional employees were nearly nine times more likely to be discharged than non-minority professionals in the Washington area. Outside of the Washington area, this ratio drops to less than five times more likely for professionals.

Mr. Chairman, I believe that these statistics document an intolerable situation that must be addressed by this Congress and the current administration. As I have said many times, "we have one life to live. This is no dress rehearsal, and this is a life." What people don't seem to understand, and I am sure you understand all too well, is that when you are passed over, pushed down, and ignored because of your race, gender, or ethnicity, it doesn't just affect you, it affects every aspect of your life. Being held back and not being allowed to become the best that you can be on your job keeps food off your table, affects the choice of school you send your child to, affects the type of car you drive, and most important of all, it affects your morale, and has a way of making you angry and very frustrated. [Applause.]

I look forward to the testimony from today's witnesses, and for the guidance it will provide on how we should proceed to take such action as is necessary to end discrimination and ensure that all of our employees are afforded equal employment opportunity, human dignity, and justice within the Federal workplace. [Applause.]

[The prepared statement of Hon. Elijah E. Cummings follows:]

STATEMENT OF THE HONORABLE ELIJAH CUMMINGS
BEFORE THE SUBCOMMITTEE ON CIVIL SERVICE
HEARING ON
EMPLOYMENT DISCRIMINATION IN THE FEDERAL WORKPLACE

September 10, 1997

Workforce discrimination is an issue that is vitally important to all Americans, not just people of color and other minorities who are employed by the Federal government, and, as such, Mr. Chairman, I am extremely pleased that you agreed to my request to hold today's hearing on the subject. I extend my thanks to you again for your courtesy. I want to also thank my colleagues from Maryland, Rep. Albert Wynn for his leadership on this issue over the past several years and Rep. Steny Hoyer for his untiring leadership on a wide array of civil service matters. Finally, I wish to commend Rep. Matthew Martinez and Delegate Eleanor Holmes Norton for their efforts to improve the process for resolving discrimination complaints through the introduction of a bill I have cosponsored, the Federal Employee Fairness Act.

I, like all of the Members of Congress here, represent thousands of Federal employees. And I have been disturbed by the number of African-American, Hispanic, Latino, and Asian Federal employees who have contacted my office with charges of discrimination against various government agencies. An example of one group making such a contact is Black Males for Justice at the Social Security Administration. This organization presented my staff with data that shows that both at its headquarters in Baltimore and nationwide, the Social Security Administration hires very few black males. While black makes comprise approximately 13% of the civilian labor force in

the Baltimore metropolitan area, they make up only 5.7% of the headquarters staff. This gross under representation is compounded by allegations that black males receive unfair and negative performance appraisals, are denied promotional opportunities, and are largely concentrated in lower grade positions. Two years ago, the situation came to a head when a formal complaint was filed with the Equal Employment Opportunity Commission (EEOC) on behalf this class of agency employees. It remains pending at this time.

Mr. Chairman, beyond the one situation I have described at Social Security's headquarters, there appears to be abundant evidence that people of color and other minorities are being subjected to verbal and psychological abuse, unfairly evaluated, and denied opportunities for advancement throughout the Federal workforce. There is also abundant evidence that the existing process for resolving these problems is not working effectively. Reports of excessive delays with some cases languishing for years within the agencies and within the EEOC are common. This hearing provides the opportunity to examine just how employing agencies, the EEOC, and the Merit Systems Protection Board (MSPB) are investigating and resolving discrimination complaints. The testimony should help to determine what, if any, Congressional action is needed to improve this process.

I should point out, Mr. Chairman, that officials at the EEOC are not unaware or unconcerned about this situation. Last year, Chairman Gilbert Casellas initiated a

comprehensive review of the Federal sector process. This past May, the working group that undertook this task presented a comprehensive set of recommendations to the Chairman to improve the efficiency and effectiveness of the complaint process. Steps are now being taken to: require agencies to offer alternative dispute resolution to complaining parties at the beginning of the EEO process; eliminate unnecessary layers of complaint review; decrease the filing of multiple complaints; and improve the process for handling multiple complaints. I plan to closely monitor the implementation of these reforms. I hope they result in a dramatic reduction in pending cases.

Data contained in the EEOC's Federal Sector Report on EEO Complaints Processing and Appeals for FY 1995 indicates that there continues to be significant employment discrimination within the Federal workplace. At the beginning of FY 1995, the government wide EEO complaint's inventory totaled more than 25,000 complaints, At the end of the fiscal year, more than 30,600 complaints remained open. In addition, the number of EEO complaints filed continued to increase. Between FY 1994 and FY 1995, Agencies reported an overall increase of almost three thousand complaints filed.

The EEOC Hearings Program received 10,515 requests for administrative hearings in FY 1995, slightly below the 10,712 requests received the previous fiscal year. The EEOC's Appellate Review Program received 8,152 cases for review in FY 1995, up from 7,141 the previous fiscal year.

Race and reprisal were the leading bases on which Federal EEO complaints were filed during FY 1995. A total of 13,869 complaints were based on race, while 11,230 involved reprisal.

The Annual Report on the Employment of Minorities. Women and People with Disabilities in the Federal Government for FY 1995, issued by the EEOC, indicates that while the presence of minorities in the permanent Federal workforce increased slightly from 29.9% in FY 1994 to 30.3% in FY 1995, and minorities with the exception of Hispanics and women were represented at a higher level than their presence in the civilian labor force, they continue to be represented in Senior Pay Level positions at rates well below their presence in the labor force.

A new report being issued today by the MSPB, entitled *Achieving a Representative Federal Workforce: Addressing the Barriers to Hispanic Participation*, points to some of the reasons why the level of Hispanic employment remains below what it should be. MSPB found that managerial attitudes adversely affected the commitment to Hispanic recruitment. In addition, geographic obstacles were also found to hamper recruitment efforts. The report recommends an integrated strategy for addressing these problems which includes devoting more resources toward finding well-qualified Hispanic job applicants and establishing more entry-level jobs in locations with large Hispanic populations. I believe that taking steps such as these can

help, but they can only be truly effective if senior managers understand their responsibilities toward workforce diversity and are held accountable.

A report issued in August of 1996 by the MSPB, entitled *Fair & Equitable Treatment: A Progress Report on Minority Employment in the Federal Government*, states that minorities tend to be concentrated in lower paying occupations or in the lower grades of higher paying occupations. In addition, the report states that even when differences in education, experience, and other advancement-related factors are statistically controlled for, minorities occupy lower average grades than White men, suggesting that the careers of some minorities have been hindered by their race or national origin. This is further evidence that biased attitudes obstruct the advancement of qualified individuals.

Furthermore, an April 1995 Office of Personnel Management report, entitled *Final Report: Minority/Non-Minority Discharge Rates*, states that Black and Native Americans are discharged at significantly higher rates than others. The report states that Black Americans were 2.4% more likely to be fired than whites, Hispanics, and Asians. Even more distressing was data in the report which demonstrated that black professional employees were nearly nine times more likely to be discharged than non-minority professionals in the Washington area. Outside of the Washington area, this ratio dropped to just less than five times more likely for professionals. Among non-professionals, blacks were 3.5 times more likely to be discharged in the Washington

area than other racial groups and slightly less than twice as likely to be discharged than other racial groups outside of the Washington area. These findings make it hard to believe that Black Americans have achieved parity in the Federal workforce.

Mr. Chairman, I believe that these statistics document an intolerable situation that must be addressed by this Congress and the current Administration. What people don't seem to understand -- and I am sure you understand all too well -- is that when you are passed over, pushed down, and ignored because of your race, gender, or ethnicity, it doesn't just affect you, it affects every aspect of your life. Being held back and not allowed to become the best that you can be on your job keeps food off your table, affects the choice of school you send your child to, affects the type of car you drive and, most important of all, it affects your morale and has a way of making you angry and very frustrated.

I look forward to the testimony from today's witnesses for the guidance it will provide on how we should proceed to take such action as is necessary to end discrimination and ensure that all of our employees are afforded equal employment opportunity, human dignity, and justice within the Federal workplace.

Thank you Mr. Chairman.

Mr. MICA. Thank you, Mr. Cummings. I also applaud your statement and also again commend you for your leadership. Most folks may not know this, but Mr. Cummings joined recently as the ranking member. And I believe in operating our subcommittee and my congressional work in a bipartisan and cooperative manner. I think partisanship needs to end at the door when it comes to issues like this that affect our Federal employees. I solicited from him what his top priority was, and he said it was, in fact, this issue.

That is why this hearing is being held today and we will hold another hearing. He and I will work together, committed to see that there are improvements made, and when there are instances of discrimination in the Federal workplace, we will do everything, working together, to see that those problems and matters are resolved.

I just want to make that comment. Thank you again, Mr. Cummings.

I want to recognize the vice chairman of our panel, Mr. Pappas of New Jersey. You are recognized, sir.

Mr. PAPPAS. Thank you, Mr. Chairman. I want to thank you for holding this hearing. I remarked to a member of the staff that not since I was on our county board and I chaired a hearing on locating a garbage incinerator have I seen a crowd as large as this. Certainly it speaks to the importance of the issue that is to be discussed.

I have a written statement that I would like to submit for the record. I look forward to hearing from the witnesses.

[The prepared statement of Hon. Michael Pappas follows:]

Opening Statement of Representative Michael Pappas
Before the Subcommittee on Civil Service
Hearing on Employment Discrimination in the Federal Work Place -Part I
September 10, 1997

Mr. Chairman - Our civil service system should have the best and most qualified individuals for the job and in order to retain and recruit such fine employees, there must be efficient and a fair adjudication process for resolving grievances. Many believe the appeals process used to address discrimination issues in the federal sector is, complicated, cumbersome, and costly.

The recruitment and retention of individuals in the federal work force should not be based on race, color, sex, or age but on their respective qualifications and potential contribution to serve the people of our country. In order to ensure this kind of federal work force exists, our adjudication system must resolve, in an effective manner, those real cases where the aforementioned types of discrimination exist. Appellate procedures must be reformed so that frivolous cases that are brought up are quickly dismissed and the real cases of discrimination are resolved fairly and in a expedited manner.

We have a substantial challenge to improve the process, to attempt to enhance the achievement of just results, and to eliminate the aggravation that results from abuses of current procedures. I look forward to our witnesses' presentations today in the hope that they will provide insight which leads us toward better solutions, not merely additional allegations of intractable problems.

Mr. MICA. I thank the vice chairman, and would like to recognize now the distinguished gentlelady who represents so ably the District, Ms. Norton. You are recognized.

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

May I begin by thanking you for the bipartisanship you have shown in calling these hearings, and if I may say so, the bipartisanship with which you have consistently run this committee.

I want also to salute the leadership of our ranking member who has been consistent in moving this issue and coming to the chairman with information and data that made it clear that these hearings were timely and appropriate.

I cannot begin without thanking the leadership of the Federal employees, and unions, and organizations like Blacks In Government, who perhaps were the first to discover these problems and bring them to the attention of the regional members.

My special interest in this extends to special obligations as a former chair of the Equal Employment Opportunity Commission under President Carter. I have felt it my obligation to pay special attention to try to apply what I learned in that agency to what I see.

The first thing I see is that the agency responsible for eliminating these problems has not gotten the attention it deserves from the Congress or the administration for the last several years. And if the organ that is supposed to root out discrimination does not have strong support, and resources, and priority attention, then the problems of Federal workers are not going to be addressed. It is as simple as that. [Applause.]

When I was at the EEOC—and I will say this to my President when I see him at the picnic that is supposed to happen this evening—when I was at the EEOC, any success I had was in no small part due to the fact that the President of the United States gave the EEOC special attention, and gave me the resources with which to reduce the backlog and start a strong systemic program to root out discrimination everywhere I found it and everywhere I saw it. We have got to, in the next several years, raise up this agency so it can go get the problems that are as clear as the nose on our very faces. [Applause.]

The Congress deserves high marks for increasing and strengthening the EEOC jurisdiction. There has been, in the 1991 Civil Rights Act, there has been the ADA, and I see Mr. Hoyer who was central to the enactment of the ADA. The fact is that both of these are very complicated statutes. Now, if you add to what we brought to the EEOC in the late 1980's, which was the ADA and all of the civil rights functions, and a mounting backlog—you add jurisdiction, you increase the volume, you give the agencies problems, and you deny relief, then you must expect that at sometime and some place there will be problems. We are seeing these problems now come forward from Federal employees.

Blacks, women, and other minorities—Hispanics, Asians—all in Government, have exposed these problems. I want to ask the committee this morning to look carefully at possible sources, if we are serious about remedy. Because, now if you look at the overall statistics about minorities and women, you will not find large changes. But those are generic statistics that demand that we look further,

because this kind of concern is not coming from nowhere. But we have got to shine a flashlight on where the problems are.

A set of questions occur to me from the information that has been brought forward thus far. For example, we must ask ourselves, in light of the fact that statistics are fairly stable, remember the statistics weren't where we wanted to get them in the first place. So stable statistics, or statistics that show only slight changes, even if those changes are downward, are no cause for self-congratulation. We have got to move forward. We have got to make progress before we can hold our heads up.

But we have got to ask ourselves, in light of the stability of the statistics, is this a problem that affects certain agencies more than others, or are we dealing with a governmentwide problem?

We hear the names of some agencies raised more than others. Is that because we have more conscious employees, or is that because there really are more serious problems with some agencies, and that there is great unevenness among agencies? We have an obligation to ferret that out.

We have to ask ourselves; do the problems of discrimination permeate the system of hiring and promotion, or only at some levels? Again, we hear more complaints about the more senior pay levels, and the statistics look worse the further up you go. I mean, that is the story of the Federal system, says this fourth generation Washingtonian. Blacks could always find jobs in the Federal Government at the bottom, thank you very much, Uncle Sam. [Applause.]

Even when this city was a legally segregated city, which sent youngsters like me to segregated public schools, we could always find jobs at the bottom of the Federal Government. The overall statistics do not tell any of us anything.

Buyouts, early outs, retirements that are products of downsizing were supposed to make room for minorities and women to move up. We should have had an improvement in statistics, not stability in statistics.

When I was at the EEOC, we worked on systemic discrimination, and finally began to file complaints system-wide. Is this a matter of systemic discrimination, or do we have old-fashioned individual discrimination?

The chairman opened his remarks with talk that essentially went to the issue of affirmative action. Mr. Chairman, with all due respect, the complaints that the Federal employees have brought forward do not sound in affirmative action. They have said, they have voiced complaints such as verbal and psychological abuse, and discrimination in evaluation and promotions. That is old-fashioned discrimination of the kind that has bipartisan support. [Applause.]

The growth for the EEOC has not been in affirmative action; the growth for the EEOC for Federal employees and for other employees—has been in individual discrimination as we see a resurgence of old-fashioned racism in the United States of America. [Applause.]

Our country has made progress, and we ought to be proud of that progress, but we cannot deny what our very eyes see, that there are some people in this country who feel they have been given permission to say and do the kinds of things that we had thought by

now everyone would understand were disallowed under the law. We cannot correct these discrimination problems, however, with a broken system.

The Federal Employees Fairness Act has been reintroduced this week with many of us as cosponsors, and I salute the author, Representative Martinez, who is, of course, here to testify this morning. This has been a bill that he wrote years ago, and has worked for years to bring forward. He and I were heartbroken when it couldn't go forward in the last session because it simply wasn't strong enough for us to put our names behind. We had made headway on this bill. Surely the time has come now to pass the Federal Employees Fairness Act and correct the system so the system can correct discrimination. [Applause.]

We have a totally dysfunctional system for Federal employees. It is filth; it is rotten from the ground up because it has a conflict of interest. [Applause.]

It is an insult to Federal employees who are American citizens to set up a system with a built-in conflict of interest. [Applause.]

We don't allow anybody in this country to investigate themselves. [Laughter and applause.]

And the Congress of the United States has even committed itself to investigation in passing an act that says we will bring ourselves under the same law as everybody else. If we are going to bring ourselves under the same law as everybody else, let's bring the Federal employees under the same laws as everybody else. [Applause.]

Finally, if I may close, Mr. Chairman, by saying I appreciate the willingness to work on cleaning up this grossly inefficient, backlog-producing system.

Last year I went in a bipartisan fashion with Representative J.C. Watts to the floor. We got a $7 million increase in the appropriation for the EEOC. I have been promised a colloquy on the floor this year in order to achieve another increase in committee. We must, in fact, move forward in the way, Mr. Chairman, that your leadership has started us to do so with today's hearing, and I thank you very much. [Applause.]

Mr. MICA. I thank the gentlelady for her opening statement, and also again for her leadership on this and many other issues. She has to represent, as the District of Columbia delegate, in a very difficult time. She has done an able, admirable job. I admire her.

I would like to recognize now the gentleman from Texas. Mr. Sessions, you are recognized.

Mr. SESSIONS. Yes, thank you, Mr. Chairman. With great regard to everyone who is in this room, I would like to tell you that I did not intend on making a statement, but I must, for fairness, for everyone in here, refer to background information that we up on the podium have been provided as members.

One of the discussions which has received a great deal of attention today is promotional opportunities. I will tell you that I spent 16 years in private industry. I had the largest work force of workers in the company—that was Southwestern Bell Telephone Co., a five-State area. I lived in Dallas, TX. I am married to a woman of color. I have great admiration for people who are trying to go to work every day to make something of their lives and to contribute not only to their family, but to their community. But I am com-

pelled also to tell you that the numbers that I am looking at do not show where status quo is, as has been stated, in force.

I would like to read for you figures that are information we have been provided by the President out of the Office of Personnel Management. What these figures will tell you is that, in fact, progress is being made. I would like to read for you those figures, and if some of those heads that are shaking in disagreement in the audience, if you will allow me that opportunity, and I would challenge anyone in the room to please, and anyone on the panels to please differ or disagree with these figures, but they are what have been provided.

In 1983, minorities held a total of 439 out of approximately 7,200 senior executive service positions. By 1993, 10 years later, it had gone from 439 to 823 positions. By the end of fiscal year 1996, minority employees held 1,499 positions. That has gone from 439 to 823 to 1,499. In 1983, minority employees occupied 20,697 GS–13 to GS–15 positions. By 1993, minorities held 44,298. That went from 20,000 to 44,000. Ladies and gentlemen, I would suggest to you that comes at a time when overall Government employment had decreased.

Once again, I will state to you, if those of you in this room who do not think we are being provided correct information, at the appropriate time, I would encourage you to please let us know what is wrong with these figures. Because, in my mind, that is progress in a shrinking work force. This is not meant in any way for me to suggest that I am satisfied with these numbers. What I am simply trying to suggest to you is that I see a glimmer of hope that we are primed to go toward the correct direction and that, in fact, these figures are headed in the right direction.

Mr. Chairman, that is my comment. Thank you.

Mr. MICA. I thank the gentleman for his opening statement. I yield to the distinguished panelist from Tennessee, fairly new on the panel but doing an excellent job, Mr. Ford. You are recognized.

Mr. FORD. Thank you, Mr. Chairman, and I want to thank you for your leadership on this issue and the ranking member, Mr. Cummings, for having the steadfastness and persistence to bring this issue not only to the forefront of this committee, but to the forefront of this Congress. I say to my colleagues, Ms. Norton and Mr. Martinez and all of our panelists, distinguished Mr. Hoyer and Mr. Wynn, thank you for the leadership that you have offered as well.

As a fairly new member of this committee and this body, I am vaguely, but not specifically aware of many of the issues that those of you have raised today. Having traveled back to the district every weekend and holding townhall meetings, I am fully aware of some of the concerns that many of you in this room have, for they parallel the concerns that many constituents in my district have. I look forward to the testimony, and I look forward to the young women who stood to rebut some of the comments that my dear friend Mr. Sessions made. I look forward to hearing from you this morning.

But if we prepare as a Nation to embark on a new century, it is important that we realize that in order for us to compete and succeed and win in this global economy, we must utilize the

strengths and talents of all our people—the racially and culturally diverse work population and work force we have in the Federal Government, and even the private sector. And, as a young person, as a member of generation X, that responsibility, in particular, will fall upon a generation of Americans who have not emerged quite yet. And I must say, Mr. Chairman, this hearing will certainly, I believe, move us forward in that process and certainly play a vital role in terms of crafting an appropriate Federal role in ensuring that complaints and grievances get resolved in an effective fashion.

I look forward to hearing from those who are testifying on the first and second panel, and I certainly look forward to hearing from those who have come to Capitol Hill today to participate in these very, very important hearings.

Again Mr. Chairman, thank you, and thank you, Mr. Cummings, for your leadership.

[The prepared statement of Hon. Harold E. Ford, Jr., follows:]

HAROLD E. FORD, JR.
9TH DISTRICT, TENNESSEE

COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEES:
[illegible] EMPLOYMENT, TRAINING [illegible]
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COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
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CIVIL SERVICE

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Opening Remarks of Congressman Harold Ford, Jr.
Hearing on Employment Discrimination in the Federal Workplace
Civil Service Subcommittee
September 10, 1997

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Thank you Chairman Mica and my leader Mr. Cummings.

Let me begin by thanking the Chairman for allowing the Subcommittee to hold a hearing on this critically important issue.

Several months back I had the opportunity to conduct a series of townhall meetings with federal workers in my district. At one of my stops, several white and nearly a dozen black employees stepped forward to discuss how they have witnessed black employees subjected to racial slurs and skipped over for promotions. I share this with you today not to fan the flames, but to illustrate a simple yet fundamentally important point that we must not lose sight of as we consider ways to improve the grievance procedures: discrimination (overt and subtle) still occurs too often in both our nation's public and private workplaces.

Unfortunately, there is little that this subcommittee or Congress as a whole can do to change peoples behavior in ways that will bring an end to discrimination. What we can do as public policymakers, however, is help to craft and implement a grievance mechanism like that in Mr. Martinez's and Norton's bill, which will: (1) treat those who allege discrimination with respect; (2) dismiss frivolous suits as early as possible following a complete investigation; and (3) provide equitable relief in a timely manner to those who have been aggrieved.

In closing, I just want to say that as America prepares to embark upon a new century and millennium, our continued stability and economic prosperity as a nation will depend in large part upon our capacity to utilize the full strengths and talents of our culturally and racially diverse population. And although this is a challenge that all Americans must face, my generation and today's young people in particular will bear the primary responsibility of ensuring that this nation fulfills its true potential in the 21st century. And I believe that we are up to the challenge.

Mr. MICA. Thank you for your opening statement. Now, I would like to yield to the gentleman from Wisconsin, Mr. Barrett. You are recognized.

Mr. BARRETT. Thank you, Mr. Chairman.

I would like to thank the subcommittee for giving me the opportunity to participate in the hearing today on employment discrimination in the Federal workplace. Discrimination in the Federal workplace remains a serious problem and it is clear that the current process for handling complaints of discrimination must be improved significantly. I applaud Mr. Cummings for requesting this hearing, and I applaud you, Mr. Chairman, for agreeing to hold the hearings. I also appreciate the persistent work of Mr. Wynn on this critical issue, as well as the work of Mr. Hoyer.

The current backlog of discrimination complaints within both agencies and the EEOC is extremely troubling. At the beginning of 1995, the EEOC backlog was 25,000. At the end of the fiscal year, 30,682 complaints remained open. In light of this situation, I am very concerned that the Commerce, Justice, State legislation that the House is expecting to consider as early as this week, falls short of the President's request for the EEOC budget.

While we must commit ourselves to provide adequate funding to the EEOC to process complaints of discrimination, we must also review the current process of handling complaints itself. That is why I am pleased that Mr. Martinez and Ms. Norton plan to reintroduce the Federal Employees Fairness Act to address some of the fundamental flaws in the current administrative review process of discrimination complaints.

In my congressional district, complaints have been leveled against the management of several Federal agencies, including the IRS district office. The problems with the current process of dealing with discrimination in the Federal workplace are exemplified in the case of Betty Loving and the Milwaukee IRS district office. While the EEOC made a determination of seven counts of discrimination against Mrs. Loving on the basis of race, not a single official was disciplined. [Applause.]

The district director at that time publicly stated that he would not discipline the IRS managers involved, including himself, because he wanted them to retire with dignity. Mrs. Loving didn't retire with dignity. In fact, she still works there, and claims that she has faced further acts of harassment and retaliation.

The Milwaukee chapter of the NAACP has identified a number of ongoing concerns in the Milwaukee IRS district office, including continued racial hostility, retaliation against complainants, a lack of promotions, and unfair evaluations for African-Americans, and an ineffective internal EEOC complaint process, and underrepresentation of African-Americans in higher level managerial positions. Minority representation in senior pay level positions is far below minority representation in the labor force. The Milwaukee IRS district office, located in the city of Milwaukee, employees only 1 minority out of 26 employees in the Milwaukee/Waukesha area in the top two grade levels, despite the fact that approximately 39 percent of the population of the city of Milwaukee and 27 percent of the Milwaukee county are racial minorities.

I would like to take this opportunity to submit for the record a statement from Mrs. Loving, on behalf of the Milwaukee chapter of the NAACP, along with a statement from employment attorney Sandra Graf. Mrs. Graf's testimony ends with a quote from a 15-year special agent in Milwaukee with an excellent work record. After experiencing retaliation after testifying in an EEOC hearing, this special agent related this statement, "My whole world as I knew it has changed. I used to love my job; now I hate going there. I thought I was doing what was right. Had I known, I would have kept my mouth shut."

Mr. Chairman, our job today is to make sure these employees can continue to go to work and be treated fairly, and again, I thank you for bringing this issue to the forefront. [Applause.]

[The prepared statement of Hon. Thomas M. Barrett follows:]

THOMAS M. BARRETT
5TH DISTRICT, WISCONSIN

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Statement of
U.S. Representative Thomas Barrett
As Delivered

Committee on Government Reform and Oversight
Subcommittee on Civil Service
September 10, 1997

I would like to thank the Subcommittee for giving me the opportunity to participate in this hearing today on employment discrimination in the federal workplace. Discrimination in the federal workplace remains a serious problem, and it is clear that the current process for handling complaints of discrimination in federal agencies must be improved significantly.

I applaud Mr. Cummings for requesting this hearing and Chairman Mica for agreeing to hold the hearing. I also appreciate the persistent work of Mr. Wynn on this critical issue.

The current backlog of discrimination complaints within both the agencies and the EEOC is extremely troubling. At the beginning of FY 1995, the government-wide EEO complaints totaled 25,072 complaints. At the end of the fiscal year, 30,682 complaints remained open.

In light of this situation, I am very concerned that the Commerce/Justice/State legislation that the House is expected to consider as early as this week falls more than $6 million short of the President's request for the EEOC budget.

While we must commit ourselves to provide adequate funding to the EEOC to process complaints of discrimination, we must also review the current process of handling complaints itself. I am pleased that Mr. Martinez and Ms. Norton plan to re-introduce the Federal Employees Fairness Act to address some of the fundamental flaws in the current administrative review process of discrimination complaints.

In my congressional district, complaints have been leveled against the management of many federal agencies, including the IRS District Office. The problems with the current process of dealing with discrimination in the federal workplace are exemplified in the case of Bettye Loving and the Milwaukee IRS District Office. While the EEOC made a determination of seven counts of discrimination against Ms. Loving on the basis of race, not a single offending official was disciplined. The District Director at that time publicly stated that he would not discipline the IRS managers who were found guilty, including himself, because he wanted them to "retire with dignity." Ms. Loving hasn't retired with dignity, in fact she still works there and has claimed that she has faced further acts of harassment and retaliation.

The Milwaukee Chapter of the NAACP has identified a number of ongoing concerns in the Milwaukee IRS District Office, including continued racial hostility, retaliation against complainants, a lack of promotions and unfair evaluations for African-Americans, an ineffective internal EEO complaint process, and under-representation of African-Americans in higher level managerial positions.

Minority representation in Senior Pay Level Positions is far below minority representation in the labor force. The Milwaukee IRS District Office, located in the City of Milwaukee, employs only one minority out of 26 employees in the Milwaukee/Waukesha area at the top two grade levels, despite the fact that approximately 39% of the population of the City of Milwaukee and 27% of the population of Milwaukee County are racial minorities.

I would like to take this opportunity to submit for the record a statement from Ms. Loving on behalf of the Milwaukee Chapter of the NAACP, along with a statement from employment attorney Sandra Graf.

Ms. Graf's testimony ends with a quote from a fifteen year Special Agent in Milwaukee with an excellent work record. After experiencing retaliation after testifying in an EEO hearing, this Special Agent related this statement:

"My whole world as I knew it has changed. I used to love my job, but now I hate going there. I thought I was doing what was right. Had I known, I would have kept my mouth shut."

Mr. Chairman, our job here today is to ensure that federal employees can go to their jobs and work with dignity. I thank you for the opportunity to speak at this hearing today.

Mr. MICA. I thank the gentleman for his opening statement. Without objection, the statements that he has requested will be made part of the record.

[The prepared statements of Mrs. Loving and Mrs. Graf follow:]

To: Tom Barrett
United States Congressman
Milwaukee, WI

From: Bettye Loving
IRS Employee

Date: September 9, 1997

The following statement has been prepared by Bettye Loving, the complainant, in regard to the discrimination complaints that I have filed against the Internal Revenue Service (IRS), Milwaukee, WI, and it is also being submitted on behalf of the Milwaukee Branch of the NAACP.

Statement Regarding Racial Issues at the Milwaukee and Waukesha Offices of the *Internal Revenue Service (IRS)*

An EEO complaint was filed in January, 1994 by an employee and in March, 1995 the complainant proved all seven counts of race discrimination in an Equal Employment Opportunity Commission court. The IRS refused to discipline the management officials who were engaged in the intentional discrimination, which included flagrant acts such as, publicly calling the complainant a "Bitch" and "Psycho".

Since then the complainant has faced many acts of retaliation and harassment. The former District Director publicly stated that he would not discipline the officials who were found guilty of discriminatory practices, including himself, because he wanted them to retire with dignity. What about the dignity of African Americans?

The former District Director wrote an open letters to all employees discrediting the complainant and the winning of her case. The complainant was forced to continue to work under the supervision of the manager found guilty of discrimination because the IRS refused to remove the supervisor. The District Director publicly stated that he did not believe the supervisor had discriminated, after the decision had been made by the judge.

The Milwaukee Branch of the NAACP has been involved in this case for over 4 years and much has not changed.

The NAACP has identified six critical issues that are being advanced for changes to be made at the Milwaukee District IRS. They are as follows:

1. Under representation of African Americans in upper management decision making positions: Minorities are unable to obtain

promotions, especially to higher level managerial positions. Those who are denied promotions in Milwaukee have been able to obtain them in other cities. Out of 80 plus managers, Milwaukee IRS has two African American manager. One was recently hired because of pressure excerpted by the NAACP.

2. Continued Racial hostility: Incidents of racial hostility have occurred in the Milwaukee and Waukesha offices of the IRS. When the incidents are reported, IRS officials tell the complainant that the incidents are simply mistakes, perceptions, or that they are nonracial "abuse". If that does not kill the complaint, they are offered transfers in return for dropping the complaint. If that does not work, the complaints are dismissed based upon technicalities. If stonewalling does not work the complainant is forced to seek justice outside the IRS complaint process at a great personal expense.

   But management officials are given an attorney free of charge by the IRS. The managers lose nothing whether they win or lose. They are never disciplined, even though the IRS has a policy that states when a management official engages in discriminatory conduct, he/she is removed from management. The complainants are usually lower grade employees who are forced to file EEO complaints and are not financially suited to hire an attorney. Management knows this, which probably account for their total lack of accountability.

   Retaliation: Whether complainants win their cases or not, they are retaliated against. The IRS officials campaign actively in the workplace among employees to discredit and minimize the court decision. When other employees supports the complainant, they also are retaliated against.

   When you file an EEO complaint at the IRS that information is revealed to the parties who you have alleged the charges against and then management supports the employee in retaliation against the complainant. The retaliation is severe and management has even trumped up fictitious charges against complainants.

   Recently, an employee filed an EEO complaint against the District Director and her supervisor for continuing to foster a racially hostile work environment. The next day the District Director supporters verbally attacked her and portrayed to her co-workers that she was mentally unstable. This was done before the complainant arrived at work. The complainant's supervisor watched the attack and did not intervened to stop the attack. The complainant has notified her attorney, her Senators, her Congressman that the next time this happens, she is going to call the police to come to the IRS office.

   Many complainants have been forced to leave the IRS for medical reasons due to the stress, emotional distress, mental anguish, etc.

3. Lack of promotions and unfair evaluations for African Americans.

4. The racial politics where the District Director is using other African Americans to discredit and intimidate African Americans

and others who file EEO complaints

5. The IRS Internal EEO Complaint Process: It stalls, discourages, covers up and forces legitimate complaints to the outside. The complaint process kills legitimate complaints instead of uncovering and remedying racial problems. It is a system that is set up to protect management. It masquerades as an office that aids in eliminating discrimination, when in fact, it is a pawn for management. They use it to continue the discriminatory practices against complainants.

The DEO office within the IRS is charged with the responsibility of promoting diversity and racial equality, which reports to the District Director of the IRS. The former DEO manager has publicly stated that the IRS has never found race discrimination in any complaint received by that office.

The EEO complaint process needs to be thrown out. The investigation of EEO complaints should not be done by employees of the IRS or any agency. It is a conflict of interest and they will never police themselves fairly. Justice will always be denied as it has in the past.

The IRS DEO office protects the District Director whom they report to. This is a waste of taxpayers' money.

To conclude, the IRS has formed a Climate Assessment Team made up of 16 18 employees who are supporters of the District Director. The climate assessment team is just a pawn for the District Director. It is costing the taxpayer over $20,000 a day to run this team. The District Director already knows that the climate is racially hostile.

In February, 1997, they conducted a survey of the racial climate in the Milwaukee IRS. All employees participated in the survey and the results of which they stated would be shared with IRS employees as well as Senators, Congressman and other community leaders. In approximately April, 1997, the outside vendor who conducted the survey, provided the results. It has been reported that the outside vendor stated that the results were the most racially hostile he has ever seen.

Since that time, the Climate Assessment Team has requested all members to sign statements that they will not disclose the true results of the survey. Instead, they have worked to twist the results into a favorable spend. To date, seven months later, in spite of the NAACP's request for a copy of the results, the results of the survey have not been made public, as promised.

The manipulation continues. The real results of that survey will prove our claim of racial hostility and we have a right to have the real results.

TO: TERRY FERRY

DATE: SEPTEMBER 9, 1997

RE: IRS DISCRIMINATION POLICIES

FROM: ATTORNEY SANDRA K. GRAF
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I am an employment/labor attorney who practices primarily in the field of Discrimination, for Complainants. A large portion of my job involves working with State (Wisconsin's Equal Rights Division) and Federal agencies (Equal Employment Opportunity Commission) that seek to enforce the antidiscrimination laws. It has also been my unfortunate experience to have filed claims against the Internal Revenue Service in Milwaukee, Wisconsin which involved interaction with the IRS's Internal EEO process. I state that the experience has been unfortunate from the standpoint that I believe the entire internal EEO process lends little to the truth-seeking functions it is supposed to portray. Unlike the Private Sector's EEO process, there are little attempts at impartiality, and seems to be a gross bias in favor of Management. In addition, there is little, if any, efforts made at resolving any of the issues in the early stages. This leads to an escalating of the situation, and gross retaliation at the Milwaukee and Waukesha Wisconsin IRS offices. The cases I have handled against the IRS in Milwaukee/Waukesha have put me in touch with other Complainants and also with the Milwaukee Chapter of the NAACP. Much to my disgust, the incidents my clients and I have encountered bear many similarities to those of other Complainants, including but not limited to retaliation, victimization, and isolation.

One recurring theme at the IRS is its failure to initiate any good faith settlement efforts to either settle the Complaint or to stop the offensive conduct. Management frequently cites to the "Privacy Act" in defense of its position that it cannot disclose, what, if anything, was done to curtail discriminatory practices in the workplace. This makes Complainants unaware of any disciplinary actions or corrective measures. The Privacy Act is being used as a shield to protect harassers and violators of the law. Management has declined the simple exercise of posting policy statements, such as, "discriminatory/retaliatory conduct will not be condoned in the workplace" which would not be violative of the Privacy Act. Instead, the IRS chooses to place the Complainant in a position to continue the processing of the Complaint. Settlement offers from the IRS are blatantly offensive, and refuse to acknowledge or address the problems in the workplace. Thus far, Management has made settlement offers on cases I have handled ranging from an outright refusal to discuss settlement; suggestions that my client seek out mental health counseling from the Employee Assistance Program; suggestions that my

client could quit her government job if she is dissatisfied; and suggestions that my client should move to another District. Never has Management come up with a proactive measure that it could take.

Once a Complaint is filed, or a person has testified against the Government in an EEO proceeding , it seems to be quite common for the employee to encounter various forms of retaliation. The IRS Milwaukee has gotten less creative with its means of retaliation, and common examples can be cited for different employees. One example is to suggest that the employee has a "communications problem" and to send the employee to another IRS employee, an Occupational Development Specialist "ODS". This has been used on at least two victims of discrimination that I am aware of. IRS uses this as an opportunity to label the victim the problem, instead of addressing the real issue of discriminatory/retaliatory practices. In addition, this allows the IRS to get the employee alone, without an attorney, and possibly get statements that can later be used against the employee in a hearing. One of my clients submitted a list of questions about the ODS specialist that Management was suggesting she go see, but Management did not respond to her inquiries.

Another strategy that the IRS frequently uses against discrimination Complainants is to accuse them of being some sort of threat to themselves or others. Once this is done, the matter is turned over to the Inspection Department who will conduct meetings, without the attorneys. Several IRS employees with impressive work records have been reduced to tears in such meetings. Their tears were taken as indicators of "mental incompetence" and the employees have been terminated or sought to qualify for disability. I can name three Complainants, some with long exemplary work histories, that were later accused of being a "threat" to others.

Usurping the Complainant's attorney is a common occurrence at IRS. Management attempts to have closed door meetings with Complainants, without allowing the attorney to be present, at all stages of the EEO process. I have several times heard that Management claims that I have a "conflict of interest" and cannot attend a meeting because of it. Of course, I have not conflict of interest, and Management has yet to back this up with any concrete evidence.

Management also uses isolation as a means to retaliate. It is not uncommon for the Manager of an employee who has opposed discriminatory practices to cease communicating with the employee. One discrimination victim was moved to another office, another communicates with her boss strictly through voice mail. Job duties and responsibilities are taken away from the Complainant. Other employees see the results of "going against Management" and soon follow the lead out of sheer fear that it will happen to them if they have any association with the employee.

The actual EEO process is also grossly flawed. The EEO Counselors' case history notes are inaccurate and contrary to what was said . Statements that are adverse to Management are often times not included, or are later retracted. Once the Complaint gets

to Chicago for processing, the issues are narrowed, and taken out of context. It is not uncommon to get the Complaint back and it has been rephrased using Management's version of what happened. IRS EEO chooses to look at each isolated instance, but never at the whole picture, and many Complaints are disposed of at this stage, with the Complaints center stating there was "no harm" to the Complainant. Next, Complainants are made to give extremely detailed discrimination statement, and Management provides little in return other than to state that they disagree with the Complaint or don't feel their conduct was discriminatory. After the Complainant gives detailed statements, Management goes into a cover-up mission. The EEO counselors always take their side. When investigating the file, the alleged discriminators and Management are allowed to give irrelevant and prejudicial statements about the Complainant—pertaining to everything from their impression of the Complainant's mental health and integrity .

After the Complaint is investigated, the file is shown to the Complainant and we are allowed to comment. Management uses this as an opportunity to bias the file against the Complainant and to supplement the file. None of Complainant's comments are acted upon, and nothing in the file gets expunged or further investigation—the file always stands as it is. Once the file is certified to hearing, the IRS attempts to keep witnesses out of the hearing. I have had cases where the Administrative Law Judge has prohibited me from calling witnesses I deemed essential to my client's case. After one hearing, a member of Management that was sequestered from the hearing, sought to speak with one of my witnesses regarding her testimony and take adverse actions against her for it. Management further spread rumors to other members of Management and other coworkers about the contents of this witness' testimony and that this witness had testified untruthfully, which was not factual. Management sees nothing wrong with violating the Privacy Act with regards to adversely affecting a Complainant.

The purposes and policies behind having an internal EEO procedure are not being met with the current process in place at the IRS-Milwaukee. Further, Management lacks the sensitivity and foresight to stop discrimination. Instead of taking on the problems in the workplace, Management seeks to rid itself of the persons making the Complaints. It is unfortunate that persons who have utilized or taken part in the IIEO process at IRS regret over having availed themselves to the procedure. I think one of my clients, a fifteen year Special Agent with an excellent work record, summed it up best when she commented to me on her insight after feeling the repercussions (retaliation) of having testified in an EEO hearing: "My whole world as I knew it has changed. I used to love my job, but now I hate going there. I thought I was doing what was right. Had I known, I would have kept my mouth shut." I think Management would be pleased with themselves.

Mr. MICA. Members of the panel, we have one vote, possibly two votes. The first one, I think, is a motion to adjourn, and then possibly a journal vote. What we will do is recess the panel at this time, and we will reconvene 5 minutes after the close of the second vote, if there is a second vote, or 5 minutes after that vote.

For members of the audience who joined us today, there are still folks in the hall who haven't been seated. I am not going to get into seating arrangements, but we have tried to accommodate as many folks as possible. I do want to let you know that if you leave, others will be given your place. Act accordingly, and we are sorry that the room or rules don't let more folks come in at this time.

We'll recess until the appointed time. Thank you.

[Recess.]

Mr. MICA. If the subcommittee could come to order—I request those in the audience to either find a standing position or a seat, and again, we can fill up any of these seats at the second level here.

We heard, before the vote, from the members of the panel and their opening statements, and we now have our first panel to discuss the question of employment discrimination in the Federal workplace. Our panelists are the distinguished gentleman from Maryland, Steny Hoyer; the Hon. Albert Wynn from Maryland; and Matthew Martinez, our colleague and distinguished Member from California.

At the request of this side of the aisle, I am going to recognize first Mr. Wynn. He has also been a leader in bringing this issue of discrimination before the Congress and before this panel. You are recognized, sir, and welcome.

STATEMENTS OF HON. ALBERT WYNN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND; HON. STENY HOYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND; AND HON. MATTHEW G. MARTINEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WYNN. Thank you very much, Mr. Chairman, and let me take this opportunity to sincerely express my appreciation to you for convening this hearing. I am also very pleased, after listening to your opening statement, because I recognize that you understand the dimensions and the significance of this issue and that you are prepared to move forward, and that is indeed very pleasing.

I also would like to take this opportunity to recognize the work of my colleague, and ranking member, Mr. Cummings, who has exerted great leadership on this issue and really has laid out the issue in his opening statement quite well.

I would also like to recognize Ms. Norton of the committee for continuing leadership, in particular, her legislative expertise and the passion that she brought to the discussion this morning. I appreciate everything that she has done.

It is a pleasure for me to appear here along with my colleagues, Mr. Hoyer and Mr. Martinez, to talk about this significant issue. I was thinking about it this morning, and I thought about the personal consequences of how you fight an enemy such as discrimina-

tion. It is invisible; it's insidious; it's degrading; it's debilitating. And my colleague, Mr. Cummings, talked about the personal impact of discrimination. It is expensive when you have to take one of these issues to court. It is psychologically damaging. I have seen constituents who literally have had their lives destroyed. And perhaps worst of all, it brings us back to a period in our history I think many of us would like to forget.

Mr. MICA. Go ahead. We will have time, I think for one other panelist.

Mr. WYNN. I'll proceed then, Mr. Chairman.

Let me say this: The problem with discrimination in the Federal work force is a long-festering sore. I consistently receive complaints about discriminatory practices in Cabinet departments and independent agencies. In 1993, I became actively involved in allegations of discrimination at the National Institutes of Health. Since then, I have received complaints about the Departments of the Interior, Agriculture, and State, the Government Printing Office, the Library of Congress, the U.S. Information Agency—the list goes on and on. These complaints have led me to one conclusion: This is a systemic problem, not a matter of isolated incidents.

In attempting to resolve these complaints, I have found that my concerns have been shared by Members of Congress, employee groups, union leaders, retired Federal employees, all of whom confirm the significance of this problem. To his credit, the President has spoken about the issue, as has Speaker Gingrich. We need to address the problem of race and discrimination in America. However, I have concluded that if we are serious about talking about race in America, we need to look in our own backyard first—and that is the Federal work force. [Applause.]

For the purposes of today's hearing, I would like to focus on three issues that I believe are reflective of problems of discrimination in the Federal work force.

First, within the Federal work force, there is an appalling lack of diversity in the senior management level. These positions, GS–13, GS–14, GS–15, up through the senior executive service, reflect the Government's top management. As of May 7 this year, minorities—African-Americans, Hispanics, Asian-Americans, and native Americans—accounted for nearly 30 percent of the Federal work force. However, according to the EEOC, all minorities combined make up only 13 percent of GS–15 and only 11 percent of all SES positions.

Let me give you an example. At the Department of the Interior, at GS–15, there are 1,159 employees; only 38 blacks. Virtually entire agencies have no top-level minority managers.

At the Department of Agriculture, at the grade GS–15 level, you have 1,592 positions; only 31 are Hispanic. At the SES level, at the Department of Agriculture there are 398 employees; only 6 are Hispanic.

When President Clinton took office, he insisted that his Cabinet look like modern-day America. He pursues this goal with vigor. I believe it is equally important that the senior management levels of the Federal Government also look like modern-day America and reflect the true diversity of our country. [Applause.]

I believe that corporate management cannot be expected to integrate until the Federal Government does. [Applause.]

Clearly, minorities are underrepresented and some people would say that this just happens. I don't believe it just happens; I believe there are particular reasons why it happens. It is a matter of a pattern of discriminatory personnel practices.

Which brings me to point No. 2. There is a chronic pattern of abuse, misuse, and manipulation of personnel laws. [Applause.]

Once upon a time, the Federal Government was seen as a haven of opportunity for minorities, against latent racism and employment discrimination in the private sector. Although there has been significant hiring of minorities, discrimination is still an unfortunate fact of life, as my colleague Ms. Norton pointed out, when you are trying to move out of the mail room or secretarial pool, or some dead-end mid-level position.

The most frequent complaint that we receive is that non-minorities consistently receive preferential work details and assignment. In other words, they get the better jobs. These lead to increased responsibilities and opportunities, which in turn result in pay increases and promotions. Conversely, minorities receive extended temporary assignments, without pay increases, and are oftentimes asked to train non-minorities who then become their permanent supervisors. [Applause.]

Additionally, minorities receive subjective evaluations from supervisors who are accountable to no one. And complaints of unfair treatment often result in retaliation. As an example of that retaliation, after information was circulated about one of our witnesses appearing today, that witness was intimidated by the director of her agency, embarrassed in front of her peers, and left with the impression that if she testified, she would face trouble. She is not here today.

Finally, the third issue that I would mention is the underfunded and ineffective EEO process. We have observed that despite talk about increasing funding, even the President acknowledged that the Equal Employment Opportunity Commission has a substantial backlog of discrimination cases. Some figures estimate this figure to over 100,000 cases still pending at EEO. Agriculture has 1,400 complaints pending; Department of the Interior has 774 complaints; Department of Transportation has 663 complaints. They are astonishing, but they also continue to increase. We need more resources.

We also need more accountability. The managers that perpetrate these acts of discrimination are never sanctioned, are never disciplined, never held accountable. [Applause.]

There are currently 12 class action suits either just resolved or pending against the Federal Government. If this were the case in the private sector, people would be appalled, and there would be a confirmation that there was indeed a significant problem.

Let me conclude by saying something that the people in this audience said to me today as we came in. This is the first step. This is not the end. We need more accountability; we need more funding; we need more sanctioning; we need more evaluation; we need more monitoring; we need legislative approaches such as Ms. Norton and Mr. Martinez have advocated, and then we can begin to

make a serious attempt to resolve the problem of discrimination in the work force.

Thank you, Mr. Chairman, for allowing me to testify. [Applause.]

[The prepared statement of Hon. Albert R. Wynn follows:]

ALBERT R. WYNN
4TH DISTRICT, MARYLAND

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TESTIMONY OF THE HONORABLE ALBERT R. WYNN

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
CIVIL SERVICE SUBCOMMITTEE

"EMPLOYMENT DISCRIMINATION IN THE FEDERAL WORKPLACE: PART I — CONTINUING CONCERNS"

September 10, 1997

Good morning, Mr. Chairman. Let me take this opportunity to thank you, Ranking Member Cummings, and members of the subcommittee for convening this hearing. I appreciate the opportunity to offer my testimony for your consideration.

The problem of discrimination in the Federal workforce has been a long-festering sore. As the member of Congress who represents 72,000 Federal employees, more than any other member of Congress, I consistently receive complaints about discriminatory practices in cabinet departments and independent agencies. In 1993, I became actively involved in allegations of discrimination at the National Institutes of Health. Since then, I have received complaints about the Departments Interior, Agriculture, State, the Government Printing Office, Library

of Congress, U.S. Information Agency and the list goes on and on. These complaints have led me to conclude that this problem is systemic -- not a matter of isolated incidents.

In attempting to resolve these complaints, I have found that my concerns are shared by other members of Congress, leaders of minority employee groups, union leaders and retired Federal employees, all of whom confirm that this is a significant problem.

To his credit, President Clinton has said that we need to initiate a dialogue on the issue of race in America. I believe, however, that if we are serious about dealing with the problems of race in America that the Federal government must first look in its own backyard — the Federal workforce.

The range of individual anecdotes and horror stories about discrimination in the Federal workplace is quite broad. However, for purposes of today's hearing I would like to focus on three issues that I believe are reflective of the problem of discrimination in the federal workforce.

First, within the Federal government there is an appalling lack of diversity in senior management positions. These positions, GS 13, 14, 15 and Senior Executive Service (SES), reflect the government's top management levels. As of May 7th of this year, minorities [African-Americans, Hispanics, Asian Americans and Native Americans] accounted for nearly 30% of the Federal workforce. However, according to the U.S. Equal Employment Opportunity Commission

(EEOC), all minorities combined make up only 13% of all GS 15, and only 11% of all Senior Executive Service positions. Clearly, minorities are under represented among the Federal Government's CEOs. For example:

Department	Grade level	Total	Blacks
Interior	GS 15	1159	38 (3.28%)
	SES	277	14 (5.05%)

Department	Grade level	Total	Hispanics
Agriculture	GS 15	1592	31 (1.95%)
	SES	398	6 (1.51%)

When President Clinton took office, he insisted that his cabinet be an accurate reflection of modern day America. He continues to pursue this goal with vigor and success. I believe it is equally important, however, that the senior management of the Federal government also look like modern day America and reflect the true diversity of our country --- Corporate America cannot be expected to integrate until the Federal government does.

Clearly, minorities are underrepresented among the Federal government CEO's. There are some who say that this underrepresentation "just happens", but what I have observed is that this pattern is the result of discriminatory personnel practices, which brings me to point number two.

The most frequent complaint of discrimination is that non-minorities consistently receive preferential work details, which lead to increased responsibilities and opportunities, which then result in pay raises and promotions. Conversely, minorities receive extended temporary assignments without pay increases and, oftentimes, are responsible for training non-minorities who then receive permanent positions, and in some cases become their supervisors. Additionally, they receive subjective evaluations from supervisors who are accountable to no one, and complaints of unfair treatment often result in retaliation. As an example of that retaliation, after information circulated through an agency that one of the witnesses that was invited to testify today would appear, she was intimidated by the Director of her agency, embarrassed before her peers, and left with the impression that to testify before this committee would be detrimental to her job security. She is not testifying today.

The impact of the previously mentioned issues is reflected in the third major issue I would like to discuss — the underfunded and ineffective EEO process, which currently has a huge backlog of cases in various agencies. President Clinton, in his speech in San Diego, California, acknowledged that the "Equal Employment Opportunity Commission has a substantial backlog of cases with discrimination claims."

As of today, there are over 100,000 discrimination cases pending with the EEOC. At the Department of Agriculture there are over 1,400 EEO complaints pending; while the Department of Interior has 774 complaints and the Department

of Transportation has 663 complaints. Not only are these numbers astonishing, but they also continue to increase.

President Clinton has called for increased resources to address the large backlog of EEO cases, but current budget figures indicate only a marginal increase for fiscal year 1998, and basically flat expenditures are proposed for subsequent years.

How should these problems be addressed? While I recognize that the President's Commission on Race Relations and many others will make recommendations to the President on this issue, I have suggested that the President utilize the bully pulpit to demonstrate his determination to root out discrimination and racism in the federal workplace. I am asking this Subcommittee, as the voice of civil servants across the country, to do the same. This should be followed up by an administrative and congressional review of diversity, discrimination and EEO complaints.

I also suggest that the following steps be taken:

* Cabinet and Agency heads should be held accountable for diversity in their organizations and for reducing the EEO backlog;

* Additional funding should be allocated for the EEOC and EEO offices at individual agencies;

* Tough policies should be implemented requiring sanctions on supervisors found to have engaged in or tolerated discrimination (modeled after the approach to sexual harassment cases) and;

* Diversity goals should be implemented to make the Federal workforce more reflective of America.

I believe the issue of discrimination in the Federal workplace is a critical element of the dialogue on race. Existing employee demographic data, the burgeoning EEOC caseload and the large number of class actions suits conclusively demonstrates the need for immediate action. I do not want this hearing or this data to serve solely as a passing indictment of the Federal government. This information and the statements of today's witnesses should serve as a catalyst to give the issue of discrimination in the Federal workforce greater priority on the national agenda, and serve as the impetus for concrete policies to reduce discrimination and increase diversity in the Federal workforce.

Mr. Chairman, this concludes my prepared statement. I look forward to working with you and Ranking Member Cummings on this important issue.

Mr. MICA. I thank you for your statement, for your commitment to this issue. I am going to give the other two panelists a choice now. I guess Mr. Hoyer would be recognized next. Do you want to take 5 minutes now, or did you want to come back?

Mr. HOYER. Let me take 5 minutes now. I'll be brief; I'll cut my statement short.

I want to thank you and the ranking member, Mr. Cummings. We are very proud of Mr. Cummings from Maryland. He has discussed with you, and you have agreed to hold a hearing on what, in my opinion, is the essence of our democracy. And the essence of our democracy as annunciated by Thomas Jefferson was that all of us are equal, and we ought to be treated equally.

In 1964, we passed the civil rights statute. Somewhat controversial at the time, now no one would say that it was the wrong thing to do; in fact, they would say it was the essence of what our country was all about. That we would treat all people equally; that they would have equal opportunity.

Employment, of course, is absolutely central, as is the ability to have good employment, and to have the fruits of your talents recognized in that employment. When we meet one another we ask one another, "What is your name?"

"My name is Sally Brown."

The next question inevitably is, "What do you do?"

It identifies us; it gives us a sense of self-worth; it is in fact, as we all annunciated in the welfare bill, what we want people to do: work.

The Federal Government, Mr. Chairman, has 1.9 million civilian employees, another 1.4 million in our armed services. The Federal Government has not only the legal responsibility, but the moral imperative to ensure that our workplace is a workplace in which discrimination is not only illegal, but recognized as immoral and against good management. [Applause.]

Business has found, Mr. Chairman, in the area of discrimination against those with disabilities that it costs money to discriminate. So not only is it wrong, it is bad economics.

Mr. Chairman, because time is short, I will submit the rest of my statement, but I would urge you to listen very carefully to those who testify today, who will, in many ways, be much more compelling than those of us who are Members of Congress.

The fact of the matter is that all of us have had as Members of Congress the opportunity to work with various groups. Early on, I worked with Blacks in Government [BIG]. I want to congratulate them for the work they have done. Al Wynn and I worked with respect to NIH. [Applause.]

Lou Stokes and I have for many years looked at the statistics at NIH. They are perhaps difficult to turn around, but as Ms. Norton pointed out, they certainly are not reflective of great progress.

We now have 5 minutes, Mr. Chairman, so I will have to conclude. But as you listen to the witnesses, let us together act both to ensure that budgets are adequate, so that agencies that are charged with responsibility for hearing these cases and disposing of them in a just manner have the resources to do so. To articulate an objective and not to fund it is to fall short of the commitment that you make. [Applause.]

Most of the cases that you hear are legitimate. Are there some cases that are not legitimate? Of course there are. In every instance in human endeavor we find that. But they are the great minority of cases. The majority of cases, unfortunately, reflect that what we still have in this country, notwithstanding the articulation in 1964, is the presence of racism, of sexism, of discrimination based upon other items that are illegal to discriminate on. And we must make sure, to the extent that we possibly can, that we eliminate those in the Federal Government, in the Federal work force, if we are to have the status as leaders of this country, which holds as its basic principle that all of us are equal.

Thank you, Mr. Chairman. [Applause.]

[The prepared statement of Hon. Steny Hoyer follows:]

STATEMENT OF THE HONORABLE STENY H. HOYER

BEFORE THE SUBCOMMITTEE ON CIVIL SERVICE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

REGARDING EMPLOYMENT DISCRIMINATION

IN THE FEDERAL WORKPLACE

SEPTEMBER 10, 1997

Mr. Chairman, Mr. Cummings, thank you for the opportunity to appear at this very important hearing. I also want to commend the Ranking Minority Member for requesting that this hearing be held.

One of the fundamental responsibilities of any employer is ensuring that each employee and potential employee is considered without regard to age, race, religion, ethnic or national origin, gender, or disability. This is the law under the Civil Rights Act of 1964, Title VII. Clearly, as Congress has enacted in Title V, we expect the Federal Government to set a high standard with its treatment of the 1,900,000 civilian employees as well as the 1,400,000 men and women in our Armed Services.

While the vast majority of Federal managers fully support and follow equal opportunity law, there are those that fail to do so. In fact, there continues to be a disturbing number of complaints about deliberate discrimination. This is unacceptable.

There are concerns about the process by which Federal employees can seek redress for discrimination. Some believe that poor performers use the complaint process to delay their well-justified removal from office. Others, with genuine complaints about their workplace situation, find the grievance process cumbersome and slow. I am pleased that, in addition to reviewing the extent of the problem, this Subcommittee will also review the process that agencies, the Equal Employment Opportunity Commission, and the Merit Systems Protection Board use to investigate and resolve complaints.

As Chairman of the Federal Government Service Caucus and the representative of almost 60,000 Federal employees, I have heard first hand from a number of Federal workers concerned about discrimination in their offices. In

addition to general allegations of discrimination, there are cases where a single supervisor's behavior appears to be unacceptable.

I have also heard repeated calls for accelerated consideration of complaints so that those who have been wronged are not dragged through a multi-year process that is a strain on them and their families. Expedited consideration would also help root out those who are simply using the grievance process to cover poor performance.

At the end of Fiscal 1995, the Equal Opportunity Commission had 30,682 complaints pending. Race and reprisal were the bases for the majority of complaints. The workload has also risen at the Merit Systems Protection Board and I, as Ranking Member on the Treasury-Postal Service-General Government Appropriations Subcommittee, have repeatedly pressed for adequately funding the MSPB.

These issues will not be easy to resolve. But difficulty cannot be an excuse for inaction and I commend the Committee for focusing attention on an issue of high importance to me and to my constituents.

Thank you.

Mr. MICA. I thank the gentleman for his comments and also for his leadership on this and other civil service issues, and am committed to working with him, Mr. Wynn, and others.

We will recess now until 5 minutes after the end of this vote. We have a vote pending, and we do want to hear from Mr. Martinez who has introduced important legislation on this subject.

[Recess.]

Mr. PAPPAS [presiding]. Can I have everyone's attention, please? I would like to begin the hearing. Could everyone please have a seat? We would like to begin the hearing. Those of you who may want to continue your conversations step outside, or please take a seat so we can continue. Many of you have been here for a long time, and we apologize for the inconvenience of the votes. That is unfortunately how things go around here.

I'm Mike Pappas, the vice chairman of the committee. The chairman will be back, but since my colleague Mr. Martinez has returned, we thought we would give him the opportunity to address the panel. Mr. Martinez, the floor is yours.

Mr. MARTINEZ. Thank you. Mr. Chairman, I would like to thank you and members of the subcommittee for the opportunity to offer testimony today. I would also like to commend you, Mr. Chairman, as well as members of the committee, especially Mr. Cummings, for holding this timely and important hearing on employment discrimination in the Federal workplace.

This is a very critical issue that deserves the full attention of the Congress. It has, in fact, deserved the full attention of the Congress for a long time, and it just hasn't received it. I say that because through 1985–91, I was the chairman of the Subcommittee on Employment Opportunities of the Education and Labor Committee. And while I was chairman of that committee, we held hearings, quite a few hearings, throughout the country on this very issue. And we found that consistently, where the complaints would be filed by the employee, they would be denied by the agency who was their own watchdog, and the more persistent ones, and this means that a lot of the cases that were legal and justified went by the wayside, because only the more persistent ones would go to civil court and then in every case they won. Which proves that many of the others, if they had gone to civil court, they could have won too, but they just didn't have the wherewithal nor the persistence to do it.

Having said that, Mr. Chairman, I look at this problem as one that maybe now is coming to the point where many of us will take a definite interest in it because of the work of Ms. Horton, I mean Norton—sorry about that Eleanor—and do something about it.

I know that the chairman has some differences of opinion with me on my bill and how to streamline the Federal complaint resolution procedures, but I think any of those disagreements can be worked out and we can move forward. That bill is a good vehicle to move forward with.

I believe that the current redress process for dealing with discrimination claims by Federal employees is simply not working. As the chairman said, it's broke. Well, it has been broke for a while. The current process does not serve the interest of the Federal employees, or the respondents, or the U.S. taxpayer. The procedures

that are available for dealing with discrimination complaints by Federal employees are unreasonably cumbersome; they are time consuming, and call into doubt the fairness and legitimacy of the whole process. The current system of processing discrimination complaints in the Federal Government is riddled with abuses. In fact, we had several witnesses that testified before us of the widespread abuses in the Federal agencies, indeed because the Federal agencies are allowed to reject or modify Equal Employment Opportunity Commission findings against them. They do so over and over again.

The former EEOC Chairman, Evan Kemp, Jr., placed the responsibility for improving the process squarely on the shoulders of the Congress. Mr. Kemp observed that,

> It is better to view each department and each agency as an independent country. Once you realize that, you then realize how difficult it is to enforce our decisions. I think the responsibility lies with Congress.

He meant that we should legislate some type of reform that would change the current process by which the agency could then again and again deny the findings of the EEOC.

By far the largest employer in America, it is the Federal Government's responsibility to have in place employment practices that should be models of fairness. There is no doubt that they do not. In fact, in years past, during those years that I had EEOC oversight as chairman of the Subcommittee of Employment Opportunities, we held hearings that provided evidence and materials for the Latin officers of the FBI to sue—sue successfully I should say—the FBI. And subsequent to that, the black officers of the FBI sued and won their case, too. Now, with two individual groups suing the FBI, and the judge finding in the favor that there was rampant discrimination in the FBI, we saw some changes, but not great changes. Even today, there is still not the movement up to upper management of Hispanic or black officers that there should be.

But, Mr. Chairman, you have said earlier, and Al Wynn said earlier, and Steny Hoyer said earlier, that they have constituents that work for the Federal Government. I think we all have constituents working for the Federal Government. And we are all aware that the very system designed to protect these employees is burdened with rules and procedures that systematically deny their due process rights. Moreover, changing workplace demographics draws attention to the inequalities of the status quo and demonstrates the need for swift action.

It is estimated that, by the turn of this century, that the vast majority of the new applicants to our work force will be composed of minorities and women. This is a sobering projection, considering the potential for harassment and discrimination. The only way to ensure fairness and continue to attract the best and brightest into Government service is by passing legislation that truly protects Federal workers.

Therefore, I have introduced the Federal Employment Fairness Act, along with Delegate Norton and Representatives Cummings, Wynn, and Ford. This legislation amends title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act of 1967, to improve the effectiveness of administrative review of employment claims made by Federal employees.

The Federal Employees Fairness Act encourages alternative dispute resolution procedures during the precomplaint period. In fact, for the first 20 days, the complainant will spend this time in the resolution process, and still allows it throughout the process. It eliminates the fundamental conflicts of interest that currently exist within the redress system. It eliminates the problem of so-called mixed cases involving jurisdictional overlap between the MSPB and EEOC, and discourages employees from filing meritless EEO charges.

Mr. Chairman, I would just say that the bill is quite extensive. I could take the time to explain it; I am sure that many of you have already read it. And I think, as I have said, I understand that in the last session of Congress there was a chart that seemed to make it appear to be convoluted. It is no more convoluted than the system that is in place now. In fact, it is less. Proof of that is that the OMB scored this bill as saving the Federal Government $25 million. If it would save the Federal Government $25 million, then I have to believe that it is more efficient than the system that is in place now.

Thank you, Mr. Chairman, and I am available to answer any questions. [Applause.]

[The prepared statement of Hon. Matthew G. Martinez follows:]

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Good morning Mr. Chairman. I would like to thank you and members of the Subcommittee for the opportunity to offer testimony today. I would also like to commend you, Mr. Chairman, and Representative Cummings for holding this timely and important hearing on employment discrimination in the Federal workplace. This is a critical issue that deserves the full attention of Congress.

Mr. Chairman, although we may have differences of opinion on how best to streamline Federal complaint resolution procedures, we do agree, I believe, that the current redress process for dealing with discrimination claims by Federal employees is simply not working. The current process does not serve the interests of Federal employees, the respondent agencies or the U.S. taxpayer.

The procedures that are available for dealing with discrimination complaints by Federal employees are unreasonably comburesome and time-consuming, calling into doubt the fairness and legitimacy of the whole process. The current system of processing discrimination complaints in the Federal Government is riddled with abuses. Indeed, because Federal agencies are allowed to reject or modify Equal Employment Opportunity Commission (EEOC) findings against them, they do so over and over again.

Former EEOC Chairman Evan Kemp Jr. placed the responsibility for improving the process squarely on the shoulders of Congress. Mr. Kemp observed that, and I quote, "it's better to view each department and each agency as an independent country. Once you realize that, then you realize how difficult it is to enforce our decisions. I think the responsiblity lies with Congress." End of quote. I agree with Mr. Kemp.

As the largest employer in America, it is the Federal Government's responsibility to have in place employment practices that should be the model of fairness. We all have constitutents working for the Federal Government, and we are all aware that the very system designed to protect these employees is burdened with rules and procedures that systematically deny them their due process rights.

Moreover, changing workplace demographics draw attention to the inequalities of the status quo and demonstrates the need for swift action. It is estimated that by the turn of the century, the vast

majority of the new applicants to our work force will be composed of minorities and women. This is a sobering projection considering the potential for harassment and discrimination. The only way to ensure fairness and continue to attract the best and brightest into government service is by passing legislation that truly protects Federal workers.

Therefore, I have re-introduced the Federal Employee Fairness Act, along with Delegate Norton and Representatives Cummings, Wynn, and Ford. This legislation amends Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 to improve the effectiveness of administrative review of employment discrimination claims made by Federal employees.

The Federal Employee Fairness Act encourages alternative dispute resolution procedures during the pre-complaint period and throughout the process; eliminates the fundamental conflicts of interest that currently exist within the redress system; eliminates the problem of so-called "mixed cases" involving the jurisdictional overlap between MSPB and EEOC; and discourages employees from filing meritless EEO charges.

The Federal Employee Fairness Act would allow a window of 180 days to elapse between the time of the alleged incident leading to the complaint and the time an employee must complete formal filing. This 180 day time period conforms with what is provided to private sector employees and greater than that currently allowed Federal employees, who now must consult a counselor within 45 days of the alleged grievance.

This extended time period will permit employees to reflect on one of the most important decisions they will make in their Federal careers, affording them valuable time to explore the merits of their case. In agencies using an alternative dispute resolution process under EEOC rules, an employee under my measure would be required to participate in 20 days of pre-complaint conciliation prior to filing a complaint. This conciliation period does not count against the 180 day filing limit. The bill provides that pre-complaint counseling be undertaken with a conciliator who is neither connected to the circumstances of the complaint nor supervising the employee.

The federal employee fairness act would designate the EEOC as the clearinghouse for all discrimination complaints. However, complaints may be filed with EEOC, the Merit Systems Protection Board, or the employee's agency.

The present redress system requires employees to have their complaints heard initially by the allegedly offending agency. Currently, every Federal agency, no matter how small, has its own equal employment staff -- to provide counseling, investigate charges of discrimination, and process reports to the EEOC. As we have found over the past several Congresses, this haphazard system is fraught with problems because agency employees --who are after all career civil servants -- are expected to investigate their own agency.

Under current rules, therefore, it is the agency that allegedly committed the violation that is charged with investigating it. If that is not troublesome enough, even if the agency investigator concludes that there was merit to the claim, the agency head can issue a finding clearing the agency. This represents a clear case of conflict of interest. This is like having the fox guard the chicken coop. In fact, the current system not only allows the fox into the henhouse, but then finds the hen at fault because the fox eats it. Under the Federal Employee Fairness Act, employees would have a choice of forums for hearing their complaint, with the option of filing directly with the EEOC, or the agency, or the Merit Systems Protection Board, if appropriate. The right to file a civil action following a decision at the initial level would be retained.

Employees, upon filing a complaint, will have up to 90 days to decide which forum they wish to pursue their claim. In the event the employee chooses a forum other than EEOC, EEOC will forward the complaint within 10 days to the appropriate agency for determination. In the event the employee chooses MSPB or EEOC, the respondent agency shall forward documents and information to the appropriate agency within 5 days of receipt of notice from EEOC.

In order to avoid any confusion, the bill states that the employee shall name the head of the agency in which the discrimination is alleged to have occurred as the respondent. Later on, the complaint may be amended to name the proper individual where the head of the agency is misidentified. Current regulations (29 cft 1614) provide no such safeguards.

Under the bill, once an employee chooses the EEOC administrative process, the EEOC is required to assign an administrative judge or an administrative law judge to hear the complaint within 10 days. As you know, current federal regulation does not set a time frame for assigning an administrative judge or an administrative law judge.

The Federal Employee Fairness Act would streamline the decision-making process by requiring the administrative judge to issue a decision within 210 days of complaint filing (300 days in the first year after the effective date of the act) or within 2 years and 30 days in a class action complaint. Under the present system, it can be several years before decisions are rendered.

Furthermore, the bill would make the decision of the administrative judge final unless the employee or respondent file an appeal within 90 days. If the administrative judge has not issued a decision 20 days after the required deadline, the employee may file a civil action seeking de novo review.

The administrative judge, after reviewing the record, is authorized to dismiss frivolous complaints, complaints for which relief is not available under the Civil Rights Act, and where applicable, complaints in which the employee has failed to participate in pre-complaint conciliation.

A major change proposed by the bill would be to eliminate the right of the agency to modify or reject the administrative judge's decision, as is allowed under current regulations. I believe that

allowing agencies to essentially ignore administrative judges' decisions undermines the legitimacy of the whole process. In an effort to further streamline the process, the Federal Employee Fairness Act requires the EEOC to establish a program and procedures to foster settlement of claims.

At present, there are no mandated time frames within which the EEOC must complete its review of an administrative judge's decision. In an effort to streamline this process, the bill would require the EEOC to issue a written order affirming, reversing, or modifying the administrative judge's decision within 150 days of the appeal request. The bill strengthens the authority of the administrative judge by requiring that the EEOC accord "substantial deference" to the findings of the administrative judge, if they are supported by a preponderance of the evidence.

If the EEOC has not issued a decision 20 days after the required deadline, the employee may file a civil action seeking de novo review. Upon issuance of a written decision by the administrative judge, the employee has 90 days to file a civil action. The employee or the respondent has up to 90 days in which to appeal the administrative judge's decision to the eeoc. All claims included within the order that are not appealed are final.

Finally, the bill provides that the Office of Special Counsel shall be notified of any finding of intentional discrimination. Under the measure, the Office of Special Counsel shall investigate such findings to determine whether there has been a prohibited personnel action for which disciplinary action should be sought. The Federal Employee Fairness Act will ensure that Federal employees who discriminate will be held accountable for their actions.

In closing, Mr. Chairman, the Federal Employee Fairness Act streamlines the adjudication process; establishes reasonable time limits for investigating and adjudicating complaints; removes the agencies' authority to judge themselves; charges the EEOC with the primary responsibility for investigating and prosecuting Federal employee discrimination claims; and requires sanctions against Federal employees found to have discriminated. The Federal Employee Fairness Act eliminates the conflict of interest inherent in the existing system and brings fairness and credibility to the redress process.

Thank you Mr. Chairman and members of the Subcommittee. I am available to answers your questions.

Mr. MICA [presiding]. I thank you, Mr. Martinez, for your testimony and also your initiative in introducing this legislation. You have said that one of the major changes in your legislation is to encourage alternative dispute resolution. One of the problems that we had last year when we grappled with trying to speed up the appeals process, and this whole process, is that if you institute some changes, folks say that they are not getting a fair hearing. Maybe you could tell us how your alternative dispute resolution mechanism is set up, and how it would ensure that folks feel that they are getting an adequate hearing.

The other thing, is there employee participation in this process? When I say employee, is there some room for employees being involved in this process?

Mr. MARTINEZ. Employees other than the one filing the complaint?

Mr. MICA. Yes, other than the one who has filed the complaint.

Mr. MARTINEZ. That is possible. It would depend on that reconciliation period which all employees filing a complaint would be required to go through. It would be 20 days. And in that pre-complaint conciliation—that is, prior to them actually going through the formal process of filing a complaint—it is meant to allow the persons involved, on both sides of the complaint, to sit and talk with their supervisors and other employees to see if it can't be resolved before actually filing a complaint. In some cases, it might take as little as an apology, and a change of attitude, and a change of practice, to correct the problem, and no complaint would need to be filed.

If there still, after that, is the necessity to file a complaint, they would have 180 days in which to file that complaint. That means they would have 180 days to think it over and think over the merit of their complaint and consult an attorney or whoever else they wanted to, to make sure they want to proceed with it.

Right now there is only 45 days for the Federal employee; yet, in the private sector it is 180 days. And in many cases, during that period of time, the people think it over and think, "Maybe I acted too hastily," and some of those cases are not filed. So, all along the line there is an opportunity for something other than the formal filing of a complaint.

And, yes, I would say the employees would be entitled to have in that reconciliation period other employees to back their word. The person that the complaint was filed against would have this ability in that reconciliation. It would just be a negotiation of the complaint to find if there was or was not enough merit to go forward.

Mr. MICA. I also have a question related to mandatory versus voluntary participation in alternative dispute resolution. Which do you favor and why? For example, should the employee just be given a choice to go directly to another dispute resolution mechanism without the first step being alternative dispute? Either a choice for the employee to take? What is your opinion here?

Mr. MARTINEZ. My opinion is that if you allow the people the 20 days, that first 20 days, to go through this reconciliation period, if you don't require them to do it, and my bill does require them to do it, they may proceed helter-skelter without much thought, and

end up in something they really weren't after and really would rather not have gotten into it. And that is what that period of time is for. It is for them to decide. I don't think anybody would really resent a period of time in which they had to contemplate what their action would be or should be.

Mr. MICA. And you think 20 days is adequate?

Mr. MARTINEZ. I think 20 days is adequate, yes.

Mr. MICA. All right.

The other point that you testified to, you said that estimates are that your proposal will save $25 million. Where would that savings come from?

Mr. MARTINEZ. From the efficiency of the operation itself——

Mr. MICA. But you think it would be?

Mr. MARTINEZ. Right now you have each agency, no matter what size it is, has an affirmative action office, or an EEO office, rather, and a lot of that would be eliminated, because the people who actually file their complaint; they would get their choice whether they go to one of three agencies, that is, the EEO itself, or the Merit Systems Protection Board, or the employment agency itself. And having that choice, you can understand that if the EEOC has the master control of this whole process, that every agency isn't going to need every one of those little EEO offices within its agency itself.

And the other thing that it does, it takes away the ability for the agency itself to decide on cases, which is a big problem now. It is like the fox watching the chicken coop. [Applause.]

Mr. MICA. A final question is that we have heard some charges about lack of ability for minorities to obtain higher-level positions, does your bill in any way address this issue?

Mr. MARTINEZ. No, it does not. But the simple fact, if you eliminate discrimination in the Federal workplace, you then create an atmosphere where people are looking at people in a colorblind way, and, thereby, giving them those opportunities that they have been previously denied.

Mr. MICA. Again, I thank you for your testimony and for your leadership in introducing this legislation and we'll be glad to work with you and others if we can craft legislation that will address some of the problems that have been described?

Mr. MARTINEZ. Thank you very much.

Mr. MICA. I would like to recognize our ranking member, Mr. Cummings.

Mr. CUMMINGS. Mr. Martinez, thank you very much. I also like to echo the voice of the chairman. Thank you for your sensitivity and thank you for acting and trying to make a difference.

I just have a few questions, because I think all of us want to get to the people in the audience.

In Baltimore, we have a VA hospital, and one of the things we discovered—and it is piggybacking on something the chairman just asked you. What we discovered is that there were two major problems. One, that a lot of African-Americans and women were basically restricted to GS–5, and for years, they went back and got college educations and did all kinds of things, but never moving up. Never moving up, stuck at the bottom for years and years. When an article came out in the paper, our office immediately jumped on it and what we discovered, and Congressman Wynn, was that there

was a way to move people up and take notice of all of these, what I call, passovers.

There was another problem, too, at the VA hospital, and that was that management was issuing a lot of complaints against employees. And when time came after all of the hearings and things were over, 90 percent of those complaints were dismissed. And in the meantime, what was happening, people and their families were going through all kinds of anguish on things that were actually frivolous. So there is another. One thing is to lift people up. It is another avenue. These are both avenues. If you fail to lift them up, that is one way of attack. There is another way of attack by filing frivolous complaints from management.

And, I know what you said about the moving up, your general statement that you just made in answer to the chairman's question, but does your bill address that other piece of frivolous complaints from management? Are you following me, sir?

Mr. MARTINEZ. Yes, it does. It would work both ways.

Mr. CUMMINGS. OK.

Mr. MARTINEZ. The thing is that, you know, management that does not want to elevate people of color or minorities because they want to maintain control will attack, so that they are not attacked. [Applause.]

In other words, they will file those complaints and you know in public service you have a record, and everything goes into your record, and if somebody says, why haven't you elevated this person, and personnel says, "Look at all these complaints he has. How could I promote him?"—but if you have, and one thing is that the people in the agencies continue to discriminate because they know nobody had any ability to punish them. [Applause.]

In my bill, those people in the agencies that have been proven that they discriminated will be penalized. Now, we had a case during the time that I was the chairman, and we got testimony out of, a woman air traffic controller, who was not only not promoted when she was more qualified than the people who were being promoted, but she was sexually harassed. And she filed a complaint. But the agency itself investigated the complaint. And guess what, her direct supervisor was the one in charge of the investigation. [Laughter.]

Her direct supervisor was the one who the complaint was against. Not only that, she went to civil court. She was one of the more persistent ones. She won. She won. And guess what, all she got was her job back and back pay. But the supervisor got promoted. Why would they not then continue to do it?

Mr. CUMMINGS. I am sure that you heard the testimony of Mr. Barrett and the IRS problem up there in Milwaukee, and I think that is another example of the type of thing that you just talked about. So in other words, if someone were to do what this person did, or did do what Mr. Barrett referred to a few moments ago, then there are provisions in the bill to address them, too.

Mr. MARTINEZ. Yes.

Mr. CUMMINGS. Because that is criminal. [Applause.]

Let me just comment on just two other things. I think that, if I could just summarize, and this is just my last thing, this is sort of summarize something you've said. It is kind of hard to be on the

offense when you are constantly on the defense. So, and I think—would you agree with that?

Mr. MARTINEZ. Absolutely. Part of the way we have all been suppressed for so long is that they made us feel that we were wrong. They kept us in guilt mode, and we shouldn't consider ourselves as equal.

Steny Hoyer said it best; I think our Founding Fathers said we are all created equal; it is only after that people start becoming less equal than others.

Mr. CUMMINGS. Last, but not least, I understand that your bill has enjoyed broad support. Can you tell us whether the Federal employees and civil rights groups have endorsed it?

Mr. MARTINEZ. Yes, they have.

Mr. CUMMINGS. All right. Thank you very much.

Mr. MICA. Thank you, Mr. Cummings. I recognize Mr. Pappas. No questions at this time?

I recognize Ms. Norton.

Ms. NORTON. Thank you, Mr. Chairman. I have only one question. I do want to say to Representative Martinez that, for the record, his efforts, which predated my coming to Congress, to reform this system have been nothing short of heroic. And his determination to stay with this is of vital importance to it. He has the institutional memory. He has never given up. And if I may say so, he was not able to get it through a Democratic Congress either. And we should have been able to do so.

In essence we have gotten to the point where we have a system that has lost the confidence of the public and of those that must use the system. That is a very dangerous point at which to be. The one thing any justice system has to have is the confidence that justice will be done in the system. Now we always see problems in various justice systems, but we seldom see straight-out conflicts that nobody would even attempt to justify.

In addition, you have spoken, Representative Martinez, of what amounts to the hallmark of the system here which is gross inefficiency—we are just tossing the money down the nearest drain in the way in which we have set up this system. And this is a Congress that wants very much to save rather than spend money. I would like, because I really do think that we might well come to closure on this bill, and I know you have tried, and you tried during the last session—could you explain what you believe are the differences that came forward the last time you tried to pass the bill? I think it was in the 104th Congress. What are the differences? What will we need to get closure on in order to get a bill out, that would get your bill out during the 105th Congress? What are the major points of difference between, for example, you and the chairman on this matter?

Mr. MARTINEZ. There should be no difference between me and the chairman, and I'll tell you why. He comes from a party that believes there should be Government reform—right off the bat. Second, I think from the speeches he has made on the floor, and I have listened to them, that he believes that Government should be held accountable for its actions toward the people.

This whole thing works into something that I thought from the first day that I took elected office, which was on a city council in

Monterey Park, is that the people we hire as our bureaucrats, as they are called, should really serve the people. They are not there as policemen, or as enforcers of any particular law, to the extent that the individual hasn't broken the law. They are there to facilitate the business of the people.

And what is happening on the Federal Government level, and you know a lot of times people are unhappy with elected officials and complain about Government as they understand it, the elected officials, but the only problem with the elected officials is that they don't take enough time to oversight the Government agencies that they have oversight over, and make them responsible to the people.

If we, as a Congress, spend more time living up to our responsibilities of oversighting what the agencies were doing with regard to how they were treating the public, we would reform Government, and we would make the people in those agencies understand that they are there to serve the people, and that they are public servants.

And I think in that we have a lot in common. And I think we both want for the Government agencies to be responsive to the situations, and certainly in the Federal agency if you have a lot of unhappy people working for the Federal agency because they are being discriminated in their own agency that they are working in, how are they going to be good representatives of the Federal Government? I don't think they can be.

Ms. NORTON. I ask the question because I know there was an attempt made on the Democrat or Republican side to come together, and Mr. Martinez, in every way I have seen you be reasonable. For example you answered the question on ADR. I support you on ADR. As a lawyer, I can tell you what is killing the justice system is litigiousness of every kind that keeps from getting at cases that have real merit. Lawyers have a lot to do with that. ADR can break through that.

When I was at EEOC, the only way I was able to allay that backlog was to engage in negotiated settlements, and the remedy rate went up very significantly because we were able to negotiate settlements.

I would hope, Mr. Chairman, that an attempt could be made, as was made before, with your staff and with Mr. Martinez's staff to pass this bill. We have had many hearings on Mr. Martinez's bill, but I have to tell you we have never seen this kind of crowd come out. And I think what it means is that we have a problem that has built while we have been considering this matter, and I hope we will. [Applause.]

Mr. MICA. I thank the gentlelady for her comments and for your responses. Just, if I might add, you do have my commitment. I have only been in Congress 5 years. I was in the minority; I requested hearings and never had the opportunity to see those hearings. Never, that I recall, have I had an opportunity to testify with a panel like the panel we have assembled here today—all Members of the other party, given full consideration and full participation. So you have not only seen my commitment, but I pledge to work with you and, if we can, in fact craft legislation in a bipartisan manner that will remedy these problems that are outlined; I am fully committed to working with you.

And again, I thank Mr. Cummings for his leadership, and his setting this with me as a priority.

I recognize now Mr. Ford.

Mr. FORD. Thank you, Mr. Chairman, and again, Mr. Cummings, and my colleague, Mr. Martinez. Briefly, if you could, sir, I know one of the principal objectives of the Federal Employee Fairness Act, in which I am a cosponsor, is to curb the pursuit of groundless claims. Specifically, how does the Employee Fairness Act address that issue and allow us to really get to, as the former chair of the EEOC said, and my colleague, how are we able to get to closure to those cases that have narrowed and warrant some consideration?

Mr. MARTINEZ. The only time that a case would be declared meritless is that it would have to have gone all the way to either the EOC, and the EOC would have appointed an administrative law judge, and that administrative law judge would then look at the evidence, and on the evidence, and actually the EOC would have to declare that there was a preponderance of evidence to either affirm the discrimination act or affirm that it was a meritless act. And only after that was done would it be declared a meritless act.

So the individual has his way all the way up through the complaint, to that point of actually entering into an extended period of time where, even under our bill, because it is just the way things are, it would take a minimum of 210 days to resolve the case, or as much as 1½ years to resolve the case—to where there would be somebody that would be objective, not somebody from the agency. It would be an administrative law judge appointed by the EOC who would look at the evidence to determine whether or not it was a meritless case or it had merit.

Mr. FORD. And again, just quickly, as the ranking member said, this is something that has gained approval and support of the various organizations who have been just giants and more in bringing this issue to our attention.

Mr. MARTINEZ. Yes. There are a couple of organizations that do not drop their support because of it, but they have some problems with that aspect of it. They are fearful that in some instance there might be a meritorious case that is ruled not meritorious. And we would try to work with that to make sure that didn't happen.

Mr. FORD. And last, your bill also calls for the creation of conciliation programs, conciliation programs at the agencies to investigate before a dispute, a claim rather, is brought. How do you envision that, the conciliation process working, just very briefly, as outlined in the legislation?

Mr. MARTINEZ. I envisioned it the way that we drafted it was that the agency itself would set up a meeting in which the person filing the complaint, the person the complaint was filed against, and any corroborating witnesses or people they wanted to talk about, the group would be put together; they would sit for as long as 20 days and talk about it. Like I say, a lot of times there may be a misunderstanding, and maybe too, there has been an infraction and the person creating the infraction didn't realize that they were creating it—and at least give people an opportunity to resolve it before it has to go to a full-blown hearing.

Mr. FORD. Last, and I know I said "last" before, but, I guess even a rhetorical question: Why was this system set up from the beginning where the agency could overrule EEOC findings? Perhaps it is a function of my youth and the fact that I have only been here a few months, but it would seem to me that if we charge the EEOC with fulfilling its obligation, responsibility, at a very minimum we ought to respect the findings in which they have put effort, and work, and sacrifice into. I know you are not responsible for that, Mr. Martinez; you are trying to correct it, but just your thoughts, if you might.

Mr. MARTINEZ. Yes. My belief is that it is like—we had a colleague, Pat Williams, who is no longer in Congress. He was from Montana. He, one time on the House floor, got up and he said, "Never underestimate the power of the bureaucracy." And he said the power of the bureaucracy comes from the negligence of the elected official. And in that, the elected official was neglectful when they created that situation that allowed the agencies to be their own EEO administrators. And once they had that control—this legislation takes that control away, and as Ms. Norton has said, it has been all these years we have been trying to correct this one big problem that is really at the heart of the problem. That and the fact that because they are the only EEOC agency, they don't have to pay attention to the EEOC; they can ignore their findings, and they do consistently.

So what we are trying to do is take that authority out of their hands, because they can't do it adequately. In other words, they can't investigate themselves. [Applause.]

Mr. MICA. Thank you, Mr. Ford. Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman. I do think that this is a very significant hearing, and again I want to thank the chairman for holding this hearing.

Like many people in this room who are probably cynical about the system and the process, many times I am cynical as well. And I think some of the panel members on both sides of the aisle are. And I, frankly, can't think of an issue of more importance that is traditionally associated with the Democratic party that has been granted a hearing by the majority party since the Republicans took over in 1994. So, I think it is very significant that Mr. Mica is listening to the concerns that we have here today, and I think that is due in part because of his honest attempt to deal with this as well as the leadership that Mr. Cummings, Mr. Wynn, and other Members have shown on this issue as well.

My only comment is along the same lines that Delegate Norton made earlier. And that is, I think that the most important thing that can be done, that can come out of this, is to have the different parties, including yourself, obviously a leader in this issue, to sit down and try and work something out.

I have far more optimism that we can move forward on this issue now than I did 3 hours ago, and I think it shows the good will. And if people can sit down and honestly work together, I think something can come out of it. So I urge you to continue your fine work.

Mr. MARTINEZ. Thank you, Mr. Barrett. I don't want my loyalty to the Democratic party to be questioned. The funny thing is, that

in the time I have been here I have received more cooperation from the Republicans that I have worked with. [Applause.]

The fact is that there was a major piece of legislation that I tried to get out for two Congresses in the past, and it wasn't until the Republicans took over in last Congress that we were able to move it out of the House. The Senate didn't act on it, but this year we were able to move it out of the House and I am understanding the Senate is going to act on it in the next couple of days. The way I got that through was by going to someone on the Republican side who was sympathetic, Bob Barr. And Bob Barr helped me honcho that through the Congress. So, it is with people working together from either party for the good of the people that we can accomplish great things. And I think this is one of those things we can do.

Mr. BARRETT. Good, good. I yield back the balance of my time.

Mr. MICA. I thank you for your comments, for your questions. And also an unprecedented step, you're not on the Government Reform and Oversight panel. I remember going to hearings as a Member of the minority and never getting a chance to ask questions, but you are recognized, Mr. Wynn.

Mr. WYNN. Thank you, Mr. Chairman. I don't have a question, but I do want to echo that sentiment, because it deserves recognition. The fact that you have called this hearing is genuinely and sincerely appreciated, and I want to thank you, along with my other colleagues. I also want to thank Mr. Martinez for his legislative leadership because we have a lot of passion and fervor around this issue, but ultimately you have to have a legislative vehicle upon which to enact the change, and he has presented us with one. I look forward to working with you, Mr. Martinez, Mr. Chairman, Ms. Norton, and others. Thank you.

Mr. MICA. I thank you, too, and you shouldn't be too generous in your praise because hearings are sort of a dime a dozen around here, and when we conduct a hearing, the important thing is that we take positive action, working together.

Mr. Wynn and I had a conversation in the elevator on the way over and I said to him, that the Federal Government should be setting the example. We should be setting the standard. [Applause.]

I don't intend to make it a partisan issue and I am glad that Republicans have been responsive, but I think we all have a responsibility to put in place some positive legislative fixes that will address these problems adequately. The Federal Government, the Federal workplace, should set the standard and be the example, and that should be our goal.

We have no other panelists. I do want to thank you again for your leadership on this issue. We are pledged to work with you. We will have our staffs on both sides work together and hopefully we can craft a solution. So thank you and, I appreciate it.

Mr. MARTINEZ. Thank you, Mr. Chairman.

Mr. MICA. I would like to call now our second panel, if I may, and if you would come up. Could we have staff please prepare the table?

Witnesses for this panel are Oscar Eason, president of Blacks In Government; A. Baltazar Baca, National Image, Inc.; Thomas Tsai, chairman of the Federal Asian-Pacific-American Council; Dorothy Nelms, president, Federally Employed Women; Howard L. Wallace,

author, "Federal Plantation: Affirmative Inaction Within Our Federal Government."

I might first inform the audience and the panelists that this particular subcommittee of Congress is an oversight and investigation subcommittee, and our full committee and all subcommittees are charged with investigations and oversight. The first panel consisted of Members and we do not swear the Members in. But all others who testify, non-Members of Congress, are asked to be sworn in. So if you would please stand and raise your right hand.

[Witnesses sworn.]

Mr. MICA. Witnesses have answered in the affirmative. I would like to welcome each of you to our panel. I might also inform you, what we try to do is limit the oral presentations before the subcommittee to 5 minutes and we will put the timer on since we have another panel with a number of panelists. However, if you have a lengthy statement in addition to your verbal statement, or anything else, within reason, you would like submitted for the record, we will include that in the record of this hearing.

So, I would like to welcome our panel and I'll recognize Oscar Eason, president of Blacks In Government. Sir, you are recognized.

STATEMENTS OF OSCAR EASON, PRESIDENT, BLACKS IN GOVERNMENT; A. BALTAZAR BACA, NATIONAL IMAGE, INC.; THOMAS TSAI, CHAIRMAN, FEDERAL ASIAN-PACIFIC-AMERICAN COUNCIL; DOROTHY NELMS, PRESIDENT, FEDERALLY EMPLOYED WOMEN; AND HOWARD L. WALLACE, AUTHOR, FEDERAL PLANTATION: AFFIRMATIVE INACTION WITHIN OUR FEDERAL GOVERNMENT

Mr. EASON. Thank you, Mr. Chairman.

Mr. Chairman, esteemed members of this committee, I would like to step out of the context of my presentation and to thank Congressman Wynn, Congressman Cummings, and of course, Delegate Eleanor Holmes-Norton, who has worked with Blacks In Government [BIG] for many years. I want to thank you all very much.

My name is Oscar Eason, Jr., and I am the president and chief executive officer of Blacks In Government, or BIG as we are commonly called. We represent 2.5 million African-American employees in the public sector—and that includes the Federal, State, and local employees at all levels of government. I would like to request that my written testimony, which we have already submitted, be entered into the record.

Blacks In Government convened a Summit on Equal Opportunity in the Public Sector in May of this year at the Brookings Institution. We would like to submit to you copies of our report which is entitled, "Racism and Disparate Treatment in the Public Sector." We are making copies of this report available to all members of this committee and we'll make them available to your staffs and others as well.

Let me just say a few words about Blacks In Government. We have over 300 chapters nationally and a national office in Washington, DC. We were formed in 1975 to fight discrimination in the public sector. Ladies and gentlemen, we have been fighting for 22 years to change the public sector employment to one in which human beings are judged by the content of their character and

their productivity on the job. This, I hope, is the goal for all of us. But this colorblind working environment does not yet exist within our Federal Government. In fact, it has led to discriminatory and racist employment practices within the Federal Government.

African-Americans are being discriminated against at a rate three times that of their white counterparts in Federal Government. Discrimination has led to a decline in the percentage of African-American men in Federal employment. It has also led to the underemployment of African-Americans in the Federal work force to the extent that whites are employed, on the average, at 2 grade levels above African-Americans.

We can sit here and debate relative facts and figures, but the bottom line is that racism and disparate treatment are still part of the daily experience for thousands of African-Americans employed in the Federal Government.

My written testimony recounts the too frequent physical and verbal abuses that African-Americans experience on their jobs. I realize that public policy is not solely developed from anecdotal evidence; however, the preponderance of the evidence we have collected suggests that thousands of African-Americans experience direct and blatant acts of discrimination while performing their Federal jobs. They also experience the more subterfugal acts of discrimination that contribute to stressful working conditions.

Let me give just one example. African-Americans at the Library of Congress, many of whom serve you as employees of the Congressional Research Service, were awarded a class action monetary relief of $8.5 million—the largest ever granted to a discrimination suit against a Federal agency. Blacks In Government had to lead a demonstration on the steps of the Library of Congress in order to get the Library to pay its amount.

You would think that the Library's administrators would have learned from this experience. But losing the lawsuit has not corrected discriminatory practices at the Library of Congress. African-American employees had to file a second-class action suit in April of this year. This suit was filed because discriminatory conditions at the Library have not changed.

This is a Government agency right across the street from your congressional offices. This is one of the Federal agencies that brings knowledge and information to our citizens and to the rest of the world. It should be an environment of enlightenment, and not one of discriminatory abuse. The Library has wasted millions of taxpayer dollars in payments to employees because of its discriminatory practices. And American taxpayers will lose more because these practices have not ended.

The truly sad part is that discrimination is not simply a fact of life only in the Library of Congress. Many African-American employees believe that they work in environments that are akin to a plantation system, where discriminatory practices are part of their daily lives in many Federal agencies. Some of these episodes are part of the testimony recorded in our report.

Blacks In Government is committed to stopping discrimination where it exists in the Federal workplace. If we need class action suits in each agency of Government to end discrimination, then

that is what we will have to do. But what we are creating here is a cycle of pain, with no end in sight.

Blacks In Government maintains nobody really wins in this scenario. Thousands upon thousands of discriminatory charges have already been filed in almost every agency.

The figures that Representative Sessions quoted a few minutes ago, I would like to just highlight what he said in terms of those progresses that we have made as reported by the OPM. Now those figures that were presented, those increases represent predominantly white women. And certainly we applaud that. We are not against the increase in the number of white women at the SES level. But let's put the facts truly in perspective. [Applause.]

And I might also add that those cases where SESes have been promoted from African-Americans, those cases generally were won through the complaint process. [Applause.]

And that is exactly why we are here today. It is apparent that we have created a system in which discrimination is an accepted practice. We have failed to create working environments in which all Americans are encouraged to achieve to their very fullest potential.

We believe that a large part of the problem is that we have failed to provide an equitable means of resolving complaints of discrimination. There are thousands of cases filed within the current equal opportunity structure of every agency. Thousands of hours of Federal manpower will be needed to move these cases through the system.

We suggest that Blacks In Government work with you to develop strategies and remedies to help change this situation. In addition, we would like to offer our experiences, and the experiences of all of those who are associated with Blacks In Government, to work closely to develop these guidelines. One thing is certain: We cannot allow agencies to continue to manage their own equal opportunity process. [Applause.]

And, as Representative Martinez said, this is like the fox guarding the chicken coop. We recommend taking the complaint process away from individual agencies entirely and placing the responsibility in an independent, autonomous agency. This should be an agency that has total authority. We have been told that the Equal Employment Opportunity Commission does not have the subpoena authority, and it does not have the authority to mandate its findings. So this really should be an agency that has total authority for both processing and enforcement of the EEO process. Currently, the EEOC has the most experience in handling complaints of discrimination within Federal Government, and should be considered the leading candidate to be this agency.

The centralization of the complaint process would take agencies out of the business of judging themselves, end conflict-of-interest problems, eliminate duplication of filing procedures, and increase accountability for managing the process of EEO claims.

We do not want to fight these same battles this time next year. Even if we disagree about the specifics, we need to work together to ensure all employees of the Federal Government get the opportunity to give their very best in the service of this Nation.

Thank you very much for the opportunity to present these views today, and we hope to be a part of whatever comes out of this hearing.

