

GAO

Testimony

Before the Committee on Governmental Affairs  
United States Senate

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APPLICATION OF LAWS

Comments on the  
Congressional  
Accountability Act—S.2071

Statement of Robert P. Murphy  
Acting General Counsel



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Mr. Chairman, Senator Roth, and Members of the Committee:

I am pleased to be here today to discuss the proposed application of certain employee protection laws to the Congress and other legislative branch organizations, including the General Accounting Office. Bills before the Committee vary substantially in the laws to be applied, the breadth of coverage, and administrative and enforcement mechanisms. These bills include S. 29, S. 103, S. 579, S. 2071, and S. 2194. I will focus on the most comprehensive bill, S. 2071, which would apply to the Congress and congressional instrumentalities 10 employee protection laws, as well as the Freedom of Information Act and the Privacy Act. That bill would provide aggrieved employees the right to seek remedial action under a system analogous to the one currently available to GAO employees.

As the Final Report of the Joint Committee on the Organization of Congress described last December, application of employee protection measures to the legislative branch is a patchwork. There is more consistent application of these laws to the three major support agencies—GAO, the Government Printing Office, and the Library of Congress—than to organizations closer to the core of the legislative branch’s constitutional roles of oversight and enacting legislation. We at GAO are subject to most of the laws addressed in S. 2071 either directly or by incorporation through the GAO Personnel Act of 1980, or with respect to a few, through GAO regulation or policy. Appended to this testimony is a fact sheet describing the application of these provisions to GAO. The enforcement mechanisms for GAO are largely analogous to those described in S. 2071. For us, these laws have worked well, contributing to a safe, fair, and equitable work environment, and helping to attract a highly qualified and motivated workforce.

Based on our experience with GAO’s employee protection provisions, on the operation of an independent enforcement mechanism at GAO—our Personnel Appeals Board, and on our evaluation of personnel management practices at other agencies, we suggest several issues for the Committee to consider with respect to S. 2071 and related bills.

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## Legislative Branch Enforcement

First, for many legislative branch organizations, enforcement of employee protection laws by the executive branch, as several bills provide, presents the potential for the same conflicts which caused the Congress to remove GAO’s personnel system from executive branch regulation in 1980. As a

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consequence, we recommend that legislative branch authorities administer and enforce the laws.

The GAO Personnel Act of 1980 ended any possibility of compromise of GAO's audit and investigative responsibilities with respect to the Office of Personnel Management, which then had the power to determine grade levels for GAO staff, and with respect to other executive branch personnel agencies with power over GAO.

As we testified at the time, the potential for compromise when such a conflict exists is subtle and unlikely to be a public matter, but its very potential raised questions about the objectivity of GAO's work. For that reason, the GAO Personnel Act of 1980 established a Personnel Appeals Board to perform the functions that the Office of Personnel Management, the Merits Systems Protection Board, the Federal Labor Relations Authority, and the Equal Employment Opportunity Commission perform for executive branch agencies. Appeals from our Personnel Appeals Board originally went to the United States Court of Appeals for the D.C. Circuit, and now go to the Federal Circuit, where the Board's decisions are accorded the same deference accorded to executive branch administrative bodies. The Act also established a General Counsel to the Personnel Appeals Board to investigate and prosecute allegations of prohibited personnel practices and to investigate labor-management and employment discrimination cases.

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## Existing Programs

The second issue concerns existing agency enforcement systems which would be replaced under S. 2071. We have not examined the personnel and equal employment protection systems at GPO or the Library of Congress; but at GAO, our equal employment program and the employee appeals system through our Personnel Appeals Board have taken years to develop and play key roles in positive employee/management relations and employee expectations of a fair and equitable workplace. For that reason, we recommend that the Committee maintain enforcement systems now in place which are working satisfactorily.

The Personnel Appeals Board at GAO plays two roles. It resolves matters brought by aggrieved employees, and in that role it is truly an independent body favoring neither the employee nor the agency. In addition to civil rights and related laws, GAO employees are covered by many of the other substantive provisions of law governing executive branch employees. These include the merit systems principles and performance appraisal

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principles, which are incorporated in the GAO Personnel Act of 1980. The GAO Personnel Appeals Board hears, and under S. 2071 would continue to hear, allegations of prohibited personnel practices such as violations of merit system principles. In deciding these disputes, the Board is commonly viewed at GAO as fair and impartial, contributing to an atmosphere that promotes effective employer/employee relations.

