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FULL COMMITTEE HEARING ON H.R. 12080 AMENDMENTS

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HEARING

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BEFORE THE

COMMITTEE ON

POST OFFICE AND CIVIL SERVICE

HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

H.R. 12080

A BILL TO AMEND TITLE 5, UNITED STATES CODE, TO ASSURE THAT APPOINTMENTS IN THE CIVIL SERVICE ARE ON THE BASIS OF MERIT, TO ESTABLISH AN INDEPENDENT BOARD TO HEAR APPEALS FROM CERTAIN FEDERAL PERSONNEL DECISIONS, AND FOR OTHER PURPOSES

MAY 11, 1976

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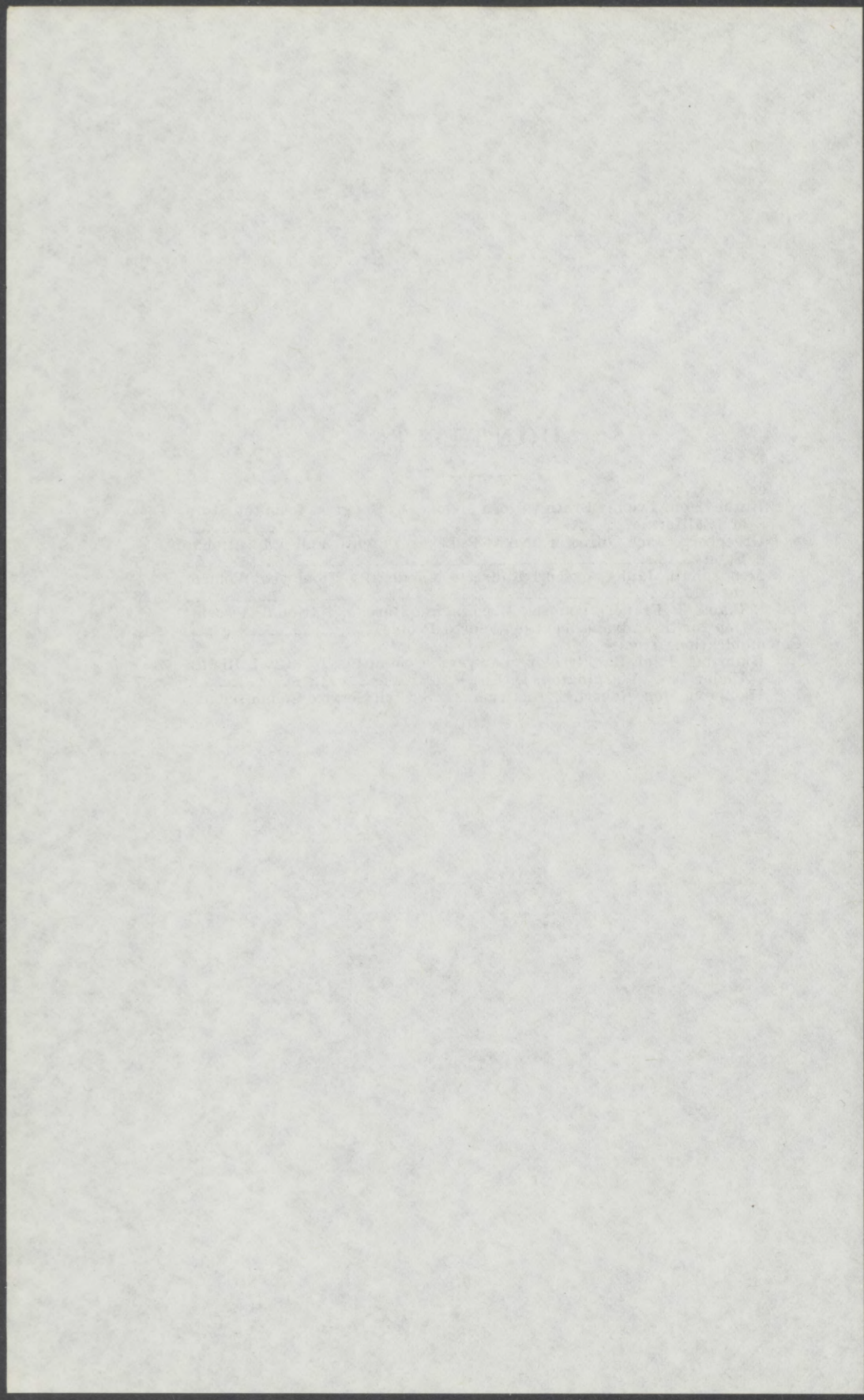
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FULL COMMITTEE HEARINGS ON H.R. 12080 AMENDMENTS

TUESDAY, MAY 11, 1976

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, D.C.

The committee met at 9:50 a.m. in room 311 of the Cannon House Office Building, Hon. Dominick V. Daniels (acting chairman) presiding.

Mr. DANIELS. The House Post Office and Civil Service Committee meeting will come to order.

This hearing is convened to take testimony on H.R. 12080; in particular, the provisions relating to appointments in the competitive service. We have before this committee this morning a committee print, dated May 7, 1976, which contains this section as amended by the committee at an earlier executive session.

Our first witness is the Honorable Yvonne Brathwaite Burke, who is appearing as a representative of the Congressional Black Caucus. We welcome you.

TESTIMONY OF HON. YVONNE BRATHWAITE BURKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. BURKE. Thank you very much, Mr. Chairman.

I am afraid that I don't have the new committee print. But I have the language that was inserted. If I could get a copy of the new committee print, I would appreciate it.