[The prepared statement of Mr. Eason follows:]

Statement by Oscar Eason, Jr.
President, Blacks In Government

Before the Committee on Government Reform and Oversight, Civil Service Subcommittee

September 10, 1997

Mr. Chairman, I thank you for this opportunity to come before this committee to comment on the issue of discrimination in the federal government. I believe that there is no more important matter before this body than the subject we are addressing today, for it focuses on the central issues of our capacity to govern, to set appropriate standards for society, and to operate a government that fully represents the diversity of the people it governs.

GOVERNMENT WORKPLACE CHARACTERIZED BY DISPARATE TREATMENT

Blacks In Government (BIG) was started 22 years ago as a means of addressing the very issues before this tribunal today; discrimination in the federal workplace. Today we find we are confronting the same issues that we confronted at that time--disparate treatment in hiring, promotions, assignments, awards, adverse actions, and in just almost every aspect of the government workplace. This constitutes a double standard of treatment in the workplace that insures that African Americans will be unable to break the steel ceiling which keeps them at the bottom of the workforce and in deadend jobs. Let me briefly cite a few vital statistics:

- An Office of Personnel Management study shows that Blacks are being terminated at three times the rate of Whites from federal government employment.
- The number of Black males in federal employment has been steadily declining, from 7.2 percent in 1984 to 6.6 percent in 1994.
- Almost 60 percent of Black federal workers are in grades GS-9 and below.
- The average grade for Blacks is 7.8. For Whites it is 9.8.
- Blacks are disproportionately adversely impacted by

downsizing. Blacks, who are only 16.9 percent of the federal workforce suffered 25 percent of the reduction-in-forces (RIF) in 1996.

LAX ENFORCEMENT GENERATES EXTREME BEHAVIOR

Blacks In Government recently hosted a summit of organizations concerned with discrimination in the government workplace which put a face on these statistics. The testimony showed how disparate treatment of individual African Americans in the workplace can result in statistical disparities. Moreover, the testimony provides a graphic picture of what can happen in a workplace where anti-discrimination laws are not enforced and racism is permitted to flourish unchallenged. Examples in our report include:

- Incidents of physical attacks at the job site
- An employee attempting to assist at the scene of an accident is forced to pay $1,000 for repairs to the government vehicle. In the same agency a White employee cited as negligent in another automobile accident receives a citation for safety and awarded $1,000.
- A hangman's noose was placed around the telephones of African Americans at a job site.
- A dead employee was listed as a drowning victim but the autopsy revealed rope burns on his neck and Black employees suspect racially-motivated foul play.

We have submitted this report to this committee to provide further documentation of the disparate treatment accorded African Americans in the federal sector.

PRESENT COMPLAINTS PROCESSING SYSTEM INADEQUATE

In a system where disparate treatment is a reality and African Americans are at a demonstrable risk, what happens when an African American federal employee complains? Is there a viable system for resolving complaints that provides a remedy for individuals who have been victimized by racism, that punishes the guilty and protects the innocent? Sadly, this is not the case, and to this extent, the disparate treatment statistics I have cited are unlikely to dramatically change in the near future.

A federal government employee or applicant who feels he or she is a victim of discrimination must file an informal complaint with his/her agency. The alleged discriminating official is a manager within that agency. The EEO counselor who handles the informal complaint is generally an employee of the agency, who, in most cases, is performing that role as a collateral duty. The investigator, whether he is an employee or a contractor, is

generally under the control and influence of the agency. The result is a process replete with conflict of interest. The results are predictable: a huge backlog of cases with interminable delays in processing times; few findings of discrimination; and even fewer sanctions against the discriminating manager regardless of how outrageous the discriminatory act.

Contrast this with the process for the State or private complainant. Here, the complainant may file a complaint directly with the Equal Employment Opportunity Commission. This means the case is immediately handled by a disinterested party. There is greater objectivity in investigating the facts, less opportunity for a biased judgement; and greater interest in a fair and equitable resolution of the complaint.

The failure to provide an equitable means of resolving discrimination complaints is the cornerstone of institutional discrimination in the federal government. Because there are no effective sanctions against discriminatory behavior, managers are not deterred from discriminating and in fact, even today, we find that the manager who discriminates is more often than not, promoted and advanced.

The impact of an unfair system of processing EEO complaints on employee morale poisons the relationship between the agency and its minority employees and women. African American employees who view the unfairness of the present system lose faith in the integrity of their government and its ability to handle the public's business equitably.

Thus most EEO counselors in the federal sector become more a part of the problem than the solution. The role of EEO counselors is misunderstood by the agency, the complainant, and the EEO counselor themselves. The counselor is supposed to be an impartial party that encourages resolution of the complaint between the manager and the employee. However, managers view EEO counselors as employees and it is not unusual for counselors who diligently pursue the settlement of a case to be cautioned by managers to back off. The impartial role of the counselor is thus compromised.

Many counselors likewise consider themselves management representatives. They attempt to stay within the bounds of management expectations rather than their directives as EEO counselors. At the same time, it is not unusual for the complainant to rely on the counselor as an impartial party, and more often than not, as his/ her representative, generally to his/her regret. As a result, complainants may find their issues narrowly framed, their witnesses only cursorily examined; and the final report favoring the agency's position. Overall, the

processing of the complaint is afforded little more than lip service.

The fact is, nobody takes this system seriously--not the agency, which views it as a management tool to put out fires; nor complainants, who see the cards stacked against them from the beginning; and certainly not the general public, which sees the system as a government attempt to curb discrimination by providing barriers to the resolution of complaints.

NEW LEGISLATION IS NEEDED

In general, we endorse the Federal Employees Fairness Act, particularly, its provisions for moving the complaints processing responsibility to a central body, alleviating conflict of interest and improving the time requirements in the system. However, the Act has several provisions designed to discourage employees to refrain from pursuing meritless EEO charges that we find somewhat objectionable.

First of all, we do not agree that the risk of groundless complaints constitutes a substantial risk to the integrity of the process. We believe a far greater risk is that the complaint is not taken seriously regardless of its merits. Because of the subjective nature of discrimination and its damage to its victims, any charge of racial discrimination deserves serious consideration by an impartial adjudicator before it is dismissed as groundless

Our positions on provisions of the Federal Employee Fairness Act designed to discourage the pursuit of groundless charges are as follows:

o The Act requires the parties to engage in conciliation discussions before a complaint is filed and requires agencies to create and maintain state-of-the-art conciliation programs.

Conciliation programs are workable only if they are entered into in good faith by both parties. If management treats the process as it does the present informal complaint process, in which ill-trained EEO counselors face agency pressure in conciliatory roles, then it would be doomed to failure. We would only endorse a conciliation program that provides for well trained conciliators and an impartial role for conciliators, free of agency pressures.

o The Act requires early dismissal of charges found to be frivolous.

We must be careful that we do not throw the baby out with the bath water. What is a frivolous charge? Who determines if an allegation of discrimination is frivolous? What do we mean by frivolous? Certainly the pursuit of a legal right is bound to be perceived by some to be frivolous in any case. Where race is involved, the danger of misinterpretation is too great to be ignored.

Is manipulation of the personnel system frivolous? This is certainly the charge that can be made against those agencies with huge backlogs of cases, few findings of discrimination, and ill-trained EEO personnel. Some of the defenses put forth by agencies are patently absurd, and yet the complainant is forced to assume the burden of proving that they are pretenses. We would hope that the Act would recognize the importance of including appropriate sanctions against agencies whose record of participation shows abuse of the system.

o The Act permits the adjudication of charges without a hearing if there is no genuine issue of material fact in dispute between the parties.

A decision on the record is appropriate in such cases. Again, here it is even more important that the decision is made by some party other than the agency.

The act requires EEOC to dismiss entirely those administrative complaints which raise a mixture of civil service and discrimination allegations where the equal employment claim is frivolous.

We disagree that the option to go to MSPB or EEOC in mixed cases represent "two bites of the apple." Moreover, we consider it dangerous to dismiss the entire case simply because the complainant is unable to support his/her EEO allegations. A decision that an allegation of discrimination is frivolous should have no bearing on the merit system issues of the MSPB case.

The Act's streamlining of the federal sector EEO process will reduce the delays in charge processing that currently encourage some employees, who are desperate for relief, to file multiple complaints.

Employees file multiple complaints because of the reprisal actions taken against them on a regular basis. Management will not hesitate to take action against an employee who files a discrimination complaint. EEOC statistics will show that the percentage of reprisal charges is extremely high and reflects the way in which management tends to deal with complainants.

However, alleviating the delay in charge processing should help to expedite the process; it will probably do little to reduce multiple complaints.

RECOMMENDATIONS FOR REFORM

The following constitute BIG's recommendations for reforming the process by which discrimination complaints are handled in the federal government.

I. TAKE COMPLAINTS PROCESSING RESPONSIBILITIES FROM AGENCIES AND PLACE THEM IN A CENTRAL BODY, I.E, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

We believe that federal complainants should have the right to file complaints directly with a central, independent, autonomous body rather than with their agencies. Ideally, this would be a body that would handle only federal cases, and would be a quasi-judicial body with full powers to enforce compliance.

Although the EEOC has its own problems, in the absence of a new independent agency it is the best alternative to the present system. However, it would need to substantially strengthened and fully funded to meet the new workload.

The EEOC should handle the investigation and judgement of all complaints of discrimination originating in the federal government, just as it handles cases from the private sector and the state government level. This change would:

o Alleviate conflict of interest

It would take agencies out of the business of investigating and judging themselves by transferring the authority for judging the merits of EEO claims from the agencies against which the claims have been filed. Recently, federal agencies were 72 times more likely to adopt findings of discrimination than of no discrimination reached by EEOC administrative judges in cases tried before them.

It would end many of the conflict of interest problems inherent in a process which is best described as "the fox guarding the chicken house."

The system of processing complaints has become a means of reinforcing institutional discrimination rather than preventing it. Managers know that they can relegate claims to their colleague handling the EEO department and that in most cases an employees will eventually drop a complaint because of the difficulty involved in obtaining relief. And they know they have nothing to fear if they continue to discriminate.

o Decrease Duplication

It would eliminate the duplication that currently occurs when more than 120 different agencies each investigate claims and attempt to keep their EEO staff trained in the latest legal developments by transferring to the EEOC the authority for ensuring that claims are properly investigated and judging the claims.

O Increase accountability

Centralizing the complaints processing system in the EEPC would greatly increase the accountability for managing the processing of EEO claims by placing principal responsibility in one agency, not multiple agencies.

We further recommend that:

o All expenses involved in the investigative process shall be borne by the agency with the funds transferred prior to the investigation taking place.

o Personnel currently handling EEO cases in the agencies should be given the option of being transferred to EEOC, provided they meet the qualifying standards mandated by the highly professional process this legislation is intended to establish.

o EEOC investigative findings should be a directive to the agency, not a recommendation.

o Agency and the complainant would both have the right to appeal to the EEOC Administrative Judge for a hearing on the issue(s).

o Findings from the hearing would be a directive to the agency and would be enforced by the EEOC.

o Complainants could go to the District Court if not satisfied with the EEOC Judge's ruling. The agency could go to court with the approval of the U.S. Attorney's office.

II. IMPROVE TIME REQUIREMENTS FOR PROCESSING CLAIMS

The complainant should have 180 days after the incident occurs in which to file an EEO complaint, similar to that now available to State and private complainants.

A study contracted by the Congress showed that the average time to fully adjudicate EEO claims in the federal sector was 607 days in Fiscal Year 1988, the most recent year for which figures are available. Some agencies process the claims much more slowly, such as the Department of Justice which averaged 1,631 days, and the Department of State which averaged 1,350 day. Regulations require the agencies to process cases within 180 days, but no penalties are attached to the failure to comply.

III. PROCESS MUST BE SIMPLIFIED AND MADE MORE USER-FRIENDLY

It is recommended that if the issue is a "mixed case"--a case with both discrimination and civil service issues--it should only be heard in one venue, either EEOC or MSPB, but not both. This choice must be made at the beginning of the process and would remain throughout the process. Both MSPB and EEOC judges should be required to be familiar with the EEO process, personnel laws and regulations in order to decide any case.

The present system is complex and confusing, and invites abuse. Placing "mixed cases" under a single agency would go a long way toward ameliorating the confusion that sometimes result from different agencies handling aspects of the same case. The rights of the complainant should not be adversely affected if the administrative law judge hearing the case is required to be versed in civil service law as well as anti-discrimination law.

In addition, complainants threatened with an adverse action that could materially affect their livelihood, i.e., suspension, reassignment, termination, should have the action stayed until the case has received a final administrative decision.

IV. EXPAND THE DISCOVERY POWERS OF THE COMPLAINANT AND THE SUBPOENA POWERS OF THE EEOC

To ensure a full and accurate record, the discovery powers available to the parties should be expanded to provide for greater opportunities for identifying and collecting relevant information. The EEOC should have the right to subpoena witnesses if necessary to complete the record and provide for a comprehensive hearing on the issues.

V. PROVIDE SANCTIONS AGAINST SUPERVISORS WHO DISCRIMINATE

We need effective sanctions against supervisors found guilty of intentional discrimination. Under the present system, a federal

managers feels that he/she is carrying out the objectives of the agency and is willing to overlook EEO regulations and obligations to this end.

Supervisors found guilty of intentional discrimination should be subject to disciplinary action and sanctions, including demotion, termination, suspension, reassignment, and fines.

VI. PROVIDE SANCTIONS AGAINST AGENCIES THAT DISCRIMINATE

Agencies that fail to comply with the timelines and other requirements of a good faith anti-discrimination enforcement program shall be subject to sanctions, including fines and demerits.

There should be appropriate sanctions against agencies that fail to carry out its EEO obligations. The agency should be held accountable for compliance with the time limits and performance standards in the law to the same extent as the complainant.

VII. PROVIDE INTEREST ON BACK PAY

The legislation should provide for the express right to interest on the awards of back pay and to reimbursement for the cost of experts at market rates.

Without the right to interest on back pay awards, payments on back pay claims that arose years earlier hardly provide for the make whole relief that Title VII was designed to furnish. Denial of such interest rewards discriminating agencies for delaying for years the processing of valid complaints by denying the victims of discrimination the true present value of the back pay they were denied.

These recommendations, if enacted, will go a long way toward creating a fair and equitable system of handling discrimination complaints. And I believe that such a system should do much to deter discriminatory conduct and assure greater protections for victims of discrimination.

Mr. MICA. Thank you for your testimony and we will defer questions until we have finished all the panelists' testimony. And, without objection, additional information will be added into the record.

Mr. Baca, you are recognized.

Mr. BACA. Thank you, Mr. Chairman, committee members.

I have come here today representing the fastest-growing minority in the country, and the only group underrepresented in the Federal Government. We are voters; we're stockbrokers, migrant workers, dock workers, attorneys, construction workers, doctors, and dentists, and architects, and magazine publishers, journalists, typists, and CEO's. We are Hispanics. We may speak with an accent, but we don't think with one.

My name is Baltazar Baca, as the chairman noted, and I serve as general counsel of National Image, an organization dedicated to the protection of employment, education, and civil rights of Hispanics.

I speak today on behalf of National Image, and on behalf of five other Hispanic organizations: the League of United Latin American Citizens, the largest and oldest Hispanic civil rights group in this country; National GI Forum, a group of veterans, Americans, who also per capita Hispanics have the largest per capita congressional Medal of Honor winners in this country of any other identifiable group. I also represent MANA, National Association of Hispanic Women; the National Association of Hispanic Federal Executives, and the National Puerto Rican Coalition.

The Federal Government, as has been stated earlier, has a legal obligation to include Hispanics and all minorities in the Federal work force. Congress has passed several laws, as we are all aware of in this room: the Civil Service Reform Act of 1978, and the Civil Rights Act of 1964, which included Federal employees for the first time in 1972. In 1991, those acts were passed. But Federal agencies have failed to abide by these laws, as was stated by Mr. Eason, by Congressman Martinez, by Congressman Wynn, and by Congressman Hoyer.

Study after study performed by Government agencies, including the Merit Systems Protection Board, the Office of Personnel Management, the Equal Employment Opportunity Commission, the Postal Service, the Department of the Interior, and the Government Accounting Office, show that the only—the only—underrepresented group in the Federal work force are Hispanics.

We have heard reason after reason for this longstanding underrepresentation and discrimination: downsizing, geography, a lack of qualified applicants. As history has shown us, none of these washes. Though downsizing is a reality in both the Federal and the private sectors, it should not be used as a pretext for discrimination, particularly at a time when the Hispanic community has been proactive in increasing job training programs to ensure that Hispanic candidates obtain the necessary qualifications for Federal employment.

Federal agencies, as a matter of record, have failed to fully and fairly consider Hispanics for positions, as has been pointed out in other anecdotal testimony earlier today. Hispanics have been, and are, filing suits on behalf of Hispanics against the FBI, for example. And FBI agents filed suit in U.S. District Court, as Congress-

man Martinez pointed out, alleging that they were treated differently from other agents, placed on what they called a "tortilla circuit" and given menial and dangerous assignments. To add insult to injury, they were later denied opportunities for promotion. The court found in their favor and the case cost the Federal Government, again as Mr. Eason has noted, millions of dollars, not only in payments of damages, but in lost image, goodwill, and thousands of hours of time defending the case by the Department of Justice and the FBI.

Was it worth it? Were there lessons learned? Apparently not.

Today, similar cases are pending in Federal courts and administrative agencies. Recently, Hispanic postal service employees filed class actions alleging a widespread and continuing pattern of discrimination and reprisal. About 90 postal workers in California, Texas, Florida, New York, and Illinois, plus Colorado, New Mexico, Arizona and other States, have stated that they feel they have been discriminated against because they are Hispanic.

The U.S. Veterans' Administration also has a class action complaint pending against it, filed by Hispanics who feel they have been discriminated against because of their national origin. There are several not-for-profit organizations considering filing class action suits against the Federal Government as we speak.

In other words, is the Federal Government going to pay now, or are they going to pay later for these discriminatory acts? I suggest that it is penny-wise and pound-foolish to delay and deny that this discrimination is not going on at the present time.

Supervisors, coworkers, recruiters, and human resource professionals need sensitivity training in order to widen their understanding of the Hispanic cultures. Federal Government workers need to understand that speaking with an accent does not mean that you think with an accent. Many of the non-profit corporations represented here today offer such courses on sensitivity training to Federal Government employees at very reasonable rates.

We do not need any more studies on the subject. [Applause.]

Congress already has spent more than 3 years and countless dollars on study after study that concludes that Hispanics now are the only underrepresented group in the Federal work force. We need coordinated, cohesive efforts on the part of the Federal agencies to address the serious underrepresentation of Hispanics in the Federal Government.

And some agencies have been successful. There is a success story and a memorandum of understanding between the Bureau of Land Management at the Department of Interior and National Image, where there is an understanding, where there is a coordination of sharing of announcements, sharing of knowledge of what promotions become available, and also sharing in terms of coordinated meetings within BLM and National Image employees throughout the country. This has been a very positive effort and it has proved in positive results in increasing the employment of Hispanics within the Federal Government.

If agencies require applicants to pass an entrance exam, the agencies should ensure that the exams and the review workshops are available to Hispanics. This has not been done and there are studies to show that, for example in the Postal Service.

Congress should pass the Federal Employees Fairness Act, introduced by Congressman Martinez and Eleanor Holmes-Norton, which would streamline the EEO process within the Federal Government and would, therefore, help all persons filing charges with the Federal agencies. And it would help the Federal agencies, too, decrease their own bureaucracy.

Congress needs to grant EEOC sufficient funds to monitor the affirmative employment plans which are submitted by the agencies to EEOC by addressing the goals of full representation in the agencies' work forces. Again, these reporting requirements allow Congress and oversight committees, such as this one, to measure the progress that is being made in complying with the established laws. And these laws already exist. We don't have to reinvent the wheel, as far as this aspect of the process is concerned.

There are solutions to confront the difficult issues of how to mobilize the Federal agencies and to actively recruit and retain Hispanics. One place to start would be to enforce the laws that already have been passed by Congress to ensure diversity in the workplace.

The President of Mexico at the time Abraham Lincoln was President of the United States was Benito Juarez, and he said "Respecto al derecho ajeno es paz." "Respect for the rights of others is peace." These words are inscribed on a statue across the street from the Watergate complex on Virginia Avenue, about 4 miles from where we sit today. Isn't that a good, basic guide for Federal agencies to pursue as they strive for fair representation of Hispanics in the Federal work force?

Thank you very much for your time and attention. [Applause.]

[The prepared statement of Mr. Baca follows:]

I have come here today representing the largest minority in the country and the only group underrepresented in the federal workforce.[2]

We are voters, stockbrokers, migrant workers, dock workers, attorneys, construction workers, doctors, dentists, architects, magazine publishers, journalists, typists and CEOs — we are Hispanics. We may speak with an accent but we don't think with one.

My name is A. Baltazar Baca. I serve as general counsel for National Image, Inc. ("Image"), an organization dedicated to the protection of employment, educational and civil rights of Hispanics. I speak today on behalf of National Image, Inc. and on behalf of five other Hispanic organizations. I also bring something else to the table — personal experience to the table as a Hispanic who worked for the federal government at the Departments of Justice and Interior and the EEOC for 12 years.

There is a continuing pattern of discrimination and denial by the federal government against Hispanics. Today we call on Congress to put an end to it. This pervasive and longstanding discrimination against Hispanics in the federal workforce must be changed. The refusal of federal agencies or Congress to remedy the problem must be challenged. Congress must enforce the laws to ensure that the federal government make a concerted and coordinated effort to recruit, hire and retain Hispanics. In order to do this, Congress needs to ensure (1) that each federal agency take active steps to increase recruitment of Hispanic employees; (2) that Hispanic job applicants are considered fully and fairly for positions; (3) that employees who file complaints of discrimination do not become victims of acts of retaliation.

The federal government has a legal obligation to include Hispanics and all minorities in the federal workforce. Congress has passed several laws, such as the Civil Service Reform Act of 1978 & the Civil Rights Act of 1972, 1978, & 1991, to ensure diversity in the federal workplace. But federal agencies have failed to abide by

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[2] In 1993, the United States Merit Systems Protection Board issued a study which discussed the aggregate underrepresentation of Hispanics in the federal workplace. The report recommended that federal agencies increase recruitment of Hispanics. U.S. Merit Systems Protection Board, "Evolving Workforce Demographics: Federal Agency Action and Reaction," Washington, D.C., November, 1993, p.xi. A subsequent report showed that the only group underrepresented in the federal workforce is Hispanics. United States Merit Systems Protection Board, "Fair and Equitable Treament: A Progress Report on Minority Employment in the Federal Government," Washington, D.C., August 1996.

these laws. Study after study performed by government agencies, including the Merit Systems Protection Board, Office of Personnel Management, the Equal Employment Opportunity Commission, the Postal Service, the Department of the Interior and the General Accounting Office shows that the only underrepresented group in the federal workforce is Hispanics.[3]

This means that the fastest growing ethnic population in the country today and in the foreseeable future, will continue to be deprived of its right to fair representation in the federal workforce unless Congress takes positive action.

You must understand what's going on here. Recruitment efforts are not reaching Hispanics. Jobs are going unannounced by many agencies. Agencies are not reaching out to the Hispanic community, to colleges with large Hispanic enrollments, to Hispanic non-profit organizations, or to publications with large Hispanic readership. They can and they must.

Many agencies require that applicants pass an entrance examination in order to be considered eligible for employment. The Postal Service, for example, requires such an exam. However, it offers workshops prior to the exam to assist applicants in learning the necessary information. Why are the workshops and exams not regularly publicized and made available in Hispanic communities?

Why aren't managers and supervisors of federal agencies being held responsible for recruiting, retaining and promoting Hispanics? Management can no longer remove itself from the agencies' EEO obligations.

Federal agencies have diversity development plans in place. Why are they not being implemented? Is it because the human resources departments and the diversity development departments are on different floors?

We've heard reason after reason for this longstanding underrepresentation and discrimination. Downsizing. Geography. A lack of qualified applicants. None of these

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[3]Indeed, as of 1995, the U.S. Office of Personnel Management reported that Hispanics comprised 5.9 percent of the federal workforce and 10.2 percent of the private sector workforce. The EEOC reported that Hispanics comprise 6.1 percent of the federal workforce and 8.1 percent of the private sector workforce.

washes. Though downsizing is a reality in both the federal and private sectors, it should not be used as a pretext for discrimination, particularly at a time when the Hispanic community has been proactive in increasing job training programs to ensure that Hispanic candidates obtain the nesseary qualifications for federal employment.

Despite being qualified, when Hispanics seek employment within the federal government, they face discrimination based on the mistaken negative assumptions and unjustified stereotypes that they are lazy, not well educated, under-qualified, or have language limitations. Merely speaking with an accent can tip the scales against an applicant.
However, more and more private companies are finding that bilingual employees are a business asset. There is no reason to assume that this would not be equally true in the federal sector.

Federal agencies, as a matter of record, have failed to fully and fairly consider Hispanics for positions. And they are sending out a message that Hispanics are not welcome. Almost 10 years ago, Hispanic FBI agents filed suit in U.S. District court, alleging that they were treated differently from other agents, placed on what they called a "tortilla circuit,"[4] and given menial and dangerous assignments. To add insult to injury, they were later denied opportunities for promotion. The court found in their favor and the case cost the federal government millions of dollars not only in payment of damage awards, but in loss of image, good will and thousands of hours of time in defending the case by the Department of Justice and the FBI. Was it worth it? Were there lessons learned? Apparently not.

Today, similar cases are pending in federal courts and administrative agencies. Recently, Hispanic Postal Service employees filed a class action, alleging a widespread and continuing pattern of discrimination and reprisal. About 90 Postal Workers in California, Texas, Florida, New York, and Illinois, plus, Colorado, New Mexico, Arizona and other states said that they feel they have been discriminated against because they are Hispanic. The U.S. Veterans Administration also has a class action complaint pending against it, filed by Hispanics who feel they have been discriminated against because of their national origin. There are several not for profit organization considering filing class action suits against other federal agencies as we speak.

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[4]Perez v. FBI, 707 F. Supp. 891 (W.D. Tex. 1989).

Supervisors, coworkers, recruiters and human resource professionals need sensitivity training in order to widen their understanding of the Hispanic cultures. Federal government workers need to understand that speaking with an accent does not mean that you think with an accent. Many of the not-for-profit corporations represented here today offer such courses on sensitivity training to federal government employees at very reasonable rates.

Discrimination against Hispanics in the federal workplace can no longer be tolerated. Congress must ensure that Hispanics are given their right to federal employment, and, that once employed, they are not discriminated or retaliated against.[5]

We do not need one more study on this subject. Congress already has spent more than three years and countless dollars on study after study that concludes that Hispanics now are the only underrepresented group in the federal workforce. We need a coordinated, cohesive effort on the part of all federal agencies to address the serious under- representation of Hispanics in the federal government.

- Federal agencies need to establish a coordinated, comprehensive and targeted program to recruit Hispanics. Although a few agencies have made some efforts to recruit Hispanics, their efforts have not been targeted, coordinated or continuing.[6] The agencies need to ensure that job vacancy announcements are made available to Hispanics, by broadly publicizing every vacant position, in newspapers and trade magazines that

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[5]The EEOC has seen a dramatic increase in the number of charges filed by individuals who complain of discrimination based on their national origin. Indeed, the number of national origin EEO complaints has increased by 72% in the last 3 years. The EEOC also has seen a dramatic increase in the number of charges filed by individuals who complain of being retaliated against after they file an initial EEO complaint.

[6]Many agencies have been successful in the few attempts they have made at coordinating with non-profit organizations. In some cases, federal agencies have simply contacted non-profit organizations when jobs became available. In other cases, agencies have worked with non-profit organizations to establish memoranda of understanding to coordinate outreach to and recruitment of under-represented groups. For example, National Image, Inc. has successfully executed an MOU with the Bureau of Land Management at the Department of the Interior and with the Office of Personnel Management. MOUs are not in themselves a solution, but they create an interactive process that will help to solve the underemployment of Hispanics in the federal workforce.

have broad Hispanic readership, working with the Hispanic community and coordinate with non-profit organizations. The agencies also should coordinate more effectively with colleges where there are large Hispanic populations.

- If agencies require applicants to pass an entrance examination, the agencies should ensure that the examinations and any review workshops are available and accessible to Hispanics.

- Congress should pass the Federal Fair Employment Act, introduced by Congressman Martinez (D.CA.) and Eleanor Holmes-Norton (D-DC), which would streamline the EEO process within the federal government and would, therefore, help all persons filing charges and the federal agencies.

- Congress needs to grant EEOC sufficient funds to monitor the Affirmative Employment Plans which are submitted by the Agencies to EEOC by addressing the goal of full representation in the agencies' workforce. Again, these reporting requirements allow Congress and oversight committees, such as this one, to measure the progress that is being made in complying with the established laws.

There are solutions to confront the difficult issue of how to mobilize the federal agencies to actively recruit and retain Hispanics. One place to start would be to enforce the laws that already have been passed by Congress to assure diversity in the workplace. The President of Mexico at the time Abraham Lincoln was President of the United States, Benito Juarez said, "respecto al derecho ajeno es paz." "Respect for the rights of others is peace." These words are inscribed on a statute across the street from the Watergate complex on Virginia Avenue, about four miles from where we sit today. Isn't that a good, basic guide for the federal agencies to pursue as they strive for fair representation of Hispanics in the federal workplace?

Mr. PAPPAS [presiding]. Thank you, Mr. Baca.

And now we will turn to Mr. Thomas Tsai, chairman of the Federal Asian-Pacific-American Council. You have 5 minutes, sir.

Mr. TSAI. Good afternoon, Mr. Chairman, and distinguished panel members.

Thank you for the opportunity to testify in this hearing. As chairman of the Federal Asian-Pacific-American Council, I am privileged.

Mr. PAPPAS. Excuse me, sir. Could you move the microphone a little bit closer? I think some people in the back may have trouble hearing you. Thank you.

Mr. TSAI. As chairman of the Federal Asian-Pacific-American Council, I am privileged to present the views of my fellow Asian-Pacific-Americans in Government to this committee. My oral testimony will be focused on the nature of the discrimination against Asian-Pacific-Americans or [APA's], and our recommendation to reduce it. I request here to record the written statement in your record, which we submitted on September 8.

Mr. PAPPAS. Without objection.

Mr. TSAI. The Federal Asian-Pacific-American Council was formed in 1985 as an interagency working group of the employees interested in promoting equal opportunity. Over the years, it has become a nationwide organization for APA employees in the public sector. We sponsor the largest conference of Asian employees every year. Over 400 people from about 100 agencies, other organizations, and the congressional staff attended our last conference in May 1997.

As of September 30, 1996, there were 81,521 APA's in the civil service and 44,743 in the military services. As other panel members showed this morning, discrimination in the Federal Government does happen. However, if not addressed and resolved, discrimination damages morale and productivity of the employee.

As our Government becomes smaller, it is even more critical to reduce discrimination in the workplace. Discrimination may be overt or subtle. Many of us have experienced overt discrimination such as hate crimes and racial slurs. It is the subtle discrimination, however, that often affects Asian-Pacific-Americans in the workplace, often arising from racial stereotyping.

Non-selection and work environment harassment are the two most common forms of discrimination against Asian-Pacific-Americans. Stereotyping contributes to a perception that APA's are good employees, but lack what it takes to be good managers. However, statistics show that a large proportion of Asian-Pacific-Americans successfully manage businesses and advanced technology companies nationwide.

Let us look at some of the statistics facing APA's today in the Government. A recent report by the Merit Systems Protection Board released in 1996, in professional occupations in the Government, the Asian-Pacific-Americans hold about 6.5 percent of nonmanagerial jobs, but only 4 percent of managerial jobs, and only 1.2 percent of senior executive jobs.

Regarding the comment made by Representative Sessions this morning, we know that there were progresses made for more people in the GS–13 to GS–15, but the numbers in my written state-

ment show that number of GS–14's is much smaller than the GS–13's. The number of GS–15's is much smaller than the number of GS–14's. Since the OPM lumps GS–13's and GS–14's together, this is not a fair statement. You would not consider 15 equal to 13. This is a very big jump in the numbers. I hope the panel can study the numbers in this GS–13, GS–14, and GS–15 block.

This underrepresentation of Asian-Pacific-Americans in management has a strong negative impact on the morale, productivity, and creative development of all Asian-Americans in the Government. The same report also found, among APA's surveyed, that 42 percent said they hated the glass ceiling at their present grade. Thirty percent said that race or national origin was the major factor in nonselection for a recent promotion. The MSPB also said in this report that Asian-Americans have the highest percentage of bachelor degrees among Federal employees. We are not all Westinghouse Science winners, but we do have high education and should work better in the Government.

A recent study at one science-based agency shows that only 11.5 percent of the APA employees received outstanding ratings, while 45.3 percent of the white employees did. Such a difference in ratings limits the potential of APA employees for receiving choice assignments, and it decreases the likelihood of retaining their jobs in the event of a reduction in force.

What should we do? What can we do to reduce discrimination? We recommend the following changes: Revise the EEO program plan of each agency with specific goals to meet the needs and have the management involved in the development of the same program plan.

Hold managers accountable for new efforts to achieve a diverse work force. Inspect, periodically, where and against whom the EEO complaints are often directed, why this is the case and what can be done to solve the issues. Make adequate resources available to the EEOC. Improve the technical and management skill to accelerate EEO processing at the EEOC. Finally, determine whether EEOC should take over from the agencies the entire formal EEO complaint process.

In conclusion, President Clinton had it right when he said, "Mend it but don't end it." I believe the Federal employees deserve a better EEO and affirmative action program. Our proposals today will go a long way to achieve equality and fairness within the Federal work force. We look forward to working with you to end discrimination.

I am prepared to answer any questions you have, Mr. Chairman. [Applause.]

[The prepared statement of Mr. Tsai follows:]

Testimony of Dr. N. Thomas Tsai
Federal Asian Pacific American Council
before the
Committee on Government Reform and Oversight
Subcommittee on Civil Service
United States House of Representatives

September 10, 1997

Chairman Mica and distinguished members of the Subcommittee, thank you for the opportunity to testify in this hearing on "Employment Discrimination in the Federal Workforce: Part I- Continuing Concerns". It is my privilege to appear as the Chair of **Federal Asian Pacific American Council** (FAPAC) to present the views of Federal Asian Pacific American employees before this Subcommittee.

Asian Pacific Americans (APA) have a long history in the development of this nation and have served in the civilian and military services of our country with distinction. "Today," President Clinton said in a message to FAPAC on April 29, 1997, "Asian Pacific Americans serve in positions throughout the Federal government, setting an inspiring example of commitment to public services." As we set our sights on a new millennium, we must improve the government to meet the challenges of the 21st century. As the President said, "if our nation is to succeed in the years to come, we must embrace the creativity and energy of every one of our people." The purpose of my testimony today is to seek ways to implement this idea and to ensure that our energy and creativity will be fully included.

As this is the first time we have been invited to appear before this Committee, I will describe the objectives of FAPAC first. Then, I will present the concerns of Asian Pacific Americans in the government and recommendations.

FEDERAL ASIAN PACIFIC AMERICAN COUNCIL

FAPAC was founded in 1985 as an inter-agency working group of employees interested in promoting equal employment opportunity activities for APAs in the Federal and District of

Columbia governments. In addition to coordinating such activities among agencies, it has also become the principal organization for organizing leadership training program and activities which highlight the achievements of APAs in the public sector. Specifically, FAPAC was established --

> To assist the Federal and District of Columbia Governments in promoting and establishing an effective and equitable participation of APA in the work force;
> To promote overall awareness of the impact of Asian and Pacific cultures, contributions, work ethic, and behavior as related to government employment;
> To promote a better understanding of, and to seek solutions for particular problems of APAs in the governments, and the community in general;
> To promote career development and advancement of APAs in the Governments through workshops, training conferences, and APA Heritage Month observances, and
> To work with other advocacy groups in a concerted effort to fight discrimination on all fronts and assist in resolving discrimination problems.

We aim to be the preeminent source of information and career development for APA employees in public service; to sustain and advance our membership through organizational vitality, empowerment and through activities that address the issues and concerns of our membership; and to strive toward ensuring continuous support and timely dissemination of information.

After twelve years, FAPAC has become the focal point of nation-wide APA employees in the public sector. It has sponsored annual leadership training conferences and Congressional Seminars to provide opportunities to exchange views with Congressional members on issues concerning APA employees in the government. Such conferences have been the largest for APA employees. Over 400 people from about 100 agencies, civil right organizations and Congressional offices attended the latest one in May this year. Attachment A is a summary of the activities and findings of that conference.

ASIAN PACIFIC AMERICANS IN THE GOVERNMENT

An Asian Pacific American is a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, among others, China, India, Japan, Korea, the Philippines, and Samoa. Some reports refer to this group as Asian/Pacific Islanders. According to 1994 Bureau of the Census figures, APA numbered 9 million and made up an estimated 3.45 percent of the nation's population. Today, almost 10 million Americans can trace their roots to Asia and the Pacific Islands. As the most diverse group of minorities in the nation, Asian Pacific Americans are projected to increase from 10 million today to 17.2 million by 2010 and 22.7 million by 2020.

As of September 30, ~~1995~~ 1996, according to the latest data from the Office of Diversity of the U.S. Office of Personnel Management (OPM), there were 82,961 Asian Pacific Americans in the Federal executive branch workforce. Attachment B presents their distribution among all federal agencies. Since FAPAC is the only government-wide group representing the voices of Asian Pacific Americans in the federal government, Attachment B also shows the number of Asian Pacific Americans in the military services, as reported by the Department of Defense.

The 1995 Annual Report of the Equal Employment Opportunity Commission **(EEOC)** on the Employment of Minorities, Women and People with Disabilities in the Federal Government shows 116,257 total civilian APA employees, an increase of 31,376 from 1986. This number includes those in temporary and other pay plans.

DISCRIMINATION OF APAs IN THE FEDERAL GOVERNMENT

As complaints of Equal Employment Opportunity (EEO) discrimination have shown over the years, discrimination does occur and is part of our life. However, if not controlled, discrimination will damage the morale and productivity of the workforce. It has cost a great deal

of human suffering to the employees and financial loss to the employers. As the government becomes smaller, it is even more critical to reduce discrimination in the work place.

Complaints of discrimination against Federal agencies are processed in accordance with the regulations in 29 Code of Federal Regulations Part 1614 (29 CFR 1614) which took effect on October 1, 1992. A complainant, either an employee or applicant for employment to an agency, may file a formal complaint when counseling efforts fail to resolve the complaint. Complaints may be filed for discrimination on the basis of race, color, sex, religion, national origin, age, disability, equal pay, and reprisal. In FY 1995, the most frequently alleged grounds were reprisal, race, sex, and age, accounting for 64% of all cases. The top three issues alleged, by number and percentage, in formal complaints filed in 1995 were harassment (19.3%), promotion/non-selection (15%) and disciplinary action (15%). The other issues include evaluation, training, equal pay, and awards.

In general, discrimination may be overt and subtle. It is subtle discrimination that often affects APAs. It is also more difficult to prove. Many APAs can recall personal experiences when acts of discrimination were overt and directed toward them as hate crime or racial slurs. APAs tend to ignore subtle acts of discrimination and are not prepared to respond to them. Also, we are not prepared to make a big deal of these kinds of discrimination, such as when passed over for promotion or selection. Often arising from racial stereotyping, non-selection and work environment harassment are the two most common forms of discrimination against APAs.

Furthermore, APAs are perceived as lacking political sophistication. Second, most APAs do not have the political network outside the Asian communities. Third, APAs are brainy but often considered as outsiders. Taken together, these stereotypes contribute to a perception that APAs are good employees but lack what it takes to be good managers or representative of an office or agency. However, statistics shows that APA's have a higher proportion of entrepreneurial activities from small business to advanced technical companies in the "Silicon Valley", and thus, are competitive as managers.

For these reasons, APAs face the "Glass Ceiling" problem both in the civilian and military services of the government, as sample data shown in Attachment C. The ceiling differs in different agencies and location. At the National Institute of Health (NIH), a highly regarded medical research agency where APAs typically excel, the ceiling is GS-14. In most of the remaining civilian agencies, like the Departments of Navy and Army, the ceiling is about GS-12. The ceiling happens to be at the first level of supervisors in most agencies.

A 1996 report, "Fair and Equitable Treatment: A Progress Report on Minority Employment in the Federal Government," of the U.S. Merit Systems Protection Board (MSPB), shows that APAs are relatively close to Whites in terms of average grade, but occupy considerably fewer management positions. The APAs hold about 6.5 percent of the non-management professional jobs but only 4 percent of the management jobs, and only 1.2 percent of the executive jobs. In some agencies such as the Department of Agriculture, there had been no APA career senior executive until this year, after the issue was raised by a coalition of minority groups. This under-representation of APAs in management has a strong negative impact on the morale, productivity, and career development of future APAs.

In analyzing the under-representation of minorities in management positions, the MSPB Report shows 58 percent of APAs have a bachelor or higher degrees when they started their Federal career, the highest percentage of bachelor's degree holders among Federal employees. The Report found that, among those surveyed -

- 21% said that APAs were subjected to discriminatory practices.
- 49% said that managers should consider the level of minority under-representation in the work unit as one of the important factors in making a selection to fill a vacancy.
- 42% said that they hit a glass ceiling at their grade level.
- 30% said that race or national origin discrimination was a major factor in their non-selection for a recent promotion.
- From 1978-1995, APA representation in professional jobs in the government increased from 1.9% of the workforce to 6.1%. This is in line with the growth of APA professional workforce

in the nation. In the same period, APA merely increased their representation in executive positions from 0.4% to 1.3%.

- In professional positions at grades 14 and 15, APAs received substantially fewer cash awards than Whites, while in lower grade levels (for both professional and administrative positions), the award rates for APA and Whites are comparable.

A recent study at one science-based agency showed that only 11.5% of APA employees received outstanding rating while 45.3% of Whites did. Such difference in rating limit the potential of APA employees in receiving choice assignments and ~~increase~~ decrease the likelihood of retaining their jobs in the event of a reduction-in-force. The same study showed that APAs have not been targeted for leadership or management training, despite the fact that they were often rated as lacking in leadership skills. Being discriminated against in performance rating, training, and award, most APAs find promotion and breaking the glass ceiling difficult.

Although not a part of the civil service, APAs in other governmental service are also being discriminated. As shown in Attachment C, the military service, protected by its own codes and unwritten rules, often created a "steel ceiling" for the APAs, as well as other minorities. As the government becomes smaller, there are more APAs who, as contract workers, perform government jobs on site, often under direct control of government managers. Those workers have no proper protection against discriminatory actions by government managers.

DISCUSSION AND RECOMMENDATIONS

Many people do not understand racial discrimination. Many just do not believe it is happening in today's world. So how can we educate them to know and to feel it? Awareness training is one way. Through the years, some training has been done but more is needed.

Since most EEO offices report to top personnel managers within an agency, their function are perceived as pro-management. Thus, it is not helpful to employees that face discrimination

problems from their supervisors and managers. Because of this and the fact that it is difficult to measure or prove subtle discrimination, the EEO process has been overloaded over the years to such a degree that many people give up hope for a quick solution to their complaints. Ways must be found to reform the EEO process, and to eliminate fundamental conflicts of interest within the process. We recommend the following changes to make the EEO program more effective.

Federal Agency

- Each agency should establish an Employment Dispute/Complaint Center with the state-of-the-art conciliation programs where employees can stop by and get counseling on an informal level.
- Agency must demonstrate a good faith effort to resolve the complaint before it goes formal to EEOC.
- the Agency EEO program plan should be revised with specific goals to meet the need for diversity. The program should include human relations training and recognition.
- EEO counselors should be trained properly in counseling and mediation. Training of counselors and management in EEO issue are critical to the success of this program.
- Management should be held accountable for their actions. Agencies should assess periodically where and against whom the EEO complaints are often directed, the reasons for these complaints and what can be done to solve the problem.
- Finally, almost every agency has issued statements regarding the future composition of their workforce. These "public declarations to do good" need to be enforced whenever a promotion or hiring opportunity arises in which a minority has applied, is highly-qualified, but was not selected.

EEOC and EEO Complaint Procedure

- Make more resources available to the EEOC. The EEOC must also improve its technical and management skills to accelerate the EEO processing period at EEOC.
- Revise, develop and screen criteria on who may file EEO complaints that will help guide the agencies to shorten the complaint process. Revise 29 CFR 1614 if needed.
- Consider whether EEOC should take over from the agencies the entire formal EEO complaint ~~compliant~~ process.

CONCLUSION

In his message to Asian Pacific Americans last May, President Clinton said, "Along with a vast array of skills, Americans of Asian and Pacific Island ancestry brought their remarkable traditions of hard work and respect for family and education to their new country. Their belief in the American Dream of equality and opportunity enabled them to face the challenges of adversity and discrimination and achieve a record of distinguished service in all fields, from academia to government, from business to the military, and medicine to the arts." The reforms we proposed, together with that of others, should help Federal employees who face the challenges of adversity and discrimination.

As the President has said, when times change, so government must change. We look forward to working with the subcommittee as we improve the equal employment opportunity program and discrimination complaint system for the new millennium.

Thank you, Mr. Chairman.

Biographical Summary

Dr. N. Thomas Tsai

Chair, Federal Asian Pacific American Council

Long active in the Asian Pacific American community, Dr. Tsai has served in many civic and professional groups. For instance, he has served as principal of a Chinese Language School, and Vice Chair of the Chinese American Professional Association in metropolitan Washington, D.C. area. A member of the Federal Asian Pacific American Council (FAPAC) since 1988, he has served in many capacities, such as Chair of the Bylaws Committee and the Conference Committee. As Chair of FAPAC, an organization representing federal Asian Pacific American employees in the civilian and military services, he has worked with the National Coalition for Equality in Public Service that includes the BIG, FEW and IMAGE.

He has worked for more than 23 years in the Federal government. He is now a senior research manager of the High-Speed Train Safety Program at the Federal Railroad Administration of the U.S. Department of Transportation. He has published over 50 technical papers and numerous articles in local Chinese newspapers. He has organized and chaired many technical conferences. He has represented the U.S. Government in official visits to Canada, China, Japan and several NATO countries.

He has a Ph.D. degree in Mechanical Engineering from the University of Rochester, Rochester, New York. He is a member of the American Society of Mechanical Engineers and Sigma Xi. He is married to the former Elizabeth R. Tan of the Philippines and has two children, Pearl and Andrew.

Attachment A

1997 FAPAC Conference Report

Introduction The Federal Asian Pacific American Council (FAPAC), an inter-agency organization of Asian Pacific American (APA) employees in the federal government, held its 12th Congressional Seminar and National Leadership Training Conference on May 5-8, 1997. The theme of the conference was ***Asian Pacific American United: One Vision, One Mission and One Voice.*** About four hundred people from over one hundred federal agencies, civil right organizations, and Congressional offices attended the Conference, the largest gathering of Asian Pacific American federal employees. In addition, sixteen agencies participated in a successful job fair in Rockville, Maryland. The Congressional Seminar took place at Room G-50, Senate Dirksen Building on May 5, the National Leadership Training Conference took place at the Doubletree Hotel in Rockville, Maryland on May 6-8, 1997. The conference was co-sponsored by the Congressional Asian Pacific American Caucus, the Asian American Government Executive Network (AAGEN), The Conference on Asian Pacific American Leadership (CAPAL), the Asian Pacific American Network in Agriculture (APANA), the National Association of Professional Asian American Women (NAPAW), and the Asian Pacific American Heritage Council (APAHC). This report summarizes the major activities at the Conference.

Congressional Seminar: Mr. Fredrick Pang, Assistant Secretary of Defense, the highest ranking APA official, gave the opening remark and Mr. Daniel Goldin, Administrator, NASA gave the keynote speech at the Congressional Seminar. An award was presented to Mr. John Dalton, Secretary of the Navy, for his leadership role in making Navy the leading Department with most APA employees in both the civilian and military services. A panel presented by the CAPAL, addressed the concerns/issues of the 105th Congress that affect Federal employees. In an open forum on EEO issues, a panel of EEO directors provided guidance to our members. A third panel gave the tips on how to access Congress. In addition, several members of Congress presented their views on issues of interest to federal employees.

National Leadership Training Conference: There were seven plenary sessions and thirteen workshops in the Conference. The major topics were: Affirmative Action, APAs in the Military Service, APA Women in the Workplace, Health Issues, Alternative Dispute Resolution , Strategies for Success, Mentoring, Organizational Skills, Information Technology, Public Speaking, Shedding the Immigrant Image, Coalition with APA employees and with other minorities. Issues of FAPAC directions were also discussed. Highlights are presented here:

Affirmative Action: A series of plenary sessions and workshops were devoted to affirmative action, the most significant employment issue affecting APAs and other minorities in the workplace. There

are about 120,000 APAs in the government. Although affirmative action in practice has been marginally helpful to APAs, there are tools that FAPAC (and other APA groups) can use to make significant impact. The following is a list of conference recommendations:

1. Use statistical workforce data to focus on a specific agency(s) where APA are under-represented..
2. Get appropriate buy-in from APA supporters and allies.
3. FAPAC initiates meeting with the head of certain federal agency to resolve problems of APA under representation within a targeted job category.
4. Develop an MOU(s) that will commit FAPAC and the targeted federal agency(s) to work together to eliminate under representation, and
5. FAPAC provides a status report to the membership after 6 months.
6. EEO investigation currently done by agencies should be restored to EEOC.

Coalition Building: FAPAC has developed a strong coalition with other APA groups as well as other minorities and women employee groups in the government. Representatives of several national groups presented their views and programs at the Conference. Effective training programs were developed for this conference through the assistance of several coalition groups. To help our members, FAPAC will continue to work for a stronger coalition. Specific projects on political appointments and coalition development are needed.

APAs in the Military: As one of the initiatives of this conference, several members of the military service reviewed the current employment status of APAs in the military. Like the APAs in the civilian service of the government, the Glass Ceiling is also an issue in the military branches. Since one-third of the APAs are in the military services and there is no other representative voice, FAPAC will continue to serve as a forum to address this issue.

Mentoring Program: FAPAC has developed a mentoring program that relies on volunteers with mentors having multiple mentees. The FAPAC program is problem oriented with obtaining some resolution to the given problem as the primary factor. FAPAC will provide information via the webb site or e-mail on the following topics:

a. For an agency without a mentoring program, what is the mechanism and strategy for convincing the management to invest in such a project?

b. Techniques/hints for SES application. A synopsis of this should be passed on to the interested members.

c. A listing of FAPAC mentor volunteers is needed.

Conference Evaluation: On a scale of 1 to 5, with 1 being the best, the conference was rated between 1

and 2. Of the 106 Conference evaluations examined, 25 had a mean ranking of 1; 65 had a mean ranking of 2; 10 had a mean ranking of 3; 4 had a mean ranking of 4.

Agencies participating in the job fair:

1 U.S. Secret Service
2 Department of Veteran's Affair
3 US Agency for International Development
4 U.S. Postal Service
5 National Security Agency
6 Environment Protection Agency
7 National Science Foundation
8 U.S. Customs Service
9 Antheon Corporation
10 National Transportation and Safety Board
11 Department of Justice
12 U.S. Marshal Service
13 U.S. Department of Labor
14 Department of the Army
15 U.S. Immigration & Nationalization Service
16 U.S. Nuclear Regulatory Commission.
17. Bureau of Prisons (one day only)

Attachment B
APAs in the Federal Government

Civilian Agency	Total APAs	Percentage		Ave.Grade
Agriculture	2,600	2.3%	GS	8.8
Commerce	1,632	4.6		11.2
Air Force	5,318	3.0		8.9
Army	9,073	3.6		9.3
Navy	21,052	9.6		9.1
(Defense	40,991	5.2		8.9
Veterans Affair	15,921	6.3		9.8
Treasury	4,629	3.2		9.7
Transportation	1,790	2.8		11.7
State	511	3.4		10.8
Labor	369	2.4		10.2
Justice	2,996	2.7		9.2
Interior	951	1.3		9.5
HUD	333	2.9		10.9
HHS	2,603	4.7		10.7
Energy	6,709	3.7		12.4
Education	145	3.0		12.1
Other agencies				
NASA	891	4.6		12.8
etc				
Total	81,851	4.3		9.5
Military Services				
Air Force	8,023	2.1		
Army	11,514	2.4		
Navy	21,925	5.4		
others				
Total	44,743	3.1		

May 1997 Federal Asian Pacific American Council: from OPM and DoD, September 1996.

Attachment C

Asian Pacific Americans in NIH/Army/Navy

(Number of APAs/percentage of APAs in the workforce)

Grade	NIH Civilian	Army Civilian	Army military	Navy military	Navy Civilian
GO/SES	1/0.5	7/1.9	2/1.0	0	21/3.9
GS/15/O-6	44/4.7	83/2.8	69/1.9	48/1.5	103/2.9
GS/14/O-5	117/9.0	258/3.4	170/1.9	136/1.9	250/4.2
GS/13/O-4	76/5.9	790/4.0	240/1.8	272/2.5	1235/6.4
GS-12/O-3	94/6.0	1745/5.1	730/3.1	686/3.4	3166/8.2
GS-11/O-2	111/8.3	1071/3.8	300/3.6	252/3.8	2063/8.6
GS-10/O-1	14/4.3	119/5.2	367/4.0	333/5.0	138/7.6
GS-09	49/5.8	831/4.1			1096/7.9
GS-08	18/2.8	75/2.1			141/6.2
GS-07	62/4.5	634/3.4			1319/10.0
GS-06	20/3.1	432/3.1			976/9.2
GS-05	24/6.4	920/3.8			1696/10.7
GS-04	3/2.6	616/4.2			867/10.9
GS-03	1/4.8	110/3.7			173/8.9
Subtotal		7703/4.0	1880/2.8	1728/3.1	13327/8.4
W.O.			214/1.8	60/2.9	
EN/wage	67/3.9	1336/2.3	9420/2.4	20137/5.7	7568/13.3
TOTAL	701/5.5	9073/3.6	11514/2.4	21925/5.4	21052/9.6

Mr. PAPPAS. Thank you very much, Mr. Tsai.

We will now move to our fourth panelist. For those of you who are standing, there are a few seats over here on this side of the room, if you are interested.

Our next panelist is Dorothy Nelms, president of the Federally Employed Women, Inc. You are recognized, Ms. Nelms.

Ms. NELMS. Good morning, Mr. Vice Chairman. First, let me thank you again for convening this hearing. I think it is overdue; I think it is timely, and I think it has the possibility of doing some really great things for the Federal worker.

I am the national president of Federally Employed Women, an organization which represents over 1 million women who are employed in the civilian or military capacity or retired from the Federal Government. We were founded in 1968 with the expressed purpose of ending sex discrimination and enhancing career opportunities for women. It is ironic today to remember that it was just 25 years ago this year the Equal Employment Opportunity Act amended the 1964 Civil Rights Act and brought the Federal Government under the provisions of the civil rights law.

Many Federal workers at that time, including myself, who were working for the Federal Government at that time, looked upon this with great joy. We thought that great things would happen with the largest employer in the world, now that we had a recourse for the discrimination we felt we had been feeling for these many years. Unfortunately, there were also some cynics who felt that perhaps nothing would change after all. It is an awful thing to say 25 years later, but it looks like the cynics were right. We would not be having this hearing if the cynics did not have a point. It looks like the largest employer in the country has failed to establish itself as a model, has failed to establish a model work place, and has allowed rampant discrimination to continue. [Applause.]

Our testimony today will focus on women in the Federal Government. We also have to urge you to remember that women transcend all of the groups you have heard from today, and, as a matter of fact, we earn less than the men in every one of those groups.

If you look at where women are in the Federal Government, we represent 42.9 percent of the work force, with Hispanic women being the most severely underrepresented. But if you look at where we are in occupation distribution, there are some astounding facts. We have a firm hold and grip on all those grades from GS–1 to GS–8. And 72 percent of all women are in those grades. You have a total flip-flop as you start up the ladder. And the percentages go down. Forty-two percent of all women are in grades 9 to 12, 25 percent in grades 13 to 15, and 19 percent in the senior executive service [SES].

One cannot conclude that all of this is caused by discrimination. We have to look at some various factors that have been lifted that could shed further light on this.

First of all, there have been some studies by the Merit Systems Protection Board, "The Glass Ceiling Study" among them, to show that discrimination and barriers to the advancement of women exist; that these barriers are severe; that in the last number of years they have not changed; that if these barriers are not removed, it will be 25 more years before women have a significant

part in the management of the Federal Government, because they will occupy a significant number of SES positions at that time.

Evidence of discrimination abounds. First of all, you look at the number of complaints we have had about discrimination rising every year by about 25,000 to 30,000. We get testimony from many witnesses at congressional hearings about the atrocities and the horrors they have undergone in terms of discrimination, both from sex discrimination and sexual harassment. Then we also talk about reprisals, because that constitutes a big part of discrimination complaints. Management takes it out on employees who have chosen to exercise their right of saying, "I want to be treated fairly." [Applause.]

As advocacy groups, I'm sure each of us has received hundreds of phone calls from individuals in the Federal Government who are undergoing discrimination complaints, who are complaining primarily of how these complaints are being handled, and most of all, about the length of time that it takes to process their complaints. [Applause.]

And abounding above all that is the unspoken thought that the Government owns the process, and we don't have a chance.

We have studies of the Merit Systems Protection Board and other Government bodies to support that discrimination abounds. But if you look at discrimination, you need to look at two sides of it. We can just assume it's there and that it's going to continue or we can talk about what are those things that we need to do to prevent discrimination, and it's just as important to focus on prevention as it is to focus on how do we handle the complaints that we have.

And I think when we talk about prevention, we can talk about two things. One, that some Federal agencies are very seriously embracing cultural diversity and managing diversity issues. We think that those should be given very strong emphasis, so that we can unlearn some of the prejudices many of us have had—those prejudices that have influenced managerial decisions.

We also see a need for training of equal opportunity staff—as well as managers, supervisors, and employees—on what the law is; what it's supposed to do; what their responsibilities are under the law; what employees' rights are under the law.

Then, second, in talking about what we have, we need to address some problems with the complaints-processing system. They have been pointed out by persons more eloquent than I, members of your respective committee, and other persons that have testified. The process is flawed. It's apparent to us every day as we talk to people who said, "It's been a year since somebody even spoke to me about my complaint." The process is supposed to be set up so you don't need an attorney until you're almost through the process. Most people think immediately they have to have an attorney, and they're responsible for paying this attorney, and having to pay an attorney certainly limits the amount of protection you can get for yourself.

We firmly believe that the complaints-processing system has to be taken care of, and we have some recommendations. One is, as Ms. Norton pointed out, the inherent conflict of interest that exists because agencies have to review themselves and make the first de-

cision about whether or not they've discriminated against somebody.

It's also noted that when EEOC has a chance to get a hearing, the first outside look at a claim, the agency can take that hearing and decide whether they want to use it or not.

Delays in processing are inexcusable. We have regulations which require agencies to stick to certain time limits. There is nothing in these regulations to give agencies an incentive and there is no accountability if they don't stick to these time limits. People are left waiting, waiting, waiting for their complaints to be processed.

Our recommendations are there should be some accountability; that there should be more funding from EEOC. We don't recommend blindly putting money into EEOC; we're recommending seeing that that money is used for training people to process complaints and reducing the backlog of complaints. [Applause.]

We are very much in favor—we are in favor of the Federal Employees Fairness Act, and we commend Mr. Martinez and Ms. Norton for bringing it back, and our organization supports it. We look forward to working with this committee and offer the help of our organization in doing anything that can help to turn around this situation we currently see.

Thank you for this opportunity to testify today. [Applause.]

[The prepared statement of Ms. Nelms follows:]

TESTIMONY OF DOROTHY E. NELMS, PRESIDENT
FEDERALLY EMPLOYED WOMEN, INC.

SEPTEMBER 10, 1997

HEARING OF THE
HOUSE GOVERNMENT REFORM AND OVERSIGHT COMMITTEE,
SUBCOMMITTEE ON CIVIL SERVICE

REGARDING
EMPLOYMENT DISCRIMINATION IN THE FEDERAL WORKPLACE

Chairman Mica, distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Dorothy Nelms, President of Federally Employed Women (FEW). FEW is a non-profit, non-partisan membership organization representing over one million women employed by or retired from the federal government throughout the world. Founded in 1968, FEW actively works to eliminate sex discrimination and enhance the career potential of civilian and military women working in the federal sector. FEW is firmly committed to the principle that every employee has the right to work in an environment that allows individuals to perform at their best and that is free from artificial barriers to selection and advancement.

There is no question that discrimination impedes productivity, displaces experienced workers, and seriously thwarts the advancement of equal employment opportunities for women, the disabled, and ethnic minorities in the federal sector.

FEW's testimony will present data on women's overall representation in the federal workforce, employees experiences of discrimination, existing barriers to preventing and resolving complaints of discrimination in an effective manner, and, finally, FEW's recommendations for how the federal government can better fulfill its promise of equal opportunity for all workers.

I. REPRESENTATION OF WOMEN IN THE FEDERAL WORKFORCE

Despite significant gains over the last decade in women's employment in the federal government, women of all ethnic backgrounds continue to face barriers to employment and advancement, especially in professional and administrative occupations and at higher grade levels. While women's under-representation, compared to the civilian labor force or to other groups of federal workers, does not necessarily indicate overt discrimination, it does indicate a need for particular management attention that is unlikely to occur in agencies in which overt discrimination is rampant and unchecked.

Overall Representation

In FY 1996, women in the federal government were underrepresented compared to women in the civilian labor force, at 42.9 percent versus 46.1 percent. While they were fully represented in 23 of 41 federal executive departments and independent agencies with 500 or more employees, they remained underrepresented in 17.[1]

[1] OPM, Office of Diversity, *FEORP Report*, FY 1996, p. 3, 6.

Considering women's employment statistics categorized by race and ethnic group reveals further underrepresentation.

- Hispanic women were the most severely underrepresented group among all federal employees. In FY 1996, they were only 2.4 percent of the total federal workforce, 40 percent of federally employed Hispanics, and 56 percent of their percentage in the civilian workforce, Further, although the federal government is hiring Hispanic women at a higher rate than it is losing them, they are still only being hired at 60 percent of their representation in the civilian labor force.[2]

- Asian/Pacific Islander women in the federal workforce were represented in equal proportion to their representation in the civilian labor force; however, they were underrepresented compared to Asian/Pacific Islander men, as 40 percent of all employees of their ethnic group.[3]

- Non-minority women were also underrepresented, at 80 percent of their representation in the civilian labor force and as 35.1 percent of all federally employed non-minorities. They are leaving the federal government at a higher rate than they are beginning employment, and that new hire rate is only 71 percent of their overall representation in the civilian workforce.[4]

- In FY 1995, only 6.1 percent of the federal workforce were women with disabilities compared to 8.5 percent of men with disabilities.[5] Compared to disabled men, disabled women are represented at an even lower proportion than the overall proportions of federally employed women to men.

Occupational Distribution

Examining occupational distribution is important to understanding women's and minorities' progress and opportunities for advancement; generally, only those employees in professional or administrative occupations advance beyond GS12 into the promotional pipeline to become managers or executives.[6] Women still face significant barriers to career advancement at senior levels and in male dominated fields.

- In FY 1996, women comprised 84.6 percent of all clerical employees and 61.1 percent of all technical employees. However, as only 41.8 percent of administrative employees, 31.2 percent of professional employees, and 9.3 percent of blue collar employees.[7]

Grade Distribution

Projections by the Merit Systems Protection Board (MSPB) in its 1992 report on the glass ceiling indicate that, unless the federal government takes conscious remedial measures to remove artificial barriers to women's advancement, "women will continue to represent less than one-third

[2] OPM, Office of Diversity, *FEORP*, FY 1996, p. 20, 56.
[3] OPM, Office of Diversity, *FEORP*, FY 1996, p. 30, 56.
[4] OPM, Office of Diversity, *FEORP*, FY 1996, p. 56.
[5] OPM, Office of Diversity, *Women in the Federal Government*; FY 1995, p. ii.
[6] MSPB, *A Question of Equity*, 1992, p. 7.
[7] OPM, Office of Diversity, *FEORP*, FY 1996, p. 6, 52.

of the Government's senior executives 25 years into the future. As long as women are in the minority in top-level jobs, stereotypes that limit their effectiveness and make it more difficult for them to advance are likely to remain in force."[8]

- Women remain overwhelmingly concentrated at lower grades. In FY 1996, women held 72.4 percent of GS 1-4, 71.3 percent of GS 5-8, 42.2 percent of GS 9-12, and only 25.4 percent of GS 13-15 and 19.9 percent of SES positions.[9]

- A 1995 GAO study of positions classified and graded under the Factor Evaluation System (FES) concludes: "occupations with high female representation were 1.77 times more likely to be undergraded...compared with occupations having a low or medium female representation."[10]

- Minority women are more severely underrepresented at high grade levels than non-minority women, a difference that "cannot be accounted for either by qualifications or by gender alone."[11] For example, in FY 1996, in comparison to non-minority women, who were 16.0 percent of all GS 15 employees, Black women were only 2.0 percent, while Hispanic women were .6 percent, Asian Pacific Islander women were 1.4 percent, and Native American women were .2 percent.[12]

Promotions and Opportunities for Advancement

Despite gains in the rate of women's promotions, according to the MSPB's glass ceiling report, "women have not been treated equitably with regard to promotions during their federal careers."[13] Taking length of government service and educational differences into account, women are still more likely to work at lower grades than men and to receive fewer promotions over the course of their careers.[14]

- Although women of all ethnic groups are receiving promotions in high proportion to their total representation in the federal workforce, Hispanic and non-minority women are still being promoted at lower rates than Hispanic and non-minority men, respectively.

- Women are promoted at a lower rate than men at GS 9 and GS 11, which are critical points in the promotion pipeline.[15] From 1988-1990, men were "promoted at a rate nearly 33 percent greater than women at the GS 9 level, and 44 percent greater than women at the GS 11 level."[16]

- According to the MSPB glass ceiling report, minority women face a "double disadvantage";

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[8] MSPB, *A Question of Equity*, 1992, p. 38.
[9] OPM, Office of Diversity, *FEORP*, p. 53.
[10] GAO, *Federal Job Classification; Comparison of Job Content with Grades Assigned in Selected Occupations*, 1995, p. 9.
[11] MSPB, *A Question of Equity*, 1992, p. 34.
[12] OPM, Central Personnel Data File, 30 September 1996.
[13] MSPB, *A Question of Equity*, 1992, p. 14.
[14] MSPB, *A Question of Equity*, 1992, p. 15.
[15] MSPB, *A Question of Equity*, 1992, p. 4.
[16] MSPB, *A Question of Equity*, 1992, p. 12.

"minority women currently in grades GS 9 and above have been, on average, promoted less often than non-minority women with the same qualifications."[17]

- Within the agencies responding to the Office of Personnel Management (OPM)'s Federal Equal Opportunity Recruitment Program (FEORP) survey for FY 1996, women comprised only 35.8 percent of those employees participating in agencies' formal career development programs in preparation for higher-level management or executive positions, and they were only 38.8 percent of participants in government-wide leadership programs such as the Executive Potential Program.

II. FEDERAL EMPLOYEES' EXPERIENCE OF DISCRIMINATION

Evidence of discrimination in the federal workplace abounds, from the thousands of formal EEO complaints, to the testimony of scores of witnesses at congressional hearings, to the hundreds of personal accounts and pleas for assistance that advocacy groups like FEW receive, to the studies published by the MSPB, GAO, and other government bodies. Evidence of federal employees' personal experiences with discrimination and retaliation stand in stark contrast to the stereotype of federal employees as "aggressive participants in an EEO system that allows or even encourages frivolous, groundless complaints." In fact, the common thread to many employees' stories is that they file formal complaints *despite* the difficulties and hardships of the complaints process, because their situations have become intolerable and, as one caller to FEW said, "things can't get much worse."

Other groups here today have focused specifically on discrimination based on race, ethnicity, and national origin. I would like to focus on sex-based discrimination, including pay inequity, sexual harassment, and some of the persistent stereotypes that block women's career advancement. I would also like to focus on reprisal, which is perhaps the most pernicious form of discrimination in that it unlawfully punishes simply because individuals exercise their right to seek redress.

For every worker who experiences discrimination, there may be several others who suffer the broader effects of a hostile working environment. When one worker steps forward with a complaint of discrimination, it often indicates a subtle or even overt climate of discrimination within the agency and tolerance for discrimination that serves to undermine productivity, commitment to merit principles, and faith in the government's commitment to equal opportunity. When one employee is courageous enough to attempt to seek redress, and agencies, at any level, meet those attempts with stonewalling, intimidation, obstruction, delays, or mishandling, it can not only demoralize the survivor of discrimination, it can demoralize the entire work team.

The case of Dr. Margaret P. Fowler, a civilian doctor of veterinary medicine for the Army who filed two EEO complaints of sexual harassment and a subsequent charge of retaliation, speaks poignantly to the issue:

> I am very disillusioned with the military and the government....I just had no idea that the lying would go on to cover up....I was naïve [coming from a private veterinary practice]. I thought if you're good at what you do and treat people well, you'll do well. That's just not the way it is....There's just no accountability.

[17] MSPB, *A Question of Equity*, 1992, p. x.

Despite the Army's finding that Dr. Fowler did suffer reprisal, she dropped all of her complaints in the hopes of improving her situation, after several years of delays and ongoing harassment. She is now reduced to zero hours, blackballed as a troublemaker, and psychologically and "physically damaged" from stress.

Equal Pay Violations

Although the federal government's published pay structure mitigates wage discrimination in comparison to its incidence in the private sector, in FY 1995, there were 91 complaints of Equal Pay Act violations.

For example, a recent case filed by eighteen female custodians against the Architect of the Capitol charges that women custodians are not paid as much as male laborers, although they share most of the same responsibilities. The female custodians point out that, while the top pay for custodians, who are 97.7 percent women, is $9.90 an hour, laborers, who are mostly men, earn a maximum of $10.77 an hour. These custodians, due to recent downsizing, are performing the same jobs as laborers in addition to their normal routines.[18]

Women facing gender-based wage discrimination must work harder and longer to earn the same pay that men earn, despite performing the same work.

Sexual Harassment

In FY 1995, 1,390, or 2.9 percent, of all complaints filed with the EEOC were based on sexual harassment.[19] However, evidence suggests that federal workers experience such discrimination at far higher rates. In 1994, 44 percent of women and 19 percent of men working in the federal government and responding to an MSPB survey reported that they had experienced some form of unwanted sexual attention during the preceding two years. The incidence of sexual harassment has not decreased significantly since the MSPB's 1988 report, despite widespread employee awareness programs on what constitutes sexual harassment and official efforts by federal agencies to institute anti-harassment programs.[20]

Sexual harassment affects both the direct targets of harassment and their coworkers. It creates a chilling climate of intimidation, fear, and mistrust. Women and men who know that an employee has harassed others will often go to extraordinary lengths to avoid working with the harasser, transferring out of a department, turning down new projects, or missing other important opportunities to participate in workplace teams.

Contrary to the popular misconception that employees lodge many sexual harassment complaints as retaliatory gestures against managers and co-workers, according to the American Psychological Association (APA), research shows that less than one percent of sexual harassment complaints are false. In fact, victims of sexual harassment rarely file complaints even when they are justified in doing so because of the continuing stigma, time, and threat of reprisal.[21]

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[18] *Federal Times*, 12/30/97.

[19] EEOC, *Federal Sector Report*, FY 1995, p. 32.

[20] MSPB, *Sexual Harassment in the Federal Workplace*, 1995, p. viii.

[21] American Psychological Association, "Sexual Harassment: Myths and Realities."

Some people may dismiss as "oversensitive" employees who report incidents of sexual harassment, such as looks/gestures, pressure for dates, letters, calls, jokes, and remarks, labeling the incidents as "minor" or "less serious" behavior that women should grin and bear. Nevertheless, even when the MSPB excluded this unlawful behavior from its calculations of sexual harassment incidence rates, it still found that 38 percent of women and 15 percent of men reported experiencing sexual harassment.

Stereotyping, Prejudice, and Blocked Opportunities for Advancement

Workforce representation statistics and formal complaints represent only one measurement of discrimination and agency actions to foster or hinder equal employment opportunity. For every employee who files such a complaint, there are many others who report experiencing discrimination but who do not file charges.

Among women and minority men, there are widespread perceptions that the federal workplace is not a level playing field. This indicates that efforts to eliminate discrimination must reach well beyond reforming the formal complaint process. Gaps between the perceptions of women and men and between minorities and non-minorities indicate that many managers and workers are still reluctant to take the first step in eliminating discrimination by acknowledging its existence.

Agencies must reaffirm their dual commitments to hiring and promotion based on merit principles and to consciously seeking out qualified employees of all backgrounds, especially those who are currently underrepresented. Only when women and minorities are significantly represented among agencies and department leadership, managers, and supervisors will the federal government have the capacity and willingness to confront discrimination and to hold all employees responsible for their behavior.

- According to the MSPB's glass ceiling report, 55 percent of women and only 9 percent of men surveyed believed that, "A woman must perform better than a man to be promoted.[22]

- More than half of both minority women (60 percent) and non-minority women (51 percent) disagreed with the statement: "men and women are respected equally."[23]

- According to the MSPB's glass ceiling report, "Women receive performance appraisals that are as good or better than men's, and women surveyed expressed just as much commitment to their jobs and career advancement as men. However, there is evidence to suggest that women are often *perceived* to be less committed to their jobs than men. Particularly susceptible to this misperception are women in the first 5 years of their careers and, throughout their careers, women with children, who are promoted at an even lower rate than women without children."[24]

- "A significant minority of women in grades GS 9 and above believe they often encounter stereotypes that cast doubts on their competence, and that attribute their advancement to

[22] MSPB, *A Question of Equity*, 1992, p. 31.
[23] MSPB, *A Question of Equity*, 1992, p. 35.
[24] MSPB, *A Question of Equity*, 1992, p. x.

factors other than their qualifications."[25]

- A majority of minority women felt that they "face extra obstacles in their careers because they are both minority and female," with 71 percent of African American women, 64 percent of Hispanic women, 47 of Asian/Pacific Islander women, and 54 percent of Native American women agreeing with the statement. White men and women, however, agreed only at 17 and 32 percent.[26]

Reprisal

Following the leading number of EEO complaints of race and national origin, reprisal was the next largest basis for federal EEO complaints, with 11,230 complaints, or 21.8 percent, filed in FY 1995.[27] When workers face reprisal for filing complaints, it exacerbates the hostility of the workplace environment and tacitly supports discrimination and the attitudes that perpetuate it. Reprisal discourages both informally mediated and formally adjudicated settlement and redress of discrimination since employees are often too intimidated to initiate or continue with the complaints process. Reprisal also serves to discourage workers from "getting involved" or "making waves" by contributing to investigations or supporting colleagues who file complaints.

- The MSPB's 1995 report on sexual harassment documents that, for almost half of those employees who filed a grievance or adverse action appeal regarding sexual harassment, taking action made their situations worse.[28]

III. BARRIERS TO PREVENTING, ADDRESSING, AND ELIMINATING DISCRIMINATION

This section documents some of the existing barriers to preventing and eliminating discrimination including: lack of management commitment to upholding civil rights; lack of employee confidence in the system; the need for reform in the federal EEO redress process; and inadequate collection and dissemination of data on discrimination

Lack of Management Commitment to Upholding Civil Rights

Unfortunately, there seems to be a government-wide disparity between employee and employer perceptions both of agencies' willingness to confront sexual harassment and other forms of discrimination and of their effectiveness in doing so. While most agencies profess a zero tolerance policy for discrimination, employees rarely express great faith in agencies' adherence to stated policy. Agencies often address employees concerns by stonewalling and measure the success of their civil right enforcement by the existence of official policies, rather than by a decrease in employees' experiences of discrimination or by their confidence that agencies will punish proven discriminators.

For example, according to a 1988 MSPB report on sexual harassment:

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[25] MSPB, *A Question of Equity*, 1992, p. x.
[26] MSPB, *Fair & Equitable Treatment*, 1996, p. 42.
[27] EEOC, *Federal Sector Report*, FY 1995, p. 24.
[28] MSPB, *Sexual Harassment in the Federal Workplace*, 1995, p. 34.

- Although 100 percent of agencies reported taking swift action to investigate complaints of sexual harassment, only 32 percent of employees shared this perception.[29]

- Although 82 percent of agencies reported enforcing penalties against harassers, only 27 percent of workers thought harassers were punished.[30]

- Although 59 percent of agencies reported enforcing penalties against managers who perpetrated or tolerated harassment, only 18 percent of employees agreed.[31]

- Although 85 percent of agencies reported that their disciplinary actions against managers were effective, only 65 percent of employees shared that perception.[32]

A 1997 report on civil rights in the Department of Agriculture (USDA) also illustrates this point well.

- Although the USDA has a long, well-documented history of rampant discrimination and an official commitment to addressing institutional causes of discrimination and to holding all managers accountable for their actions, USDA employees report that managers remain reluctant to confront discrimination. They further report that "many of the agency's managers lack the skills and training necessary for managing a diverse workforce."[33]

- Although managers are supposed to use affirmative employment plans to help set goals and measure their success, most disregard them when make hiring, promotion, and other employment decisions.[34]

- The USDA, like many agencies, spends less than one percent of its staff and budgetary resources on civil rights enforcement.[35]

Continuing disparity between agency and employee reports of the incidence of discrimination and their handling of it indicate that agencies fail to take their equal employment policies seriously and that oversight of civil rights enforcement must go beyond the official story to determine how well the policies actually work for the betterment of federal employment.

Lack of Employee Confidence in the System

Employees must have confidence that their agencies are committed to and effective at confronting, punishing, and eliminating discrimination, or they will be reluctant to come forward with complaints. Those who experience discrimination will endure, rather than report, it, and those who violate civil rights law and EEO policy will feel emboldened to initiate or continue their behavior because they know they can "get away with it."

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[29] MSPB, *Sexual Harassment in the Federal Government*, 1988, p. 34.
[30] MSPB, *Sexual Harassment in the Federal Government*, 1988, p. 34.
[31] MSPB, *Sexual Harassment in the Federal Government*, 1988, p. 34.
[32] MSPB, *Sexual Harassment in the Federal Government*, 1988, p. 37.
[33] USDA, *Civil Rights at the U.S. Department of Agriculture*, 1997, p. 9.
[34] USDA, *Civil Rights at the U.S. Department of Agriculture*, 1997, p. 10.
[35] USDA, *Civil Rights at the U.S. Department of Agriculture*, 1997, p. 12

For example, government-wide, a significant percentage of survivors of sexual harassment decided not to take formal action because they lacked confidence in their agencies' willingness to support them or to follow-up appropriately on their complaints. Of those employees:

- 20 percent thought nothing would be done;
- 17 percent feared reprisal; and
- 8 percent feared they would not be believed and 9 percent feared they would be blamed for the incidents.[36]

The 1996 MSPB report on minority employment in the federal government echoes the findings above:

- Only 43 percent of all employees surveyed agreed that supervisors who discriminate receive appropriately strong punishment, and, among minority employees, only 20 percent of African American, 31 percent of Hispanic, 32 percent of Asian/Pacific Islander, and 33 percent of Native American employees agreed.
- Only 34 percent of all employees believed that actions filed charging race/national origin discrimination would be resolved in a fair and just manner.[37]

Many federal workers harbor deep mistrust and fear of the formal complaint process and do not seem to make allegations of discrimination lightly.

- Government-wide, 17 percent of survivors of sexual harassment chose not to take formal action because they did not want to hurt the perpetrator of the harassment, and 29 percent thought it would make their work situations more unpleasant.[38] Only 6 percent of victims reported taking formal action.[39]
- Only 12 percent of employees who believed they have experienced race or national origin discrimination reported filing a complaint. Fifty percent of those who chose not to file cited fear of retaliation; 40 percent felt that filing a complain was not worth the effort; and 37 percent felt they would not get a fair hearing.[40]

No matter how effective agencies think their policies are, if employees do not perceive them to work, the policies will neither have the deterrent nor the remedial effects they are intended to have.

The Need for Reform in the Federal EEO Redress System

FEW fields scores of phone calls each year from women who complain that they are not only unduly burdened by the unlawful acts of discrimination perpetrated against them, but also by

[36] MSPB, *Sexual Harassment in the Federal Workplace*, 1995, p. 35
[37] MSPB, *Fair & Equitable Treatment*, 1996, p. 58.
[38] MSPB, *Sexual Harassment in the Federal Workforce*, 1995, p.35.
[39] MSPB, *Sexual Harassment in the Federal Workforce*, 1995, p.33.
[40] MSPB, *Fair & Equitable Treatment*, 1996, p. 59.

obstacles to relief posed by the defective and demoralizing federal EEO complaints process itself. Lengthy delays, inherent conflicts of interest, inadequate counseling and investigative processes, and the absence of real enforcement authority on the part of the EEOC are just some of the obstacles that undermine federal employees' confidence in the system and, all too often, cause them to abandon or avoid the process altogether.

1. According to the EEOC's most recent report on federal sector complaints processing and appeals for FY 1995, the EEOC continues to carry an enormous backlog of cases, and resolution of complaints takes an inordinate amount of time. Although there are specified deadlines, there are no real incentives for agencies to comply with them and inadequate resources for the EEOC to discharge its responsibilities in a reasonable time period.

- At the beginning of FY 1995, there were 25,072 EEO complaints filed by federal employees. At the end of the fiscal year, 27,472 new complaints had been filed and 30,682 complaints remained open.[41]

- Average processing time was 305 days for all types of resolutions and 489 days for merit decisions in FY 1995.[42]

- 39 percent of all cases were pending at the investigation stage, which federal agencies currently control.[43]

- EEOC administrative judges resolved 9,324 cases, with an average processing time of 187 days. In the same year, the EEOC received 10,515 requests for hearings.[44]

We, at FEW receive numerous complaints each month from women who have had EEO cases pending for several years.

2. It is fundamentally unfair and ineffective for agencies to investigate and adjudicate EEO claims against themselves.

- Although agencies contracted-out 65 percent of all or part of their EEO investigations during FY 1995,[45] they continued to hold responsibility for supervising those contractors, maintaining the inherent conflict of interest in the investigation process.

- EEO counselors or investigators, who are ultimately responsible to agency supervisors and directors, may fear retaliation. EEO staff do not often have full management support for their EEO work and are under extreme pressure to encourage complainants to reach a quick, quiet, informal settlement of their claims.

- Agencies that approach discrimination claims with impartiality would be expected to treat these findings of discrimination and non-discrimination alike, rejecting and accepting

[41] EEOC, *Federal Sector Report*, FY 1995, p. 1.
[42] EEOC, *Federal Sector Report*, FY 1995, p. 2.
[43] EEOC, *Federal Sector Report*, FY 1995, p. 3.
[44] EEOC, *Federal Sector Report*, FY 1995, p. 3.
[45] EEOC, *Federal Sector Report*, FY 1995, p. 2.

them with comparable frequency. The reality, however, falls far short of this expectation. In FY 1995, agencies accepted 45 percent of the recommended findings of discrimination and 97 percent of the recommended findings of no discrimination.[46] Agencies appear more than twice as likely to accept findings in their favor as findings against them.

3. Agencies do not allocate sufficient resources to train and support staff to adequately counsel complainants or to investigate and resolve EEO cases in a timely or complete manner.

- Collateral duty counselors accounted for 80 percent of all EEO counselors in the federal sector.[47]

- The factual records compiled by the agency-conducted investigations, while voluminous, often omit information that is critical to the full and fair adjudication of EEO claims.

- Complainants often cite counselors' incomplete explanation of the process and of their rights as complainants as barriers to pursuing their EEO process effectively.

- Complainants often cite lack of knowledge about the progress of agency investigations counselors'/investigators' lack of discretion and respect for confidentiality as major contributions to their frustration, stress, and decreased productivity.

4. Forty-five days is not sufficient time for employees to initiate the EEO process.

5. Administrative judges have limited authority to compel witnesses' attendance at hearings, to enforce time limits, or to hold agencies accountable for incomplete investigations.

6. Agencies are reluctant to punish managers who are proven to have perpetrated acts of discrimination. Too often, employees who commit discrimination do so with impunity, retaining their employment and sometimes reaping promotions or desirable transfers instead of punishment for illegal conduct.

Inadequate Collection and Dissemination of Data on Discrimination

Data on EEO complaints and employee representation across grades and occupational categories should be disaggregated by race and gender; women of color often face double discrimination. To categorize all women together masks differences between women, positive and negative, based on race, ethnicity, or national origin, just as classifying men and women together within ethnic groups masks gender differences.

When agencies deal with financial resources, they expect to have full financial disclosure from their managers to know where they are and where they need to be. Similarly, dealing with human resources, good management requires the same emphasis on real numbers with sufficient detail to make an appropriate analysis. For example:

- Available EEO data does not address special problems women may face in resolving their complaints, such as the possibility that agencies reject cases based on sexual harassment

[46] EEOC, *Federal Sector Report*, FY 1995, p. 3.
[47] EEOC, *Federal Sector Report*, FY 1995, p. 1.

at a higher rate than cases charging other forms of discrimination.

- Public EEO data does not specifically address complaints that involve both race and gender discrimination.

- The annual Federal Equal Opportunity Recruitment Program (FEORP) report does not, in general, break down its statistics by both race and gender, leaving readers to extrapolate how women of color are progressing in comparison to non-minority women and minority men.

- Focus groups and surveys do not always adequately address stereotypes, prejudices, and discriminatory behavior directed at specific ethnic groups of women or men.

- Although discrimination based on sexual orientation is a prohibited personnel practice, no public data exists about the extent to which federal employees experience discrimination based on real or perceived sexual orientation.

IV. RECOMMENDATIONS

1. Strengthen Affirmative Employment Programs and Manager Accountability for Achieving Equal Opportunity Goals

All recent reports on discrimination and on women's and minorities representation in the federal government recommend more consistent implementation of programs that foster merit-based selection and promotion of workers who are fully representative of the nation's diverse population. Only when all workers are allowed the opportunity to demonstrate their abilities, without the barrier of discrimination and stereotyping, will the federal government effectively take advantage of its full human resources to serve the public with sensitivity, creativity, and dedication.

Seeking out qualified women and minorities for supervisory and leadership roles would also go a long way toward alleviating the mistrust that employees feel toward management and increasing confidence that coworkers and supervisors alike would be sensitive in dealing with complaints.

2. Collect, by Gender and by Ethnicity, Survey and Statistical Data on Employees' Perceptions and Experiences of Discrimination

Both the MSPB's most recent report on sexual harassment and its report on minority employment recommend regularly administering surveys and studies that "help agency policymakers see the work environment through employee's eyes...to help in devising remedies that are sensitive to an agency's multiple cultures"[48] and to help "correct perceptions that some employees receive better or worse treatment than other employees."[49] By showing that agencies are willing to listen and that they are willing to act on employees' concerns and suggestions, agencies can better foster a spirit of teamwork, productivity, and trust in the system.

Accurate data collection is also essential both to creating and monitoring progress toward

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[48] MSPB, *Sexual Harassment in the Federal Workplace*, 1995, p. xi.
[49] MSPB, *Fair & Equitable Treatment*, 1996, p. 63.

measurable goals for achieving and maintaining workplace diversity and for helping to provide the basis for management and EEO staff training regarding employees' concerns and needs in the workplace.[50]

3. Pass the Employment Non-Discrimination Act to Extend Basic Civil Rights Protections In Employment To Sexual Orientation

FEW supports equal employment opportunities for all people without regard to sexual orientation.

4. Restructure the EEO Complaints Process

FEW strongly believes that only a total legislative restructuring of the federal EEO complaints process can render the process effective for federal employees and the agencies for which they work. To that end, FEW has supported the Federal Employee Fairness Act each year it has been introduced. Any streamlining or restructuring of the federal discrimination redress process introduced should include the following elements:

a. Eliminate the inherent conflict of interest between agencies' investigating and adjudicating complaints against themselves by entrusting authority to the EEO administrative judges (AJs) to oversee investigations and to render binding decisions, appeallable to the appellate level of the EEOC. Specifically, the AJs should be empowered to:

- determine if the investigative record complied by the agency is complete, and, if not, impose appropriate sanctions;
- issue subpoenas to compel the respondent to produce information and federal or non-federal witnesses;
- issue written orders granting or denying relief on any outstanding claims, within a reasonable time limit, that agencies and complainants must either accept or appeal to the EEOC.

b. Expand, from 45 days to 180 days, the time period in which employees may initiate the complaint process. Employees in the private sector and employees of the U.S. Senate are entitled to 180 days in which to initiate the complaint process available to them. This change will make the process more equitable for federal employees and allow them adequate time to consider and prepare their cases.

c. Maintain mediation and conciliation discussions between an agency and an aggrieved employee or class of employees as a *voluntary process*.

d. Impose deadlines that agencies and the EEOC must meet in resolving the complainants' cases and establish sanctions for noncompliance with the deadlines. Such deadlines, which are already in effect for complainants, would remove significant barriers for employees attempting to obtain timely relief for illegal discrimination and dismiss unfounded charges more quickly.

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[50] USDA, *Civil Rights at the U.S. Department of Agriculture*, 1997, p. 39-40.

e. Increase the EEOC's funding authorization to allow it to administer effectively its expanded responsibilities and to comply with deadlines.

f. Retain complainants' rights to bring actions on civil court for de novo review of discrimination claims and establish the right to petition civil court for enforcement of any part of a EEO ruling with which a federal agency does not comply.

g. Allow aggrieved employees with mixed complaint cases, in which they have claims of both civil rights and adverse personnel actions, to chose to have their cases heard either by the EEOC or by the MSPB and to petition for a de novo review of the case at the end of the first process, should they so desire.

h. Make agencies accountable for findings of discrimination and require appropriate punishment and accountability of managers and other employees found to have engaged in discriminatory behavior. Authorize withholding of salary for any employees found to be in non-compliance with EEO rulings.

i. Improve mandatory, systematic oversight of the complaint process. A periodic summary report of the nature, extent, and form of resolution of formal and informal complaints at each agency would help keep agency heads, the EEOC, Congress, and other oversight bodies and interested parties better informed of EEO activity. To quote a 1993 Inspector General's report about ongoing sexual harassment in the Veterans' Affairs Administration, "continuing deficiencies in the same VA program areas may result from merely issuing new policies without the attendant requisite to ensure that they are effective."[51]

5. Improve evaluation of and accountability for agency EEO training for employees, managers, and EEO counselors and investigators by establishing and adhering to measurable standards for successful training outcomes.[52]

6. Collaborate with other agencies and the private sector to improve training and to expand the base of EEO compliance trainers and experts.

> FEW has a cadre of qualified trainers who have excellent experience dealing with sexual harassment and other forms of discrimination. FEW's national and regional training programs are just one forum for federal employees to attend initial and follow-up workshops.

7. Widely publicize the range of penalties and disciplinary actions for sexual harassment and other forms of discrimination and the application of these penalties to particular situations.

The following MSPB recommendation can easily be applied to all forms of discrimination.

> Employees should be made aware of how the agency intends to discipline proven harassers. Victims should always be informed about what happened to their harassers,

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[51] Office of Inspector General, Department of Veterans Affairs, *Review of the VA EEO Program*, 3/31/93, 27.

[52] MSPB, *Sexual Harassment in the Federal Workforce*, 1995, p. xi.

> and penalties should be public enough to serve as examples to potential harassers that management's prohibition of sexual harassment is more than lip service.[53]

Seveny-two percent of employees surveyed by the MSPB felt that publicizing the range of penalties that can be imposed on perpetrators would be among the most effective action an agency could take to address and deter sexual harassment.[54]

8. Take action against perpetrators of sexual harassment and discrimination based on the seriousness of the offense rather than on the rank of the offender.

FEW supports the MSBP's recommendation that:

> managers and supervisors should not give undue weight to the harasser's [or other discriminator's] performance and value to the agency .... [T]he value of a harasser's contributions to the organization is likely to be diminished by behavior that hurts morale, demonstrates a lack of ethics, or exhibits a double standard. Further, the example that management sets in following through with appropriate penalties can be more effective as a preventative measure than the policies it promulgates.[55]

Similarly, lack of appropriate action to discipline managers undermines official policy and sends an unwritten message that zero tolerance is a sham.

9. Work harder to prevent reprisal and take strong action against those who do retaliate against complainants. Provide workers with claims of retaliation with the same protections as whistleblowers.

Sixty-seven percent of employees surveyed by the MSPB felt that protecting victims from reprisal is critical to effectively dealing with sexual harassment.[56] Specific steps to take should include:

- expanding treatment of reprisal in training materials on discrimination;
- including the results of EEO reviews and the presence or absence of reprisals against workers who file complaints of sexual harassment in performance ratings for managers and supervisors.

V. CONCLUSION

The success of the federal government ultimately depends on the quality of its workforce. To be successful, federal employees must be guaranteed a workplace that is free from discrimination and that provides a level playing field for individuals to succeed on their merits.

Discrimination in the federal government is real. You have heard about the underrepresentation of women and minorities, the experiences of real people, the overwhelming numbers of

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[53] MSPB, *Sexual Harassment in the Federal Workforce*, 1995, p. xi.
[54] MSPB, *Sexual Harassment in the Federal Workforce*, 1995, p.41.
[55] MSPB, *Sexual Harassment in the Federal Workforce*, 1995, p. xi.
[56] MSPB, *Sexual Harassment in the Federal Workforce*, 1995, p. 41.

complaints, lack of employee confidence in agency accountability, and the ineffective EEO redress process. Restructuring the federal EEO system is one step toward addressing discrimination.

However, our primary efforts must be focused on the prevention of discrimination and the attitudes and institutional barriers that support it. The federal government has the responsibility to ensure that policies governing our nation are made in an environment that fosters the strengths and contributions of all its workers. To be fully effective, the body of individuals making and implementing that policy must be reflective of the people it serves.

Federally Employed Women looks forward to working with Congress and the Administration to achieve that goal.

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APPENDIX

NEW HIRES	Total # NH	Percent NH among Women in FW	Percent NH within Ethnic Group	Percent NH within Total FW	Proportion Rate NH in Total FW to % in CFW
Black Women	2,994	19.8	50.7	7.6	1.36
Hispanic Women	1,024	6.8	30.3	2.6	.60
Asian/Pacific Islander Women	837	5.5	39.5	2.1	1.31
Native American Women	542	3.6	59.3	1.4	3.5
Non-minority Women	9,765	64.5	35.8	24.7	.71
Total Women	15,142	100.0	38.2	38.2	.82
Non-Minority Men	17,511		64.2	44.2	.82
LOSSES	**Total #**	**Percent Losses among Women in FW**	**Percent Losses within Ethnic Group**	**Percent Losses within Total FW**	**Percent Difference Btwn Rate of Hire and Rate of Loss**
Black Women	10,059	2.3	55.3	9.4	-23.7
Hispanic Women	1,995	4.4	39.2	1.9	26.9
Asian/Pacific Islander Women	1,401	3.1	34.4	1.3	38.1
Native American Women	1,372	3.0	56.7	1.3	7.1
Non-minority Women	30,184	67.0	39.3	28.3	-14.6
Total Women	45,011	100.0	42.2	42.2	-10.5
Non-Minority Men	46,613		60.7	43.7	1.1
PROMOTIONS	**Total #**	**Percent Promot. among Women in FW**	**Percent Promot. within Ethnic Group**	**Percent Promot. within Total FW**	**Proportion Promotions to Total Percent FW**
Black Women	25,340	24.9	67.6	13.1	1.25
Hispanic Women	6,551	6.4	46.1	3.4	1.42
Asian/Pacific Islander Women	3,875	3.8	50.0	2.0	1.25
Native American Women	1,926	1.9	57.9	1.0	1.11
Non-minority Women	64,191	63.0	49.1	33.2	1.20
Total Women	101,883	100.0	52.6	52.6	1.23
Non-minority Men	66,669		50.9	34.4	.67

PERMANENT FEDERAL WORKFORCE	Total Number	Percent among Women in FW	Percent within Ethnic Group	Percent within Total FW	Proportion FW to Total Percent in CFW
Black Women (5.6 % CF)	169,047	24.5	61.8	10.5	1.87
Hispanic Women (4.3% CF)	38639	5.6	40.0	2.4	.56
Asian/Pacific Islander Women (1.6% CF)	25,530	3.7	40.0	1.6	1.00
Native American Women (.4% CF)	13,799	2.0	52.9	.9	2.25
Non-minority Women (34.4% CF)	443,664	64.3	35.1	27.6	.80
Total Women (46.3% CF)	689,990	100.0	42.9	42.9	.93
Non-Minority Men (65.6% CF)			64.9	51.0	.95

Dorothy E. Nelms

Dorothy E. Nelms, National President of Federally Employed Women, Inc. (FEW), a former federal employee, took early retirement after 28 years of service to complete law school. A graduate of George Washington University National Law Center, Washington, DC, Ms. Nelms specializes in civil rights, criminal, and domestic law. This experience has greatly enhanced her training programs. Most recently, as an attorney, she has conducted agency-wide training on sexual harassment with Mitsubishi, the U.S. Geological Survey, and the U.S. Indian Health Bureau.

Ms. Nelms has been a professional public speaker and trainer for many years. As an internationally renowned speaker, she has spoken and conducted trainings in all 50 states, Germany, Japan, Belgium, and Canada. Although most of her work has been with the public sector, she also has worked extensively with the private sector.

Highlights of Professional Experience

National President, Federally Employed Women, Inc. (FEW), 1996 to present: Leading a national organization of over 200 chapters in the U.S., Germany, Japan, and Korea engaged in legislative and policy issues to help end sex discrimination in the federal government.

President, Nelms and Associates, Washington, DC, 1981 to present: Attorney-at-Law and Consultant to Management on human resources, equal employment opportunity, and affirmative employment planning.

Director, Organizational Development and Training, Hubbard and Revo-Cohen, Inc., a human resources consulting firm, Reston, VA: Consulted on issues such as team-building, conflict management, executive and staff development, managing cultural diversity, and equal employment opportunity laws.

Director of Executive Resources, U.S. Department of Housing and Urban Development, 1975-1978: Managed a staff responsible for personnel functions of all executives, consultants, and political appointees in the Department.

Director of Training, U.S. Department of Housing and Urban Development, 1971-1975: Directed a staff responsible for the training of 17,000 employees of the Department and managing two national training centers.

International Assignments

Germany: Frankfurt, Heidelberg, Wiesbaden, Wurms, Augsburg, Kaiserslautern, Graefenwoehr, and Munich in 1990, 1991, and 1992.
Japan: Tokyo in 1990 and 1991.
Canada: Toronto in 1992.

Organizational Affiliations

American, National, and D.C. Bar Associations
American Society for Training and Development
National Capital Speakers Association
Federally Employed Women
Business and Professional Women

Special Awards and Recognition

Distinguished Service Award, U.S. Department of Housing and Urban Development
Distinguished Service Award, FEW

Education

J.D., George Washington University National Law Center, Washington, DC.
M.B.A., George Washington University, Washington, DC.
B.S., Howard University, Washington, DC.