The Board also performs oversight of GAO's equal employment program. The Board has examined and issued reports on GAO's employment of persons with disabilities, GAO's affirmative action planning process, and GAO's affirmative action activities concerning women and minorities. An oversight report concerning an alternative dispute resolution process for resolving workplace grievances is currently being prepared.

The Board's organization and procedures and our internal equal employment processes—including our mediation and our counseling programs—have developed substantially during the years since the 1980 GAO Personnel Act. This has been a collaborative process including the Board, agency employees and employee organizations, and GAO management. While we cannot speak to the effectiveness of other agencies' systems, we recommend that the Committee preserve those, such as our Personnel Appeals Board and equal employment program, that operate effectively.

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## Implementation Issues

Our third suggestion, really a group of suggestions, concerns implementation and derives from our reviews of personnel management practices in the legislative branch, most recently of operations of the Architect of the Capitol on the Senate side, and last year on the operations of the House of Representatives Office of Fair Employment Practices. Those reviews highlight the importance of establishing specific objectives for management operations, such as would occur under S. 2071. I will briefly list implementation issues that emerged from this work which the Committee might take into consideration with respect to the bills before it:

- For management systems to operate predictably and effectively, clear regulations and guidance must be issued and kept current.
- The laws in question are in many cases complex, and adjudicating complaints or disputes that arise under them may require considerable expertise. Whatever mechanism is selected for adjudicating these disputes,

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- qualifications should be established to ensure that deciding officials have appropriate knowledge and experience.
  - Issuance of regulations is not sufficient to ensure that covered employees are informed about the procedures to follow and the rights afforded them under the laws. Officials responsible for implementation of the laws need to establish education and outreach efforts to periodically inform management and covered employees about the protections afforded by these laws. Such efforts might include periodic direct communication with employees or posters or other displays prominently and continuously available in workplaces. Efforts such as these are particularly important in some legislative branch organizations where employee turnover is relatively high.
  - Once policies and procedures are established, periodic self-evaluation or review of the implementation of the laws, as well as oversight by an independent organization, are important to ensure that they are being implemented as intended, and that no unexpected problems have emerged. Self-evaluation procedures and oversight by our Personnel Appeals Board help us at GAO to identify areas for continuous improvement and to obtain early indications that problems are emerging.

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## Conclusion

Based on our experience with most of the laws addressed in the bills now before the Committee, we believe that they have worked well at GAO. One essential part of our employee protection program is an independent administrative body, our Personnel Appeals Board, serving as an effective forum for personnel and equal employment oversight and dispute resolution. This system avoids conflicts that would exist between GAO's legislative branch role and enforcement by executive branch organizations. To avoid similar conflicts, we recommend administration and enforcement of legislative branch employee protection measures by authorities in the legislative branch. We also recommend that the Committee preserve existing enforcement mechanisms in the legislative branch that work effectively, such as GAO's Personnel Appeals Board and equal employment program. Also, we believe that clear guidance, qualified decisionmakers, employee education, periodic self-evaluation, and independent oversight are key to successful implementation of any employee protection program.

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# Fact Sheet of Employment Laws Applicable to the GAO

## Civil Rights and Related Laws

### A. Title VII of the Civil Rights Act of 1964

GAO employees are provided protections under this Act similar to those provided to employees in the private sector. Employees initially seek administrative resolution of their complaints through the GAO Civil Rights Office and then either the GAO Personnel Appeals Board or federal district court.

Under 42 U.S.C. § 2000e-16, Title VII is applicable to all "executive agencies as defined in section 105 of Title 5." Section 105 defines an executive agency to include an independent establishment under 5 U.S.C. § 104, which includes GAO.

### B. Age Discrimination in Employment Act

This Act provides GAO employees with protections commensurate with those provided to employees in the private sector. Employees may seek administrative resolution of their complaints, but may skip this phase and file an action in federal district court after giving GAO 30 days' notice.

This Act is codified at 29 U.S.C. § 621 et seq. Under 29 U.S.C. § 633a, the Act is applicable to all executive agencies as defined in 5 U.S.C. § 105 which, as noted above, includes GAO.