Mr. PAPPAS. Thank you, Ms. Nelms.

And last, but I don't think least, Mr. Howard Wallace, author of "Federal Plantation: Affirmative Inaction Within our Federal Government."

Mr. WALLACE. Thank you, Mr. Vice Chairman. I want to take this opportunity to thank this subcommittee for allowing me to testify today. It is an honor and a privilege to participate in a process that will ultimately lead to safeguarding the civil rights of millions of American citizens, and I don't take this lightly.

Systemic discrimination is rampant throughout the Federal sector. When I did my research for the publication of "Federal Plantation: Affirmative Inaction Within our Federal Government," every agency I looked at had identical problems. Minorities were the last hired, first fired; disciplined more often and more severely; promoted less frequently, and given much smaller dollar amounts when it came to awards.

Many people criticize me for the title of my book, but what they don't understand is that the message represents the sentiments of millions of American citizens who are having their civil rights violated daily. Hard-working, taxpaying Americans are calling me from congressional districts throughout this country. Most want me to consult with them on their cases; others just want to pray and cry, and some do both.

Let me make three quick points. Point No. 1, in 1992, the Department of Defense processed approximately 900 EEO complaints. The cost to the taxpayer per complaint was $50,000. This equates to a total bill of $45 million, and this is just one Government agency. If the numbers for every agency were tabulated in today's dollar, the taxpayer bill would probably exceed $1 billion annually. A quarter of this bill could be used to pay reparations to victims of systemic discrimination, and the taxpayer would get more for their money.

The EEO complaints process is broken. There is no incentive for managers to negotiate settlements in good faith. Most EEO officers, counselors, and other EEO personnel are part of the problem. They are rewarded for discouraging employees from filing—[applause]—and making the process so difficult to understand, that many complainants withdraw their complaints out of frustration. Findings of discrimination are virtually nonexistent; yet, billions of dollars are being wasted on processing paperwork that amounts to nothing more than an exercise in futility.

I also want to mention that, when it comes to the EEOC, I echo the sentiments of Ms. Nelms here. I think we all agree that the EEOC is not fully funded, but they also need to be made accountable for how they're operating within the budget that they currently have. All the people that I'm talking with, there is not one person that I have met that thinks that the EEOC is doing the job that it was chartered to do. [Applause.]

So rather than throw good money after bad, we have to make sure they reform the way they conduct their business.

One other comment about the EEOC—and I have to say this with all due respect for everyone in this room: It seems to me that the EEO system works just fine when there's a case of sexual harassment involving white women. [Applause.]

The question that we have to ask ourselves is: Why is that system not as diligent and fair when it comes to the discrimination of African-American males, females, and other minorities who work for this Federal Government?

One of the biggest examples of governmental malaise in safeguarding the civil rights of American citizens is Aberdeen Proving Ground. In light of all the adverse media attention, one would think Aberdeen would be working to become a model installation in terms of its EEO program. Well, on the contrary, this installation continues to employ an EEO officer who continuously violates regulations in an attempt to sabotage the due process procedures of filing complaints. [Applause.]

Numerous letters to the garrison commander have fallen upon deaf ears. In spite of documented evidence of malfeasance, this EEO officer has not received any form of reprimand and was even promoted, further signaling that the way to please management when it comes to EEO is to violate the rights of minorities. [Applause.]

That same EEO officer on Friday evicted the only black employee that worked for him, and while that employee was contemplating what had just happened to him, a locksmith showed up to change the locks on the doors. There comes a time when we have to put to stop to this criminal behavior.

Another recent example—and, by the way, that employee is here today—another recent example of why we must reform the current EEO process took place at the Department of Navy. The Secretary of the Navy refused to fire his auditor general after receiving a scathing command climate assessment report that cited this man for saying numerous racially insensitive remarks in front of witnesses. To compound the problem, they paid a consultant $25,000 to help the auditor general improve his relationship with minorities. This decision sent a message to the work force that a double standard of justice exists for white senior executives.

This hall of shame is also prevalent at Commerce, Agriculture, and the Library of Congress. Just yesterday I received a telephone call from an organization in Commerce that has had to file a class action suit, and those people are here today.

A hard-working, single mother was almost reduced to homelessness after being wrongfully terminated because of her race. Taxpayer liability will probably be $300,000 upon the completion of her jury trial.

The situation concerning our black farmers is a national tragedy. [Applause.]

Point No. 3: Congress and the President must institute a governmentwide, three strikes and you're out law for repeat discriminators, as well as immediate dismissal for the most egregious cases. The Government has far too many managers who have numerous EEO complaints filed against them. [Applause.]

The current process breeds defiance, arrogance, and allows managers to make a mockery of a system that was intended to safeguard an employee's civil rights.

Congress and the President must prohibit Government agencies from policing themselves. This is an inherent conflict of interest and adds unnecessary years to the process. Agency EEO programs

should be limited to special emphasis, diversity awareness, less management training, and mediation of disputes. Complaint processing should be done exclusively by the EEOC. If every Government agency was made to institute a fair and equitable alternative dispute resolution program, the process could be greatly streamlined without compromising the complainant's rights to legal redress.

In summation, before I came here today, I reflected upon the story of the Jewish exodus in the Old Testament. Moses in so many words asked God, Why would pharaoh, the most powerful monarch on the face of the Earth at that time, listen to someone so insignificant as himself. I asked God the same thing: What could I say in 5 minutes to truly reflect the pain and suffering of millions of American citizens who are being held in bondage, both spiritually and psychologically, by thousands of would-be pharaohs through the use of systemic discrimination?

These are bright, energetic, hard-working Americans who are not looking for something for nothing. They just want to enjoy the full fruits of their labors in accordance with the law. Almost every African-American public servant is one to two grades lower than they would be if they were white. This is fundamentally and morally wrong. [Applause.]

On behalf of the millions of American citizens in both the public and private sector, I echo the plea of Moses: "Let God's people go." [Applause.]

Both the President and the Congress need to send a message of zero tolerance with regard to systemic discrimination in the work force.

Again, I thank you for allowing me to come here. And as always, I give honor to my Lord and Savior, Jesus Christ, for making this possible. [Applause.]

Thank you.

[The prepared statement of Mr. Wallace follows:]

Prepared By: *Howard L. Wallace EEO Expert and Author of The Critically Acclaimed Federal Plantation Affirmative Inaction Within Our Federal Government*

The Problem: Rampant and wide spread discrimination directed at African Americans and other minorities throughout the Federal Government.

The Mechanics of the problem:

- The Federal Government refuses to acknowledge the extent of the problem and continues to use small incremental pockets of progress as justification for inaction.

- The government continues to ignore existing evidence such as the wide disparity in the termination rate between Blacks and Whites, the extremely high concentration of Blacks in low to mid-level jobs, virtually no Black representation in the senior level ranks, and the blatant discrimination perpetrated against Black farmers who are having there farms foreclosed on and there livelihood stolen by racist employees in the Department of Agriculture. Rather then take swift and immediate action the government continues to convene worthless studies that conclude "it looks like a duck, it walks like a duck and it quacks like a duck, but we're not sure if its a duck"

- One of the biggest examples of governments malaise in safe guarding the civil rights of its American citizens is Aberdeen Proving Ground. In light of all the adverse media attention one would think Aberdeen would be working to become a model installation in terms of its EEO program. On the contrary, this installation continues to employ a EEO officer who continously violates regulations in an attempt to sabotage the due process system when employees file complaints. Numerous letters to the Garrisson Commander have fallen upon death ears. In spite of documented evidence of malfeasance this EEO officer has not received any form of reprimand, and was even promoted further signaling that the way to please management when it comes to EEO, is to violate the rights of minorities.

- The Equal Employment Opportunity Complaint Process is flawed beyond repair. There is no incentive for managers to negotiate settlements in good faith. Most EEO Officers, Counselors, and other EEO personnel are a part of the problem. They are rewarded for discouraging employees from filing and making the process so difficult to understand that many complainants withdraw their complaints out of frustration. Findings of discrimination are virtually non-existent yet billions of dollars are being wasted on

processing paper work that amounts to nothing more then a exercise in futility.

The solution:

What government must do:

- Immediately acknowledge that it has been the biggest violator of its own civil rights laws.

- Institute a government wide three strikes and you are out law for repeat discriminators. The government has far to many managers who have numerous EEO complaints filed against them. The current process breeds defiance, arrogance and allows managers to make a mockery of a system that was intended to safe guard an employees civil rights.

- Prohibit government agencies from policing themselves. This is an inherent conflict of interest and adds unnecessary years to the process. Agency EEO programs should be limited to special emphasis, diversity awareness/management training and mediation of disputes. Complaint processing should be done exclusively by the EEOC.

- Government needs to bench mark successful companies in the private sector who truly believe in the value of a diverse work force, and actively cultivate and utilize minority talent. In my research companies like the chemical conglomerate Hoescht Celanese were light years ahead of the government in their understanding that white male dominated companies was not the model for success in a ever changing global economy. Even Dennys has instituted programs that the government would do well to imitate.

- Totally reinvent the Equal Employment Opportunity Commission (EEOC) and make it responsive and accountable to regulatory time lines. Currently the EEOC is non-responsive. Some complaints have been in the system for almost ten years. There is also too much grand standing on complaints in the private sector that have media attention, and not enough attention given to ensuring due process for every employee regardless of the magnitude of the complaint. Thought should seriously be given to replacing the EEOC with a more effective and efficient oversight agency.

- Institute a mandatory dispute resolution program at every government agency. However; a person should still be allowed to file a EEO complaint so that both actions would occur simultaneously. Because there is such a time lag between the filing of a complaint and the actual investigation, dispute resolution could occur during the administrative processing stage.

- Immediately begin negotiating a good faith settlement on the order of Texaco to reimburse blacks and other minorities who can prove lost wage and other benefits due to systemic employment discrimination. In 1992 the Department of Defense processed approximately 900 EEO complaints. The cost to the taxpayer per complaint was $50,000.00. This equates to total bill of $45,000,000 (forty five million dollars), and this is jus one government agency. If the numbers for every agency were tabulated i todays dollars, the taxpayer bill would probably exceed a half billion dollars annually! A quarter of this bill could be used to pay reparations to victims of systemic discrimination.

Summation:

My mother served the federal government faithfully for 34 years, but because of her race and gender she was never able to rise above the grade of GS-5. She sadly recalls how a white female secretary who entered the agency after her, was put in a upward mobility position and had risen to the grade of GS-15 when my mom retired.

On her meager earnings she raised 6 children and kept the nucleus of the family together. She was a widow having lost her husband in an ill-fated airplane crash while he was serving this country as a member of the armed forces.

Her story echoes the voices of African Americans everywhere who serve this country faithfully everyday. They work just as hard as their white counterparts and on average are paid less, disciplined more often, hired last and fired first. Getting rid of affirmative action is not our greatest fear. Allowing the current EEO system to remain as is, will do far more damage to our economic well being then the eradication of affirmative action ever could.

Almost every African American public servant is one to two grades lower then they would be if they were white. This is fundamentally and morally wrong. On behalf of the millions of american citizens in both the public and private sector I ask the Congress of the United States of America, to implement the necessary changes that will ensure Equal Employment Opportunity becomes a reality and not just a slogan.

Mr. PAPPAS. Thank you very much, Mr. Wallace, for your comments.

I have a couple of questions specifically to a couple of you folks, and then one or two for all of you, and I'll try to be as brief as I can.

Mr. Baca, I think you had said in your comments, both in your written testimony and in your presentation, you said that Congress needs to grant the EEOC sufficient funds to monitor the affirmative employment plans. I think it was toward the end of your testimony.

And I'm wondering, and I'm not trying to tie you to a specific dollar amount, and I know Ms. Nelms said—and I think every taxpayer agrees—no one advocates just throwing money at a situation, and I'm not suggesting that's what you're suggesting. I'm just wondering if you could give me a feel for to what degree you think, whether it's a percentage or if you can give any kind of a further—if you could illustrate your suggestion any more than you have.

Mr. BACA. It's difficult to state, without looking at the affirmative employment section within EEOC. My suggestion would be that it should be in proportionate amount to the amount of complaints that are occurring in terms of the lack of monitoring within the affirmative employment plan.

What my understanding is, is that one person reviews, one or two people review, all of the Federal affirmative employment plans within the Federal Government, and a lot of those plans are not submitted on a timely basis and they're not actually reviewed in any detail. And some of it is almost like works of fiction in and works of fiction out, in the sense that they don't have any reality based on the particular agencies.

I would say that it doesn't mean a lot of money. I think you're talking about the equivalent of maybe three to five more staff, professional staff persons, with appropriate support staff, is my best guess at that. But, you know, it's from a layman's perspective from the outside looking in. But I think that that would be some rule of thumb within the professional level of staffing it at the GS–12 through the GS–14 level, or GS–15 level, as a senior supervisor. It would be something like that.

Mr. EASON. Vice Chairman Pappas, Blacks In Government has done some extensive study on just that subject. We would welcome the opportunity to resubmit that data to you as soon as possible.

Mr. PAPPAS. That would be very helpful.

Mr. EASON. Would that be enough?

Mr. PAPPAS. Sure.

Mr. EASON. We certainly will do that.

Mr. PAPPAS. Thank you very much.

Mr. EASON. Thank you.

Mr. PAPPAS. Thank you, Mr. Eason.

Ms. Nelms, you had, I think, mentioned that more complaints have been filed, I guess, in recent years than previously, and I'm wondering if you could talk about when that may have started, and to what degree, and why you think that may have been occurring.

Ms. NELMS. Well, in particular, sexual harassment complaints have increased, and this has started from 1991 or 1992 until the present, and each year there's an increasing number. I think the

congressional hearings about sexual harassment in late 1991 and the other—the Air Force and the Navy—incidents of sexual harassment heightened awareness of sexual harassment and made people understand that they had rights that they could exercise; that they no longer had to just take things. And I think this prompted more people to start filing complaints. I'm not necessarily saying there was an increase in incidents of sexual harassment, but I think people became more aware of their rights, and would decide to use the system to file complaints. And I think I could trace those to early nineties to the present time.

In terms of sex discrimination complaints, I'm kind of like Ms. Norton, they've remained kind of stable. They're not going down, but they're still at a very high level in terms of the sex discrimination complaints: I'm not getting the promotions that I want; I'm not being put in a management job, et cetera.

Mr. EASON. Mr. Pappas, I'd also like to add some information to that. I think we'd be remiss if we didn't recognize the fact that this massive attack on affirmative action over the last 3 to 4 years has certainly been responsible for a lot of the increased amount of complaints. Employees that come to us come basically with the initial position that there is nobody there; there's no longer any element within the Government system that will listen to them and will act effectively on their behalf. They feel the Government is less responsive than they were years ago, when the EEOC and agencies seemed to have affirmative action as a tool for, I think President Nelms put it, some maintenance, pre-action, to avert the complaints that are being brought in, some positive action taken on their behalf. And I think they now feel that it's a hopeless cause, and that's why you're getting a lot of complaints.

Mr. BACA. It's interesting as it relates to Hispanics, Congressman Pappas, because as it relates to Hispanics in the last 3 years, national origin complaints, according to the Equal Employment Opportunity Commission, have increased by 72 percent, and what we see as far as Hispanics are concerned is the same sense of frustration that President Eason said in relationship to blacks. But, at the same time, we're also seeing that Hispanics are getting so frustrated that they're actually filing complaints. Historically, Hispanics in the Federal work force from 1972 to around 1990, you'll see that their percentages of complaints are relatively low. But even within the Hispanic work force, there's been a substantial increase, and as we all know, those are expensive, as was pointed out earlier by the author of "Federal Plantation."

Ms. NELMS. I would just like to add one comment to that also. As an attorney who has worked in the civil rights area, I would like to say that I think in the last 10 to 12 years we have experienced a returning to an era when it's OK to be a bigot, when it's OK to be discriminatory. [Applause.]

I have seen this in many places, and I think that that environment in which it's permissible for people to be bigoted and prejudiced has influenced what has happened in terms of managers in the Federal Government. I don't think our managers have received the kind of training that they need to give them the skills to manage people, so that they don't let their personal biases and preju-

dices get in the way of doing what they're supposed to do as managers. [Applause.]

I think until we get out of that era, we're going to see discrimination complaints.

Mr. WALLACE. The Government, Mr. Vice Chairman, if I could, also needs to be prepared for a continued onslaught of these complaints, for two factors: the continued downsizing, and also the request by many agencies to now use alternative personnel systems. There are alternative personnel systems that are coming on the scene that most employees are absolutely horrified by. Some of these I have heard, and I have seen some of them in test cases, divide the work force into three categories. Those categories are extremely ominous.

One category is overcompensated; the other is compensated, and the last category is undercompensated, which will basically give these same managers who we're here complaining about today the authority to make the decision on who's overcompensated and who's undercompensated. And if you fall into that first category of being overcompensated, some of these personnel systems will not allow you to get COLA's, cost-of-living increases, wage grade increases, or any awards until you perform up to standard. So the Government needs to understand that reform is absolutely necessary in the EEO process because of what's coming down the pike.

Mr. PAPPAS. Mr. Wallace, could you just elaborate on something that you said? I think I understand what you mean, but just so there's no question in my mind. You mentioned that downsizing could prompt an additional—or be another reason why there might be some additional complaints filed. I think that's what you were suggesting. Could you state if that is what you meant and elaborate on that?

Mr. WALLACE. Well, downsizing is one of the reasons. It's also many of the reasons that—it's like a dual sword. Downsizing causes a lot of complaints to be filed, but mainly because many supervisors will use downsizing as a cloaking device to discriminate. When complainants come in or when employees have RIF actions done against them, if you look at the civil personnel rules, they are intricate in trying to understand how a person goes through this RIF process that they basically have carte blanche in their ability to RIF who they want to RIF. [Applause.]

And so, therefore, downsizing causes these supervisors to be able to play more and more games with people's lives. Discrimination, even as a lot of people have said here today, yes, there is an increase in the amount of overt bigotry, but I want to also say to the people here that discrimination has become very sophisticated. I mean, it is a now-you-see-it, now-you-don't type of proposition. And so downsizing certainly plays a major role in that, and the RIF process has been a disaster for many of the employees in the Federal Government.

Mr. PAPPAS. I just have one more question really. This is for—hopefully, all of you will be able to respond. Maybe you don't want to or couldn't. I hope that you feel free to, though.

But are there some agencies or are there some departments, are there some divisions within a department within the Government,

that you think that—or you have heard from your peers—that are more problematic than others?

Mr. WALLACE. Well, I'd like to certainly take an opportunity to bite that piece of meat, Mr. Vice Chairman. [Laughter and applause.]

You know, I mean, every agency I looked at was bad, but you're right, there were some that were worse than others, though. The Department of the Interior sticks out in my mind; NIH. [Applause.]

But I also want to say, within the Department of Defense, and at Aberdeen Proving Ground, it is an absolute, unbelievable situation, and it is a tragedy that when the eyes of the Nation were finally on Aberdeen, they were on there for sexual harassment, which we certainly don't condone, but discrimination against blacks and other minorities were far more prevalent a problem than the sexual harassment situation. And you've got many employees that have come down here today, Mr. Chairman, from Aberdeen Proving Ground who have decided that they're no longer going to stand for this, and they're going to avail themselves of every process necessary to change the situation.

So there are many agencies—the FBI. There are a lot—Internal Revenue. I mean, you could line them all up, and in order to pick the primary one would be very difficult, but there are some worse than others.

Ms. NELMS. I'd like to take a different cut at it. I think there's a difference between what happens at headquarters in Washington, DC, and around Washington, DC, and what happens in those far-out installations where people work all over the country. There, I think people are at the mercy of whoever is the chief, the commanding officer, the whoever, and reports of discrimination that we get from all agencies, from people who are out in the field, are far worse than those here at headquarters. It's bad enough at headquarters, but I think the things that are perpetrated, the subtleties used by—well, it's got to go through headquarters, and if headquarters doesn't do it, we can't do it here, and we're stymied by headquarters—all of those things are used as kinds of excuses, and the persons are just impotent, unable to do anything about it. And those are the areas that have real great problems.

Mr. TSAI. I'd like to add to our original statement. In attachment B, we have an agency list showing that the Department of Agriculture and the Department of the Interior have the worst record in employing Asian- and Pacific-Americans.

Of course, if you think about the military, discrimination in the military is one of the worst cases—not just a glass ceiling; there we have steel ceiling problems. It's not part of the civil service, I know, but I hope some of the congressional members can address that, too.

Mr. EASON. Yes, thank you. Mr. Pappas, our research has shown that it's somewhat similar to what President Nelms has said. In agencies that have affiliates in rural areas during the sixties, seventies, and the eighties. The agencies such as HHS, with a large metropolitan area or inner-city area contingencies, when they were developing—proceeding with progress in the field of affirmative action and equal employment. They sort of bit the bullet early on and

made those changes within the structure of the organization to reflect a more multicultural work force.

But you have agencies such as the agency I work for, the Corps of Engineers, that has a double category here. You have the military side that is progressive in terms of promotions, recruitment, and advancement. They work side by side with a civilian element, such as myself; whereas, we have a large rural contingency—Missoula, MT; Spokane, WA, and small areas where you have families, and where African-Americans are literally nonexistent; they have been slow to integrate and to bring in African-Americans and minority workers because the local population did not reflect that.

So that now in 1997, when you have a three-star general who is an African-American, and a lot of district engineers throughout the country who are African-American and minorities, then that creates sort of a problem, because therein lies what we are here about today.

They're having to make that change in 1997. The Bureau of Land Management—we've had tremendous response of complaints in the last several years coming from the Bureau of Land Management. All of those rural-oriented kinds of Federal agencies that never had to make that change or never had at this point to make that change are now having to do that. And if you look at the stats involving those agencies, they look terrible. You'll see an entire department, an entire section, and an entire branch without one African-American, and all African-Americans existing there exist at the very bottom of the organization. There is where a lot of the problems lie.

The other side of all of this is that all of these agencies have systemic problems dealing with whether African-Americans can actually tow the rope or not, and we still haven't gotten to that.

Mr. PAPPAS. I'm going to interrupt you, and I appreciate everything that you've said, but I'm just asking you, are there specific departments that you feel that you could share? I understand you're suggesting the outlying, and I appreciate that; Ms. Nelms said the same thing. But are there specific departments or divisions or agencies that you feel that you would like to share with us that there may be more problems within them than others?

Mr. EASON. Well, it would be unfair to just single out BLM. I mentioned BLM, Ag. You know about Ag because it's hitting the papers every day. Interior. But let's just not—I mean, I don't think this committee needs to think that other agencies do not have the same problems.

Mr. PAPPAS. I'm not suggesting that. [Applause.]

Mr. BACA. With respect to Hispanics, I'd like to remind the committee—I suspect you're all aware of this—the fact is that Hispanics are the only group that are underrepresented in the entire Federal Government, based on race, sex, national origin, or religion. It's the only group that the latest study by the Merit Systems Protection Board has noted that underrrepresentation.

Listen to these statistics, if you want to use statistics: 20 percent of all major league baseball players in the United States are Hispanic or Latino. The population of Hispanics, by the most conservative estimates, are about 10.6 percent or even maybe roughly rounded up to 11 percent, if they were accurately counted. The

most liberal interpretation of the Federal work force of Hispanics in this country is by the EEOC and MSPB is at 6.1 percent.

In other words, we have a better chance of becoming professional baseball players than we do of working for the Federal Government. It's an amazing thing when you think in terms of the Hispanics. We're not at the glass ceiling; we're not at the steel ceiling; we're not even at the ground floor, as far as employment in the Federal Government is concerned.

And if you want to look at specific agencies, you look at the Department of the Interior; you look at the Department of Agriculture; look at the Department of Transportation; Health and Human Services, and the Pentagon, and you look at those disparities and those statistics not at the GS–1, not at the GS–9 through the GS–15 levels, or at the SES categories. Clear across the board from GS–1 through the SES, that's where we're at; we're totally underemployed in the Federal Government throughout the entire Federal Government. I target those five agencies, and the reason that I do is with the idea that they're the largest Federal agencies in the Federal Government.

Mr. PAPPAS. Thank you, Mr. Chairman.

Mr. MICA. Thank you, Mr. Pappas.

I recognize Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

I have a few questions, but I want to just say something that's very important. Back on August 31—July 31, rather—we had a hearing with regard to some Federal employees who had been placed in the wrong retirement system—the wrong retirement system. And working with the chairman, to his credit, we gave a deadline that we wanted the matter resolved within about, I guess, 45 days. Yesterday we had a resolution. [Applause.]

And let me—just hear me out. And the reason why I pressed was not because the witnesses—it has nothing to do with the fact that the witnesses were all white males, but it was because they were human beings, and they sat there and they were in pain, and one of them was almost in tears. And working with the chairman, we were able to get that ball rolling, push, and to get some resolution, because my concern was that Government was working too slowly. It did not make any difference to me whether they were white or black or any other color; they were in pain.

Today we have people who are in pain. And so with the same expediency, I'm hoping that we'll be able to resolve some of the problems that we are addressing here today.

Out of curiosity, I'm just curious—and without applause, please—how many people in our audience, because we need to put faces on policy, how many people here feel that you have been discriminated against in the Federal Government. [Show of hands.]

OK, thank you.

How many—listen up—how many of you feel—I mean, if you had to swear—you all can't testify because we had to have limited witnesses—if you had to swear and be sworn in to say that you knew absolutely, without a doubt, 10 people that you know have been discriminated against that work with you, how many of you would swear to that, that that were the case? [Show of hands.]

All right, thank you.

And I just want us to understand what we're dealing with, we up here, to understand what we're dealing with.

Last, but not least, let me try to put all of this in context. One of the things that I've often said is that motion, commotion, and emotion with no results means nothing to me. It means nothing. [Applause.]

And so what we're going to try to do is come up with some solutions.

Congressman Wynn said something in my absence, and I apologize for having to leave. We had a breast cancer unit that's opening up trying to protect women's health down at the Convention Center, and I had to leave, but I'm glad that he asked and expressed his concern.

He said something about an Interior Department witness who was supposed to come—am I right? But because of intimidation, or what have you, was unable to come. Mr. Chairman, I ask you to work with me to try to address that problem.

I think it is criminal that a congressional committee can ask people to come, so that we can do our job, but that there's someone who is intimidated from coming. That goes against everything that we stand for—everything that we stand for. [Applause.]

And as one who practiced criminal law for 20 years, I am appalled, and I want us to look into that, Congressman Wynn, to figure out what that's all about, because if we are obstructing people, if there's obstruction from people coming here to give the Congress of the United States of America, the greatest government in the world, testimony to change things, then I've got a major, major problem with that.

Let me just ask a few other questions, and then I'm going to be finished, because I think Mr. Pappas has really hit on some very key issues.

Mr. Eason, let me ask you this: What is the general perception of Blacks In Government with regard to the Federal Government as a fair employer?

Mr. EASON. Congressman Cummings, as I stated earlier, Blacks In Government has 22 years of experience in this area. That is why Blacks In Government was founded, in order to look into exactly just the question that you frame.

There was a point in the eighties when Blacks In Government really thought we were going to go out of business. Progress was being made. The Equal Employment Opportunity Act of 1972 was working for us, and we had a very good feeling about what was happening, did happen, generally in Government.

I think I'm safe in saying that several years ago, when this massive attack on affirmative action was launched, I think the harm that was done by that, and then several years earlier, during the previous administration's—a little earlier, a few years earlier, it started this whole anti-affirmative action, anti-progress of minorities in Government. I think that's hit the wrong tone.

Somebody said here today that what is happening—proposition 209, the Hopwood decision—all of those cases generally ruled against progress that's being made in this country by minorities, I think they really set the tone for people who felt that bigotry and racism were permissible. But it also did the very same thing for

those who were sitting on the fence, who were neutral. And I think what it has done over a short period of time, it has created an element that has really done more harm than good to the Federal workplace. The element is not good. The feeling is not good in the Federal Government today in terms of racism.

Mr. MICA. Mr. Baca.

Mr. BACA. I don't think that we could call an employer fair if it doesn't even try to recruit, much less retain, Hispanics, and because of the fact that they're so statistically underemployed in the Federal Government or unemployed in the Federal Government, it's an amazing thing to me to see that in the Federal Government a lot of times employers will not hire, the managers or supervisors will not hire, a person because he or she may have an accent. And, yet, the fact is that the private sector has found that bilingual education and being bilingual in a global village in terms of an economic society which we face today is an asset, as opposed to a liability, and they emphasize the accent rather than the bilingualism. And it's an amazing thing to see and to state that our Federal Government is not being fair, Congressman Cummings. It could be fair.

There are pockets in the Federal Government, like Hispanics or blacks or women, that are not homogeneous, and there are spots of positive forces within the Federal Government, just like there are in a lot of other employers. But it's not as fair as it could be, and the standard that's set by Congress is that it should be fair in relationship to the laws that have been passed. And that's an ideal standard. We have a long way to go.

Mr. CUMMINGS. I've got you. Let me say this: Mr. Baca, you said something that I just want to—I want you to just—I just want to add something to it. You said—you were talking about the various suits, and whatever; I think it was you—and you said something to the effect that Government can pay now or the Government can pay later. And I just want you to just think about something that I said a little bit earlier. When Government pays later, there are a lot of missed opportunities that shall never come again during our lifetimes, and that's part of the problem with paying later.

As a father of a 3-year-old and a 15-year-old, we only have our children, for example, for a limited amount of time. For example, if I'm not treated fair during my working years, my daughter may not be able to go to Spellman; my children may not be able to have the violin lessons that they want to have. My quality of life may not—and that's what I'm concerned about.

I want us to think more from that direction. That "pay me later" doesn't help those missed opportunities that make people suffer for the rest of their lives. [Applause.]

And I'm not—and the only reason I say that is because it's just so important. And I think when we look at our children, they are a visible example, because we only have them for a short period of time. And to deprive not only ourselves, for us to be deprived, but for our families to be deprived of opportunities, again, will go with them and have negative results until the day they die.

And so that's why discrimination—I just wanted to add that on, because I don't want us to just think that somebody gives you some

money and makes up for something; you've lost those opportunities. Those opportunities are gone forever. [Applause.]

Mr. Wallace, you said something that really kind of struck a note with me, and you were talking about EEOC and how it worked for white women. I think we need to have the benefit of your comments just a little bit more, and then we're going to have to take a break because we have a vote. But could you comment on that a little bit further?

You said it works. I think that's what you said. Correct me if I'm wrong.

Mr. WALLACE. Absolutely. A lot of the EEO policies work almost like the flavor of the month for an ice cream parlor. In the EEO process you have seven bases. I know right now that sexual harassment is one of the bases that gets a lot of attention. There seems to be a lot of media following in terms of the adjudication of the EEO process.

I know where I work, once sexual harassment became the "issue of the month," there was emphasis given to it by senior managers, and rightly so—but certainly not at the expense of the other aspects of the EEO process: race, handicapped, and so forth, and so on.

And what I'm saying is that when you look across America, most of the time what is happening, particularly within the Federal Government, is whatever's hot is what gets the attention. And we need to have a system that works for zero tolerance of discrimination, whether there's cameras there or not. And that's the standard that we need to strive to obtain, and we have not gotten there yet. [Applause.]

Mr. CUMMINGS. Thank you very much.

Mr. MICA. Mr. Wynn. I think we have time for several more questions.

Mr. WYNN. Thank you, Mr. Chairman. Actually, I don't have a question, but I'd like some information, and I know we do have to run.

By the way, I think the panel did a wonderful job. I want to thank you for that. [Applause.]

Several of you have mentioned the lack of accountability with respect to managers, managers engaging in retaliation, managers continuing to be promoted after being repeat offenders. I would like to take the liberty, if the chairman would allow it, of asking you to submit to us recommendations on specifically how we can hold managers more accountable within the context of a piece of legislation. I know Mr. Martinez has some mechanisms, but I think we specifically have to go to the question of manager accountability, and I think those recommendations would be helpful to all of us as we try to frame a piece of legislation. And that would be my only question or request.

Mr. MICA. Thank you. And I will ask the panelists and others who so desire, our previous panel, to also review the proposed legislative solution that Mr. Martinez has proposed and any other recommendations you have, and if you would, get them to us as soon as possible. Direct them to me as chairman. We'll try to see that whatever legislative solution is drafted does incorporate those concerns and those suggestions, because, again, you can talk about the

problem, but unless you act and have some viable solutions, nothing is going to get done.

Unfortunately, there is not just one vote; there are two votes. I must recess the hearing.

I will excuse the panel. I want to thank each of you for participating. And those of you heard me say earlier that Mr. Cummings had asked for this hearing, and I had agreed to set this as one of our subcommittee priorities—I also asked Mr. Cummings to select the panel. Sometimes in previous Congresses the panel are—they agree to a hearing, and then the panels were fixed by the majority, and that wasn't the case. Each of you were selected by Mr. Cummings. So we've tried to be fair and open in the process, and we appreciate your participation in this in a constructive manner.

There being no further business before this panel, again, I thank you, and you're excused.

We will recess until 5 minutes after the final vote, and then we'll have our final panel. Thank you.

[Recess.]

Mr. MICA. I'd like to call the subcommittee back to order. I appreciate greatly the patience of the third panelists, and we should have someone from the other side of the aisle joining us in just a minute, but they've given us permission to proceed.

So I'd like to welcome panel 3. Panel 3 consists of Lawrence Lucas with the Coalition of Federal Employees at the Department of Agriculture; Romella Arnold, who's with the National Association of Black Federal Employees; LaVerne Cox with the Library of Congress class action plaintiffs; Sam Wright, an employee of the Federal Aviation Administration.

We appreciate each of you coming to testify before our subcommittee. As I explained to our previous panel, we ask you to limit your oral presentation to 5 minutes. You can submit lengthier statements for the record.

And this is an investigation and oversight subcommittee of Congress. So I must swear you in. If you'd stand, please, and raise your right hands.

[Witnesses sworn.]

Thank you. We appreciate, again, your being with us, and your willingness to testify on this important matter.

I would like to recognize first Mr. Lawrence Lucas with the Coalition of Federal Employees at the Department of Agriculture. You're recognized, sir.

STATEMENTS OF LAWRENCE E. LUCAS, COALITION OF FEDERAL EMPLOYEES AT THE DEPARTMENT OF AGRICULTURE; ROMELLA ARNOLD, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF BLACK FEDERAL EMPLOYEES; LAVERNE COX, LIBRARY OF CONGRESS CLASS ACTION PLAINTIFFS; AND SAM WRIGHT, FEDERAL AVIATION ADMINISTRATION EMPLOYEE

Mr. LUCAS. Mr. Chair, I hope that my request to have my testimony, as well as my verbal comments, become a matter of record is not included in my time.

I appreciate the courage that this committee has taken to deal with the issue of discrimination, especially the work of the Honor-

able Mr. Wynn as well as the Honorable Elijah Cummings for making this event an event that I think should have been long called.

What we have is we have an issue that is center stage to many of us who represent people of color, as well as the disabled, which is the organization that I represent. But we can't move further without the President actually having a dialog on race. However, the President's initiative cannot expand until the President confronts discrimination in his own backyard, and that's the Federal Government.

We cannot have a dialog about what is happening throughout the country without first handling the situation that exists in the Federal bureaucracy, especially when those decisions are having an impact on the lives and destiny of employees, as well as the destiny and lives of people we serve.

I would like to say we have a problem in this country, both on the plantation that's located on the other side of Independence Avenue and the plantation that exists here, of which I'm speaking today, because we know the kind of bills that are being passed by the Congress that bring about the demise of employees, that bring about the demise of small and disadvantaged farmers, and I'm talking about the Department of Agriculture.

My name is Lawrence E. Lucas. I represent the USDA Coalition of Minority Employees, an organization that is multiracial and multicultural, concerned about the discrimination, both systemic and institutionalized cultural discrimination at the U.S. Department of Agriculture.

Most people here will say that the worst agency is the agency they represent. I'm here to say that the worst agency is the agency within the Department of Defense, and I'm glad to say I have Mr. Ira Patterson, who's president of the USDA—I'm sorry, of the U.S. Army Coalition of Minority Employees, who are with me today, who will attest to that.

But, most important, I think we have the U.S. Department of Agriculture report after report, testimony after testimony, and if I put that testimony in front of me, Mr. Chair and committee people, that you would not be able to see my face.

What I'm saying to you today is decade after decade, Secretary after Secretary, administration after administration, Congress after Congress, has observed benignly and taken part in the wholesale discrimination that has led to the destruction of many Federal employees' lives. Administration after administration has allowed our customers, the American people, to be underserved and has contributed to the demise of, i.e., women farmers, farmers of color, small and disadvantaged farmers, and, most egregiously, the black farmers of this Nation.

John Boyd, president of the National Black Farmers Association, who was supposed to have accompanied me here today, will attest to that. The current Secretary of Agriculture, Dan Glickman, admits that USDA is the last plantation. The fact has been confirmed over the years, report after report, as well as inside the Department and outside.

What I'm concerned about today, as I heard the testimony, I heard that there's a bill before Congress. I have not seen it. And I'm not saying the bill is good or bad, but, however, this Congress

passes bills, and you have a bill that's coming to you, and this organization is saying that we're sick and tired of being sick and tired. I'm here because there are people who have given their lives to make sure that I can sit here and say what I'm saying, and I'm talking about Medgar Evers; I'm talking about Martin Luther King; Emmit Till; I'm talking about Fannie Lou Hamer, who said, "I'm sick and tired of being sick and tired," and go back to Fannie Lou Hamer.

What I'm saying to you, we have hearings and we have legislation, and some of that legislation, such as what you will see very soon, that has the audacity to want to grandfather 7,300 employees who are employees of the Department of Agriculture, but yet, and still, they're being paid. You're going to grandfather these people who have a history of racism and sexism into this system. And I say to you that it's unfair; that black farmers and the unions that I talk to will challenge you to bring forth such a legislation that will state that these people that you want to grandfather, these county committee people, who are guilty of discrimination and sexism, bring through a system and say that they don't have to compete like other Government employees—I think that's appalling.

But yet, and still, you pass bills that make decisions on our lives. I'm here to say that I'm not here to go along, to get along. I'm here to bring forth to you the issue and concern.

And I don't have three recommendations. I have before you one of the most comprehensive reports that's ever been written on a Federal agency. It's called the CRAT's report—92 recommendations. If you want to solve the problems that are going on in the Federal Government, take this report and apply it to every Federal agency within the Federal bureaucracy, and you'll see change immediately.

One of the biggest problems that we've had, we have a Department of Agriculture; they call it zero tolerance. Zero tolerance that the Secretary has is nothing but a paper tiger. Individuals who are found guilty of discrimination, both political as well as Government bureaucrats, nothing is done about it. The same individuals who are political appointees and Government bureaucrats, who go along to get along at the expense of our black farmers, our small and disadvantaged farmers, and employees of this country, is a disaster. It is a national disgrace.

And we here sit here and nod our heads and go along to get along. I'm not here to go along to get along. I'm sick and tired of being sick and tired of the racism and sexism that comes from this end of Pennsylvania Avenue, Independence Avenue, and I'm also sick and tired of what goes on in the Department of Agriculture; why people view and sit aside.

Now why do I say this about the Department of Agriculture? Let me give some stats. Ninety-one percent of all people GS–15 and above are white. Seventy-nine percent of those individuals are white male. Now you tell me, who benefits from affirmative action? Who benefits from affirmative action in this country? And you will check out any agency and you'll find almost the same statistics.

Now let me say this: We have one of the biggest problems. There's no way in the world that all this discrimination and racism

against disabled, people of color, is going along, because without the support of our law enforcement arm of the Federal Government—and I'm talking about this Congress; I'm talking about this Congress—and I also speak about the Office of General Counsels and OIG's throughout the Federal Government, that perpetuates the racism and supports these people who are found guilty of discrimination throughout the Federal Government, not just in the Department of Agriculture.

Let me give you a statistic about the Office of General Counsel, for example. The Office of General Counsel in USDA has few minorities in its ranks: 238 attorneys at the agency and only 2.9 are black. Only 1.3 are Hispanic; 2.1 are Asian-Pacific, and 94 percent of the attorneys in OGC are white.

If you look at the managerial ranks of OGC, it's even worse. Ninety-seven of the managerial positions are held by whites.

Now you tell me, how can a department that has an Office of Civil Rights have absolutely no African-Americans, and they sit and make decisions on the lives of many people throughout this Government. [Applause.]

They make the final decisions. The Office of OGC is not supposed to set policy in any agency. You all have created this dinosaur at the other end of Pennsylvania Avenue, and you are responsible for it. You are responsible for the racism and the sexism that exists in these Federal bureaucracies.

And I thank you, Mr. Chair. Out of respect for you and the members who have come here today, allowed us to speak, I'm not talking about you, because I see change. I had Mr. Wallace to say to me before walking in this room, "Lawrence, I see a change happening."

The only thing I want to say is, before I close—and I'm going to do some skipping around—let me close by saying that in 1960 the South, a civil rights battleground, the civil rights movement by Dr. Martin Luther King and others were models for positions of social change. I believe that today the model of social change must be the Federal Government itself, and the employees and customers—and I'm talking about those black farmers and others and small and disadvantaged farmers and women. The U.S. Department of Agriculture, at the forefront of this effort—and I'm talking about discrimination—just as the South in 1960, today the U.S. Department of Agriculture epitomizes a culture of racism and sexism and maintains a good-old-boys network at any and all costs. The South was resistant to 1960; today, in 1997, USDA's still resistant to change, trying to maintain a status quo and keeping in place a culture that began over 130 years ago.

In closing, I thank you for letting me proceed, but, look, like segregation in the South, the days of blatant and unchecked racism and sexism in the Department of Agriculture are numbered, and I have faith in what you're trying to do here today, and I thank you again, chairman and assistants. And what I'm saying to you today, we certainly intend to do—and I know that the farmers will continue to do what they have to do. USDA continues to resist change, even in the face of orders of the Secretary himself. The South resisted it well. But together, today, USDA and throughout the Fed-

eral Government, we are determined to make the Federal Government accurately reflect the diversity that is in America.

Thank you very much for giving me this time to speak with you today. [Applause.]

[The prepared statement of Mr. Lucas follows:]

Lawrence C. Lucas, President, USDA Coalition of Minority Employees.
Testimony before the U.S. House of Representatives
Committee on Government Reform and Oversight
Subcommittee on Civil Service
September 10, 1997

To the Chairman, the Honorable Jon Mica, to the Ranking Member, the Honorable Elijah Cummins, to other Members of the Committee, thank you for giving me the opportunity to appear before you today. I appreciate this Committee's willingness to address an issue that remains at the front and center of our nation's troubles and I want to especially thank the Honorable Albert Wynn of Maryland for your leadership in this effort.

Several weeks ago, the President signaled that it's time for America to have a dialogue on race. However, the President's initiative on race cannot expand until the President confronts discrimination in his own backyard. We cannot have a dialogue about what is happening throughout the country without first handling the situation existing in Federal agencies which choose to ignore the laws and impact of their decisions. We must look at those agencies that have historically ignored the civil rights laws and their own civil rights policies - and I'm pleased that - for the first time to my knowledge - this Committee is making an historic effort to take on this critical task.

I am here before you today because Medgar Evers, Martin Luther King, Emmit Till, Fannie Lou Hamer, Sojourner Truth, other civil rights workers, for the inclusion of minorities in the ideas set forth in our Constitution. Even though there have been tremendous changes since the 1960's, people are still receiving unequal treatment. At USDA, the unequal treatment is as clear as the numbers. 91% of the employees at the G.S. 15 and above level - the top management at USDA - are white. African-Americans, Hispanics, Asians, American Indians - all others make up only 9%. 80% of USDA's best paid employees are males. It is normal at USDA to find white male employees with only high school diplomas supervising Blacks and other people of color who have masters and doctorate degrees. This is especially acute at the Farm Services Agency and the Food Safety and Inspection Service. USDA is an agency plagued by "institutionalized discrimination."

Decade after decade, Secretary after Secretary, Administration after Administration, Congress after Congress, Republicans and Democrats alike have observed and have benignly taken part in the wholesale discrimination that has led to the destruction of many Federal employees lives. Administration after Administration has allowed our customers (the American people) to be under served and it has contributed to the demise of Black farmers, women, and small disadvantaged farmers in U.S. Agriculture. Mr. John Boyd, President, National Black Farmers Association, who has accompanied me here today, can attest to this fact. The current Secretary of Agriculture, Dan Glickman, admits that USDA is the "last plantation," a fact that has been confirmed over the years in report after report, from both inside and outside of Agriculture.

At USDA, the Coalition of Minority Employees - a multi-cultural, multi-racial organization, has

been working diligently to force the Department to deal seriously with these issues. It has been an uphill struggle - but we have nevertheless continued to march up the hill. In June 1994, the USDA Coalition of Minority Employees was formed with the assistance of the NAACP. The NAACP, which was then led by the Reverend Benjamin Chavis, declared an "assault" on discrimination with the Federal Government; and long suffering minority employees at USDA were especially ready to meet the challenge.

They formed an effective, motivated, determined cadre of leaders who have persisted and let it be known that they are not going away. Coalition leaders also reached out to partner with other employee organizations, such as the Asian Pacific American Network in Agriculture (APANA), the Hispanic Alliance (HACE), the Black and Minority Employee Organization (BMEO), labor unions, the Forum on Blacks in Agriculture, and even white males, white females, and Jewish employees who have been excluded by virtue of being outside of the "good old boy-girl network".

The newly formed Coalition identified several key issues impacting minorities at USDA, including: the glass ceiling keeping Blacks and others out of top positions; disparate treatment with respect to training opportunities; lack of promotions which keep minorities in the same grade for years; preselections; disparities in awards; an ineffective EEO complaint process and the prevalence of acts of retaliation and reprisal against employees who do complain; and the lack of disciplinary actions against managers who discriminate, many of whom actually received promotions. All of these issues were developed from the personal experiences of USDA employees.

The Coalition was born out of years of frustration and anger at the failure of several Administrations to seriously address discrimination at USDA. It was also born out of frustration because the very agencies that are supposed to protect employees rights are often being used against them. Mr. Chairman, our own law enforcement mechanisms, the Office of General Counsel and the Office of Inspector General, even our own Justice Department, have not met their responsibility -- they have not cracked down on the agencies in the federal government and its employees who knowingly break, if not ignore, civil rights laws and policies. In fact, as the U.S. Department of Agriculture's Civil Rights Action Team (CRAT) reported, they have often done more to work against those who have been discriminated against.

Mr. Chairman I have to add that the conduct of law enforcement at USDA is only a part of the problem. In our country, we have a law enforcement system that would spend $8- $9 million dollars (or some say even twice as much) to investigate a former Secretary of Agriculture for allegations of misconduct amounting to a questionable figure of $35,000. At the same time, USDA has failed to investigate or resolve close to 800 complaints of discrimination filed by minority farmers in cases where they have lost land valued at millions of dollars. We will provide $8 -9 million to pay for a special prosecutor to investigate former Secretary Mike Espy for such a minor figure, while over 100,000 employee complaints have been languishing at the Equal Employment Opportunity Commission for years because they lack the resources to do

their job. There are over 1500 employee complaints pending at the Department of Agriculture. Where is the Justice in this? Where is the commitment to ending discrimination - right here in the President's back yard? Clearly, attention has been diverted to less important issues.

With the release of the CRAT report last February, I can honestly say that no agency of the Federal government has identified, uncovered, or clearly documented so much blatant discrimination against its own employees and its customers (i.e. Black farmers, women farmers, small and disadvantaged farmers) better than the U.S. Department of Agriculture. The CRAT reported what those of us who have labored at USDA have always known - the Department of Agriculture is hampered by an "entrenched bureaucracy", and it is polluted by a racist and sexist culture that is resistant to change. It is a culture where management officials - some of them political appointees, but most of them career civil bureaucrats, believe "we were here when you got here, and we will be here when you are gone. We are above it all!"

The General Accounting Office stated in 1995 that USDA has "no formal mechanism" to hold agency heads accountable for affirmative employment programs. Without any mechanisms to hold agency heads accountable - there is no accountability. The lack of accountability is perhaps the most critical issue that USDA and every Federal agency must address if civil rights is to be a reality. The CRAT report noted that even though the Assistant Secretary for Administration is supposedly responsible for civil rights at the Department, he also had no authority to hold agency heads accountable for civil rights. These reports make it clear that enforcement of civil rights laws and regulations is non-existent.

The Civil Rights Action Team described a Department with a "general lack of civil rights leadership," and signaled out two agencies, the Office of General Counsel and the Forest Service, who have been particularly hostile to civil rights. It reported on a bureaucracy - the Farm Services Agency - that would even try to grandfather 7300 county committee people, knowing that many are racist and sexist, and lack the diversity needed to serve all of USDA's customers. This is a National Disgrace -- bureaucratic racism and sexism at its best and it is going on under the watchful eyes of our nation's leaders who appear to condone the inaction.

I want to make several points to clarify the problem being created by the Office of the General Counsel. First, USDA's OGC has very few minority attorneys in its ranks. Of 238 attorneys at the agency, only 2.9% are black, only 1.3% are Hispanic, and only 2.1% are Asian Pacific Americans. 94% of the attorneys at OGC are white. If you look at OGC's managerial ranks, the situation is even worse - 97% of the managers are white. The lack of diversity at OGC is one reason why the CRAT report said the organization is perceived to be "hostile" towards civil rights.

This lack of diversity among the attorneys who have such a powerful impact on interpretations and decisions involving civil rights at USDA is only one of OGC's problems. The agency routinely stone walls discrimination cases, and works to prevent settlements - rather than facilitate them. Just two weeks ago a Federal Judge had to order USDA - again, the Office of

General Counsel and the Justice Department - to mediate four cases of discrimination by black farmers which date back several years. The attorneys at OGC wanted more time to continue trying to prevent settling these four cases, but the Federal Judge ordered USDA to the table. This is just the latest example of OGC being part of the problem, not part of the solution.

Just a few weeks before that, USDA's Civil Rights Director, Lloyd Wright, wrote the General Counsel a memorandum in which he stated that the General Counsel could not be trusted to provide the kind of legal assistance he needed to get civil rights cases resolved. This is an outrage, and until USDA's Office of General Counsel is held accountable for civil rights, you cannot expect that others will be held accountable. The CRAT recommended that OGC establish a civil rights division to be staffed with attorneys who are committed to civil rights. USDA is now moving towards establishing that division. Yet, we continue to maintain that the attorneys are needed - but they should be in the Office of Civil Rights, and work for the Civil Rights Director, not the General Counsel who will impact their careers. Until that happens, the fox will still be guarding the chicken coop, and nothing much will change. It is a question of retaining power and control at any cost.

We are also concerned that the Directors of Civil Rights at USDA are still far removed from the Secretary, and do not report to the Secretary personally. USDA has seven mission areas, and they all have civil rights directors who report in some cases to the very agency heads and officials whose actions they are supposed to oversee. They cannot enforce civil rights, because they do not have the power to do so. They will not put their jobs on the line by finding their supervisors non-compliant. The Department's Civil Rights Director, Lloyd Wright, should report to the Secretary - and the Agency civil rights directors should report to Mr. Wright. Until this happens, civil rights will continue to be manipulated and be a powerless as a toothless tiger at USDA.

The Civil Rights Action Team made an attempt to address this issue by delegating "full authority" for civil rights to the Acting Assistant Secretary for Administration. However, even though the Acting Assistant Secretary, Pearlie Reed, has authority on paper, in practice it is a different story. Others - from OGC to the Secretary's staff - continue to make decisions about civil rights at USDA that go against the spirit of the CRAT report. Quite frankly, neither Mr. Reed, nor Lloyd Wright, have truly been delegated the authority they need; because transferring the power to delegate agency resources to minorities is unacceptable to those in control. That is something that USDA's stubborn bureaucracy simply refuses to do. They will have to be forced by the Congress and informed that the laws "do" apply to them.

I also want to address this issue of accountability. As I stated earlier, there has been no accountability for civil rights at USDA in the past. And unless the Department is willing to make some drastic changes with past practices, there will not be any in the future.

The Acting Assistant Secretary for Administration has been delegated the authority to rate agency heads on their civil rights performance elements - but it remains to be seen how this will work. It is unlikely that anybody will be removed from his position for failing to improve civil rights. It is unlikely that any high official will be removed - or even if any state or county level official will be reprimanded - when found guilty of discrimination. It remains to be seen whether or not Mr. Reed's authority to rate agency heads will translate into the authority to take meaningful action when those who are in control don't measure up. We will be watching - because unless the Department starts holding its managers accountable for enforcing the law, they will continue to ignore it - and the Department's "zero" tolerance policy towards discrimination will continue to have zero impact.

Before I conclude, I have just a few recommendations that are vital to improved government implementation of civil rights, for customers and employees.

First, Congress needs to revitalize the EEOC and provide sufficient funds and staff to reduce the over 100,000 case backlog. Also, make EEOC decisions binding on the agencies - and not just "recommendations" that agencies can accept or ignore. This is critical, because with such a back log, and with EEOC unable to make binding decisions, there is effectively no civil rights enforcement within the Federal government. Again, it is unconscionable that our government would spend millions of dollars investing $35,000 worth of alleged infractions by the former Secretary of Agriculture, while blatant racism and discrimination throughout the Federal government is not being adequately investigated because of lack of resources.

Second - implement a government-wide policy that supports employee organizations and empower them to play a greater role in civil rights policy within Federal agencies.

Third - mandate that agency civil rights offices be restructured so that the Civil Rights Director answers directly to the Secretary. As I discussed above, there won't be any effective civil rights enforcement as long as Civil Rights Directors are put in the position of having to find their supervisors non-compliant. They don't do it. They won't do it. To be effective, they need to report to the person at the top - no one else. And mandate that they be given the full authority - and resources - to enforce civil rights laws by holding people accountable when they break the law. That is the only way to really break up "good ole boy" networks that are powerful, entrenched, and obstinate.

Fourth - ensure that the mandates of Offices of General Counsel throughout government don't extend beyond advising policy officials to making policy. Civil Rights efforts at USDA has been, and continues to be hampered by an Office of General Counsel that does more than give advice - it makes critical policy decisions and dictates the outcome of civil rights cases - almost always to the detriment of the customer or employee.

Let me close by saying that in the 1960's, the South became a civil rights battleground. The Civil Rights movement, led by Dr. King and others, was a model for positive social change. I believe that today that model for social change must be the Federal government itself, and the employees and customers of the United States Department of Agriculture are at the forefront of that effort. Just as the South was in the 1960s, today the USDA epitomizes a culture of racism and sexism, and maintenance of the "good ole boy" network at all costs. The south was resistant in the 1960s. Today, in 1997, USDA is still resisting change, trying to maintain the status quo, and keeping in place a culture that began some 130 years ago.

But like segregation in the South, the days of blatant and unchecked racism and sexism at the Department of Agriculture are numbered. I hope this Committee, and this Congress, will remain vigilant on this issue. We certainly intend to do so and I know that farmers will continue to do so. USDA continues to resist change, even in the face of orders by the Secretary to comply. The South resisted as well. But together, today at USDA and throughout the Federal government - we are determined to make the Federal government accurately reflect the diversity that is America. Thank you very much for giving me this opportunity.

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Mr. MICA. Thank you, Mr. Lucas.

I'd like to now recognize Romella Arnold with the National Association of Black Federal Employees. Welcome, and you're recognized.

Ms. ARNOLD. Thank you, Mr. Chair. Good afternoon, members of the committee. I would like, first, to say that I was not the first choice to give testimony today, but I am from that agency that sent out a message to our senior-level employee who was asked and invited to participate in this testimony that, if she showed up, that her career would be over. So I am sorry Ms. Cummings is not here because I could shed some light to that incident as it happened, and I am her replacement.

I also feel that I, too, will be reprised against, once it gets back to the Department that I am the witness giving testimony here today. So I would like to go on record as saying that reprisal is very much the monster at the Department of the Interior, and that, yes, the message is managers can and will reprise and retaliate against us when we speak out about the injustices at the Department of the Interior.

I am here today as a representative for the National Association for the Advancement of Black Federal Employees. NAABFE was formed by African-American employees at the Department of the Interior in 1997–1994. Our mission is to address the status of African-American employment within the Department. The employees we represent are deeply concerned by the lack of equal opportunity within the Department of the Interior. The Department's long-standing resistance to adhere to the spirit and the intent of equal opportunity laws and regulations has caused severe underrepresentation and in some instances a conspicuous absence of African-Americans within the employment categories and levels.

Throughout the years, the Department's EEO program has been the focus of numerous congressional inquiries, audits, and investigations by regulatory agencies and the media. All appear to have reached the same incontrovertible conclusion: The Department, through its employment practices, has systemically excluded African-American employees as a class, and those practices continue to perpetuate the effects of past discrimination. The legacy is a work force that in no way reflects the diversity of our Nation, and a Department that will be ill-prepared to enter the next century and to deal with the challenges and the opportunities that a more diverse society will present.

We believe the following statistics reflect what many years of institutional racism has created. These percentages should be compared to the national civilian labor force percentage of 10.4 percent, and this percentage has been used by the Office of Personnel Management as the representational standard.

All but two major Federal agencies, the Department of Agriculture and the Department of the Interior, have met and exceeded this standard. As of June 1997, out of a total employment population of 74,827, African-Americans represent only 6.1 percent or 3,357 of the 53,400 permanent employees and 2.4 percent or 514 of the 21,427 temporary employees within the Department.

A recent article in the Washington Post identified the Department of the Interior as the whitest of all Federal agencies when it

comes to employment at the GS–13 and above levels. At the GS–13 through GS–15, out of a total of 9,100 employees, African-Americans represent 3.8 percent or 346. This condition has persisted, despite a net growth in the Department over the last 10 years.

According to an annual report published by the EEOC, the representation of African-Americans from 1986 to 1995 flat-lined between 5.9 and 6.0 percent, despite a net increase of over 5,000. I submit to you, Mr. Chair, if we were hooked up to an EEOC respirator, they would have pulled the plug on us by now. We contend this is due to an unwritten quota policy of replacement only where African-American employment is concerned. The same EEOC report has ranked Interior last out of 42 agencies and departments in its employment of African-Americans.

As the statistics demonstrate, the institutional discrimination that has produced and perpetuated this underrepresentation of African-Americans is evident in the representational statistics within every department, and some far more worse than others.

For instance, the Bureau of Land Management, African-American males represent 1.2 percent or 101 of a total of 8,418. In the Bureau of Reclamation, African-American men are 1.3 percent or 73, and African-American women are 1.5 percent or 88 out of a total of 5,612. Within the Office of the Solicitor, African-American males represent 4 or 1.1 percent of a total 365 attorneys. In this Nation's Capital, where attorneys are like taxi drivers, it's appalling to wonder why Interior only has four black male attorneys nationwide within the Department.

African-Americans are also severely under-represented and mostly conspicuously absent in many of the Department's mission-critical occupations. Mission-critical occupations are those occupations that are typically highly populated and they are directly related to the agency's missions, and they offer the greatest career opportunities.

Examples of these agencies are as follows: Park management positions within the National Park Service, where African-American men represent 3.7 percent or 119, and African-American women represent 1.7 percent or 55 out of a total of 3,220 park management positions.

General biologist positions within the U.S. Fish and Wildlife Service, where African-American males represent 0.5 or 5 and African-American women represent 1.2 or 12 out of a total population of 973 biologists.

In the Bureau of Land Management, range management specialists, African-American males and women are nonexistent. We represent zero percent out of a total of 392 range managers.

Equally disturbing has been the loss of African-Americans at the SES level, and within the departmental personnel and EEO offices. In 1993, there were 17 African-American SES's at the Department out of a population of 256. While modest, this representation had taken years to achieve. In 1997, this number has declined to 13 out of 196. Because of the severe under-representation of African-Americans at the GS–15 and GS–14 levels, and the absence of any effective recruitment program at this level, we feel this number will continue to decrease.

In 1976, the political leadership at the Department began a concerted effort to recruit African-Americans into the departmental Office of Personnel. This office is key because it is where personnel policies are formulated and interpreted for the Department. At that time, there were no African-American personnel specialists within this office. By 1993, there were nine. By 1997, we're down to one. This loss occurred at the same time new employees were being hired in the Department's Office of Personnel. In 1996, there were seven new hires in this office, all at the GS–13 and above level, and all of the selectees were white.

A similar decrease has occurred within the Office of Equal Opportunity and the agency's EEO offices. These offices, traditionally understaffed, were among the first targeted for downsizing. Because the EEO offices have been one of the few offices to hire a significant number of minorities and women, the loss of EEO staff only served to exacerbate the Department's poor EEO profile.

In 1993, there were 267 EEO specialists departmentwide and 30 within the departmental Office for Equal Opportunity. By 1997, there are approximately 140 EEO specialists departmentwide, a decrease of 40 percent, and 10 in the departmental office, a decrease of 66 percent.

Most distressing of all, however, is the comparison between new hires and separations. Between 1992 and 1997, there were approximately 7,110 new hires into the Department. Of that number, African-Americans represented 6 percent or 426. During the same time period, approximately 18,188 people left the Department. Of that number, African-Americans represented 6.6 percent or 1,198.

We believe an explanation for the work environment facing African-American employees very early in their employment—many realize there is no future at the Department. This message is driven home in a variety of ways, some more overt than others. Among the more glaring examples are the incidents of racial intolerance and harassment that have increased in recent years.

There is a story in the Department about an incident that occurred back in the 1930's during the construction of the Hoover Dam. As the story goes, white employees of the Bureau of Reclamation who were involved in this construction project accepted an old black dog as their mascot. They named this dog "Old Nigger," and thought so highly of him that, upon his death, they placed a plaque at the site of the Hoover Dam with the inscription, "To Old Nig." This plaque remained there for quite some time, until it was finally removed in the 1960's.

Unfortunately, the following case studies reveal not much has changed since then. A newly hired black male employee of the regional office of the U.S. Fish and Wildlife Service was continually subjected to various forms of harassment by his first-level supervisor through most of his first year of employment. Just prior to terminating him in December 1996, days before Christmas, his first- and second-level supervisors presented him with a certificate. This certificate was prepared on Government time and on Government equipment, containing shocking racial language, clearly intended to demean this young black male. An EEO counselor later found a copy of this certificate, which I hold in my hand, and after presenting it to the managers at the agency, the gentleman was

promptly rehired. To date, we know of no disciplinary action that was taken against either of the supervisors.

In 1992, an African-American female employee of the Minerals Management Service was confronted by a white male manager after she was informed that he had referred to her as a "Mississippi nigger." When she confronted him to ask him if he made this statement, his comment to her was, "Would it make you feel better if I called you a 'good Mississippi nigger'?" Initially, the officials within the Minerals Management Service resisted to taking any action, stating that it was her word against his word. It wasn't until 1997 that the officials finally decided to suspend the manager for only 3 days.

In 1995, an EEOC administrative judge found the National Park Service had racially harassed an African-American woman in the Service's regional office. A white male coworker of the woman had referred to her as "a lazy black bee" and "a F-ing nigger" on a number of occasions. These statements were made in the presence of his supervisor and other coworkers who chose to do nothing.

After over a year-and-a-half of adamantly refusing to take any disciplinary action against the coworker or the supervisor, the Park Service reluctantly issued both of them a letter of reprimand, which is the lowest form of disciplinary action that one can take.

Most recently, at the Department of the Interior, as of August 1997, there was a Ku Klux Klan poster posted in the mechanics room, known as the "weld room." The Ku Klux Klan poster was prominently displayed, and it was announcing a Klan rally to be held in Bowie, MD. The managers who got a hold of the poster tried to keep it quiet, but the employees who worked down there felt intimidated, and they came to our organization and reported this incident. We reported it to the Office of the Secretary ethics counselor. To date, we know of no disciplinary action that has been taken against the employee who posted the poster in the weld room.

In 1996, there were over 700 discrimination complaints at the Department. On an average, it takes complaints 565 days to be processed, three times longer than the statutory requirements of 180 days. Too often, complaints of discrimination are accompanied by complaints of reprisal and retaliation by complainants alleging they experienced an adverse employment action as a result of an EEOC complaint.

Fear of reprisal is very real at the Department. Recently, an African-American senior executive employee had agreed to serve as an agent on a class action complaint against the Department, withdrew his name, citing incidents of reprisal he felt were directly related to his involvement in the class. Rights have little meaning if one is in fear of exercising them. If someone at the SES level can be intimidated, one can only wonder about the chilling effects that it has on lower-graded employees such as myself.

We recognize these problems have evolved over many years and will take time to correct. However, the time to begin is long overdue. We, along with other employee groups, have provided the Secretary of the Interior and his designee with specific recommendations to correct these inequities on a number of occasions since his arrival in 1993. We believe that the problem is not that the Depart-

ment does not know how to effectuate the change needed, but that the Department is disinclined to make these changes.

The recommendations that we have provided are summarized in four points: Establish EEO goals and time tables designed to eliminate the severe underrepresentation of African-Americans.

The development and implementation of an accountability system that rewards EEO progress and punishes noncompliance.

The development of centralized recruitment and training programs at the entry, mid, and senior levels, that create applicant pools.

And the implementation of a policy that ensures incidents of racial discrimination and harassment are dealt with expeditiously, in a manner designed to send a message to others who might be inclined to engage in similar behavior.

We know these problems we have described are not unique to the Department, but are symbolic of a larger issue involving the structure of the Federal equal opportunity programs. Bureaucracies do not suffer change well; they are best for maintaining status quo.

We believe for the equal opportunity program to function effectively it must be able to carry out its responsibilities independent of influences by the department or agencies it represents. Similar to the inspector general's role, the role of the EEO office should be to monitor and to ensure compliance and establish laws and regulations. The existing structure does not permit this. In fact, it impedes change.

Therefore, we respectfully recommend that Congress initiate legislation that will enable Federal EEO officials to be more effective. We suggest that you play a key role through your agency appropriations committees in ensuring that intent becomes a reality. We only have to look to NASA in the mid-seventies; it was not until a congressional appropriations committee for NASA made it clear that NASA's future funding would be contingent on demonstrable EEO progress that we finally saw our first minority astronaut and woman astronaut. We need your interdiction, and I thank you for allowing me to participate in these hearings. Thank you. [Applause.]

[The prepared statement of Mr. Arnold follows:]

STATEMENT ON THE STATUS OF AFRICAN-AMERICAN EMPLOYMENT AT THE DEPARTMENT OF THE INTERIOR

Good Morning, Mr. Chairman and members of the Committee. I want to thank you for allowing me to testify before you today. Although I am an employee of the Department of the Interior, I am here today as the representative of the National Association for the Advancement of Black Federal Employees (NAABFE). NAABFE was formed by African-American employees of the Interior in 1994. Its mission is to address the status of African-American employment within the Department.

The employees we represent, are deeply concerned by the lack of equal opportunity within the Department of the Interior. The Department's long standing resistance to adhere to the spirit and intent of Equal Employment Opportunity (EEO) laws and regulations has caused severe underrepresentation, and in some instances a conspicuous absence of African Americans within employment categories and levels.

Throughout the years, the Department's EEO program has been the focus of numerous Congressional inquiries, audits and evaluations by regulatory agencies, and the media. All appear to have reached the same incontrovertible conclusion - the Department, through its employment practices, has systematically excluded African Americans as a class, and those practices continue to perpetuate the effects of past discrimination. The legacy, is a work force that in no way reflects the diversity of our nation, and a Department that will be

ill prepared to enter the next century and deal with the challenges and opportunities that a more diverse society will present.

We believe the following statistics reflect what many years of institutional racism has created. These percentages should be compared to the national civilian labor force percentage of **10.4**. This percentage has been used by the Office of Personnel Management as a representational standard. All but two of the major federal agencies, the Department of Agriculture and the Department of the Interior, have met and exceeded this standard.

As of June 30, 1997, out of a total employment population of 74, 827, African Americans represented **6.1%**, or 3,357 of the 53,400 permanent employees and **2.4%**, or 514 of the 21,427 temporary employees within the Department (See Exhibit 1). While African Americans are underrepresented in most administrative and professional occupations, underrepresentation is particularly severe at the higher grade levels. A recent article in the Washington Post (July 21, 1997) identified the Department as the whitest of all" federal agencies at the GS-13 and above levels.
At the GS-13 through GS-15 levels, out of a total of over 9,100 employees, African Americans represent **3.8%** or 346
(See Exhibit 1a).

This condition has persisted despite a net growth in the Department over the last ten years. According to an annual report published by the Equal Employment Opportunity Commission (EEOC), the representation of African-Americans from 1986 to 1995 flatlined between **5.9%** and **6.0%**, despite a net increase of over 5,000

employees during this period (See Exhibit 2). We contend this is due to an unwritten quota policy of "replacement only" where African American employment is concerned.

The same EEOC report ranked the Interior **last** out of 42 federal departments and agencies in its employment of African Americans (See Exhibit 3).

As the statistics demonstrate, the institutional discrimination that has produced and perpetuated this underrepresentation of African Americans is evident in the representational statistics within every agency of the Department (See Exhibit 4A-E), some far worse than others. For instance, within the Bureau of Land Management African American males represent only **1.2%** or 101 of the total population of 8,418; in the Bureau of Reclamation, African American men are **1.3%**, or 73 and African American women are **1.5%** or 88, out of a total population of 5,612; and within the Office of the Solicitor, African American men are **1.1%** or 4, out of a total population of 365.

African Americans are also severely underrepresented in most and conspicuously absent in many of the Department's mission critical occupations. Mission critical occupations are typically the most highly populated, they are directly related to an agency's mission, and they offer the greatest career opportunities. Agency specific examples include: Park Management positions within the National Park Service in which African Americans men represent **3.7%** or 119 and African American women represent **1.7%** or 55 out of a total population of 3,220; General Biologist positions within the U.S. Fish

and Wildlife Service in which African American males represent **.5%** or 5 and African American women **1.2%** or 12, out of a total population of 973, and Range Management Specialists within the Bureau of Land Management, where African Americans, men and women, represent **0%** out of a total population of 392 (See Exhibit 5).

Equally disturbing, has been the loss of African-Americans at the SES level, and within the Departmental personnel and EEO offices. Some of this loss is attributable to downsizing and reductions in force, both of which have had a disproportionate impact on African Americans.

In 1993 there were **17** African Americans at the SES level out of a population of 256. While modest, this representation had taken years to achieve. By 1997, this number had declined to **13** out of 196. Because of the severe underrepresentation of African Americans at the next lower levels, GS-15 and GS-14, and the absence of any effective recruitment programs at this level, we feel that this number will continue to decrease.

In 1976, the political leadership at Interior began a concerted effort to recruit African Americans into the Departmental Office of Personnel. This Office is key because it is where personnel policies are formulated and interpreted for the Department. At that time, there were no African American personnel specialists within this office. By 1993 there were **9**. By 1997, this number had decreased to **1**. This loss occurred at the same time new employees were being hired into the personnel office. For example, in 1996 there were

seven new hires into this office at the GS-13 and above levels - all of the selectees were white.

A similar decrease has occurred within the Departmental EEO office and agency EEO offices. These offices, traditionally understaffed, were among the first targeted for downsizing. Because the EEO offices have also been one of the few offices to hire a significant number of minorities and women, the loss of EEO staff only served to exacerbate the Department's poor EEO profile. In 1993 there were 267 EEO specialists Departmentwide and 30 within the Departmental Office for Equal Opportunity. By June 30, 1997, there were approximately 147 EEO specialists Departmentwide, a decrease of over **40%,** and 10 in the Departmental EEO Office, a decrease of over **66%**.

Most distressing of all, however, is the comparison between new hires and separations that have occurred within the general schedule in the last five years.[5] Between 1992 and June 30, 1997, there were approximately 7,110 new hires into the Department. Of that number African Americans represented **6.0%** or 426. During the same time period approximately 18,188 people left the Department. Of that number, African Americans represented **6.6%** or 1,198.

Even more dramatic is the same comparison at entry levels GS-5 and GS-7. Typically, those hired into the government at the GS-5 or GS-7 level are new college graduates whose major qualifies them for a career in one of the administrative or professional occupations. During this same five year time frame there were 1,388 new hires at the GS-5 level and 723 at the GS-7 level. At the GS-5 level African

5

Americans represented **8.7%** or 121. At the GS-7 level African Americans represented **4.7%** or 34 of the new hires. However, during the same period, there were 2,446 separations at the GS-5 level and 1,832 at the GS-7 level. African Americans represented 9.6 percent, or 235 of those separated at the GS-5 level and 12.8 percent or 234 or those separated at the GS-7 level. As evidenced by these numbers, the rate of African Americans leaving the Department far exceeded the rate of African Americans hired into the Department. (See Exhibits 6a through 6c).

We believe one explanation for this is the work environment facing African American employees. Very early in their employment, many realize there is no future for them at the Department of the Interior. This message is driven home in a variety of ways, some more overt than others. Among the more glaring examples are the incidents of racial intolerance and harassment that have increased in recent years.

There is a story at the Department about an incident that occurred in the late 1930s during the construction of the Hoover Dam. As the story goes, white employees of the Bureau of Reclamation who were involved in this construction project came to accept an old black dog as their mascot. They named this dog "old nigger", and thought so highly of him, that upon his death they placed a plaque at the site of the dam with the inscription to "ole nig". This plaque remained for quite sometime, until it was finally removed in the 1960s. Unfortunately, as the following case studies reveal, not much has changed since then.

Case Study Number One - A newly hired black male employee of a regional office of the U.S. Fish and Wildlife Service, was continually subjected to various forms of harassment by his first level supervisor throughout most of his first year of employment. Just prior to terminating him in December 1996, days before Christmas, his first and second level supervisor presented the man with a "certificate" (See Exhibit 7 for a copy of the document). This certificate, prepared on government time and with government equipment, contained shocking racial language clearly intended to demean this young black man. An EEO counselor later found a copy of this document, which resulted in the man being promptly rehired. To date, we know of no disciplinary action taken against either supervisor.

Case Study Number Two - In 1992, an African American female employee of the Minerals Management Service confronted her white male manager after being informed that this manager had referred to her as a "Mississippi nigger". When she asked him if this were true, he allegedly responded by saying, "would it make you feel better if I called you a "good Mississippi nigger." Initially, officials within the Minerals Management Service resisted taking any action, stating that it was her word against his. It wasn't until 1997 that officials of the Minerals Management Service decided to suspend this manager for three (3) days.

Case Study Number Three - In March 1995, an EEOC administrative judge found the National Park Service had racially harassed an African American women at one of the Service's regional offices. A white male co-worker of the woman had referred to her as a "lazy black bitch" and "fucking nigger" on a number of occasions. These

statements were made in the presence of their supervisor, who chose to do nothing. After over a year and a half of adamantly refusing to take any disciplinary action against the co-worker or supervisor, the Park Service reluctantly agreed to issue both a letter of reprimand, the lowest form of formal disciplinary action.

Case Study Number Four - African American employees of the Office of the Secretary, Interior's Service Center, (located at the Main Interior Building, Washington, D.C.) were subjected to racial harassment in August 1997 when a Klu Klux Klan poster was prominently displayed in the mechanic's work room. The KKK poster announced an upcoming Klan gathering in Bowie, Md.

In 1996 there were over 700 hundred complaints of employment discrimination in process against the Department. On average, these complaints take approximately 565 days to process, or over three times longer than the statutory time frame of 180 days.
Too often, complaints of discrimination are accompanied by complaints of reprisal and retaliation by complainants alleging they experienced an adverse employment action as a result of filing an EEO complaint. Fear of reprisal is very real at the Department. Recently, an African American SES employee, who had agreed to serve as an agent in a class action complaint against the Department, withdrew his name citing incidents of reprisal he felt were directly related to his involvement in the class.

Rights have little meaning, if one is in fear of exercising them. If someone at the SES level can be intimidated, one only has to wonder about the chilling effect this has on lower graded employees.

We recognize these problems have evolved over many years and will take time to correct. However, the time to begin is long overdue. We, along with other employee groups have provided the Secretary of the Interior and/or his designees with specific recommendations to correct these inequities on a number of occasions since his arrival in 1993. We believe the problem is not that the Department does not know how to effect the changes needed, but that the Department is disinclined to make these changes.

The recommendations provided can be summarized in four points: (1) the establishment of EEO goals and timetables designed to eliminate the severe underrepresentation of African Americans within five years, and a system to monitor the achievement of these goals, (2) the development and implementation of an accountability system that rewards EEO progress and punishes non-compliance, (3) the development of centralized recruitment and training programs at the entry, mid and senior levels that create applicant pools of African American candidates, and (4) the implementation of a policy that ensures incidents of racial discrimination and harassment are dealt with expeditiously, in a manner designed to send a message to others who might be inclined to engage in similar behavior.

We know the problems we have described are not unique to the Department, but are symbolic of a larger issue involving the structure of federal equal opportunity programs. Bureaucracies do not suffer change well, they are best at maintaining the status quo. We believe, for the equal opportunity program to function effectively it must be able to carry out its responsibilities independent of influences by the Department or agency it represents. Similar, to the Inspector

General's role, the role of the EEO office should be to monitor and ensure compliance with established laws and regulations. The existing structure does not permit this, in fact it impedes any change.

Therefore, we respectfully recommend that Congress initiate legislation that will enable federal EEO officials to more effectively carry out their enforcement role. The EEO Act of 1972 made clear the Congressional intent was to eliminate any remaining vestige of racial discrimination within the federal government's policies and programs. We suggest that Congress can play a key role through its agency appropriations committees, in ensuring that intent becomes a reality. We only have to look at the example provided by NASA in the mid 1970s. It was not until the Congressional appropriations committee for NASA made it clear, that NASA's future funding would be contingent upon demonstrable EEO progress, that we finally saw our first minority and woman astronaut.

We need your intervention, if EEO within the Department of the Interior and federal government is to be more than just a hollow promise. We thank you for holding these hearings, and for listening to our concerns.

Romella J. Arnold

Romella J. Arnold is a native Washingtonian, and a graduate of Cheyney University of Pennsylvania, the oldest Historically Black College in the United States. Ms. Arnold first entered the Federal Government in 1992, as Co-op Intern, employed with the Department of Health and Human Services. Upon completion of graduation in 1975, she was recruited by the Department of the Interior, where she has been employed until the present.

Ms. Arnold began her career working in the Department's Office for Equal Opportunity and is currently working for the Bureau of Land Management's Equal Employment Opportunity Office. She has a wealth of experience in the field Civil Rights.

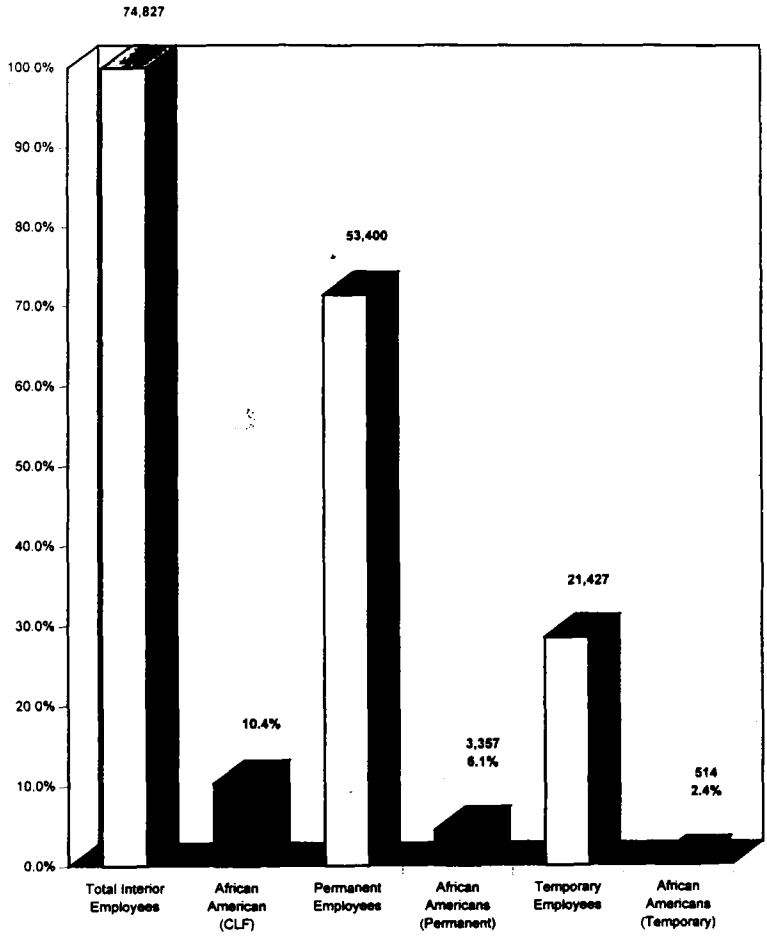
Ms. Arnold has served as a member on numerous board of Directors for various organizations, such a the National Alumni Association for Cheyney University, the Board of Trustees for Michigan Park Christian Church, and the National Association for the Advancement of Black Federal Employees (NAABFE).

Ms. Arnold has dedicated her public service to working with the youth of our citizenry by serving as a Girl Scout Leader, the Chair of Youth Activities for Michigan Park, and is currently serving as Chair of scholarship fund-raising for the Washington D. C. Chapter Cheyney Alumni Association.

Ms. Arnold is a charter member of the National Association for the Advancement of Black Federal Employees founded in 1994, at the Department of the Interior. She was elected as Vice President in 1994, and was re-elected in 1996. Most recently, NAABFE presented Ms. Arnold with an award for her outstanding leadership and courageous work in the spirit of the struggle for Civil Rights.

Over the years, Ms. Arnold has received numerous Special Achievement Awards, and Public Service Awards for her dedicated service to the organizations she is affiliated with.

DEPARTMENT OF THE INTERIOR AFRICAN AMERICAN REPRESENTATION WITHIN THE CIVILIAN LABOR FORCE (CLF)



Source: Department of the Interior, Office of Equal Opportunity

Exhibit 1

Monday, July 21, 1997 A19
The Washington Post

THE FEDERAL PAGE

The White Look

■ The Interior Department has won the dubious distinction of being, as one administration official said, "the whitest of all" in a survey of several departments' hiring practices. The demographics of employees ranked GS-13 and above, compiled by the Equal Employment Opportunity Commission and released by Rep. Albert R. Wynn (D-Md.), show Interior's work force was 87 percent white, and African Americans were 4 percent of the employees. Transportation and NASA were both 85 percent white, and the remaining two departments checked, Energy and Agriculture, were 84 percent white. Nine percent of Agriculture's employees were African American, as were 7 percent of Energy's, 5 percent of NASA's and 7 percent of Transportation's.

Exhibit 1A

TABLE 1-8

FEDERAL AGENCY TREND SUMMARY FOR AGENCIES WITH 500 OR MORE EMPLOYEES
FOR 1986 - 1995

YEAR	TOTAL ALL NUMBER	TOTAL FEMALE NUMBER	%	WHITE FEMALE NUMBER	%	BLACK MALE NUMBER	%	BLACK FEMALE NUMBER	%	HISPANIC MALE NUMBER	%	HISPANIC FEMALE NUMBER	%	ASIAN AMERICAN / PACIFIC ISLANDER MALE NUMBER	%	ASIAN AMERICAN / PACIFIC ISLANDER FEMALE NUMBER	%	AMERICAN INDIAN / ALASKAN NATIVE MALE NUMBER	%	AMERICAN INDIAN / ALASKAN NATIVE FEMALE NUMBER	%
HOUSING AND URBAN DEVELOPMENT																					
1986	11,274	5,953	53.75	3,199	27.98	954	8.42	2,268	21.02	284	2.55	322	3.03	99	0.93	118	1.23	42	0.43	49	0.30
1987	12,199	6,711	55.01	3,539	29.01	1,011	8.29	2,567	21.04	299	2.45	372	3.05	135	1.11	163	1.34	54	0.44	70	0.49
1988	12,625	7,068	55.97	3,693	29.25	1,049	8.31	2,735	21.66	304	2.41	388	3.07	129	1.02	178	1.41	52	0.41	72	0.57
1989	12,921	7,356	56.93	3,787	29.31	1,071	8.29	2,871	22.22	318	2.46	434	3.36	133	1.03	183	1.42	52	0.40	81	0.57
1990	13,084	7,542	57.64	3,830	29.27	1,053	8.05	2,972	22.71	319	2.44	474	3.62	145	1.11	185	1.41	53	0.41	81	0.62
1991	13,878	8,097	58.34	4,180	30.12	1,091	7.86	3,115	22.45	352	2.54	509	3.67	156	1.14	208	1.50	57	0.41	85	0.61
1992	13,407	7,802	58.19	3,996	29.81	1,062	7.92	3,028	22.59	346	2.58	492	3.67	155	1.16	202	1.51	52	0.39	84	0.63
1993	12,885	7,510	58.28	3,819	29.64	1,030	7.99	2,935	22.78	325	2.52	480	3.73	156	1.21	193	1.50	48	0.37	83	0.64
1994	12,455	7,321	58.78	3,686	29.59	1,003	8.05	2,899	23.28	316	2.54	466	3.74	154	1.24	192	1.54	47	0.38	78	0.63
1995	11,130	6,614	59.42	3,287	29.53	901	8.10	2,660	23.90	284	2.55	424	3.81	144	1.29	168	1.51	42	0.38	75	0.67
INTERIOR																					
1986	55,141	18,143	32.90	12,830	23.27	1,658	3.01	1,674	3.04	1,247	2.26	788	1.43	457	0.83	281	0.51	3,661	6.68	2,389	4.35
1987	54,681	18,180	33.25	12,809	23.42	1,669	3.05	1,662	3.04	1,242	2.27	821	1.50	453	0.83	280	0.51	3,665	6.70	2,608	4.66
1988	55,606	18,936	33.93	13,425	24.06	1,670	2.99	1,645	2.95	1,270	2.28	850	1.52	465	0.83	293	0.53	3,713	6.65	2,723	4.77
1989	56,766	19,589	34.51	13,894	24.48	1,670	2.94	1,701	3.00	1,329	2.34	925	1.63	461	0.81	310	0.55	3,656	6.44	2,739	4.68
1990	57,562	20,188	35.07	14,273	24.80	1,666	2.93	1,790	3.11	1,387	2.41	991	1.72	457	0.79	332	0.58	3,665	6.37	2,802	4.87
1991	59,563	21,355	35.84	15,082	25.31	1,771	2.97	1,883	3.16	1,460	2.45	1,111	1.86	461	0.77	358	0.60	3,717	6.24	2,921	4.90
1992	62,028	22,670	36.55	16,010	25.81	1,824	2.94	1,870	3.16	1,540	2.48	1,191	1.92	496	0.80	384	0.62	3,766	6.11	3,115	5.02
1993	62,832	23,141	36.83	16,305	25.95	1,842	2.93	1,896	3.18	1,552	2.47	1,203	1.91	537	0.85	408	0.65	3,848	6.12	3,228	5.14
1994	63,090	23,127	36.66	15,906	25.21	1,787	2.83	1,913	3.03	1,533	2.43	1,159	1.84	524	0.83	398	0.63	4,707	7.46	3,749	5.94
1995	60,289	22,048	36.58	15,247	25.30	1,748	2.90	1,848	3.07	1,471	2.44	1,085	1.80	512	0.85	386	0.64	4,356	7.23	3,482	5.78
JUSTICE																					
1986	64,880	24,244	37.36	15,285	23.56	3,974	6.12	7,102	10.94	3,699	5.70	1,401	2.16	455	0.70	322	0.50	229	0.33	134	0.11
1987	66,007	25,594	38.77	16,105	24.40	3,925	5.95	7,481	11.33	3,757	5.69	1,512	2.29	498	0.75	352	0.53	236	0.36	144	0.10
1988	72,886	28,643	39.30	17,997	24.69	4,231	5.80	8,158	11.19	4,674	6.41	1,910	2.62	617	0.85	479	0.66	232	0.32	99	0.22
1989	77,898	29,715	38.15	18,416	23.64	4,953	6.36	8,575	11.01	5,054	6.49	2,058	2.64	696	0.89	549	0.70	266	0.34	117	0.15
1990	79,565	31,061	39.04	19,359	24.33	5,028	6.32	8,717	10.96	5,183	6.51	2,252	2.83	752	0.95	594	0.75	256	0.32	139	0.17
1991	86,603	34,316	39.62	21,457	24.78	5,466	6.31	9,445	10.91	5,718	6.60	2,629	3.04	807	0.93	623	0.72	271	0.31	162	0.19
1992	92,080	36,586	39.73	23,043	25.02	5,805	6.30	9,773	10.61	6,321	6.86	2,863	3.11	932	1.01	721	0.78	277	0.30	186	0.20
1993	93,407	36,965	39.57	23,131	24.76	6,006	6.43	9,795	10.49	6,563	7.03	3,001	3.21	1,027	1.10	846	0.91	306	0.33	192	0.21
1994	93,364	36,426	39.02	22,615	24.22	6,151	6.59	9,664	10.35	6,845	7.33	3,059	3.28	1,111	1.19	883	0.95	358	0.38	205	0.22
1995	98,017	37,932	38.70	23,581	24.06	6,597	6.73	9,878	10.08	7,527	7.68	3,273	3.34	1,270	1.30	977	1.00	440	0.45	223	0.23

Source: Equal Employment Opportunity Commission Report Fiscal Year Ending 1995

Exhibit 2

TABLE I-19

RANKING AS A PERCENT OF TOTAL WORK FORCE
BY RACE, NATIONAL ORIGIN AND GENDER
FOR FEDERAL AGENCIES WITH 500 OR MORE EMPLOYEES

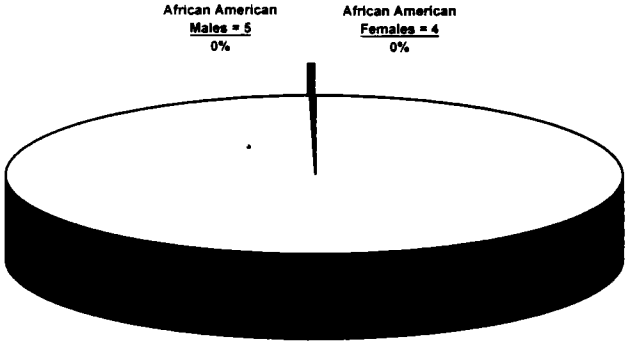
AGENCY OR DEPARTMENT	BLACK	RANK	HISPANIC	RANK	ASIAN AMERICAN / PACIFIC ISLANDER	RANK	AMERICAN INDIAN / ALASKAN NATIVE	RANK	WOMEN	RANK
AGENCY FOR INTERNATIONAL DEVELOPMENT	27.18	14	3.21	28	3.14	18	0.43	30	46.74	21
AGRICULTURE, DEPARTMENT OF	9.66	40	4.90	17	2.03	32	2.43	3	41.31	28
AIR FORCE, DEPARTMENT OF THE	9.76	39	9.29	4	2.92	22	1.06	8	32.49	37
ARMY, DEPARTMENT OF THE	14.24	32	5.40	14	3.37	15	1.11	7	37.22	33
COMMERCE, DEPARTMENT OF	17.74	26	2.64	32	4.47	7	0.45	27	43.96	24
DEPARTMENT OF DEFENSE - SUMMARY	13.93	33	5.79	12	5.17	4	0.94	10	36.44	36
EDUCATION, DEPARTMENT OF	36.79	5	3.91	24	2.99	21	0.68	22	60.66	6
ENERGY, DEPARTMENT OF	11.79	36	5.00	16	3.61	13	1.27	6	38.70	31
ENVIRONMENTAL PROTECTION AGENCY	17.98	25	4.02	23	4.13	9	0.45	26	49.34	18
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	47.85	2	11.16	2	2.48	27	0.66	24	66.27	2
FEDERAL COMMUNICATIONS COMMISSION	29.44	10	2.81	31	3.94	12	0.35	31	51.43	16
FEDERAL DEPOSIT INSURANCE CORPORATION	15.65	31	3.09	29	2.15	31	0.52	25	44.24	23
FEDERAL EMERGENCY MANAGEMENT AGENCY	19.59	24	2.06	38	1.37	40	0.34	32	32.30	38
FEDERAL TRADE COMMISSION	23.19	21	1.45	42	2.68	26	0.11	42	52.06	15
GENERAL SERVICES ADMINISTRATION	27.43	13	4.35	19	3.26	16	0.68	21	42.10	27
GOVERNMENT PRINTING OFFICE	57.38	1	2.27	36	0.79	41	0.17	38	39.50	30
GOVERNMENT WIDE (CPDF)	16.92	29	5.62	11	3.98	10	1.79	4	43.69	25
HEALTH & HUMAN SERVICES, DEPARTMENT OF	17.93	26	2.60	33	3.52	14	16.95	1	61.91	3
HOUSING & URBAN DEVELOPMENT, DEPT. OF	31.99	9	6.36	8	2.80	23	1.05	9	59.42	8
INTERIOR, DEPARTMENT OF	5.97	42	4.24	21	1.49	38	13.01	2	36.58	35
INTERSTATE COMMERCE COMMISSION	36.59	6	2.44	35	0.54	42	0.81	13	49.59	17
JUSTICE, DEPARTMENT OF	16.81	30	11.02	3	2.29	29	0.68	23	38.70	32

Source): Equal Employment Opportunity Commission Report Fiscal Year Ending 1993

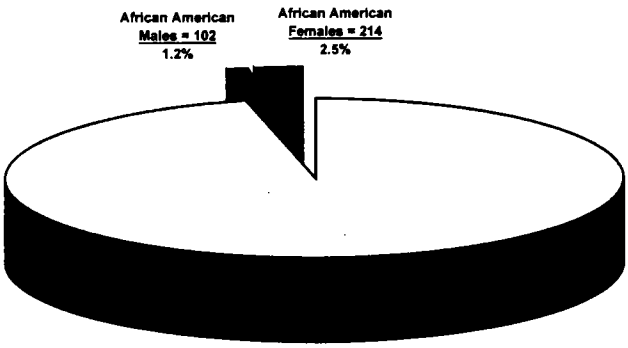
Exhibit 3

DEPARTMENT OF THE INTERIOR
AFRICAN AMERICAN REPRESENTATION
PERMANENT WORK FORCE BY BUREAU

BUREAU OF INDIAN AFFAIRS
Work Force = 5,308



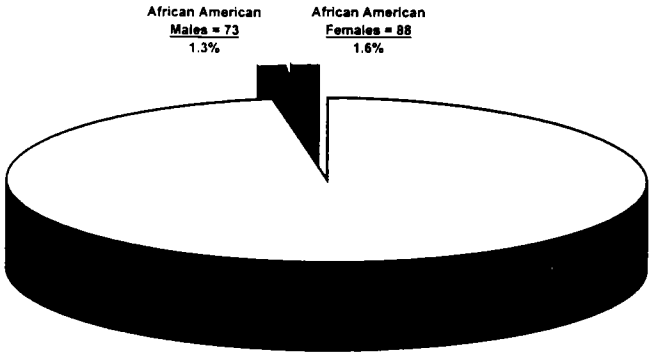
BUREAU OF LAND MANAGEMENT
Work Force = 8,418



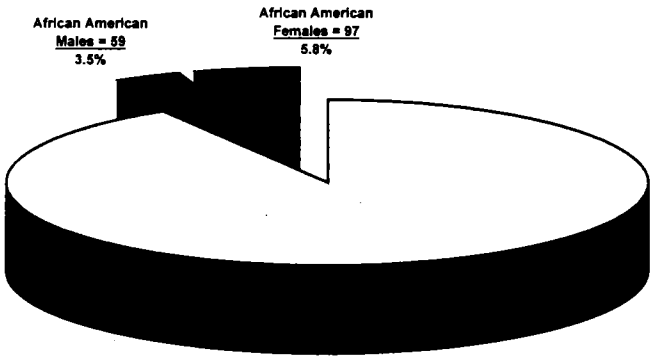
Source: Department of the Interior, Office of Equal Opportunity

Exhibit 4-A

BUREAU OF RECLAMATION
Work Force = 5,612



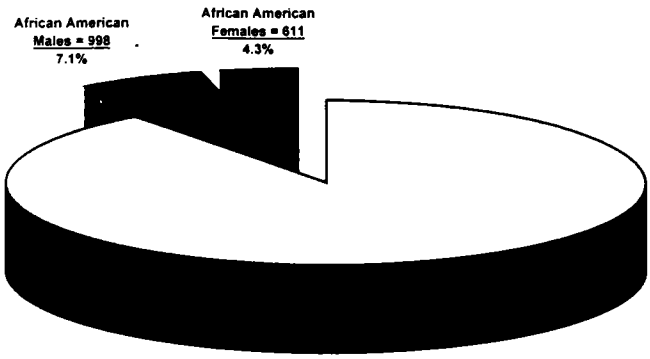
MINERALS MANAGEMENT SERVICES
Work Force = 1,662



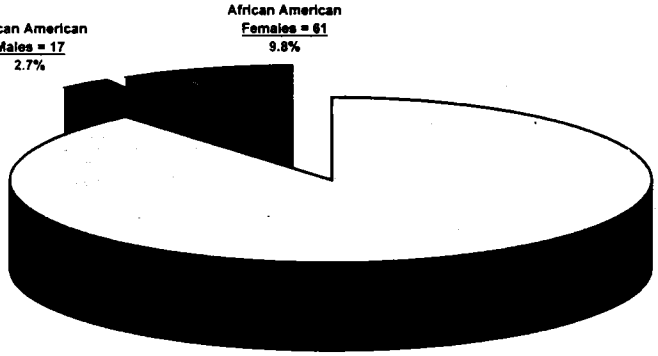
Source: Department of the Interior, Office of Equal Opportunity

Exhibit 4-B

NATIONAL PARK SERVICE
Work Force = 14,122



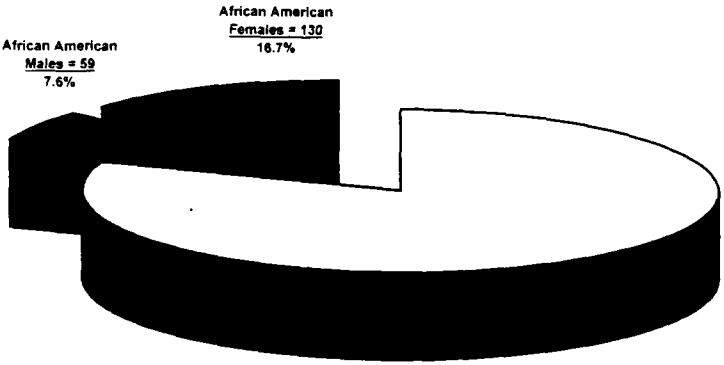
OFFICE OF SURFACE MINING
Work Force = 625



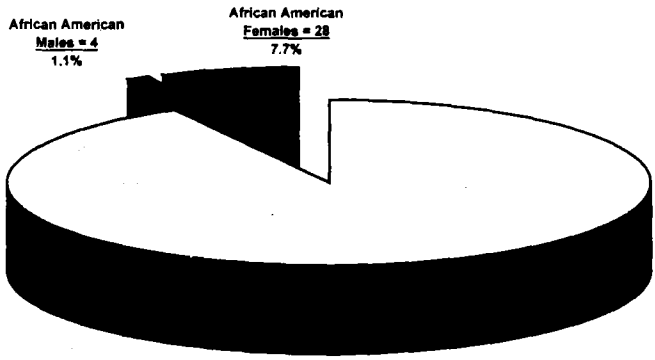
Source: Department of the Interior, Office of Equal Opportunity

Exhibit 4-C

OFFICE OF THE SECRETARY
Work Force = 780



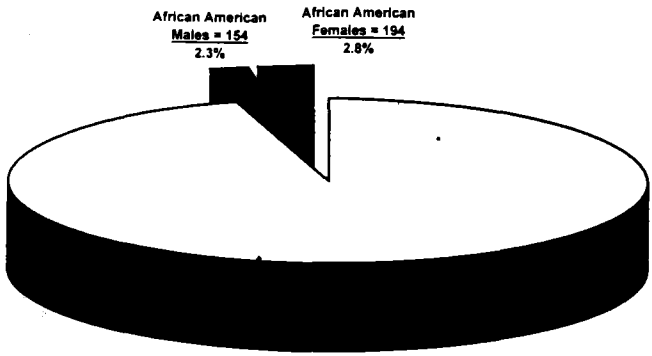
OFFICE OF THE SOLICITOR
Work Force = 365



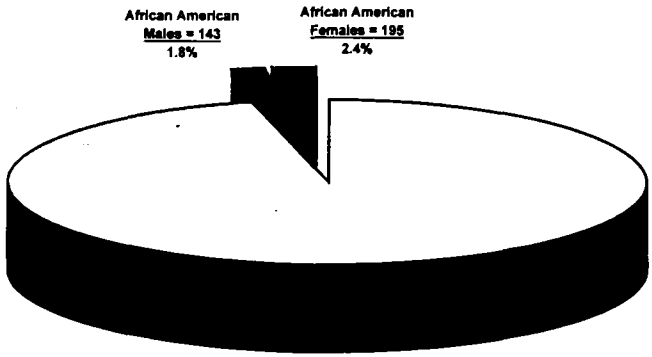
Source: Department of the Interior, Office of Equal Opportunity

Exhibit 4-D

U.S. FISH AND WILDLIFE SERVICES
Work Force = 6,819



U.S. GEOLOGICAL SURVEY
Work Force = 8,118

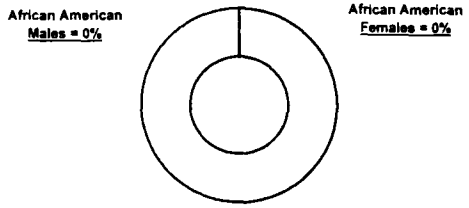


Source: Department of the Interior, Office of Equal Opportunity

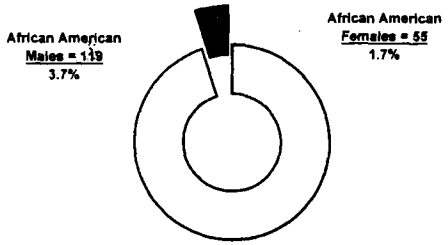
Exhibit 4-E

AFRICAN AMERICAN REPRESENTATION MISSION CRITICAL OCCUPATIONS

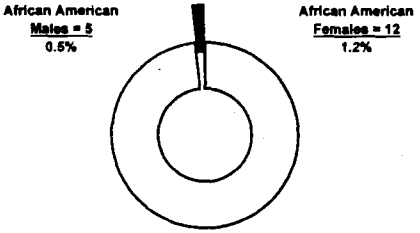
BUREAU OF LAND MANAGEMENT
Range Management Specialist = 392



NATIONAL PARK SERVICE
Park Management = 3,220



U.S. FISH AND WILDLIFE SERVICE
General Biologists = 973

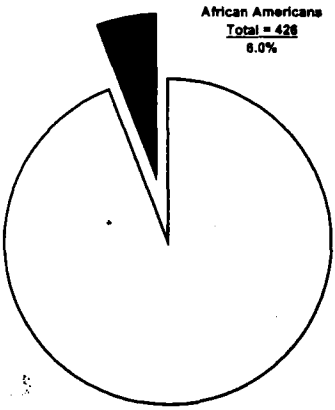


Source: Department of the Interior, Office of Equal Opportunity

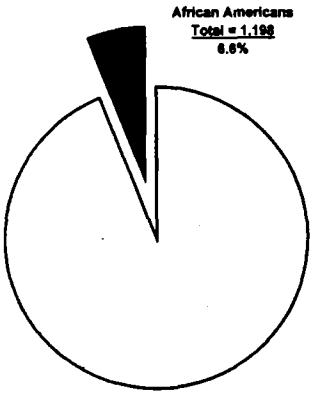
Exhibit 5

COMPARISON OF NEW HIRES TO SEPARATIONS TOTAL WHITE COLLAR (GS) EMPLOYEES FROM 1992 TO JUNE 30, 1997

TOTAL (GS) NEW HIRES = 7,110



TOTAL (GS) SEPARATIONS = 18,188

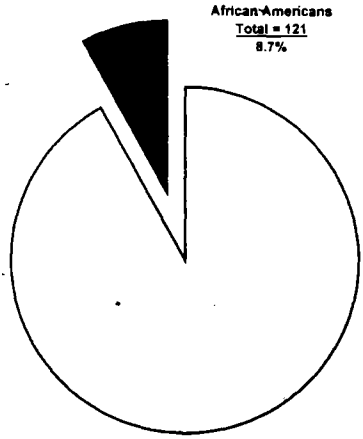


Source: Department of the Interior, Office of Equal Opportunity

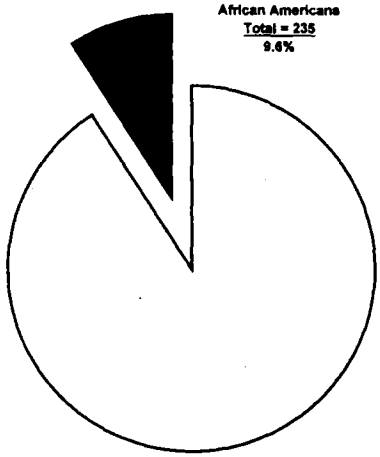
Exhibit 6-A

TOTAL OF GS-05 EMPLOYEES

TOTAL (GS-05) NEW HIRES = 1,388



TOTAL (GS-05) SEPARATIONS = 2,446

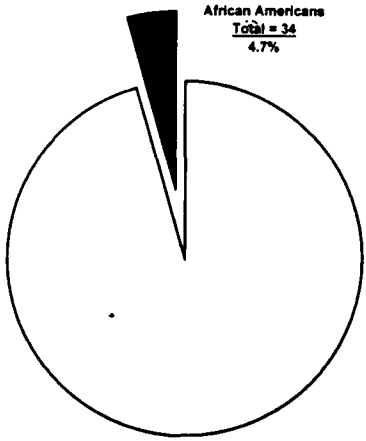


Source: Department of the Interior, Office of Equal Opportunity

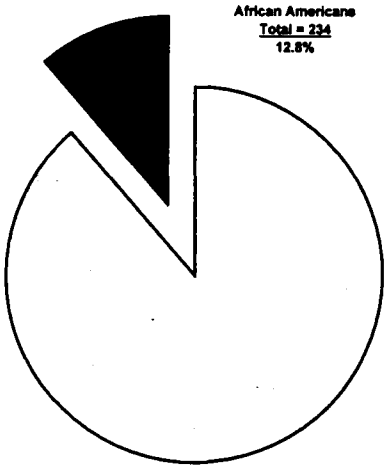
Exhibit 6-B

TOTAL OF GS-07 EMPLOYEES

TOTAL (GS-07) NEW HIRES = 723



TOTAL (GS-07) SEPARATIONS = 1,832



Source: Department of the Interior, Office of Equal Opportunity

Exhibit 6-C

SRTIFCUT UF PRESHE ASHUN

FER ALL DA GOOD HEP THAT LELAND BRAGGS HAZ DONE WITH HEES BIG MUSSELS N ASSISTN HEES BOSS WOMANN WITH PUTTIN UP WALLS N HOOKUN UP KUMPOOTER THANGS IN DA KUPPEL A MUNTHS DAT SHE BIN SO OVRWHILMD. THANX.

Donna Hoff

Susan MacMillan

Exhibit 7

Mr. MICA. Ms. Arnold, you may hold the record for the longest 5 minutes in the subcommittee. [Laughter.]

But we do value your testimony and participation.

I'd now like to recognize LaVerne Cox, and she's with the Library of Congress class action plaintiffs. You're recognized.

Ms. COX. Thank you. Mr. Chairman and members of this committee, thank you for inviting me to appear before you. My name is LaVerne Cox. I'm a personnel management specialist in the Personnel Office of Human Resources at the Library of Congress. I also serve as president of the Library of Congress chapter of Blacks In Government, and am a member of the steering committee for the Howard Cook class action lawsuit. I am testifying not as a Library official, but as president of the Library of Congress chapter of Blacks In Government and a member of the Cook lawsuit.

I request that my written statement be entered into the record.

For those of you who may be new to the conflict, the Cook class action lawsuit was filed in 1975. The Library's Equal Employment Opportunity Office rendered a decision in 1981 and found no discrimination existed. In August 1992, the U.S. District Court found in our favor and against the Library. The U.S. Treasury has paid $8.5 million to the plaintiffs. The Library management has suffered no consequences and has continued its discriminatory practice with impunity. The Library of Congress continues to defy both the letter and spirit of the Federal court order.

My testimony will focus on two major issues: racial discrimination at the Library of Congress and recommendations for corrective action, and remedies to more effectively and efficiently redress the weaknesses in the current equal employment opportunity complaints process.

During my 17 years at the Library of Congress, I have often been reminded of the 1857 Dred Scott decision of the U.S. Supreme Court, which upheld the notion that African-Americans have no rights that European-Americans are constitutionally required to respect. To all appearances, the Library has largely adopted this proposition in its relationship with African-American employees and African-American applicants for employment.

As I've already noted, in 1992, after more than 17 years of litigation, the U.S. District Court for the District of Columbia concluded that the Library of Congress had clearly and systematically discriminated against African-Americans because of their race. The court found that the Library had practiced racial discrimination at every step of the selection process. The management of the Library, however, has always contended that it does not practice racial discrimination, and this is the current view of Library management.

Despite the court order, it took more than 3 years for us to reach a settlement agreement with the Library management on specific actions to be taken and relief. Although the U.S. Treasury has paid out $8.5 million of taxpayers' money, the Library has refused to honor the injunctive relief requirements of the settlement agreement. As you know, these provisions are of central importance because of they specify actions that the Library must take to bring its selection procedures into compliance with the law.

Because of the Library's functionally defiant attitude, members of the Cook class have taken new actions in Federal district court,

filing both a new class action discrimination complaint in April 1997 and a motion to force the Library of Congress to comply with the settlement agreement.

Now the specifics: the Library of Congress has failed to comply with the requirements of the court in four ways: First, the Library has continued to non-competitively appoint, promote, and reassign their preferred choices into attractive and often higher-level positions under the guise of other regulations or actions.

Second, the Library has failed to provide data on competitive and non-competitive selections, data which are critical to the oversight of the settlement agreement.

Third, the Library has turned the court-ordered affirmative action review process into a shame.

Fourth, the Library has refused to validate its election procedures in accordance with the Uniform Guidelines on Employee Selection, as ordered by the court.

Now to our recommendations for this committee: It appears the Congressional Research Service, a unit of the Library of Congress, is particularly hostile toward African-Americans, especially those in the economic series, with regard to the denial of promotion plan promotions. Our first recommendation is that this committee review the way that the Congressional Research Service marginalizes African-American employees. Indeed, four of the original seven plaintiffs in the Cook class action lawsuit were employed in CRS.

Based on the results of a survey of professional African-American employees in CRS conducted by Blacks In Government, an obvious pattern of denial of promotions within promotion plans emerged, but the problems don't stop there. Under the competitive selection process, a discrimination complaint is now pending alleging an egregious violation of the interview process. As further illustration, CRS has transferred the only two senior professional African-American employees who occupied policy positions to nonpolicymaking positions under the pretext of efficiency and replaced them with a white male.

CRS has a total of 16 African-American analysts and attorneys out of 249. CRS has a unique opportunity to improve the overall diversity profile of its professional staff by incorporating successful recruitment strategies of African-Americans in their plans to fill a projected 100 vacancies.

Second, we respectfully urge that the Library of Congress be required to provide this committee with a copy of its compliance with section 15 of the Uniform Guidelines. In this way, the committee can readily ascertain the extent to which the Library has defied the court order and the Congress in its responsibility to provide fairness in its hiring practices.

In conclusion, Mr. Chairman and members of this committee, we believe you are in a unique position to directly impact the Library's employment policies and practices; avoid further embarrassment to this body and needless expenditure of tax dollars, and much individual grief and suffering.

That concludes my discussion of discrimination at the Library of Congress. I now turn my testimony to the second topic: Remedies to more effectively and efficiently redress discrimination. Here are the remedies we recommend: First, the only way to ensure fairness

in the administration of justice is to remove the enforcement authority from the agency where charges of a discrimination arise and to place them under another authority, EEOC. Under section 717 of title VII of the Civil Rights Act of 1964, as amended, the Librarian of Congress is responsible for enforcing nondiscrimination in employment in the Library of Congress. That same person, under section 717, is the defendant in discrimination complaints. This is a patently obvious conflict of interest.

Some of the consequences of this arrangement can logically or rationally be related to the manner in which discrimination complaints are handled at the Library of Congress. It now takes between 3 and 7 years to process an administrative complaint. I have personal experience in this area. I filed a complaint almost 7 years ago, and to this date I have not received a final decision.

Second, there should be binding arbitration in all EEOC cases, if the complaints process is kept within the agency. The Library has a history of hiring arbitrators to hear EEO cases and then refuses to accept the finding. This places the employee in a posture to incur costs of legal representation at the administrative stage and then when the case goes to court.

Third, if the complaints process is kept within the agency, it should be removed from the Human Resources Office and placed directly under the control of the chief operating officer of the Library.

Fourth, the EEO process needs to be strengthened to effectively deal with complaints at the informal stage. We believe that a review of the historical record since 1992 will result in a compelling finding that the Library of Congress, in general, and the EEOC office and Dispute Resolution offices, in particular, have long histories of failure to process complaints in a timely fashion.

Fifth, the defendant agency should bear all expenses in cases in which the plaintiffs prevail, instead of having these fees satisfied by the Justice Department. In this way, agencies will be motivated to take an active role in creating an environment in which fairness prevails.

Sixth, there should be appropriate punishment for managers who are found to be in violation of title VII of the Civil Rights Act of 1994.

Seventh, the bill should provide specific provisions and mandates to clean up the current backlog of EEO cases at EEOC.

That concludes my testimony. Thank you for this opportunity. [Applause.]

[The prepared statement of Ms. Cox follows:]

TESTIMONY OF A. LAVERNE COX BEFORE THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT, SUBCOMMITTEE ON CIVIL SERVICE U. S. HOUSE OF REPRESENTATIVES Wednesday, September 10, 1997

Mr. Chairman and Members of the Committee. Thank you for inviting me to appear before this committee. My name is A. LaVerne Cox. I am a Personnel Management Specialist in the Personnel Office of Human Resources Services at the Library of Congress. I also serve as President of the Library of Congress (LOC) Chapter of Blacks In Government, and a member of the Steering Committee for the Howard Cook Class Action lawsuit. I am testifying not as a Library official, but as President of the Library of Congress Chapter of Blacks In Government, and a member of the Cook lawsuit.

For those who may be new to this conflict, Howard Cook, an employee of the Congressional Research Service, filed a discrimination complaint in 1975. A finding was not rendered by the Library's Equal Employment Office until 1981, and they found no discrimination existed. In August 1992, the U.S. District Court found in our favor and against the Library. Since that time, we have been unsuccessful in our efforts to get the Library to meet the requirements of this decision. The U.S. Treasury has paid some $8.5 million to the plaintiffs; the Library management has suffered no consequences, and has continued its discriminatory practices with impunity. The Library of Congress continues to defy both the letter and spirit of the federal court order. As a result, we have filed a new class-action lawsuit designed to force the Library to implement the court ordered Settlement Agreement.

My testimony will focus on two major issues: (1) racial discrimination at the Library of Congress, and recommendations for corrective action, and (2) remedies to more effectively and efficiently redress the weaknesses in the current Equal Employment Opportunity complaints process.

RACIAL DISCRIMINATION IN THE LIBRARY OF CONGRESS

During my 17 years at the Library of Congress, I have often been reminded of the 1857 Dred Scott decision of the U.S. Supreme Court, which upheld the notion that African Americans have no rights that European Americans are constitutionally required to respect. To all appearances, the Library has largely adopted this proposition in its relationship with African American employees and African American applicants for employment.

As I have already noted, in 1992, after more than 17 years of litigation, the U.S. District Court for the District of Columbia concluded that the Library of Congress had clearly and systematically discriminated against African Americans because of their race. The court found that the Library had practiced racial discrimination at every step of the selection process. The management of the Library has always contended that it has not practiced racial discrimination, and this is their current view.

Despite the court order, it took more than three years for us to reach a Settlement Agreement with Library management on specific actions to be taken in relief. Although the U.S. Treasury has paid out $8.5 million of taxpayer dollars, the Library has refused to honor the injunctive relief

requirements of the Settlement Agreement. As you know, these provisions are of central importance because they specify actions that the Library must take to bring its selection procedures into compliance with the law. Because of the Library's functionally defiant attitude, members of the Cook class have taken new actions in Federal District Court, filing both a new class-action discrimination complaint and a motion to force the Library of Congress to comply with the Agreement.

Now the specifics: The Library of Congress has failed to comply with the requirements of the Court in five ways.

Non-Competitive Assignments

In violation of paragraph 4 of the Agreement, the Library has continued to noncompetitively appoint, promote, and reassign their "preferred choices" into attractive, often higher-level positions, under the guise of other regulations or actions. In our motion filed with the court to enforce the Settlement Agreement, we cited at least 13 non-competitive reassignments and reclassifications that have occurred since the Settlement Agreement was signed. We believe that the actual number of illegal actions is significantly higher, but this is difficult to quantify because of the Library's refusal to provide sufficient documentation as required by the Settlement Agreement.

Further, the Library has refused to issue adequate regulations to insure that non-competitive personnel actions are based on legitimate, non-discriminatory criteria. The Library has even violated the one regulation, *Human Resources Directive HRD 7-05-06,* that it has issued in administering non-competitive personnel actions.

These actions reinforce our belief that the Library continues to defy the court order and discriminate against African-American employees.

Statistical and Other Data on Selections

In violation of sections 9 and 10 of the Agreement, the Library has failed to provide data on competitive and non-competitive selections, data which are critical to the oversight of the Settlement Agreement.

Affirmative Action Reviews

In violation of Appendix B of the Agreement, the Library modified the process outlined in the Agreement for the conduct of "affirmative action reviews." Although the court ordered a five-level Affirmative Action review process to ensure fairness, equity, and diversity, the Library consistently ignores the findings.

Validation of Selection Procedures

In violation of paragraph 3 of the Agreement, the Library has refused to validate its selection procedures in accordance with the Uniform Guidelines on Employee Selection Procedures (See *29 CFR, Part 1607(1978)*). The major components which it has refused to validate include the following:

1. Interview protocol: Here is what the Court stated in its 1992 decision: "The Court finds that plaintiffs have presented evidence of a specific employment practice--namely...**pronounced subjectivity in both the establishment and measurement of criteria during the interview stage....**"

The interview stage has been used to effectively eliminate African Americans from successfully competing for professional employment at the Library. The Library's non-validated interview component of the selection procedures allows Library managers to ask questions that are not directly related to the performance of the position, and to infuse subjectivity into the process. The interview questions should be developed based on job analysis criteria in conformance with the Uniform Guidelines.

Even subsequent to the agreement, cases of abuse in the interview process have been reported

2. Performance rating: Performance rating is a selection procedure, but it has not been validated in accordance with the Agreement.

3. Time in grade
4. Education
5. Work experience/training
6. Physical requirements

Limited Vacancy Announcements

Another technique employed by the Library is the use of limited vacancy announcements, whereby Library management limits the persons eligible to apply by area of the Library, such as a division, section, or office. This procedure severely limits the opportunities for advancement of African-Americans and other protected class members, particularly in areas of the Library where African-American employees are under-represented or unrepresented .

RECOMMENDATIONS

On the Congressional Research Service

Mr. Chairman and Members of the Committee. I especially request that this Committee review the way that the Congressional Research Service mistreats African American employees. Indeed, four of the original seven plaintiffs in the Cook Class Action lawsuit were employed in CRS. It appears that CRS is particularly hostile toward African Americans, especially those in the economist series, with regard to denial of "promotion plan" promotions.

The Library of Congress Chapter of Blacks In Government, which I head, conducted an informal survey of professional African American employees in CRS. The results identified a pattern of denial of promotions in the professional promotion plans. These employees competed for positions in a GS-5 through GS-15 promotion plan, but are repeatedly denied promotions based on subjective criteria that their white counterparts do not have to meet. It was interesting to note that these African American employees possessed *equal to or better than* the education and experience credentials of their white counterparts.

Under the competitive selection process, a discrimination complaint is now pending alleging

an egregious violation of the interview process.

As a further illustration, CRS has transferred the only two senior professional African American employees who occupied policy positions to non-policymaking positions under the pretext of efficiency, and replaced them with a white male.

The Director of CRS came before Congress to promote his "succession initiative." We believe that CRS has a unique opportunity to improve the overall diversity profile of its professional staff. In attempting to prepare for the attrition of professional employees, CRS could make a focus effort to replace some of the projected 100 slots with African Americans and other minorities. The current statistics indicate that out of the approximately 249 analysts and attorneys, only 16 are African Americans. Because CRS is directly responsible to Congress in many of its operations, we believe that this Committee is in a position to address conditions that exist in CRS.

Conformity with the Uniform Guidelines

While we have chosen to highlight the conditions in CRS, we want this committee to understand that these problems are endemic throughout the Library. Therefore, we respectfully urge that the Library of Congress be required to provide this Committee with a copy of its compliance with Section 15 of the Uniform Guidelines. In this way, the Committee can readily ascertain the extent to which the Library has defied the Court and the Congress in its responsibility to provide fairness in its hiring practices.

Mr. Chairman and Members of the Committee, we believe you are in a unique position to directly impact the Library's employment policies. Therefore, we respectfully request that you intercede in forcing the Library of Congress to implement the specific terms of the court-ordered settlement. Racial discrimination in the workplace and tolerance of such practices is bad management and fiscal waste.

That concludes my discussion of discrimination in the Library of Congress. I now turn to my second topic.

REMEDIES TO MORE EFFECTIVELY AND EFFICIENTLY REDRESS DISCRIMINATION

Here are remedies that we recommend:

First, the only way to insure fairness in the administration of justice is to remove enforcement authority from the agency where charges of discrimination arise, and to place it under another authority (e.g., EEOC) with a mandate to expedite disposition of complaints.

For example, under Section 717 of *Title VII of the Civil Rights Act of 1964*, as amended, the Librarian of Congress is responsible for enforcing nondiscrimination in employment in the Library of Congress. Yet that same person, under Section 717, is the defendant in discrimination complaints. This is a patent and obvious conflict of interest.

Some of the consequences of this arrangement are related to the way that discrimination complaints are handled in the Library. For example, in the Howard Cook Class Action Complaint, it took more than six years, from 1975 to 1981, for the Library to conclude that discrimination did not exist. Eleven years later, the Court found the opposite. It now takes between three and seven years to process an administrative complaint. I have personal experience in this area. I filed a

complaint almost 7 years ago, and to this day I have not received a final decision.

Second, there should be binding arbitration in all EEO cases, if the complaint process is kept within the agency. The Library has a history of hiring arbitrators to hear EEO cases and then refusing to accept their findings. This requires the employee to pay the cost of legal representation at the administrative stage and when the case goes to court. Library management relies on the fact that most employees cannot afford legal representation, and therefore must drop their complaints. We believe that this manipulation is unfair to employees and fiscally irresponsible.

Third, the defendant agency should bear all expenses in cases in which the plaintiffs prevail instead of having these fees paid by the Justice Department. In this way, agencies will be more motivated to take an active role in creating an environment in which fairness prevails.

Fourth, if the complaint process is kept within the agency, it should be removed from the Human Resources Office and placed directly under the control of the Chief Operating Officer of the Library.

Fifth, there should be appropriate punishment for managers who are found to be in violation of *Title VII of the Civil Rights Act of 1964.*

That concludes my testimony. Thank you, Mr. Chairman

Mr. MICA. Thank you for your testimony, Ms. Cox.

And we'll turn now to Sam Wright, who's an employee of the Federal Aviation Administration. Also, if possible, I'd ask if you can summarize as much of your testimony as possible for the Subcommittee. I noticed it's rather lengthy, and we will submit the entire statement and other comments you have submitted for the record.

You're recognized, sir.

Mr. WRIGHT. Thank you, Mr. Chair. I'll try to beat the red light. [Laughter.]

I've been employed by the Federal Aviation Administration since 1976 and have been involved in EEO in the Federal sector since 1977. I'll focus my oral presentation on why the redress system for Federal employees is ineffective and inefficient; why employment discrimination in the Federal work place continues to be a concern, and how I believe the redress system for Federal employees may be made effective and efficient.

The causes of continued discrimination in the Federal service are complex and cannot be reduced to a single factor. I believe some of the most important reasons for continued discrimination in the Federal sector are: Agencies in the executive branch fail to obey the law of the land. The Office of the President of the United States and agencies of the executive branch demonstrate within the arena of employment discrimination in the Federal work place. They are currently unwilling to properly investigate wrongdoing.

When presented with evidence of discriminatory behavior, the Office of the President of the United States and agencies in the executive branch do not take corrective action. Agencies in the executive branch do not obey the regulations set forth by the EEOC. The EEOC does not enforce or ensure that agencies comply with its requirements.

Some of the most important reasons why the redress system for Federal employees is ineffective and inefficient are: The courts allow the Government privileges and benefits contrary to the Federal Rules of Civil Procedure. The Office of the President of the United States and agencies permit known corruption and malfeasance to continue.

The EEOC and the MSPB allow agencies to abuse the administrative process. The Government is permitted to commit perjury to Congress, in the courts, and in the administrative process without penalty. Government officials suffer no sanctions when they discriminate. Discriminatory decisions by Government managers are defended by the agencies regardless of the truth. In the courts, the agencies and the Department of Justice work in concert to defend and protect discriminatory managers and decisions regardless of the truth.

Agencies use their civil rights offices as a tool of management to support discriminatory decisions and to discourage complaints or to assist the agency in unlawfully withholding information that reveals discrimination. During the administrative process, agencies require aggrieved persons to surrender first amendment rights before agencies will settle complaints.

Agencies intentionally sabotage the EEO process to eliminate EEO complaints regardless of merit. Title 28 of the United States

Code, subsection 2414, and title 31 of the United States Code, subsection 1304, provide strong incentive for agencies not to settle complaints during the administrative process.

I believe the redress system for Federal employees may be made effective and efficient by requiring the Government to comply with the Federal Rules of Civil Procedure as any other person in the courts; imposing monetary penalties against agencies' budgets instead of the judgment fund maintained by the U.S. Treasury when they do not comply with the regulations of the EEOC; imposing monetary penalties against managers and others who discriminate; establishing the Equal Employment Opportunity Investigation Authority to handle the first stage of the EEO complaint process and to independently investigate all EEO complaints filed by Government employees.

I have to take exception with one thing that's been offered to this committee today, and that's the EEOC functions as a quasi-tribunal in the EEO administrative process. Therefore, I think the EEOC should not have the investigative authority if it's going to perform the quasi-tribunal authority of rendering decisions. But I do agree that the committee needs to formulate legislation that gives the EEOC the same quasi-tribunal authority that the MSPB enjoys, and that agencies must abide by its rulings.

I believe we need to conduct a comprehensive audit of each agency's EEO program, imposing strict penalties for agencies and managers who lie to Congress or to the EEOC or to the MSPB; imposing strict penalties for agencies, managers, and employees who lie during the EEO investigations or in Federal court.

At this time, I'd like to comment on the Federal Employees Fairness Act bill. Some of the testimony I've heard here today leads me to say that there are parts of the bill that are duplicative of the process that is now currently in place.

The problem with the Federal sector EEO process is not the volume of meritless EEO complaints; the problem is that Federal agencies do not obey the laws passed by Congress and they do not obey the regulations set forth by the EEOC.

In the current process, a person is required to see an EEO counselor prior to filing an EEO complaint; 29 CRF, subsection 1614.105(a) reads in relevant part: "Aggrieved persons who believe they have been discriminated against must consult a counselor prior to filing a complaint in order to try to informally resolve the matter." Conciliatory decisions are already required under the current process; they do not help.

29 CFR, subsection 1614, part 104(b), reads in relevant part: "The Commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally." So conciliatory decision requirements are already in place, and they do not help.

The adjudication of charges without a hearing, if there is no genuine issue of material fact in dispute between the parties, is already permitted by 29 CFR, subsection 1614.109(e)(3).

The fourth concern of the act addresses complaints which would be classified as mixed-case complaints. The handling of a mixed-case complaint is adequately addressed by 29 CFR, subsection 1614.302 through 1614.310.

I submit to this committee that the failure of the agencies and the EEOC to abide by the requirements of 29 CFR, subsection 1614, provide a substantial contribution to the continuing problems regarding employment discrimination in the Federal workplace. Agencies are currently required to maintain a continuing affirmative program to identify and eliminate discriminatory practices and policies; provide sufficient resources to its Equal Employment Opportunity program to ensure efficient and successful operation; provide for the prompt, fair, and impartial processing of complaints; conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices, and working conditions; review, evaluation, and control manager and supervisory performance.

Take appropriate disciplinary action. Establish a system for periodically evaluating the effectiveness of the agency's overall EEO program. Develop the plans, procedures, and regulations necessary to carry out its program. Assure that individual complaints are fairly and thoroughly investigated. Develop a complete and impartial factual record, and complete its investigations within 180 days. The EEOC is currently required to periodically review agency resources and procedures.

I submit, Mr. Chairman, that new bipartisan legislation is needed to provide for pecuniary penalties and discipline for managers and others who discriminate, penalties for agencies that do not comply with the regulations of the EEOC, penalties for the EEOC when it does not enforce and ensure that agencies comply with its regulations, and compensation to victims of discrimination which come from the agencies' budget and not from the judgment fund of the U.S. Treasury.

Thank you. [Applause.]

[The prepared statement of Mr. Wright follows:]

I held the position of Air Traffic Control Specialist (ATCS, GS-14) from 1976 to 1989; I held the position of facility cartographer (GS-8) from 1989 to 1992; I held the position of Data Systems Coordinator (DSC, GS-14) from 1992 to 1994; and I currently hold the position of Support Specialist (GS-14).

I was the only black on a crew when all of the white controllers received an outstanding performance rating. I did not receive an outstanding performance rating, but my job performance was equal to or better than each white ATCS on the crew. I suffered mediocre performance appraisals as an ATCS between February, 1980 and March, 1994 as a result of filing EEO complaints and my involvement in civil rights activities.

In October, 1985, agency management suspended me without justification and against regulations. In December, 1985, agency management issued me an involuntary permanent reassignment to New York Air Route Traffic Control Center and temporarily reassigned me, without justification and against regulations. In January, 1986, agency management refused to allow me to maintain currency on operational positions without justification and against regulations. The agency actions from October, 1985 through January, 1986, were found to be discriminatory by the Equal Employment Opportunity Commission.

In March, 1986, agency management withheld a Letter of Appreciation written to me without justification and against regulations. In October, 1988, my annual leave request was denied contrary to agency regulations. In February, 1989, I was counseled for doodling on a scratch pad. In March, 1989, I was counseled for reading information necessary for the safe operation of his control position.

On March 14, 1989, my request for three hours of sick leave during the evening shift was denied without justification and against regulations. In the early morning hours of March 15, 1989, agency management administered reasonable suspicion drug test on me. Agency management threatened me with adverse action if I refused to submit to reasonable suspicion drug testing or if I failed to cooperate with the collection procedures. I passed the reasonable suspicion drug test. Agency management's decision to administer a reasonable suspicion drug test to me was arbitrary, without justification, against regulations, a retaliatory decision for my filing EEO complaints and my involvement in civil rights activities, and a violation of my constitutional rights.

On March 14, 1989 I did not exhibit any of the symptoms of drug use. Prior to administering the reasonable suspicion drug test, the agency had the opportunity to have me examined by a physician, but the agency chose not to have me examined by a physician. Statements of ATCS's and supervisory ATCS's that observed my behavior at the time of the incident leading to the reasonable suspicion drug test show that I was in no way acting erratic. My supervisor, Geoff Shearer, told the Air Traffic Manager of the Washington ARTCC, that I did not exhibit any symptoms of drug use.

On March 14, 1989 agency management held a telephonic conference to determine whether reasonable suspicion drug testing would be administered to me, but I was not afforded the opportunity to be heard during that telephonic conference. Representatives from the offices of the Regional Flight Surgeon and the General Counsel are required to participate in the decision process regarding reasonable suspicion drug testing, but those offices did not participate in the decision process regarding the reasonable suspicion drug test administered to me. The agency did not follow its own rules, or the law of the land, concerning the reasonable suspicion drug test administered to me. I was not interviewed or examined by anyone who spoke during the telephonic conference held on March 14, 1989, to determine if a reasonable suspicion drug test would be administered to me.

According to agency regulations an ATCS's shift is over 8 hours after the ATCS begins work. On March 14, 1989, I was performing the duties of an ATCS and began working no later than 2:32 p.m., therefore, my shift was over no later than 10:32 p.m. On March 14, 1989, the agency issued me an order at 11:01 p.m. to remain at the Washington ARTCC. Before my shift ended, the agency did not issue me any orders or directives to remain on duty. The agency ordered me back on duty, without justification, against agency regulations and in violation of my rights under the law, to administer the reasonable suspicion drug test.

Agency management placed me on a performance improvement plan to change the way I communicated. I changed the way I communicated, then the agency used the change as a basis for reasonable suspicion drug testing. Without justification and against agency regulations, agency management ignored safeguards designed to preserve my rights and, without due process of law, deprived me of my liberty rights guaranteed by the Fourth Amendment of the United States Constitution.

For the reasonable suspicion drug test, agency management required, without justification and against agency directives, and in violation of my rights under the law, that my urine specimen be given under direct observation. I was not seen with, nor did I have, equipment or implements used to tamper with urine samples. The agency had not previously confirmed that I was an illegal drug user. I have the right not to be subjected to the unreasonable, unjustified and excessive requirement of direct observation in providing my urine specimen even if the reasonable suspicion drug test was otherwise made in accordance with due process of law. In retaliation for my filing EEO complaints and my involvement in civil rights activities, agency management was deliberately indifferent to my constitutional right to be free from unreasonable search and seizure, and knowingly permitted a series of acts which it knew or reasonably should have known would cause the infliction of constitutional injury to me. I suffered severe emotional distress and humiliation as a result of the agency's actions.

In an effort to justify administering a reasonable suspicion drug test to me, the agency used my failure to explain the reason for the turns I issued as the basis for reasonable suspicion drug testing. The ATCS that relieved me on the radar position on March 14, 1989, was a white male. He issued at least thirteen air traffic control clearances which include turns and he did not explain the reason for the turns he issued. However, the white ATCS did not receive reasonable suspicion drug testing. The white ATCS and me were observed by the same agency managers and supervisors. The reasonable suspicion drug test was designed to punish me for attempting to preserve rights secured to me by law and it had that result. The reasonable suspicion drug test was unreasonably intrusive and I suffered irreparable harm as a direct result of the reasonable suspicion drug test administered to me by the Agency.

Agency management coordinated my removal from ATCS duties, using the incident on March 14, 1989, where I lost concentration while thinking about my ongoing difficulties with the agency as pretext for removal. In June, 1989, Dr. Edward Bauer, then the FAA Eastern Region Flight Surgeon, medically disqualified me from performing the duties of an ATCS on the basis of a psychiatric diagnosis of "Adjustment Disorder/Personality Disorder, Dysfunctional" and hypertension. Dr. Edward Bauer is not a qualified psychiatrist, therefore, Dr. Edward Bauer is not qualified to render a psychiatric diagnosis of "Adjustment Disorder/Personality Disorder, Dysfunctional." The diagnosis "Adjustment Disorder/Personality Disorder, Dysfunctional" is not written in any psychiatric evaluation performed on me. The diagnosis "Adjustment Disorder/Personality Disorder, Dysfunctional" is not listed in the Diagnostic and Statistical

Manual Of Mental Disorders (DSM-III-R), Third Edition - Revised, published by the American Psychiatric Association.

Prior to March 14, 1989, Dr. Barton Pakull, the agency's Chief Psychiatrist determined that I did not possess any disqualifying mental condition. After March 14, 1989 there has been only one psychiatric evaluation performed on the me and that evaluation was performed by Dr. Selwyn Rose. Dr. Selwyn Rose's psychiatric evaluation reads in relevant part "Psychiatric Diagnosis: No mental illness" and "[h]e would be capable of air traffic control in another facility, . . . "

On March 12, 1990, the agency issued its final medical determination finding that I am medically disqualified from performing ATCS duties because I am a "person with a personality disorder ...which clearly indicates a potential hazard to safety in the Air Traffic Control System." My agency medical file does not contain any documents which support the agency's decision to medically disqualify me because I possesses any psychiatric disorder or any other condition for which an ATCS is or has been medically disqualified. On December 29, 1989, Dr. Pakull conceded in a telephone conversation that I was not in such condition that I should be disqualified from ATCS duties. A letter of January 26, 1990, from Dr. Pakull to Manager, Employee Health Branch, which recommends that the Federal Air Surgeon uphold my permanent medical disqualification, does not contain any medical basis for upholding my medical disqualification.

Agency management has denied me the opportunity to gain staff experience as a Military Operations Specialist, as a Training Specialist, and as a Quality Assurance Specialist as reprisal for my filing EEO complaints and my involvement in civil rights activities. While I was assigned to the GS-8 position as facility cartographer, I arranged a detail for myself to a GS-14 staff position in FAA Headquarters. FAA Headquarters staff experience is beneficial towards promotion because it provides the most points on the promotional evaluation. Agency management at the Washington ARTCC refused to release me to FAA Headquarters, even though I was filling a GS-8 position. Agency management's refusal to release me to FAA Headquarters for a staff position detail was designed to punish me for the filing of EEO complaints and for assisting employees in the vindication of civil rights. The experience gained as a Military Operations Specialist, as a Training Specialist, as a Quality Assurance Specialist, and as a Headquarters staff Specialist is considered by the Agency to be necessary for promotion to the GS-15 position. Agency management denied me the experience and training that would allow me to successfully compete for promotion.

The Agency has removed me from ATCS duties, denied promotional opportunities, discriminated in training, discriminated in retraining and on-the-job training, or otherwise abused and discriminated against I because of race, sex, color, age, and as reprisal for my involvement in both civil rights activities and the EEO process.

The FAA fails to:

- Take appropriate or corrective action regarding the discriminatory treatment, abuse, and harassment suffered by me.
- Promote the full realization of equal employment opportunity through a continuing affirmative program.
- Maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies.

- Provide for the prompt, fair, and impartial processing of complaints.
- Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions.
- Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity.
- Take appropriate disciplinary action against employees who engage in discriminatory practices.
- To establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.
- Appraise its personnel operations at regular intervals to assure their conformity with its program, 29 C.F.R. § 1613 and § 1614, and the instructions contained in the Equal Employment Opportunity Commission's management directives.
- Evaluate, from time to time, the sufficiency of the total agency program for equal employment opportunity.
- Make improvements or corrections in the agency program for equal employment opportunity, as needed.
- Take prompt remedial action or prompt disciplinary action with respect to managerial or supervisory employees who have failed in their responsibilities to comply with the requirements set forth in FAA Order 1400.8 and other equal employment regulations, rules, directives, and laws.
- Deter discriminatory personnel actions.
- Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation.
- Enforce its equal employment opportunity regulations contained in FAA Order 1400.8.
- Process employment discrimination complaints fairly, promptly, and in accordance with the 29 C.F.R.
- Assure conformity per 29 C.F.R. 1614.102(b)(2).
- Follow its own rules, directives, or policies.

The FAA does not fully or fairly investigate situations involving allegations of discrimination prior to rendering a decision. The FAA unfairly and unlawfully terminated processing on my EEO complaint numbers 87-177 and 88-88 without notice to me.

The above listed violations by FAA management are uncorrected and ongoing and represent discrimination and reprisal against me for having engaged in activities protected by the laws of the United States, activities which agency management found distasteful.

While I was assigned to the facility cartographer position, agency management required me to incessantly leave my office door open. Since January, 1976, office doors in the Washington ARTCC have been open or closed isochronally and coworkers have been permitted to visit any office and chat. The FAA does not have any policy or regulation prohibiting the closing of office doors, any policy or regulation that proscribes the number of persons allowed to use an office telephone, or any policy or regulation that limits the number of persons allowed to visit an office. My supervisor never indicated that the closing of my office door, or the number

of visitors to my office, or the frequency or length of the use of my office telephone in any way interfered with my work, or that my work performance was less than satisfactory.

I obtained permission from my supervisor to be able to close my office door. A coworker subsequently entered my office. Shortly afterwards, the Air Traffic Manager at the Washington ARTCC entered my office. The Air Traffic Manager told me that my office was for official business and she wanted to make it perfectly clear that the door to my office was to remain open, at all times, because my office was not a counseling room. Additionally, the Air Traffic Manager stated that my office and the telephone within were only for official business use. The Air Traffic Manager was hostile, unbusinesslike, discourteous, abusive, insulting, disrespectful, loud and boisterous.

During this time, I was assisting Ms. Kim Hamilton and other employees with the vindication of their civil rights. FAA management told Ms. Hamilton that she could not speak with me whenever she needed to, but she would have to get management's approval prior to speaking with me and agency management refused to allow Ms. Hamilton to talk with me in my office or in the hallway outside my office. Agency management wanted to inhibit the assistance that I could provide Ms. Hamilton and other employees with EEO matters and agency management's actions had that effect. Agency officials were deliberately indifferent to our constitutional right to be free to associate for the vindication of civil rights.

Between October 12, 1990, and October 14, 1990, agency management terminated the outside line access on my office telephone, without justification, to inhibit the vindication of civil rights, to inhibit me from providing assistance for the vindication of civil rights, and as punishment for assisting in litigation vindicating civil rights and previously filed complaints. Agency management's termination of the outside access on my office telephone had the effect of inhibiting the vindication of civil rights and inhibiting me from providing assistance for the vindication of civil rights.

Agency management terminated my access to the reference materials containing EEO laws and regulations at the Washington ARTCC, without justification and against regulations. The agency required me to make an appointment and to submit a written request for the information I wanted regarding EEO. I complied with the agency's requirement and submitted a written request to the agency for EEO, discrimination regulations and reference material. The agency did not honor my request. I was never given access to all of the information I requested. The agency's unwarranted termination of my research of EEO laws and regulations and the agency's failure to honor my request for EEO and discrimination laws and regulations was discriminatory behavior based on race, sex, color, age, was a retaliatory decision for my filing of EEO complaints, was intended to inhibit my litigation vindicating my civil rights, and reprisal for my providing assistance to other employees in the vindication of their civil rights.

On September 15, 1993, while on duty during the 4 p.m. to midnight shift, I was called a "motherfucker" by a white coworker. I reported the verbal abuse to the management of the Washington ARTCC. Agency management at the Washington ARTCC did not take corrective action. Verbal abuse of black employees by white employees at the Washington ARTCC is condoned by management at the Washington ARTCC. I have been ridiculed by white employees at the Washington ARTCC. I reported being ridiculed by white employees to the management of the Washington ARTCC. Agency management at the Washington ARTCC did not take appropriate corrective action. White employees ridiculing black employees at the Washington ARTCC is condoned by management at the Washington ARTCC.

On approximately May 10, 1995, the Air Traffic Manager at the Washington Air Route Traffic Control Center, selected a white male as the Assistant Manager for Plans and Programs for a period not to exceed 120 days without equally considering me for the position. A promotion from Plans and Programs Specialist to Assistant Manager for Plans and Programs is accompanied by a raise in salary. The time served as the Assistant Manager for Plans and Programs is experience that can be used to bid on other GS-15 positions within the Federal Aviation Administration, within the Department of Transportation and other agencies within the United States Government. At the time of the promotion, both I and the white male that was selected were Plans and Programs Specialists assigned to the Plans and Programs Office within the Washington Air Route Traffic Control Center. The white male that was selected does not have any qualifications for the position that I do not possess. I do have qualifications that the white male that was selected does not possess. I was not interviewed for the position. I was not fairly considered for promotion because I am a black male, I had filed EEO complaints and as reprisal for my involvement in civil rights activities.

After the discriminatory selection on or about May 10, 1995, of the Assistant Manager for Plans and Programs for a period not to exceed 120 days, I wrote a letter requesting to see the Eastern Region Air Traffic Division Manager. The Eastern Region Air Traffic Division Manager is the supervisor of the Manager of the Washington ARTCC. I offered to travel to New York, at my expense, to meet with him. He refused to meet with me, even though, he traveled to the Washington Center to an award ceremony. The Manager of the Washington Center received a passing evaluation in the area of EEO.

The Eastern Region Air Traffic Division Manager recently received the Secretary of Transportation's Award for Excellence in EEO. After hearing about the award, I telephoned the Civil Rights Officer in the Eastern Region and asked how in the world this was possible. The Civil Rights Officer admitted to me that he and the Eastern Region Air Traffic Division Manager never had one conversation regarding EEO. Later, I understood just how the award was possible. The Civil Rights Officer for the Eastern Region was on the committee that voted the award to the Eastern Region Air Traffic Division Manager. After the Eastern Region Air Traffic Division Manager received the award, the Civil Rights Officer was promoted. The Eastern Region Air Traffic Division Manager refused to take any action that would correct the situations contained in my letter and refused to see or speak with me regarding the contents of my letter because I am a black male and as reprisal for I having filed EEO complaints and my involvement in civil rights activities.

The unlawful acts described hereinabove are of such a nature, and were committed under such circumstances, that they would not have occurred, but for the fact that the person or persons committing them was an official, purporting to exercise his official powers. The unlawful acts consist of an abuse or misuse of power which is possessed by agency officials only because they are agency officials. Agency management's actions were based on impermissible considerations of sex, race and civil rights activities. I have suffered and continues to suffer pecuniary losses, severe emotional distress, mental anguish, loss of enjoyment of life, humiliation, and other nonpecuniary losses as a direct result of agency management's unlawful and discriminatory actions. The abusive practices and actions of agency management and agency personnel contained herein have been condoned by the agency, and therefore, can be said to have been adopted by the agency. Agency management has performed, or failed to perform, acts which

operate to deprive me of one or more of my rights protected by the United States Constitution, law or regulation.

My experience with EEO in the federal sector has convinced me that the federal government is not a model employer, with regard to EEO. In fact, the opposite is true and the climate has not changed in the past two decades.

Attachment A is a Memorandum from the former Department of Transportation Inspector General to the FAA Administrator. In that Memorandum, Ms. Schiavo makes a disturbing observation regarding FAA management's mind set. Ms. Schiavo observed that "[w]hile each of these abuses are vastly different, there is a common thread. That thread is the mind set within FAA that managers are not held accountable for decisions that reflect poor judgment. Until senior FAA management is willing to send a different message, I suspect that the pattern of abuse we identified will, unfortunately, continue."

The same "mind set" that Ms. Schiavo identifies in her memorandum is present with regard to EEO and able to perpetuate because senior FAA management is unwilling to abide by laws enacted by Congress, or to send the message that discrimination will not be tolerated. I have personal knowledge of several instances where discrimination was found within the FAA, however, discipline has never been recommended and the offending management official has never been disciplined.

The FAA has a separate Office of Civil Rights. The Office of Civil Rights is charged with overseeing the actions and decisions of management officials. The Office of Civil Rights does not oversee the actions and decisions of management because all of the field EEO employees work for the very persons they are charged to oversee. It is impossible to oversee a manager's actions or decisions when you work for that manager or that manager controls or influences what kind of performance rating you receive. FAA management (1) controls the actions and decisions of its civil rights personnel, (2)uses its Office of Civil Rights to support, not oversee, the discriminatory decisions made by its managers, (3) condones discriminatory decisions, and (4) does not properly discipline management officials or others that discriminate.

Management in the FAA decides and controls everything regarding EEO (i.e. who becomes an EEO counselor, who becomes an EEO investigator, how EEO investigations are conducted, etc.). I suspect it is the same throughout the other federal agencies. When members of management, who are not committed to EEO, are deciding the who's, what's, when's, etc. regarding EEO, it is impossible to have equal employment opportunity. The FAA's EEO investigators are, for the most part, untrained and instructed to conduct investigations in a way that protects the agency. The FAA's EEO investigators receive a complaint for investigation, the investigator contacts the complainant and asks for a affidavit regarding the allegations in the complaint, and then the investigator asks the alleged discriminatory management official if he or she discriminated against the complainant. That is the extent of the overwhelming majority of investigations. The complainant is left to collect all of his or her evidence and witnesses. This type of investigation can hardly be considered "a complete and impartial factual record upon which to make findings on the matters raised by the written complaint" as required by 29 C.F.R. § 1614.108(b).

Although significant progress has been made in the EEO arena, in the current environment in the federal government, several factors prevent the federal government from becoming a "model employer" and contribute to its continuing to be the best example of the

"unlawful discrimination in employment" that necessitated Civil Rights Acts of 1964, 1972, and 1991. Those factors are:

- Agencies willfully do not comply with applicable law and regulations.
- Agencies suffer no consequences for failing to comply with applicable law and regulations.
- Agency managers suffer no consequences for discriminatory decisions.
- Agencies promote managers that practice discrimination.
- Agencies disseminate EEO information to management and keep employees uninformed.
- The EEOC, the Merit Systems Protection Board (MSPB), and the federal courts fail to maintain an unbias and impartial role.
- While the current laws are a step forward, they do not provide sufficient sanctions for discrimination in the federal government.

In a conversation with a member of management with the Department of Labor, I learned that, inspite of the fact that there is a requirement for each agency to have EEO regulations, the Department of Labor (DOL) does not have any regulations regarding EEO. The FAA's and DOL's failure to comply with the requirements of 29 C.F.R. § 1614 is but one example of federal agencies willful noncompliance with regulations. The noncompliance by federal agencies with applicable law is obvious. When cases are taken to federal court and either settled or damages awarded, the monies are paid from the judgment fund of the Department of the Treasury. The Department of Justice defends the offending agency, manager(s), and others. Punitive damages are not available from the federal agency guilty of discrimination. Therefore, the offending agency suffers no sanctions. Mangers and others who discriminate are defended, in administrative proceedings by agency attorneys, are not disciplined, and suffer no loss (either pecuniary or nonpecuniary). Their careers continue on and they are often promoted, even after the MSPB, EEOC, or a federal court finds that they have discriminated. The FAA's Office of Civil Rights distributes guidance to management on important EEO matters, but keeps the employee uninformed. Employees are left "out in the cold" and force to acquire EEO information as best they can, while civil rights personnel keep agency managers informed of the current legal opinions. Too often the MSPB, the EEOC, or a federal court simply takes the naked assertions of agency counsel or the Assistant U.S. Attorney as evidence instead of requiring the same standard of proof required from the complainant or plaintiff. Agency attorneys and the U.S. Attorney ought to be held accountable for willfully perpetrating frauds in proceedings and an agency should not be able to simply say we did not commit any acts of discrimination, but must, in fact, be required to produce some evidence other than the ramblings of a lying attorney. While the current laws provide for compensatory damages of up to $300,000, the laws are insufficient to deter or compensate for discrimination.

Although the EEOC does find discrimination in some cases, all too often the EEOC fails to take an impartial and unbiased role in the EEO process. In one case that I was providing representation for a complainant before the EEOC, the FAA failed to comply with an ORDER issued by the EEOC. In this case, the FAA dismissed a complaint. The dismissal was appealed to the EEOC. The EEOC reversed the FAA's dismissal of the complaint and ORDERED the FAA to investigate. Instead of investigating the complaint as ordered, the FAA sent the complainant a letter threatening to dismiss the complaint again. I petitioned to the EEOC for an

ORDER to require the FAA to conduct an investigation as ordered by the EEOC. The EEOC sent me a letter saying that the FAA submitted documentation that showed it was in compliance with the ORDER issued by the EEOC. When I requested a copy of the documentation submitted by the FAA to the EEOC (as a copy had not been provided to me, as the complainant's representative, by the FAA), the EEOC could not produce a copy of the documentation it said it received from the FAA. When I attempted to file a complaint with EEOC management regarding the handling of my petition for enforcement and the failure of the FAA and the EEOC to provide me with required submissions, I found it impossible to speak with any management official at the EEOC with authority to correct the deficiency. On several occasions, I have requested an appointment to speak with the Chairman, Vice Chairman, and each Commissioner at the EEOC. They are all to busy to discuss the shortcomings of the EEOC.

I represented Ms. Kim L. Hamilton while she was an FAA employee and have continued to represent her since her removal from the FAA. Ms. Hamilton was an FAA employee from July 1988 to May 1991. After Ms. Hamilton was removed from the FAA, I, as Ms. Hamilton's representative, wrote a letter to Mr. James Busey, then the Administrator of the FAA, and requested the assistance of his office in correcting the inequalities and inappropriate actions concerning Ms. Hamilton's removal. In my letter, I pointed out that (1) FAA Order 1400.8, paragraph 810 requires "Any decision which constitutes an adverse or disciplinary action or any change in duty station, or job assignment, or supervision of an employee who has contacted an EEO counselor or who has filed a discrimination complaint must be coordinated with the EEO Officer . . . " (2) Ms. Hamilton had contacted an EEO counselor, and (3) the coordination required by FAA Order 1400.8, paragraph 810, had not been accomplished prior to Ms. Hamilton being removed (Attachment B).

In response to my letter to Administrator Busey, I received a letter from Mr. Leon C. Watkins, then Assistant Administrator for Civil Rights (Attachment C). Mr. Watkins' wrote, "we do not substitute the judgment of the EEO office for the judgment of individual managers except in the most extraordinary circumstances . . . FAA Order 1400.8, Section 810 does not have the force and effect of an injunction, nor does it stay managerial decisions regarding adverse or disciplinary action against employees . . . [s]econdly, we believe the complaint processing regulations and civil service rules contain sufficient safeguards to ensure that a wrongfully discharged employee is restored to her rightful place with all the appropriate benefits and conditions of employment . . . [b]ut in our civil service system, a manager's actions are presumed reasonable unless they are proven otherwise . . . Ms. Hamilton's complaint will be thoroughly investigated and the parties given an opportunity to resolve it." Mr. Watkins' letter provides clear and convincing evidence that (1) the FAA's Office of Civil Rights does not ensure or enforce compliance with FAA Order 1400.8, (2) when managerial decisions that are contrary to agency directives are brought to the attention of the highest levels of management in the FAA the agency will not take action to correct them, (3) in the FAA, regardless of whether the requirements of applicable directives have been followed, a manager's decision is going to be upheld by the FAA until the aggrieved person **proves** the decision to be discrimination, (4) the FAA cannot be trusted to completely and unbiasedly investigate complaints of discriminatory treatment and eliminate discrimination on its own, but waits for adjudication of EEO complaints, (5) the FAA is not committed to a work environment that promotes equal opportunity, and (6) the FAA does not investigate complaints alleging discriminatory decisions before allowing

managerial decisions to become effective, but presumes that its manager's decisions to be reasonable.

Ms. Hamilton requested a hearing on her EEO complaint before the EEOC. The administrative judge at the EEOC determined that Ms. Hamilton's EEO complaint was a mixed case and required Ms. Hamilton to file an appeal with the MSPB. Ms. Hamilton filed an appeal with the MSPB. During the proceedings before the MSPB the (1) agency lied about the location of Ms. Hamilton's records, (2) agency's attorney withheld evidence, willfully disobeying two Orders of the administrative judge, (3) agency's attorney lied to the administrative judge, (4) administrative judge did not sanction the agency or the agency's attorney for the misconduct.

The attorney for the FAA in this matter is Ms. Mary McCarthy. The FAA issued a final agency decision letter by certified mail, return receipt requested on June 21, 1993. Ms. Hamilton signed the return receipt for the decision letter on July 26, 1993. Ms. Hamilton appealed her removal to the MSPB. Upon receipt, the Administrative Judge (AJ) issued an Acknowledgment Order directing the FAA to submit "copies of all other documents which are relevant and material to this appeal." As a part of the Order, the AJ, *sua sponte*, questioned the timeliness of the appeal and ordered Ms. Hamilton to submit evidence and argument to establish that her appeal was timely.

Ms. Hamilton timely responded to the above Order on August 30, 1993, supplying a copy of the Certified Mail receipt showing that she had mailed her appeal on August 13, 1993. However, she did not submit evidence showing when she received the FAA's decision because the FAA was ordered to submit "copies of all other documents which are relevant and material to this appeal." The FAA had in its possession the return receipt that Ms. Hamilton signed showing when she received the FAA's decision letter. As the timeliness of Ms. Hamilton's appeal was an issue and the FAA was ordered to submit all other relevant and material documents, the FAA had a moral, legal and ethical responsibility to submit a copy of the return receipt signed by Ms. Hamilton showing when she received the FAA's final decision letter.

Ms. Mary M. McCarthy filed the Agency's response. Ms. McCarthy did not submit ANY of the required agency documents. Instead, she filed a letter with the AJ arguing that Ms. Hamilton had not met her burden of proving that her appeal was timely filed and requesting that Ms. Hamilton's appeal be dismissed as untimely. Ms. McCarthy withheld relevant evidence (the signed return receipt) and then argued a position that she knew or reasonably should have known was ethically improper.

The AJ dismissed Ms. Hamilton's appeal as untimely filed. Upon receiving the above ruling, Ms. Hamilton went to the post office and obtained a copy of the postal form showing when she signed for the copy of the FAA's decision. Ms. Hamilton filed a Petition for Review with the Board which contained a copy of the postal form.

Ms. McCarthy opposed further review. In the Agency's Response To Petition For Review, under Statement of Facts, Ms. McCarthy does not include the date that Ms. Hamilton signed for the agency's final decision letter. Ms. McCarthy argued that "Appellant did not exercise due diligence to obtain evidence of the date she received the agency's final EEO decision." Ms. McCarthy also argued "the Acknowledgment Order gave the agency the opportunity to respond to the issue of timeliness, but did not require it to do so." Lastly, Ms. McCarthy argues "if Appellant required documents in the sole possession of the agency to establish that her appeal was timely, it was incumbent on her to request those documents from the Agency." The MSPB denied Ms. Hamilton's Petition For Review.

Ms. Hamilton appealed the Board's dismissal of her appeal to the United States Court of Appeals for the Federal Circuit. The Court said, "As an initial matter, we reject the FAA's argument that it had no obligation to come forward with relevant evidence in its possession. While we conclude that the MSPB may place the burden of proof of timeliness on the employee, the agency may not excuse its withholding of evidence on that ground. The agency may not sit by concealing evidence that would change the result in a case. We disapprove of such gamesmanship." Attachment D, page 646.

The Court found that Ms. Hamilton's appeal had been timely filed. The final decision of the Board was reversed and the case was remanded for further proceedings to the merits of Ms. Hamilton's removal. The result of Ms. McCarthy's withholding of evidence was to delay a hearing on the merits of Ms. Hamilton's appeal for 3 years. At this point, a Federal Court had expressed disapproval to Ms. McCarthy regarding her unethical behavior. However, Ms. McCarthy's behavior would become even more unethical.

On April 16, 1996, the AJ issued an Order directing the FAA to submit the required agency response because it was not previously provided. Ms. McCarthy failed to (1) submit the complete agency record of the action as ordered, (2) submit all relevant documents as ordered, and (3) contact Ms. Hamilton or me, as Ms. Hamilton's representative, as ordered.

On June 26, 1996, I contacted Ms. McCarthy and requested that the file maintained by the agency's Eastern Region Office of Civil Rights on Ms. Hamilton be forwarded to one of Ms. Hamilton's witnesses who is employed by the Department of Transportation's Office of Civil Rights. Ms. McCarthy offered to send a Xerox copy of the file or in the alternative, she offered to allow the witness to view the original file at the Regional Office in New York. I informed Ms. McCarthy that both of her offers were unacceptable.

Ms. McCarthy filed a Motion with the Board requesting an order allowing her to produce a copy of the file maintained on Ms. Hamilton to Ms. Hamilton's witness. Ms. McCarthy misleads the AJ by saying "The Agency has a general concern about transmitting original files outside the facility in which they are maintained. There is the possibility that these documents can be lost or destroyed in the mails leaving the Agency without an original copy of many documents. Additionally, files can become lost when they are removed from their normal location."

The agency has no such concern. The only concern Ms. McCarthy has is to intentionally frustrate the rational search for the truth. Ms. McCarthy misled the AJ in order to justify her intentional withholding of the file in question. On Wednesday, June 26, 1996, at 9:30 a.m. I telephoned Ms. McCarthy in order to request that the file be forwarded to the Departmental Office of Civil Rights in the headquarters building of the Department of Transportation for Ms. Barbara Boulware's review. I did not speak with Ms. McCarthy at this time, but instead got her voice mail. I left a message on Ms. McCarthy's voice mail explaining the purpose of the telephone call and requesting that Ms. McCarthy return my telephone call.

After leaving the message on Ms. McCarthy's voice mail, at 9:45 a.m. the same morning, I telephoned Ms. Loretta E. Alkalay, Assistant Chief Counsel, at the telephone number 718-553-3285. I was told that Ms. Alkalay was engaged in a telephone conversation on another line. I left a message for Ms. Alkalay requesting her to return my telephone call.

After leaving the request for Ms. Alkalay to telephone me, at 10:00 a.m. the same morning I telephoned Mr. Marcus Davis, Field Civil Rights Officer, at 718-553-3290 and asked him if Ms. McCarthy had returned Ms. Hamilton's file to his office. Mr. Davis responded that

Ms. McCarthy had not returned the file. I asked Mr. Davis if he had any objection to sending the file in question to Ms. Barbara Boulware in the Departmental Office of Civil Rights in the headquarters building of the Department of Transportation for her review. Mr. Davis told me that he did not have any objection to the file being sent to Ms. Boulware.

At 12:22 p.m. the same day Ms. Alkalay telephoned me. I was not available and Ms. Alkalay left a message that she had called and would be available until 4:00 p.m. At 1:00 p.m. the same day I again telephoned Ms. Alkalay. During this telephone conversation I explained that the reason for my telephone call was to request that Ms. McCarthy forward the file on Ms. Hamilton that was obtained from the Eastern Region Office of Civil Rights to the Departmental Office of Civil Rights in the headquarters building of the Department of Transportation for Ms. Barbara Boulware's review by July 1, 1996. Ms. Alkalay asked if I had contacted Ms. McCarthy with the request. I informed Ms. Alkalay that I had attempted to contact Ms. McCarthy, but got her voice mail and left a message, but I had no way of knowing if Ms. McCarthy was in the office, so I placed a telephone call to her because she was the Assistant Chief Counsel. Ms. Alkalay responded that she was not familiar with the case, but she saw no problem with sending a civil rights file to another civil rights office.

At 1:30 p.m. the same day after finishing the telephone conversation with Ms. Alkalay, I telephoned Mr. Davis in the Eastern Region Office of Civil Rights. I advised Mr. Davis of the 1:00 p.m. conversation I had with Ms. Alkalay and that the file in Ms. McCarthy's possession would be forwarded to Ms. Boulware by July 1, 1996. I asked Mr. Davis to forward the file to Ms. Boulware by July 1, 1996 if the file was returned to his office. Mr. Davis agreed to forward the file to Ms. Boulware should the file be returned to his office.

At 4:00 p.m. on the same day Ms. McCarthy telephoned me. Ms. McCarthy advised me that she would send a Xerox copy of the file to Ms. Boulware. I informed Ms. McCarthy that a Xerox copy of the file is unacceptable. Ms. McCarthy then informed me that Ms. Boulware can review the file in the FAA's New York offices. I informed Ms. McCarthy that to require Ms. Boulware to travel to New York to review the file is also unacceptable. Ms. McCarthy refused to send the original file to Ms. Boulware and told me that I would have to "work it out with the Office of Civil Rights." I then told Ms. McCarthy that Mr. Davis said that she has custody and control of the file. Ms. McCarthy responded that the Office of Civil Rights has custody and control of the file. I then informed Ms. McCarthy that I already had the consent of the Office of Civil Rights to forward the file to Ms. Boulware.

The next morning on June 27, 1996 I telephoned Mr. Davis and informed him of the contents of the conversation with Ms. McCarthy at 4:00 p.m. the previous day. Mr. Davis informed me that he had requested the return of the file from Ms. McCarthy. I again requested Mr. Davis to forward the file to Ms. Boulware as soon as it was returned to his office. Mr. Davis agreed to do so. On July 1, 1996, I telephoned Mr. Davis to see if the file had been returned to his office and forwarded to Ms. Boulware. Mr. Davis informed me that Ms. McCarthy had not returned the file.

Ms. McCarthy's argument that the agency has a general concern about transmitting original files outside the facility in which they are maintained is without merit and is simply a pretentious appeal to authority. Mr. Davis, Field Civil Rights Officer, is responsible for the custody and control of the file in question and does not have an objection to the file being forwarded to Ms. Boulware. Ms. Alkalay, Assistant Chief Counsel and the head of Ms. McCarthy's office, sees no problem with forwarding the file in question to Ms. Boulware. Ms.

McCarthy is the only person expressing any concern about forwarding the file in question to Ms. Boulware for her review.

The Departmental Office of Civil Rights in the headquarters building of the Department of Transportation receives original copies of documents from all the subordinate Offices of Civil Rights everyday in the normal course of business. This fact can be easily verified by Ms. Boulware (202-366-8964). I did not request the agency to forward the file outside of the Department of Transportation. I did not request the agency to handle the file any differently than the agency does with originals of files every day in the normal course of business.

The agency's witness reviewed the original file. Ms. Hamilton is entitled to have her witness review the same documents and not copies of the documents. The agency did not claim any privilege regarding the file in question. Ms. McCarthy argues that files can become lost when they are removed from their normal location. The argument is without merit. Ms. McCarthy seems to be arguing that the Department of Transportation is incapable of tracking files between offices. Ms. McCarthy did not cite a single instant in which files have been lost when they were sent from one agency office to another.

The normal location for the file in question is in the Eastern Region Office of Civil Rights. The file in question was removed from its normal location by Ms. McCarthy and then retained by her. The file in question has not been lost and it falls into the category of a file that has been sent from one agency office to another.

In a telephone conference with the AJ on June 11, 1996, Ms. McCarthy said she did not submit individual pages from relevant agency Order(s) because she wanted to submit the entire Order, but was having trouble locating the Order. Ms. McCarthy's intention was to have the Board believe she was making an effort to find the Order(s). In a telephone conference on June 18, 1996, Ms. McCarthy said she had found a copy of the Order she was searching for, but it would take some time to copy. Ms. McCarthy again intentionally misled the AJ. She had not located a copy, had made no effort to locate a copy and it is clear that it would take less than five minutes to copy the Order.

During a June 17, 1996, telephone conference Ms. McCarthy was ordered to serve the Ms. Hamilton by noon on June 19, 1996, via Federal Express with material that included a copy of the Washington Air Route Traffic Control Center (Washington ARTCC) Training Handbook. On June 18, 1996, Ms. McCarthy made a telephone call to Mr. William Croghan at the Washington ARTCC. Mr. William Croghan used the speaker connected to his telephone during the conversation. I could clearly hear what was being said by both Ms. McCarthy and Mr. Croghan. During that conversation, Ms. McCarthy asked Mr. Croghan if he had a copy of the Washington ARTCC Training Handbook. When his answer was in the affirmative, she asked him to make copies and give them to the Acting Air Traffic Manager. Ms. McCarthy then telephoned the Acting Air Traffic Manager and asked the Acting Air Traffic Manager to give a copy to me. On June 19, 1996, I received a telephone call from the Acting Air Traffic Manager at the Washington ARTCC. The Acting Air Traffic Manager told me, "I have something for you." I went downstairs to the Air Traffic Manager's office and was handed a copy of the Washington ARTCC Training Handbook. During the conversation with the Acting Air Traffic Manager, I was told that Ms. McCarthy had not made ANY previous requests or inquiries regarding the availability of the Order.

Ms. Hamilton was employed at the Washington ARTCC in Leesburg, Virginia. The Orders sought by Ms. McCarthy are on file at the Washington ARTCC. At least one of the

Orders was written by the Washington ARTCC. If Ms. McCarthy was making a reasonable effort to locate Orders relevant to Ms. Hamilton's appeal Ms. McCarthy would certainly have contacted the Washington ARTCC because the Washington ARTCC was the facility that wrote one of the Orders and was the facility that employed Ms. Hamilton. Ms. McCarthy DID NOT make an appropriate or reasonable inquiry, but misled the AJ to believe she had done so. During the telephone conferences on June 11, 1996, and June 17, 1996, Ms. McCarthy intentionally misled the Board to believe that she was making reasonable effort to locate the Order(s) when, in fact, she had made NO effort.

During the course of the hearing conducted by the MSPB, two witnesses for the agency willfully and with premeditation committed perjury during their testimony. Ms. McCarthy knew or reasonably should have known that they were going to willfully and with premeditation commit perjury. Mr. Alan Siperstein testified that he reviewed the records for Ms. Hamilton and in those records was an undated, unsigned, handwritten note that he believed was written by Mr. Raul Ratcliffe, that he interpreted to mean that the coordination required by FAA regulations had been accomplished, on May 20, 1991. Mr. Siperstein's testimony was perjurious and Ms. McCarthy knew or reasonably should have known that Mr. Siperstein would be willfully committing perjury.

On April 11, 1991, Mr. Marcus Davis, Civil Rights Officer, AEA-9, wrote the Manager, Air Traffic Division, AEA-500, to notify him that Kim L. Hamilton had filed a discrimination complaint and that no change or adverse personnel action may be implemented involving Ms. Hamilton without prior consultation with the Civil Rights Staff, AEA-9. This document was in Ms. McCarthy's possession and she withheld it.

On June 4, 1991, Mr. Hugh McGinley, Manager, Labor Relations Branch, AEA-16, wrote Mr. Marcus Davis. Mr. McGinley's letter reads, "On February 5, 1991 the Manager of Washington Center proposed to remove ATCS Kim L. Hamilton as a result of Unsatisfactory Training Progress. Subsequently on May 17, 1991, ATCS Hamilton was removed from her position with the FAA. After termination this office learned for the first time that ATCS Hamilton had filed a discrimination complaint over her withdrawal from training. Consequently **no coordination took place between this office and your office prior to either the proposal to remove or the removal decision** (emphasis added). For your information and consideration ATCS Hamilton was offered three alternative ATCS assignments after withdrawal from training, all offering promotion potential to grade GS-12. She declined all three offers. Specifically she was offered assignment as an ATCS at Buffalo Flight Service Station, Leesburg Automated Flight Service Station, and Richmond Air Traffic Control Tower. Leesburg Automated Flight Service Station is located within a few miles of her present duty station and would have not required relocation. Related to both her removal on May 17, 1991, as well as her discrimination complain, which we understand was filed in November 1990, is the fact that ATCS Hamilton personally submitted a grievance on August 1, 1990 under the negotiated agreement between NATCA and FAA. The grievance was related to termination of her training at Washington Center. While we have not seen her discrimination complaint, we have been advised that it also was related to the termination of her training. 5 USC 7121 (d) permits an employee affected by a prohibited personnel practice under section 2301(b)(1), which also includes discrimination, to either raise a complaint under the negotiated grievance procedure or under the statutory procedure, but not under both. Article 9, Section 4 of the NATCA/FAA agreement grants employees the same option. If ATCS Hamilton has in fact filed both a grievance and a

discrimination complaint about the same matter, then the first option elected is the option of choice and the second filing is invalid. From the limited information available to us it would appear that the discrimination complaint is invalid. If that is so, then there was no failure to coordinate the proposal to remove and decision to remove. We are enclosing the material related to both ATCS Hamilton's removal and her grievance. For your information, the grievance has been escalated to arbitration and arrangements are being made now to establish a date and time for the hearing. Should either the FAA or the Department conclude that the discrimination complaint is valid and that the grievance is invalid as a result, please let us know quickly so that we can raise objection to the grievance at the start of the arbitration hearing." This document was also withheld by Ms. McCarthy.

On December 16, 1991 at 4:15 p.m., Mr. Siperstein was asked by the Headquarters Civil Rights Officer to prepare a briefing on the background and status of Ms. Hamilton's EEO complaint. During this time, Mr. Raul Ratcliffe was also assigned to the Regional Office of Civil Rights with Mr. Siperstein. On December 17, 1991, Mr. Siperstein prepared a briefing item and faxed it to the Headquarters Civil rights Officer.

Mr. Siperstein was not in the Office of Civil Rights when Ms. Hamilton filed her EEO complaints or when Ms. Hamilton's removal was proposed or effected. Mr. Siperstein would have had to consult the file on Ms. Hamilton or discuss Ms. Hamilton's situation with someone in the Regional Office of Civil Rights who was familiar with the case in order to prepare the briefing item for the Headquarters Civil Rights Officer. When Mr. Siperstein consulted the file on Ms. Hamilton he would have read the letter from Mr. Hugh McGinley and known that the required coordination had not been done. Further, Mr. Siperstein would have seen a handwritten, unsigned, undated note that he believed to be written by Raul Ratcliffe and would have most certainly discussed it with Mr. Ratcliffe. The action log written by Mr. Siperstein concerning Ms. Hamilton's EEO complaint indicates that Mr. Siperstein and Mr. Ratcliffe both attended a meeting of December 18, 1991, and during that meeting discussed the background of Ms. Hamilton's EEO complaint, as well as the alternatives. So, Mr. Siperstein would have learned during one of the above mentioned conversations with Mr. Ratcliffe exactly what the handwritten, unsigned, undated note means. In any event, Mr. Siperstein could not truthfully testify that he knows that the required coordination was accomplished because he saw a handwritten, undated, unsigned note that he **believes** was written by Raul Ratcliffe, that he **interprets** to mean that the coordination required by FAA Order 1400.8 had been accomplished.

Ms. McCarthy had the June 4, 1991, letter written by Mr. McGinley in her possession more than a month prior to Mr. Siperstein's testimony. Ms. McCarthy also knew that Mr. Marcus Davis was assigned to the Regional Office of Civil Rights during the time frame in question. Ms. McCarthy had the April 11, 1991, letter from Mr. Davis in her possession prior to Mr. Siperstein's testimony. Ms. McCarthy knows that Mr. Davis has first hand knowledge that the coordination required by FAA Order 1400.8 had not been accomplished. Ms. McCarthy knows that Mr. Davis is currently assigned to the Regional Office of Civil Rights. Ms. McCarthy had to have Mr. Davis' permission to remove Ms. Hamilton's files from the Regional Office of Civil Rights. Ms. McCarthy knows that Mr. Siperstein does not have first hand knowledge regarding the coordination required by FAA Order 1400.8. Ms. McCarthy had the agency action log which shows the December 18th meeting in her possession prior to Mr. Siperstein's testimony. Assuming Ms. McCarthy performed a reasonable inquiry into the question of whether or not the coordination required by FAA Order 1400.8 was accomplished it

would have been impossible for her not to know that if Mr. Siperstein testified to anything other than he learned that the coordination had not been accomplished, then he would be committing perjury. Nevertheless, Ms. McCarthy had Mr. Siperstein to testify, and not Mr. Davis, knowing that Mr. Siperstein's testimony would be perjurious.

Mr. Marcus Davis currently works in the FAA Eastern Region Office of Civil Rights and Mr. Hugh McGinley currently works in the FAA Eastern Region Human Resource Management Division. Both have first hand knowledge of whether or not the coordination required by FAA Order 1400.8 was in fact accomplished. Ms. McCarthy knows this to be true. However, Ms. McCarthy chose to bring Mr. Siperstein, a witness without any first hand knowledge, to testify to a handwritten, undated and unsigned note, that was not submitted by the agency as ordered by the AJ, that he interpreted to mean the required coordination had been accomplished.

After Ms. McCarthy returned Ms. Hamilton's files to the Eastern Region Office of Civil Rights, Ms. Hamilton traveled to the Eastern Region Office of Civil Rights in Jamaica, New York and reviewed the files that are suppose to contain the handwritten, unsigned, undated note by Mr. Raul Ratcliffe. Ms. Hamilton's files did not contain any handwritten, unsigned, undated notes whatsoever. Ms. McCarthy had Mr. Siperstein testify knowing that Mr. Siperstein would testify to exactly what she wanted him to say and also knowing that Mr. Siperstein's testimony would be perjurious. There is no doubt that this was an intentional act on the part of Ms. McCarthy and Mr. Siperstein. Instead of assisting the fact finder in determining the truth, Ms. McCarthy purposefully perpetrated a fraud upon the Board and willfully obstructed the rational search for the truth.

Mr. Eugene Ullger testified that he was present during Ms. Hamilton's debriefing session after her 100% certification on April 19, 1990. He also testified that the 100% certification sheet was corrected and given to Ms. Hamilton on April 19, 1990. During cross examination Mr. Ullger confirmed that his testimony regarding when the 100% certification sheet was corrected and given to the appellant was in direct conflict with an affidavit executed by him on October 28, 1991. Mr. Ullger testified that he had a chance to review his personal notes prior to testifying and he did not have an opportunity to review his notes prior to executing the affidavit. For several reasons, Mr. Ullger's explanation for his perjury is unworthy of belief.

First, the EEO investigator interviewed Mr. Ullger and took notes for his affidavit prior to October 28, 1991. The EEO investigator then typed up Mr. Ullger's affidavit and presented it to him to sign. Mr. Ullger had from the time the EEO investigator interviewed him until he signed the affidavit to review his personal notes prior to executing the affidavit. Mr. Ullger would have the AJ believe that the EEO investigator interviewed him, typed up his affidavit, and had him sign it without affording him the opportunity to review his personal notes. If Mr. Ullger had wanted to review his personal notes prior to signing his affidavit, then the EEO investigator would not have forced Mr. Ullger, a second level management official, to sign an affidavit without affording him the opportunity to review his personal notes. Mr. Ullger's assertion is absurd.

Second, the last paragraph of the affidavit Mr. Ullger executed on October 28, 1991 reads, "I have read the above statement consisting of two pages and it is true and complete to the best of my knowledge and belief. I understand that the information I have given is not to be considered confidential and may be shown to the interested parties." This paragraph makes it clear to Mr. Ullger that his signature on the affidavit is a certification that it is complete and contains the truth.

Third, with regard to when the 100% certification sheet was corrected, Mr. Ullger's affidavit is consistent with the testimony of William Croghan and Jean Needham. Both Mr. Croghan and Ms. Needham testified that the 100% certification sheet was corrected and given to Ms. Hamilton at least a month after April 19, 1990.

Fourth, if Ms. Hamilton's 100% certification sheet was corrected and issued to Ms. Hamilton on April 19, 1990 there would be **NO** reason for Mr. Skiles to write the July , 1991 memorandum to Ms. Hamilton issuing the corrected sheet. This document was also withheld by Ms. McCarthy.

Fifth, if Mr. Ullger had executed the affidavit of October 28, 1991 without reviewing his personal notes he should have contacted someone after he reviewed his notes and found out that what he had sworn to in his affidavit was not the truth. Mr. Ullger did not contact anyone to advise that his affidavit was not the truth.

Sixth, Mr. Ullger wrote a Memorandum on September 7, 1990, which was found by me after the Record closed, which outlines the pertinent chronology of Ms. Hamilton's training. It shows that Ms. Hamilton's evaluation sheet was corrected and issued on July 12, 1990 and not April 19, 1990. This document was also withheld by Ms. McCarthy. It is obvious that Mr. Ullger committed willful, premeditated perjury.

Ms. McCarthy avers she has never suborned perjury, has acted at all times within the cannons of ethics, and is not aware of any perjurious or false testimony presented in this case. The facts prove that Ms. McCarthy is a liar. Ms. McCarthy knew or reasonably should have known that Mr. Siperstein and Mr. Ullger were going to willfully and with premeditation commit perjury during their testimony.

Assuming that Ms. McCarthy performed a reasonable inquiry into the question of whether or not the coordination required by FAA Order 1400.8 was accomplished, Ms. McCarthy read the files she had in her possession since June 1996. After reading Ms. Hamilton's files Ms. McCarthy knew:

- that Mr. Siperstein had conversations with both Mr. Ratcliffe and Mr. Watkins concerning Ms. Hamilton's removal.
- that Mr. Siperstein does not have first hand knowledge regarding the coordination required by FAA Order 1400.8.
- that Mr. Marcus Davis was assigned to the Regional Office of Civil Rights during Ms. Hamilton's removal.
- that Mr. Davis has first hand knowledge of whether or not the coordination required by FAA Order 1400.8 has ever been accomplished with regard to Ms. Hamilton's removal.
- that the coordination required by FAA Order 1400.8 has not been accomplished.

After reading Ms. Hamilton's file, a reasonable inquiry would lead Ms. McCarthy to first speak with Mr. Marcus Davis and Mr. Hugh McGinley. Mr. Davis currently works in the FAA Eastern Region Office of Civil Rights and Mr. McGinley currently works in the FAA Eastern Region Human Resource Management Division. Both Mr. Davis and Mr. McGinley have first hand knowledge of whether or not the coordination required by FAA Order 1400.8 was, in fact, accomplished. Undoubtedly, Ms. McCarthy spoke with one or both of them. However, neither Mr. Davis nor Mr. McGinley would testify that the required coordination had been accomplished. It is most likely that Mr. Davis and Mr. McGinley told Ms. McCarthy exactly the

opposite. Ms. McCarthy needed a witness to testify that the required coordination had been accomplished. So, Ms. McCarthy chose to bring Mr. Siperstein. After reading Ms. Hamilton's file and speaking with Mr. Davis and/or Mr. McGinley, Ms. McCarthy cannot reasonably or ethically offer testimony from Mr. Siperstein that he saw a handwritten, unsigned, undated note that says the required coordination occurred on May 20th, when she has in her possession a typed, signed, and dated agency document to the contrary, without seeing the handwritten, undated and unsigned note and submitting both documents to the AJ. It is obvious that Ms. McCarthy went *witness shopping* to find a witness that would testify to what she wanted said. The aforementioned documents are irrefragable evidence that Ms. McCarthy knew or reasonably should have known that Mr. Siperstein and Mr. Ullger would be giving perjurious testimony.

If Ms. McCarthy is aware of the legal and ethical requirements of her position, then her outrageous behavior must be contributed to a willful intent to mislead the AJ and frustrate the rational search for the truth. The frauds willfully perpetrated by Ms. McCarthy are clear evidence that Ms. McCarthy is untrustworthy and unprincipled. Instead of assisting the fact finder in determining the truth, Counsel for the Agency willfully perpetrated several frauds upon the Board and exhibited contumacious misbehavior that is obstructing the administration of justice. In a court of the United States, Ms. McCarthy would be guilty of criminal contempt under 18 U.S.C. § 401. See United States v. Thoreen, 653 F.2d 1332 (1981).

Final arguments were submitted in August 1996, and to date, the AJ has not issued a decision in Ms. Hamilton's case. The agency's and the agency's attorney's conduct before the MSPB is further evidence that the FAA will go to any lengths to defend discriminatory decisions and that the FAA cannot be trusted to eliminate discrimination. The failure of the MSPB administrative judge to sanction the FAA or the FAA's attorney contributes to the ineffectiveness of the redress process.

After the MSPB hearing concluded, I contacted FAA management at the Washington ARTCC and explained that I had evidence which confirms that, during the MSPB hearing, several management officials willfully and with premeditation, committed perjury and the agency attorney had full knowledge, prior to their testimony, that the management officials involved were going to give perjurious testimony. I requested an appointment with the appropriate management official because the conduct of the managers and the agency attorney involved violated agency directives. Management at the Washington ARTCC forwarded my request to the FAA's Eastern Region office. FAA management refused to grant me an appointment.

After my attempt to grant the FAA the opportunity, in the first instance, to investigate the wrongdoing of agency employees was unsuccessful, I wrote to The President of the United States to request his immediate attention and correction of corruption and serious malfeasance within the FAA (Attachment E). I included a copy of Attachment A with my letter to President Clinton. The only action taken by the Office of the President was to simply forward my letter to the Department of Transportion (Attachment F). The letter I received reads "To ensure that your concerns are addressed . . . " As you will see, my concerns have yet to be addressed.

The Department of Transportation did not address my concerns, but simply forwarded my letter to FAA Headquarters. FAA Headquarters did not address my concerns, but forwarded my letter to the FAA's Eastern Regional Administrator (Attachment G). The FAA's Eastern Regional Administrator did not address my concerns. The letter I received from the FAA's Eastern Regional Administrator reads, in pertinent part, "We have carefully reviewed the

information you provided in which you state several management officials gave perjurious testimony during a Merit Systems Protection Board (MSPB) Hearing. We have been advised that you made a motion at that MSPB Hearing with regard to this perjury claim. We are currently awaiting the ruling from the MSPB Judge. It would be inappropriate to conduct an investigation into your allegations until the results of this ruling are known. If you require any further information, please contact us or have a member of your staff contact Charlotte Happle, Administration Branch, AEA-541.1, at 718-553-4546." Attachment H.

As I did not have the opportunity to provide the FAA with any specifics regarding the perjurious testimony given by its managers, I contacted Ms. Happle, in January of this year, and inquired what information had been reviewed because I had not yet provided any information. Ms. Happle explained that she did not know what information had been reviewed, but promised to get back to me. After waiting two weeks for Ms. Happle's response, I telephoned her again. Ms. Happle explained that she was not yet ready to respond to my inquiry, but again promised to get back to me. I am still waiting for her return telephone call. FAA's Order 3750.4 provides specific penalties for the conduct I allege (Attachment I). The MSPB Administrative Judge's ruling has no bearing on whether or not the FAA disciplines its management employees for unacceptable conduct. FAA management refuses to discipline the managers or the agency attorney involved. So, the President of the United States, DOT, and the FAA have taken no action against two management officials for willfully giving perjurious testimony, or the agency attorney for her participation.

On October 29, 1996, I filed a complaint with the New York Bar Association against Ms. Mary M. McCarthy. Ms. McCarthy requested that the Department of Justice represent her in that proceeding. Before providing representation for a government employee, the Department of Justice requires the employing agency to certify that the employee was acting within the scope of his or her employment. Such a certification from the employing agency would naturally require an investigation by the employing agency into the incident that is at the heart of the request for representation from the Department of Justice.

On March 4, 1997, I filed a Freedom of Information request with the FAA requesting a copy of all documents from the Department of Transportation, Federal Aviation Administration containing a statement of its findings as to whether Ms. McCarthy was acting within the scope of her employment and its recommendation for or against the Department of Justice providing representation (Attachment J). My request was forwarded to the FAA's Eastern Region for collection. I received a response, not from the FAA's Eastern Region Administrator but from the very office that employs Ms. McCarthy, from the Eastern Region Legal Counsel. The same office that I believe, in January 1997, advised the FAA's Eastern Region Administrator that an investigation into my allegations of misconduct would be inappropriate. The Eastern Region Legal Counsel informed me that my request had been forwarded to the Office of the Chief Counsel in FAA Headquarters. I did receive a letter from the FAA's Chief Counsel denying my request, but admitting that "a November 26, 1996, memorandum from the FAA's Assistant Chief Counsel for the Eastern Region to the FAA's Assistant Chief Counsel for Litigation, advising of the legal proceedings instituted against attorney McCarthy, and expressing an opinion on whether attorney McCarthy was acting within the scope of her employment" and "a December 13, 1996, letter from the office of the FAA's Assistant Chief Counsel for Litigation to the Department of Justice, setting forth that office's analysis and findings on whether attorney

McCarthy was acting within the scope of her employment, and expressing a recommendation concerning legal representation" do exist (Attachment K).

Given these facts, if the FAA did not conduct an investigation into the Ms. McCarthy's behavior in the hearing before the MSPB, then the FAA actively misled the Department of Justice regarding the issue of whether or not Ms. McCarthy was acting within the scope of her employment, or, if the FAA conducted an investigation, then that investigation was a biased one because management of the FAA did not contact me to secure the specifics of the incident. No matter which is true, it is obvious that the FAA condones and protects the outrageous behavior of Ms. McCarthy and the managers involved.

The FAA's managers and attorneys lying in an EEO proceeding should not come as a surprise though. They learned that lying is "acceptable" behavior by noting FAA's top management's behavior before Congress. FAA management has been lying to Congress for quite some time, but Congress has not imposed any sanctions against the FAA or its managers for lying to it. The recent press statement by Congressman Frank R. Wolf, Chairman, Transportation Appropriations Subcommittee, on Management of the Federal Aviation Administration and the Issue Paper, dated May, 1997, to the Committee on Appropriations on the Federal Aviation Administration Potomac Tracon Project by the Surveys and Investigations Staff, clearly indicate that FAA's top management has being lying to Congress for years to cover up many "errors in judgment." Neither the FAA nor the officials involved suffered any sanction for lying to Congress. The agency did not suffer any penalty for lying to Congress. The message sent by the Congress is "Even when we catch you lying to us nothing will happen to you." The same "acceptable" behavior has been adopted by agency managers and attorneys to cover up discriminatory actions. So, it is not surprising that such outrageous behavior is encouraged, condoned and protected by all levels of FAA management. Effective legislation that imposes severe sanctions that will curtail the FAA's condoning and protecting such outrageous behavior by its managers and other employees and the FAA's tenacious efforts to withhold or cover up the truth must be passed to require the FAA to obey the law and to protect the citizens from discrimination and the resulting indignities, abuses and violations of federal and constitutional rights suffered because of the FAA's unlawful acts.

Should any member of Congress desire additional information, or any additional supporting documentation , my business telephone number is (703) 771-3421.

I do solemnly declare and affirm under penalty of law that the contents of the foregoing are true and correct to the best of my knowledge, information, and belief.

September 8, 1997
DATE

SAM WRIGHT, JR.

STATEMENT

OF

KIM L. HAMILTON

Kim Hamilton
168 Peyton Road
Sterling, VA 20165
703-406-0315

U.S. House of Representatives
Committee on Government Reform and Oversight
Civil Service Subcommittee
Washington, DC 20515-6143

September 5, 1997

My name is Kim Hamilton. I am an unemployed Air Traffic Control Specialist. I was hired by the FAA on July 4, 1988. After successfully completing phases I through IV of training at the Air Traffic Academy in Oklahoma City, I reported for duty at the Washington Air Route Traffic Control Center in Leesburg, VA. I was assigned to the C Area of specialization. Upon completion of phase VIII, I began on-the-job-training (OJT) on my first sector of live air traffic (phase IX of the training program.) The object of OJT is to train and observe a controller, on a given sector, until he can receive a successful certification at that sector. I was five months pregnant when I began phase IX. At the beginning of this phase, I was told by three different veteran controllers, all from the C Area, that attempts were going to be made to "wash me out" of the program due to the fact that I was a woman and that I was pregnant. I ignored the warnings.

During phase IX, I experienced several difficulties, the first being serious inconsistency in my OJT instruction. I was assigned to a crew with no OJT instructors, so I was forced to train with instructors from other crews. I ended up receiving instruction from a total of 14 different instructors on my first air traffic sector. (There are seven sectors in the C Area, all of which require certification.) In November of 1989, I was assigned to another crew in order to receive more consistent training. Because of my lack of knowledge about FAA regulations and training orders, and because of what the Assistant Manager for Training told me, I believed I was finally going to receive adequate training. However, in December, 1989, I was given a letter of performance deficiencies by my area manager, Cal Mann. When Mr. Mann handed me the letter he said, "Don't worry, this is just a formality, as long as you keep working at it, you'll get through this phase of training."

On several occasions during phase IX, I informed my first-line supervisor that my pregnancy was classified as high-risk. I previously gave the Assistant Manager for Training a letter from my doctor, dated September 6, 1989, which explained that my pregnancy was high-risk. The letter was placed in my file. Several times I requested either less strenuous duties or to have my training suspended until after my baby's birth. My requests were ignored. On January 26, 1990, I gave my supervisor, Greg Davis, a letter from my doctor which stated that I was scheduled for a Cesarean delivery on February 14. That wasn't good enough for Mr. Davis. On January 30, I gave Mr. Davis another letter from my doctor specifically requesting less strenuous duties. Mr. Davis told me he would have to consult my doctor before he could consider my request. Mr. Davis continued to make me train on live traffic, with full knowledge that my pregnancy was high-risk and knowing that I was scheduled for surgery in just two weeks. When Mr. Davis couldn't reach my doctor by phone, he proceeded to tell the nurse in my doctor's office that my job wasn't stressful and that I was "only a trainee."

I then went to the C Area Manager (now Gene Ullger) with the same request. He denied it also. It was at this point that I went to the air traffic controllers union (NATCA) and asked for assistance. Paul Williams, then NATCA President, and I had a meeting with Gene Ullger to discuss my job duties. Mr. Williams informed Mr. Ullger that other women in the facility were given lighter duties because of pregnancy, with a simple oral request. Mr. Ullger responded that he didn't care what was done in the past, he wasn't going to do it for me. Mr. Ullger told me that if I couldn't do my job then I should take

sick leave and stay home. Mr. Williams took the matter to the Air Traffic Manager (ATM) of the facility. I was placed in an administrative office on February 2, just 12 days before the Cesarean birth of my daughter.

In January, 1990, I submitted a request to Gene Ullger for 320 hours of advanced sick leave to cover the time I would be off work after my C-section. On February 13, the day before my surgery, I received a letter from Mr. Ullger granting me only 64 hours of advanced leave with the remainder of maternity leave to be charged as leave without pay. This was far below the number of hours normally advanced at Washington Center for maternity leave. I asked Mr. Ullger how he arrived at 64 hours. His response was that due to my position in training and the way I had managed my leave in the past, I was only being allowed 64 hours. The truth is, that Mr. Ullger wrote a letter to the Washington Center ATM stating that I was deemed to be a future training failure and that I was unworthy of retention by the FAA, and therefore should not be allowed the requested leave. This letter was written well in advance of my completion of phase IX training. Since I successfully completed the first eight phases, Mr. Ullger should have been able to reason that, given a decent chance, I could successfully complete phase IX. It became painfully obvious to me that Mr. Ullger was at the head of the "wash out" committee. Once again, I contacted NATCA and requested their assistance. Literally, from my hospital bed, with a newborn in my arms, I was forced to fight for fair and equal treatment. On February 21, thanks to NATCA, I was allowed 240 hours of maternity leave.

Apprehensively, I returned to work on March 29, 1990. I was assigned to yet another crew. My new supervisor, Thomas Skiles, assured me that I would receive the best training possible from the instructors on my crew and that my training would be in accordance with FAA regulations. Unfortunately for me, on January 11, 1990, a major airspace change occurred in the sector I was training on. I had only 16 hours of allowable OJT time remaining. I spent 164 hours learning a sector which no longer existed. Even though the situation looked bleak, I worked very hard and during my certification attempt, I know my performance was at least satisfactory.

Mr. Skiles was responsible for administering my certification attempt (also called a 100% evaluation.) On April 19, 1990, He paged me back from a break during peak (extremely heavy) air traffic activity and began the certification. This is in direct conflict with agency regulations. At the end of the session, Mr. Skiles and I went into his office to go over the evaluation sheet. There were no errors marked on the sheet. Mr. Skiles began asking me questions about circumstances which were outside my sector and that I was not required to know. He then started writing things on the sheet. I could see what was coming. On April 23, Mr. Skiles gave me a letter of withdrawal from training. I was assigned to work in the Flight Data section of Washington Center. I submitted a written response to the letter and contacted NATCA.

Paul Williams and I had another meeting with Gene Ullger. I pointed out to Mr. Ullger that 55 of my 75 OJT instruction reports were filled out incorrectly and that my 100% evaluation was not conducted according to FAA regulations. Nothing was accomplished by this meeting, so I requested a meeting with Joyce Sexton, then ATM, in order to discuss my training with her. She denied the request stating that it would be inappropriate for her to discuss my training problems with me. I prepared and compiled detailed documentation clearly indicating that my training was not conducted in accordance with FAA regulations, and that several managers below Ms. Sexton failed to correct obvious mistakes in the administration of my training. I attempted to submit the documentation to Ms. Sexton, but she refused to read it. FAA Order 3120.24, 7(c) (8) states, "The role of the Air Traffic Manager is to maintain the efficiency and effectiveness of the OJT/Certification Program."

The next action I took was to write Congressman Frank Wolf. I had a meeting with him and Ms. Judy McCary on May 31, 1990. In the meeting, I expressed my concerns about losing my job with the FAA.

I followed the meeting up with a second letter to Congressman Wolf. Mr. Wolf assured me that he would personally look into the matter and that a congressional investigation would begin immediately. However, shortly after Mr. Wolf wrote to the FAA, they responded to Mr. Wolf by saying that the matter was being handled inside the agency, through the grievance procedure. Congressman Wolf took no further action. In June of 1990 I also wrote a letter to Barry Harris, FAA Deputy Administrator, detailing my treatment at Washington Center.

In November, 1990, I was presented with a letter from the Washington Center Personnel Office offering me a job at the Flight Service Center in Buffalo, New York. Acceptance of this position required a reduction in grade and salary. I prepared a written response to the letter, but the Personnel Office would not accept my response. On November 30, Larry Anderson, then acting ATM, ordered me to go home and get the letter, bring it back, and sign it either accepting or rejecting the offer. Mr. Anderson, in the presence of my personal representative, Sam Wright, stated, "If you don't accept Buffalo Flight Service, I'll fire you." I made a notation on the bottom of the letter, signed it and returned it that same day.

In February of 1991, I was presented with a letter from the ATM proposing my removal from government employment. On Friday, May 17, 1991, I was asked to work overtime, something which never occurred before. While on position, I was relieved by Richard Wallace. I told Mr. Wallace that it was not time for my break, but he insisted that he was instructed to relieve me. I was then escorted to the ATM's office where Mr. Anderson handed me a letter of removal. I was escorted to the ladies restroom, where I had a locker, and was told to remove my things. I was escorted to the regular locker room and was instructed to remove my headset and ear phones and turn them over to my escort. I was then escorted to the back door and told to leave the premises. I was fired even though I had EEO complaints pending. Regarding my removal, there was no prior coordination with the EEO office as required by FAA Order 1400.8 paragraph 810.