### C. Section 501 of the Rehabilitation Act of 1973

While GAO is not directly covered by this Act, GAO employees are afforded protections against discrimination based on a handicapping condition under the GAO Personnel Act of 1980. Consistent with this provision, GAO's Civil Rights Program, provided for under 31 U.S.C. § 732(f)(1)(A), protects employees against discrimination based on a handicapping condition. GAO employees have resort to the administrative and judicial remedies applicable to employees alleging other types of civil rights violations; and as with allegations of age discrimination, employees may file a court action before exhausting administrative remedies.

GAO is not covered by section 501 of this Act, codified at 29 U.S.C. § 791, which requires affirmative action for the

**Attachment  
Fact Sheet of Employment Laws Applicable  
to the GAO**

disabled and protects qualified handicapped individuals from discrimination on the basis of their disability.

D. Americans With Disabilities Act of 1990

GAO is covered by this Act. Enforcement is through the GAO Civil Rights Program. The Act preserved the enforcement procedures for individuals with disabilities provided for in the GAO Personnel Act. 42 U.S.C. § 12209(c)(5).

Sections 102 through 104 of this Act, codified at 42 U.S.C. §§ 12112-12114, forbid covered entities from discriminating against individuals with disabilities in regard to employment and conditions of employment. Under 42 U.S.C. § 12209(c), GAO and all congressional instrumentalities must establish remedies and procedures to be used in applying the rights and protections afforded under this Act to applicants for employment and to employees.

Worker Protections

A. Fair Labors Standards Act

Employees in the private sector and most federal employees, including GAO employees, are covered by the Fair Labor Standard Act with the same administrative and judicial remedies.

This Act, codified at 29 U.S.C. § 201 et seq., requires that certain employees receive a minimum wage and overtime. The Act applies to GAO through the definition of employee in 29 U.S.C. § 203(e)(2), which includes an employee of an executive agency as defined in 5 U.S.C. § 105.

B. Occupational Health and Safety Act of 1970

Under this Act, codified at 29 U.S.C. § 654 et seq., GAO and other federal agencies have limited coverage. Federal agencies must establish and maintain an occupational health and safety program consistent with standards promulgated by the Secretary of Labor. Agencies must file annual reports regarding occupational accidents and injuries and their internal programs to ensure a safe and healthy work environment. The Act does not vest enforcement authority in the Secretary of Labor in regard to federal agencies.

**Attachment**  
**Fact Sheet of Employment Laws Applicable**  
**to the GAO**

C. Labor-Management Relations

GAO is required by its Personnel Act (31 U.S.C. § 732(e)(2)) to have a labor management relations program consistent with chapter 71 of title 5, which governs labor-management relations for federal employees. Under the system implemented at GAO, employees essentially have the same rights and protections afforded all federal employees, including resort to administrative and judicial dispute resolution.

D. Sections 101 through 105 of the Family and Medical Leave Act of 1993.

GAO employees are covered under a similar statute applicable to federal employees, codified at 5 U.S.C. § 6381 et seq. Federal agencies are excluded from the coverage under the Family and Medical Leave Act of 1993. GAO employees have rights for family and medical leave very similar but not identical to those under the 1993 Act.

E. The Employee Polygraph Protection Act of 1988

This Act, codified at 29 U.S.C. § 2001 et seq., does not apply to any federal employees, including GAO employees. 29 U.S.C. § 2006(a).

F. The Worker Adjustment and Retraining Notification Act

Under this Act, before an employer can order a plant closing or mass layoff, the employer must give workers 60 days' notice. GAO is not covered by this Act, codified at 29 U.S.C. § 2101 et seq. GAO's policy has been to afford any workers affected by an office closing more than 60-days' notice.

Freedom of Information Act and Privacy Act

While the FOIA and Privacy Act, codified at 5 U.S.C. §§ 552 and 552a, respectively, do not apply to GAO, the agency has voluntarily adopted the provisions of those Acts by regulation. 4 C.F.R. Part 81. GAO added an additional exemption from disclosure to reflect its responsibilities to the Congress. GAO exempted from disclosure "Congressional correspondence and other papers relating to work performed in response to a Congressional request ... and Congressional contact memoranda." 5 C.F.R. § 81.6(a).

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