Five years later, in June of 1996, I finally had a hearing before the Merit Systems Protection Board (MSPB) with Sam Wright as my representative. Two years of this five year delay were due to the fact that an Administrative Law Judge (ALJ) dismissed my case on a timeliness issue. I appealed the ALJ's decision to the U.S. Court of Appeals for the Federal Circuit. On January 26, 1996, the decision was reversed and the case was remanded back to the MSPB for a hearing on its merits. Final arguments in my case were submitted to the MSPB on August 9, 1996. After 13 months of waiting, I have not received a decision.

I do solemnly declare and affirm under penalty of law that the contents of the foregoing are true and correct to the best of my knowledge, information, and belief.

September 5, 1997 — Lyn R. Hamilton

DATE

ATTACHMENT A

Memorandum

U.S. Department of Transportation
Office of the Secretary of Transportation
Office of Inspector General

Subject: ACTION: Environment for Abuse

Date: January 26, 1996

From: A. Mary Schiavo
Inspector General

Reply to Attn of:

To: Federal Aviation Administrator

During the last 12 to 18 months, the Office of Inspector General has advised you of at least four instances of significant abuses by the Federal Aviation Administration (FAA). They related to Gregory May training; permanent change-of-station moves in Denver; use of familiarization trips for personal gain; and, most recently, the rehiring of retired FAA employees who accepted voluntary separation incentive payments (buyouts) as contractors. While each of these abuses are vastly different, there is a common thread. That thread is the mind set within FAA that managers are not held accountable for decisions that reflect poor judgment. Until senior FAA management is willing to send a different message, I suspect that the pattern of abuse we identified will, unfortunately, continue. I, therefore, urge you to change the message and begin taking actions to clearly let FAA managers know they will be held accountable for decisions that waste Federal assets or reflect unfavorably on FAA.

If I can answer any questions or be of any further assistance, please feel free to call me on x61959, or my Deputy, Mario A. Lauro, Jr., on x66767.

#

ATTACHMENT B

168 Peyton Road
Sterling, VA. 22170
(703) 406-0315
June 13, 1991

Mr. James B. Busey
Administrator
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Dear Mr. Busey:

My name is Sam Wright, Jr. I represent Ms. Kim L. Hamilton and am writing on her behalf. Ms. Hamilton filed a timely complaint of discrimination, following all the required procedures, regarding the termination of her training on April 23, 1990, as an Air Traffic Control Specialist at the Washington Air Route Traffic Control Center.

Through no fault of Ms. Hamilton, during the processing of her complaint a miscommunication occurred between the EEO counselors handling her complaint, therefore, an extended period of time elapsed before her complaint reached the Office of Civil Rights, at FAA Headquarters.

Ms. Hamilton's employment was terminated on May 17, 1991, contrary to the provisions of FAA Order 1400.8, paragraph 810 which states, "Any decision which constitutes an adverse or disciplinary action or any change in duty station, or job assignment, or supervision of an employee who has contacted an EEO counselor or who has filed a discrimination complaint <u>must</u> be coordinated with the EEO officer, <u>prior</u> to being effected. When advised that such action is proposed, the EEO officer shall review the proposed action and the recommendation of the field EEO officer and determine whether the action should be taken as proposed. Consultation is <u>required</u> on all such actions which are initiated after employee has contacted an EEO counselor." This order clearly applies to Ms. Hamilton and it has been ignored by Eastern Region Air Traffic, Mr. Larry Anderson, Acting Air Traffic Manager, Washington Center, as well as, Ms. Gwen Jones, Director of Internal Programs, Headquarters Office of Civil Rights. The Office of Civil Rights <u>was</u> <u>not</u> coordinated with prior to Ms. Hamilton's removal.

On May 28, 1991, Ms. Hamilton and I visited the Headquarters Office of Civil Rights. We spoke with Ms. Barbara Boulware, Civil Rights Staff Specialist, regarding Ms. Hamilton's EEO complaint and the removal decision. Additionally, at that time because of her removal, Ms. Hamilton filed another EEO complaint based on reprisal. Ms. Boulware was extremely knowledgeable and professional. She is an obvious asset to the Civil Rights Office and the Administrator's commitment to Equal Employment Opportunity.

On June 12, 1991, fifteen calendar/eleven working days after our visit to the Headquarters Office of Civil Rights, I received a telephone call from Ms. Gwen Jones informing me that, in Ms. Hamilton's case, it was her decision that the Office of Civil Rights would not address the fact that Ms. Hamilton was removed without the agency following FAA Order 1400.8, signed by the Administrator. Ms. Jones also stated that the Office of Civil Rights would not be interposing an objection to Ms. Hamilton's termination because sufficient information had not been obtained to make a decision regarding the matter. The fact that the Office of Civil Rights does not have sufficient information, from the investigative process, to determine whether the removal should be taken is beyond Ms. Hamilton's control and is exactly the reason that the Office of Civil Rights should interpose an objection to the removal action.

If the Administrator's stated policy and commitment on EEO, the Civil Rights process, Equal Employment Opportunity, and agency regulations are to be respected and have any validity or integrity, it appears there are some fundamental issues which must be addressed. First, when agency officials issue decisions, whether knowlingly or otherwise, in violation of agency regulations, direction should be provided to correct those decisions so that the resulting actions are "in line" with agency directives. Second, the offices charged with the responsibility for ensuring that agency directives are followed have to fulfil their obligation and duty to issue decisions which correct the situations resulting from inappropriate and improper actions or decisions by agency officials. Additionally, agency officials will have to fully support the your commitment to the Civil Rights process and Equal Employment Opportunity by becoming knowledgeable of agency policy and regulations, then subsequently issuing decisions which are within stated policy or regulations, or when advised that decisions or actions are obviously contradicted by agency regulations or policy correcting those decisions or actions so as to be in compliance.

In Ms. Hamilton's case, when agency officials were advised that her removal had been effected contrary to agency regulations action should have been taken to comply with stated directives, that action being to rescind the letter of removal and follow the procedure as required by the order signed by the Administrator. Further, due to the nature of the allegations contained in Ms. Hamilton's complaint, an objection to her removal should be interposed by the Office of Civil Rights, at least until the EEO investigator's report has been completed, to allow time for the Office of Civil Rights to obtain the information necessary to render an informed decision regarding whether the removal should be taken as proposed. This has been the hallmark of the Office of Civil Rights for at least the last ten years. In many, many cases in the past, it has proven to be of benefit to the agency and to the employee.

I feel certain that Mr. Watkins would not knowingly encourage or uphold a decision to sustain an agency action which is clearly against agency regulations, does not promote or encourage Equal Employment Opportunity, and does not support the Administrator's commitment to EEO. However, Mr. Watkins is not available because of travel requirements, hence, our appeal to the Office of the Administrator as we feel this matter deserves immediate consideration. This situation has placed an undue economic hardship on Ms. Hamilton and her two small children. We realize the enormous demands of your office and any assistance that you would provide in correcting the inequalities and inappropriate actions concerning Ms. Hamilton's case will be greatly appreciated.

If I can be of any assistance to you or any member of your staff, or should additional information be required I can be contacted at (703) 478-1467 or (703) 406-0315.

Sincerely,

Sam Wright, Jr.

a. This provision shall apply only when the complainant has presented a written and signed statement designating the representative by name to the field EEO officer or other official receiving the complaint.

b. When the complainant's designated representative is required to travel in order to represent the complainant, the FAA is not obligated to pay travel costs or provide official time for travel associated with his or her participation.

806. COMPLAINANTS, REPRESENTATIVES, AND WITNESSES who are FAA employees shall make appropriate arrangements with their supervisors when they wish to be released from their duties to consult with EEO counselors during normal duty hours. Such employees shall be provided a reasonable amount of official time to consult with the EEO counselor, except when it is operationally impracticable to be released from official duties.

807. EMPLOYEES WHO MAY NOT REPRESENT COMPLAINANTS are EEO specialists, EEO counselors, personnel specialists, Federal Women's Program Coordinators, Hispanic Employment Program Coordinators, and any other persons whose designation as representative might result in a conflict of interest or conflict of position.

808. REPRESENTATIVES WHO ARE NOT FAA EMPLOYEES. The FAA shall not be responsible for the participation of and the FAA shall not in any way compensate any representative who is not an FAA employee.

809. FREEDOM FROM REPRISAL. EEO counselors, complainants, complainant's representatives and witnesses shall be free from restraint, interference, coercion, discrimination, or reprisal as a result of their participation in the discrimination complaint process.

810. REQUIRED CONSULTATION WITH EEO OFFICER. Any decision which constitutes an adverse or disciplinary action or any change in duty station, or job assignment, or supervision of an employee who has contacted an EEO counselor or who has filed a discrimination complaint must be coordinated with the EEO Officer, through the field EEO officer, prior to being effected. When advised that such action is proposed, the EEO Officer shall review the proposed action and the recommendation of the field EEO officer and determine whether the action should be taken as proposed. Consultation is required on all such actions which are initiated after the employee has contacted an EEO counselor. Temporary changes to meet emergency needs of FAA are exempted from the requirement for prior consultation. In such cases, the responsible management official shall consult with the field EEO officer at the first opportunity.

ATTACHMENT C

U.S. Department
of Transportation
Federal Aviation
Administration

800 Independence Ave S.W.
Washington D.C. 20591

JUL 24 1991

Mr. Sam Wright, Jr.
EEO Representative
168 Peyton Road
Sterling, Virginia 22170

Dear Mr. Wright:

Administrator Busey has asked me to respond to your June 13, 1991, letter regarding the employment discrimination complaint of Ms. Kim L. Hamilton. I will try to address the major concerns raised in your letter.

First, please know that Ms. Hamilton's complaint is being processed in accordance with the rules and regulations contained at 29 CFR 1613. While the Federal Aviation Administration (FAA), Office of Civil Rights "coordinates" proposed adverse actions against EEO complainants, we do not substitute the judgment of the EEO office for the judgment of individual managers except in the most extraordinary circumstances. FAA Order 1400.8, Section 810 does not have the force and effect of an injunction, nor does it stay managerial decisions regarding adverse or disciplinary action against employees.

Secondly, we believe the complaint processing regulations and civil service rules contain sufficient safeguards to ensure that a wrongfully discharged employee is restored to her rightful place with all the appropriate benefits and conditions of employment. If it is determined that Ms. Hamilton was subjected to unlawful discrimination, you can be sure that she will be reinstated and given the full measure of remedial relief.

Finally, the FAA is committed to a work environment that promotes diversity and equal opportunity. We also take our responsibility for ensuring that the workplace is free of discrimination very seriously and individuals who engage in discriminatory conduct are disciplined. But in our civil service system, a manager's actions are presumed reasonable unless they are proven otherwise. As a general matter, we can not justifiably interpose objections every time a member of a protected class is separated from federal service. Such usurpation of managerial discretion demands a set of

compelling facts and circumstances. In Ms. Hamilton's case, the information currently available is just not sufficient to warrant such a drastic exception to the rules.

Ms. Hamilton's complaint will be thoroughly investigated and the parties given an opportunity to resolve it.

Sincerely,

for Leon C. Watkins
Assistant Administrator
for Civil Rights

ATTACHMENT D

IV

Finally, the appellants challenge the government's actions as violative of the Takings and Due Process Clauses of the Fifth Amendment. In the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 20 L.Ed. 287 (1870), the Supreme Court rejected just such an argument, noting that an embargo would not give rise to a compensable taking or a valid due process claim:

> A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared.... [W]as it ever imagined this was taking private property without compensation or without due process of law?

Id. 79 U.S. (12 Wall.) at 551. While it is true that takings law has changed significantly since 1870, the principles that the Supreme Court articulated in the *Legal Tender Cases* have remained valid, *see Chang v. United States*, 859 F.2d 896, 896-98 (Fed.Cir.1988), particularly as they apply to governmental actions in the sphere of foreign relations.

For example, in *Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed.Cir.1993), *cert. denied*, — U.S. —, —, 114 S.Ct. 2100, 128 L.Ed.2d 662 (1994), this court rejected a takings claim virtually identical to the one the appellants have raised here. In *Mitchell Arms*, BATF revoked the plaintiff's import permits for certain assault rifles, which resulted in the plaintiff's losing the opportunity to sell the arms under an already existing contract. The court held that BATF's revocation of import permits for firearms did not effect a taking. The court noted that the business of importing weapons is "subject to pervasive Government control," and that as a result, "Mitchell's expectation of selling the assault rifles in the United States—which expectation necessarily flowed from the ATF permits—could not be said to be a property right protected under the Fifth Amendment." 7 F.3d at 216. Because "Mitchell's ability to import the rifles and sell them in the United States was at all times entirely subject to the exercise of ATF's regulatory power," Mitchell did not acquire a sufficient interest in the permits to prohibit the government from revoking them without paying compensation. *See also Dames & Moore v. Regan*, 453 U.S. 654, 674 n. 6, 101 S.Ct. 2972, 2983-84 n. 6, 69 L.Ed.2d 918 (1981) (because of President's "authority to prevent or condition" pre-judgment attachments against Iranian assets, American company "did not acquire any 'property' interest in its attachments of the sort that would support a constitutional claim for compensation" after those attachments were nullified).

[4] The same principle is directly applicable here. While an individual who obtains a permit to import arms may make commitments in the arms market on the assumption that the permit will not be revoked before the importation is completed, that assumption does not constitute a "reasonable investment backed expectation[]" of the type necessary to support a takings claim. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979). That is particularly true with respect to importations of arms from a country with which the United States has an arms embargo, that is subject to an exemption that could be terminated at any time. *See 767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1581 (Fed.Cir.1995).

[5] The appellants' due process claim fares no better. They assert that the implementation of the Chinese arms embargo deprived them of property without due process of law by denying them the opportunity to sell in the United States the munitions for which they had obtained permits prior to the announcement of the embargo. As we have discussed, however, the appellants' right to import and sell Chinese arms in the United States was subject at all times to the hazard that their permits would be revoked, pursuant to statute and regulation, on foreign policy grounds or for other reasons. The Due Process Clause does not require the government to stand as a surety against the adverse consequences sometimes suffered by persons who knowingly undertake that kind of commercial risk.

AFFIRMED.

Kim L. HAMILTON, Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD, Respondent.

No. 94-3195.

United States Court of Appeals, Federal Circuit.

Jan. 26, 1996.

Employee sought review of Merit Systems Protection Board's (MSPB) decision denying her petition for review. The Court of Appeals, Nies, Senior Circuit Judge, held that: (1) Board may sua sponte raise issue of employee's compliance with its regulations respecting timeliness, and (2) procedures followed by administrative judge failed to afford employee full and fair opportunity to litigate issue of timeliness of her appeal and thus, dismissal of appeal for untimeliness was arbitrary.

Reversed and remanded.

1. Officers and Public Employees ⇐72.41(1), 72.43

While Court of Appeals has no jurisdiction to review merits of a mixed case, Court will entertain appeal from Merit Systems Protection Board (MSPB) in any case where complaint was dismissed on grounds of untimely filing of employee's complaint to MSPB and in such appeals, MSPB, as the acting agency, is named respondent rather than petitioner's employing agency.

2. Officers and Public Employees ⇐72.41(1)

Court of Appeals had jurisdiction over employee's appeal from Merit Systems Protection Board (MSPB) which raised only timeliness issues.

3. Officers and Public Employees ⇐72.20

Merit Systems Protection Board (MSPB) has discretion to require that appeals be processed in accordance with regulations prescribed by the Board.

4. Officers and Public Employees ⇐72.27

Timeliness provisions of Merit Systems Protection Board (MSPB) are comparable to the rules or orders of the Court of Appeals setting times for filing motions, briefs, petitions for rehearing, and the like, which may be waived by Court.

5. Officers and Public Employees ⇐72.27

Congress, by reinstating the *Hopkins* rule, mandated that regulations fixing time periods be treated as procedural matter in which Merit Systems Protection Board (MSPB) is the party in interest, not substantive defense of the employing agency, comparable to a statute of limitations.

6. Officers and Public Employees ⇐72.27, 72.41(1)

Employing agency has no right to court review of Merit Systems Protection Board (MSPB) ruling on timeliness nor, on appeal, can it defend against the merits on the ground that MSPB improperly waived its regulation respecting timeliness of petition for review; agency may only seek to persuade MSPB that waiver would prejudice its case.

7. Officers and Public Employees ⇐72.27

Merit Systems Protection Board (MSPB) may sua sponte raise issue of appellant's compliance with its regulations respecting timeliness since timeliness regulations are directed to MSPB docket control and orderly procedures and MSPB is the litigating respondent on appeals involving timeliness; however, this ruling does not preclude issue of timeliness from being raised on motion by the agency as ...

8. Officers and Public Employees ⇐72.27

Procedures followed by administrative judge failed to afford employee full and fair opportunity to litigate issue of untimeliness of her appeal and thus, dismissal of her appeal for untimeliness was arbitrary; only opportunity given employee to establish timeliness was in response to acknowledgement order which was a formidable document to digest; judge had evidence only of the filing date, not date of receipt which started the period running, and before dismissal, judge should have asked both parties for such evidence; and employee timely responded to order, albeit not in manner which resolved judge's problem.

9. Officers and Public Employees ⇐72.27

Merit Systems Protection Board (MSPB) may place burden of proof of timeliness on employee, but agency may not excuse its withholding of evidence on that ground; the agency may not sit by concealing evidence that would change result in case.

10. Officers and Public Employees ⇐72.27

Before undertaking the draconian action of dismissing appeal on a finding of untimeliness, administrative judge must have sufficient evidence which at least facially establishes that fact.

11. Officers and Public Employees ⇐72.27

Administrative judge's reliance on a double-barrelled presumption to dismiss employee's appeal as untimely was improper: first that decision was mailed on date it was signed and second that it was received by employee within five days.

12. Officers and Public Employees ⇐72.27

Fact that administrative judge's order requesting information regarding timeliness of employee's appeal was not fully answered is insufficient ground for dismissal of appeal where it is apparent that employee was making good faith effort to comply and pursue her appeal.

13. Officers and Public Employees ⇐72.33(1)

Failure to respond to order of the Merit Systems Protection Board (MSPB) may result in dismissal of appeal.

Kim L. Hamilton, Sterling, Virginia, submitted Pro Se.

Lee A. Black, Arlington, Virginia, was on the brief Amicus Curiae in support of petitioner.

Eric D. Flores, Attorney, Merit Systems Protection Board, of Washington, D.C., submitted for respondent. With him on the brief were Mary L. Jennings, Acting General Counsel and Martha B. Schneider, Assistant General Counsel.

Peter B. Broida, of Arlington, Virginia, was on the brief for Amicus Curiae, Federal Circuit Bar Association. Of counsel was Kenneth J. Nunnenkamp, Finnegan & Henderson, Washington, D.C.

Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, Jeanne E. Davidson, Assistant Director and Agnes M. Brown, Attorney, Commercial Litigation Branch, Department of Justice, Washington, D.C., were on the brief for Amicus Curiae, United States Postal Service.

Before PLAGER, Circuit Judge, NIES, Senior Circuit Judge *, and RADER, Circuit Judge.

NIES, Senior Circuit Judge.

I.

The appeal of Kim L. Hamilton to the Merit Systems Protection Board, Docket No. DC-0752-93-0669-I-1 (January 5, 1994), was dismissed *sua sponte* by the Administrative Judge for untimely filing. The full Board refused to consider Hamilton's petition for review accompanied by evidence showing her appeal was timely. Because of serious questions regarding the Board's procedures and ruling on timeliness, the panel requested additional briefing on the following issues:

May the Merit Systems Protection Board, *sua sponte*, raise the issue of the untimeliness of an appeal to the Board taken pursuant to 5 U.S.C. § 7701(a), or is untimeliness an affirmative defense which is waived if not raised by the Agency? Please discuss which party should have the burden of proof regarding the timeliness of the appeal. Please also discuss the legal basis, if any, for the Board's current practice of raising untimeliness *sua sponte*, and 5 C.F.R. § 1201.56(a)(2) (1993), which places the burden of proof regarding timeliness on the Appellant.[1]

For the reasons set forth below, we hold that the MSPB may raise the issue of timeliness. However, Hamilton was denied a fair opportunity to establish that her appeal was timely, and we hold that the dismissal of Hamilton's appeal for untimeliness was arbitrary. 5 U.S.C. § 7703(c) (1988).[2] Accordingly, we reverse and remand for consideration of the merits of her case.

II.

BACKGROUND

Kim Hamilton worked as an Air Traffic Control Specialist for the Federal Aviation Administration ("the FAA"). In 1989, Hamilton was receiving training for her position at the Washington ARTC Center in Leesburg, Virginia. Despite completing maximum training, Hamilton was declared a training failure on April 23, 1990. Her removal was effected on May 17, 1991.

Shortly after her removal, Hamilton filed a complaint of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that her removal resulted from sex discrimination and as reprisal for two earlier filed complaints. The earlier complaints also alleged sex discrimination. The EEOC dismissed Hamilton's case because her charge of discrimination was asserted in connection with her termination, a personnel action appealable to the MSPB. As noted in its order of dismissal, under 29 C.F.R. § 1614.302(d), an individual who elects to file a mixed case, that is, one seeking to overturn an adverse personnel action on the ground of discrimination, must first proceed before the employing agency and the MSPB. Accordingly, the case was sent to the FAA for investigation and decision.

The FAA issued a final decision on June 21, 1993, concluding that Hamilton had not been the victim of discrimination. The letter accompanying the decision correctly stated, "Within 20 days of your receipt of this final decision, you have the right to appeal this decision to the [MSPB]." (Emphasis added.)

Hamilton's appeal papers were mailed by certified mail to the Board on August 13, 1993. Upon receipt, the AJ issued a lengthy form letter designated an "Acknowledgement Order" containing directives to both parties on procedures to be followed, as discussed more fully hereinafter, and advising that failure to follow the AJ's orders could result in the imposition of sanctions under 5 C.F.R. § 1201.43 (1991). As part of the Order, the AJ *sua sponte* questioned the timeliness of the appeal without, however, providing information respecting the dates on which the AJ relied and ordered Hamilton to submit evidence and argument to establish that her appeal was timely or that good cause existed for the delay.

Hamilton timely responded to the above Order on August 30, 1993, supplying a copy of the Certified Mail receipt showing that she had mailed her appeal on August 13, 1993. However, she did not submit evidence showing when she received the FAA's decision, nor did she ask for a waiver of the time limit for good cause. The FAA filed a very brief

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* Judge Nies ... ded but assumed Senior status on November 1, 1995, after the hearing.

1. The court acknowledges with appreciation the briefs *amici curiae* filed by the U.S. Postal Service and by the Federal Circuit Bar Association. The MSPB, which at the time had only two members, presented a brief which stated the conflicting views of these members.

2. Section 7703 of Title 5 provides the following standard of review:

(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation; or (3) unsupported by substantial evidence

conclusory response asserting only that Hamilton had not met her burden of proving her appeal was timely filed and requested dismissal of her case.

On September 29, 1993, the AJ issued his decision, dismissing Hamilton's appeal for untimeliness. The AJ ruled that Hamilton had not proved when she received the FAA's decision and that it was "reasonable to presume" that appellant received it on June 26, 1993, five days after the date of the decision. Under this rationale, her appeal filed on August 13, 1993, was late and he dismissed her case.

Upon receiving the above ruling, Hamilton promptly sought to obtain a copy of the postal form from the post office showing when she signed for the copy of the FAA's decision. The post office supplied a copy showing her receipt on July 26, 1993, not June 26, 1993. She then submitted the postal form and requested the AJ to review the evidence and reinstate the appeal, arguing that the Agency had failed to act in good faith in seeking dismissal when it had the original receipt and knew, or should have known, her appeal was timely. The submission was docketed as a petition for review by the full Board.

The FAA opposed further review on the ground that the petition did not satisfy the criteria for full board review under 5 C.F.R. § 1201.115(c). Particularly, the applicable regulation provides for review where

> (1) New and material evidence is available that, despite due diligence, was not available when the record closed.

The FAA argued that the postal receipt was not new evidence within the meaning of the regulation, that it had not acted in bad faith because it was not required to respond or furnish evidence on timeliness, and that if Hamilton had needed more time to obtain the document to submit it to the AJ, she should have requested an extension of time. Also, she could have requested the postal receipt from the FAA and did not. Thus, the FAA argued, Hamilton did not exercise due diligence. The FAA never furnished the original postal receipt which it had or should have had in its file.[3]

The full Board denied the petition for failure to meet the standard of new evidence required for its review, and this appeal followed.

III.

JURISDICTION OF THIS COURT

[1, 2] This court has jurisdiction over this appeal pursuant to 5 U.S.C. § 7703(b)(1). While this court has no jurisdiction to review the merits of a mixed case, *Williams v. Department of the Army*, 715 F.2d 1485 (Fed.Cir.1983) (*in banc*), the court will entertain an appeal from the MSPB in any case where the complaint was dismissed on the grounds of untimely filing of the employee's complaint to the MSPB. *Wallace v. Merit Sys. Protection Bd.*, 728 F.2d 1456, 1458 (Fed.Cir.1984). In such appeals, the MSPB, as the acting agency, is named respondent rather than the petitioner's employing agency. *See Amin v. Merit Sys. Protection Bd.*, 951 F.2d 1247 (Fed.Cir.1991). Thus, we have jurisdiction over the subject appeal which raises only timeliness issues.

IV.

TIMELINESS

The timeliness of Hamilton's appeal, which involves allegations of discrimination, is governed by 5 C.F.R. § 1201.154 (1993).[4] That regulation states in pertinent part:

> Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:
>
> (b) If the appellant has filed a timely formal complaint of discrimination with the agency:
>
> (1) An appeal must be filed within 20 days [now 30] after the appellant receives the agency resolution or final decision on the discrimination issue;

In the event that an appeal to the Board is untimely filed, section 1201.22(c) provides that the appeal "will be dismissed as untimely filed unless a good reason for the delay is shown."

[3] This regulation was issued pursuant to 5 U.S.C. § 7701(j) (1988) which provides that the MSPB "may prescribe regulations to carry out the purpose of this section." As this court stated in *Phillips v. United States Postal Service*, 695 F.2d 1389, 1390–91 (Fed. Cir.1982), the Board has discretion to "requir[e] that appeals be processed in accordance with regulations prescribed by the Board."

Regulatory Procedure or Affirmative Defense?

The issue of the timeliness of an appeal to the Board has had a surprisingly complex and tortuous history. In its earliest decisions, the Board considered a timely appeal necessary to establish the Board's jurisdiction. *See, e.g., Butler v. Department of Interior*, 9 MSPB 305, 10 M.S.P.R. 25 (1982) (vacating initial decision and remanding case for hearing on "the jurisdictional issue" of the timeliness of the petition). Thus, it followed that the Board could, indeed, was obligated to raise the timeliness issue *sua sponte* and to place the burden on the appellant to prove timeliness as with any other jurisdictional issue. *See Hambsch v. United States*, 857 F.2d 763, 764–65 (Fed.Cir.1988), *cert. denied*, 490 U.S. 1054, 109 S.Ct. 1969, 104 L.Ed.2d 437 (1989). In *Wallace*, 728 F.2d at 1458 n. 2, this court noted that the time for filing an appeal to the MSPB was fixed only by regulation, not statute, and, thus, was not jurisdictional. Not being a jurisdictional issue, we questioned at that time the practice of the Board in raising a nonjurisdictional issue *sua sponte*, *id.*, but the *Wallace* case was decided on other grounds. In any event, the MSPB has continued to raise the issue of timeliness *sua sponte* in its Acknowledgement Orders, as it did in this case.

Other litigation related to timeliness has concerned naming the proper respondent in an appeal to this court. The Department of Justice normally handles the case for the employing agency before the MSPB and in this court. In connection with appeals to this court related to timeliness, however, the MSPB asserted that it was the proper respondent. The Department of Justice disputed this contention. This dispute arose because of the cryptic language of 5 U.S.C. § 7703(a)(2) (1982), which then provided:

> The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent. [Emphasis added.]

Thus, in some appeals, the Board is the respondent[5] while in others the employing agency or OPM must be named.

In *Hopkins v. Merit Systems Protection Board.*, 725 F.2d 1368 (Fed.Cir.1984), this court undertook an analysis of the timeliness regulations. In *Hopkins*, the Board rejected an application for attorney fees because of the untimeliness of the request under 5 C.F.R. § 1201.37(a)(2) (1982). In affirming that rejection, this court examined the statutory provision respecting the appropriate respondent and concluded that because the employing agency had taken no action appealed to the Board respecting the attorney fee request and was essentially a mere bystander, the MSPB was the appropriate respondent as "the agency responsible for taking the action." 5 U.S.C. § 7703(a)(2). This court reasoned:

> Rather, the MSPB has acted by rejecting the fee request on the basis of its own appellate procedural regulations, properly promulgated pursuant to the authority Congress provided under section 7701(a). In such a situation involving purely the

3. The FAA obtained an extension of time to supply its file on Hamilton. Whether the file was submitted is not shown by the record before the court.

4. Unless otherwise noted, all citations to the Code of Federal Regulations are to the 1993 edition.

5. *See* S.Rep. No. 969, 95th Cong., 2d Sess. 62–63 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2784–85.

MSPB's own appellate procedures, where the employing agency has had no responsibility or involvement whatsoever, logic dictates that Congress intended the MSPB to be named respondent, and that the exception for the agency, a mere bystander in this case, does not apply.

Id. at 1371–72. *Accord Phillips*, 695 F.2d at 1390 n. 2. Thus, this court in *Hopkins* treated the timeliness regulations as merely a procedural matter affecting the MSPB, rather than the agency.

The issue of the proper respondent on timeliness issues was revisited by the court in *Hagmeyer v. Department of Treasury*, 852 F.2d 531 (Fed.Cir.1988) (*in banc*), another case involving an attorney fee request. The court noted that the *Hopkins* rule had not proved entirely workable, particularly because the MSPB as respondent was not in a position to settle the case on the merits, a problem disclosed in *Van Fossen v. Merit Systems Protection Board*, 788 F.2d 748, 751 n. 8 (Fed.Cir.1986). *Hagmeyer*, 852 F.2d at 535. The *in banc* court rejected the MSPB's view that its decisions on the threshold issues of timeliness and jurisdiction are implicitly made under the Board's broad authority to adjudicate all matters within its jurisdiction (5 U.S.C. § 1205(a)) and to litigate on its own behalf (5 U.S.C. § 1205(h)). Overturning *Hopkins* and its progeny, the *in banc* court held that where a petitioner has invoked, or sought to invoke, the Board's appellate jurisdiction under section 7701, the respondent before the MSPB, that is, the employing agency, remained the respondent upon judicial review by this court even though the appeal involved timeliness or jurisdictional issues. *Hagmeyer*, 852 F.2d at 540.

Shortly thereafter, the dispute between the Justice Department and the MSPB was aired before Congress in connection with MSPB's proposed amendment to the statute to overturn this court's decision in *Hagmeyer*. The Justice Department argued that it was unseemly for the MSPB to defend its own decisions in the courts and that the employing agency, not the MSPB, was the real party in interest in the case and should be the respondent, as held in *Hagmeyer*. *Whistleblower Protection Act of 1987: Hearings on H.R. 25 Before the Subcommittee on Civil Service*, 100th Cong., 1st Sess. 16–19 (1987) (statement of Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division, Department of Justice). The MSPB countered that the MSPB should be armed with litigating authority to defend its decisions (like, *e.g.*, the National Labor Relations Board) where the merits of the personnel action taken by the agency were not in issue. *Id.* at 297 (response of Llewellyn M. Fischer, General Counsel of the Merit Systems Protection Board, to written questions submitted by the Subcommittee). Congress adopted the position of the MSPB over that of Justice. As stated in the legislative history:

> Until January 1987, the Board had the authority to defend some of its decisions in court. Up until that time, the Federal Circuit Court had issued a series of decisions holding that the Board was the appropriate statutory respondent in cases involving jurisdictional and procedural issues where the merits of the underlying personnel action was not at issue (*e.g., Hopkins v. MSPB* (725 F.2d 227 [1983] (Fed.Cir. 1984)). However, in *Hagmeyer v. Department of Treasury* (809 F.2d 1581 (Fed.Cir. 1987)), the Court of Appeals for the Federal Circuit reversed its own precedent and held that the employing agency should be the respondent in all employee appeals to that Court.
>
> S. 508 would reverse the *Hagmeyer* decision and provide the Board with the litigating authority established under *Hopkins* and similar decisions. The bill would provide that the Board be the respondent in appeals involving jurisdictional and procedural matters, which are matters purely within the Board's jurisdiction, which [sic, while] the employing agency would be the respondent in cases involving the underlying personnel action or attorney's fees.

S.REP. No. 413, 100th Cong., 2d Sess. 21–22 (1988). Specifically, as amended, section 7703(a)(2) now reads:

> The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

[4–6] Given the entirety of this jurisprudential and statutory history, we must conclude that Congress, by reinstating the *Hopkins* rule, mandated that the regulations fixing time periods be treated as a procedural matter in which the MSPB is the party in interest, not a substantive defense of the employing agency, comparable to a statute of limitations.[6] As further support for this conclusion, we note that the MSPB has discretion under 5 C.F.R. § 1201.12 to waive the untimeliness of an appeal. This authority negates timeliness being an affirmative defense of the employing agency. Moreover, no statutory provision identifies the time period set by regulation as an affirmative defense of the employing agency. An employing agency has, for example, no right to court review of an MSPB ruling on timeliness nor, on appeal, could it defend against the merits on the ground that the MSPB improperly waived its regulation respecting timeliness of the petition. The agency may only seek to persuade the MSPB that waiver would prejudice its case. *Womack v. Merit Sys. Protection Bd.*, 798 F.2d 453, 456 (Fed.Cir.1986).

[7] Timeliness regulations being directed to MSPB docket control and orderly procedures, and the MSPB being the litigating respondent on appeals involving timeliness, we conclude the Board may *sua sponte* raise the issue of an appellant's compliance with its regulations respecting timeliness.[7]

The Merits

[8] Having concluded that the Board may *sua sponte* raise the issue of timeliness, we, nevertheless, conclude that the Board erred in a rush to judgment against Hamilton. Upon review of the record, we conclude the procedures followed by the AJ failed to afford Hamilton a full and fair opportunity to litigate the issue.

The only opportunity given Hamilton (denominated "appellant" before the Board) to establish timeliness was in response to the Acknowledgement Order ("the Order"). That Order is directed to both parties and contained six pages of general instructions, together with six pages of enclosures. The Order provided information on the appellant's right to a hearing if requested; directed appellant to submit evidence and argument within 15 days to prove that the appeal was within the Board's jurisdiction and timely filed; directed the filing of an enclosed "Designation of Representative" form; ordered good faith negotiations for settlement and discussed procedures to enforce any agreement reached; explained and set out discovery procedures; explained the appellant's right to reply to agency motions; gave instructions on the size of paper to be used, the need for certificates on any submissions, calculations of filing dates and extensions of time; and incorporated by reference the Board's regulations in 5 C.F.R. Parts 1201 and 1209 (not enclosed). The Agency was ordered to submit material set out in a schedule and other information required by 5 C.F.R. § 1201.25 within 20 days of the date of the Order; to designate a representative; and to negotiate with appellant in order to define the issues, agree to stipulations, and pursue settlement of the case.

The Order is a formidable document to digest, particularly as some of the stock paragraphs may be inapplicable. For example, there was no basis for raising a question respecting the Board's jurisdiction in this case, an issue on which the AJ ordered evi-

6. The timeliness provisions of the MSPB are, thus, comparable to the rules or orders of this court setting times for filing motions, briefs, petitions for rehearing, and the like, which may be waived by the court. *See American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539, 90 S.Ct. 1288, 1292, 25 L.Ed.2d 547 (1970) ("[T]he general principle [is] that '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.'") (quoting *National Labor Relations Bd. v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir.1953)).

7. Our ruling does not, however, preclude the issue of timeliness [illegible] being raised on motion by the Agency as w[illegible]

229

dence and argument. The part of the Order related to timeliness reads as follows:

> You must file an appeal with the Board within 20 days of your receipt of the agency's final decision on your discrimination complaint. 5 C.F.R. 1201.154(b)(1). The date your appeal is postmarked is ordinarily considered the date of filing. If you personally deliver your appeal to the regional office, the date of filing is the date of receipt. If you file by facsimile, the date of filing is the date of the facsimile. Because your appeal appears to have been filed after the time limit, it may be untimely filed.
>
> You have the burden of proof on the issue of timeliness. Accordingly, I ORDER you to file evidence and argument showing that your appeal was timely filed or that good cause existed for the delay. Your submission must be filed within 15 days of the date of this Order. The agency may file a response on this issue within 25 days of the date of this Order. Unless I notify you to the contrary, the record on this issue will close on that date. No evidence or argument on the timeliness issue filed after the close of record will be accepted unless you show that it is new and material evidence that was unavailable before the record closed.

As indicated, Hamilton timely responded to the Order with evidence showing when she filed her appeal. Given the AJ's extended explanation of what constituted the date of filing, a person carefully reading the Order could reasonably conclude that the AJ was unable to determine the filing date of Hamilton's appeal. Instead of issuing another Order clarifying the ambiguity, the AJ immediately dismissed the appeal stating:

> Appellant subsequently submitted documentation establishing that she filed her appeal on August 13, 1993, but she did not address her receipt of the agency's June 21, 1993, decision.[1] The Board has held that in the absence of evidence to the contrary, it will presume that a document was mailed five days prior to its receipt. *See Adamo v. United States Marine Corps*, 41 M.S.P.B. [M.S.P.R.] 275, 278 ([MSPB] 1[illegible]). Here, because there is no other evidence, I find it reasonable to presume that appellant received the agency's June 21, 1993, decision on June 26, 1993. In this regard it is relevant to note that the agency's decision was sent to the same address that appellant has used in the present appeal. To be timely, appellant's appeal should therefore have been filed by July 16, 1993. The appeal eventually filed on August 13, 1993, was almost one month late.

[1] In a September 21, 1993, submission the agency asserted that appellant had not met her burden on the issue of timeliness and requested that her appeal be dismissed. The agency's submission was untimely, however, and will not be considered.

This ruling was error.

[9] As an initial matter, we reject the FAA's argument that it had no obligation to come forward with relevant evidence in its possession. While we conclude that the MSPB may place the burden of proof of timeliness on the employee, the agency may not excuse its withholding of evidence on that ground. The agency may not sit by concealing evidence that would change the result in a case. We disapprove of such gamesmanship.

[10] In addition, before undertaking the draconian action of dismissing an appeal on a finding of untimeliness, the AJ must have sufficient evidence which at least facially establishes that fact. The AJ in this case had evidence only of the filing date, not the date of receipt which started the period running. Before dismissal, the AJ could and should have asked both parties for such evidence. Further the AJ must then inform the parties of the dates on which the AJ intends to rely to support the dismissal. Only by knowing those dates before a final order is issued can an appellant make a meaningful response by way of either challenging the dates or showing good cause for the period of delay.

[11] An appellant cannot be expected to fight a fog of generality. Here, it was not until the AJ's Order entering dismissal that the appellant could know that the AJ simply presumed the appealed decision was received

by the employee five days after the date it bears.[8] We reject the AJ's reliance on a double-barrelled presumption: first, that a decision is mailed on the date it was signed and, second, that it was received by the employee within five days. Appellant then was cut off from attacking the AJ's presumption because the AJ had closed the record. Dismissal because of failure to anticipate with exactitude the problems and solutions in the mind of the AJ is not the process which is due an appellant. The AJ should have at least afforded Hamilton a further opportunity to reply.

[12] As indicated, the Order underlying the dismissal covered numerous subjects. That the Order was not fully answered is insufficient grounds for dismissal where it is apparent that the appellant was making a good faith effort to comply and pursue her appeal. In *Mendoza v. Merit Systems Protection Board*, 966 F.2d 650, 653 (Fed.Cir. 1992) (*in banc*), we upheld a dismissal for untimely filing, but it is significant that, in *Mendoza*, the AJ had issued a second "show cause" order limited to the issue of timeliness which specifically warned the appellant that her appeal would be dismissed unless she established timeliness, an order which was ignored. Dismissal was not upheld merely because of the broadly framed Acknowledgement Order. A "one-strike-and-you're-out" rule based on the Acknowledgement Order alone can only be characterized as arbitrary in this case.

[13] Here we do not have a case where the appellant ignored orders from the Board or an AJ. That the Board is entitled to maintain orderly procedures is clearly necessary for proper adjudication. As held in *Mendoza*, 966 F.2d at 653:

> A petitioner who ignores an order of the Administrative Judge does so at his or her peril. Litigants before the Board, whether rich or poor, whether resident abroad or in the United States, are obligated to respect the Board, its procedures, including deadlines, and the orders of the Board's judges. The doors of the tribunal are open to all claimants but only on the same terms. This is the essence of due process and equal treatment under the law.

Failure to respond to an order of the Board may result in dismissal. *See Chepsiuna v. Merit Sys. Protection Bd.*, 69 F.3d 1143 (Fed.Cir.1995). In this case, however, Hamilton timely replied to the Order, albeit not in a manner which resolved the AJ's problem. Thus, Hamilton is not guilty of ignoring or disregarding a Board order or failing to prosecute, conduct for which sanctions may be imposed under 5 C.F.R. § 1201.43

V.

Conclusion

Under the regulations of the Board, the period for filing the appeal in this case began to run when the appealed decision was received. 5 C.F.R. § 1201.154. Hamilton has proffered uncontroverted evidence that she received the appealed decision on July 26, 1993. Thus, her appeal on August 13, 1993, fully met the regulation.[9] As held in *Saddler v. Department of Army*, 68 F.3d 1357 (Fed. Cir.1995), the Board is guilty of arbitrary and capricious action in dismissing the case of an appellant who has met the requirements of the regulation in filing his or her appeal.

The final decision of the Board is reversed and the case is remanded for further proceedings directed to the merits of Hamilton's removal.

VI.

Costs

Costs are awarded to petitioner.

8. The AJ apparently equated issuance with mailing of the decision.

9. The government argues that the case should be remanded for consideration of whether Hamilton delayed unreasonably in picking up the certified mail. Under current regulations, Hamilton's appeal was timely. As held in *Saddler v. Department of Army*, 68 F.3d 1357 (Fed.Cir.1995), whether delay was caused by the appellant's negligence is immaterial given the language of the regulation.

ATTACHMENT E

825 East Market Street
Leesburg, Virginia 20176-4496
(703) 771-3421
October 1, 1996

The President
The White House

Dear Mr. President:

I am an employee of the Federal Aviation Administration (FAA) and represent a former FAA employee who was removed from the federal service contrary to applicable rules and regulations. The purpose of this letter is not to ask for your intervention in that circumstance. It is however, to request your immediate attention to and correction of corruption and serious malfeasance within the Department of Transportation (DOT) and the FAA, which was discovered during the administrative process which began with the removal of that FAA employee from federal service.

A hearing was held before the Merit Systems Protection Board (MSPB or the Board) to adjudicate the merits of the removal action concerning the FAA employee. That hearing ended on July 26, 1996. During the hearing, management officials of the FAA were called to testify. Before testifying, each management official was sworn to tell the truth. Several management officials not only did not tell the truth, but, willfully and with premeditation, committed perjury. The agency attorney had full knowledge, prior to their testimony, that the management officials involved were going to give perjurious testimony.

After I obtained the evidence which confirms that the management officials involved willfully and with premeditation committed perjury, during the hearing before the Board, and that the agency attorney had full prior knowledge prior that the management officials involved were going to give perjurious testimony, I had a meeting on September 4, 1996 with Ms. Heather Biblow, Acting Air Traffic Manager and Mr. Phil Kain, Acting Assistant Air Traffic Manager at the Washington Air Route Traffic Control Center in Leesburg, Virginia. During this meeting with Ms. Biblow and Mr. Kain I explained that I had evidence which confirms that several management officials who testified at the hearing before the Board, willfully and with premeditation,

committed perjury, and that the agency attorney had full knowledge that the management officials involved were going to give perjurious testimony prior to their testifying. I requested to speak to a representative from the appropriate agency office that would be concerned with such serious misconduct. I was told that either Ms. Biblow or Mr. Kain would get back to me.

The following day, Mr. Kain advised me that he had passed along my request to the Eastern Region Air Traffic office of the FAA. On September 9, 1996, Mr. Kain told me that he was advised to tell me to take my concerns to the Board. I assured Mr. Kain that I would make the Board aware of the behavior of the agency at the appropriate time, but that had nothing at all to do with my request to see the appropriate agency official to discuss the misconduct of management officials. On September 12, 1996, Mr. Kain confirmed that the Air Traffic Division in the Eastern Region understood my request.

On September 23, 1996, I telephoned the Inspector General's (IG's) Hotline in the Office of the Inspector General in the DOT because I did not get any further response from the FAA. I spoke with Ms. Lisa Yearwood and explained the reason for my telephone call. After explaining the reason for my telephone call, I asked if this was a situation which the IG's office would investigate. Ms. Yearwood asked me to hold on while she asked the investigators. When Ms. Yearwood returned to the telephone, she informed me that this is not a situation that the IG's office would investigate.

Considering the fact that the FAA and the DOT have serious penalties, for the misconduct I have described above up to and including removal from federal service, along with the fact that perjury is a criminal offense, the only possible explanation for management officials to be *comfortable* enough to willfully commit perjury, is that the management officials involved are certain that; (1) no disciplinary action will be forth coming for their outrageous behavior, (2) the FAA and the DOT will protect them, and (3) the Department of Justice will not prosecute them. Support for that explanation is found in the fact that neither the DOT nor the FAA will investigate to determine if such government malfeasance exists within either agency and the Department of Justice rarely, if ever, prosecutes such cases.

As the Chief Executive, you Mr. President, are responsible for the running of the Agencies in the Executive Branch. The President of the United States ought to be as concerned with the proper functioning of the Executive Branch of the United States Government as he is about the inner working of foreign governments. You appoint the Secretary of Transportation, Administrator for the FAA and the Attorney General of the United States. The Secretary of Transportation, the Administrator for the FAA and the Attorney General of the United States serve at your pleasure and at your direction. Therefore, the DOT, the FAA and the Department of Justice function under your direction. Neither the FAA nor the DOT is interested in investigating to determine if there has been misconduct such as I have described on the part of agency management.

Since the Administrator of the FAA and the Secretary of the DOT are appointed by you and serve at your direction and pleasure, then one could reason that both agencies failures to investigate my accusations must be in accordance with White House policy. All U.S. Government employees take an oath of office, as you did, Mr. President, to support and defend the Constitution of the United States against all enemies, foreign and domestic; that they will bear true faith and allegiance to the same; and that they will well and faithfully discharge the duties of the office on which they enter, so help them God.

The mind set within the management at the FAA is that "managers are not held accountable for decisions that reflect poor judgment." Ms. A. Mary Schiavo wrote those words to the Administrator of the FAA on January 26, 1996, prior to her resignation. I have attached Ms. Schiavo's Memorandum to this letter. I suggest to you, Mr. President, that the atmosphere at the FAA is far worse than described in Ms. Schiavo's Memorandum. I suggest that management within the FAA disregards appropriate agency regulations and the laws of the United States without fear of being held accountable.

The Federal Courts have decided, as a matter of law, that managers within the U.S. Government perform their duties in good faith. Therefore, it is the duty of the Executive Branch to insure that managers that do not perform their duties in good faith

are removed from government service. Managers within the U.S. Government enjoy limited immunity from suit as a result of performing the duties of their job. Only infrequently are they burdened by having to pay for the consequences of their actions. They don't have to be concerned about having to pay an attorney to represent them because the Department of Justice defends them regardless of how outrageous their behavior is. Rarely are they prosecuted by the Department of Justice for violations of the law. There used to be a fear of prosecution for committing perjury. Managers within the FAA have no such fear. FAA managers hide behind the cloak of protection afforded them, without ever being held accountable. In most cases I suspect, their never have to explain the rationale for their outrageous behavior or decisions. They can cause serious havoc in the life of law abiding citizens without fear of ever being held personally accountable. Support for my belief is found in the recent case of *Hamilton v. Merit Systems Protection Board*, 75 F.3d 639, 647 (Fed.Cir.1996). In that case the Court said,

> As an initial matter, we reject the FAA's argument that it had no obligation to come forward with relevant evidence in its possession. While we conclude that the MSPB may place the burden of proof of timeliness on the employee, the agency may not excuse its withholding of evidence on that ground. The agency may not sit by concealing evidence that would change the result in a case. We disapprove of such gamesmanship.

I believe that an investigation by your office will find that within the FAA that this is not an isolated instance, but, rather, it is the normal course of business. The normal course of business being, covering up misconduct by agency officials by concealing the evidence of their malfeasance. It continues on and on unabated. After all, agency managers control all the evidence. Agency managers do not and will not investigate the wrong doings of each other. The IG's Office in the Department of Transportation will not and does not investigate allegations of agency manager's wrongdoings. Even after the Administrator

of the FAA was notified of an "environment for abuse," no action that was discernible to the workforce was taken. Such internal workings within the Executive Branch of the U. S. Government is not in the interest of the American people.

Individuals have been removed from federal service for reasons far less serious than willful premeditated perjury. It has never been public policy that individuals serving as U. S. Government officials should be allowed to willfully and with premeditation commit perjury on behalf of the United States. Mr. President, is it the policy of the White House to allow or encourage agency officials to take the oath for U. S. Government office and then take another oath at a judicial or quasi-judicial preceeding and swear to tell the truth and then willfully commit premeditated perjury? If it is not the policy of the White House to encourage, permit and/or condone such outrageous conduct by government officials, then, Mr. President, I suggest that an immediate investigation is in order from the White House to determine the following:

1. The validity of the accusations described herein,
2. Why neither the DOT nor the FAA investigated the accusations described herein,
3. If corruption is involved and, if so, to what degree that corruption exist.

Such an investigation should be conducted by some authority outside the FAA or DOT as both the FAA and the DOT have already demonstrated that neither organization is willing or trustworthy enough to investigate and police theirselves. Referring this letter to the DOT or the FAA for an answer on behalf of the White House will surely result in both agencies trying to further cover up for (1) the managers involved and (2) both agencies failure to investigate. It will not result in a rational search for the truth. I respectfully suggest that a member of your staff telephone Ms. Biblow and Mr. Kain. That telephone call will provide the name and telephone number of the agency official to whom my request for an investigation was referred. That agency official can subsequently be called and asked what action was taken or why no investigation was

initiated. The IG's Office in the Department of Transportation should be contacted to ascertain why they refused to investigate the misconduct described above.

Mr. President, I am sure you will agree that the Federal Government was established for the good of the American people and that the American people do not exist for the good of U. S. Government officials. You asked the American people to elect you to the office of President of the United States and now you ask the American people to re-elect you to that high office. I respectfully submit to you, Mr. President, that your position as the Chief Executive, and that the oath you took upon entering the office of President, both require you to investigate this circumstance, and if corruption and malfeasance are found, to take swift corrective action. I am at your disposal to provide additional information as necessary, to allow for the examination of the evidence I possess, and to assist in any way possible.

Respectfully,

Sam Wright, Jr.

Enclosure

CC: Mr. Robert Dole
Mr. Ross Perot
Congressman James Oberstar
Congressman Bud Shuster
Congressman John Duncan
The San Francisco Chronicle
The Los Angeles Times
The AFL-CIO
The Washington Post
The Washington Times
The New York Times
The Detroit News
The Chicago Tribune
The Wall Street Journal
The Dallas Morning News
The Minneapolis Star & Tribune
ABC News
NBC News
CBS News
FOX News
WJLA - Channel 7
WUSA - Channel 9
WDCA - Channel 20

ATTACHMENT F

THE WHITE HOUSE

WASHINGTON

October 11, 1996

Mr. Sam Wright, Jr.
825 East Market Street
Leesburg, Virginia 20176-4496

Dear Mr. Wright:

Thank you so much for your letter. President Clinton greatly appreciates the trust and confidence you have shown in him by writing.

To ensure that your concerns are addressed, I am forwarding your letter to the Department of Transportation for review and any appropriate action. Please bear in mind that it may take some time to look thoroughly into the issues you have raised. Should you wish to contact the Department of Transportation directly, you may write to: Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590.

Many thanks for your patience.

Sincerely,

James A. Dorskind
Special Assistant to the President
Director of Correspondence and
Presidential Messages

ATTACHMENT G

U.S. Department
of Transportation
Federal Aviation
Administration

Director of Human Resource Management

800 Independence Ave., SW.
Washington, DC 20591

NOV 4 1996

Mr. Sam Wright, Jr.
825 East Market Street
Leesburg, VA 20176

Dear Mr. Wright:

President Clinton has asked the Federal Aviation Administration to respond to your letter in which you allege misconduct on the part of certain managers with our Eastern Region's Air Traffic Division.

It appears that our Eastern Region may have all the facts in this matter and would be in the best position to address your concerns. Therefore, we are forwarding your letter to the Regional Administrator, Ms. Arlene Feldman, for response. I have asked Ms. Feldman to look into this situation and respond directly to you. You should be hearing from her shortly

Sincerely,

Glenda J. Witty for

Kay Frances Dolan
Director of Human Resource
Management

ATTACHMENT H

U.S. Department
of Transportation
**Federal Aviation
Administration**

Eastern Region
Air Traffic Division

Federal Building
JFK International Airport
Jamaica, New York 11430

JAN 08 1997

Mr. Sam Wright, Jr.
825 Market Street
Leesburg, Virginia 20176

Dear Mr. Wright:

This is in response to your letter dated, November 4, 1996, to President Clinton alleging misconduct on the part of certain managers within the Eastern Region Air Traffic Division.

We have carefully reviewed the information you provided in which you state several management officials gave perjurious testimony during a Merit Systems Protection Board (MSPB) Hearing.

We have been advised that you made a motion at that MSPB Hearing with regard to this perjury claim. We are currently awaiting the ruling from the MSPB Judge. It would be inappropriate to conduct an investigation into your allegations until the results of this ruling are known.

We hope you find this information helpful. If you require any further information, please contact us or have a member of your staff contact Charlotte Happle, Administration Branch, AEA-541.1, at 718-553-4546.

Sincerely,

Arlene B. Feldman
Regional Administrator

ATTACHMENT I

NATURE OF OFFENSE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
18. Non-compliance with any Federal Aviation Regulation while in the performance of official duties in piloting or maintaining aircraft. (Exception: Technical violations necessary for the performance of duty.) Since such violations usually involve a deficiency in performance on the part of the employee, disciplinary action should be based upon the deficiency; i.e., improper performance of duties, negligence, committing an unsafe act, etc. (See chapter 1, paragraph 6d.)	Written reprimand to removal	10 days suspension to removal	30 days suspension to removal
19. Non-compliance with standards, policies, regulations, or criteria issued by the agency. (This includes, but is not limited to, actions, or lack of action which deprive applicants or employees of bona fide equal opportunity, violation of travel regulations, etc.)	Written reprimand to removal	10 days suspension to removal	30 days suspension to removal
20. Disorderly conduct, fighting, threatening, or attempting to inflict bodily injury on another while on the job or on FAA property; disreputable conduct; use of insulting, abusive or obscene language to or about other individuals while on the job or on FAA property; creating a disturbance on or off the job which adversely affects efficiency or which reflects	Verbal reprimand to removal	Written reprimand to removal	10 days suspension to removal

	NATURE OF OFFENSE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
28.	Failure to assess a penalty when the facts are known and warrant disciplinary action.	Written reprimand to 5 days suspension	10 days to 30 days suspension	Removal
29.	Ignoring, concealing, or covering up a recognized offense or material fact for another employee, a supervisor, or a subordinate employee, which, if revealed, would result in disciplinary action being assessed against the employee.	Written reprimand to 10 days suspension	30 days suspension to removal	Removal
30.	Violation of security regulations.	Oral reprimand to removal	Written reprimand to removal	10 days suspension to removal
31.	Falsifying attendance record for one's self or another employee.	Written reprimand to removal	10 days suspension to removal	Removal
32.	Refusal to give information or testimony, or intentional falsification, misstatement or concealment of material fact in connection with employment or any investigation or inquiry.	Written reprimand to removal	Removal	
33.	Actual or attempted theft of Government or personal property.	Removal		
34.	Misconduct generally; criminal, infamous, dishonest, immoral, perverted, or notoriously disgraceful conduct.	Written reprimand to removal	30 days suspension to removal	Removal
35.	Misuse of identification cards, or investigative or identification credentials.	Written reprimand to removal	10 days suspension to removal	Removal

ATTACHMENT J

Received by Glenn Griffo on 3/4/97

168 Peyton Road
Sterling, VA 20165
March 4, 1997

Ms. Heather J. Biblow
Acting Air Traffic Manager
Washington Air Route Traffic Control Center
825 East Market Street
Leesburg, VA. 20176-4496

Dear Ms. Biblow:

I filed a complaint against Ms. Mary McCarthy, with the New York Bar Association. Ms. McCarthy is an attorney with the Department of Transportation, Federal Aviation Administration, Eastern Region. Ms. Nancy Miller, an Assistant United States Attorney, is representing Ms. Mary McCarthy before the New York Bar Association.

Under the Freedom of Information Act, I am requesting (1) a copy of all documents requesting the Department of Justice provide representation for Ms. McCarthy before the New York Bar Association, (2) a copy of all documents from the Department of Transportation, Federal Aviation Administration containing a statement of its findings as to whether Ms. McCarthy was acting within the scope of her employment and its recommendation for or against providing representation.

Please send the requested documents to:

Sam Wright, Jr.
168 Peyton Road
Sterling, VA 20165

Your prompt attention to this request will be greatly appreciated.

Sincerely,

Sam Wright, Jr.

ATTACHMENT K

U.S. Department
of Transportation
Federal Aviation
Administration

800 Independence Ave., S.W.
Washington, D.C. 20591

APR 18 1997

Mr. Sam Wright, Jr.
168 Peyton Road
Sterling, VA 20165

Re: Freedom of Information Act (FOIA) Request 97-0297, dated March 4, 1997.

Dear Mr. Wright:

This letter is in response to your Freedom of Information Act (FOIA) request dated March 4, 1997, which was received in this office on April 7, 1997. You requested copies of (1) all documents requesting Department of Justice representation for FAA attorney Mary McCarthy before the New York Bar Association; and (2) all documents from this agency setting forth its findings as to whether attorney McCarthy was acting within the scope of her employment, and its recommendation as to whether representation should be provided to attorney McCarthy.

There are 4 documents responsive to your request: (1) attorney McCarthy's November 25, 1996, memorandum to the Federal Aviation Administration's (FAA's) Assistant Chief Counsel for the Eastern Region, requesting Department of Justice representation; (2) attorney McCarthy's November 26, 1996, letter to the Assistant Attorney General requesting Department of Justice Representation; (3) a November 26, 1996, memorandum from the FAA's Assistant Chief Counsel for the Eastern Region to the FAA's Assistant Chief Counsel for Litigation, advising of the legal proceedings instituted against attorney McCarthy, and expressing an opinion on whether attorney McCarthy was acting within the scope of her employment; and (4) a December 13, 1996, letter from the office of the FAA's Assistant Chief Counsel for Litigation to the Department of Justice, setting forth that office's analysis and findings on whether attorney McCarthy was acting within the scope of her employment, and expressing a recommendation concerning legal representation.

All of the above documents are being withheld under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). This provision exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a

party . . . in litigation with the agency." As such, it exempts documents recognized as "privileged" in the context of civil discovery.

Each of the requested documents is protected from disclosure by the attorney-client privilege. This privilege attaches to all confidential communications between clients and their attorneys. These communications are shielded from disclosure in order to encourage full and frank discussion between clients and their legal advisors.

In addition, documents 3 and 4 are also protected from disclosure by the attorney work-product privilege. The attorney work-product privilege protects materials prepared by attorneys in anticipation of litigation.

Lastly, documents 3 and 4 are also protected from disclosure under the deliberative process privilege. The deliberative process privilege protects the advice, opinions, and recommendations rendered by agency staff in the course of reaching a final determination or position on any particular matter under agency or inter-agency consideration. These communications are shielded from disclosure to encourage open and frank discussions between agency employees.

The undersigned and David M. Wiegand are responsible for the above-referenced denial. You may request reconsideration of this determination by writing to the Associate Administrator for Administration, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591. Your request must be made in writing within 30 days from the date of receipt of this letter and must include all information and arguments relied upon. Your letter must state that it is an appeal from the above-described denial of a request made under the FOIA. The envelope containing the appeal should be marked "FOIA."

Sincerely,

Nicholas G. Garaufis
Chief Counsel

Mr. MICA. I thank each of our panelists for their testimony, and I'm going to yield first to the gentlelady from Maryland, who has joined us, Mrs. Morella, for questions.

Mrs. MORELLA. Thank you, Mr. Chairman, and I want to thank Mr. Cummings for requesting these hearings and Mr. Mica, for you in having them.

I read all the testimony, certainly have the benefit of this last panel. You've all very clearly expressed your concern with the current EEO process, and also sharing concerns about strengthening and simplifying the system and eliminating the backlog.

I do want to pledge here to work with Mr. Mica and Mr. Cummings, Mr. Martinez, Ms. Norton, and Mr. Wynn to craft the legislation that would help to clear up that backlog of cases and discrimination that we've seen here, and try to remedy it in other ways also, and make it far more fair.

But let me just ask you one question. What else do you think that we can do? What is the role, in your regard, of the alternative dispute resolution? And do you think that diversity training within the Federal workplace would also help? So I guess I would just ask that question to each of you—perhaps whoever wants to start.

Ms. ARNOLD. I'd like to be the first to respond. As far as the role that Congress could help to correct this problem, I feel that once again I will state it for the record: If you tie the appropriations of the agencies to their noncompliance, they would think twice about discriminating against individuals and classes of protected groups.

Also, at the Department of the Interior, ADR is just a litmus test. There is no active, formal ADR program that employees can turn to, and, also, ADR is voluntary. If an employee wants an ADR session and a manager does not, that session will not occur at the Department of the Interior. So unless, once again, ADR is legislated to be part of the process, it won't happen at our agency.

Mrs. MORELLA. But even if the employee wants it and the manager does not, it doesn't happen?

Ms. ARNOLD. Right, because the manager has to be a part of it.

Ms. COX. Hi. I'd like to respond first to the question regarding the diversity training. As one of the things that the agency did after the court found them guilty of discrimination, it was to engage in diversity training for all management, all management and all staff. And we believe that this training has had an effect on employees, but we believe that it needs to go further in terms of dealing with the managers, because we believe that they are in the unique position to set the standards and affect the attitudes of their work force. So we believe that there has to be something in their evaluation that holds them accountable for how they manage in terms of the diversity and achieving and maintaining the diversity within their organizations, as well as how they individually deal with these people.

Mrs. MORELLA. So not just the courses and the training——

Ms. COX. Right.

Mrs. MORELLA [continuing]. But the followup and accountability——

Ms. COX. The accountability is critical.

Mrs. MORELLA [continuing]. Training? Thank you.

Ms. COX. And then in respect to what else can be done, I think that it has to be clear that you're serious and they have to hear it from this body to effect real change.

Mrs. MORELLA. I appreciate that. Mr. Lucas.

Mr. LUCAS. I would like to respond to you. First, I would like to say that I'm a bit frustrated with the amount of dollars and cents that we have spent in training. My feeling is that I'm not concerned with training of individuals who have been culturally insensitive to the issues and the rights of women, people of color, the disabled, and others in the work force. I'm more interested in changing their behavior than changing their minds, if you get my point. And I think that the way you do this is to put enforcement, an enforcement mechanism that you have the power to do, to make sure those who are found guilty of discrimination are penalized. That is really the accountability piece that we have a tendency to always ignore, because that's the piece that says that anyone found guilty will be penalized.

I don't know of any other agency or any other bureaucracy besides the Federal Government that allows people to treat people in the way that we have been treating our employees, as well as our customers, and allowed to get away with it. If I do not pay my tickets in Washington, my name will appear possibly in the newspaper. I think that we have to work in terms of accountability to make sure those people who are found guilty and have a history of discrimination, they're penalized for it. I think that's the bottom line.

Mrs. MORELLA. Are some penalized and some not, or is nobody penalized?

Mr. LUCAS. Virtually, I would say, virtually none are penalized. And when you have an exception to the rule, they may say they send them to what you just mentioned; we send them to training. That is not the answer to the problem of the racism and sexism that permeates the Federal bureaucracy today.

Mrs. MORELLA. Mr. Wright, would you like to comment?

Mr. WRIGHT. Like I said, I've been involved in the EEO since 1977, and the requirements that I just read to the committee that are currently in place for Federal agencies are not new; they're two decades old. The Federal Government has had 2 decades to fulfill the requirements I just read to you.

It's not that they don't get it. They understand perfectly, and the one thing that they understand is that I can do this to you, and you cannot get to me. That's the one thing that they understand foremost. [Applause.]

If the Chair of this committee asked you to leave this room and spoke to you indignantly, and you could do nothing about it, you would be incensed if there was no course of action you could take to get to him. You have a Federal Government full of employees who suffer this same thing every single day. Managers make decisions, and there is nothing the employee can do to get to him.

Mrs. MORELLA. So you also feel that the alternative dispute resolution is not even because both parties—you know, one party can't ask for it like the employee and require the manager? Do you see that there is a role for that?

Mr. WRIGHT. No, I don't, and the reason that I don't is because you're not—you don't start out on an even field. When two parties

approach a conciliatory discussion, it presupposes that both parties have something to lose. The Federal Government has nothing to lose. If it simply chooses not to do it, what is the person on the other side of the table going to do? If you go to a conciliatory hearing, discussion, and you're arguing over a piece of real estate, both sides have something to lose, which is what they're arguing about. The Federal Government has nothing to lose ever, until a legislative body decides that, gentlemen, we gave you 2 decades; you just don't get it. The proof is you just don't get it, and I would defy any Federal agency to send any representative to this committee or any other committee at any place at any time and provide proof that they comply with any of the requirements I read to the subcommittee. [Applause.]

Mrs. MORELLA. Thank you. I would imagine that what follows from that is the devastation of morale and possibly the accompanying productivity lapse, too, because of the lack of morale and sense of confidence that the employers, the Government, all of us care.

Well, Mr. Chairman, I thank you. I just want to point out again that I think this hearing has demonstrated that maybe we've made some progress, but we sure have a long way to go in terms of combating discrimination in the work force, and as the Federal Government, we should be leading the way. So I hope we can draft something. Thank you.

Mr. MICA. I thank the gentlelady and turn now to our ranking member, Mr. Cummings.

Mr. CUMMINGS. Mr. Wright, your testimony about 1977 is just a reminder that—I think what happens is that people can be worn down, and time alone, when you don't have the sensitivity within the Federal Government, time alone will wear people down. The opportunities being gone, and then the next thing you know you have another group of people who come in, and they're complaining about the same things; only they're worse.

And so your testimony about 20 years, it goes back to what I said before: Opportunities, missed opportunities gone. I keep emphasizing that because it shows how criminal all of this is. It is criminal. If we steal something, if we go and steal a loaf of bread, or steal anything else, you've got a chance of going to jail. If you steal opportunities from children and people, there is not even a slap on the hand, according to your testimony, and I think we've got to look at it as theft, because you're stealing something that people can never regain. That's the other piece; you can't replace it—opportunity, that is.

One of the things that I talked about a little bit earlier is how we came to a very quick resolution to a problem a little bit earlier this year, and it's because of what you said, Ms. Arnold, and I think it's what you said, Ms. Cox: This committee said, no more; we're not going to allow it to happen, and the people at OPM, they jumped on it like you would never believe. They jumped on it; they came up with solutions, because we had grown men sitting in the same seats that you're sitting in crying.

And so some kind of way, although I haven't seen any tears here today, I know that there are tears of pain that are cried when you're not even here, and I understand that. And so some kind of

way, we've got to deal with it, and I'm so glad that you all have come out today to express what you've expressed.

The third point is I want to thank you all for doing what you're doing. Some of you know—and, Mr. Chairman, I cannot emphasize it enough—some of you all know that merely being here today—merely being here today—merely coming before a congressional hearing today will cause you pain. Will cause you pain. And that's a damned shame; it really is.

But I thank you for being bold enough to do it. And I said to Congressman Wynn a few minutes ago, I said, "We cannot let these people down. We cannot let them down, and we've got to find a way to come up with solutions." And I'm so glad that the chairman and Mrs. Morella have expressed what they've said from the other side. And I do believe them; we will come up with some kind of solutions.

Another thing that I'm just wondering about, Ms. Cox, you said something that I just want to make sure I have clarification on. You were talking about the number of employees, African-American employees, at CR——

Ms. COX. CRS, the Congressional Research Division for the Library.

Mr. CUMMINGS. Right, which is, of course, an agency that all of us use all the time.

Ms. COX. Exactly.

Mr. CUMMINGS. And you said something about an opportunity to hire some new people. Maybe I missed it or didn't understand it. Can you explain that?

Ms. COX. Yes. It's spelled out in detail in my written testimony, but what I was referring to is that the Library had come before Congress, the Director of CRS, to ask for special funding to prepare for the attrition, the retirees that we're expecting to have the turnover, and they identified some 100 positions that they are projecting to have to fill in the next year, the next 2 years, I think. And we believe that this is a unique opportunity to improve their diversity work force profile by attempting to successfully recruit African-Americans in those positions—in at least some of them.

Mr. CUMMINGS. Well, perhaps we can have some conversations with them. There are certainly all kinds of solutions to all kinds of problems, and sometimes it is good to at least let them know, Mr. Chairman, that we are sensitive to those kinds of issues, because, again, if they are discriminating in the hiring process, then that means that there are missed opportunities again, and that's hard to regroup, even with legislation, to get back to.

One of the things that you mentioned, Mr. Lucas—and I want to just talk about it for a moment: The New York Times had a piece about, I guess, about 10 months ago about this whole question of changing behavior, the same kind of thing you talked about. In other words, I think you said you're not so much worried about people and the fact that they've been discriminating for so long; the implication was they will continue, but you have to have ways to either punish them or find some kind of way to get them to change their behavior.

What this article talked about was these Fortune 500 companies, and they only listed—they list about six or seven of them, but one

of the things that they talked about is how the management was rated. In other words, the management got raises or got promotions based upon a showing—this was a major part of their evaluation—that they had across the board promoted people fairly and had found ways to empower people; in other words, to make them stronger. And that became like an incentive for them to do better, as far as promotions are concerned. I mean, what do you think of that? I'm just curious.

Mr. LUCAS. In response to that question, during my dialog, I indicated that this document here, which is called the CRAT's report, the most scathing report, as well as some of the best recommendations that have ever been done by a Federal agency on itself as it relates to the problem of employees and customers, especially black farmers, small and disadvantaged farmers of the country.

What is in this document is clearly one part of the 92 recommendations, is the fact that the managers, political appointees, and top management, the SES people and managers, have in their performance element a civil rights element, and that now we're saying at the Department of Agriculture—we're demanding that that recommendation be implemented and that that be followed through on, so that when people get promotions, when their bonuses are due at the end of the year, they have to go through an evaluation process through the Assistant Secretary of Administration and Civil Rights to make sure that they have complied in many ways to what we call certain civil rights standards of fairness and equality in the workplace and hiring, and how they treat their employees.

So in this document—and I mentioned to the chair and to the committee earlier—I think that this document is a good beginning for all agencies to use as an example in terms of what we call the lack of accountability in the Federal Government. So I think that's what the corporations are doing, and you're seeing a change in behavior, and I think that we have to do this in Federal Government, so we can demand and get that kind of behavior amongst our top managers in the Federal Government.

Mr. CUMMINGS. Help me with something. When you have a new, say, Secretary come in, and I'm sure that—and this is just a logical question that I think most people would ask. Of course, Mr. Espry was there for a short while. Does that make a difference, as to who the Secretary is? In other words, it is so ingrained that the Secretary is more or less almost a figurehead with regard to these kinds of issues, and I'm just wondering, does it make a difference?

Mr. LUCAS. Let me say this: Whenever you have the leader of the pack endorsing and supporting with not just paper, but also with actions, making sure that people followup on the recommendations and making sure people are punished, yes, it does make a difference. I would say that if you have that kind of support, committed support, you have change. But it also takes the efforts of the employees and the other managers throughout the system and demand that the system is held accountable all the way down to the supervisory level. It's all about accountability and responsibility and making sure that happens. But it just does not permeate from the Secretary, but I do believe that when you have a Secretary that demands accountability, that demands that employees—and not

just a paper tiger—I think you will have a change in the attitude and behavior. Because what you'll do is you'll make sure those people who are guilty of discrimination are punished, and that's not happening in agriculture; it's not happening throughout the Federal Government.

Mr. CUMMINGS. Just one last question: I think this is probably to Ms. Arnold and Ms. Cox. I can't remember who said what; I'm sorry.

One of the things that was said was that the Congress looking at the purse strings makes a difference, and maybe both of you all talked about that. How do you think it's best that we have a dialog; that is, that we, as Congress Members, so that when those issues come up we have something that we can use and say, "Wait a minute. This is something that's going on, and we have concerns about this," and just like we wanted certain things corrected at OPM that I just mentioned a little bit earlier, that we are concerned. But, of course, we have to have the information. Do you follow what I'm saying?

Do you have a proposal with regard to that? I mean, I'm sure it's something that you all have probably given some thought to, and I'm just curious because when those guys came before us and OPM was involved—by the way, OPM was in the room; they were in the room. In other words, when the allegations were made, and they were clear allegations, OPM was in the room, and the chairman, to his credit, said, "Look, we've got a deadline and you've got to have us an answer within 45 days." Actually, it was less than 45 days that they came and we met with them yesterday, and they had answers to the problem. And I mean, this was a very, very, very, very complicated problem, but they had answered, and they have worked on this for years.

So I'm just trying to figure out, do you have any suggestions as to how we can do that, because we want to be effective?

Ms. ARNOLD. Thank you, Mr. Cummings. Our recommendation was the recommendation to tie the appropriations to the agencies that are in noncompliance. One way to keep track of that is through the reports that come out from EEOC, because all of the agencies have to report to EEOC. And when you get those reports and you see an agency such as the Department of the Interior ranking last out of 42 agencies with the underrepresentation of African-Americans, you have to wonder, is this by design or how did this happen? And then when you look at the complaint process system within the agency and you don't see that the process is working, when it comes appropriation time, you go to the chairs that sit on the Appropriations Committee for that agency and you do an inquiry, and you say, "Well, why do you all continue to have 700 complaints on the books that have not been processed?"

And EEOC already has charted out how long it has taken us to process our complaints. The average complaint within the Department takes 565 days to process. That's years of a person's life—years.

So when you see that kind of report card that's coming out from the Commission, you can use that as leverage when you go to these agencies and it's appropriation time. They come to you all and they say, "We need 'X' amount of dollars for the grazing of land." And

you say, "Well, what does your human resources profile look like? We know you've got a grazing problem, but what about your people problem?" [Applause.]

Mr. CUMMINGS. Let me just interject something in there, and then I want to hear from you, Ms. Cox.

One of the things that I think we have to stay reminded of—and, again, I think we've just got to embed this in the DNA of every cell of our brains—we all pay into the Federal Government system, all of us. If you don't believe it, ask IRS. And so we all deserve, as Americans, fair opportunities. And sometimes we seem to forget that, that we all pay into this system. Nobody gives you a tax exemption because you can't be promoted. Nobody gives you a tax exemption because you can't get a job, although you're qualified. Nobody gives you a tax exemption when your child has done everything in his power or her power, stayed on the right side of the law, did everything right, and then can't get into the University of California. Nobody gives you a tax exemption.

And so I think we need to just keep that in mind. This is a thought off the top of my head.

I'm sorry, Ms. Cox.

Ms. COX. The Library of Congress, because it is a legislative agency, doesn't have to report their statistics to EEOC. So there's no report card for them. But they can be requested to report to you in terms of what they're doing, how they are demonstrating—how they are handling and processing these EEO complaints and how they are being dealt with.

So I think the power is here within the committee when they go for appropriations to ask them, or prior to that time, or periodically set it up so you will have the information prior to the hearing to be able to say, well, you told us that you had "X" number of EEO complaints, the date, the age. I talked with my deputy librarian yesterday in terms of having, the same thing I told you here in terms of having an EEO complaint that's been pending for 6 years with no resolution, where essentially the Librarian has already admitted liability. So these are the kinds of things that you can address to them.

Mr. CUMMINGS. One other thing, as I close—did you have something, sir?

Mr. WRIGHT. Mr. Cummings, if I might address that issue?

Mr. CUMMINGS. Please.

Mr. WRIGHT. When the agencies bring their budgets to Congress, each agency has as part of its budget its civil rights program, and it asks Congress for whatever amount of money it is that it needs to run its civil rights program, and if the Congress were to ask the agencies, "All right, you want 'X' number of dollars from us to run your civil rights program, and it appears to us that you either don't have one or it's a failure. Now, gentlemen, explain to us why we should give you more money to run a program that don't work."

Mr. CUMMINGS. I'm so glad you said that. I'm hoping that the chairman and I can perhaps get some joint letters out with regard to these issues.

I don't have any other questions, but I do thank you all for taking a day of your lives, and every second is very precious of our lives, to take a day of your lives to be here with us. And I just want

you to know that we are committed to making a difference. You know, we've got to use the resources that we have and try to make a difference. And thank you very, very much.

And, again, Mr. Mica, the chairman, I want to thank you for your efforts, because the fact is that, as we've noted, Government can move fast. It can move fast when there are people up here who want it to move fast, and not only want it to, but do what is necessary to make it move fast. And I'm very glad that we're having this hearing. You all have said a lot of information that is very important.

There are a lot of people in pain, and we understand that pain. We feel that pain, and we're going to try to make sure your pain does not go on forever and ever and ever, and that 10 years from now you're still talking about the same pain.

Yes, Ma'am?

Ms. ARNOLD. You weren't in the room when I addressed the committee, but I am the replacement of the black female senior executive that was forewarned that her appearance here today may result in her career demise. So I just wanted to mention that.

Mr. CUMMINGS. I promise you—I promise you—that that is going to be something—I hope Mr. Mica will join me in that, but no matter what—no matter what—if God spares my life long enough, I will get a letter to whoever is the head of that Department, a copy to the President, trying to figure out what is going on there, because to me that is criminal, and it will be even more criminal for me as a Member of the Congress of the United States not to do something about it. [Applause.]

Yes, Ma'am?

Ms. COX. One last comment. As we litigated the class action lawsuit at the Library for 22 years, and people died during that course, and they will never be repaid for the pain and the suffering or the jobs that they were denied.

In addition to that, the men, black women and men, in the CRS division are being denied. They competed to get in promotion plans from the GS–5 through the GS–15 level. We did a survey that demonstrated that, once they reached the 12 level, it takes an African-American 3 to 5 years to get promoted to the 13, and then from the 13 to the 14 it's longer, and then from the 14 to the 15 it's almost nonexistent. These people are suffering. They are losing money. They want to take care of their families in the same way as you've articulated earlier.

But how do we—and when we marginalize employees to this extent, they leave us, after we've invested years of training, and again taxpayers' resources, to develop these people, but they leave because they're hurt and they're disadvantaged, and they don't believe in the system any longer. So these are the kinds of things that we really need to focus our attention on.

Mr. CUMMINGS. And—and then I'm finished, Mr. Chairman—and they look at their lives. They look at their lives like I do every day now at 46 years old and ask, how long do I have to live? And then you begin to say, how can I maximize everything that I have, so that I can live the best life for the rest of my life that I can. And so they get worn down. That's what you're saying. And then they

reach out for whatever they can get, and if they see that they can't get it where they are, then they find another way.

Thank you.

Ms. COX. Thank you.

Mr. MICA. I thank each of our panelists for appearing before us today.

I might first say to Ms. Arnold and to our ranking member that I will not tolerate the intimidation of any witnesses of this subcommittee or prospective witnesses for this subcommittee. I will direct our staff to work with the minority staff to investigate the matter that's been brought before us because we cannot operate and be threatened or intimidated by any agency. Our job is oversight and investigation, and we expect the cooperation of every agency of Government that we have that responsibility for. So that will be pursued, I can assure you, and if I hear of any witness or prospective witness that is to come or testifies before this subcommittee that's harassed in any way, I think—I don't know how long Mr. Cummings has known me, but I have a way of making life extremely miserable, and we'll be dedicated to that for those perpetrators.

The other item that I wanted to mention, I just have one question. Mr. Wright, the question has come up, and the proposed legislation has mandatory alternative dispute resolution, at least to be the first avenue, and it is set up as mandatory in this proposed legislation. I don't know all the details.

Do you think that that would help? You said now that you're concerned that management can walk away; that there isn't participation.

Mr. WRIGHT. The answer to your question, Mr. Chair, is it depends on the structure of the legislation. If the agency is not a controlling party, but a required participant with no other authority in the process than it is mandated to attend—it cannot control it; it cannot establish it; it can have no authority in the process other than the Congress mandates that it attends—yes, I think it would have some significance.

If it has any authoritarian input, no, I think it will be exactly the same circumstance you have now. They have the discussions at the beginning; they decide that they don't want to participate; they don't want to decide this; they don't want to end the complaint, and there's no incentive for them to. There's no incentive for any Federal agency to end any complaint in the administrative process because it costs them money. If they get beyond the administrative process, which is what they want to do, it costs them no money. The Department of Justice defends them. They don't have to send their employees. They don't take any money out of their budget. It cost them nothing to make you take them to court.

Mr. MICA. Well, the other thing I think you've pointed out, Mr. Wright, is that there has been legislation on the books and there have been regulations and standards set, but failure for policy to be carried out to comply with those laws and those regulations; it is lacking.

This hearing today has shed light on a number of agencies. In fact, I'm a bit shocked particularly by the Department of the Interior, the Department of Agriculture, and some of the others that

should have a better, fairer representation. And I think the Congress has a responsibility in our oversight capacity to see what we can do to deal with these folks, to see that we can improve the situation. Now we can legislate all we want, and it sounds like we've done some of that, and there have been some laws, and we need some improved laws. But, hopefully, we can be the catalyst for some action, too.

So I'm going to try to work with Mr. Cummings. We may need additional hearings. Maybe we need to call in or even subpoena some of these folks and talk to them. We'll see if we can't make it known that the intent of this Congress is that there not be any discrimination; that there be fair employment, and that everyone have equal opportunity, and that's our policy, as representatives of the people.

We have another hearing scheduled for next week, and if we need to hold an additional series to get action, I'm committed to that.

I want to thank each of the panelists and I welcome you to examine the legislation. Mr. Martinez's legislation was just introduced; I believe it's to be introduced this week—was introduced last night and there's been some other legislation prior to that. We have not had a chance to completely review it, so we are very much open to suggestions, recommendations, both for content and improvement of his language and other provisions. So we welcome that.

And if you have additional testimony, I will allow the record to remain open for a period of at least 2 weeks, so that can be submitted.

There being no further business to come before this subcommittee, again, I thank our panelists and those who participated today. I will call this meeting of the Civil Service Subcommittee adjourned. Thank you.

[Whereupon, at 3:45 p.m., the subcommittee adjourned subject to the call of the Chair.]

[Additional information submitted for the hearing record follows:]

B.M.F.J.-S.S.A. Inc.

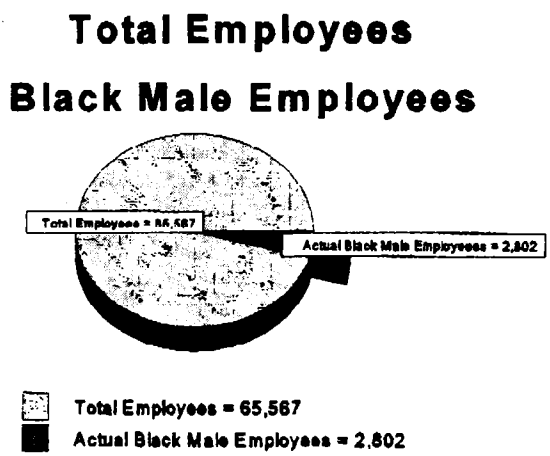
BLACK MALES FOR JUSTICE - SOCIAL SECURITY ADMINISTRATION
1515 BURNWOOD ROAD
BALTIMORE, MD 21239-3539

We, the Black Men for Justice at the Social Security Administration (BMFJ/SSA), thank you for providing this opportunity for us to provide our input and recommendations to you today. The problem of employment discrimination in the Federal government is all too real. It is our organization's hope that this Civil Service Subcommittee will finally begin a process to resolve the problem.

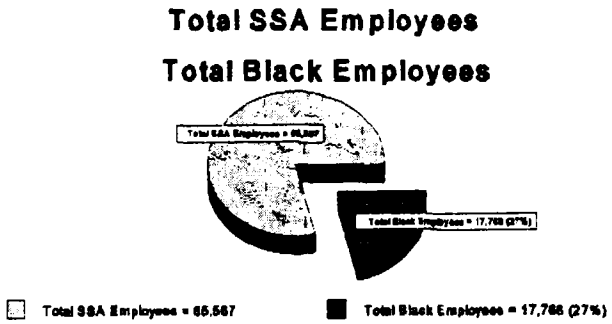
Today, we want to briefly inform you of some of the equal employment opportunity problems that need to be addressed at the Social Security Administration, which I will allude to as SSA, and discuss the efforts of our organization to receive one of the rights every American expects--that being justice. Here are some of our suggestions as to how the redress for Federal employees could be made more effective and efficient.

We, who have been discriminated against as black men, ask the committee to consider the following scenario:

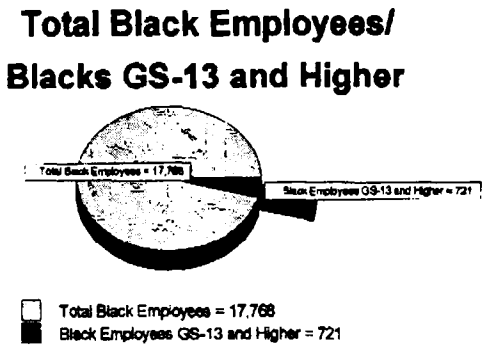
Picture yourselves standing in the middle of RFK Stadium. Seated in the stands around you are all 65,567* SSA employees. Now, if you were to ask all the permanent career and career conditional African-American male employees to stand up, only 2,802* persons would do so. Ladies and Gentlemen, to begin with, SSA hires very few Black males.



If you were to ask all African-American employees to stand up 17,768* would be standing. I am sure you would agree that this is quite a large number. It is almost a third (27%) of SSA's total work force.



However, if you were to ask all those below grade GS-13 to sit down, only 721* people would remain standing.

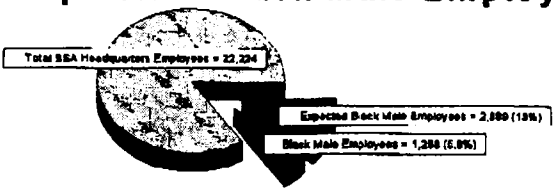


Over the years, endless studies, analyses, and evaluations have concluded, simply in the words of the Government Accounting Office uttered back in 1987 that "SSA Can Do More To Improve Minority Representation In It's Workforce". Yet, ten years later, things remain the same.

SSA headquarters in Baltimore, Maryland, less than 40 miles from Washington, D. C., provides a striking example. There are a total of 22,224* employees at SSA headquarters. But, only 1,288* are African-American males. This is less than 6 percent of the total 22,224* employees.

Total SSA Headquarters Employees

SSA Headquarters Black Male Employee

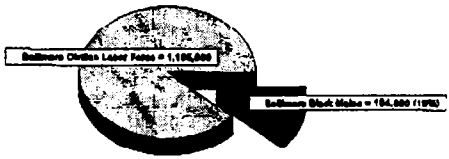


Total SSA Headquarters Employees = 22,224
Black Male Employees = 1,288 (5.8%)
Expected Black Male Employees = 2,888 (13%)

Yet, African-American males make up approximately 13 percent** of the civilian workforce in the Baltimore metropolitan area. This alone points out a major disparity in an area flooded with colleges and universities which graduate qualified black men each year.

Baltimore Metropolitan Area

Baltimore Black Males

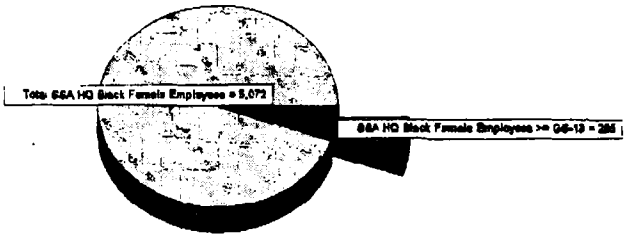


Baltimore Civilian Labor Force = 1,185,000
Baltimore Black Males = 154,000 (13%)

There are 5,072* African-American females employed at headquarters, but only 285* employed are above grade GS-12.

Total SSA Headquarters Black Female Employees

SSA Headquarters Black Female Employees GS-13 and High



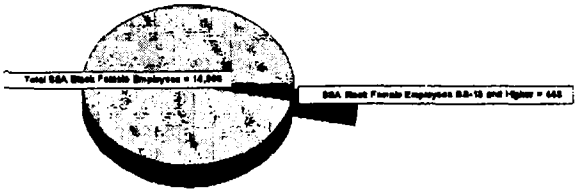
Total SSA HQ Black Female Employees = 5,072

SSA HQ Black Female Employees GS-13 and Higher = 285

Ladies and Gentlemen, there 14,966* African-American females working for SSA nationwide, but only 463* are employed above a grade GS-12 level.

Total SSA Black Female Employees

SSA Black Female Employees GS-13 and Higher



Total SSA Black Female Employees = 14,966

SSA Black Female Employees GS-13 and Higher = 463

SSA hires very few Black males and it does not provide equal employment opportunity for advancement to Blacks. We believe the same pattern of numbers could be developed for all other minorities employed by the Social Security Administration. This is the reason why BMFJ/SSA has engaged the firm of Kator and Scott to help us in our struggle to receive justice.

Our efforts to resolve our equal employment opportunity (EEO) complaint began in November 1995 and continues to this day. Over the two past years, we have become very familiar with the EEO process and we have experienced many of the problems in the process.

We would like to make the following recommendations:

GENERAL CONCERNS

First, too many appeals are allowed government agencies in the process. This makes the time frame for resolving complaints far too long. We believe that the alleged discriminating agencies have learned to use the lengthy and time consuming appeals process to their advantage and to the disadvantage of the complainants.

Second, the EEO Office in all Federal agencies should report directly to the Agency Director.

INFORMAL COMPLAINTS

The EEO Counselor should be empowered to resolve all complaints of discrimination if the complaint can be resolved at the informal level. Years ago, EEO counselors were selected from a pool of volunteers who had been initially screened and who were constantly evaluated during a rigorous period of training. It was a requirement that the selectees owe special allegiance to no one and no agency. This equipped them to do an excellent job of representing a complainant because during their queries, they automatically assumed the rank of the alleged discriminating official or the person being questioned; i.e., the rank of a person would not be used to intimidate the counselor. At the present time, EEO counselors represents the agency which pays them, rates them, rewards them and is directly responsible for their advancement or lack or advancement. This alone is a negative factor for the complainant. The EEO counselor should not be in a position to compromise a complainant because of fear of the agency response to his/her efforts. This can only be achieved if the EEO office is a separate entity responsible to the Agency Director. As it is now structured, it is akin to a jury pool where all prospective jurors work in the States Attorney's office as prosecutors.

Additionally, we believe the EEO Counselor should have the authority to discharge a case that clearly does not meet the legal requirements related to discrimination.

FORMAL COMPLAINTS

The contractual firms who are charged to investigate allegations and prepare the investigative file must interview the witnesses of the complainant. Presently, often times this does not happen deliberately, the facts are therefore skewed, and the complainant receives no justice.

EEOC ADMINISTRATIVE LAW JUDGES

We believe the EEOC Administrative Law Judges should be employed with the tenure and salary as those Administrative Law Judges employed the Social Security Administration Office of Hearings and Appeals. This, we believe, would further insulate them from possible interagency pressures and internal pressures at the EEOC.

All decisions made by EEOC Administrative Law Judges should be binding upon the Federal Agencies

It is the opinion of the BMFJ/SSA that the implementation of these types of changes would lead to much more efficient and certainly a more effective EEOC process. We believe we would have better decisions and Federal employees would receive fairer treatment. Perhaps, we could look forward to more substantial progress toward all of our goals - that of real equal employment opportunities in the Federal Government.

Again, we thank you all for your time and interest in seeing that this real and serious problem is addressed and that solutions are forthcoming.

Attachment

Additional Numerical Data concerning the employment of African American by the Social Security Administration

5,067* Number of SSA positions above GS-12

285* Number of Black Females in SSA positions above grade GS-12

Blacks hold only 14 percent* of positions above grade GS-12

Blacks comprise **27 percent*** of SSA workforce

1,514* Black males are employed in SSA's 10 regions

82* Black males in SSA's 10 regions are above grade GS-12

163* Black males at SSA headquarters are above GS-12

* Social Security Administration Workforce Inventory Profile System Permanent Career/Career Conditional Employees Grade Summary Detail. DATA as of 09/30/95. Report Processed as of 01/18/96. Workforce as of 09/30/95.

** Data Derived using Current Population Survey, 1988, U.S. Department of Labor, Bureau of Labor Statistics and Maryland Department of Economic Development Office of labor market Analysis and Information.

Respectively submitted:

DONALD L. HICKMAN, PRESIDENT
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THE LIBRARIAN OF CONGRESS

September 24, 1997

Dear Mr. Chairman:

Thank you for the opportunity to respond to certain assertions about the Library of Congress which were included in testimony presented before the Subcommittee during its hearings on employment discrimination in the federal workforce held on Wednesday, September 10, 1997. In recent years, the Library has taken extensive measures to ensure equity in its employment policies and practices. We have also taken other actions designed to prevent employment discrimination and to provide effective means of redress for staff who believe that they have been subjected to illegal discrimination. In light of these efforts, it is important to identify those areas where serious misrepresentations occurred during the testimony and to correct the hearing record.

The inaccurate statements regarding the Library of Congress appear in the testimony presented by Mr. Oscar Eason, President of Blacks in Government (BIG), and Ms. LaVerne Cox, who represented the Library of Congress *Cook* class action plaintiffs and the Library's chapter of BIG. First, Mr. Eason asserted that it was necessary for BIG to lead a rally to force the Library to pay out the settlement awards in the *Cook* class action. The Library did not delay the implementation of the payouts for the back pay awards. Library managers and officials cooperated fully with the Department of Justice and the Department of the Treasury to expedite payments totaling $8.5 million to more than 2,000 past and present African American Library of Congress employees. We completed these payouts in April 1997.

In addition, the Library has implemented other terms of the settlement agreement which included 40 promotions and 10 reassignments. Beginning in 1994, the Library modified its selection procedures to ensure equity in the employment process. Diversity training has been provided for all managers and supervisors.

Both Mr. Eason and Ms. Cox asserted that certain plaintiffs had to "file a second class action lawsuit" to address a further series of alleged problems. In fact, no second class action lawsuit has been filed in federal court. Counsel for the class action plaintiffs has filed a motion with the court to compel compliance with the settlement agreement, and three representatives of the class have filed an administrative complaint with the Library's Equal Employment Opportunity Complaints Office. Both the motion and the complaint allege the same instances of noncompliance with the *Cook* settlement agreement. Since the settlement agreement provides procedures for resolving claims of noncompliance, the administrative complaint has been referred to the plaintiffs' counsel in accordance with the terms of the agreement.

The Justice Department filed a brief on behalf of the Library last week regarding compliance with the Cook case. We are awaiting the judge's decision on the motion and feel confident with our position.

101 Independence Avenue, S.E. Washington, DC 20540-1000 Tel.: (202) 707-5205 FAX: (202) 707-1714

The allegations raised by Ms. Cox regarding employment practices in the Congressional Research Service are addressed in the attached statement from Daniel P. Mulhollan, Director of CRS. (See Attachment A).

During her testimony, Ms. Cox suggested that the Library's employment complaint process was too slow, citing the processing of her own complaint as an example. She further asserted that, as Librarian of Congress, I admitted liability regarding her individual EEO complaint. I have had no involvement in her agency complaint. This matter is still at the examination stage. The current backlog (matters older than 180 days) includes only 50 cases, a much smaller number than in most executive branch agencies of comparable size.

Ms. Cox asserts that an external entity should monitor the Library's complaint procedures. The Library has, in fact, suggested to the Office of Compliance that Congress authorize our employees to use the administrative processes of the Office of Compliance as well as the Library's current EEO procedures. In addition to the Equal Employment Opportunity Complaints Office, there are three other avenues of possible redress for claims of employment discrimination including: 1) the Dispute Resolution Center; 2) a grievance procedure (for bargaining and non-bargaining unit employees); and 3) the Employee Assistance Program. The Library's complaint procedures were reviewed and found to be comprehensive in a report issued by the Congressional Office of Compliance dated December 31, 1996.

I remain committed to the ideals of fairness and equity within the Library of Congress. This commitment is reflected in the *Mission and Strategic Priorities of the Library of Congress*. A key component of the enabling infrastructure necessary to accomplish the agency's mission is "[the promotion of] fairness, equal opportunity, and respect for diversity at all levels and in all parts of the Library."

Again, thank you for your continued support for the Library and for the opportunity to clarify some of the information presented to you and your colleagues last week.

Sincerely,

James H. Billington
The Librarian of Congress

Attachment

The Honorable John L. Mica
Chairman, Subcommittee on Civil Service
Committee on Government Reform
and Oversight
U.S. House of Representatives
B371C Rayburn House Office Building
Washington, DC 20515

Attachment A

Response of the Congressional Research Service to Testimony before the Subcommittee on the Civil Service on September 10, 1997

In her testimony of September 10, Laverne Cox requested that the Committee "review the way that the Congressional Research Service mistreats African American employees." This characterization, as well as the specific issues which she cites, seriously misrepresent CRS management's commitment to--and demonstrated success in--achieving greater diversity in its workforce and providing meaningful opportunities for advancement to minority staff members.

Ms. Cox's first criticism is that CRS appears to be "particularly hostile toward African Americans, especially those in the economist series, with regard to denial of 'promotion plan' promotions." There is no basis for this charge. CRS promotion reviews are conducted pursuant to applicable laws, regulations, and provisions of the collective bargaining agreement with our union, the Congressional Research Employees' Association (CREA). Promotion decisions are based upon objective reviews of employees' demonstrated performance at the next higher grade level. As a matter of record, there are several instances where promotion has been denied appropriately to non-minority staff, as well as to minorities, in the economist series and indeed throughout the Service. Promotion reviews, like other personnel decisions affecting CRS staff members, may be appealed through identified channels which assure thorough and objective review under established criteria.

A second issue raised in Ms. Cox's testimony concerns the transfer by CRS of two senior African American employees from policy positions to non-policymaking positions, and their alleged replacement by a white male. This charge is also without merit. In fact, the actions referred to were part of a major reorganization which took place in CRS in the fall of 1995 (prior to the effective date of the settlement agreement dealing with this issue). This restructuring was one of several steps undertaken in order to preserve CRS' capacity to serve the Congress effectively in a continuing period of limited budgetary resources and declining staffing levels. The reorganization dealt with this need by redirecting senior staff to positions in which they could provide direct policy analysis support to the Congress. There were two principal components to this transfer of staff capabilities: first, a number of management and administrative functions and responsibilities were consolidated, allowing several staff to move from managerial positions at the departmental level to specialist and senior specialist positions in their areas of subject specialization. Second, the CRS senior specialists, who had previously reported organizationally to the CRS Director, were integrated into the Service's research divisions, so that their efforts could be more closely coordinated with divisional needs in serving Congress in critical issue areas. While a total of three African Americans were indeed affected in both components of the reorganization, the vast majority of those impacted--more than 85%--were not minority staff members. Management's intent was not to "replace" staff, whether minority or non-minority, but rather to reduce the number of positions not devoted to direct congressional support.

A third issue concerns the CRS "succession initiative", designed to sustain CRS' research capacity in the face of the expected retirement of over half its staff between now and the year 2006. This proposal, included in CRS' budget request for FY 1998, would permit CRS to hire 60 additional staff over a three-year period, followed by an equal reduction over the following six years. Ms. Cox states that this CRS effort offers "a unique opportunity to improve the overall diversity profile of its professional staff." We agree. Indeed, the Director of CRS, in his testimony before the Service's appropriations and oversight committees earlier this year, expressly stated that one of the benefits of the initiative was that it would "allow us to increase diversity". Unfortunately, it does not appear that funding will be provided for the initiative in FY 98. However, CRS management continues to pursue a number of other programs designed to enhance the diversity of its staff through broadened recruitment in a period of severely constrained resources and limited opportunities for permanent hiring.

For example, CRS made vigorous efforts to continue its Graduate Recruit Program, which is based upon intensive recruitment from graduate public policy schools and other universities throughout the country. This program in the past has provided institutional gains by bringing highly qualified minorities to CRS for the summer, after which successful candidates have been placed in permanent positions. The use of this program in previous years resulted in a total of 32 permanent hires, 66% of which were minorities. However, given funding limitations and a resulting loss of approximately 117 authorized staff positions, CRS had to suspend this program for five years. Unfortunately, CRS was unable to reactivate this program in 1997 due primarily to delays in receiving approval from the Cook class (such approval has now been obtained, and the program will be utilized in 1998 if funds are available). Because of these delays in launching the Graduate Recruit Program, the Service decided to invest in a Summer Employment Program. Under this program, 24 interns were selected for temporary entry level professional positions, 42% of whom were minorities. CRS plans to build on the highly successful outreach efforts employed for this program when recruiting for the 1998 Graduate Recruit Program.

In addition to the Summer Employment Program, CRS participated in the 1997 Presidential Management Intern Program from which it selected two female interns (one of whom is a minority) for entry level research analyst positions. The CRS Law Recruit Program, which mirrors the Graduate Recruit Program for the field of law, has been used for a number of years to focus recruitment on minorities and women to apply for positions on the professional staff in the American Law Division. The most recent recruitment under that program (1995) resulted in the selection of an African-American female for an entry-level legislative attorney position in that division and over the life of that program, five minority attorneys were added to the staff of the Division.

A further demonstration of CRS's commitment to equal employment opportunity is its current participation in the Library's Affirmative Action Intern Program through which it plans to fill three professional positions out of a total of six positions for the library's entire program. CRS management has

also entered into an agreement with CREA to announce detail opportunities Service-wide for up to one year. Under this program, the Service identifies areas that require temporary assistance as congressional priorities shift, notifies staff of the opportunity to provide this assistance, and selects from among interested staff to fill this need. Several minority employees have benefitted from these detail opportunities.

In summary, the record does not substantiate Ms. Cox's criticisms of CRS management policies and practices regarding the recruitment, treatment and career development of African Americans and other minorities. CRS has aggressively sought to increase diversity through the recruitment of highly qualified minority staff, and to provide opportunities for career advancement based on demonstrated performance and consistent with the Service's statutory responsibilities to serve the Congress.

Daniel P. Mulhollan, Director
Congressional Research Service

EMPLOYMENT DISCRIMINATION IN THE FEDERAL WORKPLACE

Statement by Edith Lawrence, Working Woman
Lifetime Member of Blacks In Government
Union Member of Local 2830, American Federation of
State, County, and Municipal Employees, AFL-CIO
Career Employee with the U.S. Department of Justice,
Office of Justice Programs, Office of Juvenile
Justice and Delinquency Prevention, Training and
Technical Assistance Division

Before the Committee on Government Reform and
Oversight, Civil Service Subcommittee

September 10, 1997

Thank you for providing this opportunity for me to submit comments on issues that have caused me grief Mr. Chairman and Distinguished Members of the Subcommittee. I am an active member of Blacks In Government (BIG) and have been since 1991. Also I am an active Union member of Local 2830, American Federation of State, County, and Municipal Employees (AFSCME), AFL-CIO and have been since 1990. In addition I have 20 years of civil service with the Federal government and for the last seven years, I have been employed with the U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention in the Training and Technical Assistance Division (TTAD).

One issue that concerns me is the U.S. Department of Justice Negotiated Agreement between the JSIA Agencies/OJP and AFSCME Local 2830, May 1984, as Supplemented through December 1991. Article 9, regarding the Upward Mobility Program, pp. 25-27, of the Agreement seems to be unknown or ignored between the pages of the Agreement for the past seven years that I have worked in Office of Juvenile Justice and Delinquency Prevention (OJJDP). According to the Agreement, "Upward Mobility is a systematic management effort that focuses Federal personnel policy and practice on the development and implementation of specific career opportunities for lower level employees who are in positions or occupational series that do not enable them to realize their full work potential." The Upward Mobility Program attempts to implement the requirements of the Equal Employment Opportunity Act of 1972

by providing training and education programs for career opportunities for Federal employees in GS 1 through GS 8 grades. By providing this support to interested employees, the Program is suppose to provide opportunities for lower scale Federal employees to advance to higher paid positions in civil service.

In January, 1990, I started work as a temporary secretary for the then Acting Administrator, OJJDP. Subsequently, also in 1990, I worked as a temporary secretary for the Director, Office of Personnel, Office of Justice Programs (OJP). It was through both the Acting Administrator, OJJDP, and then the Director, Office of Personnel, OJP, that I learned about the potential benefits and rewards of the Bureau's Upward Mobility program. This knowledge convinced me in September, 1990, to return to Federal civil service and to take a position as a Secretary, GS-7, to the Director, Training and Technical Assistance Division (TTAD). Seven years later, I am still wearing my yellow button that states, "Upward Mobility Now." I am still waiting for OJJDP's implementation of its Upward Mobility Program before I retire. A second issue of concern is a letter to the Administrator, OJJDP, from the president of the Union, regarding Career Growth in his Office, dated February 15, 1996. In it the Union president states, that clerical staff members have told the Union of their dismay at what they perceive to be a lack of career growth opportunities and advancement possibilities. The letter goes on to state, "...these employees as well as more senior professional staff members say there is personal favoritism in selecting people for promotions and deplore the lack of opportunities for interdivisional movement and cross-training." It further states that, while the Union recognizes that not every employee complaint is based on well-founded objective actualities, the fact that so many complaints have come to its attention for quite a long time prompts us to believe, at a minimum, that a morale problems exists in OJJDP whatever the real situation may be." The letter from the president of the Union ends with "We hope that this memorandum will be accepted as a constructive suggestion for additional attention to employee career needs. We would be pleased to meet with you at any time to discuss these matters."

Thirdly, the president of the AFSCME Local 2830 sent a second letter to the Administrator, OJJDP, on April 23, 1996, regarding internal morale problems that the Union surveyed

OJJDP's work force to determine the extent of morale problems. The Union stated that it had not taken an official position on any matters, but that the Union "...is only operating as a vehicle to bring to your attention how distressed many employees feel." Further, the letter stated that "The Administrator's Office is over-staffed. Everything is a priority. Supervisors don't listen to their staff members and do not seek their advice. They only heed favorite folks." The Union president indicated that he would be happy to help facilitate improvements in management-staff relations.

I had high hopes before the present Administrator arrived in OJJDP, but nothing under the leadership of the Administrator, OJJDP, has changed. Under his management, together with the Assistant Director, TTAD, the Administrative Officer, OJJDP, the Deputy Administrator, OJJDP, and the present Director, Office of Personnel, OJP, I was suspended without pay for 64 hours from Tuesday, September 2, 1997, through Thursday, September 11, 1997. The incident prompting this suspension started with an e-mail message I sent to ten people in TTAD and OJJDP which stated, in part, "It was too bad that TTAD directorship was not represented at the subject meeting," regarding the new appraisal program. This e-mail message lead to a formal Reprimand to me by the Assistant Director of TTAD. Even though the Union president appointed me to participate in an OJP task force to implement this new performance appraisal program years ago and even though my e-mail message was about the same program, the Assistant Director, TTAD, was offended.

In the Reprimand dated July 9, 1997, from the Assistant Director, TTAD, he inappropriately interpreted my e-mail message "...as an attempt to embarrass, chide or denigrate..." him. The Reprimand is now a part of my Official Personnel Folder and it will remain in my folder for a period not to exceed two years. The Assistant Director, a former Captain of the U.S. Marines, cited my inappropriate behavior in the past and an e-mail message that I sent to TTAD professionals, including him, during the TTAD Director's extended leave, requesting that TTAD professional staff provide me with higher-graded assignments. The Assistant Director advised me in the Reprimand that only my supervisor could give me assignments which is contrary to the facts. He went on to state, "For these reasons, I have taken the liberty to make an appointment for you...with the Director of the Employee

Assistance Program Office in the hope that she can assist you." I asked myself, assist me with what? Subsequently, in a memorandum to me dated July 14, 1997, with the subject Proposed Suspension, the Deputy Administrator, OJJDP, gave me notice "...that I propose to suspend you from duty without pay for 10 calendar days...." in accordance with Department of Justice Order 1752.1A and applicable Civil Service laws and regulations. By memorandum dated August 29, 1997, and from the Administrator, OJJDP, the suspension was activated. The Union is working double time with OJJDP management to improve conditions for me, a senior citizen who is also a minority.

Mr. Chairman and Distinguished Members of the Subcommittee, I will furnish supporting documents regarding the above issues. I will furnish names of co-workers who can verify and confirm my story to all or any one of you. These co-workers and former co-workers may have issues of their own.

The message from OJJDP to juveniles in these United States and throughout the world is that there is a bottom line: responsibility for ones behavior. However, in our civil service system, management personnel are not held accountable for their extreme behavior when issuing disparate treatment in adverse actions against lower-grade workers, especially if they are female, senior citizens, and minorities.

Perhaps the above information will encourage the review of all formal and informal complaints by present employees and former employees of OJJDP whether these complaints are presented against OJJDP employees with the Union, the EEOC or before a Court. No law punishes a manager who is found to be abusive by the Union after arbitration. No law punishes the manager who is found to be at fault after EEOC claims and subsequent investigations. No law punishes an Agency defendant if it does not win a law suit. Almost all of the individuals who cause grief in the workplace to other individuals are protected from law suits for their misconduct and behaviors. I ask you to please review all complaints that were filed or settled by employees in OJJDP for the period January 1989 September 1997, and then please introduce legislation to stop the abuse of Federal employees.

Thank you.

Edith Lawrence
P O Box 833
Washington, DC 20044-0833

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ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

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BERNARD SANDERS, VERMONT
INDEPENDENT

December 3, 1997

Ms. Tanya Ward Jordan
8705 East Grove
Upper Marlboro, Maryland 20774

Dear Ms. Jordan:

Thank you for submitting your September 22 letter containing information about the National Institute of Standards and Technology's demonstration project. We appreciate this information to supplement our hearing record on employment discrimination in the federal workforce, and your statement will be included in our records.

This information is especially helpful in light of the recent Office of Personnel Management report documenting abuses of direct hiring authority at the National Credit Union Administration and in the context of several other agencies that have approached the Congress seeking independent personnel authorities. We appreciate the information that you have included with your statement.

Thanks, again, for this information.

Sincerely,

John L. Mica
Chairman
Civil Service Subcommittee

Tanya Ward Jordan
8705 East Grove
Upper Marlboro, MD 20774

9/22/97

Congressman John L. Mica
Chairman of Civil Service Committee
Room 2157
Washington, D.C. 20515-6134

Dear Congressman Mica:

I attended the hearings on "Employment Discrimination in the Federal Workplace" on September 10,1997. I would like very much to submit the enclosed statement. My statement focuses on the various Personnel Demonstration Projects which allow agencies to replace the Office of Personnel Management's hiring, promotion, and retention standards with their own Departmental standards. This Project has already promoted hiring inequalities within the Department of Commerce.

Should someone need to contact me from your staff, I can be reached on 202-482-0233.

In Pursuit of Equity,

Tanya Ward Jordan, BIG Member

Co-editor, Department of Commerce's Diversity Newsletter

cc: Congressman Elijah Cummings

Statement for the Hearing on Discrimination

Conducted by the Committee on Government Reform and Oversight

Submitted by Tanya Ward Jordan

The Department of Commerce seeks to expand its National Institute of Standards and Technology (NIST) Personnel Demonstration Project (Project). This Project allows the Department to replace Office of Personnel Management (OPM) standards with their own standards. It also allows NIST managers *new liberties* over hiring, retaining, recruiting, and promoting personnel. This alarms me! Perhaps, you may wonder – Why? I can give you over a dozen reasons. But, in respect for your time, I'll give you one.

- Commerce's NIST Personnel Demonstration Project, a Project held up as a government model, has escalated inequalities with respect to minority hiring.

This has been documented. OPM's Third Annual Evaluation Report: NIST Project reveals that the "direct hiring" authority has unleveled the playing field. In fact, this expanded authority given to managers, has prevented many individuals from even getting on the "playing field." The Report states (see Attachment 1): "*. . . in support occupations the number of minorities hired has actually dropped.* ***Our findings indicate that this change coincides with the introduction of the expanded direct authority*** *. . . Another explanation is that the use of direct hire authority is more likely to yield white rather than black applicants . . . We speculate that direct hire authority leads managers to pursue informal contacts (such as* ***friends*** *and other professional contacts).*"

These findings should not be ignored. Nor should they be dismissed. Instead, they should be addressed before expanding anymore Personnel Projects throughout the Federal Sector. Discrimination within the government is rampant enough. We do not need new systems to perpetuate this problem. Management has been advised of the Project's ills. It is unacceptable to excuse the Project's evaluation findings or the Project's weaknesses by saying, as one OPM official said to me, *"the biases of the old system are just carrying into the new."*

I submit to you that the Government should not steer forward with any personnel proposal that lacks accountability. In doing so, government would only be authorizing more discriminatory acts. Government should, however, ensure that the:

1) employee can seek redress for discrimination in a fair and timely manner;
2) Departments have documented disciplinary action for managerial abuse; and
3) Department's level of EEO complaints/grievances, are low enough, to provide reasonable assurance that the climate is safe for "testing" a new personnel system. (No agency with a class action suit standing should ever be a candidate for introducing such a subjective based system.)

Any implementation effort done short of these recommendation prompts me to Ask: **What Is the Real Motive Behind These Personnel Changes?**

ATTACHMENTS: Third Annual Evaluation Report (dated November 12, 1991) (Attachment 1)

Do We Really Want to Clone NIST? (Attachment 2)

REFERENCE: Fifth Annual Evaluation Report (dated July 18, 1994), of the NIST Project *"minority hiring has not yet reached the levels found for pre-implementation hires."*

Attachment I

However, in support occupations the number of minorities hired has actually dropped. Our findings indicate that this change coincides with the introduction of expanded direct hire authority. One possible explanation for this finding is that the number of black support personnel in the Gaithersburg job market has declined since the start of the demonstration project (although the total number of blacks in the area has increased over the past decade). Another explanation is that the use of direct hire authority is more likely to yield white rather than black applicants. This is possible because direct hire authority may lead to reliance on informal recruiting channels.

Research on recruitment (e.g., Kirnan, Farley, & Geisinger, 1989) indicates that women and minority job candidates tend to use formal job search methods (such as newspaper advertisements, college placement offices, and employment agencies) while white males tend to use more informal methods (such as employee referrals, referrals by candidates' friends and family, and self-initiated applications). We speculate that direct hire authority leads managers to pursue informal contacts (such as referrals from friends and other professional contacts) more frequently than was the case prior to the demonstration project.

We spoke with officials in the Office of Personnel and Civil Rights at NIST to determine how NIST recruits minorities. We found that NIST has developed specific recruitment plans for increasing the number of minority applications in various occupations in which minorities are under represented. In 1990 six occupations were targeted in the ZP career path and one was targeted in the ZA path. Also, EEO council members from NIST divisions develop contacts with specific colleges and universities to find cooperative students and permanent employees in the ZT and ZP career paths from under-represented groups. Thus, specific activities are undertaken to assist managers in finding qualified minority candidates; however, these activities are focused primarily on highly educated candidates. Personnel officials indicated that recruitment for support positions may entail visiting a local career fair or placing an advertisement in the local (Gaithersburg) newspaper.

During our focus groups, some hiring officials told us they thought the number of minority and female applicants has not changed since the start of the demonstration project. This perception may reflect the fact that the project was generally not designed to affect applicant pools. As we mentioned before, most of the interventions were targeted toward helping hiring officials employ their top choice candidate. Thus, the extent to which more females and minorities apply, and are hired under the demonstration project depends now, more than ever, on the recruiting priorities of individual managers.

2.6.3 Adequacy of the NIST Interventions

In general, our interviews at other Federal agencies having strong recruitment programs found they tend to have a strong central office that coordinates the more decentralized activities; they track applicants; they have distinct budgets; they use both general and targeted advertisements; they are well integrated with other organizational entities, often sharing and receiving information from other units; they have a strong emphasis on affirmative recruiting; they have full-time recruiters, and they carefully train all recruiters; they evaluate the recruitment effort on many levels; and they receive strong support from management.

Third Annual Evaluation Report

National Institute of Standards and Technology

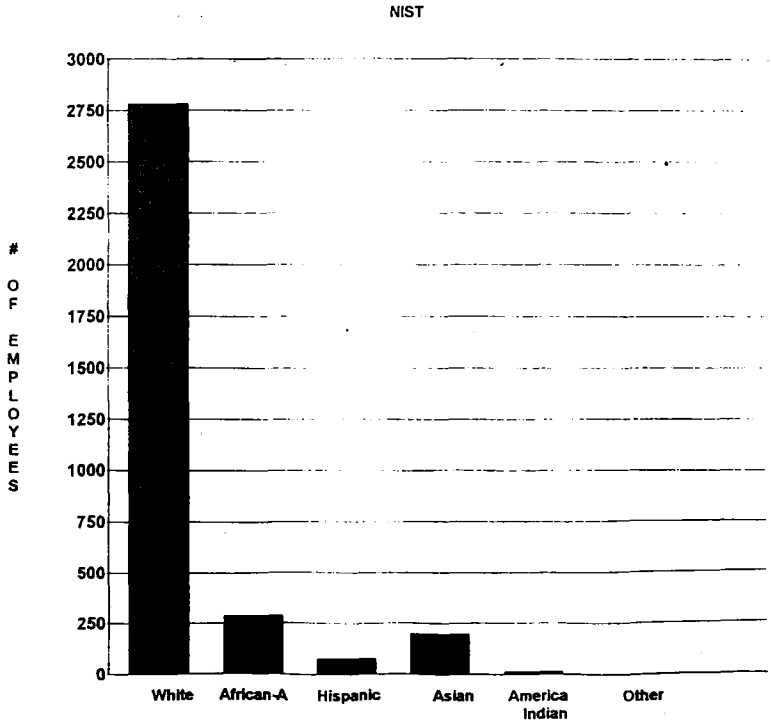
Personnel Management Demonstration Project

United States
Office of
Personnel
Management

DO WE REALLY WANT TO CLONE . . . *NIST?*

Attachment II

Department of Commerce
Employment by Race, National Origin
As of the Pay Period Ending: 4/26/97 2:12 PM



METROPOLITAN'S WOMEN'S
COMMUNITY GROUP
P.O. BOX 5144
Herndon Virginia 20172-1969

September 26, 1997

Congressman John L. Mica, Chairman
House Government Reform & Oversight
Civil Service Subcommitte
B- 371 C Rayburn H.O.B.
Washington, D.C. 20515

Dear Congressman Mica:

The attached story in the Washington Post (dated July 08,1997) says it all. Racism in management within the Federal Government, funded by taxpayers. The Federal Government has become a safe haven for White Collar Criminal.

Due to the fact that E.E.O.C. is well known to be mismanaged, non responsive and incompetent ... We would like to propose that not one more tax dollar should be place in the hands of individuals who admits that they cannot do their jobs. Directors and Managers within E.E.O.C. should be fired on the spot for incompetence. The lives of poor working businessmen/women and African American employees have been destroyed due to the bias and uncaring attitudes of managers within the E.E.O.C.

More money to E.E.O.C. for the same kind of mismanagement, fraud, waste, abuse of power and incompetence... is wasted money. How about closing the entire branch and let private community task force groups do the job the Federal Government is not able to do. It is already well known that more money in the hands of same people who are not doing their jobs is not going to make the situation better for any American. It's just going to create more jobs for more incompetent federal managers.

In summary ....

. Place any federal employee accused of bias, racist acts in Employment or Business on Administrative Leave Without Pay. Let a private community task force investigate the problems, county by county.

. Shut down the E.E.O.C. Again let the public (taxpayers) Community Task Force clean up the backlog of cases inwhich Federal Managers were too incompetent to resolve.

. Hold Department Heads and appointed Secretaries responsible for what their Agency is charged with by the public. White Collar Crime of this nature should be prosecute by a Federal Court of Law with a jury.

fax (703) 709-8170 phone (703) 471-1450

Congressman Mica
Page (2)
September 26, 1997

It is well known that the Government cannot be trusted to investigate itself. After all, our tax dollars pay the Justice Department, yet when federal agencies are charged with Racism ...the Justice Department runs to the defense of the agency regardless of numerous complaints against the same individuals within the agency. Does this sound like a merry go round or what?
It appears the Jusitice Department is there to protect the reputation of the agencies managers who have claims against them of bias treatment and racism, ... needless to say the taxpayer pick up tab ! The same taxpayers (African Americans) in most cases are the victims. We ask you Congress Mica, if someone breaks into a private home, should the homeowner give gas money to the thief for the get away car? That is what taxpayers are doing when racist managers are employed within the federal government and our Justice Department defend wrongful acts by Federals Managers.

Your written response regarding racism by Management and our suggestions to remedy the problems. We are interested in giving verbal or written testimony regarding racism by Management against Federal Employee's and Small Business.

Sincerely,

Shirley A. Stewart

Shirley A. Stewart
Virginia Division

Attachments

cc:
Washington Post Reporter
Congressman Albert Wynn
Senator Warner
J.C. Watts

Lawmakers Urge Clinton to Ad[illegible] Discrimination in Federal Workplace

A4 TUESDAY, JULY 8, 1997

By Michael A. Fletcher
Washington Post Staff Writer

Expressing alarm at the huge number of discrimination complaints filed by federal workers, several members of Congress yesterday called on President Clinton to make a concerted effort to root out racism in the federal workplace.

Rep. Albert R. Wynn (D-Md.) said eliminating discrimination within the federal work force should be a priority as the president embarks on a year-long effort to bridge America's racial divide.

"It seems to me if we are serious about dealing with the problems of race in America, we ought to start in our own back yard: with the federal work force," Wynn said during a Capitol Hill news conference.

Wynn, whose congressional district includes about 72,000 federal employees, was joined by D.C. Del. Eleanor Holmes Norton (D) and Rep. Elijah E. Cummings (D-Md.) in calling on Clinton to hold Cabinet secretaries and other federal agency heads responsible for the racial climate in their agencies.

There were 30,682 discrimination complaints from federal workers pending at the end of fiscal 1995, more than a 20 percent increase over the previous year. In addition, 12 class-action employee lawsuits are either on file or about to be filed against the federal government, according to Wynn.

The lawmakers said the president should push for a large increase in the budget of the Equal Employment Opportunity Commission, which investigates workplace discrimination and has a 100,000-case backlog.

They also promised to seek hearings into the problem and to push legislation to streamline the cumbersome complaint process for federal workers who believe they are victims of discrimination. Often, federal workers must file complaints with their agency, go through an informal resolution process and then face an agency investigation before their case can go to the EEOC.

Parts of the process that allow agencies to investigate claims against themselves are like "having the fox guarding the henhouse," said Oscar Eason Jr., president of Blacks In Government, which represents black employees at all levels of government.

For generations the federal government has been considered one of the most desirable workplaces for minorities, especially African Americans. Last fall, an Office of Personnel Management report found that minorities represented 28.7 percent of the 1.9 million executive branch workers, while they made up 25.5 percent of the civilian labor force. Blacks made up 17 percent of the federal work force, while they were 10.8 percent of civilian labor force.

But the federal government's reputation as a good workplace for minorities masks a number of troubling trends. Among them are that blacks and other minorities tend to be grouped in the lowest-paying jobs. Also, Hispanics as a group are underrepresented in federal jobs, and African Americans are fired from federal jobs at a rate more than three times greater than that of whites.

"I intend to do all I can do to explore this issue and find real solutions to the problems that all Americans of color encounter in the federal work force," said Cummings, the ranking Democrat on the House Government Reform and Oversight civil service subcommittee.

BY MATT ANTIL—THE WASHINGTON POST
REP. ALBERT R. WYNN
"start in our own back yard"

Study Says Minority Firms Underrepresented in U.S. Contracts

By Maxine A. Fletcher
Washington Post Staff Writer

Firms owned by minorities and women receive a much smaller share of government contracting dollars than their numbers would suggest, pointing to the need to maintain affirmative action programs that are under heated attack, according to a report released yesterday by the Urban Institute.

Despite programs that set aside contracts or establish goals and timetables aimed at putting more government contracting dollars in the hands of minority- or female-owned firms, the report by the liberal think tank said such companies win only 57 percent of the government contract work they would be expected to receive, based on the number of such firms in business.

Businesses owned by Native Americans fared the worst, followed by female-owned firms, and then owned by Asians, Latinos and blacks, the analysis found.

"Minority firms were underrepresented when it comes to getting government work," said Michael Fix, the Urban Institute's principal investigator for the project. "It raises a real red flag when we are throwing remedies out of the window left and right. And I think it throws a lot of assumptions people have about widespread reverse discrimination into doubt."

The analysis came under immediate attack from an affirmative action opponent, who called the small share of contract dollars going to minority and female-run firms an unfortunate outcome of a competitive marketplace, rather than evidence of discrimination.

"These findings are not surprising," said Clint Bolick, litigation director for the Institute for Justice. "It seems to me that government contracts is one place that there is absolutely no justification for race and gender preferences. Most government contracts are awarded on a completely objective basis, namely the lowest responsive bidder wins."

Bolick added that the disparity in the amount of government contract work going to white-run firms is logical, given their size and wealth relative to minority-run firms.

"Minority firms tend to be smaller and have less capital than nonminority firms, so it is not surprising that they receive proportionately fewer contracts," he said.

The Urban Institute's report comes as many government affirmative action programs are under attack in the courts and through legislative and citizen initiatives.

Despite a string of legal setbacks, most other anti-affirmative action efforts have failed, although a potentially troublesome ballot initiative to dismantle local and state government affirmative action programs in California is singing to a 5-percentage point lead, according to a recent poll.

The Urban Institute's report is based on an analysis of "disparity studies" done by 10 states and local governments, school boards, and other government entities in 10 states and the District of Columbia. The studies document the differences between the share that minorities and women owned of all firms, and the share of government contracts that they received.

"At minimum, these findings suggest that barriers remain to minority firms' participation in the government contracting process," the report said. "Beyond, the wide disparities indicate that adoption of affirmative action and other programs to assist minority firms has not led to broad displacement of nonminority firms in the award of government contracts. . . . Taken, the results indicate that disparities are greater in those areas where no affirmative action program is in place."

AACTIVIST, October 31, 1996

CORRECTION

The calendar in Tuesday's Health section incorrectly reported that a group for an Alateen group meets at Jonesville Presbyterian Church, 1234 Chase Bridge Rd., McLean. The group meets on Tuesdays.

I. INTRODUCTION

My name is Raul Yzaguirre and I am the President of the National Council of La Raza (NCLR). I would like to thank you, Mr. Chairman, for accepting this statement made on behalf of NCLR in an effort to note the disparities and inequalities that exist in hiring, promotion, and pay as they relate to Hispanics in our federal workforce.

NCLR is a Washington, D.C.-based national organization that exists to improve life opportunities for Americans of Hispanic descent. A nonprofit, tax-exempt organization incorporated in Arizona in 1968, NCLR is the nation's largest constituency-based Hispanic civil rights organization. It serves as an advocate for Hispanic Americans and as a national umbrella organization for about 220 formal "affiliates," community-based organizations that serve Hispanics. Through its affiliate network, NCLR annually serves more than two million Hispanics in 38 states, the District of Columbia, and Puerto Rico.

II. HISPANIC DEMOGRAPHICS

Latest data show that Hispanics constitute the second largest minority group in the U.S.; currently, more than one in 10 Americans (10.7%) is Hispanic. Further, the data tell us that Hispanics constitute two-fifths of the U.S. minority population (39.5%) and, as one of the fastest-growing and youngest population groups, are expected to become the nation's largest "minority" group by 2005 and almost one-fourth of the total U.S. population by 2050. In addition, Latinos are now at least 10% of the civilian labor force and are expected to comprise almost 40% of the new labor force entrants, making it a national imperative to improve the social and economic status of our community.

III. NOTEWORTHY RESEARCH

Employment discrimination in the federal government has become a civil rights issue high on the list of priorities for national Latino advocacy groups. We share the problems of promotion, pay equity and glass ceilings with women and other minorities; however, Hispanics have the unique problem of not being able to even get their "foot in the door."

Recent studies indicate that employment discrimination against Latinos, in both the public and private sectors, is widespread. Employment discrimination is still a significant factor in the employment and economic status of Hispanics, accounting for their significant interview rejection rate, wide earnings gap relative to Whites, and poor career advancement opportunities.

A report released in August 1996 by the U.S. Merit Systems Protection Board (MSPB), and numerous other reports by the Equal Employment Opportunity Commission (EEOC) and the Office of Personnel Management have noted that, among minority groups, Hispanic Americans continue to show the greatest disparity between their representation in the federal workforce, where they account for 6% of employees, and their representation in the civilian labor force, where they constitute 10.2% of employees.[1] Hispanics are the *only* continuously underrepresented group in the federal workforce.

The analysis also found that even when differences in education, experience, and other relevant factors were controlled for, Hispanics were found to be in lower-paying jobs than White men. When analyzing career opportunity and advancement in grade levels, Hispanics once again fared worse than their White counterparts after controlling for relevant variables. After considering all job-relevant responses to survey questions, the race or national origin of the employees had a statistically significant effect on how far they advanced in their careers. Data also supported the perception that minority women experience greater discrimination in their careers by virtue of being both minority and female.[2]

The MSPB is releasing another report this month focusing specifically on Hispanics in the federal workforce that confirms what our community has known for so long -- that discrimination is still a critical factor in explaining why Hispanics have been unable to enter into and advance within the federal workforce. Demographic factors such as low educational attainment, citizenship or demographic make-up do not sufficiently explain this slow advancement of Latinos in the federal workforce for several reasons: First, African

Americans have lower labor force participation rates overall than Hispanics and also have similarly low educational attainment levels, but are overrepresented in the federal workforce. Second, Asian Americans have a significantly lower citizenship rate than Hispanics, but they are adequately represented in the federal workforce and even share comparative career advancement rates as White males; and third, Asian Americans are even more affected by geographic mismatch than Hispanics but do not have the resulting underrepresentation. In addition, the geographic issue still does not explain why Hispanics are not adequately represented even in those states with both a significant Hispanic population and substantial federal employment.

According to 1995 MSPB data, Texas, Arizona and New Mexico were the only states in which the percentage of Hispanics in the state's federal civil service workforce was comparable to their proportion in the state population. However, it must be noted that while 2.8% of all Hispanics in the U.S. live in San Antonio, Texas, 12.6% of all Hispanics who work for the federal government work in metropolitan San Antonio. Kelly Air Force Base in San Antonio employs 40% of all Hispanics in the Department of the Air Force and 6.4% of all the Hispanics in the federal government. Kelly is scheduled for base closure by 2001, causing a serious problem for federal diversity efforts and for the economic stability of San Antonio's Hispanic working-middle-class.[3]

Federal workforce numbers also reveal a consistently high concentration of Hispanics in the blue collar and clerical sectors of the federal government. Unfortunately, these are the sectors that have faced, and will continue to face, significant reductions in personnel, especially in states like New Mexico, California and Texas where Hispanic employment in these areas is strongest due to the high number of defense and military installations, as noted in the Kelly Air Force case. Partly as a result, the MSPB forecasts a *decreasing* proportion of Hispanics in the federal workforce as well as little change in advancement opportunities.

Other findings of these reports include a high concentration of Hispanics in General Schedule (GS) grade groups 5-8 and 9-12. Hispanics are severely underrepresented in GS groups 13-15 and even rarer in the Senior Executive Service (SES) level. They are also highly represented in the clerical and administrative levels with no real opportunities afforded to them for advanced training to move up the professional career ladder.

Furthermore, according to a 1995 report, Hispanics also appear to be continuously underserved by the federal agencies such as the EEOC -- the federal agency whose mission is to enforce the nation's civil rights laws in the federal workplace. For example, despite substantial evidence of employment discrimination, Hispanics represented only 3.5% (1,801) of all complaints filed in the federal sector in Fiscal Year (FY) 1995. We note, however, that there was an 82% increase in complaints filed from FY 1992 to FY 1995, reflecting part of a strengthened commitment to this issue by one commissioner.

The civil rights community has documented the serious need, on the part of the EEOC, to improve the administrative review of employment discrimination claims made by federal employees, particularly those filed by minority groups. Numerous class action law suits are pending against the government by Hispanics in agencies such as the U.S. Immigration and Naturalization Service, the U.S. Postal Office, the U.S. Customs Service, and the U.S. Air Force, to name a few. In light of strong evidence that discrimination against Hispanics is worsening and additional law suits may be filed, the Commission needs to focus on national origin-based discrimination.

Moreover, the data strongly suggest that the agencies' individual civil rights enforcement divisions are not effectively protecting Latino employees or prospective new hires.

IV. IMPACT ON COMMUNITY

Employment discrimination is rarely considered a factor which contributes to Hispanic poverty. In fact, while many dismiss its effects as negligible, the previously cited research

strongly suggests that employment discrimination does help to explain the high and persistent Hispanic poverty rate.

In order to determine the extent to which the earnings of poor Hispanic workers and their families would be affected by the elimination of employment discrimination, NCLR estimated the amount of additional income that Hispanics would earn if employment discrimination were nonexistent. The result: one-fourth of Hispanic families with a full-time, full-year worker (26.5%) would be lifted above the poverty level if employment discrimination were eliminated.[4] Eliminating discrimination in the federal workforce would go a long way toward this goal.

V. CONCLUSIONS

There are several steps that can be taken to enforce and strengthen existing laws to end systemic employment discrimination against Hispanics based on national origin. NCLR recommends that:

- **Congress resist efforts to repeal affirmative action.** To date, affirmative action has helped to open some of the doors of opportunity for Hispanics; however, with such programs now under attack at the local, state and national level, the possibilities of continued or accelerated progress may be halted. Given that educational attainment, median earnings, and unemployment rates for Hispanics are significantly lower than that of their White counterparts, Congress needs to pass and strengthen legislation to eliminate labor force entry and glass ceiling barriers for women and minorities in the public sector, and help narrow wage differentials between racial, national origin and gender groups.

- **Federal workforce reform efforts include tougher monitoring and stronger measures than those that currently exist to promote diversity in the federal workforce (e.g. penalizing managers who continuously fail to implement adequate outreach and recruitment efforts to the Hispanic community).**

- **Congress should allocate adequate resources for oversight agencies, such as the EEOC, to enforce anti-discrimination laws.** Additionally, the work of such agencies must be monitored and adapted to effectively address this serious problem as opposed to maintaining procedures that deter or prevent individuals from filing complaints and seeking assistance. Similar efforts are needed within each agency's civil rights enforcement division.

- **Elected and appointed officials, as well as other leaders, also need to underscore the importance of diversity in the United States.** Based on the nation's changing demographics, the Black/White paradigm is no longer fully inclusive of our society's interests. We must all take affirmative steps to reduce bigotry and discrimination affecting all racial and ethnic communities. Without a significant commitment on the part of our country's leadership to enforce our civil rights laws and promote the value of true diversity, the problems will continue to fester and grow.

In conclusion, NCLR appreciates the need to assure that the federal government fully reflects the changing demographics of our nation as it captures the important racial, ethnic and gender data that are critical for assuring a diverse federal workforce. Furthermore, I would like to acknowledge the difficulty and sensitivity of this issue. Nevertheless, we urge the Committee to consider carefully the concerns outlined above as it proceeds on this matter. I thank the Chair once again for considering our views, and urge the members to feel free to contact me if you have any questions.

ENDNOTES

1. U.S. Merit Systems Protection Board. ***Fair & Equitable Treatment: A Progress Report on Minority Employment in the Federal Government.*** August 1996; U.S. Office of Personnel Management. **Federal Equal Opportunity Recruitment Program.** September 1996; U.S. Equal Employment Opportunity Commission. **Annual Report on the Employment of Minorities, Women and People with Disabilities in the Federal Government.** September 1995.

2. U.S. Merit Systems Protection Board. **Fair & Equitable Treatment: A Progress Report on Minority Employment in the Federal Government.** August 1996.

3. U.S. Merit Systems Protection Board. ***Issues of Merit.*** August 1997.

4. Washington, DC: National Council of La Raza. **State of Hispanic America 1993: Toward a Latino Anti-Poverty Agenda.** July 1993.

EMPLOYMENT DISCRIMINATION IN THE FEDERAL WORKPLACE—PART II

THURSDAY, SEPTEMBER 25, 1997

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CIVIL SERVICE,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:17 a.m., in room 2154, Rayburn House Office Building, Hon. John L. Mica (chairman of the subcommittee) presiding.

Present: Representatives Mica, Pappas, Morella, Cummings, Norton, and Ford.

Staff present: George Nesterczuk, staff director; Caroline Fiel, clerk; Ned Lynch, professional staff member; and Cedric Hendricks and Ron Stroman, minority counsels.

Mr. MICA [presiding]. Good morning. I'm John Mica, chairman of the House Civil Service Subcommittee. I'd like to welcome you to our hearing this morning, and we are going to go ahead and begin. We have a delay from the minority side, but they've given us permission to proceed and we'll have other Members joining us, but we did want to start. We have several Members to testify in our first panel and I will begin with some opening remarks.

This morning the subcommittee resumes discussions of employment discrimination in the Federal workplace. On September 10, we heard very powerful, emotional allegations that Federal agencies continue to discriminate against blacks, Hispanics, Asian-Pacific-Americans, and women. The accounts that we heard were deeply troubling, especially because all of the actions described during that testimony have long been prohibited by law.

For years we have worked hard to eradicate discrimination in the Federal workplace. Each year agencies spend millions of dollars training Federal employees and managers on their rights and responsibilities under the law. To ensure that these employees receive due process when they have occasion to file a grievance or a complaint, we have established, at the Federal level, an elaborate system of appeals. The Clinton administration has pursued a very aggressive work force diversity agenda during the past few years, as we all know. Yet, in spite of all this activity, there has been an alarming growth in the number of discrimination complaints filed with the Equal Employment Opportunity Commission.

Is it possible that all the attention and focus on employment discrimination during the last 20 years has led to more discrimination? Could we have created an environment that engenders the filing of discrimination complaints?

The witnesses at our last hearing claim that the ethnic, racial, and gender discrimination are as pervasive in some agencies today as they were 30 years ago. The witnesses today will also testify to their encounters with race and gender discrimination in Federal agencies. What they will describe are excesses perpetrated by Federal agencies while pursuing diversity goals.

As a result, agencies have resorted to recruiting unqualified applicants for Federal jobs in some cases, and giving preference to qualifiable employees over those already qualified. I think we have an example of one of those instances, which is blown up here. It's a recent USDA Forest Service announcement that states, "Only applicants who do not meet the OPM qualification requirements will be considered under this announcement." Some agencies have resorted to keeping jobs vacant rather than to hire nonminority applicants or veterans. In growing numbers these hiring plans are being challenged in court. Recently, the entire affirmative action plan of the Internal Revenue Service was deemed to be unconstitutional by the U.S. District Court for the southwestern District of Louisiana because of its discriminatory ethnic, racial, and gender preferences.

The employees appearing here today are no less victims of discrimination than the witnesses who appeared 2 weeks ago. Edward Drury is here because a Federal district court jury awarded him a $500,000 judgment supporting his discrimination claim. The manager responsible for discrimination against him was promoted shortly after the jury rendered its verdict. During the last hearing we heard instances also of cases where there were verified discrimination and charges brought and other employees or managers were not reprimanded or, in some instances, were also given promotion.

Angelo Troncoso is here because he was repeatedly denied promotions. He often ranked first among the best qualified, only to be passed over in favor of others who filled diversity criteria. On one of those occasions his agency chose an applicant ranked 13 positions below him on the selection list. Mr. Troncoso's case is particularly ironic in light of the findings in our last hearing that the Hispanic-Americans are the most underrepresented among minority groups in the Federal Government. One can only wonder what diversity criteria were applied to justify bypassing a best qualified employee and also a member of an underrepresented minority group, in favor of another less qualified individual.

The Federal Equal Opportunity Program was meant to work within a merit system, not to conflict with it. In their pursuit of work force diversity, Federal agencies seem to have lost sight of that purpose. In the course of implementing diversity policies, many agencies are violating the rights of employees, adversely affecting the morale of their organizations, and subjecting the Government to costly litigation. At times they have even endangered the public safety.

We are developing a civil service so twisted around questions of the race, gender, and ethnicity of its employees that the employees and their agencies too often lose sight of their original mission.

For over 100 years Federal employment has been based on merit principles, hiring the most qualified applicants in open competition.

Affirmative action was intended to ensure equal opportunity in employment through an affirmative outreach approach. Federal agencies were required to make an extra effort to recruit qualified minority applicants in order to broaden the applicant pools. Affirmative action in the Federal Government should never have been about anything other than hiring the most qualified employees.

In light of the failures of the current system, perhaps the time has come to redefine the rules of Federal employment in order to truly provide equal opportunity for all our citizens regardless of race, ethnicity, or gender.

It's my hope in working with our ranking member, and I've had discussions with him since our last hearing, that we can move forward to set the Federal workplace as a better standard, both in practice, perception, and reality, and I look forward to working with Mr. Cummings. We probably will not be holding additional hearings on this subject in the near future, but rather than embarrass some of the agency heads, we've decided to call some of them in independently, particularly with some of the most alarming cases that have been brought to light in problem agencies, and hopefully make some progress together working with those agency heads in a mutual effort. So, that's our intention from this point, and I try to keep the committee on an action-oriented agenda, rather than just to hold hearings and do nothing about it.

Second, we will review the legislative proposals that were brought before us at the last hearing, and, hopefully, we'll be able to incorporate some of those provisions into omnibus legislation. We're also interested in hearing from our panelists today and their recommendations as how we should proceed legislatively.

[The prepared statement of Hon. John L. Mica follows:]

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Opening Remarks of the Honorable John L. Mica
Chairman, Civil Service Subcommittee

Employment Discrimination in the Federal Workplace -- Part II
Race and Gender Preferences in Federal Employment
September 25, 1997

Today the Subcommitte resumes discussion of employment discrimination in the federal workplace. On September 10, we heard powerful, emotional allegations that federal agencies continue to discriminate against blacks, Hispanics, Asian-Pacific-Americans, and women. The accounts that we heard are deeply troubling, especially because all of the actions described during that testimony have long been prohibited by law.

For years we have worked hard to eradicate discrimination in the federal workplace. Each year agencies spend millions of dollars training federal employees and managers on their rights and responsibilities under the law. To ensure employees receive due process when they have occasion to file a grievance or a complaint we have established an elaborate system of appeals. And the Clinton Administration has pursued a very aggressive workforce diversity agenda during the last few years. Yet, in spite of all this activity, there has been an alarming growth in the number of discrimination complaints filed with the Equal Employment Opportunity Commission.

Is it possible that all the attention and focus on employment discrimination during the last twenty years has led to more discrimination? Could we have created an environment that engenders the filing of discrimination complaints?

The witnesses at our last hearing claimed that ethnic, racial and gender discrimination are as pervasive in some agencies today as they were thirty years ago. The witnesses today will also testify to their encounters with race and gender discrimination in federal agencies. What they will describe are excesses perpetrated by federal agencies while pursuing diversity goals.

As a result agencies have resorted to recruiting unqualified applicants for federal jobs, and giving preference to "qualifiable" employees over those already qualified. Some agencies have resorted to keeping jobs vacant rather than hire non-minority applicants or veterans. In

growing numbers these hiring plans are being challenged in court. Recently, the entire affirmative action plan of the Internal Revenue Service was deemed to be unconstitutional by the U.S. District Court for the Southwestern District of Louisiana because of its discriminatory ethnic, racial, and gender preferences.

The employees appearing here today are no less victims of discrimination than the witnesses who appeared two weeks ago. Edward Drury is here because a federal district court jury awarded a $500,000 judgment supporting his discrimination claim. The manager responsible for discriminating against him was promoted shortly after the jury rendered its verdict.

Angelo Troncoso is here because he was repeatedly denied promotions. He often ranked first among the "best qualified," only to be passed over in favor of others who filled diversity criteria. On one of those occasions his agency chose an applicant ranked thirteen positions below him on the selection list.

Mr. Troncoso's case is particularly ironic in light of the findings in our last hearing that Hispanic Americans are the most underrepresented among minority groups in the federal government. One can only wonder what diversity criteria were applied to justify bypassing a "best qualified" employee, a member of an underrepresented minority group, in favor of another less qualified individual.

The federal equal opportunity program was meant to work within a merit system, not to conflict with it. In their pursuit of workforce diversity, federal agencies seem to have lost sight of that purpose. In the course of implementing diversity policies, many agencies are violating the rights of employees, adversely affecting the morale of their organizations, and subjecting the Government to costly litigation. At times, they have even endangered the public's safety.

We are developing a civil service so twisted around questions of the race, gender, and ethnicity of its employees that the employees and their agencies too often lose sight of their missions.

For over one hundred years federal employment has been based on merit principles: hiring the most qualified applicants in open competition. Affirmative action was intended to ensure equal opportunity in employment through affirmative outreach. Federal agencies were required to make an extra effort to recruit qualified minority applicants in order to broaden the applicant pools. Affirmative action in the federal government should never have been about anything other than hiring the most qualified employees.

In light of the failures of the current system, perhaps the time has come to redefine the rules of federal employment in order to truly provide equal opportunity for all our citizens regardless of race, ethnicity or gender.

Mr. MICA. With those opening remarks I'll turn for opening comments to our vice chairman, Mr. Pappas.

Mr. PAPPAS. Thank you, Mr. Chairman. I'm glad to be here for the second hearing and I look forward to hearing from the panelists today.

Mr. MICA. Thank you. I'd like to now turn to the gentlelady from Maryland, Mrs. Morella.

Mrs. MORELLA. Thank you. Thank you, Mr. Chairman. I want to thank you for holding today's hearing on employment discrimination in the Federal work force. I learned a lot from last week's hearing and I look forward to continuing to consider how we can defeat discrimination. I want to commend you on the pledge that was made at that hearing on forwarding legislation, along with the ranking member, Mr. Cummings, Al Wynn, Matt Martinez, Eleanor Holmes-Norton, and I'm committed to be part of the solution, as well.

Discrimination is not an easy problem to fight. We have heard from witnesses who've described its deleterious effects. It's ugly, divisive, and it hurts. It hurts individuals, it hurts families, it hurts morale, and it hurts work force productivity. In the Federal Government, it has also resulted in a backlog of EEO cases, and, in many cases, a destructive work environment.

One of our witnesses today, our good colleague, Congressman Canady, is going to discuss his bill to end affirmative action in the Federal work force. While I believe that it would be helpful for the American people to have a rational and reasoned discussion of the issue, I don't believe that ending affirmative action is the answer to ending discrimination. I think it's important that we note that real affirmative action is not filling quotas, it's really just looking at the need for goals and targets and maybe timetables for the targets. As President Clinton's Executive order maintaining Federal affirmative action stated, "Goals may not be rigid and inflexible quotas . . . but targets reasonably attainable by application of good faith efforts." Of course it ties into the Supreme Court decision, too. I think affirmative programs have been vital to the progress that's been made by minorities and women in increasing opportunities in education and employment. Discrimination and stereotypes deeply rooted in our history, while much diminished, still are present. To uproot affirmative action policies to rectify this imbalance, I think would freeze in place the progress made so far and leave us short of achieving our national vision of equal opportunity for all. There may be a need, and I think there is a need, to look at our current programs and maybe to change things, but not necessarily to abolish something where there is still a need.

It is important to remember that today's hearing reaches far beyond the question also of affirmative action. We must understand the depth and dimensions of the problem and the problem of discrimination, particularly in the Federal Government, and we must ensure that the Federal work force leads the way to promote equal opportunity and fairness in an environment that is free of discrimination. It's critical that we eliminate the backlog at the EEOC and take steps to ensure fairness to all Federal employees.

Mr. Chairman, I'm delighted at the first panel that you have before us two very good friends of mine, Congressman Canady, and Congressman Herger who came in on my class in the historic 100th Congress. Thank you, Mr. Chairman.

[The prepared statement of Hon. Constance A. Morella follows:]

The Honorable Constance A. Morella
Subcommittee on Civil Service
Employment Discrimination in the Federal Workforce -- Part II
September 25, 1997

Mr. Chairman, I want to thank you for holding today's hearing on Employment Discrimination in the Federal Workforce. I learned a lot from last week's hearing, and I look forward to continuing to consider how we can defeat discrimination. I highly commend your pledge to forward legislation, along with Representatives Elijah Cummings, Al Wynn, Matthew Martinez, and Eleanor Holmes Norton, and I am committed to be part of the solution as well.

Discrimination is not an easy problem to fight. We have heard from witnesses who have described its deleterious effects. It is ugly and divisive, and it hurts. It hurts individuals, it hurts families, it hurts morale, and it hurts workforce productivity. In the federal government, it has also resulted in a backlog of EEO cases and, in many cases, a destructive work environment.

One of our witnesses today, Congressman Charles Canady, will discuss his bill to end affirmative action in the federal workforce. While I believe that it would be helpful for the American people to have a rational and reasoned discussion of this issue, I do not believe that ending affirmative action is the answer to ending discrimination. It is important to note that affirmative action programs are characterized by setting goals and targets, not by filling quotas. I support President Clinton's executive order, maintaining Federal affirmative action programs, which states that "Goals may not be rigid and inflexible quotas ... but targets reasonably attainable" by application of good faith efforts. Affirmative action programs have been vital to the progress made by minorities and women in increasing opportunities in education and employment. Discrimination and stereotypes deeply-rooted in our history, while much diminished, persist. To uproot affirmative action policies to rectify this imbalance would be to freeze in place the progress made so far and leave us short of achieving our national vision of equal opportunity for all. We should follow the guidance established

by the U.S. Supreme Court last year to ensure that affirmative action programs are undertaken only in cases of redressing a clear and specific pattern of discrimination. It is a reasoned and moderate approach to a very important and sensitive issue.

It is important to remember that today's hearing reaches far beyond the question of affirmative action. We must understand the depth and dimensions of the problem of discrimination in the federal government, and we must ensure that the federal workforce leads the way to promote equal opportunity and fairness in an environment free of discrimination. It is critical that we eliminate the backlog at the EEOC and take steps to ensure fairness to ALL federal employees.

Mr. MICA. I thank the gentlelady, and would like to now recognize our first two panelists. As Mrs. Morella described, we have Charles Canady, my colleague from Florida, and Mr. Wally Herger from California. Both of these Members of Congress have introduced legislative proposals dealing with the subject at hand. I'd like to welcome you to our panel this morning and I'll recognize, I think in seniority order. We'll hear from Mr. Herger first and then we'll get to Mr. Canady. Thank you. You're recognized.

STATEMENTS OF HON. WALLY HERGER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA; AND HON. CHARLES CANADY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. HERGER. Thank you, Mr. Chairman and members. I appreciate this opportunity to address this committee on the important matter of racial and gender preferences in Federal agency hiring and promotion decisions. Mr. Chairman, and Members, I have several documents that I would request unanimous consent be included in the record and have been made available to the members of the committee.

Mr. Chairman, I represent an area with all of or parts of eight national forests. Over the years, I have heard from numerous U.S. Forest Service employees who have contacted me to express their disgust with the Forest Service's discriminatory and unfair hiring and promoting practices. They tell me about how careers have been derailed, morale has been devastated, personnel costs have skyrocketed and public resources and even public safety have been put at risk due to the imposition of bizarre hiring and promotion decisions.

According to Webster's Dictionary, the word discriminate is defined as, "to make a difference in the treatment or favor on a basis other than individual merit." Mr. Chairman, I will use my time today to exhibit how the U.S. Forest Service has continually and blatantly engaged in discriminatory hiring and promotion practices and has outright failed to hire on the basis of merit for many positions.

Example 1: One Forest Service job announcement declared that, and I quote, "Only unqualified applicants may apply." This was an attempt by the Forest Service to avoid hiring or promoting qualified employees in order to fill the jobs with minorities, but unqualified employees. If this is not discrimination, I don't know what is.

Example 2: Notes from a Forest Service Civil Rights Action Group meeting state that, "There are many factors involved in the selection process, and the objective is to select a qualified person, not necessarily the most qualified." Again, the Forest Service is directing their supervisors to not hire the most qualified individual—that's discrimination.

Example 3: A memo from a Forest Service Assistant Director for Affirmative Action states, "The only legal requirement is to meet entry level qualification requirements. Greater tenure may produce candidates who are overqualified but that is irrelevant to the issue at hand, which is getting on with an agency affirmative action program." I cannot imagine too many private sector businesses that

would last very long if they deliberately passed over the most qualified person for the job. This is discrimination.

Example 4: A White Paper, produced by the Plumas National Forest, which is located in my congressional district, spells out, in grim detail, the consequences of quota hiring plans. "In a growing number of instances, we are not filling positions when there are no women applicants. In the past 3 months, we have either re-advertised, left vacant, or filled with unqualified temporaries, 11 permanent fire positions because we could not find female applicants. If the position is in fire prevention or forest fuels management, the job simply doesn't get done and we face the consequence of additional person-caused fires." Continuing with the quote, "When the roster was completed, the majority of the applicants were male and the top of the roster was blocked by male veterans. The Plumas attempted to fill five fire positions from the roster, but could only reach two women. Both women declined our offers. No offers were made to men. All fire positions are presently vacant or filled by unqualified temporary employees."

Now, with this example, not only are Federal workers being discriminated against by the Forest Service, but civilian citizens are being put at risk. Innocent people could have died or had their homes destroyed because the Forest Service refused to fill critical fire fighting positions due to their ridiculous quota requirements.

When criticized for its quota policies, the Forest Service often blames a court order to diversify their work force. However, a 1994 letter from the Department of Agriculture Assistant Secretary for Administration states, "The consent decree required that one selection factor in all cases was to be whether the applicant contributed to the Agency's diversity. It also limited the use of this factor either as a tie-breaker when all other qualifications were equal, or as one of several factors." The letter goes on to say that, "One of those expectations is that competitive promotions will be based on merit factors. If someone competes for a position and is the best person qualified for the job, he or she will be selected."

Regrettably, that was not the case. Clearly, the consent decree did not mandate the abandonment of all common sense. The Forest Service has gone well beyond the requirements of both the court and common sense. Indeed, a memo from one Forest supervisor warned his employees against aggressively pursuing diversity goals and admitted that doing so was a violation of the law.

Quoting from the document, "Free and open discussions have occurred regarding such things as creating or filling a position with an affirmative action candidate or not filling the position at all, or providing significant career enhancing opportunities/education to affirmative action candidates that are not available to other candidates. These types of discussions are in violation of the laws and regulations mentioned and should not occur, and the penalties for this type of conduct are severe." Mr. Chairman, the Forest Service is admitting that what they are doing is in violation of the law.

Furthermore, this is still happening now. In February of this year, under strong criticism because of its quota policies, the Forest Service issued a Merit Promotion plan. The plan stipulates that promotions, "shall be based solely on job-related criteria." But a few paragraphs following that statement, the document explains

that, "Selection procedures will provide for management's right to select or not select from among a group of best qualified candidates." How can it be a merit plan if it specifically permits the Forest Service to avoid selecting from the pool the best qualified candidates and the most qualified candidate? Even in an attempt to solve their acknowledged problems with discrimination, the Forest Service once again establishes unfair hiring and promotion practices.

The Forest Service's quota policies are inequitable to both the public and our Federal employees. They are divisive, morally indefensible, and blatantly unfair. We cannot combat past discrimination by engaging in yet more discrimination.

I commend the committee for addressing this very serious problem and thank you for your time.

[The prepared statement of Hon. Wally Herger and the documents referred to follow:]

September 25, 1997

Rep. Wally Herger (R-CA)

Testimony before the House Committee on Government Reform and Oversight, Subcommittee on Civil Service

I appreciate this opportunity to address the Committee on the important matter of racial and gender preferences in federal agency hiring and promotion decisions. Mr. Chairman, I have several documents that I would request unanimous consent to be included in the record which are numbered and have been made available to the members of the committee.

Mr. Chairman, I represent an area which includes all or parts of eight national forests and I have had dozens of U.S. Forest Service employees contact me to express their disgust with the Forest Service's discriminatory and unfair hiring and promoting practices.

They tell me about how careers have been derailed, morale has been devastated, personnel costs have skyrocketed, and public resources and even public safety have been put at risk due to the imposition of bizarre hiring and promotion decisions.

According to Webster's Dictionary the word "discriminate" is defined as: "to make a difference in treatment or favor on a basis other than individual merit."

Mr. Chairman, I will use my time today to exhibit how the U.S. Forest Service has continually and blatantly engaged in discriminatory hiring and promotion practices and have outright failed to hire on the basis of merit for many positions.

Example one: one Forest Service job announcement declared that, and I quote "Only Unqualified Applicants May Apply," unquote. This was an attempt by the Forest Service to avoid hiring or promoting qualified employees in order to fill the jobs with minority -- but unqualified employees. If this is not discrimination, I don't know what is.

Example two: Notes from a Forest Service Civil Rights Action Group meeting state that quote, "there are many factors involved in the selection process, and the objective is to select a qualified person, not necessarily the most qualified," unquote. Again, the Forest Service is directing their supervisors to not hire the most qualified individual -- that's discrimination.

Example three: A memo from a Forest Service Assistant Director for Affirmative Action states quote, "The only legal requirement is to meet entry level qualification requirements. Greater tenure may produce candidates who are over qualified but that is irrelevant to the issue at hand, which is getting on with an agency affirmative action program," unquote.

I cannot imagine too many private sector businesses that would last very long if they deliberately passed over the most qualified person for the job. This is discrimination.

Example four: A "White Paper" produced by the Plumas National Forest, which is located in my Congressional District, spells out in grim detail the consequences of quota hiring plans.

Quote: "In a growing number of instances, we are not filling positions when there are no women applicants. In the past three months, we have either re-advertised, left vacant, or filled with unqualified temporaries eleven permanent fire positions because we could not find female applicants... If the position is in fire prevention or forest fuels management, the job simply doesn't get done and we face the consequence of additional person-caused fires."

Continuing with the quote, "When the roster was completed, the majority of applicants were male and the top of the roster was blocked by male veterans. The Plumas attempted to fill five fire positions from the roster, but could only reach two women. Both women declined our offers. No offers were made to men. All fire positions are presently vacant or filled by unqualified temporary employees," end quote.

Now, with this example, not only are federal workers being discriminated against by the Forest Service, but civilian citizens are being put at risk. Innocent people could have died or had their homes destroyed because the Forest Service refused to fill critical fire fighting positions due to their ridiculous quota requirements.

When criticized for its quota policies, the Forest Service often blames a court order to diversify their workforce.

However, a 1994 letter from the Department of Agriculture Assistant Secretary for Administration states, quote, "The (consent) decree required that one selection factor in all cases was to be whether the applicant contributed to the Agency's diversity. . . It also limited the use of this factor either as a tie-breaker when all other qualifications were equal, or as one of several factors," unquote.

The letter goes on to say that only, quote, "One of those expectations is that competitive promotions will be based on merit factors. If someone competes for a position and is the best person qualified for the job, he or she will be selected," unquote.

Regrettably, that was not the case.

Clearly, the consent decree did not mandate the abandonment of all common sense. But the Forest Service has gone well beyond the requirements of both the court and common sense. Indeed, a memo from one Forest Supervisor warned his employees against aggressively pursing diversity goals and admitted that doing so was a violation of the law.

Quoting from the document, "free and open discussions have occurred regarding such things as creating or filling a position with an affirmative action candidate or not filling the position at all, or providing significant career enhancing opportunities/education to affirmative action candidates that are not available to other candidates. These types of discussions are in violation of the laws and regulations mentioned and should

not occur, and the penalties for this type of conduct are severe." unquote.

Mr. Chairman, the Forest Service is admitting that what they are doing is in violation of the law.

Furthermore, this is still happening now. In February of this year, under strong criticism because of its quota policies, the Forest Service issued a Merit Promotion plan. The plan stipulates that promotions "shall be based solely on job-related criteria."

But a few paragraphs following that statement, the document explains that, quote, "Selection procedures will provide for management's right to select or not select from among a group of best qualified candidates," unquote.

How can it be a merit plan if it specifically permits the Forest Service to avoid selecting from the pool of best qualified candidates? Even in an attempt to solve their acknowledged problems with discrimination, the Forest Service once again establishes unfair hiring and promotion practices.

The Forest Service's quota policies are inequitable to both the public and our federal employees. They are divisive, morally indefensible, and blatantly unfair.

We cannot combat past discrimination by engaging in yet more discrimination.

I commend the committee for addressing this crucial issue.

attchmt - Mr Herger's Hint

ANNOUNCEMENT: R510-026-90 OPENING DATE: 11-20-89 CLOSING DATE: 12-18-89
SERIES/GRADE: GS-462-5/6 (TARGET GS-7)
TITLE: FORESTRY TECHNICIAN
LOCATION: SIX RIVERS N.F. CITY/ST: EUREKA, CA.

THIS POSITION IS INTERCHANGEABLE WITH R510-122-89, GS-462-5/6 (TARGET GS-7)

PROMOTION POTENTIAL: THIS IS AN UPWARD MOBILITY POSITION WITH A TARGET GRADE OF GS-7. ENTRY LEVEL IS AT THE GS-5 LEVEL. ONLY UNQUALIFIED APPLICANTS FOR GS-5 WILL BE CONSIDERED. THE SELECTED EMPLOYEE MAY BE PROGRESSIVELY PROMOTED TO THE GS-7 LEVEL WITHOUT COMPETITION UPON MEETING QUALIFICATIONS, TIME-IN-GRADE REQUIREMENTS AND SATISFACTORY PERFORMANCE. SELECTION WILL BE BASED UPON POTENTIAL TO PERFORM THE TARGET JOB.

AREA AND LEVEL OF CONSIDERATION: Region-wide. This announcement is open to all Forest Service employees having competitive status. Applications will be accepted from UNQUALIFIED applicants only. Applications must be received by the closing date of the announcement to be considered. Applications must be submitted whether or not a voluntary application was previously on file.

DUTIES: Serves as Assistant Dispatcher and performs related administrative duties.

TOUR OF DUTY: Permanent Full Time.

QUALIFICATIONS: **ONLY UNQUALIFIED APPLICANTS MAY APPLY.** Applicants will be rated against the OPM X-118 qualification standards to determine what is needed to qualify for the target position. A training agreement will b developed for the selectee to provide the necessary training in order for the individual to train towards and be promoted into the target position upon meeting all requirements.

FOR MORE DETAILED INFORMATION, REFER TO THE OPM X-118 HANDBOOK IN YOUR PERSONNEL DEPARTMENT. APPLICANTS MUST MEET X-118 AND TIME-IN-GRADE REQUIREMENTS WITHIN 60 DAYS AFTER THE VACANCY CLOSES.

EVALUATION CRITERIA:

1. Ability to learn dispatching procedures for numerous and varied "First Responder" resources to Emergency situations.
2. Ability to acquire knowledge of Computer Systems used in the support of the Aviation and Fire Management program.
3. Ability to acquire knowledge of fire fighting techniques and terminology, fire behavior, air craft and related equipment utilized in the suppression of wildfires.
4. Ability to learn to communicate verbally.

TIMEFRAMES FOR LEARNING THE SKILLS AND KNOWLEDGES WILL BE ESTABLISHED BASED ON THE SELECTEE'S NEED, IN THE TRAINING AGREEMENT REQUIRED FOR UPWARD MOBILITY POSITIONS.

SELECTION CRITERIA: All of the above plus:

Contributes to a federal workforce reflective of the nation's diversity with respect to race, color, religion, sex, or national origin.

METHOD OF EVALUATION:

CRAG MEETING 1/11/95
Truckee Ranger District

Attendees: Karen Jones, Elena Brady, Art Umland, Rudy Aguas, Vicki Crocker, Linda Brown, Sheri Elliott, Terry Gunder, Jerry Sirski, Pete Brost, Tony Rodarte, Karen Durand, and Joanne Roubique.

Main agenda item for the day was to review the FY95 Affirmative Employment Program Plan in preparation for the Forest Leadership Team meeting 1/17/95. More specific Target Dates and stronger language for Action Items were added to ensure that things will be done and not just attempted.

One barrier statement which was removed from the AEPP involved the perception many employees have that job selections/promotions do not go to the most qualified person. This was determined to be a "fact of life" rather than a barrier. A letter will be coming out shortly to all employees explaining that there are many factors involved in the selection process, and that the objective is to select a qualified person--not necessarily the most qualified. ?

Sheri Elliott spoke about changes in Temporary Hiring Authority. Final regs. are out for temps. The 180-day authority is not eliminated yet. OPM and the Forest Service are working together to make a smooth conversion with non-competitive eligibility.

The temporary hiring process for this year will be similar to the NTE 1-yr. We will be working with EDD as an optional source for applicants. Each forest has its own system and some forests must use EDD, but not the Tahoe N.F.

Personnel has a form for people to get on a mailing list for jobs. The form has specific areas of interest which are coded into an electric mailing list system. It was suggested that perhaps a code should be added for people interested in Silviculture jobs.

Training for supervisors of temporary employees will be given in mid-February. Personnel is waiting for more (and final) information on the conversions before setting the date for the training. This session will also include Student Temporary Employment.

The Student Program has changed! New regs. have changed Student/Summer Aid, into the Student Temporary Employment Program. Some of the features include:

- Students of High-School age (16 yrs. or 18 yrs. for arduous duty).
- There is no income limitation for the student's family.
- Student is required to be in school at least part-time.
- Student must have a 2.0 grade point average
- Student can be hired any time of the year.

Co-op is now the Student Educational Employment Program. One of the major differences between these programs is the Co-op had to earn a position competitively, and the new program converts the student non-competitively to a career-conditional appointment.

Full-time, part-time, and intermittent tours are ok in both student programs.

AFFIRMATIVE ACTION-Why we have it,
What it is,
Whose job.

The requirements for non-discrimination, equal employment opportunity, and affirmative action are prscribed by law. As such, their basis is no less secure than other law that relates to our Agency, e.g. Organic Act, Wilderness Act, etc. The Chief has, therefore, embraced these programs just as much as any other program of the Agency. As we all know, I hope, when a decision is made by a higher authority it becomes our decision [whether we like it or not]. If we don't agree with it we have two choices, i.e. [1] Accomodate ourselves to the decision, or [2] find a new job. So, it should be clearer to all of us that Affirmative Action is here to stay and we need to get on with this job, the same as any other job of the organization.

So, what is the job? Simply put, its to change our workforce profile [every occupation-every grade] at an accelerated pace to be representative of the demographic population found in the civilian labor force. For example, if 43% of the CLF are women then 43% of our foresters at every grade level should be women, 43% of our District Rangers should be women, etc. This is what parity means, its a requirement of law and therefore a policy of the U.S. Forest Service.

We should also understand that the responsibility for overall management of this program rests with the Equal Employment Opportunity Commission, a Government Agency that reports directly to the President. As such, they interpret the laws and set the rules for us to follow. One requirement they have established is a multiple-year targeting process which sets employment targets for women and minorities in various categories with the intent of moving us to parity in each and every category. Agencies are encouraged to do this voluntarily. If they don't legal action can be brought against the Agency and they will be required to do it by court order. This, as we found out in R-5 where it happened,is a very burdensome, costly, and difficult job.

One thing we need to be very clear on is that all positions are to be filled with qualified incumbents and that means meet the requirements of the Office of Personnel Managements X-118 qualification standards. This often becomes a sensitive issue and the cause of much friction, e.g. a caucasian male with a forestry degree hired as a forestry technician [perhaps temporary] who has worked for the Agency for sometimes finds himself competing for a permanent forestry position that is eventually filled by a woman or minority co-op student. This leads to bitter complaints of less qualified, reverse discrimination, backlash, and finally the victim game. Lets talk briefly about each of these:

<u>Less qualified</u> The only legal requirement is to meet entry level qualification requirements. As long as that happens the procedural requirements have been met for the position in question. Greater tenure may produce candidates who are over qualified but that is irrelevant to the issue at hand which is getting on with an Agency affirmative action program and filling positions with people who meet the position's legal qualification requirements.

<u>Reverse Discrimination</u> A buzz word that has come into being with the advent of affirmative action. It is typically used by caucasian males to describe

EXHIBIT GG

situations is which they believe they are the victims of advantages given to women and minorities in employment situations. In fact there is no such thing. Discrimination because of race, color, sex, national orgin, or religion in any practice, condition, or privilege relating to employment us against the law. And, the way you assure that no employment discrimination of any kind against anyone exists is to run all of your employment systems by the book. And, as long as you do there is no discrimination, "reverse" or otherwise.

Backlash Another term which has emerged with the advent of affirmative action. It refers to the attitude/posture of those employees, usually caucasian males, who are opposed to/resisting the Agencys affirmative action policies/programs and sometimes by mouth or deed actually sabotage the program. Let us respond by first saying that as employees of this Agency we are all expected to support the Agencies policies. Thats a condition of our employment.

We cannot tell employees how they should think. We can, however, tell them what behavior is expected. And, if they choose to pursue unacceptable behavior we can deal with that through the Agencies disciplinary system. Put another way, we cannot legislate morality; we can however legislate immorality [and we will].

Victim Game This is usually practiced by those who perceive themselves as victims of "reverse" discrimination [directly or indirectly] and are, in fact, practicing backlash. It usually translates to some kind of subtle or direct harassment against the affirmative action candidates of the organization. The result is, of course, that some innocent employee becomes the victim of some other ignorant individuals actions when in fact if there is a concern it should be directed to those who made the decisions [management] in the first place.

To summarize this point, whether we agree or not, positions are filled with qualified employees, "reverse" discrimination is not occurring, and we must not tolerate the existence of backlash and more importantly the existence of the victim game. Where we find these situations [and they are every where] they must be dealth with through the Agencies disciplinary system. In short the Affirmative Action program is just as real as any othe program of the Agency and of we are to accomplish this program we must have all of the Agencies employees supporting the program and contributing to its accomplishment.

Arlen Roll
Assistant Director for Affirmative Action and Employment
Personnel Management-Region One

EFFECT OF VACANT FIRE POSITIONS ON PLUMAS NATIONAL FOREST FIRE MISSION CAPABILITY WHITE PAPER

JUNE, 1989

EXECUTIVE SUMMARY

Our ability to safely and effectively accomplish the fire protection mission on the Plumas National Forest is being compromised by our inability to fill vacant fire positions in a timely manner.

It takes an average of nine months to fill a position. (Enclosure No. 2) Consequently, we are using a large number of detailers in key fire positions. Presently, the crew supervisor or assistant position is vacant or filled with a detailer on one half of our initial attack modules. We are entering fire season with one third (five) of our initial attack modules on five day firestatus. This equates to a 10 per cent reduction in initial attack capability. Additionally, this shortage of crew supervisors eliminates our ability to staff reserve engines/crews during lightning storms, for fire replacement or during periods of extreme fire danger.

We are concerned that the large number of detailers in key fire positions will cause leadership problems. Our seasonal fire crews experienced an average of 48 per cent in-season turnover last year. With high turnover rates, it is not reasonable to expect short term detailers to deal effectively with major supervision challenges such as fire fighting safety, substance abuse, sexual harrassment and racial discrimination.

Our fire crews demand the highest level of supervision available. These crews are responsible for combatting wildfires to protect lives, homes and natural resources on National Forest and private land. The work is hazardous, extremely arduous, and involves working with dangerous or sophisticated equipment such as chain saws, helicopters and complex fire engines. Our crew supervisors must be able to operate and manage this equipment and rapidly train a constantly changing crew in its safe and effective operation.

Our fire crews are comprised of young people who are employed for about seven months. Many are fresh out of high school. Turnover on our crews is high because of the nature of the work, low pay and the remote locations of many of our fire stations. The labor shortage has forced us to hire more college students. These students must return to school in late August which is the most critical part of the fire season. When the students leave, we must recruit and train green replacements. Presently, ten percent of our temporary positions are filled with students

In a growing number of instances, we are not filling positions when there are no women applicants. In the past three months, we have either re-advertised, left vacant or filled with unqualified temporaries eleven permanent fire positions because we could not find female applicants. If a crew supervisor position is not filled, the crew will be operational five days per week or shut down entirely. If the position is in fire prevention or forest fuels management, the job simply doesn't get done and we face the consequences of additional person-caused fires and untreated hazardous forest fuels.

From this level, it appears that the situation will continue to deteriorate. There are simply not enough qualified women to fill half the vacant fire positions at GS-5 and above levels. There is widespread belief that the pipeline for GS-5 and above women is running dry. In spite of extensive outreach, we fail to receive a single female applicant for many vacancies and almost all details. For example, we recently attempted to fill a GS-7 Engine Supervisor job with a detailer. The skills bank revealed 56 qualified individuals; of which four were women. All four were either at the GS-7 level or would be eligible for GS-7 within three months. Consequently, there was no promotional incentive for these women to apply and we received no response.

Since detailers almost always come from other fire positions, we are detailing behind detailers. This causes a domino effect throughout the Region. Employees are eligible for only one detail per year and eventually everyone that wants a detail has had the opportunity.

We are competing with higher paying state and local fire agencies. For example, in April, one of our GS-7 women received four offers for higher paying entry level jobs with municipal fire departments.

The California Department of Forestry and Fire Protection pays crew supervisors the equivalent of GS-11 wages. Forest Service crew supervisors are grades GS-6 or GS-7. In spite of this higher pay, and fewer remote stations, the CDF&FP is also having great difficulty attracting adequate numbers of women.

This spring, several forests in the northern part of the state conducted extensive outreach in an effort to attract entry level female applicants to the OPM delegated exam roster. When the roster was completed, the majority of applicants were male and the top of the roster was blocked by male veterans. The Plumas attempted to fill five fire positions from the roster, but could only reach two women. Both women declined our offers. No offers were made to men. All fire positions are presently vacant or filled with unqualified temporary employees.

The following summary of vacant positions, or positions that have just been filled, may serve to illustrate the situation.

<u>POSITION</u> <u>FRENCHMAN ENGINE SUPERVISOR GS-7</u>

1-5E

DEPARTMENT OF AGRICULTURE
OFFICE OF ASSISTANT SECRETARY FOR ADMINISTRATION
WASHINGTON, D. C. 20250-0100

MAY 20 1994

Mr. Kyle Felker
401 First Street
Quincy, California 95971

Dear Mr. Felker:

Enclosed is the final decision of the Department of Agriculture on your complaint (920916) of discrimination. Please refer to the decision for your rights of further review.

Sincerely,

Wardell C. Townsend, Jr.
Assistant Secretary
for Administration

Enclosure

2-4

4

The following reason is articulated regarding the management decision forming the basis of the complaint:

- According to RO3, he did not concern himself with the relative qualifications of the candidates. The selectee was qualified for the position, so the selection was made to help correct underrepresentation of women as required by the Decree.

There is no question but that RO3 considered gender when he chose the selectee. According to RO3, he "did not concern [himself] with who was the superior candidate ... [he] selected [the selectee] because she ... helped to correct underrepresentation as required by the Consent Decree." The only question is whether the Decree permitted the Agency to consider gender in the manner that RO3 did.

Implicit in the analysis which follows is the presumption that the Decree legally required the Agency to act affirmatively in order to achieve proper goals. So long as Agency managers took actions specifically required or permitted by the Decree, there is no violation of Title VII of the Civil Rights Act or the Age Discrimination in Employment Act. However, if actions taken by managers go beyond the provisions of the Decree, they are not protected and may be held to be discriminatory.

In judging which actions may have exceeded the boundaries of the decree, one can look at the specific language of the Decree, and at the standards by which Federal courts judge voluntary affirmative action plans. For example, goals and timetables are permissible aspects of an affirmative action plan and were an important part of the Decree, but quotas are impermissible and were not part of the Decree. Therefore, if an Agency manager operated as if the Decree's requirements imposed mandatory quotas (instead of establishing goals which might be met, exceeded, or not met as circumstances decreed), then the manager's actions are discriminatory, and not justified by simple reference to the Decree. RO3's statement that correction of underrepresentation was "required by the Consent Decree" alerts us to look more closely at his actions, as the Decree only established goals (as well as procedures that would contribute to accomplishing the goals), and required no absolute numbers as suggested by RO3.

Another principle of appropriate affirmative action plans, which was incorporated by the Decree, is that gender may be considered as one of several factors in an employment decision, but a conscious decision to select only a woman (thereby making it a primary factor) would be discriminatory. The Decree required that one selection factor in all cases was to be whether the applicant contributed to the Agency's diversity, i.e., whether the applicant was a female applying for a position in which females were underrepresented. It also limited use of this factor either as a tie-breaker when all other qualifications were equal, or as one of several factors.

3-5

RO1, for example, probably considered gender in an appropriate manner when he forwarded his initial recommendation (although the absence of detailed explanations raises considerable doubt about his credibility). RO3, however, clearly stated that he "did not concern [himself] with who was the superior candidate." He did not consider gender as a tie-breaker, or as one of several factors. It was the primary and only factor he used, and therefore his actions were beyond the bounds of the Decree.

Finally, affirmative action plans may not unduly trammel the rights of other employees or unsettle legitimate, firmly rooted employment expectations, and the Decree did not. One of those expectations is that competitive promotions will be made based on merit factors. If someone competes for a position and is the best person for the job, he or she will be selected.

The Decree established numerous procedures designed to overcome the vestiges of past discriminatory practices. It required considerable outreach efforts to identify and encourage applicants from outside the Agency's traditional sources. It required intensive review of the series and grade levels at which positions were advertised, in order to tear down artificial barriers to the employment of women. It established review procedures to insure that applicants were not improperly found to be unqualified. It provided for panels with balanced membership to facilitate a fair review of all applicants. Most radically, it required that one applicant's potential to perform the position must be considered equal to another applicant's experience. Nevertheless, the Decree still focused on identifying the best person for the job. RO3's assertion that a qualified woman was to be selected, regardless of who was the superior candidate, was inconsistent with the Decree itself, violated legitimate employment expectations and demeaned the selectee, who indeed may have been the superior candidate.

Having found discrimination, there is a presumption that the complainant is entitled to be made whole, absent clear and convincing evidence that he is entitled to none. In this case, RO1 and RO2 had recommended the selection of another male applicant. Neither, however, explain how they arrived at the relative rankings. Accordingly, there is no basis to grant relief to anyone else in lieu of the complainant.

APPEAL RIGHTS

The complainant has the right to appeal this final decision to the Equal Employment Opportunity Commission (EEOC) by completing the enclosed EEOC Form 573 and sending it to the Director, Office of Federal Operations, EEOC, P.O. Box 19848, Washington, D.C. 20036. The appeal must be filed within 30 days of receipt of this decision. A copy of EEOC Form 573 is attached to the final decision (29 CFR 1614.402). Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, within 30 days of filing the appeal.

2 Decision See next page

4-5

then RO had to have placed more emphasis on the selectee's sex than provided for under the CD. This conclusion is buttressed in large part by the large discrepancy between selection ratios for males and females.

This conclusion is reached solely on the basis of RO's statements, and does not imply that the selectee was not in fact equally or better qualified than the complainant, given proper consideration of her potential to perform.

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A copy of any appeal or brief filed with EEOC or the court must be sent to the Director, Disputes Resolution Staff, Office of Advocacy and Enterprise, U.S. Department of Agriculture, Room 324-West, Administration Building, 14th and Independence Avenue, S.W., Washington, D.C. 20250. The complainant must certify to the EEOC that this office has been sent a copy of any material or brief so submitted.

If the complainant does not file an appeal to the EEOC within the time limit, any subsequent appeal will be untimely and will be dismissed by the Commission.

Within 90 days of receipt of the final decision, the complainant may file a civil action in a Federal District Court, if no appeal to the EEOC has been filed. Any civil action that the complainant files must name Mike Espy, Secretary of Agriculture, as the defendant. If the complainant appeals to the EEOC, the complainant will be able to file a civil action within 90 days of the Commission's final decision, or if there has been no final decision by the Commission within 180 days from the date of filing a timely appeal with the Commission.

WARDELL C. TOWNSEND, JR.
Assistant Secretary
for Administration

5/20/93
DATE

FROM

5-5

(3) Facts exist that will permit an inference of causation to be drawn between the protected status and the decision at issue.

The following facts establish a prima facie case of discrimination based on sex:

(1) The complainant is a member of a protected class by virtue of his sex (male);

(2) The complainant was highly qualified for the position, but was not selected;

(3) For the 15 positions filled in this case, the ratio of female selectees to female applicants was 60% (6 out of 10); the ratio of male selectees to male applicants was 8.6% (9 out of 105). The difference is significant.

The following reasons were articulated by RO as the reasons for making the selection that he did:

- The position required someone who could provide strong leadership, due to problems created by the previous incumbent.
- The complainant was clearly the most qualified applicant in terms of his range of skills and experience.
- Nevertheless, the selectee was well qualified for the position, and was an acceptable choice. In the absence of the Consent Decree (CD) (Bernardi v. Secretary of Agriculture, the purpose of which was to increase the employment and opportunities of women.), the complainant would have been chosen, but because it was in effect, he was not.

The articulated reasons are found to be discriminatory based on sex, and reflect a decision in favor of women not specifically provided under the CD. No provision in the CD provides for the selection of anyone other than the best applicant based on merit. In fact, the CD Handbook provides that the "selection criteria are those knowledges, skills, abilities, and characteristics which are unique to the specific job, and will help identify the individual with the best (underlining supplied) potential for success."

One of the selection criteria mandated by the CD was the candidate's ability to contribute to the diversity of the workforce. Guidance on the use of this factor provided that it was either to be used as one of several factors, or as a tie-breaker in the event candidates were equally qualified. In this case, RO went beyond the intent and guidance of the CD. No tie-breaker was appropriate here because RO had identified the complainant as clearly the superior candidate. It also cannot be concluded that it was merely used as one of several factors in RO's consideration, rather it was the main factor. If, as RO asserts, the complainant was "clearly" the better candidate based on his range of skills and experience,

United States Department of Agriculture | Forest Service | R-1

Reply To: 1700 | Date: March 31, 1992

Subject: Affirmative Action

To: Forest Supervisors and Staff Directors

I would like this letter and the enclosure to be required reading for all line officers and staff directors. Please ensure that all line and staff officers on the National Forests working under your supervision review this also.

It has been brought to my attention through EEO complaints, employee comments, and personal observation, that there is a perception in Region One that we have been operating under a "target" system to select and promote female and minority candidates, constituting an "Affirmative Action at-any-price" management approach.

The enclosed document outlines a few of the actions and occurrences during the past few years that may have led to this perception and have led to some questions about the credibility of our Affirmative Action program. If these or similar actions have occurred, I can understand why the integrity of the Program is being challenged.

I believe in, and fully support, the Affirmative Action program, and the efforts we have underway within the Region to become a more diverse workforce. It is essential for the long-term viability of the Forest Service that we develop within it a diversity that is representative of our society. We must be able to understand, assimilate, and respond to the concerns and priorities of all our constituents. The Forest Service cannot effectively do that without those groups represented in our workforce, and we cannot expect to have that representation unless we make efforts to recruit the underrepresented groups.

However, we will not condone or defend any unlawful or discriminatory practices. As managers we are responsible for our own actions as well as the actions of our employees to the extent that we are knowledgeable or should be knowledgeable of their actions. There is no provision that lets you off the hook because your supervisor or anyone else told you to do something inappropriate or illegal.

We face the same challenge that we have for years: that is, to support the Affirmative Action program and at the same time protect the rights of all our employees. In carrying this out, it is important to remember that the Civil Rights program is in place to protect the rights of all employees. The Affirmative Action program is a portion of the Civil Rights program that deals with underrepresented groups and ensures that they are afforded the same civil rights as everyone. There is no legal basis for allowing any group more rights

than another in the selection process. We need to ensure that all of us understand the applicable laws and regulations so that they are implemented in a legal and ethical manner.

It is very important to me that the Affirmative Action program be viewed as a positive and credible program by all employees in the Region. We need to take a look at our current program and make some necessary changes to ensure this happens. Since all programs are implemented through your line and staff officers, it is imperative that we all be involved in keeping this program on track. I am requesting that each of you review the Merit Promotion Plan, the R-1 Affirmative Action Plan, and the Report of the Workforce Diversity Task Force, "Toward a Multicultural Organization." After you have done this, if you have constructive comments or suggestions that would ensure that our Affirmative Action programs and initiatives are both legal and implemented in a manner that is credible with all employees, I would appreciate hearing them. I expect candid comments relating to improving the program, eliminating negative aspects of the program, pro's and con's of how this Region implements its Affirmative Action program, as well as any other comments you might have.

Your suggestions will be carefully reviewed with the goal of establishing a Regional Plan for Affirmative Action and Workforce Diversity. This plan should supplement the Affirmative Employment Plan and be a working document of "how to" implement a legal and defensible Affirmative Action program, protect the rights of all our employees, maintain an accountability system, and reestablish integrity and support for the program. The Action Plan will be incorporated into our FY-93 Affirmative Employment Plan.

Please provide your input to Kathy Solberg (in a blue envelope or via K.Solberg:R01A) within 45 days of the date of this letter. We will review the results of this effort at a Regional Leadership Team Meeting later this year.

/s/ JOHN M. HUGHES for

DAVID F. JOLLY
Regional Forester

Enclosure

- Some units have filled cooperative education trainee positions almost exclusively with female and minority candidates. This would appear that race and sex are factors in the selection process, which is prohibited by law.

- The bulk of professional/administrative trainees in this Region are hired through the Cooperative Education Program. Because some units have filled most, or all, of their cooperative education positions with females or minorities over the last several years, this has created an adverse impact on white males and possibly other groups' entrance into professional and administrative occupations in the Region.

- There is a perception that some Units' goal is to hire affirmative action candidates wherever and whenever possible rather than identifying recruitment needs using Civilian Labor Force (CLF) data. There appears to be no major organized efforts to recruit for candidates that are underrepresented in the workforce (based on CLF data).

- A management official organized a panel to review a certificate of eligibles. The directions to the panel were to narrow the list down to the "top three" but to make sure one of the top three was a female. This is clearly in violation of law and regulation and is indefensible.

- A management official organized a panel to review a certificate of eligibles. The directions to the panel were to provide the management official with three lists: (1) the "top three candidates;" (2) top minority candidate; and (3) top local candidate. This is clearly in violation of law and regulation. The management official would not be in a defensible position because he/she had introduced race/sex/locale into the process, regardless of who was selected.

- There are indications that some managers do not understand the significance and application of the laws and regulations that deal with civil rights, affirmative action, and merit processes. This is apparent from the free and open discussions that have occurred regarding such things as creating or filling a position with an affirmative action candidate or not filling the position at all, or providing significant career enhancing opportunities/ education to affirmative action candidates that are not available to other candidates. These types of discussions are in violation of the laws and regulations mentioned and should not occur, and the penalties for this type of conduct are severe.

ILLEGAL QUOTA ACTIVITIES

23.2 - Exhibit 01--Continued

Appendix B

RELEASED FEB 1997

MERIT PROMOTION REQUIREMENTS
(5 U.S.C. 2301)

Requirement 1

Each agency must establish procedures for promoting employees which are based on merit and are available in writing to candidates. Agencies must list appropriate exceptions, including those required by law or regulation. Actions under a promotion plan - whether identification, qualification, evaluation, or selection of candidates - shall be made without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, nondisqualifying physical disability, or age, and shall be **based solely on job-related criteria.**

Requirement 2

Areas of consideration must be sufficiently broad to ensure the availability of high quality candidates, taking into account the nature and level of the positions covered. Agencies must also ensure that employees within the area of consideration who are absent for legitimate reason; e.g. on detail, on leave, at training courses, in the military service, or serving in public international organizations or on intergovernmental Personnel Act assignments, receive appropriate consideration for promotion.

Requirement 3

To be eligible for promotion or placement, candidates must meet the minimum qualification standards, using a qualification method approved by the Office of Personnel Management (OPM). Methods of evaluation for training which leads to promotion; e.g., special provisions for qualifications, must be consistent with the CFR. Due weight shall be given to performance appraisal and incentive awards.

Requirement 4

Selection procedures will provide for management's right to select or not select from among a group of best qualified candidates. They will also provide for management's right to select from other appropriate sources, such as reemployment priority lists, reinstatement, transfer, disability or Veterans Readjustment or Preference eligible or those within reach on an appropriate OPM certificate. In deciding which source or sources to use, agencies have an obligation to determine which is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints, and meet the agency's affirmative action goals.

Mr. MICA. Thank you for your testimony. Without objection, the documents that you've requested will be made a part of the record. Now, I'd like to recognize Mr. Canady. Welcome, you're recognized, sir.

Mr. CANADY. Thank you, Mr. Chairman. I want to express my gratitude to you and other members of the subcommittee for affording me this opportunity to discuss this very important issue.

Since the 104th Congress, the House Judiciary Subcommittee on the Constitution, which I chair, has conducted a number of hearings to consider the wisdom and the constitutionality of Government-sponsored preferences based on race, skin color, ethnicity, or sex. My subcommittee has held nine indepth hearings on this controversial subject. In these hearings it has become increasingly clear that it is exceptionally difficult to defend, as a matter of legal or moral principle, the Government practice of granting preferences on the basis of race or sex.

The present system of discriminatory preferential treatment based on race and gender violates our most deeply held American principles. Preferences are the opposite of civil rights. Preferences are the opposite of equal protection. Preferences are the opposite of the self-evident truth upon which this great Nation was forged, that all people are created equal, and are entitled to be treated as individuals who are equal under the law. The question for those who formulate public policy is whether the Federal Government should treat people equally, that is without regard to race or sex, or treat them unequally, by granting preferential treatment to some. I am gratified that this subcommittee has decided to address this question as it applies within the Federal civil service.

Now, it is important to understand that the issue is not whether prejudice and bigotry have come to an end in American society. Although it is clear that we have made great progress in overcoming racism and prejudice in America, that job is certainly not yet complete. It is also important to understand that historically the Federal Government itself pursued disgraceful policies of discrimination and segregation in the Federal workplace. That history of injustice cannot and should not be denied. But the answer to that history of discrimination and to the lingering prejudice in American society is not to be found in Federal policies that classify, sort, and divide the American people on the basis of their race and gender. The answer is not found in Government-sponsored discrimination. In the debate over preference it has been said many times, but it bears repeating: We will never overcome discrimination by practicing discrimination.

The American people have already made their choice between preferences and equal protection. In our Nation's most racially diverse State, historic efforts like the California Civil Rights Initiative show that we as a people are moving beyond divisive Government-sanctioned discrimination and preferences. The courts have already made their choice between preferences and equal protection as well, and have repeatedly struck down governmental preference programs as unconstitutional.

The great American principle of equal protection is not merely a sterile formality contained in dusty law or history books. As you will see and hear before you today, there are real human faces,

genuine personal stories, and tragic human consequences that exist right now behind a governmental system that grants preferences to some and discriminates against others. I am pleased that this subcommittee will hear today from Americans who have personally tasted the sting of Federal Government-sanctioned discrimination. These people were denied an opportunity solely because of the color of their skin or their sex. These people have families. They have hopes and dreams and ambitions. Clever platitudes mean little to these citizens who have been hurt by governmental preferences. Stories like theirs, unfortunately, are all too common in America today.

There are solutions to this problem. One of them, I believe, is the Civil Rights Act of 1997, H.R. 1909, a bill which I introduced on June 17 of this year. The bill now has 74 House cosponsors, and Senators McConnell and Hatch have introduced companion legislation in the Senate. The Constitution Subcommittee held a hearing on the bill, and we were struck by the personal stories of those who testified about their personal struggles with Federal Government-sanctioned preferences. In July, the Constitution Subcommittee reported the bill favorably to the full Judiciary Committee on a voice vote without adopting any amendments.

The Civil Rights Act of 1997 is designed to provide for equal protection of the law by prohibiting discrimination and preferences on the basis of race and sex in Federal Government employment, contracting, and other actions. With this legislation and other efforts, the debate can continue in Congress over which way America should be heading as we approach the 21st century. Should the Federal Government be engaged in the dangerous and divisive business of counting, sorting and preferring people because of their race, or should the government treat all people equally, without regard to these characteristics which we have at our birth?

My position is simple, direct, and clear. The Federal Government should treat people equally. That means without regard to their race or sex. That's the position Congress took in the historic Civil Rights Act of 1964, and that's the position Congress should reaffirm today.

One final point: The Civil Rights Act of 1997 does not eliminate affirmative action. Instead, it reaffirms the original concept of affirmative action; that is, vigorous outreach and recruitment efforts, coupled with a policy of nondiscrimination in hiring and awarding contracts. We must ensure that we reach out to all parts of the community to bring qualified applicants into the pool of applicants for jobs and opportunities. But everyone should then be evaluated without regard to their race or gender, and if you'll go back to the original Executive order on affirmative action that President Kennedy issued in 1961, you'll see that it was very clear that the action which was to be taken was to be without regard to the race or gender of the individuals involved. They were to be treated on a nondiscriminatory basis. Unfortunately, over a period of years, that original concept of affirmative action was twisted and distorted into this system of preferences where some people lose because they're a member of a particular group and other people win because they're a member of the preferred groups. That is the antithesis of the original concept of affirmative action.

Now there are many problems with this system. We're going to see individuals who have been directly hurt by it. I believe that this system is bad for all Americans, including the very people it is designed and intended to help. When the Federal Government hires individuals based on their race or sex, it sends a powerful and harmful message to the American people that we should continue to think along racial and gender lines. That is a message that only reinforces prejudice and discrimination in our society; and that's exactly the wrong message for our Government to be sending.

One additional note I'd like to make on an issue of terminology. This is an area of debate where I believe semantic games are played. A preference is a preference no matter what you call it. You can label it a quota and everyone seems to agree that quotas are bad and everyone will acknowledge that. The issue is not what you call a policy, it is the way the policy operates. If you call a policy a quota and it gives people an advantage because of their race or gender, it's wrong. If a policy gives people an advantage because of their race or gender, and you call it a goal and a timetable, it is also wrong. Someone who loses an opportunity under the operation of a goal or timetable is just as damaged as someone who has lost an opportunity because of the operation of something called a quota. So I think we need to focus on the reality that is taking place and we can see that these policies that are called goals and timetables are just as harmful, just as divisive and just as discriminatory as a system labeled a quota system.

With that, I will conclude. Thank you, Mr. Chairman, for your leadership on this issue. I look forward to doing my best to address any questions you might have.

[The prepared statement of Hon. Charles Canady follows:]

Representing Florida's 12th District
Charles T. Canady
Chairman, House Judiciary Subcommittee on the Constitution

2432 Rayburn House Office Building • Washington, D.C. 20515 • 202-225-1252

Statement of Representative Charles T. Canady

Committee on Government Reform and Oversight
Civil Service Subcommittee
"Race and Gender Preferences in Federal Employment"
September 25, 1997

Good morning. Mr. Chairman and members of the subcommittee: it is a pleasure to speak with you on an issue of great importance to our constitutional system and its guarantee of equal protection of the law.

Since the 104th Congress, the House Judiciary Subcommittee on the Constitution, which I chair, has conducted a number of hearings to consider the wisdom and constitutionality of government-sponsored preferences on the basis of race, skin color, ethnicity, or sex. My subcommittee has held nine in-depth hearings on this controversial subject. In these hearings it has become increasingly clear that it is exceptionally difficult to defend, as a matter of legal or moral principle, the governmental practice of granting preferences on the basis of race or sex.

The present system of discriminatory preferential treatment based upon race and gender violates our most deeply felt principles as Americans. Preferences are the opposite of civil rights. Preferences are the opposite of equal protection. Preferences are the opposite of the self-evident truth upon which this great Nation was forged, that all people are created equal, and are entitled to be treated as individuals who are equal under the law. The question for those who formulate public policy is whether the federal government should treat people equally, without regard to race and sex, or treat them unequally, by granting preferential treatment to some. I am gratified that this subcommittee has decided to address this question as it applies within the federal civil service.

It is important to understand that the issue is not whether prejudice and bigotry have come to an end in American society. Although it is clear that we have made great progress in overcoming racism and prejudice in American society, that job is not yet complete. It is also important to understand that historically the federal government itself pursued disgraceful policies of discrimination and segregation in the federal workplace. That history of injustice cannot and should not be denied. But the answer to that history of discrimination and to the

lingering prejudice in American society is not to be found in federal policies that clarify, sort and divide the American people on the basis of their race and gender. The answer is not to be found in government-sponsored discrimination. In the debate over preference it has been said many times, but it bears repeating: We will never overcome discrimination by practicing discrimination.

The American people have already made their choice between preferences and equal protection. In our Nation's most racially diverse state, historic efforts like the California Civil Rights Initiative show that we as a people are moving beyond divisive government-sanctioned discrimination and preferences. The courts have already made their choice between preferences and equal protection as well, and have repeatedly struck down governmental preference programs as unconstitutional.

The great American principle of equal protection is not merely a sterile formality contained in dusty law or history books. As you will see and hear before you today, there are real human faces, genuine personal stories, and tragic human consequences that exist right now behind a governmental system that grants preferences to some and discriminates against others. I am pleased that this subcommittee will hear today from Americans who have personally tasted the sting of federal government sanctioned discrimination. These people were denied an opportunity solely because of the color of their skin or sex. These people have families. They have hopes, and dreams, and ambitions. Clever platitudes mean little to these citizens hurt by government preference. Stories like these, unfortunately, are all too common in America today.

There are solutions to this problem. One of them is the Civil Rights Act of 1997, H.R. 1909, a bill which I introduced on June 17, 1997. The bill now has 74 House cosponsors, and Senators McConnell and Hatch have introduced companion legislation in the Senate. The Constitution Subcommittee held a hearing on the bill, and we were struck by the personal stories of those who testified about their personal struggles with federal government-sanctioned preferences. In July, the Constitution Subcommittee reported the bill favorably to the full Judiciary Committee on a voice vote without adopting any amendments.

The Civil Rights Act of 1997 is designed to provide for equal protection of the law by prohibiting discrimination and preferences on the basis of race and sex in federal government employment, contracting, and other actions. With this legislation and other efforts, the debate can continue in Congress over which way America should be heading as we approach the Twenty-First Century: Should the Federal Government be engaged in the dangerous and divisive business of counting, sorting, and preferring people because of their race, or should the government treat all people equally, without regard to these characteristics we are given at our birth?

Our position is simple, direct, and clear: the federal government should treat people equally. That means: without regard to their race or sex. That's the position Congress took in the Civil Rights Act of 1964, and that's the position Congress should reaffirm today.

One final point: the Civil Rights Act of 1997 does not eliminate affirmative action. Instead, it goes back to the original concept of affirmative action: vigorous outreach and recruitment efforts coupled with a policy of non-discrimination in hiring and awarding contracts. We should ensure that we reach out to all parts of the community to bring qualified applicants into the pool of applicants for jobs and other opportunities. But everyone should be evaluated without regard to their race or gender.

When the federal government hires individuals based on their race or sex, it sends a powerful and perverse message to the American people that we should continue to think along racial and gender lines. That's a message that only reinforces prejudice and discrimination in our society. And it's exactly the wrong message for our government to send.

# # #

House of Representatives Committee on the Judiciary
Subcommittee on the Constitution

Subcommittee Hearing on "H.R. 1909: The Civil Rights Act of 1997"

June 26, 1997
2141 Rayburn House Office Building
9:00 a.m.

Opening Statement
Chairman Charles T. Canady
Subcommittee on the Constitution

The subcommittee will come to order. We are here today to consider H.R. 1909, the Civil Rights Act of 1997, which I introduced last week on behalf of myself and over 60 House cosponsors. Senators McConnell and Hatch have introduced companion legislation in the Senate.

Since the 104th Congress, the subcommittee has held eight in depth hearings on the general topic of government sponsored race and gender preferences. By now, we have heard arguments from many sides of the issue. We have conscientiously and respectfully considered all viewpoints.

The Civil Rights Act of 1997 is a principled yet measured approach to the issue of race and gender preferences. Those who heard the President's commencement speech two weeks ago at the University of California-San Diego know that he professed allegiance to "diversity" and "affirmative action." I noticed that he did not mention "equal protection of the law." He did not mention "civil rights." And he certainly did not mention "preferential treatment." But his Administration's action -- and inaction -- speak much louder than his words: the Clinton Administration has consistently and unerringly defended each and every brick in the pervasive wall of preferential government programs that the Civil Rights Act of 1997 would end. After pledging nearly two years ago to "study" this matter prior to acting, the wall of preferences still stands as tall and insurmountable as ever. And the only concrete proposal from the Administration on this issue would build this wall of preferences even higher. It is obvious that legislative action securing civil rights for all Americans is urgently needed.

This bill is titled the Civil Rights Act of 1997 because the present system of discriminatory preferential treatment for a select group of Americans based upon race and gender is the opposite of civil rights. It is the opposite of equal protection. It is the opposite of the self-evident truth upon which this great Nation was forged, that all

people are created equal. This legislation presents Congress with a stark and unavoidable choice in formulating public policy: either the federal government will treat people equally, without regard to race and gender, or it will treat them unequally, by granting preferential treatment to some. This is a choice we in Congress must make.

The American people have already made their choice. In our Nation's most racially diverse state, the adoption of the California Civil Rights Initiative shows that we as a people are preparing to finally move beyond divisive government-sanctioned discrimination and preferences. Unfortunately, the President went to California to pontificate on this topic about six months too late, since Californians had already spoken loud and clear at the ballot box that government must get out of the special preference business. The courts have already made their choice as well. In recent years, courts at all levels have struck down government preference programs as unconstitutional. It is irresponsible for Congress, sworn to uphold the Constitution, to allow these blatantly unconstitutional programs to exist. Although the Administration fought it, all the President's words cannot change the fact that the California Civil Rights Initiative is now enshrined in California's Supreme Law, the state constitution.

Someday, Americans will look back at our time and wonder why our government continued these immoral and unconstitutional preference policies on such a grand scale. Our grandchildren will be ashamed that our government denied equal protection to some because of the color of their skin, just as we are ashamed that our government once denied equal protection to others for the same reason.

With this legislation, the debate can continue in Congress over the true meaning of the equal protection of the law. Which way should America be headed as we approach the Twenty-First Century: Should the Federal Government be engaged in the hurtful and divisive business of counting, sorting, and preferring people because of their race, or should the government treat all people equally, without regard to these characteristics we are given at our birth?

I am pleased that today the subcommittee will hear from distinguished members of Congress, scholars, and members of the bar, all experts on this issue. But perhaps most relevant, we will hear from numerous witnesses who have personally tasted the sting of federal government sanctioned discrimination. These people were discriminated against solely because of the color of their skin or sex. Clever platitudes mean little to real citizens hurt by government preference. These witnesses have another characteristic in common: they sued to vindicate their civil rights in court. They have appeared in court at every level from a state trial court to the United States Supreme Court, and after long legal battles proved their cases on the merits and struck down unconstitutional government preference programs. But the most compelling thing these witnesses have in common is that despite the fact that they demonstrated government preference programs to be unconstitutional for various reasons none of the unconstitutional preference programs they challenged have been rescinded by government. This proves that the present system of laws is inadequate to protect fully the civil rights of all Americans and demonstrates the urgent need for the Civil Rights Act of 1997. Stories like these are all too common in America today.

The Civil Rights Act of 1997 is simple, direct, and clear: it prohibits federal government discrimination and preferences on the basis of race and sex. The subcommittee would greatly appreciate if testimony and arguments addressed this legislation and specifically whether federal government discrimination and preferences on the basis of race and sex are wise policies consistent with American legal and moral principles.

Thank you.

Judiciary Homepage

Mr. MICA. Thank you, Mr. Canady. We've been joined by two members of our panel and I'd like to recognize them for any opening comments. Ms. Norton. If she has any.

Ms. NORTON. Has Representative Herger spoken?

Mr. MICA. Yes, they have both.

Ms. NORTON. Both of them heard?

Thank you, Mr. Chairman. I would like to say to both of my good colleagues that it is time to declare victory and go home. The war on affirmative action here in the Congress and elsewhere has now been subject to three sanctions that certainly make the Canady bill unnecessary, redundant, and if I may say so, sir, absolutely divisive.

Let me indicate the three sanctions of which I speak. First, if you will read the cases, if you will bother to read the cases, you will find that the Supreme Court has virtually taken down affirmative action. There is so little left that your bill is of almost no consequence. What is left has been subject to the reforms we now know as "mend-it-don't-end-it", including regulations that are still going through the process. Finally, what is very seldom noted is that legitimate cases of reverse discrimination are actionable under title 7 of the Civil Rights Act, that it was my great privilege to enforce. That is to say, that a white male or a person of any ethnicity or race, who is subject to discrimination has exactly the same rights and will be treated in exactly the same way as this black woman would be treated if she filed a complaint before the Equal Employment Opportunity Commission. The figures supplied by the Commission of white males filing before the Commission, show that overwhelmingly they file on the basis of age, because that is the form of discrimination they encounter. The last time I looked, white men were intelligent and, if anything, more cognizable of their rights than other groups. Yet, they do not file cases in any significant numbers of reverse discrimination.

Therefore, sir, between the Supreme Court of the United States, "mend-it-don't-end-it", and the right each and every person who has been subjected to discrimination has, your bill is one of the most unnecessary pieces of legislation that I have ever seen. I'm not sure the Supreme Court responded to your bill; I don't think President Clinton, in coming forward with "mend-it-don't-end-it", responded to your bill; and I am certain that the Congress of the United States, when it made everybody—everybody—protected under the bill, did not respond to your bill. The fact of the matter is revealed both in where the cases continue to come from in large numbers and what has happened to the law of affirmative action. We do have a mission and a challenge in this body and that is to make sure that there is sufficient affirmative action left so as to deal with the prevailing problems of gender and race discrimination that remain in this country.

I thank you, Mr. Chairman.

Mr. MICA. I thank the gentlelady for her opening comments. Now, I'd like to recognize Mr. Ford, who's also joined us. Mr. Ford, you're recognized for opening comments.

Mr. FORD. Thank you, Mr. Chairman. I welcome my colleagues, both Mr. Canady and Mr. Herger. Despite my just outright dis-

agreement with much of what's been said, I'm still delighted to see the both of them.

It's interesting that today, 40 years ago, that the Federal Government took a stand for equality and fairness for all Americans when it escorted nine young African-American students into a Little Rock High School. Being from Memphis, TN, that history is very dear to me and certainly touches, not only those of us in Memphis and Little Rock, but I would assume, those in California and Florida, as well.

What does this historic event have to do with our hearing this morning, you may ask? Well, in my view, today's hearing is about the Federal Government treating its citizens fairly, justly, and equitably, and not just in the Federal workplace, but in all contexts.

To that end, I am interested in hearing, and I appreciate your comments this morning, what my colleagues and other panelists today have to say about these bedrock principles. However, I would like to point out that if we are sincere and genuine about our commitment to ensuring equality of opportunity for all Americans, then as Federal lawmakers we must do much more to provide every child in this Nation with a fair chance to learn. Until we commit ourselves to this singularly important goal, we will always be fighting a losing battle in the struggle for equality.

The both of you have raised relevant and salient, and in some ways, inflammatory points. I would associate myself with the comments made by my colleague from the District of Columbia, Ms. Holmes-Norton, and I look forward to being able to pose questions as this hearing goes forward.

Again, I thank Chairman Mica, not only for this hearing, but certainly the hearing we had last week in which we focused on some other forms of, what I consider, legitimate discrimination in our Federal hiring places.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Harold E. Ford, Jr., follows:]

HAROLD E. FORD, JR.
9TH DISTRICT, TENNESSEE

COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEES:
POSTSECONDARY EDUCATION, TRAINING AND LIFELONG LEARNING
OVERSIGHT AND INVESTIGATIONS

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
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Opening Remarks of Congressman Harold Ford, Jr.
Civil Service Subcommittee Hearing on Employment Discrimination
in the Federal Workplace -- Part II
September 25, 1997

Forty years ago today, the federal government took a stand for equality and fairness for all Americans when it escorted nine black students into a Little Rock high school.

What does this historic event have to do with our hearing this morning. Well, in my view, today's hearing is about the federal government treating its citizens fairly, justly, and equitably, and not just in the federal workplace, but in all contexts.

To that end, I am interested in hearing what my colleagues and the other panelists today have to say about these bedrock principles. However, I would like to point out that if we are sincere and genuine about our commitment to ensuring equality of opportunity for all Americans, then as federal lawmakers we must do much more to provide every child in this nation with a fair chance to learn. And until we commit ourselves to this singularly important goal, we will always be fighting a losing battle in the struggle for equality.

Mr. MICA. I thank the gentleman. I'd like to start off with a couple of questions. Gentlemen, you have an interesting panel you are appearing before. Myself having experienced, as a young person, ethnic discrimination brought up as a third generation Slovak-Italian-American; I guess we've got Mr. Pappas' Greek background; Mrs. Morella, Italian; and our two minority members, African-American members, who certainly have seen discrimination in their lifetime. The purpose of these hearings is to sort through what we're doing in the Federal workplace and try to give folks a better opportunity: access to employment, and nondiscrimination in hiring and promotion.

Mr. Herger, you brought up the instance in your district of the U.S. Department of Agriculture and the Forest Service. Probably, one of the worst agencies as far as hiring and, if you looked at sheer numbers of minorities who gained access to an agency, the Department of Agriculture has a horrible rating. You don't want discrimination or reverse discrimination. I'm wondering what we are to do. What would you recommend from a practical standpoint? Now, again, you've got very few minorities working in the Department of Agriculture, and you don't want reverse discrimination, and do you want qualified applicants? What is your prescription to give folks a fair shot and not be discriminatory?

Mr. HERGER. Well, I'd like to make two points, if I could. First has to do with the fact that the greatness of our Nation has to do with the very fact that we are a very diverse Nation and I think that has to be recognized. I want to recognize the very important point that Mr. Ford made and I must say that if I were living in your area and had to witness the incredible tragedies of discrimination that you and your parents and those before you were discriminated, I would be in there fighting with you as well in that way, but my concern is an area that's very different in the way that it is made up in the area that your in and I'd like to explain that. I'd like to also point out that just as wrong as the discrimination was in your area, I'm also experiencing discrimination. The individuals that I represent are experiencing discrimination, but it is of a reverse nature. It is of a nature where Forest Service employees, and I have many hundreds within the eight national forests that I represent in northeastern California, that have spent their lifetime working; that are in line for promotions; and because they happen to be a white male, and because, I don't doubt the fact, that undoubtedly there has not been an outreach that should have been there. In answer to your question, Mr. Mica, I believe—and I believe to the point that Mrs. Morella was pointing out, too—I believe there's a major difference of outreach and seeking out the most qualified applicants. There's a very difference from that and then, from those applicants, choosing the most qualified and ensuring that we do not discriminate. Perhaps, if there's two equally qualified individuals, and one is a minority and one is not, that in the case where we are in, as has been recognized by the courts that the Forest Service was not as racially diverse as it should have been, choosing the minority. I would support that; and I believe that undoubtedly needs to continue to be done until we do have more of a reasonable and commonsense diversity within the Forest Service or the Department of Agriculture.

That is not what has been taking place in our area and I want to make that point. We have individuals that have come to me that have worked there for many years, maybe 20 years, that are being gone around. We have a memo that's on the board over here that says, "Only those who are unqualified may apply." Why do you think that is the case? The case is because the most qualified people happen to be white males. Now, should they be discriminated against because of legitimate and recognized wrongs of the past? My question to the committee is: Do two wrongs make a right? I don't think they make a right anymore today than they did when I was a boy, when I was taught that principle, yet that is what is taking place and that is wrong.

Let me even go a step further than that as I mentioned. We're also seeing life and safety and property that are being endangered in my area. I live in forest area; represent forest area; we actually had five fire-fighting positions that were not filled because they were trying to fill, they had this goal—and whether it's a goal or a quota, whatever you want to call it—they had this goal which I believe very clearly was a quota, that said we want five women or five minorities. They had an outreach. They went out and looked for everyone. They could only find two women who wanted, or at least had applied for the job; those two turned it down. Now, did they then go and hire five other people? Whoever they may have been? No, those positions were left open and this is in an area where we had over 800,000 acres of forest burn in the State of California last year, including homes, including several lives lost. Now is this right? It's clearly wrong and it's clearly moving in the opposite direction and I would contend that, Mr. Ford, if you were living in my area and if you were representing my area, you would be as indignant about these injustices, and Ms. Norton, as I am about the very valid injustices that you also have experienced in your area, and that's what I'm trying to correct.

Now, in answer to your question, what should we do, I think we should have outreach; we should be looking and seeking every way we can; and actually going out and trying to attract minorities and women into these positions that have not been filled by them in the past. Once we have done that and once we have exhausted that, we should still hire the most qualified, whoever that is. Perhaps, again, if there's a tie, we choose the minority, but not where we now have a current reverse discrimination.

Mr. MICA. Thank you, Mr. Herger. Mr. Canady, Ms. Norton made it rather clear that she felt your legislation was unneeded and that, through other actions of court and other decisions, was unnecessary. How do you respond?

Mr. CANADY. It is true that the Supreme Court has held that racial classifications by the Federal Government are presumptively unconstitutional and I think the Supreme Court went a long way toward laying the groundwork for abolishing the system of preferences when it held in that fashion. But the fact of the matter is that the Clinton administration, under the cloak of this mend-it-don't-end-it policy, is doing everything it can to, basically, defend the status quo. I think it's more their policy is more appropriately called hide-it-don't-admit-it. They want to create a shroud around this system and pretend that it's something that it is not. That's

what they've been going about. So, individuals who are subjected to unfair treatment under the system of preferences are still suffering and I simply don't think that it's fair to tell those individuals who suffer as a result of the system of preferences, well, go to court. Go to court and maybe 5 years later, maybe 10 years later, your cause will be vindicated. I believe that we in the Congress have a responsibility to establish policies for the Federal Government that are consistent with the Constitution and that are just.

I am quite confident that over the long term the courts, unless there's some change in direction on the Supreme Court, the courts will undo this system, but in the meantime, many people are suffering and that's not right and we, in the Congress, have the responsibility to set that right. Now, I also think it's important to understand that individuals that are subjected to discrimination should continue to have their remedies under the law and nothing in the legislation I have proposed would interfere with a remedy that is available to any person who is a victim of discrimination and that's an important point to understand.

The reality in the Federal workplace today is that people continue to be discriminated against simply because of their race or gender under these policies that are called various things; goals and timetables, affirmative action plans, whatever you want to call them. Some people are getting promoted because of their race or gender and other people are being denied promotions because of their race or gender. Some people are being hired because of their race or gender; other people are being denied a job because of their race or gender. That's discrimination; and for the Congress to sit idly by while those policies continue on is unconscionable, in my opinion.

Mr. MICA. I'd like to recognize the gentlelady from the District.

Ms. NORTON. Mr. Canady, your bill, under your bill you have to go to court too. There's no such thing as a self-enforcing bill, so if you don't think it's fair to say go to court, then you ought to withdraw your bill because your bill requires that people go to court.

Blacks and women and others who experience the lion's share of discrimination have to go to court. We all have to go to court. We got to prove it, and I am saying to you that title 7 requires us all to prove it and requires us all to prove it in the same way. It doesn't say that white males have one way of proving it, and Hispanics and women and others have another way to prove it. Title 7 covers the matter.

When you talk about the Supreme Court, let me remind you, that the Supreme Court is over and above you and me when it comes to racial preferences and I invite you once again to look at what is left. Some of what you speak about, and what Representative Herger has spoken about, is actionable. Whether or not in a hearing it would prove to be illegal, I'm not sure, but it's certainly worth acting on. Fortunately, existing law provides a remedy. The last thing we need in this country now is more contention on race and that is what your bill does. It says to women and to minorities, even after the Supreme Court has taken down affirmative action; even after the Democratic administration has taken down much of it, pursuant to the Supreme Court; and even though these folks have the same remedy that I have under title 7, they still plow this

stuff through the Congress. You may not see the divisive and polarizing effect this is having, but I can tell you, without fear of being contradicted, that when you take a stick to an ant, when you take a baseball bat to a remedy that is already lying bloody on the floor, you send an extraordinarily, racially polarizing message to people in this country who have experienced racial discrimination and you send another message to whites in this country who continue to harbor racism. That is not your intent, but you have to take the consequences that fall from pressing a bill like this after there is virtually nothing left of affirmative action. If you have cases, Mr. Canady, we don't need your bill in order for the folks that have been discriminated against to go to court. We have a remedy. You ought to rest on this remedy and leave affirmative action alone. You are doing incalculable damage to race relations in this country and you ought to know it and I'm here to tell you about it.

Mr. CANADY. May I respond?

Ms. NORTON. Please do.

Mr. CANADY. I appreciate the gentlelady's view of the impact of the Court decisions, I simply think it does not correspond with reality. We've got contractual set-aside provisions that are still being implemented. People are still being given contracts under those set-aside provisions.

Ms. NORTON. Sue them. Representative Canady, under your bill the most you can do there, or under title 7, or under any other statute, is to sue. Sue under the recent Supreme Court decision.

Mr. CANADY. What we are saying is that the Congress should establish a policy that the Federal Government will not grant preferences based on race or gender. Now, my question is: Why should we not do that? What is wrong with the policy that says that no one should receive an advantage simply because of that person's race or gender? I think that the defenders of the status quo have a heavy burden to meet in explaining why anyone should receive an advantage simply because of that person's race or gender. That is discrimination. That is the essence of discrimination. As to the divisiveness of this bill, let me suggest, that I believe, the system of race and gender preferences which was created with the best of intentions has, in effect, been racially divisive. It has, as I said earlier, sent a message from the Government to the American people that we should continue to think along racial and gender lines. It has created a cloud of doubt over the accomplishments of individuals who are in the preferred groups, which is unfair, but it's a reality. It sends people a message in the preferred groups that they aren't expected to measure up to the same standards which is an indignity. It sends people in the nonpreferred groups a message that, well, you're going to simply lose because of an accident of your birth or because of your biological characteristics. That's unfair and we get down to a fundamental moral principle here: Is it right for our Government to discriminate in favor of people or against people, simply because of their color or their gender; and my answer to that is no, I believe we should have a clear, unquestioned policy in the Federal Government that we won't grant preferences based on race or gender. That's at issue here in this bill and I believe that passing the bill would make a difference. It's true, some people may still have to go to court, but I believe if we

pass this bill we would see the beginning of the dismantling of this system of preferences in the Federal Government and they couldn't hide behind the legal technicalities that they often hide behind now.

Ms. NORTON. A higher authority than you, Representative Canady, at least on these issues, has already dismantled most of affirmative action; that's the Supreme Court of the United States. I mean, it's really as if, after *Brown* v. *Board of Education* was passed, Congress said we're going to pass a law anyway. With respect to matters——

Mr. CANADY. Well, quite frankly, I think——

Ms. NORTON. With respect to matters of——

Mr. CANADY. Wouldn't you agree that would have been a good thing so that we would not have had to wait for the generation of continuing discrimination that continued after the *Brown* decision was made in 1954?

Ms. NORTON. As a matter of fact, the last thing I would have wanted would have been the Congress of 1954 or 1955 to do anything to the Supreme Court decision, and the last thing I think we ought to do here is anything to the Supreme Court decision. Finally, let me say, because I know my time is up, that, unfortunately, the effect of your bill has been to racialize an issue that sounds more in gender than it does in race today, because the primary beneficiaries of affirmative action are white women and that is as it should be. The reason it is as it should be is that they are already prepared, they come from the same backgrounds, the same homes, the same schools, and the same preparation, and they haven't been impoverished, and therefore, they are the ones, who of course, are up for such jobs far more readily than blacks and Hispanics who suffer other problems as well. Yet, out in the country, out there in the great beyond, your bill is being read as addressed at blacks as people of color. Mr. Canady, I do not accuse you of that, but as a Member of this House, you are responsible for the consequences of your actions. Now the fact is that the Supreme Court hadn't spoken; if in fact title 7 wasn't there; if there was no remedy for so-called reverse discrimination; if "mend-it-don't-end-it" had not come down; then one might be able to understand why you would continue to press this bill. You should understand, and I'm here to tell you today, that your bill is drawing a line between black people and white people in this country unnecessarily. As a child of the civil rights movement, what grieves me most is to see racial polarization in this country. What grieves me most is to see black people who now take on some of the attitudes of white people, that I do see some of the attitudes that these people are coming at us so bad, and I say to them: My God, you will lose your moral authority if you begin to look at them the way they looked at us. I think it is time for us all to step back, take a deep breath, understand that this matter has been dealt with in the Supreme Court, and is being dealt with in the Federal Government; file court cases, prove what you allege, that in fact discrimination is going on and free us from the racial polarization that your bill is inciting.

Thank you, Mr. Chairman.

Mr. MICA. I thank the gentlelady. Now, I'd like to recognize Mrs. Morella.

Mrs. MORELLA. Thank you. Thank you, Mr. Chairman. First of all, Congressman Herger, I thought your testimony was really quite compelling, but I do want you to know that I find the actions of the Forest Service, as reported in this paper and in your testimony, to be simply outrageous, dangerous, illegal, and discriminatory. I cannot help but believe that maybe only unqualified applicants was a typo. I mean, I've just never seen anything like that, as well as some of the other statements you made.

What do you think should be done to those people who are responsible in the Forest Service for actually really distorting the whole concept of affirmative action or outreach? Has anything been done, first of all, and what should be done?

Mr. HERGER. Regrettably, the actions are continuing today. I have documents that I've supplied you with copies that go back to 1989 and are as recent as February 1997 of this year. So the policy is one that has been continuing. What should be done? I'm not looking for retribution on the Forest Service, I just want the past wrongs to be corrected. I want them to change their policy. I want them to begin hiring the most qualified people that are there and making sure that we are not discriminating against anyone whether it be minorities or who, but also not discriminating against white males if they happen to be the most qualified.

Mrs. MORELLA. If that is the policy, then it is illegal right now.

Mr. HERGER. But that is not the policy that has been followed, nor is it the policy that is being followed to this very day.

Mrs. MORELLA. Well, I think it's something that I'm certainly willing to look into in terms of who would have possibly come out with statements like that.

Mr. HERGER. I wish I could say I also thought that was a typographical error, as a matter of fact, I contacted the present, the then head of the Forest Service, he also thought it was a typographical error. Yet, on checking, I found out, indeed, that was a statement that was OK'd by evidently the Forest Service, was sent out and indeed that did happen.

Mrs. MORELLA. Congressman Canady, I happen to agree that the Supreme Court took care of the concerns that you had and that we don't really need your legislation, but I want to point out, you know, it wasn't too many years ago that to be a Rhodes scholar you couldn't be a woman; it wasn't too many years ago that you couldn't have a Joyce Collins be the captain of the Space Shuttle; it wasn't too many years ago that you had women who were principals of high schools, let alone presidents of colleges. This would never have happened had you not looked around and said, "Hey, where are the women in the board room? Where are the women in important issues? Of course, it's the same thing with other minorities, too, but I'm thinking of the point from women with which I have a great deal of background, from birth as a matter of fact. What affirmative action says—and again you talked about the nomenclature and I know there can be some distortions of it—but, what it says is if you don't have these people represented, search, search; find those that are qualified, do not hire anybody who is not qualified. That is not affirmative action; it is inexcusable, but

if you don't reach out and invite, through whether it's the Chronicle of Higher Education, whatever the publication is, wherever those people are, universities; if you don't invite them to take part and let them know that the door is open, then you are losing the human resources of our great Nation and that's what I believe, and you probably believe it too, but it's not coming out that way. Do you hear what I'm saying?

Mr. CANADY. Well, if I could respond on that point. I would just commend to your attention to section 3 of my bill, which is headed "Affirmative Action Permitted," and in that section of the bill we make clear, beyond any doubt, that we support the kind of outreach efforts that you're talking about. I think that's important. You know, we have to look at the history of this country and as I said in my testimony, the Federal Government has pursued discriminatory policies in the past, there's no question about it, it was systematic and that was wrong. It's important for us to have outreach and to make certain that people are aware of opportunities, but no one should get an advantage of any kind in deciding whether that person is going to receive a job or a contract, simply because of that person's race or gender. That's just not right, that's discrimination. The movement, the civil rights movement was focused on the idea that we should treat people as individuals, that is without regard to their race and sex. That principle's been turned on its head and it is undeniable that in this system people are getting jobs and people are losing jobs simply because of their biological characteristics. That's what I'm against, and I think that's what the American people are overwhelmingly against.

Mrs. MORELLA. Except I think that's already the case we must make sure that is being done and where we have nobody we've got to reach out whether it means paying someone's transportation, looking around and putting them in the pipeline too. Thank you.

Thank you, Mr. Chairman.

Mr. MICA. I'm sorry, we have less than 5 minutes to vote. Gentlemen, in fairness to Mr. Ford, who also has questions, I would ask you to return and I think we can conclude shortly, but as soon as you vote if you'd return we'll reconvene.

The subcommittee's in recess.

[Recess.]

Mr. MICA. I'd like to call the Subcommittee on the Civil Service back into order and recognize Mr. Ford for questions. We have Mr. Canady who's returned; I think Mr. Herger is on his way back. Mr. Ford, you're recognized.

Mr. FORD. Thank you, Mr. Chairman. Again thanks, Mr. Canady, and I see Mr. Herger's making his way back into the hearing room.

Let me say a few things. I want to associate myself certainly with the comments made by my colleague, Mrs. Morella, and say to both of the panelists that I appreciate your presence and certainly appreciate your convictions on these issues, but I would remind both panelists, particularly Mr. Canady, that as we look at increasingly diverse and challenging marketplace in the coming century it is imperative that we search for ways, creative ways and imaginative ways to reach out to those who not only have been excluded and isolated, but to those whom will play a massive and significant role in ensuring that we remain competitive. Mr. Herger

has raised some very interesting points and we had a brief conversation on the floor just a few minutes ago, the two votes that we had, where we talked about finding ways to collaborate to actually improve and correct the conditions that not only, perhaps, pervade his district, but pervade my district as well.

As I said to Mr. Herger, and I say often, when we talk about discrimination and we talk about reverse discrimination it's insulting in some ways because it suggests that only whites can discriminate against other races of people and when it's somebody else discriminating against whites that it's reverse discrimination. Discrimination is discrimination. It doesn't have to be reverse or for; I didn't know that there was for discrimination. This panel has been illuminating in that way and I hope that we can move toward the rhetoric that more accurately captures what is happening.

Second, affirmative action in my summation has been good for America. I am a graduate of the University of Michigan Law School. My LSAT scores probably did not meet the means which the University of Michigan was looking for, however, I graduated with honors from law school. I don't think they give out grades based on affirmative action. I don't think they give out grades: We have to give out a few A's to Hispanic students and black students and women. I wish they had, maybe I'd have gotten more A's in law school, but I don't believe they do that in our institutions of higher learning. If you look at the number of women, and certainly Mrs. Morella has raised this issue, and the number of Latinos and native Americans and Asian-Americans and African-Americans that have been able to move into positions that normally they might not have had those opportunities, I think we have to look at it from that perspective.

I would say to my friend, Mr. Canady, that you raise the point as a justification for your legislation in light of what the Court has done in weakening affirmative action and that you want to ensure—Ms. Norton certainly touched on this—you want to ensure we don't have to go through the courts in order to address many of these issues, we can address them perhaps with a legislative remedy; and if I'm wrong, you can correct me, sir. We recently had a hearing regarding the EEOC and that just an enormous backlog that agency faces and the challenges they face. Furthermore, we found that the EEOC findings oftentimes are disregarded or ignored by many of our Federal agencies, even when they find that there's evidence or have found that there's evidence of wrongdoing, so I would appreciate hearing your thoughts on that.

Second, to my friend, Mr. Herger, I would be interested in hearing some of the recommendations you may have for outreach, because the outreach efforts you may propose I'm hoping that you can persuade Mr. Canady, and perhaps other members of your party, even some members of my own party whom would have us believe that perhaps those outreach efforts, and if I mischaracterize something that your bill states, Mr. Canady, please correct me. I might add, you have a gentleman on your staff graduated from my high school, from St. Albans, so you have my respect for at least being able to recognize good talent. I would say to Mr. Herger, perhaps you could illuminate and enlighten us all as to the type of outreach efforts you're talking about because as we look at the Piscataway

case, which I think you referenced one of the circuit cases dealing with how diversity can no longer be used as a justification for hiring and certainly promotion and retention decisions, and I'd be interested in how you would frame something like that and maybe you and Mr. Canady can work that out.

Third, to Mr. Canady, it is easier in many instances, for white men to prove that there has been discrimination in the workplace. Often the reason is because or primarily because that's the stated purpose why they didn't receive the job or they were not promoted. Whereas, with African-Americans, I think, or minorities in general, women and minorities, as you well know, you often have to show that, but for race or race was the primary or only reason that you did not receive the promotion, that you were not hired. So there seems to be an inherent tension there and I can appreciate you being able to highlight and identify the obvious, but how do we go the step beyond that and begin to address some of the underlying issues?

I realize I've said a lot and if the two of you perhaps can respond, perhaps portions or aspects or even all of that it'd be much appreciated, and thank you again for coming.

Mr. CANADY. Thank you for your questions, Mr. Ford. On this issue of outreach which I think is very important, I just want to read a portion of my bill that specifically addresses it. In the bill we specifically provide that the Federal Government is allowed, and I quote, from page 3 of the bill, starting on line 7,

> * * * to encourage businesses owned by women and minorities to bid for Federal contracts or subcontracts, to recruit qualified women and minorities into an applicant pool for Federal employment, or to encourage participation by qualified women and minorities in any other federally conducted program or activity, if such recruitment or encouragement does not involve granting a preference, based in whole or in part, on race, color, national origin, or sex in selecting any person for the relevant employment, contract or subcontract, benefit, opportunity or program.

We go on and have a similar provision that we may require or encourage similar things of Federal contractors in reaching out to subcontractors and employees. That's specifically in the bill and I think that needs to be a major focus of our efforts. So we couple the outreach with a policy of treating people as individuals, so that they will be evaluated based on their qualifications and no one will either win or lose because of that person's race or gender. Now, that's in the bill. Furthermore, I will say, that was what affirmative action was originally about. That is the original model, it was changed over time as I said earlier, but that is what I'm trying to reaffirm here.

You have raised the point about the subtlety of discrimination in certain contexts. That is true. There's no question about that, that can happen. There is no magic answer to that, but I think that the answer certainly is not putting in place a system that divides and sorts people based on their race and gender. If we look at our history in this country, the history of race in this country, it's a tragedy. We start with slavery and the contradictions involved in that institution; that reality contrasted with the ideals we expressed in recognizing the equality of all people; in recognizing, in our religious traditions, recognizing that all people are created in God's image.

Mr. FORD. Can I just ask you this? I appreciate what you're saying, again, I don't mean to sound disingenuous, I appreciate your convictions and passion on the issue. If we were to say adopt your bill or pass your bill, do you think we would obliterate the sorting and the classifying and all of the horrible things. Just out of curiosity, because I have my own personal opinion about you, but I think it might aggravate the problem that currently exists and if you and I knew the answer we would probably be a Governor or Senator somehow. Do you think your bill would actually alleviate or eliminate the problem in which you stated which currently exists?

Mr. CANADY. My bill would end Federal policies that sort and classify and divide people based on their race and gender. Would it end all discrimination in our society or within the Federal Government? No. I acknowledge that. There is still prejudice in our society, there is still discrimination. No one has the magic ball. The question for us is how can we move forward from where we are at this point. How can we move toward a society in which someone's color does not determine that person's destiny? How can we move more toward a society in which everyone is recognized as an individual, someone who is created in the image of God and should be treated as such. I understand there is one view that says in order to overcome what some people view as endemic racism in our society, we have to have this system of preferences. I think that view does not give enough credit for the progress we have made. Furthermore, it involves, a contradiction by saying that we can overcome discrimination by practicing discrimination. If you think about it, this idea that somehow we're going to overcome prejudice by following policies that treat people on the basis of their race or gender just doesn't make sense. Furthermore, it's clearly inconsistent with the historic goal of the civil rights movement that we have a colorblind legal order. Now I know many people that were involved in pursuing that goal, abandoned it because of their frustrations that economic equality did not follow immediately after the passage of the Civil Rights Act of 1964, but I think that if we look at our history and we look at the way this system of preferences has performed and the problems that we still have, and we consider our fundamental principles as Americans, we have to conclude that it is simply wrong for the Government to continue these policies of treating people one way or another because of an accident of birth. It is, it creates an environment which is bad for everybody. It creates an environment, for instance, there's some people who would deny you the respect that you deserve for your degree from the University of Michigan Law School because they would say he got that simply because of this system of affirmative action. That is unjust, that's unfair, I know that. I would condemn that kind of attitude, but when we've got this system in place it necessarily engenders that type of attitude.

Ms. NORTON. There may be some folks that would say that the majority of white guys that got into law school got in too because of a set of preferences. Do you accept the justification or the rationale that perhaps the reason we have, what you call preferences and quotas and for arguing those sakes, I'll accept that, that maybe we had a set of preferences and quotas prior to the introduction of what you claim is legal discrimination?

Mr. CANADY. There is no question that in the history of this country, and more particularly pertinent to the jurisdiction of this subcommittee, in the Federal Government itself there is no question, there was a systematic policy of excluding people on the basis of their race, of segregating people on the basis of their race. That's a reality, that happened. It was a disgrace, it was immoral, it's a blot on our national history. The issue now is, given that history, given the situation that we find ourselves in today in intervening events, what is the best way—do we move forward? I believe that the best way for us to move forward is on the principles that are articulated in the 1964 Civil Rights Act. The principles that we should treat people as individuals and that we should not discriminate based on race or gender. That's what the 1964 Civil Rights Act was about. I think that was the right thing; I think that was necessary; I think it was long overdue.

Unfortunately, in the course of time, we've gotten away from those principles. I want to get back to those principles; I believed in that. I was very young at the time, but soon after that, as I learned about it, I strongly supported what was being done there and that movement. I came from an area, when I was growing up, I saw the prejudice and discrimination, but I can also tell you, I have seen enormous changes take place over the period of time since the 1964 Civil Rights Act, and I think we have to acknowledge those changes and we have to acknowledge that America and the American people are not pervasively racist. I believe that this system of preferences is really based on the assumption that the American people and our institutions are pervasively racist. I reject that idea. Racism remains, but the American people have, at one point were racist, there's no question about that. If we look at the history, we can't deny that. We should be ashamed of it, of that history, but the reality today is different and for us to continue these policies I think only shores up racial resentments and racial divisiveness.

I want to say to Ms. Norton, I appreciate your respecting my intentions. Some others in this debate have not done that. Let me say this, I respect your intentions. I believe that there are some people that want to benefit from this system and would use it as a way to divide. I don't believe that's true of either of you. I believe that you support this because you think it's the right thing. What we have here is a fundamental difference about what will work. I believe that we are looking for the same goal. I think history tells us that allowing this Government to treat people one way or another because of their race or gender, and especially given our history of race, on the basis of race, to allow the Government to engage in these distinctions of race is inherently pernicious.

Mr. FORD. Mr. Herger, did you want to say anything, sir? I really took all your time by, I guess, reposing questions to Mr. Canady, but if you wouldn't mind? If the Chairman doesn't mind, of course?

Mr. HERGER. I really don't have anything to add. Thank you.

Mr. MICA. I thank the gentleman and recognize Ms. Norton.

Ms. NORTON. Mr. Chairman, I would just like to make a unanimous request for inclusion in the record and to say, as he leaves, to say to my good friends, and especially to Representative Canady, that you are beating a nearly dead horse. You've got to know when

to stop beating a horse, especially if that horse has race written across it's back. We need to revive enough affirmative action to get rid of the remaining remnants of our horrible, racial past so that we can, finally, after 400 years, put race entirely behind us.

Mr. Chairman, I ask unanimous consent to place into the record testimony in which I indicated that white men file 1.7 percent of discrimination complaints, or did so between 1987 and 1994, at the Equal Employment Opportunity Commission, and you have to file a discrimination complaint there before you can go into court; and that also indicated that white men filed the great majority of age discrimination complaints at EEOC, 6,541 out of 8,026 age complaints filed in 1994. I ask unanimous consent to place the testimony in the record.

Mr. MICA. Without objection, so ordered.

I would like to thank both of our panelists and colleagues for joining us today. I think it was a most interesting, provocative discussion. Probably one of the most hotly contested to come before this subcommittee, but something that does deserve further consideration and possible action by the subcommittee. We thank you for your participation and contribution to our subcommittee this morning.

Mr. CANADY. Thank you, Mr. Chairman.

Mr. HERGER. Thank you.

Mr. MICA. I'd like to welcome our next panel. On our next panel is Lynn Cole and Angelo Troncoso. Lynn Cole is an attorney, Mr. Troncoso is an IRS employee. Also, we have Edward Drury, an FAA employee, and Ronald Stewart, Deputy Chief for Programs and Legislation of the U.S. Forest Service. Excluded from the panel is Mr. John Boyer, a Social Security employee, who has withdrawn on the advice of his counsel. So we do have these individuals to testify.

Since none of you have testified before or maybe are not familiar with the panel, this is an investigations and oversight subcommittee of Congress and it is our practice to swear in our panelists who are not Members of Congress. So if you would please stand, raise your right hands.

[Witnesses sworn.]

Mr. MICA. It is answered in the affirmative and I'd like to again welcome our panelists. Ms. Cole, are you going to also testify this morning?

Ms. COLE. Yes, Your Honor.

Mr. MICA. OK. Well, we'll recognize you first and then hear from Angelo Troncoso, who is an IRS employee. You're recognized, Ms. Cole.

STATEMENTS OF LYNN COLE, ATTORNEY; ANGELO TRONCOSO, IRS EMPLOYEE; EDWARD DRURY, FAA EMPLOYEE; AND RONALD STEWART, DEPUTY CHIEF FOR PROGRAMS AND LEGISLATION, U.S. FOREST SERVICE

Ms. COLE. Good morning, Mr. Chairman and members of the subcommittee. My name is Lynn Cole. I'm an attorney, trial practicing attorney in the city of Tampa, FL, and have been so for approximately 22 years. In the past 4 years or so, at the very least, I have focused on defending and prosecuting discrimination law-

suits, primarily in Federal court. My clients have included corporations and they have included employees. Most recently, I have seen an increasing number of Federal employees who have sought my services as an attorney, and more particularly still, and perhaps not surprisingly, I have seen a number of employees from the IRS seeking my services as legal counsel.

In every case that I see, and by the way, today I will be speaking to you from the perspective of an employee, and more particularly, Federal employees. Every case has to be handled on an individual basis, with a thorough investigation and comprehensive analysis of the facts particular to that case.

However, what I wanted to share with you this morning was what I am discerning as a common thread among the complaints being told to me by Federal employees, and particularly, IRS employees. That common thread is thus: There appears to be an increasing distrust of the system. In IRS, as in most Federal agencies, the system for promotion is based upon merit. What I'm seeing by employees is increasing feeling that there are other factors involved in promotion, other than objective criteria based upon performance. These employees, as a general philosophy, a general thread common among their thinking, is that there is some other factor involving some preferential treatment.

What do I mean by preferential treatment? I have a very diverse base of clients. By preferential treatment, it can mean that client is suffering from discrimination based upon his or her race, gender, or ethnic background. I have heard complaints from other employees who believe that they're being denied promotions because someone is receiving preferential treatment based upon their race, ethnicity, or gender.

It's important to understand that once an employee has begun to feel this distrust there are some things that are going to happen, there's some feelings that are going to occur among employees in general. When they believe that they have not received a promotion based upon an objective evaluation of their performance, they become afraid. When they become afraid, they become angry, and when they become angry they reach out for any assistance that they can, and guess what, the only assistance available for the Federal employee for discrimination is in the internal EEO process of that agency.

If you've read my statement, what I've attempted to do in providing you with recommendations is to focus on one aspect that I believe can be fixed. Not only do employees feel distrust of the merit system when they think that there is another factor, other than merit, being utilized in the promotion system. Another common thread among employees that I've talked to is that when they raise the issue of discrimination and when they raise it through their own EEO agency process, the same problem is occurring. They are not being heard on the merit of their complaint. That the EEO process is not responsive to them. That it fails to disclose information to them by which they can make an informed decision.

So, what I have intended to do in my paper to you is show you where I think we can improve the system in the EEO process. Why have I chosen to focus on that? Well, I will tell you that I have an assumption in focusing on that, and that is that we will continue

to see these problems and if we don't fix them at this level we're going to see increasingly contentious and expensive lawsuits in the Federal jurisdiction. EEO, that's the first contact an employee has, and it's very important that employee is given an opportunity to be heard and to be heard in a genuine manner. So I've given you some suggestions on we do that in my paper.

Angelo Troncoso is a client of mine. He's a special agent with the criminal investigation division of the IRS. His case, perhaps, demonstrates the interplay of factors other than merit in promotions. You will hear from him today, he's not totally comfortable in providing you with testimony for his fear—his own fear—of reprisal. He is here today to answer questions, although, I will tell you, that the case is in litigation and we are expected to try this case before a jury within the next several months, so in that respect, we may not be able to be as detailed with you in some of our answers regarding the strategy or case facts.

Yes, sir.

[The prepared statement of Ms. Cole follows:]

STATEMENT OF LYNN HAMILTON COLE, ATTORNEY, TAMPA, FLORIDA, ON "EMPLOYMENT DISCRIMINATION IN THE FEDERAL WORKPLACE: PART II - RACE AND GENDER QUOTAS IN FEDERAL EMPLOYMENT"

Before the
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT'S CIVIL SERVICE SUBCOMMITTEE

SEPTEMBER 25, 1997

Mr. Chairman and Members of the Subcommittee, I have been requested to testify on a number of matters related to the subject matter of your Hearing. I have over 22 years of experience as a trial attorney, both in the private sector and previously with the federal government as an Assistant United States Attorney in the Middle District of Florida. I have practiced in Tampa, Florida, since 1979, and have focused my trial practice on employment discrimination for the past four years, handling cases for both employers and employees. Recently, I have received an increasing number of requests by federal employees to represent them in discrimination complaints.

1. *You have asked for my comments on the selection and promotion of employees by federal agencies using factors other than merit.*

My experience shows that discrimination can be a factor in the selection and promotion of employees by federal agencies. This unfortunate situation is best illustrated by the facts alleged in a case filed by Angelo Troncoso against the Internal Revenue Service in 1995. It is a case alleging that the merit system failed to promote an obviously qualified special agent in the Criminal Investigation Division who was the only Hispanic special agent employed in the North Florida District for the majority of the relevant time period. In a federal lawsuit filed after he was denied any vindication in an internal EEO investigation, Mr. Troncoso, a 34 year old Cuban American, alleges that he was denied promotions three times, twice when he ranked Number 1 under the IRS merit ranking system.

In the first 1992 promotion denied to him, three persons who ranked significantly lower were selected over Mr.Troncoso who had tied for the position of Number 1 on what the IRS calls its "Best Qualified List". In another refusal to promote him in 1995, IRS management selected a person ranked No. 14 over Mr. Troncoso who again was ranked Number 1 by a ranking panel of three Group Managers. The IRS has admitted that Mr. Troncoso was in all respects qualified for two of the promotions but has attempted to obfuscate the issues, to state inconsistent reasons why management failed to promote him, and finally, when all else failed, to take the position that it could do whatever it wanted to with respect to his promotions.

2. *Describe the factors that led to the filing of his discrimination charges.*

When Special Agent Troncoso attempted to ascertain why he had not received the first challenged promotion in 1992, his Group Manager was given information by management which was at best misleading. When he was denied his second promotion, IRS management did not provide any of the facts or documents surrounding that promotion, and he had no information with which to challenge that decision until documents later produced by the IRS in discovery of the pending lawsuit. Such documents were denied to him during the internal agency EEO investigation. When he was denied a third promotion, knowing that he had ranked as the best qualified of all of the applicants, he felt compelled to question the action and then timely filed an EEO complaint.

3. *What was Mr. Troncoso's experience working through administrative procedures, including Appellant agencies available to federal employees?*

It has been my observation in numerous examples of discrimination complaints that all too often in the initial investigation of discrimination matters, without strong leadership and direction from the highest corporate authority, management, in both the public and private sectors, tends to follow similar patterns when accused of some inappropriate action:

- Extreme anger and denial on the part of members of management accused of discrimination;
- An immediate circling of the wagons mentality among those accused in order to coordinate memories and facts;
- Professional and personal attacks on the person making the accusations;
- On occasion, parsing out some small benefit to give the appearance that the person was not mistreated in the past;
- Stonewalling on discovery of potentially damaging documents;
- Meting out reprisals - some subtle and some not - against the complainant for making the allegation.

In Special Agent Troncoso's case, unfortunately some of the patterns described above appear to have been followed. First, it is important to note that employees in the same local IRS office as the managment charged with discriminatory treatment first handled Mr. Troncoso's complaint. Importantly, the very management challenged for failing to promote him were those first deciding what do with his complaint. The EEO policy used in his investigation, as with others, is a simple form of "self-policing".

Moreover, the investigation was handled in a manner almost guaranteed to ensure

sustaining management's denial of any culpability and therefore, failure by Mr. Troncoso. The person initially assigned to handle the investigation, the EEO Counselor, followed what appeared to be a simple format to create the procedural impression without pursuing the substance of the complaint.

The simplest observation of the internal EEO procedure reveals that it is riddled with conflicts of interest. From the onset, personnel officials adopted a very defensive attitude when Agent Troncoso made inquiries regarding one of the promotions in question. Both the Counselor in the informal mediation process and the EEO investigator later assigned to investigate the case appeared to be seeking information to legitimize management's decision. For example, the Counselor interviewed the supervisor of the Chief who made the decision not to promote Mr. Troncoso. That supervisor supported the Chief's decision without independent inquiry and the Counselor blindly accepted his opinion.

As we later discovered in sworn testimony by both personnel and EEO representatives of the IRS, no one believed they had a duty to take an active role in reviewing the promotion process to ensure discrimination was not a motive in management's decisions. This position was articulated by two "Most Knowledgeable Persons" representing the IRS from both the personnel and the EEO perspective. Having experienced this apparent lack of responsibility during the agency's initial "investigation." Mr. Troncoso believed his only recourse was through the courts.

It appeared as if the agency was more interested in going through the motions instead of thoroughly investigating the complaints. Had any serious attention been given to his complaints, it is likely that his complaints could have been resolved at that juncture. As in most discrimination complaints, the timing of communication between responsible parties and the complaintant is critical to giving complainants a level of trust that their complaints are being treated fairly and taken seriously.

Because management appeared to react personally and negatively to the complaint, and because management was involved in the decision-making process, the situation escalated to a lawsuit. Any lawsuit is costly, and this one is particularly contentious. The IRS has almost limitless powers, and it is clear by its actions in this case that it will spare no costs. It has expended considerable workforce effort and countless agency attorney hours to contest the production of relevant documents. A Motion to Compel and, finally, a Motion for Sanctions have required the IRS to produce documents they otherwise would have failed to produce. In fact, the IRS misrepresented to the Court - on more than one occasion - that it did not have certain information sought in discovery in a computer format. The filing of an affidavit by another IRS employee (swearing that such computer data existed) forced the IRS to retract its representation to the Court and admit that computer data bases and statistics do, in fact, exist.

Like many lawsuits, the human costs of this lawsuit are all too high. The IRS's actions in denying Special Agent Troncoso promotions for which he was the best qualified, in its capricious handing of the agency EEO investigation and in its conduct in the lawsuit, has basically destroyed the morale and career of an agent who was totally dedicated to a system he believed in and was

proud to serve. In seeking to overwhelm this one individual who has dared to challenge merit system promotions, the Service and management daily risk losing credibility and loyalty among its rank and file agents. Like Special Agent Troncoso, the vast majority of dedicated special agents simply want a system which fairly rewards hard work and extra effort.

Most who know him understand that Angelo Troncoso has asked for no special preference because of his Hispanic heritage - only that he **not** be treated less than equal because he happens to be Hispanic. But when a merit system is manipulated to give others preferential treatment based on an individual's race, gender or ethnic origin, then a "merit" system is not only suspect, but meaningless. When employees cannot rely upon a system which preaches but does not practice merit, an employee's urge to fight becomes stronger and potential for acrimonious and costly litigation increases.

4. *Has Special Agent Troncoso suffered any reprisal or retaliatory actions?*

For the first time in the last decade of having received excellent evaluations, Special Agent Troncoso now has received a lower evaluation. More importantly, the lack of a workable, unbiased agency review system effectively punishes him. It leaves this dedicated employee with only one option, the courts and a jury of his peers. Although he has the support of his peers that know him, more than a few coworkers shun him and accuse him of disloyalty. The emotional and financial toll on him and his family is debilitating. The discovery tactics by the agency and its refusal to disclose information in the course of the litigation is disheartening, at best.

Special Agent Troncoso had serious concerns about appearing before this Committee to testify. Based on his past history, he fears that future reprisal is certain: it is only a matter of time after the conclusion of this litigation when managment is no longer in the limelight and their retaliatory action will not damage the defense of the lawsuit. Sadly, he no longer has any expectation of career advancement and only hopes to be able to perform his duties as a special agent without interference for the long remainder of his employment with the IRS.

5. *Is Special Agent Troncoso's experience an isolated incident or does it reflect more extensive agency practices?*

My experience suggests that Angelo Troncoso's case is not an isolated incident. A promotional system of merit (with all of its philosophical underpinnings) which exists in form only, but not in practice and perception, will ensure dissension, recrimination and ultimately increasing litigation. The current internal system of self-policing EEO complaints permits pervasive management influence and self-protection and creates the perception that no one raising an issue will be heard or treated fairly.

In the last month alone, I have consulted with five IRS employees, all of whom question the fairness of the EEO investigative procedures. I see an intense distrust of both the merit system and the EEO internal process. There is a growing suspicion that one's race, gender

or ethnic background is more important than consistent hard work and accomplishments ostensibly awarded under a merit system of promotion. Some IRS agents question whether or not they are being pressured to retire so that management can simply fill his or her position with an employee of a different race, ethnic origin or gender.

I also have handled discrimination matters and consulted with several Department of Justice employees. These agency employees likewise question the trustworthiness of an EEO investigative procedure where the management group making the decision on their complaint may include the very manager about whom they are complaining. The fear of reprisal is ever present and chills even the bravest employee. I am hearing more complaints than ever from employees who have never in their lives made a complaint: once they voice an objection, management makes their lives in the workplace intolerable. As one former member of IRS management has been heard to say, "Management has a long memory."

6. *Do I have any recommendations to prevent the development of such causes of action and to achieve fair redress more efficiently than under current procedures?*

Yes. In my opinion, the greatest force effecting diversity in the workforce is not affirmative action. It is Title VII, the ADA and like statutes. These statutes require that all persons be treated equally. The consequences for failure to do so in the private sector have been enormous. Boards of Directors and management listen very carefully when it affects their profit margins and Title VII has done so. As a result more corporations are working to change their corporate cultures to ensure a diverse workforce free of discrimination. When factually supported allegations of discrimination are raised, corporations are beginning to recognize the benefits of ferretting out offending employees through meaningful in-house investigation. In some cases, corporations are sincerely dedicated to prevent discrimination in the workforce before it is reported. Human Resource managers are becoming more than merely staff positions; Human Resource recommendations are taken more seriously than before and incorporated into long range corporate planning. In short, more corporations are beginning to recognize that their most valuable cost-effective asset is a loyal, diverse workforce.

Can we say the same for the federal environment? Are claims of discrimination taken seriously, or are they viewed as something to be suppressed and written off without serious consideration? Do we have a growing situation where certain minorities are given greater preference in promotions over other minorities? Will we see increasing instances where Caucasian employees believe that less qualified minorities are being promoted by virtue of their race ethnicity or gender? In a system identifying itself as one of merit, one should be promoted because of merit. If a qualified minority is not promoted, then he or she may well be faced with a situation similar to that of Special Agent Troncoso.

Unlike the private sector, the federal government does not have the same visible profit motive and accountability to ensure diversity and fair treatment in its workforce. By statute, damages allowable against the government are much less than those recoverable against private employers. Unlike private corporations and businesses that have to consider the out-of-pocket

costs of litigation as a factor in considering voluntary resolution by way of settlement, there exists little or no such economic checks when government is a defendant.

In government, the actual costs of litigation are often hidden, but nevertheless exist in the utilization of government employees as part of the defense team and in the diversion of the agency's employees' time in preparing for testimony, document production, court hearings, and trial. In addition, the loss suffered as a result of increasing employee discrimination complaints and lawsuits in a very real sense affects the public economy. Employee anger, resentment, loss of morale are all critical factors adversely affecting the productivity of the government's workforce. Recent Survey Feedback Action ("SFA") survey results in the North District of Florida show a significant distrust of IRS management by the workforce. In this survey, employees express their perception that management is treated differently than the general workforce with respect to disciplinary actions and ethical expectations.

The following concepts are respectfully offered as ways to achieve fair redress under the present system.

- Create a separate independent forum for analyzing discrimination at the agency administrative level.

  The private sector must file reports with the EEOC, and respond to inquiries and investigation from the EEOC, which has its own independence and a mission different from that of the private employer. Compare that process to a federal agency's internal EEO office. An external, probably centralized forum, to the Federal agency can be built into the investigative system dealing with agency employee discrimination complaints. By implementing such a forum, the federal government better utilizes its resources in a less costly manner.

- Utilize an independent mediation process at the agency administrative level.

  EEOC has implemented the use of mediation at the administrative level and the results look promising. So long as the mediation process requires some independent agency analysis and participation, the system may reduce the filing of lawsuits.

- Consider dissincentives and directives to discourage agency management personnel who engage in discriminating practices, hinder investigations, or retaliate overtly or covertly against complaining parties.

- Thank you for your invitation and the opportunity to answer your inquiries.

BIO FOR LYNN HAMILTON COLE

EDUCATION: University of Maryland, B.A. in History, 1967; University of Maryland, graduate courses toward M.A., 1968-69; John Marshall Law School, J.D. 1975, President, Student Bar Association, 1974-75.

ACADEMIC HONORS: Who's Who in American Colleges and Universities, 1966, 1967, 1975;
$2000 Pepsi Cola Scholarship, 1966. "AV" rated, Martindale Hubbell.

PROFESSIONAL ADMISSIONS:
U.S. Supreme Court (1989);
Pennsylvania Bar (1976);
Florida Bar (1980-present);
U.S. District Court, E.D. Pa. (1977-79);
U.S. District Court, M.D. Fla. (1980-present);
U.S. District Court of Appeals, Fifth Circuit (1979-81);
U.S. District Court of Appeals, Eleventh Circuit (1982-present);
American Bar Association (1973-present), Criminal Justice Section (1992-present), Litigation Section (1987-91);
The Florida Bar, Tampa Labor Relations Section (1995-);
Federal Bar Association (1982-present);
Hillsborough County Bar Association (1979-present);
Lehigh County Bar Association (1976-79);
Florida and Hillsborough County Associations for Women Lawyers (1982-84; 1992-present);
National Association of District Attorneys (1975-77).

PROFESSIONAL ACTIVITIES:
Assistant United States Attorney (appointed by Griffin Bell, 1979-84);
Organized Crime and Narcotics Task Force (setup by President Reagan, 1983-84);
13th Judicial Nominations Commission (appointed by Governor Chiles, 1993-present, Chair, 1996-97);
Civil Justice Reform Act Advisory Commission (appointed by Chief District Court Judge, M.D. Fla., 1993-present);
Chairperson, Selection Committee for United States Magistrate (appointed by Chief District Court Judge, M.D. Fla. 1991);
11th Circuit Vice-President, Federal Bar Association (1990-present);
President, Tampa Bay Chapter, Federal Bar Association (1989-90);
Chairman, 13th Judicial Circuit Florida Bar Grievance Committee (1987-89);
Chairman, Trial Lawyer's Section, Hillsborough Bar Association (1991-92);
State Mediation Qualifications Board (appointed by Florida Supreme Court, 1992-present);
Master and Charter Member, American Inn of Courts, Ferguson-White Inn (1987-present);
Federal Court Practice Committee, Florida Bar (1992-94);
Judicial Evaluation Committee, Florida Bar (1993-present);
Vice-President, Assistant United States Attorneys Organization (1993-present);
Secretary, National Circuit Officers Counsel, Federal Bar Association (1991-92);
Board of Directors, Lehigh County Bar Association (1977-78);
Moderator, *Trial By Jury Program* sponsored by the ABA and Hillsborough County Bar Association (1989-present);

Mr. MICA. Thank you for your testimony. We'll now hear from Angelo Troncoso. Welcome. You're an IRS employee and your counsel has also provided us with some information about your background and your case. You're recognized, sir.

Mr. TRONCOSO. Thank you, Mr. Chairman and members of the subcommittee. The subcommittee has requested that I testify regarding the conditions under which I was denied promotion by the Internal Revenue Service under three separate conditions, as well as the informal and administrative process that I worked through before filing suit in Federal district court. As my attorney stated, I do feel a degree of discomfort and conflict in being here today, not only because of a fear of reprisal, but also from a conflict that stems from a sense of betrayal to the agency that employs me. I have been able to overcome that conflict that I experienced, both in testifying here and in filing this lawsuit, by acknowledging the fact that it is because of my loyalty to the service and because of my loyalty to this Government that I've undertaken both of these actions.

I am a Cuban-born immigrant, everything I am, everything that I own, the blessings that my family and I enjoy, and even the freedoms that we enjoy in this country, are because of this Government. My loyalty lies here. Not as a Cuban-American seeking preferential treatment, but as an American demanding equal treatment under the law.

Should I prevail in the litigation against the Department of the Treasury, I will only achieve partial vindication. I think that justice demands that accountability be established for the individuals responsible for denying the promotions and justice will not totally be served until the circumstances and factors which prompted me to file this lawsuit and which also prompted me to be before you today are eliminated from Government practice, and specifically from the practice of the IRS.

There's been a series of questions regarding affirmative action and whether affirmative action should be in place or not be in place. I'm not even going to attempt to tackle that particular issue. What I do know and the scope of my knowledge is that affirmative action, as it is implemented by the Internal Revenue Service, is inherently unfair. It's unfair in the sense that it discriminates, and I'll get into it in the form of questions if the subcommittee would like. They had an opportunity to promote the most qualified individual, on two separate occasions where I ranked No. 1 on a roster. They had an affirmative action plan which they could have enforced without violating the merit selection process. They opted not to promote me on both of those occasions. I believe that decision to not promote me was racially motivated.

I have been a special agent for approximately 11 years. I started my employment with the Internal Revenue Service directly out of college. I have a bachelor's degree from the University of South Florida. I had every intention of making the IRS, and still have every intention of making the IRS a career, though I really don't feel at this point that I have much of a chance of advancing beyond my current status, because the IRS I believe will, at some point eventually, retaliate against me. The retaliation will be eventual, but it will be certain. Frankly, I think that retaliation at this point

would be counterproductive to their defense in my litigation and I don't think it's going to happen until well beyond the litigation.

Prior to being a special agent, I was a student trainee with the Internal Revenue Service. I achieved excellent marks in all my training with the Internal Revenue Service and have always received outstanding evaluations since my starting with the IRS. I can see no reason other than racially motivated reasons as to why I was not promoted on three separate occasions. Two of the occasions being to a special agent grade-13 position, and the one position being to a grade-13 group manager position, which is a supervisory position.

I don't have anything further, Mr. Chairman.

Mr. MICA. Thank you. We will return for questions, but finish the remainder of the panel first. I'd like to recognize Mr. Edward Drury. He is an FAA employee. Welcome and you're recognized, sir.

Mr. DRURY. Thank you, Mr. Chairman. Good morning, my name is Edward F. Drury and I reside in Orange Park, FL. I have been employed as an air traffic controller by the Federal Aviation Administration for 29 years and I am currently assigned to the Jacksonville Air Route Traffic Control Center in Hilliard, FL. Prior to being employed by FAA, I served 4 years in the U.S. Marine Corps as an air traffic controller, serving at Quantico, VA, and Hue, Republic of South Vietnam.

In December 1993, I had a 26-year exemplary career destroyed by senior FAA, southern region managers, in order to facilitate and justify my removal and replacement by a black male. These discriminatory actions were the result of the National Black Coalition of Federal Aviation Employees putting extreme pressure on senior FAA officials to select a black male for the position of air traffic manager at Jacksonville Center. As a result of this pressure, I was demoted and humiliated, and a black male was selected as air traffic manager.

I subsequently filed an EEO complaint with FAA's southern region civil rights division. My complaint was reviewed and accepted by FAA and due to the merits of the case, was forwarded to the Department of Transportation, civil rights division for investigation. The Department's civil rights staff never considered the merits of the case, but rather, chose to dismiss the case on a timeliness technicality. My attorneys, Datz, Jacobson, Lembcke and Garfinckel, filed suit in my behalf, shortly thereafter, in Federal district court in Jacksonville, FL.

During the intervening 2 years which it took me to get my case to trial, my attorneys were forced to respond to two different motions for summary judgment by the U.S. Attorney on the issue of timeliness. My attorneys, throughout litigation, had a very difficult time getting documents through normal discovery and, at one point, the Government was sanctioned by the court for failing to turn over documents. During this entire process no one in the Departments of Justice or Transportation seemed at all concerned with the merits of my claim, but rather, continued to try to defeat me on a technicality.

On June 17 and June 23, 1997, the parties participated in third party mediation. The Government made no serious attempt during this phase of litigation to settle my case, and seemed content to go

to trial. At one point, the mediator told my attorney that the Government attorneys' attitude was that the U.S. Government is sued all the time and that they were not concerned about going to trial.

On July 18, 1997, after a 5-day jury trial, the court ruled that I had been discriminated against by the Federal Aviation Administration and awarded me $500,000 in compensatory damages. The award was later reduced to the $300,000 statutory limit for Federal employment discrimination cases, and the court is still deliberating on the issue of equitable relief.

Additionally, I filed a second EEO complaint in September 1995, as a result of systemic discrimination by the FAA in their diversity hiring and promotion practices. I also felt at that time I was being retaliated against for filing my original complaint. This complaint, the second one, is still in the administrative process, and to date, it has been more than 725 days since I initially was interviewed by an EEO counselor. This process, by statute, is intended to be completed in 315 days. I personally have met every timeframe for the submission of documents and affidavits, yet the Department of Transportation civil rights division has failed to meet any time requirements in the processing of this complaint.

I have always believed and supported equal employment opportunities for all people. As a management official for the last 20 years, I have been a leader in enforcing EEO regulations and have consistently supported the FAA's affirmative action efforts. But I am here before you today to tell you that my experiences attempting to solve my own complaint within the administrative process was extremely frustrating. At one point, I was even told by a DOT civil rights specialist that if I was unhappy with the speed at which my complaint was proceeding, that I should file suit in Federal court.

Thank you for allowing me to appear before this committee.

[The prepared statement of Mr. Drury follows:]

Opening Statement by Edward F. Drury before House of Representatives, Committee on Government Reform and Oversight, September 25, 1997.

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On July 18, 1997, after a five day jury trial, the court ruled that I had been discriminated against by the Federal Aviation Administration and awarded me $500,000.00 in compensatory damages. The award was later reduced to the $300,000.00 statutory limit for federal employment discrimination cases, and the court is still deliberating on the issue of "equitable relief".

Additionally, I filed a second EEO Complaint in September 1995, as a result of systemic discrimination by the FAA in their diversity hiring and promotion practices. I also felt that I was being retaliated against for filing my original complaint.

This complaint is still in the administrative process and to date it has been more than 725 days since I initially was interviewed by an EEO Counselor. This process by statute is intended to be completed in 315 days. I personally have met every time frame for the submission of documents and affidavits, yet the DOT Civil Rights Division has failed to meet any time requirements in the processing of this complaint.

I have always believed and supported equal employment opportunities for all people. As a management official for the last 20 years I have been a leader in enforcing EEO regulations and have consistently supported the FAA's Affirmative Action efforts. But I am here before you today to tell you that my experiences attempting to solve my own complaint within the administrative process, was extremely frustrating. At one point I was even told by a DOT Civil Rights Specialist, that if I was unhappy with the speed at which my complaint was proceeding, that I should file suit in Federal Court.

Thank you for allowing me to appear before this committee.

Mr. MICA. Thank you for your testimony. I'll now recognize Ronald Stewart, Deputy Chief for Programs and Legislation in the U.S. Forest Service. You're recognized, sir.

Mr. STEWART. Thank you, Mr. Chairman, and I'm pleased to be here this morning to talk about the Forest Service's efforts to address employment discrimination in the Forest Service. I'm accompanied by Dr. Luther Burse, who's sitting behind me. He is the director of civil rights in the Forest Service, and if appropriate, during the questioning, I would request that he be able to join me at the table so we could be more efficient in trying to answer any questions that you might have. Also, you have my full statement. I wish to have that submitted for the record and give you——

Mr. MICA. Without objection, that'll be made a part of the record.

Mr. STEWART. Thank you and I'll summarize what's in that statement. As mentioned early this morning, you are aware of the problems the Department of Agriculture has had regarding discrimination against its customers and its work force. Civil rights immediately became one of the high priorities for Secretary Glickman as he began his tenure with the Department of Agriculture. When he heard about employees and customers complaining about inequities that existed within the department and the delivery of its programs, Secretary Glickman is serious about resolving those problems and to ensure that equal employment and equal access are institutionalized within the Department of Agriculture and he's holding all agency heads accountable for carrying out the civil rights action teams recommendations that are currently being worked on. In fact, more than one-half have already been implemented.

I was regional forester in California and saw firsthand the affects of discrimination on an agency. While carrying out the consent decree mentioned earlier, pursuant to Federal court order, I saw not only how discrimination destroyed the individual, but how it totally refocused an entire agency away from the very reason it was established. There are no winners in discrimination. Both the agency and the individual suffer in many ways as a result of it.

Over this past year, the Chief of the Forest Service, Mike Dombeck, has taken very significant steps to erase discrimination in the Forest Service. The key point is that he is personally committed to eliminating discrimination against employees and has strongly emphasized that managers will be held accountable for carrying out his policies. During late July and early August, the Chief personally visited all of the Forest Service units key management staff, line officers, and employee representatives to have them better understand the importance of civil rights in meeting the agencies mission and purpose, to build commitment to improving the program and emphasize forthcoming changes in upholding employees and management's responsibilities in assuring accountability. He also directed that strategies be developed to identify any patterns of discrimination and to take steps to reduce future problems. Civil rights was given priority attention by establishing a full-time leader on each unit to assess the unit's civil rights program and to focus on improving the work environment and resolving equal employment opportunity complaints quickly and appropriately.

We believe that the efforts of the Secretary and the Chief are beginning to show results. In the Forest Service there are 37 percent fewer open EEO cases than there were a year ago and there was a 32 percent reduction in the number of new complaints that have been filed since last year. It is our hope that through these efforts the agency will make civil rights an integral part of our everyday work life and that we will improve work environments and communication which seems to be one of the major problems; that we'll consistently treat people fairly and equitably, with dignity and with respect; that we'll understand the civil rights roles and responsibilities that we all have under law and that we use our energies more positively to carry out the mission of the agency.

You specifically asked in your letter to us that we address the hiring process for upward mobility which was mentioned earlier by Congressman Herger in which some vacancy announcements specified "Only unqualified applicants will be considered." It is unfortunate that the announcements were advertised to say only unqualified applicants would be considered, when in fact, the candidates do have to qualify for the job, but at a lower grade level. Some local Forest Service vacancy announcements did use those terms, but again, it is all part of an upward mobility program and very few vacancies are actually announced that way.

Upward mobility is a practice that has been used for many years in the Federal Government. Its purpose is to fill a portion of an agency's positions with applicants who have the ability to succeed, but lack the formal training or experience usually required. Applicants are selected at a lower grade, then promoted to the full performance level after they become qualified. Often, positions are advertised concurrently to upward mobility candidates and to fully qualified candidates so the selecting official has a broad slate of applicants from which to choose the most suitable candidate.

You also asked that we address how the agency's human resources management practices have been modified to comply with guidelines that were issued by the Department of Justice following the *Adarand* decision. We believe the Forest Service is in compliance with the *Adarand* decision, in that our affirmative employment plan focuses on Forest Service jobs in which minorities, women, disabled veterans and individuals with disabilities are underrepresented in comparison to the relevant civilian work force. Our affirmative action plan does not use quotas; it gives no preference for unqualified individuals; it ensures that a protected status will not be the only factor in hiring decisions; and that the program will be discontinued after its purposes have been achieved.

Finally, the USDA and the Forest Service will, by any means legal and necessary, strive to ensure that all employees and the public we serve are treated fairly and that discrimination does not exist in the Department and in the Forest Service. We're committed to ensuring that discrimination is eventually erased from our workplace. This job will not be easy and it won't be accomplished overnight, but we stand ready to take what action is necessary and appropriate to reach our goal of a discrimination free agency.

Our pledge, as emphasized by the Chief of the Forest Service, is to embrace the principles of equality, fairness, and justice, while fulfilling our natural resource mission.

This ends my statement and we'd be glad to respond to your questions.

[The prepared statement of Mr. Stewart follows:]

Testimony of
Ronald Stewart, Deputy Chief
Programs and Legislation
Forest Service
United States Department of Agriculture

Before the

Subcommittee on Civil Service
Committee on Government Reform and Oversight
U. S. House of Representatives

Concerning
Employment Discrimination in the Federal Workplace

September 25, 1997

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to discuss the Forest Service's efforts to address employment discrimination in the Federal workplace. I am accompanied today by Luther Burse, Director of Civil Rights in the Forest Service. I will begin by saying that the subject of discrimination is not one that is easy to discuss -- not easy because people are hurt as a result of it, not easy because it never seems to get the attention that it deserves, and not easy because it has been around for a long time and no one has found the answer to it yet.

As the Regional Forester in California, I saw first-hand the effects of discrimination on an Agency. While carrying out the consent decree pursuant to Federal court order, I saw not only how discrimination destroyed the individual, but how it totally refocused the entire Agency away from the very reason it was established.

The consent decree was a series of court orders resulting from a lawsuit filed in 1972 by a Forest Service employee who claimed gender discrimination. This lawsuit became a class action suit in 1979 and directed the Forest Service to ensure that women occupied 43% of positions in every series and grade of the Region's workforce by 1986. The Forest Service and the plaintiffs finally negotiated a settlement agreement, and the consent decree ended in May 1992.

There are no winners in discrimination. When all is said and done and the books are closed, the victim and Agency have suffered in many, many ways.

Civil rights immediately became one of Secretary Glickman's priorities early in his tenure when employees and customers complained about the inequities that existed in the Department of Agriculture. As a result, the Secretary stressed his commitment to erasing discrimination in USDA through the issuance of his civil rights policy statement to all employees. Secretary Glickman acted on his commitment to civil rights by establishing a Civil Rights Action Team (CRAT) in December, 1996, to help find solutions to the Department's civil rights problems. The CRAT held listening sessions all across the country to hear from employees and customers. From those

sessions, some of which the Secretary personally participated in, surfaced a total of 92 specific recommendations to improve civil rights. Thirty-three implementation teams, involving more than 300 people, have been working to implement the recommendations since February. To date, much progress has been made by implementing more than one-half of the recommendations. As the Secretary said before the House Committee on Agriculture on July 17, 1997, "USDA stands ready to resolve -- quickly and fairly -- legitimate civil rights complaints." There is still a lot of work to do and the Secretary is committed to doing whatever is necessary to make all of USDA -- and the Forest Service -- a model in having a discrimination-free workplace.

Mr. Chairman, I wish that I could say to you today that out of the 30,000 Forest Service employees, you will not find one person injured by discrimination. That is a vision that I am sure the entire Federal Government would someday like to achieve, but, in reality, probably never will. As you know, it is a challenge to protect a few people, let alone a group the size of our Agency. But that does not mean that we should not try to reach that goal. In fact, over the last year, the Chief of the Forest Service, Mike Dombeck, has taken very significant steps to erase discrimination in the Forest Service which I will highlight in a moment. The key point is that the Chief is personally committed to eliminating discrimination against employees and has strongly emphasized that managers will be held accountable for carrying out these policies.

The Chief has taken significant measures to bring this matter to the forefront of the Agency, as stated in his Civil Rights Policy Statement issued on May 13, 1997:

> **As Chief, I want the Forest Service to be recognized as the premier conservation and research organization in the world. To make this a reality, it will take employees who have the experience of knowing they are valued and respected for their unique contributions. Therefore, this will be an agency that shows highest regards for our human resources.**
>
> **My commitment is to building a multicultural organization. I hereby affirm that Equal Employment Opportunity (EEO) law and Affirmative Employment Planning will be enforced within our work force and featured in our services to our customers. Forest Service leadership will work with me to make this happen, as we continue the implementation of the recommendations in the "Toward a Multicultural Organization Report." I will be at the forefront in creating and maintaining a work environment where every employee is free from discrimination or harassment based on race, color, religion, sex, age, national origin, political beliefs, disability, sexual orientation, and marital or familial status. We will take action to resolve pending civil rights issues so that we can focus on moving forward.**
>
> **While Forest Service leadership is primarily responsible for ensuring that employees are respected, accepted, and appreciated, all employees have a moral and legal responsibility to treat their colleagues with respect and in a professional manner. Therefore, each of us must demonstrate a commitment to equal opportunity for all individuals. In this agency we will not tolerate discrimination, harassment, reprisal or baseless allegations.**

I expect the strong support of every Forest Service employee in embracing the principles of equality, fairness, and justice in fulfilling our vision for leading this Agency into the 21st century.

Since the Chief made that statement, he has taken aggressive action to make this policy a reality. During late July and early August, the Chief visited with all of the Forest Service units' key management staff and line officers to have them better understand the importance of civil rights in meeting the Agency's mission and purpose; build commitment to improving the program; and to emphasize the forthcoming changes in upholding their responsibilities and assuring accountability.

Additionally, the Chief directed that strategies be developed to identify any patterns of discrimination and to take steps to prevent future problems. Civil rights was given priority attention by establishing a full-time leader on each unit to complete an assessment of its civil rights program, focusing on improving the work environment, resolving equal employment opportunity (EEO) complaints appropriately, and ensuring a viable program under various titles of the Civil Rights Act of 1964, American with Disabilities Act, and the Education Act, which collectively assures that individuals are protected from discrimination in programs that receive Federal financial assistance or that are federally conducted.

Key to the Agency's commitment to reducing discrimination in the workplace was the ability to speed up the resolution of pending formal EEO complaints by establishing a mediation process. To date, this process has proven to be successful. The Forest Service has 37% fewer open EEO cases than it had a year ago, and a 32% reduction in the number of complaints filed since last year. All of these actions complement other actions taken as a result of the Secretary's Civil Rights Action Team report recommendations.

It is our hope that through these efforts, the Agency will make civil rights an integral part of our everyday worklife, and we will:

* Improve work environments and communications with employees;
* Consistently treat people fairly and equitably, with dignity and respect;
* Understand our civil rights role and responsibilities; and
* Use all our energies more positively...throughout the organization to accomplish the mission of the Forest Service -- **"Caring for the Land and Serving People."**

Mr. Chairman, you specifically asked that we address the hiring process for upward mobility in which some vacancy announcements specified "only unqualified applicants will be considered." It is unfortunate that the announcements were advertised to say "only unqualified applicants would be considered," because the candidates do have to qualify for the job, but at a lower grade level. Some local Forest Service vacancy announcements did use those terms, but, as far as we know, that has not happened since around 1989.

The practice of designating some positions for upward mobility candidates has been used by numerous Federal agencies for many years. The upward mobility program is consistent with sections 2301 and 4103 (b)(2) of Title 5 of the U.S. Code and is implemented by Office of Personnel Management direction in 5 CFR 410.307. The purpose is to fill a portion of an organization's positions with applicants who have the ability to succeed, but lack the formal training or experience usually required. Applicants are selected at a lower grade, then promoted to the full performance level after they become qualified. Often, positions are advertised concurrently to upward mobility

candidates and to fully qualified candidates so the selecting official has a broad slate of applicants from which to choose the most suitable candidate.

You also asked that we address how the Agency's human resources management practices have been modified to comply with guidelines issued by the Department of Justice (DOJ) following the ***Adarand*** decision. The Forest Service's affirmative action plan focuses on jobs in which minorities, women, disabled veterans, and individuals with disabilities are underrepresented in comparison to the "relevant" civilian labor force; our affirmative action plan does not use quotas; gives no preferences for unqualified individuals; ensures that a protected status will not be the only factor in hiring decisions; and lastly, that the affirmative employment plan will be discontinued after its equal opportunity purposes have been achieved.

Our goal is to treat each employee with respect and provide everyone the equal employment opportunity. As the President stated in his July 19, 1995 Memorandum, this "Administration will continue to support affirmative action measures that promote opportunities in employment, education, and government contracting for all Americans subject to discrimination or its continuing effects. In every instance, we will seek reasonable ways to achieve the objectives of inclusion and antidiscrimination without specific reliance on group membership. But where our legitimate objectives cannot be achieved through such means, the Federal Government will continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to reevaluation, and fair . . . ."

In closing, USDA and the Forest Service will, by any means legal and necessary, strive to ensure that all employees are treated fairly and that discrimination does not exist in the Department and in the Forest Service. The Secretary is serious about institutionalizing civil rights all across the ranks. He wants to build an institution that consistently does what is right -- and that requires building more accountability in the system.

The Forest Service is working to ensure that our civil rights objectives are incorporated into our performance management system, so managers know what is expected of them. We have a lot of good, hard-working, and dedicated employees in the Forest Service. But we still have problems that need to be corrected. We are committed to ensuring that discrimination is eventually erased from our workplace. The job will not be easy and will not be accomplished overnight. But we stand ready to take whatever action is necessary and appropriate to reach our goal of a discrimination-free Agency.

This ends my statement. Luther and I will be glad to respond to your questions.

Thank you.

RONALD E. STEWART

EDUCATION

B.S. in Forest Management, Oregon State University. June 1964.
Ph.D. in Forest Ecology and Silviculture, Oregon State University. June 1970.

PROFESSIONAL EXPERIENCE

Forester, Washington State Department of Natural Resources, Olympia, Washington. June 1964 to October 1966.

Research Forester and Project Leader, USDA Forest Service, Pacific Northwest Forest and Range Experiment Station, Roseburg and Corvallis, Oregon. November 1969 to September 1977.

Western Conifer Research Silviculturist, USDA Forest Service, Timber Management Research, Washington, D.C. September 1977 to December 1983.

Assistant Station Director for Continuing Research in Northern California, USDA Forest Service, Pacific Southwest Forest and Range Experiment Station, Berkeley, California. December 1983 to April 1988.

Station Director, USDA Forest Service, Pacific Southwest Forest and Range Experiment Station, Berkeley, California. April 1988 to December 1990.

Regional Forester, USDA Forest Service, Pacific Southwest Region (Region 5), San Francisco, California. December 1990 to August 1994.

Associate Deputy Chief for Research, USDA Forest Service, Washington, DC. August 1994 to July 1996.

Associate Deputy Chief for Programs and Legislation, USDA Forest Service, Washington, D.C. July 1996 to present.

PROFESSIONAL RECOGNITION

Fellow of the Society of American Foresters

Xi Sigma Pi, National Forestry Honorary

Phi Kappa Phi, National Scholastic Honorary.

Mr. MICA. Thanks to all of our panelists for their testimony. The ranking member has arrived and he hasn't had an opportunity to make an opening statement. I would like to defer to him at this time if he has an opening statement. The bells have just gone off for a vote, so Mr. Cummings, I'd like to recognize you if you have some comments that you'd like to have into the record, then maybe what we could do is vote, return, and I hope the panel understands that we conduct legislative business on the floor concurrently with these hearings.

You have arrived, you're welcome this morning, our ranking member, Mr. Cummings, and you're recognized.

Mr. CUMMINGS. I want to thank you, Mr. Chairman, and apologize for the lateness, but unfortunately, I had an emergency in my district. I just want to take a few moments to address a few issues.

I'm sure you all have heard that we had a hearing just a week or so ago with regard to people who had been discriminated against. They were mainly African-Americans and women. They came in and they talked about the things that they go through. In the VA Hospital in Baltimore, for example, we had instances where people had been held at GS–5's, who were well qualified for upward mobility, but were held in those positions for 12 and 13 years. They watched, as they testified, they watched people come in less qualified, train them, and then they became their bosses. So, certainly I understand the whole concept of this effort to do away with affirmative action, I'm sorry I missed Mr. Canady, my colleague, but the fact still remains as we saw in the Maryland legislature when I was there just a few years ago, we had someone to stand up and talk about all of the problems that were going on with regard to African-Americans and women getting all the contracts, but what they didn't say was that 90 percent of all the contracts were going to white males. They didn't say that. This is America. This is the greatest country in the world. The fact still remains that there are a lot of people who are being left out of the system here in 1997.

There's another part of that is very significant. When we talk about the Federal Government, when we talk about contracts we talk about employment. One of the things we have to keep in mind as is highlighted by the very hearings that are going on, have been going on with regard to IRS, in the Senate. African-American people and women and minorities pay taxes. They pay into this system. This very room exists because of the fact that people pay into the system. When we look at something like proposition 209, for example, we have a situation where people have paid, even when there parents and their foreparents children could not get into these schools they were paying. Nobody gives them a tax exemption because their children can't get into these schools. Nobody gives them a tax break, they still have to pay and when their children, who have lived by the rules, not gotten involved in drugs, done a good job in school, when they get to the door to knock on that door of opportunity to get in, they're told we can't get in. There are two sides to this story.

Then you look at a situation as we have in Texas. Very interesting there, where according to all estimates, in a few years the majority of the people in Texas will be Hispanics. Yet and still, and

even before that when you combine African-American and Hispanics, and please don't add women, then you will have that happening probably in the next 10 years or less. Yet and still, there will be no trained doctors of African-American descent or Hispanic; women will have their problems with the same thing. They will have paid the taxes for those institutions of higher learning to exist, but they won't be able to get in the door. Now, you tell me what that's all about.

I am very, very concerned as I am now studying very carefully the reconstruction period, post-reconstruction it appears that African-Americans and Hispanics are being attacked from every angle. You name it, they're being attacked. One, redistricting. You have districts in this country, if you look at them, are far worsely drawn than any of the minority districts, but yet and still, nobody talks about that. You have situations where, you have, as I just talked about, proposition 209, people being deprived of opportunity although they're paying into a system big time, big time. At the same time, you have folks who are striving to lift their children up, to make them the best that they can be, and yet they are told over and over again, we're going to shut the door here, shut the door there, and now in an effort to do away with affirmative action, so people who are a part of this system, who have lived by the law, cannot be lifted up.

As I've said many, many times and I will address this because it is multifaceted, it is multifaceted. It's an attack and it's a vicious attack.

So, Mr. Chairman, I thank you for this opportunity and I think that we have to look at this total picture because the fact is that it is all connected, it is all connected.

Thank you very much.

[The prepared statement of Hon. Elijah E. Cummings follows:]

STATEMENT OF THE HONORABLE ELIJAH CUMMINGS
BEFORE THE SUBCOMMITTEE ON CIVIL SERVICE
SECOND HEARING ON
EMPLOYMENT DISCRIMINATION IN THE FEDERAL WORKPLACE

September 25, 1997

Workplace discrimination -- no matter what form it takes, no matter who is the victim -- is of major concern to me, and, I believe, to all Americans. When it occurs in the Federal sector, it is even more troubling. The Federal government should lead all employers by providing equal employment opportunity for those who either seek or hold employment in the service of our great nation.

Two weeks ago, this subcommittee held a hearing where we heard shocking testimony of discriminatory conduct affecting minority and women employees working at a number of Federal agencies. We learned that even though the number of Federal workers has dropped 340,000 since 1991, the number of discrimination complaints has grown by a third from 9,924 in 1991 to 13,156 in 1996. We also acknowledged the issuance of several

recent reports by the Office of Personnel Management (OPM), Merit Systems Protection Board, and Equal Employment Opportunity Commission (EEOC) which document the fact that while representation of minorities and women in our workforce has significantly increased, they are still concentrated in lower paying occupations, or in the lower grades of managerial positions. Blacks and Native Americans are discharged at disproportionately higher rates than whites. And, a brand new report issued this month by the MSPB indicates that Hispanics are still employed at a rate below their presence in the labor force. The only conclusion that could be drawn from this evidence is that discrimination in the Federal workplace remains a major systemic problem.

The testimony at the previous hearing also established that the current administrative process for resolving discrimination complaints is complex, burdensome, and biased. Congressman Matthew Martinez put forth a legislative proposal to

reform the EEO complaint resolution process -- H.R. 2441, the Federal Employee Fairness Act. His bill would overhaul the process of investigating and adjudicating discrimination complaints. It would eliminate the conflict of interest inherent in having an agency investigate itself. It would require parties to engage in conciliation efforts. Finally, it would minimize opportunities for employees to pursue frivolous discrimination complaints. While this bill is not perfect in its present form, I plan to work with Congressman Martinez to revise and strengthen its provisions so as to ensure that it would both streamline and inject greater fairness into the Federal sector EEO process.

I recognize that Chairman Mica prefers a different approach than the Federal Employee Fairness Act. As I understand it, he would consolidate the appeals agencies and change the manner in which the EEOC handles Federal sector discrimination complaints. His proposal has also been the subject of some

considerable criticism. As the result, the achievement of a consensus around any course of action this year may prove to be very difficult. Nonetheless, I hope that the Chairman will work with me for as long as it takes to find common ground and establish a redress system that works to everyone's satisfaction.

Even though it may take some time for us to reach agreement on appropriate legislative action, I am pleased to note that earlier this week, the EEOC briefed committee staff on several administrative actions it is now undertaking to reform the Federal sector EEO process. The EEOC will now require agencies to offer alternative dispute resolution to complaining parties. It will strengthen requirements that agencies conduct thorough and well documented investigations. Steps are being taken to eliminate spin-off complaints, improve procedures for handling class action complaints, enhance Administrative Judge's authority to resolve cases expeditiously without a hearing, and to

eliminate the final agency decision where there has been an administrative hearing. The EEOC will also streamline the appeals process by making changes in the standards for case review and shorten the time limits for case processing. It is impossible to say today just how much time these changes will shave off the current process, or how they will affect its overall fairness, but they are the result of a comprehensive review of the current system undertaken by its current chairman, Gilbert Casellas, and do represent a real attempt at reform. I, however, will be closely monitoring the implementation of these measures in order to determine the impact that they have on complaint processing and on the need for additional administrative or legislative reforms.

Now, Mr. Chairman, to turn to today's hearing. The witnesses you have invited to testify this morning will focus on what you have branded as "reverse discrimination." They will

essentially support your view that current government employment practices sanction race or sex-based preferences which result in the disparate treatment of some Federal workers. In short, these witnesses will speak out against the remedial policy called "affirmative action." Well, Mr. Chairman, I wish to state clearly and unequivocally for the record that I strongly believe in affirmative action. I strongly believe that through well-implemented affirmative action programs, the Federal government can open the doors of opportunity for the millions of minorities and women that have and continue to be deprived of the chance to enter or advance in the Federal workforce. While I recognize that recent court decisions and the California Initiative, Proposition 209, have produced some retrenchment and greater restrictions in this area, I strongly disagree with the change in law and policy they reflect. And, certainly, the testimony we received at our last hearing well documented the existence of racial and gender bias and discrimination, justifying the continued use of affirmative

employment programs in the Federal workplace.

The policies of equal employment opportunity and affirmative action took root and evolved in the Federal sector over the past 40 years. President Eisenhower's Executive Order 10905 gave birth to the concept of affirmative opportunity by proclaiming "It is the policy of the U.S. Government that equal opportunity be afforded all qualified persons, consistent with law, for employment in the Federal Government." His successor, President Kennedy, took the next step with Executive Order 10950 which directed that agencies undertake "positive measures for the elimination of any discrimination, direct or indirect, which now exists."

Today, there is statutory authority for agencies to establish Federal Equal Employment Opportunity Recruitment Programs through which they may conduct affirmative recruitment to eliminate the under representation of minorities in the various

categories of civil service employment. The statute, title 5 U.S.C. section 7201, directs OPM to assist agencies in carrying out their recruitment programs. It also requires OPM to evaluate these programs to determine their effectiveness in eliminating minority under representation. OPM submits an annual report to Congress on the effectiveness of these Federal Equal Opportunity Recruitment Programs.

These affirmative employment programs appear to be working and achieving the goals of the statute. If some individuals are disadvantaged as the result of their implementation, I would like to know how and why that happens.

Mr. Chairman, I look forward to the testimony from today's witnesses. I will weigh it carefully and trust that it will assist this subcommittee in ensuring that all of our employees are afforded equal employment opportunity within the Federal workplace.

Thank you.

Mr. MICA. Thank you for your opening comments. Mr. Cummings, you missed a rather lively discussion. You would have been proud of Ms. Norton and the panelists and Mr. Ford. I thought it was a very good exchange, and one of the most interesting sessions of this subcommittee. I'd like to recognize now, we have about 5 minutes, Ms. Norton.

Ms. NORTON. Mr. Chairman, I want to say to these witnesses that I appreciate their testimony. I want to note that Mr. Troncoso?

Mr. TRONCOSO. Yes, ma'am.

Ms. NORTON. Indicates that he is of Cuban background?

Mr. TRONCOSO. Yes, ma'am.

Ms. NORTON. Particularly considering that affirmative action covers Hispanics, they should have been at pains when they found a very well qualified person of Hispanic extraction. It seems to me to have engaged in precisely the promotion you sought, of course, I do not have before me the case and do not tend to indicate how it should come but I do note that and find it very interesting.

Ms. Cole, the concerns that you have, I want you to know are part of what led us to ask the chairman to hold these hearings. That the system that you and your client were forced to deal in is riddled with conflict of interest, is a scar on the American justice system because essentially you have to file and go before the very people you are filing against.

Ms. COLE. Exactly.

Ms. NORTON. I do hope that working closely with the chairman, we will be able to report out a bill this year that will not put you through what you have had to go through simply to make a claim and to have it heard. There is no way in which you or your client could have had any confidence in the system to which you had to file and to go.

Let me just say that I am constrained to look at data, although I really find informative, anecdotal cases, but the anecdotal cases have to be measured against what the data shows. I do want to note for the record, because it reinforces what I indicated to my good colleague, Mr. Canady. You are now in court. You're in court because there is a remedy for this kind of discrimination and that remedy exists under Federal law.

Mr. Drury went to court and he won $500,000 despite the fact that the court said the limit should be $300,000. There was a remedy for the discrimination, and he went to court, and the remedy for the discrimination was found in the same statute that blacks and Hispanics and women seek remedy. He found that remedy, despite the fact that the Canady bill is not now, and I hope never will, become law because, in its wisdom, the Congress has afforded a remedy that applies equally to Mr. Troncoso and to Mr. Drury and to me and to my ranking member.

Mr. Stewart indicates that the Forest Service has heard and is proceeding to correct some of the very problems that have been cited. I recite all of this simply to say, that but for the fact that Mr. Troncoso was forced to deal in a system that is un-American and unheard of and unknown anywhere else in this country, that present law and present procedures have indeed provided a remedy for these witnesses. I'm proud that our legal system has done so and that by filing and getting relief and, in fact, filing and getting

an agency to respond, the system shows itself to be working on the merits.

You probably should never have had to go to court, Mr. Troncoso, if the administrative process had worked for you, you would never, it seems to me, of had to go through the process that you've had to go through. You and almost everyone else who wants to get a fair hearing, must now take on the burden and the expense of going to Federal court even though the whole point of title 7 was to give complainants like you a free system in which to file.

Mr. Chairman, I think that this has been a very helpful panel, both for how it shows the system indeed works for people regardless of race and sex, and for how it shows it doesn't work when it comes to filing in the administrative process.

Thank you very much.

Mr. MICA. What we'll do now is recess the subcommittee, vote, and return. I would like to request the panel to remain, take probably a 10-minute break here, and then we do have some questions from the minority, and I have some questions for the panel. So we will stand in recess until approximately 5 minutes after the vote.

[Recess.]

Mr. MICA. I'd like to call this subcommittee back to order. Unfortunately, we're going to probably have a vote in another 10–15 minutes, so we'll try to equally divide the time.

Ms. Cole, you recommended some changes in the way we proceed in trying to seek a fair redress under the present system. One of your recommendations in your testimony to us was to create a separate, independent forum for analyzing discrimination at the agency administrative level. Maybe you could elaborate on how you'd like to see this work.

Ms. COLE. Yes, thank you, Mr. Chairman. As the system presently exists, as I understand it, within each agency it is internal to the agency and it is self-policing. The major problem is that when an employee makes a complaint normally against management, management isn't involved in that decisionmaking process on what to do with the complaint. Inherently there is a conflict in that. Moreover, many times when the employee seeks to obtain information by which to determine whether or not to file a complaint in the first instance, he or she is met with recalcitrance and obfuscation and simply refusal to give over any documents. If you take the process out of the agency in which the vested interest to protect itself exists, you, in my opinion, create a much better system by which to avoid eventually appeals to EEOC or to lawsuits.

In Mr. Troncoso's case, the counselor who was initially appointed in the case was from the northern district of Florida and the counselor in that initial process went around and pretty much followed form, we allege without substance; talked with the supervisor of the offending or accused chief; that supervisor gave an opinion which was accepted simply as a matter of course and without question by the counselor. If that counselor had been with another agency, and certainly, these people are trained uniformly to deal with these problems, but if the counselor had been chosen from another agency perhaps there could have been a better system set up and that counselor may have been more questioning and less likely

to simply assume the position of the supervisor or the management of the offending agency. That would be a very important start.

Second, in the process, and beginning in the EEO internal process, there's an opportunity for mediation. One of the things that's happened with the EEOC is that it is beginning to use a forum called mediation. We've seen it in litigation for years and years. I use it myself in my practice and I use pre-complaint mediation. I try and get it to mediation even before we have to file the lawsuit and I try and get mediation all the way through. If you can get a forum set up for viable, independent mediation, early on in the process when the employee makes a complaint, two things are going to happen: One, you're going to get the conflict of interest out of it; and two, and perhaps more importantly, you're going to give that employee a forum in which there can be, hopefully, a more meaningful dialog. As we all know, and we use it, we see this principle in everyday life, communication is of the utmost importance. A mediation forum comprised of some independent people, other than in the interagency process, can more likely ensure that kind of meaningful dialog.

Mr. MICA. Interesting to hear an attorney advocate nonlegal remedy.

Ms. COLE. Well, my clients like it because it costs them less money in the long run.

Mr. MICA. Mr. Troncoso, I don't want to get into all the details of your case, but you said you were passed over because of discrimination. Was it another minority that was put in the positions or was it because you were a minority, you think you were passed over?

Mr. TRONCOSO. Well, let me preface my response by saying that I'm the only Hispanic special agent in the northern district of Florida, which is comprised of approximately 70 agents. In the first promotion, I was passed over for one black special agent, which was in my post of duty and two white male agents. In the second promotion, which was a supervisory position, I was passed over for a white female. In the last promotion, there were seven promotions available, and I was passed over and I may be incorrect on this, but my recollection is four white males, two white females, and one black male.

Mr. MICA. The only recourse you had was legal?

Mr. TRONCOSO. I went through the entire internal process and my first step was to contact the personnel division and right off the bat, I was met with a very defensive and very argumentative attitude from personnel. I was under the impression personnel was supposed to be a neutral body that was to ensure fairness in the promotion process. I very quickly learned that personnel favors management. The next step was the EEO counselor. My experiences there was that they were looking for a reason to discount the merits of my allegations. The step after that was the EEO investigator and I got the same feeling from the EEO investigator. They were looking for reasons to legitimize management's actions. Once I experienced this level of—basically, I came to the conclusion that the whole process was a sham and that's when I contacted Ms. Cole because I knew that ultimately it might end up in a judicial atmosphere.

Mr. MICA. Thank you. I'd like to yield now to the ranking member for the balance of the time.

Mr. CUMMINGS. I just have a few questions. Ms. Cole, you recommended that the agencies use disincentives and directives to discourage agency management personnel who engage in discriminating practices. What are the types of disincentives that are used in the private sector that could be used by agencies?

Ms. COLE. They had a number of occasions where in private corporations, ranging from where the corporation begins, where the employee makes a complaint to the human resource manager and the corporation acts on its own and then there've been other occasions when it gets beyond human resources internal of the corporation and they must file an EEOC complaint. In several cases, corporations, because they recognize that it truly does, title 7 cases truly can affect their bottom line, they are finally beginning to learn that nondiscrimination in the workplace is a very viable cost-saving device. Fortunately, I think corporations are beginning to learn that, I'm just hopeful that the Federal Government will begin to learn that soon.

I have seen employees who have been taken out and a whole range initiated by the corporation against offending managers. Those go from specific counseling particular to the offense; ongoing counseling, not just one occasion, but ongoing counseling; to termination of employment.

Mr. CUMMINGS. Mr. Stewart, I understand that white males employed with the Forest Service in California have filed a reverse discrimination suit. Is that right?

Mr. STEWART. They did, yes.

Mr. CUMMINGS. Could you just tell us the general status of that? Where that is?

Mr. STEWART. As I understand it, they filed a suit. Originally, it was dismissed, I believe they appealed and it was dismissed. More recently, females have filed a suit and, in an effort to try to intervene in that, the males filed again. It's my understanding that the court ruled not to certify them, but to wait for the outcome of the suit for the women and if there was a standing for the women that there would be, and I've forgotten the legal term for it, but there would be an opportunity for all potentially affected parties to come forward to intervene, and that's what the court offered them. So my understanding is they've not been actually certified as a class at this point in time.

Mr. CUMMINGS. What was the reasoning behind the issuance of an employment notice, soliciting unqualified applicants?

Mr. STEWART. I'm really pleased to talk about the program that I think has been misunderstood. If I might take a second to put it in context.

About 1981 or so, the court certified a consent decree involving women in California, Pacific southwest region of the Forest Service and the research station in California. That consent decree mandated or set as targets 43 percent women in every job series and every grade level in the work force. It put into place a number of programs in order to increase the representation of women, including specialized training programs, sending women back to school, and so forth. In almost every case, that I can recall of my history

there, is those programs were open to everybody, but certainly the intent of the court was that women be selected for them and there were a high percentage of women that were selected. One of the programs that was looked at in order to do that was something called upward mobility, which has been around for a long period of time but had not been used by the Forest Service.

Mr. CUMMINGS. You're going to have to shorten it because we've got 5 minutes.

Mr. STEWART. OK, I'm sorry.

Mr. CUMMINGS. It's all right.

Mr. STEWART. The upward mobility is a program targeted not for very many applications, but it gives employees within the work force the opportunity to compete for jobs at higher grade levels and to receive training. So for instance, a person in a clerical series, which is a rather dead end, usually low-paying series, has the opportunity to change series. You're using employees within the work force that you know their work history, you know the kind of things they can do and they have potential to perform in different kinds of jobs. It's a way to give them an opportunity to access these different programs. It's really a training program. So they compete for a higher level position, enter at a lower grade, and then as they complete the training, they progress through it. That's the program that's mentioned in these things here. The wording in the 1989 one was during the consent decree, it was very early in the process for us in using the program, it was not a program the Forest Service had used, we chose the wrong kinds of words. Later efforts, I think, use more standard terminology as used elsewhere in the Government for upward mobility positions.

Mr. CUMMINGS. Thank you very much. I thank all of you.

Mr. MICA. I thank the panelists for their testimony. We have another vote. I think I'm going to go ahead and dismiss the panel. We appreciate your participation, your contribution to our effort today, and when we reconvene, about 5 minutes after this vote, we'll hear our final panel. Thank you, you're excused.

[Recess.]

Mr. MICA. I'd like to call the Civil Service Subcommittee meeting back to order. I apologize for the delay. Yesterday, I guess, Mr. Miller had voted for a pay raise and today he's voting not to come back to work. [Laughter.]

Only in the Federal work force could we experience that situation, but it's part of the process. I'm pleased to welcome our third panel, Mr. Jerry Shaw, who is no stranger to this subcommittee. He's the general counsel for the Senior Executive Association; and Mr. John Fonte of the American Enterprise Institute. I'd like to welcome both of you gentlemen. As you know, this is an investigations and oversight subcommittee. If you'd stand and be sworn in. Raise your right hands.

[Witnesses sworn.]

Mr. MICA. The record will reflect that the panelists answered in the affirmative, and welcome back, Mr. Shaw. As you know, Mr. Shaw and Mr. Fonte, if you have lengthy statements or other documents you'd like included in the record, we'd be glad to do that, so hopefully use your 5 minutes to summarize. Mr. Shaw.

STATEMENTS OF G. JERRY SHAW, GENERAL COUNSEL, SENIOR EXECUTIVE ASSOCIATION; AND JOHN FONTE, AMERICAN ENTERPRISE INSTITUTE

Mr. SHAW. Thank you, Mr. Chairman, and I would like my complete statement in the record.

Mr. MICA. Without objection, so ordered.

Mr. SHAW. We appreciate the opportunity to testify on this important issue. Some of the concerns that were raised in the prior hearing by various interest groups concerning underrepresentation in the more senior levels of Government need to be put into context. According to OPM figures, there were 8,012 SES positions filled as of September 30, 1991. As of June 1997 there were 6,867 filled positions, a reduction of 1,145 or 15 percent in the number of career and noncareer appointees in SES positions. During that same period, the number of female executives in the SES increased from 958 in September 1991 to 1,456 by June 30, 1997. This is an increase of 51 percent in SES positions occupied by women. In September 1991 there were 626 total minorities in the SES. As of September 30, 1997, there were 814. This was an increase of 30 percent in minority representation in the SES. For minorities and women to have achieved these kinds of increases in representation in the SES in the face of a 15-percent reduction in the total number of positions filled over a 6-year period is significant. There has been solid growth in their representation in the senior executive service the last 6 years and everyone should be proud of those achievements.

Some argue that the Government's failure to achieve proportional representation in every grade and specialty in the Federal Government is somehow discrimination. Of course, the law is inapposite. In fact, the merit system specifically prohibits discrimination for or against applicants or employees on the basis of race, color, religion, sex, national origin, handicapping condition, marital status, and political affiliation.

It is especially difficult in these times for managers to satisfy all employees or applicants. Many agencies are downsizing substantially and they have been under orders from the OPM and the administration to reduce the level of midlevel employees, grades 13–15, and to reduce the number of SES employees.

In the face of fewer grade 13–15 and SES positions, both now and in the future, promotions will become more contentious. The pressure will be increased on the promotion process as it is now, because it is the only way for employees to advance unless they choose to leave Government. This will generate even more EEO complaints and charges of discrimination, not necessarily because the discrimination is real, but because more people will be denied the opportunity for promotions because the promotions are simply not there.

In our view, Congress and agencies should be looking for ways to enhance and reward employees in their current positions through special award programs, training opportunities, and assignments to other positions. Through these incentives, employees could see greater reward for their greater effort and could keep themselves fresh and interested in their Federal careers. In the ab-

sence of these incentives, contentiousness and litigation in the Federal community will likely increase.

In a late 1995 survey of SEA members, 92 percent of all respondents said they believed the EEO and other complaint systems are abused by employees in order to attempt to intimidate a manager or agency management from taking action against poor performers. Ninety-one percent of the respondents reported that their agencies sometimes settle complaints even when they are not viable in order to avoid the time and expense involved in defending the agency. When agencies do this, it becomes a self-fulfilling prophecy. They settle complaints, therefore, employees believe they have valid complaints. The more complaints they settle, the more validity employees feel their complaints have and the more people complain. This is counterproductive in any work force and especially counterproductive in the Federal Government which enforces the rule of law, not only upon itself, but upon others.

Sadly, 56 percent of the SES executives said they believe that legitimate complaints were not being filed in their agencies because the system is too clogged with nonlegitimate complaints; 42 percent said there were actually legitimate complaints pending whose processing was being harmed because the complaints of all were not dealt with promptly due to the increasing volume; and 98 percent said the system should be changed so that poor performers at least can be dealt with properly and those with legitimate complaints can be appropriately given relief.

Many argue strenuously that Federal managers and executives should be punished with removal actions or demotions if they are found to have discriminated against employees. It is quite obvious that Federal agencies themselves do not have faith in the EEO system as it now exists. Even when they do settle complaints and even when they sometimes feel a complaint may have been justified, they rarely take action against a manager or executive. This is because in most instances, the great, great majority of the complaints that are valid are often based on statistics or a minor technical error that took place in a promotion or other personnel action. These are not intentional acts of discrimination by individuals seeking to hold down other individuals or groups and the agencies know it and have proven it by their actions.

In our testimony in 1995, we reported that in cases dealt with by the MSPD, from fiscal years 1987–1994, while 28 percent of the time discrimination of one type or another was alleged as an affirmative defense, in less than three-tenths of the cases was discrimination found by the MSPB. The later reports in 1995 show that of 9,594 initial appeals, 2,472 involved allegations or discrimination, or 26 percent. In only 10 of these cases was discrimination actually found by the MSPB. This works out to one-tenth of 1 percent. In their annual report for fiscal year 1996, the Board reports 7,971 new cases were decided. Discrimination was actually found in 16 cases or two-tenths of a percent. In my written statement I have 0.004 and 0.007, it should be 0.1 and 0.2.

One could reasonably conclude, therefore, that in cases involving discipline and discharge of Federal employees, discrimination is a very minor component. A number of conclusions can be reached from the data presented. No. 1, the number of discrimination com-

plaints is increasing; No. 2, the number of frustrated employees is increasing, in part because there are fewer and fewer promotion opportunities in GS–13 through SES positions; No. 3, the increase in the number of women and minorities in the SES in the last 5 years has been substantial even so, especially since there has been a large decrease in the number of positions actually filled; No. 4, the system has become overloaded with complaints by employees who believe they are aggrieved, but whose complaints are often proven not to be valid; and No. 5, many employees mistrust their agencies' ability to handle their complaints fairly; and finally, no agency is handling EEO complaints in an expeditious manner.

There are a number of solutions we suggest. First, there must be a method established to separate the wheat from the chaff. Employees must be required to make a stronger case than a mere allegation based on their particular status in order for a complaint to be processed. Second, there must be required, prompt mediation within the agency before complaints become solidified. Third, when employees do file complaints, the complaints must be filed with a central agency or central court, such as the article 1 court we suggested in our testimony in 1995, and if not with that court, with a single, central Federal enforcement agency, such as the Merit Systems Protection Board or one like it.

We thank you for the opportunity to testify. We look forward to the opportunity to answer questions.

[The prepared statement of Mr. Shaw follows:]

Thank you Mr. Chairman and members of the Subcommittee for the opportunity to testify on this important issue. As you will recall, SEA testified on both October 26 and November 29, 1995 concerning streamlining the federal employees' appeal processes and federal employees' performance and accountability. In those hearings, we discussed information provided to us by our members, and some of the frustrations these senior executives face in trying to deal with the burgeoning problem of EEO complaints in their agencies.

First, however, some of the concerns that were raised last week by the various interest groups concerning under-representation in the more senior levels of government need to be put into context. According to OPM figures provided to us, there were 8,012 SES positions filled as of September 30, 1991. As of June 30, 1997, there were 6,867 filled positions, a reduction of 1,145 or 15% in the number of career and non-career appointees in SES positions. During that same period, the number of female executives in the SES increased from 958 on September 30, 1991 to 1,456 as of June 30, 1997. This is an increase of 498 or 51% in positions occupied by women. In September 1991, there were 626 total minorities in the SES. As of September 30, 1997, there were 814. This is an increase of 188 positions or 30%. For minorities and women to have achieved those kinds of increases in representation in the Senior Executive Service in the face of a 15% reduction in the total number of positions over a six year period is very significant. There has been solid growth in their

representation in the SES the last six years, and everyone should be proud of those achievements.

When interest groups argue that their percentage of employment in the federal workforce or in particular positions in the federal workforce should be in exact proportion to their employment in the private sector, or to their representation in the population, they must first recognize that the basis for promotion in the federal government is merit. While it is true that in many federal agencies today, for two equally qualified individuals competing for a position, a minority or female applicant may be given preference, it is not true that federal agencies are required to promote on any basis other than the individual with the highest qualification for the position.

Some interest groups argue that the government's failure to achieve proportional representation in every grade and speciality in the federal government is somehow discrimination. Of course, the law is inapposite. In fact, the merit system specifically prohibits discrimination for or against applicants or employees on the basis of race, color, religion, sex, national origin, handicapping condition, marital status, and political affiliation. In fact, an employee who has the authority to approve or recommend personnel actions cannot even consider any recommendation or statement with respect to any individual who requests or is under consideration for any personnel action except as authorized by

Section 3304(f) of 5 U.S.C. If federal managers and executives were to take into consideration the factors espoused by the interest groups, they would, in fact, be in violation of the law.

SEA firmly believes that every individual should have the opportunity to be employed, promoted and rewarded on the basis of their knowledge, skills and abilities. We espouse this belief to our members and to federal agencies everywhere. In fact, we believe that this is being done, while the agencies are also striving to advance those who have been under-represented in the higher levels of government for some time. As the statistics for the SES corps show (cited above), this goal of achieving representation in the SES is being accomplished.

It is especially difficult in this time for managers to satisfy all employees or applicants. Many agencies are downsizing substantially, and they have been under orders from OPM and the Administration to reduce the number of mid-level employees (13 through 15) and to reduce the number of SES employees. From a high of 8,200 in September 1992, to a low of 6,867 today, the SES has been reduced nearly 17%, while minorities and women have achieved substantially more SES positions than previously held.

In the face of reducing grade 13 to 15 and SES positions both now and in the future, promotions will become more contentious.

The pressure will be increased on the promotion process because it is the only way for employees to advance unless they choose to leave government. This will generate even more EEO complaints and charges of discrimination, not necessarily because the discrimination is real, but because more people will be denied the opportunity for promotion because the promotions are not there. In our view, Congress and agencies should be looking for ways to enhance and reward employees in their current positions, through special award programs, training opportunities and assignments to other positions. Through these incentives, employees could see greater reward for greater effort and could keep themselves fresh and interested in their federal careers. In the absence of these incentives, contentiousness and litigation in the federal community will likely increase.

In a late 1995 survey of SEA members, 92% of all respondents said that they believed the EEO and other complaint systems are abused by employees in order to attempt to intimidate a manager or agency management from taking action against poor performers. 91% of the respondents reported that their agencies sometimes settle complaints even when they may not be viable in order to avoid the time and expense involved in defending the agency. When agencies do this, it becomes a self-fulfilling prophesy. They settle complaints, therefore employees believe they have valid complaints. The more complaints they settle, the more validity employees feel their complaints have, and the more people complain. This is

counterproductive in any workforce, and especially counterproductive in the federal government which enforces the rule of law not only upon itself, but upon others. There still is such a thing as right and wrong, and agencies which settle complaints when the complaints are not justified, which do nothing but bring scorn on the EEO system and the rule of law.

Sadly, 56% of the SES executives said they believed that legitimate complaints were not being filed in their agencies because the system is so clogged with non-legitimate complaints. 42% said there were actually legitimate complaints pending whose processing was being harmed because the complaints of all were not dealt with promptly due to the increasing volume. 98% said that the system should be changed so that poor performers can be dealt with properly, and those with legitimate complaints can be appropriately dealt with.

Many of the interest groups argue strenuously that federal managers and executives should be punished with removal actions or demotions if they are found to have discriminated against employees. It is quite obvious that federal agencies themselves do not have faith in the EEO system we now have. Even when they do settle complaints, and even when they sometimes feel a complaint may have been justified, they rarely take action against a manager or executive because in most instances, the complaints that are valid are often based on statistics or a minor technical error that

took place in a promotion or other personnel process. These are not intentional acts of discrimination by individuals seeking to "hold down" other individuals or groups, and the agencies know it. In the vast majority of situations, either the agency is getting out of a case because they do not wish to deal with it because of time and expense requirements or for some other reason. Rarely is intentional discrimination proven.

In our testimony in 1995, we reported that, in cases dealt with by the Merit Systems Protection Board from fiscal year 1987 to 1994, while 28% of the time discrimination of one type or another was alleged as an affirmative defense, in less than .3% of the cases was discrimination found by the MSPB. MSPB's fiscal year 1995 report shows that of 7,030 initial appeals, allegations of discrimination were made in 2,472 or 33% of the appeals. In only ten (10) of these cases was discrimination actually found by the MSPB. This works out to .004%. In their annual report for fiscal year 1996, the Board reports 8,876 new cases were filed. In 2,065 of these cases or 23%, discrimination was alleged. Discrimination was actually found in 16 cases or .007%. These last two years show that, in fact, findings of discrimination are continuing to go down as the percentage of cases appealed to the MSPB. One could reasonably conclude therefore that in cases involving discipline and discharge of federal employees, discrimination is a very minor component in such cases.

We have examined the latest EEOC Federal Sector Report available for FY 1995. The number of allegations of discrimination are steadily increasing. There are a number of reasons for this, not the least of which was the decision in November 1992 by the EEOC authorizing the payment of compensatory damages to federal employees. Congress subsequently changed the statute to limit such payments to a maximum of $300,000. Regardless, the opportunity to receive monetary payments has undoubtedly been part of the reason for the growth spurt in the EEO complaint process.

A number of conclusions can be reached from the data presented by the interest groups and that of the MSPB and the EEOC: (1) The number of discrimination complaints is increasing; (2) The number of frustrated employees is increasing, in part because there are fewer and fewer promotion opportunities in GS-13 through SES positions; (3) The increase in the number of women and minorities in the SES in the last five years has been substantial, especially since there has been a large decrease in the number of SES positions actually filled; and (4) The system has become overloaded with complaints by employees who believe they are aggrieved, but whose complaints are often not proven to be valid.

Finally, many employees mistrust their agencies' ability to handle their complaints fairly, and no agency is handling EEO complaints in an expeditious manner.

There are a number of solutions we suggest. First, there must be a method established to separate the wheat from the chaff. Employees must be required to make a stronger case than a mere allegation based on their particular status in order for a complaint to be processed. Second, there must be required and prompt mediation within the agencies before complaints become solidified. This must be done promptly with skilled mediators who are trained in their profession. Third, when employees do file complaints, the complaints must be filed with a central agency or central court, such as the Article I Court we suggested in our testimony in 1995 and, if not with the Court, then with a single, central federal enforcement agency, such as the Merit Systems Protection Board.

The MSPB has developed the skill over time with its Administrative Judges to conciliate most appeals filed with it, with a settlement rate of 50% or better in all appeals filed. In addition, the Board handles cases very expeditiously, and thus has established a track record for adjudicating appeals in a timely fashion. While not perfect, the MSPB does have a reputation for fairness with agencies and employees. The MSPB Administrative Judges are for the most part well-trained and skillful in their jobs and certainly understand the nuances of the law. Finally, the MSPB has the structure which can be expanded upon to handle federal employee EEO cases. Obviously, the MSPB would need additional resources, but by taking the cases out of the agencies after the

conciliation process (which should not exceed 20 days), the government could save millions in complaints and complaint processing within the federal agencies. (See footnote 3 of GAO Report B-257454.2 dealing with the $139 million cost of processing discrimination complaints in agencies, January 1995). A portion of these millions certainly would meet the substantial portion of the requirements that the MSPB might have for additional funds. In fiscal 1996, the MSPB operated on an appropriation of $24.549 million. As a comparison, for fiscal year 1994, the EEOC's entire appropriation for the federal sector and the private sector was $230 million. Federal sector appeals comprise less than 4% of the total charges handled, but since they are appeals, are more time consuming and resource intensive than private sector charges. Regardless, the savings from federal agency operations should more than pay for any staffing and operations increases at the MSPB to handle these federal EEO complaints.

Thank you for this opportunity to testify and present our views. We would be pleased to answer any questions you might have.

Mr. MICA. Thank you, Mr. Shaw. I'd like to recognize now, John Fonte, who is with the American Enterprise Institute. You're recognized, welcome.

Mr. FONTE. Thank you, Mr. Chairman, I'd like my statement in the record, as well.

Mr. MICA. Without objection, so ordered.

Mr. FONTE. Today, two visions of civil rights are in conflict. The first vision is based on the principle of nondiscrimination. It's wrong to discriminate against an individual on the basis of race, religion, national origin, or sex. This vision is enshrined in the Civil Rights Law of 1964 and in the merit principle of the U.S. civil service.

In conflict with the principle of nondiscrimination, there is today a competing viewpoint, that goes under the name of diversity. The major assumption of diversity is that if employment discrimination did not exist, racial, gender, and ethnic groups would tend to fill all job categories in roughly equal proportions to their percentage in the work force. This assumption, that racial, ethnic, and gender underrepresentation in job categories, is prima facie evidence of discrimination, ignores how people behave in free societies or indeed in any society that has ever existed in the history of the world.

Profs. Donald Horowitz, Duke; Myron Weiner, MIT; Cynthia Enloe, Clark; Thomas Sowell, Hoover Institution; have spent years studying the distribution of different racial, gender, and ethnic groups in myriad occupations in every continent of the globe. They found no evidence to support the assumption that without discrimination, different ethnic groups would be randomly distributed across all occupations at all levels. Instead, everywhere in the world, in every occupation, public and private, and at every level, some ethnic groups are overrepresented and some are underrepresented for a wide variety of reasons having nothing to do with discrimination, such as average age, family traditions, geography, and so on.

Not only is ethnic group proportionalism not the norm anywhere, it exists nowhere, hence, the very concepts of underrepresentation and overrepresentation are bogus. Historically, different ethnic groups have been overrepresented in different occupational areas, including for example, Ibos in northern Nigeria in banks and railroads; the Chinese in Malaysia in the Air Force and within the detective ranks in the police service; East Indians in the diamond trade in southeast Asia; the Tamils in the 1960's in Sri Lanka among government doctors, engineers, and accountants; Germans in the optics and piano manufacturing in western Europe and the Americas. In a particularly interesting case of overrepresentation, the Wall Street Journal in 1995 reported that four-fifths of all donut shops in California were owned by people of Cambodian ancestry. Clearly, the ownership of small businesses is what Prof. Cynthia Enloe called a "mobility ladder" for Cambodian-Americans. It's a ladder to advance economically and socially in American society. However, since Cambodian-Americans are a relatively small percentage of the population this also means that they are underrepresented as a group in almost every other area of the economy. Certainly in all departments of the Federal civil service. Appar-

ently, this is a problem for diversity because it means that Asian-Americans might not be represented in Federal agencies in proportion to their numbers in the work force.

But why is this a problem for people living in a free society, and why should we assume that the proportional distribution of ethnic groups in all occupations, at all levels, that has never existed anywhere in the world, should be the norm for the U.S. civil service? Moreover, how could a policy of ethnic proportional representation remain consistent with the principle of individual merit within a free society? Prof. Donald Horowitz of Duke, after finding no multiethnic society in the world in which ethnic groups were proportionately represented throughout the work force in all positions, stated that, "it remains problematic, whether any but the most heavy-handed preferential policies, operating in a command economy, can actually move a society to such a state."

It is not surprising that an emphasis on proportional representation has resulted in more and more complaints. Indeed, initiatives to achieve proportional representation have resulted in bitterness and blatant discrimination everywhere in the world they have been tried, including India, Nigeria, Malaysia, Sri Lanka, Fiji, Britain, Canada, New Zealand, and Australia. In some countries, such as India, Sri Lanka, Malaysia, and Nigeria, these projects have resulted in widespread violence and bloodshed among the middle classes.

No doubt the more we continue to push proportionalism, the more complaints there will be from all racial and ethnic groups and from both sexes. This is true, because proportionalism is not compatible with a merit system and ultimately with a free society itself. Proportionalism means coercion. In a free society, individuals do not distribute themselves in job categories proportionally by race, ethnicity, and gender. We will never arrive at a right percentage for all groups in all positions and at the same time remain a free society.

As mentioned earlier, many Cambodian-Americans have chosen small business ownership as a mobility ladder instead of other forms of employment, for example, instead of working in the Park Service, or instead of working in the Forest Service. Why is this a problem that government-enforced favoritism must solve?

Finally, the major civil rights issue facing Americans today is the conflict between nondiscrimination that respects individual merit and proportional representation for groups that goes under the euphemism of "diversity." In the final analysis, we must determine if we are interested in appearances or principles. Do we want the civil service to superficially look like America or do we want a civil service that will substantively act like America? A civil service that merely looks like America suggests we are interested only in appearances. On the other hand, a civil service that acts like America, that is to say, acts like Americans are supposed to act, by judging people on the basis of their merit as individuals, regardless of

race, religion, ethnicity, or sex, means that we are interested in principles. Most significantly, it means we are interested in affirming America's highest and oldest principles centered on the worth of the individual human being.

Thank you.

[The prepared statement of Mr. Fonte follows:]

John Fonte
Adjunct Scholar
American Enterprise Institute

September 25, 1997

Testimony Before the House Committee on Government Reform and Oversight: Subcommittee on Civil Service.

Do We Want A Work Force that "Looks Like America" or one that "Acts Like America?"

Today, two visions of civil rights are in conflict. The first vision is based on the principle of non-discrimination--that it is wrong to discriminate against an individual on the basis of race, religion, national origin or sex. This vision is enshrined in the Civil Rights Law of 1964 and in the merit principle of the United States Civil Service. At the core of the civil service ideal is the concept that individual Americans should be chosen and promoted for positions in the United States government on the basis of their merit as individuals. There should be a single standard, the same standard, a merit standard, for all.

In conflict with the principle of non-discrimination there is today a competiting viewpoint that goes under the name of "diversity." Diversity, as it is generally defined, is the mirror opposite of non-discrimination and merit. Instead of adhering to the principle that it is unfair to discriminate against individuals because of their race, sex, or ethnicity, diversity promotes the idea that racial, gender, and ethnic groups must be proportionally represented in all civil service positions at all levels. In other words, instead of equality of individual opportunity based on merit, diversity means equality of result for groups based on preferences.

The problem with diversity is that its core premises are flawed. The central concept of diversity is proportional representation for groups. The major assumption is that if employment discrimination did not exist, racial, gender, and ethnic groups would tend to fill all job categories in roughly equal proportions to their percentage in the work force. The internal logic of this argument is, that if, for example, in a given labor market 10% of all potential workers are Asian Americans and 50% are women, then 10% of all job categories (accountants, park rangers, attorneys, electricians, typists) should be filled by Asian Americans and 50% by women. If this does not happen--and in a free society it never does--there is a problem of "underrepresentation" that Federal, state, and local governments must solve. This assumption--the concept of "underrepresentation" for groups--is: (1) neither realistic or logical, (2) neither fair not just, (3) not supported by the American people, and (4) not consistent with the spirit of the Civil Rights law of 1964.

(I) Proportional Representation is neither realistic, nor logical

Most importantly, the assumption that racial, ethnic, and gender "underrepresentation" or "imbalance" in job categories is *prima facie* evidence of discrimination ignores how people behave in free societies--or, indeed, in any society that has ever existed in the history of the world. Professors Donald Horowitz (Duke University), Myron Weiner (Massachusetts Institute of Technology), Cynthia Enloe (Clark University, and Thomas Sowell (Hoover Institution) have spent years studying the distribution of different racial, gender, and ethnic groups in myriad occupations on every continent of the globe. They found no evidence to support the assumption that without discrimination different ethnic groups would be proportionately or randomly distributed across all occupations at all levels. Instead, everywhere in the world, in every occupation, public and private, and at every level, some ethnic groups are "overrepresented" and some are "underrepresented" for a wide variety of reasons having nothing to do discrimination (medium age, family traditions, geography etc.). Not only is ethnic group proportionalism not the norm anywhere, it exists nowhere. Hence, the very concepts of "underrepresentation" and "overrepresentation" are bogus--yet they are used by diversity advocates to judge the equity of the United States Civil Service.

Professor Myron Weiner of MIT writes that "All multi-ethnic societies exhibit a tendency for ethnic groups to engage in different occupations." Professor Cynthia Enloe (Clark University) in her studies of armed forces, police forces, and government civil services found that none of these institutions anywhere in the world "mirror" the ethnic distribution of their countries. She believes that this is true because different ethnic groups use different "mobility ladders" to advance economically and socially. Thus, different ethnic groups have been historically "overrepresented" in different occupational areas, including: Ibos in Northern Nigeria in banks and railways; Chinese in Malaysia in the air force and within the detective ranks in the police service; East Indians as dentists and veterinarians in Malaysia; Tamils in the 1960s in Sri Lanka among government doctors, engineers, and accountants; East Indians in the diamond trade in Southeast Asia; Germans in optics, piano manufacturing, and beer brewing in Western Europe, Russia, and the Americas; Italians in the wine industry in Brazil; and Jewish immigrants in the clothing industry in the U.S., South America, and Australia; to name just a few examples.

Moreover, for years in major urban centers in the United States such as Chicago, Irish Americans were "overrepresented" among elected officials, many Italians were in the construction business, almost all tailors were of Eastern and Central European descent, and a disproportionately high number of restaurant owners were (and are) Greek Americans. In short, historically specific ethnic groups have entered certain professions for a variety of reasons not necessarily linked to discriminatory employment practices.

In a particularly interesting case of "overrepresentation," the *Wall Street Journal* reported in 1995 that more than four-fifths of all doughnut shops in California were owned by people of Cambodian ancestry. Clearly, ownership of these small businesses is what Professor Cynthia Enloe called a "mobility ladder" for Cambodian Americans. It is a ladder to advance

economically and socially in American society. However, since Cambodian Americans are a relatively small percentage of the population this also means that they would be "underrepresented" as a group in almost all other areas of the economy, certainly in all departments of the Federal civil service. This apparently is a "problem" for diversity advocates, because it means that Asian-Americans might not be represented in all Federal agencies in proportion to their work force numbers. But why is this a "problem" for people living in a free society? And why should we assume that the proportional distribution of ethnic groups in all occupations and at all levels--that has never existed anywhere in the world--should be the norm in the United States Civil Service?

Moreover, how could a policy of ethnic proportional representation remain consistent with the principle of individual merit within a free society? Professor Donald Horowitz of Duke, after finding no multi-ethnic society in which ethnic groups were proportionally represented throughout the work force stated that "it remains problematic whether any but the most heavy-handed preferential policies, operating in a command economy, can actually move a society to such a state" (i.e. to ethnic group proportionalism).

(2) Proportional Representation is neither fair, nor just

The current diversity project ignores the issue of economic status--of need. In fact, George Gilder estimated that 70% of the American people belong to a "protected class" and that altogether "protected classes" control 75% percent of the nation's wealth. Diversity, as it is interpreted bureaucratically, means poor people could be discriminated against in favor of rich people. For example, the son of a millionaire Pacific Islander could be given preference over the son of a poor single mother from Appalachia and the daughter of a Fortune 500 corporation president could be given preference over any poor family's son. Some ethnic groups in the "protected classes" have been more successful economically than groups that are not "protected." For example, Chinese Americans have been more economically successful than German Americans.

Moreover, it is significant that the supporters of diversity no longer bother to argue their case on the basis of past discrimination against African Americans and women. After decades of arguing that Americans should make up for the legacy of slavery and segregation they now support government enforced preferences for ethnic groups that include large numbers of recent immigrants and non-citizens--with no historical connection to slavery, segregation, or past discrimination. Professor Lawrence Fuchs of Brandeis University, a leading scholar on American ethnic history, declared that there is no "plausible reason why immigrants (and their children) who have come to the United States voluntarily in the last two decades should qualify for affirmative action." Terry Eastland has noted that 75% of new immigrants coming to the United States every year are eligible for government-sponsored favoritism on racial and ethnic grounds. Clearly, this is unfair and unjust.

Terry Eastland writing in *Ending Affirmative Action: The Case for Colorblind Justice* (1996) explains this government favoritism in describing the case of the wealthy Fanjul family of Florida: "The Fanjuls, who have kept their Cuban citizenship in order to avoid paying U.S. estate taxes, have taken advantage of their 'minority' status to win government contracts set aside for Hispanics. The finance director of Broward County, Florida, told *Forbes* magazine that it is was 'irrelevant' to him that the Fanjuls are not U.S. citizens. If someone comes to the country asking to be considered for minority status, we accept their representations that they are exactly that."

(3) Proportional Representation is opposed by a majority of Americans of all races and both sexes

Abigail Thernstrom noted in a Center for Equal Opportunity (CEO) Policy Brief (July, 1996) that Gallup polls taken between the 1970s and the 1990s have consistently revealed strong opposition to racial and gender preferences from all segments of the American people. In every survey, more than 80% opposed racial and gender preferences, while support for proportionalism was only around 10% to 11%. Strong opposition came from minorities and women as well as from whites and men. A Gallup poll in 1977 disclosed that 64 percent of nonwhites and 82 percent of women opposed special hiring preferences for minorities and women. In 1989 a Gallup poll revealed that African Americans opposed preferential policies 56 percent to 14 percent. In examining the period between the mid-1980s and the mid-1990s Everett Carll Ladd found that Americans had grown "even less inclined to grant preferences" than previously.

(4) Proportional Representation is not consistent with the spirit of the Civil Rights Bill of 1964

Throughout the original debates opponents of the Civil Rights Bill of 1964 complained that the legislation would lead to group preferences and "quotas" in order that minorities and women would be hired in proportion to their availability in the local labor force. Thus, at one point in the debate Congressmen E.C. (Ezekiel Candler) Gathings (D-Arkansas)--after noting that the population of Phillips County, Arkansas in his district was 42.2% white and 57.8% black--asked: "Would that ratio be the employment criteria that the commission [EEOC] would use?" He further asked whether this would mean that every business establishment in Phillips County, Ark., would be required to have a 42.2 percent to 57.8 percent ratio of white to black employees? In addition, Representative Gathings inquired: "What if a given local population was 45 percent Baptist or 2 percent Chinese? What would that mean? Should there be quotas for these groups?"

Rejecting this criticism the pro-civil rights forces vehemently denied that Title VII would lead to numerical requirements or racial, ethnic, or sexual quotas. One of the civil rights leaders, Senator Hubert Humphrey of Minnesota answered a civil rights opponent by declaring: "If the Senator can find in Title VII--which starts on page 27, line 21, and goes all the way through page 50, line 25--any language which provides that an employer will have to hire on the basis of

percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there."

To make sure they were not misunderstood, the civil rights coalition added the following language to the bill in section 703j: "Nothing contained in this title shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin...on account of an imbalance...in any available workforce."

Forty-four members of Congress voiced opposition to racial, ethnic, and sex preferences, only two supported preferential treatment. Among those who rejected preferences were some of the most famous liberals of the 1960s including Hubert Humphrey, Ed Muskie, John Lindsay, George McGovern, and Adam Clayton Powell, Jr.

Summation.

Real non-discrimination (making sure that all occupations in the Federal civil service are open to all Americans on the basis of merit regardless of race, religion, sex, or ethnicity) is the opposite of "diversity" (insisting that all sectors of the civil service at all levels are proportionally representative of all racial, gender, and ethnic groups).

It is not surprising that an emphasis on proportional representation for racial, gender, and ethnic groups in the Federal civil service has resulted in more and more complaints. Indeed, initiatives to achieve proportional representation have resulted in complaints, bitterness, and blatant discrimination everywhere in the world that they have been tried including India, Nigeria, Malaysia, Sri Lanka, Fiji, Britain, Canada, New Zealand, and Australia. In some countries such as India, Sri Lanka, Malaysia, and Nigeria these projects have resulted in widespread violence and bloodshed among the middle classes.

There is no doubt that as more Federal programs continue to push proportionalism, the more complaints there will be from all racial and ethnic groups and from both sexes. This is true because proportionalism is not compatible with a merit system and ultimately, as different scholars have noted, with a free society itself. Proportionalism means coercion. In a free society individuals do not distribute themselves in all job categories proportionally by race, ethnicity, and gender. We will never arrive at the "right percentage" for all groups in all positions and at the same time remain a free society. For example, as mentioned earlier, many Cambodian Americans are small business people who own four-fifths of all the donut shops in California, but, at the same time, they are "underrepresented" as a group in the U.S. Park Service. Put in a different manner: many Cambodian Americans have chosen small business ownership as a "mobility ladder" instead of other forms of employment. Why is this a "problem" that government enforced favoritism must "solve?"

The major civil rights issue facing Americans today is the conflict between non-discrimination that respects individual merit and proportional representation for groups that goes under the euphemism of diversity. In the final analysis we must determine if we are interested in appearances or principles? Do we want the civil service to superficially "look like America" or do we want a civil service that will substantively "act like America." A civil service that merely "looks like America" suggests we are interested only in appearances. On the other hand, a civil service that "acts like America"--that is to say, acts, like Americans are supposed to act by judging people on the basis of their merit as individuals regardless of race, religion, ethnicity, or sex--means that we are interested in principles. Most significantly, it means we are interested in affirming America's highest and oldest principles centered on the worth of the individual human being.

Mr. MICA. Thank you both for your testimony, and I'll yield now to our ranking member.

Mr. CUMMINGS. Mr. Fonte, you talk about several things that I find interesting. I'm trying to figure out what acting like America means? My foreparents were called three-fourths of a man; they had a heart, they had blood, they were human beings. In this country, what does acting like America mean?

Mr. FONTE. Exactly, Congressman. We were not acting like America when your forebearers were brought to this country. That's exactly the point. I think we were acting like America in the Civil Rights Act of 1964, when we started working to reverse past discrimination and also we are acting like America in the civil service ideal of merit regardless of race, ethnicity, and gender. You're absolutely right, Congressman, we're not acting like America and we took a long time, we fought a civil war, we acted like America in the civil war, when hundreds of thousands of people died just for exactly for that purpose and in the Civil Rights Bill of 1964. So that's what I mean by acting like America, acting as Americans should act, not always as they have acted in the past.

Mr. CUMMINGS. See, that's the problem. America acts in different ways on different days. That's the problem. We've got a proposition 209 that deprives people's children of even going to school. Let me just ask you this: I listen to this whole thing about the Cambodians, I find that phenomenally interesting, but suppose you have a situation as we do in this country, and in the Federal Government, where African-Americans and women pay into a system, big time, every time they get their pay stubs they see where they've been paying into a system. Suppose you have a situation such as in my district, where it was admitted that people were kept in GS–5's at a disproportionate rate; I mean it was phenomenal, it was like about, they had like about 300 employees and about at least half of them were black, and about I'd say 90 percent of that group was in GS–5's, and up at the top management, 90 percent, 95 percent white males. Now in a city that's 65 to 70 percent black, tell me about why do you think based upon all that wonderful information you just gave me, although the agency has pretty much admitted that it was discriminating, do you have other than age, geography, and all—and you didn't finish mentioning the other things, I am interested to know what they are by the way. Why we have that kind of disproportionate situation and connected directly to that, is that would you agree if that people are unfairly discriminated against that it deprives their children, it deprives them of this one life that we have to live that this is no dress rehearsal and this is the life, deprives them of the kind of life that they could provide for their children and for themselves.

Mr. FONTE. Well, of course in that situation if these GS–5's are being discriminated against and they are deliberately kept down, then you're absolutely right. That's a clear case of discrimination. One interesting thing when you talk about past discrimination this is an interesting point because this was the original idea of the Civil Rights Act of 1964. But in recent years preferential treatment is not necessarily connected to past discrimination. Terry Eastland said that 75 percent of new immigrants, that had nothing to do with previous discrimination, are now eligible for preferential pro-

grams. Under the current way we do things, if the Sultan of Brunei sent his son over to the United States and he became a citizen, say, after 5 or 6 years, he would be eligible for a preferential program. This would be someone whose had no connection to previous discrimination. So we're actually moving away from some of the things that you've suggested, by the fact that 75 percent of new immigrants, once they have become citizens and so on, are eligible for preferential programs. In the case of actual discrimination, as you're saying these GS–5's, you're absolutely right. There is only one life to live for everybody and that's why we should move against nondiscrimination vigorously. I agree with you on that.

Mr. CUMMINGS. If you walked into a room as I have and you were looking at your entire, the hierarchy of, say, the State of Maryland Department of Transportation, and let's say for example, you lived in the State like I do where there's about 25 percent African-Americans, and if you being a white man, walked in and saw all black people, very black males at the very top of, say, your Department of Transportation, and let's say there are 15 positions at the top. Let's say for example, your population is 75 percent white and you see no whites sitting there, how would you feel?

Mr. FONTE. I think that, as you say, it's a question——

Mr. CUMMINGS. Do you understand the question?

Mr. FONTE. Yes, I think I do understand the question. I think when you look, if there's nobody there, then you wonder, but I think if you have an exact or expect an exact or equal percentage, you'll never have that situation. Sidney Hook, writing 30 years ago, in a situation in New York, he said among tugboat captains, 80 percent were Swedish-Americans.

Mr. CUMMINGS. Well, I'm talking about government now.

Mr. FONTE. Yes.

Mr. CUMMINGS. I'm not talking about tugboat captains.

Mr. FONTE. Well, the same principle applies——

Mr. CUMMINGS. All right, well——

Mr. FONTE [continuing]. Whether it's government or whatever. I agree with you that we could look at the numbers as a first step—but we should not think that we're going to ever have an exact percentage or that we should be driven by the numbers. The problem with diversity programs as they're currently defined—and they don't have to be defined this way—is that if they're driven by the numbers, then everything else is trumped. In other words, the numbers trump merit, they trump everything else. So you walk into a room, you say you expect an exact equal percentage, that is simply not the way the world has worked anywhere, nor in a free society is that the way the world should work.

Mr. CUMMINGS. I understand, but I guess when you see this over and over again, the question I guess becomes how do you decide what is trumped and what is not. The one thing that you do know, I mean, that I see consistently is that in many areas of governments representation of African-Americans and women don't even come close to the society, I'm not even talking about exact percentages, I'm talking about being involved in the process. There's one other element and then I'll finish.

You know one of the things that is extremely important is that children be able to see people that look like them in key positions.

That is very significant for our general society. I'm not even talking about trump. I'm talking about their parents being given fair opportunity. I think a lot of time what happens is that people who are in control don't necessarily give fair opportunity. Let me give you an example of that. I was put in special education, I can talk personally. At 5 years old. I was told I'd never be able to read or write. They gave me an SAT, said I shouldn't be able to go to college, but one thing they couldn't determine on the SAT was my determination. I'm a Phi Beta Kappa. I'm a lawyer, I was the second highest ranking member of the Maryland Legislature, and now I'm a Member of Congress. So, you know the question is how do we determine what is being treated fairly. Most of the people that grew up with me are dead, in jail, or doped up somewhere. Most of the men, the boys that grew up with me. So, we have all kinds of, you know, like I said, the rules change and you never know what they're supposed to be, so when you talk about how America's supposed to act, I have a lot of questions about how America's supposed to act, because America has not been fair to a whole lot of people and they're just not black people. You heard what they said about IRS yesterday, targeting poor people, they weren't talking about just black people, they were talking about white people, all kinds of poor people. So if that's how America is supposed to act, I don't know what that means and that's what creates the problem.

Mr. FONTE. Well, you made a very good point, I think when you said determination is something that matters and you said that's one reason African-Americans have succeeded so well in the U.S. military is determination, and that's something that can't be quantified, that's something we don't know and can never figure out in terms of numbers. That's why these Cambodian donut shop owners are succeeding, because of determination, that's why you've succeeded, it can't be quantified.

Mr. CUMMINGS. Thank you.

Mr. MICA. I want to thank our panelists. We may have additional questions we'll submit to you. Unfortunately, today has been interrupted by a series of votes, we appreciate your patience and your participation. It's been an interesting series of hearings and as I said, we'll continue our efforts to work together to resolve some of the problems we've found.

There being no further business to come before the subcommittee, this meeting is adjourned.

[Whereupon, at 12:55 p.m., the subcommittee adjourned subject to the call of the Chair.]

[Additional information submitted for the hearing record follows:]

168 Peyton Road
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September 22, 1997

Mr. John L. Mica
Chairman, Civil Service Subcommittee
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Dear Mr. Mica:

I have reviewed H. R. 2441, the Federal Employee Fairness Act of 1997 (Act), and I cannot support it as written because in its current form the Act will (1) not correct the behavior within Federal agencies that is the cause of employment discrimination suffered by Federal employees, (2) not improve the effectiveness of administrative review of employment discrimination claims made by Federal employees, (3) not save $26 million, but will most likely cost in excess of $30 million, (4) not streamline the EEO process, and (5) provide the foundation for Federal agencies to continue to discriminate against Federal employees.

THE ACT WILL NOT CORRECT THE BEHAVIOR WITHIN FEDERAL AGENCIES THAT IS THE CAUSE OF EMPLOYMENT DISCRIMINATION SUFFERED BY FEDERAL EMPLOYEES

The behavior within Federal agencies that is the cause of employment discrimination suffered by Federal employees is a direct result of the following:

- Federal agencies fail to obey the law of the land.
- The Office of the President of the United States and agencies in the executive branch demonstrate that, within the arena of employment discrimination in the federal workplace, they are currently unwilling to properly investigate wrongdoing.
- When presented with evidence of discriminatory behavior, the Office of the President of the United States and agencies in the executive branch do not take corrective action.
- Federal agencies do not obey the regulations set forth by the Equal Employment Opportunity Commission.
- The Equal Employment Opportunity Commission does not ensure that agencies comply with its requirements.

Federal agencies refuse to comply with the following requirements in 29 C.F.R. § 1614:

- Maintain a continuing affirmative program to . . . **identify and eliminate** discriminatory practices and policies. 29 C.F.R. § 1614.102(a).

- **Provide sufficient resources** to its equal employment opportunity program to ensure efficient and successful operation. 29 C.F.R. § 1614.102(a)(1).
- Provide for the **prompt, fair and impartial processing** of complaints. 29 C.F.R. § 1614.102(a)(2).
- Conduct a continuing campaign to **eradicate** every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions. 29 C.F.R. § 1614.102(a)(3).
- **Review, evaluate and control managerial and supervisory performance** in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity. 29 C.F.R. § 1614.102(a)(5).
- **Take appropriate disciplinary action** against employees who engage in discriminatory practices. 29 C.F.R. § 1614.102(a)(6).
- **Establish a system for periodically evaluating** the effectiveness of the agency's overall equal employment opportunity effort. 29 C.F.R. § 1614.102(a)(11).
- **Develop the plans, procedures and regulations** necessary to carry out its program. 29 C.F.R. § 1614.102(b)(1).
- **Appraise its personnel operations at regular intervals** to assure their conformity with its program, this part 1614 and the instructions contained in the Commission's management directives. 29 C.F.R. § 1614(b)(2).
- **Ensure that full cooperation is provided by all agency employees** to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters . . ." 29 C.F.R. § 1614.102(b)(5).
- **Evaluate from time to time the sufficiency of the total agency program** for equal employment opportunity and report to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities. 29 C.F.R. § 1614.102(c)(2).
- Assure that individual complaints are **fairly and thoroughly investigated**. 29 C.F.R. § 1614.102(c)(5).
- Develop a **complete and impartial** factual record. 29 C.F.R. § 1614.108(b).
- Complete it investigation **within 180 days** of the date of filing of a complaint. 29 C.F.R. § 1614.108(e).

The EEOC fails to comply with the following requirement in 29 C.F.R. § 1614, to wit:

- Periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records . . ." 29 C.F.R. § 1614.104(b).

The Act does not provide any sanctions for any of the above listed causes of discrimination in Federal employment, therefore, the Act changes nothing.

THE FEDERAL EMPLOYEE FAIRNESS ACT OF 1997 WILL NOT IMPROVE THE EFFECTIVENESS OF ADMINISTRATIVE REVIEW OF EMPLOYMENT DISCRIMINATION CLAIMS MADE BY FEDERAL EMPLOYEES

The Act will not improve the effectiveness of administrative review of employment discrimination claims made by Federal employees because:

- The EEOC and the MSPB allow Federal agencies unequal latitude.
- Federal managers and others are permitted to commit perjury to the EEOC and the MSPB without penalty.
- Federal managers and others suffer no sanctions when they discriminate.
- Federal agencies suffer no sanctions when they permit discrimination.
- The discriminatory decisions by government managers and others are defended by Federal agencies regardless of the truth.
- Agencies use their civil rights office as a tool of management to support discriminatory decisions.
- Agencies intentionally sabotage the EEO process.

The Act does not change any of the above.

THE ACT WILL NOT SAVE $26 MILLION, BUT WILL MOST LIKELY COST IN EXCESS OF $30 MILLION

The Act requires each Federal agency "to establish a voluntary alternative dispute resolution process to resolve complaints." The Act also increases the amount appropriated to the EEOC to carry out its additional responsibility. Without a doubt, each Federal agency will require more monies in its budget to comply with this mandate. The cost of establishing and administering a voluntary alternative dispute resolution program in each of the Federal agencies and the increased amount appropriated to the EEOC will certainly be in excess of $30 million.

The current EEO process requires that a person must see an EEO counselor prior to filing an EEO complaint. 29 C.F.R. § 1614.105(a) reads in relevant part **"Aggrieved persons who believe they have been discriminated against . . . must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter."** Part of the EEO counselor's role

is to have discussions between management and the aggrieved person in an attempt to resolve the matter without the necessity of an EEO complaint. 29 C.F.R. § 1614.104(b) reads in relevant part "The commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally . . . " Conciliatory discussions are required under the current EEO process. The current process is the most cost efficient way of attempting to informally resolve an EEO complaint, however, it is not effective because Federal agencies choose NOT to settle complaints informally. The problem is not a lack of an informal resolution process and a more expensive informal resolution process will not make Federal agencies settle complaints informally.

THE ACT WILL NOT STREAMLINE THE EEO PROCESS

The early dismissal of frivolous complaints is currently permitted by 29 C.F.R. § 1614.107. The adjudication of charges without a hearing if there is no genuine issue of material fact in dispute between the parties is permitted by 29 C.F.R. § 1614.109(e)(3). The handling of a mixed case complaint is adequately addressed by 29 C.F.R. §§ 1614.302-1614.310. Therefore, the Act will not streamline the EEO process because the problem with the EEO process is not frivolous complaints, or the adjudication of charges without a hearing if there is no genuine issue of material fact in dispute, or mixed cases.

THE ACT WILL PROVIDE THE FOUNDATION FOR FEDERAL AGENCIES TO CONTINUE TO DISCRIMINATE AGAINST FEDERAL EMPLOYEES

The Act defines the term "Federal employee" only as "an individual employed by, or who applies for employment with, an entity of the Federal Government." To prevent a Federal employee from filing a complaint a Federal agency would only need to terminate the Federal employee. The Federal employee would not be covered by the Act because he or she would not be "an individual employed by, or who applies for employment with, an entity of the Federal Government."

Further, with regard to the Civil Rights Act of 1964, the Act predominantly amends Section 717. Section 717 of the Civil Rights Act of 1964 applies only to personnel actions. However, the D.C., Second, Fifth, Eighth, Ninth, and Tenth Circuits, and the Supreme Court of the Unites States have held that the Civil Rights Act of 1964 applies to more than just personnel actions. See Hobson v. Wilson, 737 F.2d 1 (D.C.Cir.1984); Christman v. Skinner, 468 F.2d 723 (2nd Cir.1972); Familias Unidas v. Briscoe, 619 F.2d 391, 398-99 (5th Cir.); Norbeck v. Davenport Community School Dist., 545 F.2d 63, 67 (8th Cir.1976); Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir.1982); Ownes v. Rush, 654 F.2d 1370, 1379 (10th Cir.1981); NAACP v. Alabama, 357 U.S. 449, 462 ("freedom to associate and privacy in one's associations"); Griswold v. Connecticut, 381 U.S. 479; Kusper v. Pontikes, 414 U.S. 51, 56-57; NAACP v. Button, 371 U.S. 415, 430; Board of Education v. Barnette, 319 U.S. 624; DeJonge v. Oregon, 299 U.S. 353; Elrod v. Burns, 427 U.S. 347, 359; Perry v. Sindermann, 408 U.S. 593, 597; Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640 (1941) (so, too, is action taken to intimidate prisoners from initiating legal action); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747 (1969) (correctional officials may not obstruct or unreasonably restrict prisoners in their efforts to obtain judicial relief); In Re Primus, 436 U.S. 412, 426, 431, 98 S.Ct. 1893, 1901, 1904; Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 370 (the phrase "terms, conditions, or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.). As the Act predominantly amends Section 717, any form of

employment discrimination that is not a personnel action will remain unaffected by the Act and Federal agencies would be free to continue their discriminatory ways. In spite of these court decisions, there are court decisions that stand as roadblocks to the elimination of discrimination in Federal employment. See Lucas v. Cheney, 821 F. Supp 374 (D. Md. 1992); Page v. Bolger, 645 F.2d 227 (4th Cir.1981)(en banc), cert. Denied, 454 U.S. 892 (1981).

There are various other problems areas with the Act that prevent it from correcting discrimination in Federal employment. To enumerate each one in this document is not possible. There are many problems with Federal agencies' compliance in the Federal EEO process and many reasons for discrimination with the Federal sector. The Act does not address any of these problems or reasons, therefore, the Act will do little, if anything, to correct discrimination in Federal employment. In an effort to explain all the problem areas of the Act, I attempted to secure appointments with Mr. Martinez, Ms. Norton, Mr. Cummings, Mr. Wynn, and Mr. Ford, but I was unsuccessful. My two decades of experience in the Federal sector's EEO process, various court decisions, and Federal agencies unbridled defiance of the law of the land force me to only one conclusion regarding the Act. That conclusion is that the Act, as currently written, is of no benefit to the Federal employee, or the Federal EEO process because it fails to address any of the causal factors for discrimination in the Federal workplace and it fails to address any of the problems with the Federal EEO process.

The current EEO process is not broken. The current EEO process does not need fixing. If the Federal Government complied with the requirements of 29 C.F.R. § 1614, then discrimination in the Federal Government would have been eliminated a decade ago. The proof is found in the answer, that you would certainly find unacceptable, to the following question posed to each Federal agency:

> **Did your agency fully comply with all of the requirements contained in 29 C.F.R. § 1613 and does your agency fully comply with all of the requirements contained in 29 C.F.R. § 1614? If so, explain completely and with specificity when your agency reached full compliance, the measures in place in your agency that ensure compliance and provide supporting dated documentation. If not, explain completely and with specificity why your agency is not in full compliance. If only partial compliance, explain completely and with specificity which requirements your agency fully complies with and the measures in place in your agency that ensure compliance (provide supporting dated documentation) and explain completely and with specificity which requirements your agency is not in full compliance with and why.**

My prediction is some agencies will not fully respond, some agencies will not provide supporting dated documentation, and some agencies, if not all agencies, will lie. In any event, the answer to this question will certainly be helpful in determining what needs to be included in any new legislation.

Federal agencies have not complied with the requirements of 29 C.F.R. § 1613 and 1614 for the past two decades which proves that Federal agencies **WILL NOT** voluntarily comply with the law and the requirements of 29 C.F.R. § 1613 and 1614. **THE PROBLEM IS NONCOMPLIANCE BY THE FEDERAL GOVERNMENT WITH THE LAWS AND DIRECTIVES CURRENTLY IN PLACE**!!!! The solution to eliminate discrimination in Federal employment is simple. The Congress must pass legislation that provides extremely stiff monetary sanctions on Federal agencies, managers and others and the EEOC for failure to comply with the requirements of 29 C.F.R. § 1614. One does not need to see a sign in a bank to know that bank robbery is against the law and that there are stiff penalties for robbing banks. No bank robber ever said, "I didn't know bank robbery is illegal." When Congress wanted to stop

bank robbery it established stiff penalties for committing bank robbery. Bank robbers don't get diversity training, they get prison sentences. Along with money, there is something much more precious being stolen with the discriminatory decisions at issue here. Congressman Cummings expressed what that is extremely well during the recent hearing. If Congress wants to stop discrimination in Federal agencies, then Congress must establish stiff penalties. Anything less is just a waste of valuable time. What is needed is for the Federal Government to "walk the talk." If the Federal Government will not "walk the talk" voluntarily, then the Congress MUST ensure that it does. Discrimination in Federal employment is either against the law or it isn't. This country is either the land of equality or it isn't. There is no middle ground on this issue and there is no gray area.

Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing happened.--Winston Churchill

Let us not be content to wait and see what will happen, but give us the determination to make the right things happen.--Peter Marshall

It is from numberless diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring those ripples build a current which can sweep down the mightiest walls of oppression and resistance.--Robert F. Kennedy

Ability is of little account without opportunity.--Napoleon Bonaparte

The best security against revolution is in constant correction of abuses and the introduction of needed improvements. It is the neglect of timely repair that makes rebuilding necessary.--Richard Whately

Justice is the firm and continuous desire to render to everyone that which is his due.--Justinian

Whatever the human law may be, neither an individual nor a nation can commit the least act of injustice against the obscurest individual without having to pay the penalty for it.--Henry David Thoreau

The actions of men are the best interpreters of their thoughts.--John Locke

Sincerely,

SAM WRIGHT, JR.

Date: October 7, 1997

To: Congressman John Mica
Chairman, House Subcommittee on Civil Service
106 Cannon Office Bldg.
Washington, D.C. 20002
(Tel. 202-225-6427)

From: Valerie Darbe
1600 S. Eads St. #20N
Arlington VA 22202
(703-305-9839)(w)

Dear Chairman Mica;

I have been informed by Ned Lynch that I have the opportunity to enter comments in the record regarding "Employment Discrimination in the Workplace".

I would like to enter comments regarding aspects of my experience at the Patent and Trademark Office. Particularly heinous is PTO management's deliberate and knowing generation of false allegations that I had engaged in criminal activity at the PTO, including management's creation of a police report and its subsequent illegal dissemination in blatant violation of numerous laws. In addition, since there are no records of the police report being requested from or provided by the police agency to the PTO, it is impossible for me to track down copies meaning that these slanderous documents may "haunt" me for the rest of my life, circulating to only God-knows-where.

On June 3, 1996, I came to work and was publicly escorted out of the workplace (PTO)

by uniformed armed police officers in front of my coworkers in a procedure known as a "ban and bar". As stated below, I didn't know why at the time.

After the "ban and bar", I found out that it was part of a coordinated effort to coerce me into quitting or to fire me. The effort involved PTO management, a man I had made sexual harassment complaints against (Jon Backenstose-who already had complaints against him to management by others), and the man's girlfriend (Rehana Krick). The generation of the false police report was part of their efforts, occurring a week after Commissioner Bruce Lehman sent E-mail to Labor Relations (Kit Cooper) regarding the sexual harassment. As an aside, I have learned that the "ban and bar" humiliation tactic has been used in the past by the PTO as reprisal indicating a pattern of reprehensible behavior by the PTO.

Following is a summary of my situation. There is a lot more, such as evidence disappearing, but the entire story is VERY long.

I have worked as a patent examiner in the computer field at the US Patent and Trademark Office (U.S. PTO) since September of 1993.

In April 1996, I made a complaint to management against another employee (Jon Backenstose). The other employee had been harassing me at work in various ways, trying to get

me to have an affair with him, making unwanted comments about my body, which then escalated to more intimidating behavior such as leaving weapons catalogs in my office, trying to get me into sword fighting, etc. He even showed up at my church unexpectedly and ran after me shouting. I complained to management about his harassment and I told them of my fear of this person. Instead of resolving the situation, they tried to silence me, at one point telling me "it was (my) problem if (I) couldn't handle that kind of behavior". Management also attempted to make me quit by making my life miserable in various ways.

I complained about the treatment to Commissioner Lehman-several times in April and May of 1996. The Commissioner sent E-mail referring to the sexual harassment and my complaint to PTO Human Resources/Labor Relations on May 1, 1996. Instead of resolving it at that point, management instituted a campaign to fire me.

In their attempt to fire me, a false police report was generated (May 8, 1996) which alleged that I had engaged in criminal activity on the premises of the PTO. The generation of the false police report was necessary for the PTO to have a basis (however false) to ban and bar me. The "ban and bar" means that I was escorted out of the workplace (June 3, 1996) by armed uniformed police officers, and publicly exiled from the workplace until some unspecified future time (possibly forever). I didn't know why at the time--I assumed it was an escalation in their attempt to make me quit by publicly humiliating me and cause me further anguish. Management had taken great care to insure that neither I nor the union knew about the police report or any

allegations contained therein including dissuading the police (the Federal Protective Service) from investigating--therefore no one contacted me. I only found out about the police report and allegations after I was called back to work a month later (July 3, 1996) when I was presented with the police report in a proposal to suspend me without pay. Incidently, the police (Federal Protective Service) had no record of the PTO requesting or receiving a copy of the police report (a Privacy Act document) so it raises the additional question of violations by the PTO of the Privacy act and the constitutional right to privacy.

I contacted the Dept. Of Commerce Inspector General's (IG) office in August, 1996 regarding the generation of the false police report. I continued to contact them repeatedly for months as more things became known to me. I was finally told by an IG agent that the Inspector General's Office typically turns over things involving the PTO back to the PTO to investigate, specifically mentioning the name of one of the people involved in the generation of the false police report as the person who handles the investigations!!

I fought the proposal to suspend me and, with my union, proved the falseness of allegations in the proposal -- although we were greatly handicapped by management's failure to provide witnesses, evidence etc. as required by the union contract. All the facts and evidence on my behalf were ignored and I was suspended without pay. The union and I are still fighting and have reached the last round prior to arbitration. Management continues their policy of withholding witnesses, evidence etc. in violation of the union contract and continues to ignore the

evidence on my behalf. Although they are required by the union contract to answer the evidence presented-this provision of the union contract is also blatantly disregarded.

In December, 1996; I called the Federal Protective Service (FPS) regarding the crime of generating a false police report. They dispatched an officer who received evidence from me. Months later, after numerous phone calls pressing for an FPS investigation, I found out that the officer didn't make a report and FPS Police Chief informed me that the evidence had been "misplaced". There is reason to believe that the officer turned over the evidence to the PTO in December after receiving it from me.

I have been fighting this battle ***for over a year*** trying to clear my name and trying to salvage my reputation to some extent, get management to follow the law and union contract, find out official policy and procedures, enforce my rights etc.

I have done Freedom of Information Act and Privacy Act requests and an appeal and repeatedly gotten stonewalled. In fact, DOC OGC Barbara Frederick has withheld documents using the excuse that they are "evidence" --since the documents are material evidence in the EEO investigation, then, ***by law***, they are required to be in the EEO investigatory file. They are not in the file. In December of 1996, I myself saw some of the requested documents and the documents are damaging to the PTO, which explains the desire of the PTO and DOC to withhold them. Prior to the EEO investigation, I discussed these documents with Paul Donovan (Chief of Staff to Sec. Of Commerce Daley) with regard to a FOIA request and indicated that if they were withheld

in the (then upcoming) EEO investigation, it would constitute a crime.

In summary, the PTO (in violation of US Criminal Code (Title 18, section 1001)) has withheld material evidence and material facts in official investigations (the EEO investigation and two criminal investigations), knowingly continues to use documents containing false information. etc.

The PTO has repeatedly violated (and continues to violate) the union contract which they themselves cite as official policy and procedure.

The PTO has been unresponsive for requests for the most basic policies and procedures that I have requested as a federal employee, as a union member, through the Freedom of Information act, through the Privacy Act, etc. I have been informed that their reluctance to provide the requested information may be because the PTO routinely makes a mockery of "due process".

Not to mention that generating a false police report in itself is a crime and that interfering with my reporting a crime is "obstruction of justice".

Regarding the EEO complaint process itself:

I attempted to file a reprisal complaint in July 1996 to Eugene Evans at the OCR at the PTO - it was refused and only accepted when I acquired an attorney.

In my interview with the investigator hired by the DOC for the formal investigation, I brought up numerous documents, witnesses and facts in my case. When I received the investigatory file, a large number of documents I had told the investigator about were missing. witnesses I had named were not even questioned.

In addition , PTO responses to some of the facts were so narrow as to be extremely misleading. For example, management had received prior complaints regarding Backenstose and harassment, however the file was silent regarding management's knowledge of prior complaints (except for my affidavit)--instead there was a statement that there were no ***EEO*** complaints in the prior two years regarding Backenstose and sexual harassment--making it appear that there were no prior complaints when the *opposite is true*.

The PTO was absolutely silent on other facts which I had brought up with the investigator. There is a startling difference between details and scope of my affidavit and affidavits of others interviewed by the investigator.

In addition, the DOC has missed "deadlines" regarding the EEO process.

In my opinion, the entire concept of an agency investigating its own violations of law is, by nature, a conflict of interest.

Thank you for the opportunity to enter this into the record.

Sincerely,

Valerie Darbe

Valerie Darbe

STATEMENT OF
INTERNAL REVENUE SERVICE
SUBMITTED FOR THE RECORD

for the

Subcommittee on Civil Service
Committee on Government Reform and Oversight

Employment Discrimination in the Federal Workplace
September 25, 1997

The Internal Revenue Service (IRS) appreciates the opportunity to submit this statement for the record of the hearing on the topic of employment discrimination in the Federal workplace. Our statement discusses equal employment opportunity at the IRS.

Equal employment opportunity issues often are related to workforce composition. Currently, more than 67% of our workforce is female and more than 35% is from minority groups compared to 61% for females and 30% for minorities just 11 years ago. The percentage of female IRS executives has increased from 9.7% in 1988 to 23.6% in 1997. The percentage of executives from minority groups has risen from 10.4% to 13.1% over the same period. We have had similar changes in the composition of our workforce in the higher pay grades. The percentage of females in the GS/GM 13/14/15 positions was 22.9% in 1988 and 32.9% in 1997. For minorities, the numbers rose from 12.2% to 16.9%.

A number of factors have produced this changing workforce composition. The "baby boomers" who came to the Service in large numbers after 1970 began the change in the ethnic and gender mix of the IRS. Advances in civil rights and educational opportunities, as well as

changing societal mores and economic necessity also provided the IRS labor force with increasing numbers of professionally skilled women and minorities. By the late 1980s, the IRS experienced significant changes, not only in its workforce, but also with respect to fulfilling its primary mission (to administer the tax laws), and as an employer. Changes in workforce diversity were important in the IRS planning process. They also were important as we sought to facilitate changes to our work environment and new business requirements by adopting a strategic approach to planning and management that focused on long- and short-term business objectives.

Our planning process focused on four strategic areas, one of which was "Enhancing Recruitment and Retention of Employees." In this area, the IRS undertook 17 initiatives and studies. One study reviewed the status of women and minorities in the IRS. That study (*A Design for Organizational Diversity: Report of Strategic Initiative ERR-16: Minorities and Women Within IRS* (December 1989)) (ERR-16) has been provided to this Subcommittee and probably is the most relevant study in connection with this Subcommittee's recent hearings. ERR-16 addressed a number of equal employment opportunity issues within the Service. For example, it addressed the underrepresentation of women and minorities in management and leadership positions, as compared to their numbers in the total workforce. It is clear from the study that the IRS was concerned that the concept of equal employment opportunity was clearly reflected in our recruitment efforts, but was reflected far less clearly in advancement. The study also addressed the IRS training and development programs and their adequacy and relevance to the Service's increasingly diverse workforce.

ERR-16 defined the strategic direction the IRS was taking in this area as follows:

> The Internal Revenue Service at all levels will be representative of the public it serves and committed to a leadership role that ensures racial, ethnic, and (sexual) gender equality. The IRS culture will be free of barriers which limit opportunity for minorities and women.

To elaborate on this strategic direction, we articulated strategies in five areas:

- Strengthening Management Accountability;
- Achieving Progress through Education;
- Improving the EEO Functional Support to Management;
- Ensuring Effective Recruitment, Retention, Development, and Advancement; and
- Developing Reliable Workforce Information Systems

ERR-16 called for the IRS to look beyond actions that only remedied existing representational imbalances and to pursue a comprehensive strategy to understand, and be strengthened by, the diversity of its human resources. ERR-16 challenged the IRS to become an organization in which equal employment opportunity was not considered a program for a few designated groups, but a way of doing business that would ensure that all employees were treated equitably and were not advantaged or disadvantaged by their racial or ethnic background or by their gender. It has never been the policy of the IRS to use quotas to achieve diversity. We wanted to remove barriers to advancement so that any IRS employee who was qualified for a position would be given a fair chance to attain it. This was our objective in the late 1980s, and we think it remains a good objective today.

The IRS acted in good faith to achieve this objective, and took many actions to provide opportunities for all employees. We were not alone in our efforts to provide opportunities for all employees. The concept of equal opportunity in federal employment had been reaffirmed over the years by the executive and legislative branches of the federal government and in Supreme Court decisions. It was against this backdrop that the IRS and other federal departments and agencies developed affirmative employment programs and policies. We believe that our programs and policies have served us well. Recent court decisions in the *Adarand*[1] and *Byrd*[2] cases have caused us to review how we strategically approach or evaluate progress toward our objectives in the areas of equal employment opportunity for all employees.

In April 1997, a federal district court found, in an interlocutory decision, in *Byrd* that ERR-16 violated the Fifth Amendment equal protection clause. The plaintiffs, four white male GS-12 revenue officers, alleged that they had been subjected to age, race, and gender discrimination in connection with specific personnel actions taken by the IRS. The plaintiffs contended that ERR-16 encouraged institutional discrimination against white male employees, because its objective was to increase representation of women and minorities in managerial and executive positions through employee development and advancement strategies.

After *Adarand*, government actions related to race or ethnicity that are challenged under the Equal Protection clause are examined under what is called a "strict scrutiny" standard. Under the strict scrutiny standard, the government prevails if it shows that its program or policy serves a

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[1] *Adarand Constructors Inc. v. Pena*, 115 S.Ct. 2097 (1995).

[2] *John A. Byrd v. Robert E. Rubin*, Civ. Action No. 95-1280 (W.D. La. April 9, 1997).

compelling governmental interest and that it is narrowly tailored to serve that interest. In *Byrd*, the Court held that ERR-16 encouraged or authorized preferential treatment of minority and female employees, and that, accordingly, the strict scrutiny standard must be applied to the Service's initiative. The district court then concluded that diversification of the Service's workforce was not a compelling governmental interest sufficient to justify the agency's use of race and gender criteria in decision making.

Byrd is one of the first federal court decisions in which a federal affirmative action program was found unconstitutional. It was an interlocutory decision on a motion for partial summary judgment which could not be appealed until the trial on the merits had concluded. After that decision and before a final judgment on the merits, the case was settled by the parties under an agreement not to disclose the terms of the settlement.

The Acting Commissioner, in an August 19, 1997, Memorandum For All Executives and Managers, temporarily suspended portions of two standards in individual performance plans and two measures used in the Business Review (copy attached). The temporary suspension applies only to these performance measures -- not the affirmative action program. In consultation with the Justice Department and IRS Chief Counsel, we are working to redesign the elements and standards of the performance plans for executives and managers for FY 1998. The redesigned elements and standards will ensure that all managers and executives are evaluated on their efforts to develop and promote all employees in accordance with affirmative action plans that are consistent with current law and Administration policy.

In a September 22, 1997 memorandum, the National Director, Personnel Division, reiterated the changes to 1998 performance plans which had been described in the Acting Commissioner's memorandum. The memorandum also described new, Treasury-mandated EEO performance elements and standards for all supervisors and managers to be included in the Executive/Managerial Performance Plan for the FY 1998 performance appraisal period (copy attached.) The IRS has not terminated its affirmative action program and, indeed, remains committed to doing everything permitted under law to achieve a diverse workforce.

In concluding, the IRS remains committed to providing equal opportunities for all employees and to maximizing the benefits of having a diverse workforce. The IRS is aware of its affirmative employment responsibilities under Management Directives promulgated by the Equal Employment Opportunity Commission, and will work with the Commission in maintaining a lawful affirmative employment program.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

COMMISSIONER

August 19, 1997

MEMORANDUM FOR ALL EXECUTIVES AND MANAGERS

FROM: Michael P. Dolan
Acting Commissioner of Internal Revenue

SUBJECT: Affirmative Employment Programs and Policies

For many years, the Internal Revenue Service has been in the forefront in developing programs and policies intended to provide opportunities for all employees. The concept of equal opportunity in federal employment has been reaffirmed over the years by the executive and legislative branches and in a number of Supreme Court decisions. From the outset, affirmative action measures permitted the consideration of race, national origin, sex or disability along with other criteria in government decision making. It was against this backdrop that the Service, as did other federal departments and agencies, developed affirmative employment programs and policies.

I believe that the Service's programs and policies have served us well and that we are a stronger and more effective agency because of our actions in the area of EEO and diversity. However two court cases are causing us to review how we strategically approach or evaluate progress on our objectives in these areas.

In *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995), the Supreme Court held that federal affirmative action programs that use racial and ethnic criteria as a basis for decision making are subject to strict scrutiny. Under *Adarand*, affirmative action programs and policies must serve a compelling governmental interest, such as the eradication of the present effects of past discrimination against identifiable victims. Affirmative action programs that are based on a showing of underrepresentation alone do not satisfy the *Adarand* standard. Also, a recent district court case called into question the application of the Service's strategic initiative in the area of Enhancing Recruitment and Retention of Employees, ERR-16.

I personally want to reaffirm the Service's commitment to provide equal opportunities for all our employees and our desire to maximize the benefits of having a diverse workforce. However, until we thoroughly analyze all of the ramifications of these court cases, it is advisable to temporarily suspend certain aspects of our performance management system which address expectations or measurements in the

ALL IRS EXECUTIVES AND MANAGERS

area of EEO and diversity. This suspension affects two of the general standards in individual performance plans and two measures used in the Business Review. The following guidance applies to preparation of FY 97 performance appraisals for executives and managers.

Do not prepare any narrative addressing the language shown in the following General Standards.

Critical Element: Achieve Quality-Driven Productivity Through Systems Improvement and Employee Development

General Standard: Coach and develop employees to achieve parity at all grade levels which is reflective of the Civilian Labor Force by eliminating barriers in recruiting, hiring, training, and promoting minorities, women, and persons with disabilities.

Critical Element: Maximize Customer Satisfaction and Reduce Burden

General Standard: Meet the Service's goals in: ..... minority, women, and labor surplus area contacting. [Please note that only a portion of this general standard is affected. Meeting the Service's goals in the areas of cash management, prompt payment and debt collection are still subject to narrative evaluation, as appropriate.]

All other elements and standards in the FY 97 performance plans should be addressed in the evaluations, consistent with the scope of an individual's responsibilities. For purposes of the Business Review this year, in the area of EEO measures, workforce (pool series) representation and targeted disabilities measures will not be addressed. The Business Review will cover complaint resolution rates.

Analysis of the impact of these court cases is ongoing. In the near future you can expect to see modifications to FY 98 performance plan standards and additional guidance on how to approach our critical responsibilities in the areas of EEO and diversity. If you have questions about this memorandum, please contact Paulette Sewell-Gibson, Acting National Director, EEO and Diversity, at (202) 622-5400.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SEP 22 1997

MEMORANDUM FOR REGIONAL COMMISSIONERS, CHIEF OFFICERS, EXECUTIVE OFFICER FOR SERVICE CENTER OPERATIONS, CHIEF INSPECTOR, NATIONAL DIRECTOR OF APPEALS, TAXPAYER ADVOCATE, AND DIRECTORS OF SUPPORT SERVICES

FROM: Eugenio Ochoa Sexton, FOR
James O'Malley
National Director, Personnel Division

SUBJECT: Changes to the Executive/Managerial Performance Plan and the New Performance Plan for Management Officials

This memorandum highlights several important changes to the performance management program. These changes will impact executives, managers, and management officials Servicewide. Management officials will be on a separate performance plan for FY 1998 (October 1 - September 30) performance appraisal period. Executives and managers will have a new EEO critical element and standards.

Because of these changes we are revising Form 9688, Executive/Managerial Performance Plan, and developing a new form for management officials. These new forms will not be available until mid November. Until these forms become available, the attached interim forms should be locally reproduced in order for employees to receive their performance plans timely. Regulation requires managers to communicate performance expectations with their employees usually within thirty days after the start of the rating period. Discussion and documentation of the attached interim forms would meet that requirement. Completing the formal forms would not be necessary in this case.

Changes to Form 9688, Executive/Managerial Performance Plan, (Attachment 1)

- Suspension of certain aspects of two performance standards in the Executives/Managers Performance Plan addressing expectations/measurements in area of EEO and diversity (Acting Commissioner's memo, Affirmative Employment Programs and Policies dated August 19, 1997).

  The Service is committed to provide equal opportunities for all employees and to maximize the benefits of having a diverse workforce. The Service is currently in the process of assessing its affirmative employment policies and programs in light of the recent court cases. However, until analysis of the impact these court

cases have on our performance management program are completed, we have temporarily suspended portions of EEO and diversity under the following:

Critical Element : Maximize Customer Satisfaction and Reduce Burden

General Standard: Meet the Service's goals in: . . . . minority, women, and labor surplus area contracting. (Only a portion of this general standard is suspended for FY 98 appraisal period.)

Critical Element: Achieve Quality-Driven Productivity through Systems improvement and Employee Development

General Standard: Coach and develop employees to achieve parity at all grade levels which is reflective of the Civilian Labor Force by eliminating barriers in recruiting, hiring, training, and promoting minorities, women, and persons with disabilities. (Suspended for FY 98 appraisal period.)

- Addition of a separate EEO critical element and performance standards.

  The Secretary of the Treasury is mandating uniform EEO performance element and standards for all supervisors and managers to increase management accountability for EEO activities. As a result of this mandate, the EEO critical element and performance standards have been added to the Executive/Managerial Performance Plan for the FY 1998 appraisal period. The Department's goal is to send a clear message to all supervisors and managers that they will be held accountable for upholding the Department's commitment to the EEO principles.

- Minor changes to the critical elements.

  The wording of the critical elements has been revised to reflect the language in the Strategic Plan and Budget FY 1998. The general standards remain unchanged.

Regional Commissioners, Chief Officers, Executive Officer for Service Center Operations, Chief Inspector, National Director of Appeals, Taxpayer Advocate, and Directors of Support Services

New Performance Plan for Management Officials (Attachment 2)

- In the past, management officials and their supervisors experienced problems linking their work to the three corporate objectives in the Strategic Plan and Budget (SPB) for evaluating performance. Based upon input from all levels of the organization, new performance elements and standards were developed to describe the most common duties to the management official. The new plan is within the scope of the management official and consistent with the overall objectives of the organization.

The revised Executive/Managerial Performance Plan and the new Management Official Performance Plan will be printed for Servicewide distribution. We plan to have Publishing Services print the new forms and send them directly to the CID sites to be available in mid November. If you have questions regarding the recent changes, please call Nora Prokuski at (202) 874-6213, Office of Performance and Position Management.

cc: Personnel Officers
TPC Chiefs

Attachment 1

EXECUTIVE/MANAGERIAL PERFORMANCE PLAN

Name of Employee	Office/Organization	Series and Grade
Title of Position		Period Covered From To

This performance plan has been discussed with me and I have been given a copy.

Employee Signature		Date
Supervisor's Name/Signature	Title	Date
Approving Official's Name/Signature	Title	Date

INSTRUCTIONS

Your performance plan should be developed by you and your manager. The plan will contain the established critical elements, related standards, and any amplification/additional standards developed specifically for you. The established critical elements and standards were written at the fully successful level and are designed to reflect basic, on-going responsibilities of executives and managers throughout the Service. While each critical element is a mandatory performance indicator, some general standards may not apply to your specific position. You and your manager should review each general standard and delete any that are not applicable for your plan. Deletions should be noted and initialed on the plan. Additional standards, reflecting only those few high-priority requirements that must be accomplished in the rating period, may be added to your plan. These should be kept to a minimum (usually not more than two per element) and written at the fully successful level with appropriate indicators of quality, quantity, and timeliness.

Your performance will be assessed in accordance with your plan, and will reflect a rating for each critical element and all applicable standards. An overall rating (summary level) will also be determined.
When carrying out your plan responsibilities, it is critical that each element and standard be accomplished in accordance with:

- legal, procedural, administrative, technical, and program requirements
- objectives in the Strategic Plan and Budget
- program directions and manuals
- transition to Leadership Competencies

Progress reviews are an essential part of the performance plan and appraisal system. Although the process of monitoring plan accomplishment is on-going, a minimum of one review must be conducted approximately mid-way through the appraisal period. While a formal written review is not mandated, documentation that the review has been conducted is required in accordance with local procedures.

PRIVACY ACT STATEMENT

The Privacy Act of 1974 and Paperwork Reduction Act of 1980 say that when we ask you for information, we must tell you: our legal right to ask for the information; what major purpose we have in asking for it and how it will be used; what could happen if we do not receive it; and whether your response is voluntary, required to obtain a benefit, or mandatory under the law.

This statement is being provided pursuant to Public Law 93-579 (Privacy Act of 1974) December 31, 1974, for individuals who have been requested to submit a statement of accomplishment/self-assessment.

The authority to solicit this information is derived from 5 USC 4301, et seq., and 5 CFR Part 430.

In order to allow you the opportunity to provide input into the appraisal process, management will request this information from you. The information you furnish will be considered by your supervisory officials in preparing an appraisal of your performance, or conducting mid-year progress reviews. Once prepared, the information contained in your performance appraisal will be used on a "need to know" basis by IRS officials. Disclosures may also be made when appropriate, to routine users as published in the Federal Register, such as the Office of Personnel Management, the Equal Employment Opportunity Commission, the General Accounting Office and others listed in the appropriate system of records. The information contained in your performance appraisal is part of TR/IRS 36.003, General Personnel Records.

Failure to furnish this information may result in your supervisors preparing your appraisal, or conducting a progress review, without considering any information you may feel is relevant or significant.

Executive/Managerial Performance Plan

Critical Elements and Performance Standards

The following critical elements apply to all Executives and Managers. The General Standards appearing with each element describe the requirements for fully successful performance in all organizational components and reflect the importance of successfully managing day-to-day operations and furthering the Service's progress toward meeting the organizational goals of the Strategic Plan and Budget. Additional standards may be prepared for each critical element. These amplification/additional standards should be used for clarification or emphasis of the organization's needs and the needs of the individual.

The EEO element and standards support the Service's commitment in improving and measuring EEO effectiveness.

1. Increase Compliance.

Objective: Ensure our products, services, policies, and employees directly or indirectly encourage and assist taxpayers to increase the number who voluntarily file timely, accurate, fully paid returns. When taxpayers do not comply, take appropriate remedial/enforcement actions to correct future behavior.

General Standards: Consistent with the scope of your responsibilities, apply leadership competencies to:

- Plan, implement, monitor, and deliver programs to meet the goals of the Strategic Plan and Budget timely and within budget allocations, including but not limited to effective planning and management of labor costs, space utilization, telecommunication resources, equipment inventories, and accounting controls.
- Identify emerging tax administration issues and develop/implement strategies to address them.
- Provide taxpayers with the ability to interact with employees and systems to meet their diverse needs.
- Maximize resource effectiveness through cross-functional coordination with internal and external stakeholders.
- Foster personal and employee development to better match the skills, abilities, ideas, and experiences of our diverse workforce to appropriate market segments.
- Administer the tax laws with empowered employees who protect taxpayers' rights and treat them ethically with honesty, integrity, fairness, and respect.
- Develop/maintain systems to protect internal and external customer privacy, keep data confidential, and maintain adequate security over tax/personnel data.

Amplification/Additional Standards:

2. **Improve Customer Service.**

Objective: Reduce the time and expense experienced by taxpayers, tax professionals, and others in complying with the tax laws while at the same time increasing their satisfaction with the tax system. Use the skills of a diverse workforce to support front-line initiatives to maximize internal and external customer satisfaction.

General Standards: Consistent with the scope of your responsibilities, apply leadership competencies to:

- Use the skills and abilities of a diverse workforce and technology to redesign/maintain business processes that reduce expenditures of time, money, and resources for taxpayers and internal customers.
- Provide the assistance needed to resolve issues during the initial contact with taxpayers.
- Provide customized education and enhanced outreach efforts.
- Establish and aggressively monitor necessary internal controls (annual assurance process) to deliver a quality product and guard against waste, fraud, and abuse.
- Meet the Service's goals in cash management, prompt payment, and debt collection.

Amplification/Additional Standards:

3. **Increase Productivity.**

Objective: Continually improve the quality of products and services we provide to our internal and external customers through the use of teamwork, systems improvement tools and techniques, and the development of a highly trained, diverse workforce.

General Standards: Consistent with the scope of your responsibilities, apply leadership competencies to:

- Improve processes and products by using systems management techniques and focusing our modernization efforts to meet customer needs.
- Educate the workforce/stakeholders on how organizational goals, strategies, policies, practices, and individual jobs relate to the Strategic Plan and Budget.
- Empower individuals to use independent judgment to solve problems and develop products and services in a timely and effective manner.
- Establish and maintain a constructive working relationship with the National Treasury Employees Union to implement the IRS/NTEU Total Quality Organization partnership.
- Support a healthy, safe work environment, free from harassment and discrimination, in which the privacy of employees is respected.

- Promote a workplace climate where ethical behavior is paramount and everyone is treated with honesty, dignity, and respect.

- Provide a written performance plan within 30 days of the beginning of the rating period and assign an annual performance rating of record within 30 days of the close of the rating period for each employee.

Amplification/Additional Standards:

4. Equal Employment Opportunity

Objective: Application of the Equal Employment Opportunity principles of fairness and equity in the workplace.

General Standards: In consultation with the EEO staff and to the extent authorized and consistent with existing resources:

- Supports staff participation in special emphasis programs.

- Promptly responds to allegations of discrimination and/or harassment, and initiates appropriate action to address the situation.

- Cooperates with EEO counselors, EEO investigators, and other officials who are responsible for conducting inquiries into EEO complaints.

- Assigns work and makes employment decisions in areas such as hiring, promotion, training, and developmental assignments without regard to sex, race, color, national origin, religion, age, disability, sexual orientation, or prior participation in the EEO process.

- Monitors work environment to prevent instances of prohibited discrimination and/or harassment.

Attachment 2

MANAGEMENT OFFICIAL PERFORMANCE PLAN

Name of Employee	Office/Organization	Series and Grade
Title of Position		Period Covered From To

This performance plan has been discussed with me and I have been given a copy.

Employee Signature		Date
Supervisor's Name/Signature	Title	Date
Approving Official's Name/Signature	Title	Date

INSTRUCTIONS

The critical elements are applicable to all management officials. The objective and uniform standards under each critical elements reflect the major day-to-day responsibilities of the position. All standards are written at the fully successful level. While each critical element is a mandatory performance indicator, some general standards may not apply. The supervisor and employee should review the uniform standards and delete any that are not applicable. Deletions should be noted, initialed, and dated by the employee and supervisor. Local, individual, or team standards, as appropriate, may be included to reflect areas of emphasis. These should be kept to a minimum and should be written at the fully successful level with appropriate indicators of quality, quantity, and timeliness.

The employee's performance will be assessed in accordance with the plan, and will reflect a rating for each critical element and applicable uniform standards. An overall rating (summary rating) will also be determined.

Progress reviews are an essential part of the performance plan and appraisal system. Although the process of monitoring plan accomplishment is on-going, a minimum of one review must be conducted approximately mid-way through the appraisal period. While a formal written review is not mandated, documentation that the review has been conducted is required in accordance with local procedures.

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PERFORMANCE PLAN FOR MANAGEMENT OFFICIALS

Critical Elements and Performance Standards

Element 1. Program Planning, Management, and Delivery.

Objective: Plans and organizes assigned activities and projects to timely accomplish work objectives according to procedural, administrative, and technical requirements, as well as business goals: Increase Compliance, Improve Customer Service, and Increase Productivity. Quality and customer service are reflected in all products and activities.

Uniform Standards:

- Sets effective short and long-term priorities that are realistic, responsive to accomplishment of the Strategic Plan and Budget, as well as local priorities. Plans, implements, monitors, and delivers assigned programs to meet the local goals of the Annual Performance Plan.
- Effectively implements and monitors assigned programs. Provides necessary oversight to ensure quality results that are responsive to the needs of the Service, as well as internal/external customers.
- Utilizes technology to redesign/maintain business processes that reduce expenditure of time, money, and resources for taxpayers and internal customers. Reviews and/or recommends effective use of resources for functional program areas.
- Utilizes systems management principles. Contributes to continuous quality improvement in day to day work assignments.

Local, individual, or team standards: May be used to define specific outcomes and time frames.

Element 2. Communication, Interpersonal Relationship, Team Work.

Objective: Develops and maintains lines of communication and interaction which ensure work accomplishments and enhances work relationships with peers, external/internal customers, superiors, and others.

Uniform Standards:

- Actively assists in meeting unit/team goals as appropriate.
- Exercises sound judgment in identifying the information needed to be communicated.
- Through timely and effective oral and written communication, disseminates necessary information and program guidance.
- Maintains effective working relationships.

- Keeps management and other appropriate parties timely informed of significant issues.
- Supports a workplace climate where ethical behavior is paramount and everyone is treated with honesty, dignity, and respect free from harassment and discrimination.

Local, individual, or team standards: May be used to identify specific team goals, working relationships to be improved, and feedback systems.

Element 3. Quality of Expertise.

Objective: Effectively demonstrates expertise in assigned program areas.

Uniform Standards:

- Continually develops and maintains technical program expertise.
- Provides accurate, timely guidance and instructions.
- Maintains knowledge of broad organizational goals to assure program direction and guidance advance such goals.
- Effectively researches issues and prepares thorough recommendations and solutions.

Local, individual, or team standards: May be used to cite specific issues, projects, goals, or developmental activities.

ELEANOR HOLMES NORTON
DISTRICT OF COLUMBIA

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE

SUBCOMMITTEES
PUBLIC BUILDINGS AND
ECONOMIC DEVELOPMENT
WATER RESOURCES AND
ENVIRONMENT

COMMITTEE ON
GOVERNMENT REFORM AND
OVERSIGHT

SUBCOMMITTEE
RANKING MINORITY MEMBER,
DISTRICT OF COLUMBIA

Congress of the United States
House of Representatives
Washington, D.C. 20515

TESTIMONY OF CONGRESSWOMAN ELEANOR HOLMES NORTON ON AFFIRMATIVE ACTION, PREFERENCE AND THE CIVIL RIGHTS ACT OF 1997, H.R. 1909

HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION JUNE 26, 1997

For more than three centuries, in one form or another, race has been both this country's deepest flaw and its cheapest shot. Every period has produced its own version of each, depending upon the quality of our leadership and the shape of events. Today, presidential and congressional leadership is once again being tested, but this time not on race alone but on gender and ethnicity as the country moves rapidly to become a multi-racial nation.

Today I want to discuss H.R. 1909 and its potential effects on affirmative action. I think that I would be most useful if I did so by bringing to bear my own experience as a former chair of the Equal Employment Opportunity Commission (EEOC) and a former chair of the New York City Commission on Human Rights. While I was at the EEOC, we developed Affirmative Action Guidelines for the purpose of helping employers avoid discriminating against some while eliminating discrimination against others. These Guidelines are attached to my testimony. Affirmative action in employment, which has been developed and ratified by the courts, is the generic model and the most instructive in discussing this subject in other areas.

The New York City law encompassed all forms of discrimination. In New York, I worked not only to remedy discrimination but, in doing so, to use mechanisms that avoided racial preference, polarization, and tension among New York City's numerous and extraordinary array of racial and ethnic groups. As chair of the New York City Commission, I used strong and effective affirmative action, including goals and timetables, in a city where the major Jewish organizations are headquartered. My experience in New York is noteworthy because American Jews have been perhaps the group most victimized by invidious, exclusionary discriminatory quotas. Virtually all the Jewish groups supported my affirmative action work, including goals and timetables, and later supported my candidacy when President Carter nominated me to chair the EEOC. My experience in New York as well as the documented support of most of the major Jewish organizations supporting affirmative action in general, and goals and timetables in

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particular, is persuasive evidence that goals and timetables do not generally lead to quotas.

After the Supreme Court decision in Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995), applying strict scrutiny to affirmative action remedies, it is fair to ask why anyone would come forward with the bill before you today. No one can doubt that Adarand has tied the knot as tightly as anyone in good faith could desire. That decision has caused the Clinton Administration to undertake large changes tightening all affirmative action programs. As a result, the only set-aside program (a sheltered program at the Department of Defense) has been eliminated.

To illustrate how affirmative action has been narrowed to meet even the most stringent of requirements following Adarand, one need only look at the Department of Transportation Disadvantaged Business Enterprise (DBE) regulations: use of race-neutral alternatives as a priority in meeting DBE goals; waivers of race-conscious goals altogether if good faith efforts fail to find qualified subcontractors; using factors other than race (such as social and economic disadvantage) in determining program eligibility; periodic review of the program through the reauthorization process; graduation of DBE firms out of the program; among others.

Given the Adarand strictures imposed by the Supreme Court and the narrowing of affirmative action by the Clinton Administration, ask what possible purpose could the Canady bill serve? If anything, the catalogue of new safeguards, tight restrictions, potential liability for abuse, and a daunting new strict scrutiny standard threaten most remaining affirmative action and leave little room or need for Congressional action.

Today, far from being a threat, affirmative action is surrounded by a plethora of proven safeguards, daunting new Supreme Court restrictions, and administrative limitations that should lead this Committee to inquire whether the nation's antidiscrimination effort has not already been severely undermined. Without any showing that affirmative action is no longer needed or that it in fact has been significantly abused, the Canady bill disarms legitimate efforts to eliminate discrimination. What the bill leaves is a small number of benign outreach mechanisms that have almost a century of documented failure.

It was the courts that led in requiring affirmative remedies, such as numerical indicators of progress, because they found that the methods in use (such as outreach, the central feature of Canady) had produced almost no progress. Today, no one who is serious about eliminating ancient and recalcitrant patterns of discrimination would return to the remedies of the 1950s, as this bill does. The 1964 Civil Rights Act, in succeeding the benign 1957 Civil Rights Act, deliberately opened the way for the modern remedies now in use. Nothing would increase the cynicism of blacks more than to be told to repair to the old remedies that kept their fathers and grandmothers in the backwaters of the labor force. Nothing would punish women and their families more than outreach techniques that allow employers to recruit women to a pool but continue to hire as before.

The careless and undocumented assertion that quotas result from goals and timetables has no basis in fact. The bill's author has not even tried to meet the burden of demonstrating the extent of abuse. He cites no statistical evidence. The usual anecdotal evidence is unpersuasive, especially when measured against the countless millions of instances of legitimate and systematic use of affirmative action in the workplace and the great strides women and minorities have made only as a result of strong affirmative action.

The same courts that are chiefly responsible for developing affirmative remedies have also built strong safeguards. The Supreme Court has required that neutral measures be considered before using race- or sex-based remedies; that remedies not be used to maintain a balance, even if layoffs immediately undo remedial hiring or promotion; that remedies be time-limited; that remedies be tightly tailored to the particular problem; that remedies be flexible; that numerical remedies reflect the number of qualified minorities and women in the applicable pool; that race or sex can be one but not the exclusive factor; that remedies not "unnecessarily trammel" on others or discharge them from their positions, even if the existing workers received their positions because of discriminatory practices; and that only good faith efforts, not actual hiring of excluded individuals, be required, even where there has been deliberate segregation.

Beyond the safeguards developed by courts are others that operate as a matter of law. For example, because goals are remedial, they automatically become illegal once the employment system is operating effectively to bring in members of the excluded groups on its own, even if the employer has not fully corrected discrimination. This stage normally is reached when a critical mass of individuals from the excluded group has been recruited, because then the system can revert to word of mouth recruitment. Particularly after the system is corrected, the use of numerical remedies is itself discriminatory. For example, when Title VII of the 1964 Civil Rights Act was enacted, the majority of real estate agents were men; today the majority are women. Long before the point of complete reversal of the discrimination, affirmative action would have been inappropriate, once it was clear that the veneer of discrimination had been wiped away and women were coming into the real estate profession as a matter of course. Further, goals and timetables play an important role in protecting against "reverse discrimination." An employer who engages in the appropriate outreach and makes a good faith effort to find minorities and women may cite these efforts when not finding sufficient and sufficiently qualified applicants.

This may be one of the reasons that business and the most successful use of affirmative action, our own Armed Forces, have long successfully embraced affirmative action, including goals and timetables, quite apart from the more farsighted desire to do the right thing we see from business and the Services today. Business has been spared billions of dollars in litigation because goals and timetables have encouraged self-remediation, the best and most cost efficient law enforcement.

Business support of affirmative action has been largely responsible for its survival since 1980. When the Reagan administration tried to eliminate affirmative action, it was the business

community and, ironically, Senator Bob Dole, who opposed affirmative action in the last Presidential campaign, who saved goals and timetables. Business had come to rely on the assessments by the Labor Department's Office of Federal Contract Compliance, which uses goals and timetables to help identify and correct exclusionary but often unintentional practices, an early warning that has saved countless amounts of money and time that would otherwise have gone into litigation. Goals have been essential to understanding whether discriminatory practices and tests are actually being eliminated. For example, if an employer is using a new test or advertising in new sources, goals that result in employees from new groups tell him that the new techniques are removing exclusionary barriers and protecting him from litigation.

Finally, let me offer perhaps the most persuasive evidence that white males are not victims of affirmative action. At the EEOC, on average, white men filed only 1.7% of discrimination complaints between 1987 and 1994 alone. Yet, neither at the EEOC or in other administrative agencies or courts have white males showed a reluctance to pursue their rights against discrimination. White men file the great majority of age discrimination cases at EEOC -- 6,541 of 8,026 age complaints filed in 1994. The reason, of course, is that age discrimination is the most common form of discrimination white men face -- and they pursue their rights with a vengeance. They are objects of age discrimination in particular because employers often seek to eliminate experienced and management level employees because of the cost of their wages and benefits. The record on age discrimination shows that white males understand discrimination. Their record of failing to pursue other forms of discrimination, including "reverse discrimination," is compelling evidence that affirmative action has not significantly discriminated against them.

This is not the time for a bill to kill affirmative action. President Clinton is about to take the country through a much needed dialogue on racial relations. This bill invites confrontation, not dialogue, racial, ethnic and gender discord, not reconciliation. Do not pass this bill. Pass it by.

○