Mr. DANIELS. We will be happy to furnish you with a copy. I direct your attention to page 38, paragraph 3001.

Mrs. BURKE. Thank you very much, Mr. Chairman.

I first want to thank the committee for giving me an opportunity to appear before you and to discuss this important bill that certainly has tremendous historical implications and implications for the future of the operation of our Government.

I would like to commend the committee on seeking to correct what is undoubtedly one of the blights on Government service, which is the Watergate era; and some of the abuses that we saw during that time came in the very highest level of Government. I am not condemning one administration or the other because I think that many of the problems we have seen with Watergate probably occurred in other administrations as well.

But one of the things that concerns many of us—and I speak for the Congressional Black Caucus—is that the civil service must not necessarily be placed at a tremendous disadvantage. We would also be concerned about the Commission being given undue powers in overreacting to what has happened in the Watergate situation.

We are concerned that, in an effort to revise the law, that we may very well significantly impair the rights of minorities and women to have an opportunity for full employment under the civil service.

Now, many of us have seen articles that have referred to preferential treatment. I am aware that now this language has been removed from the bill, and that's very important because this language was very ambiguous.

Even though I know that your committee was addressing preferential treatment to avoid political input, preferential treatment is a code word that has been used in newspapers and magazines to imply that minorities and women have unfair advantages in employment.

And we must clarify that. I think we have to clarify it again and again and again. If we will just look at the record, it reflects just the opposite conditions.

While we are talking about preferential treatment, or as some say, "reverse discrimination," the fact is that minority employment in the Federal Government is today and has always been very, very low, and minorities have been concentrated in low-income jobs and at the bottom of the grade scale.

I would just like to give the committee some background that I have outlined in my statement, background which really shows that the Federal civil service at one time prohibited blacks from being employed.

And then there was finally a breakthrough into the civil service, and 2 percent, then 5 percent, and finally the numbers climbed until there were some black employees throughout the civil service system.

However, in 1974, minorities made up nearly one-half of those holding GS-1 positions; one-third of the GS-2's and 3's; but only 5.5 of the GS-13's; 5.2 of the GS-14's; 5 percent of the GS-15's; 4.1 percent of the GS-16's and 3.6 percent of the GS-17's; 4 percent of the GS-18's.

Now, this kind of comparison makes it very clear that our problem is not that minorities are receiving any preference in the system, but rather they are grouped at the bottom of the civil service ladder.

What we have seen again and again is that the Civil Service Commission itself is the very one that is totally unable to correct discrimination and has in many instances been the very one guilty of discrimination.

Recent cases have come up that indicate that the Civil Service Commission has really overlooked the concept of affirmative action, and if anything, has been one of those most guilty of insuring the kind of statistics that we have been reciting.

So I would like to refer to the U.S. Commission on Civil Rights study which is in volume 5 of the "Federal Civil Rights Enforcement Effort To Eliminate Employment Discrimination," which was published last year.

It states although Congress expressed deep concern in 1972 that many of the civil service employee selection standards appear to be

discriminatory, the Civil Service Commission has failed to carry out its responsibility under title 7 to demonstrate that all Federal examination procedures having an adverse impact on minorities and women are manifestly related to job performance.

Looking at the criticisms that have been set forth again and again and in the general reply of the Commission that "they don't want a quota system," rather than making an attempt to approach some method of overcoming discriminatory patterns.

Now, again and again the request has been made for affirmative action by the Civil Service Commission.

But the Civil Service Commission has denied that it has the duty to act affirmatively under title 7 of the 1964 Civil Rights Act, and they have shown no inclination to abide by section 717 of the Equal Employment Opportunity Act of 1972.

In correspondence that has occurred between Congressman Clay of your committee and the Commission—and I have set forth this correspondence in detail, which commenced October 8, 1975—we can see that the question was submitted to Chairman Robert Hampton, asking him why in this St. Louis region there was such a lack of minority employees.

And the response of the Chairman, as I have set forth, certainly indicates that first of all he does not believe that there is a responsibility in the Commission, but rather that the responsibility should lie within the agencies.

So, again we come back to this whole question.

And I do call your attention to the specific lack of concern in the correspondence that occurred between Congressman Clay and Commissioner Hampton.

I think it clarifies exactly what the chairman believes is the responsibility of the Commission.

Now, the record, of course, is full of instances where there has been a lack of commitment to affirmative action.

And while I see the new language in the committee print, there is one question I have: "Why is there no statement expressing the responsibility of the Commission to carry out affirmative action?"

I think that unless this is spelled out, we won't see it happen. And this is one of my major concerns.

Now, I do commend the committee for taking out this language "preferential treatment." That is a key word; that is a very sensitive word. I also commend the committee for clarifying some of the language as it relates to political input.

But there are still many questions that arise from the language that is set forth. And this has been a whole area that has been developed over a period of years. It has been a very difficult area, a very technical area, and I am just concerned that by putting in new language and setting up new power structure and giving new powers to the Civil Service Commission, we won't necessarily know the full dimension of those powers.

I also appreciate this hearing.

But I wish we could explore it further and know the full implication of giving these new powers to the Civil Service Commission, giving them more latitude. And, I abhor political input, that is, twisting arms.

But quite frankly, Mr. Chairman, after one of the only assurances that my constituents have of fairness is that induced by the political pressure that we exert from our office.

And when I look back over so many instances where there has been just outright discrimination in civil service positions, the only way we have been able to approach it is by a political office making it an issue, an issue in the public's eye, in the press, and putting on the pressure. Political pressure can be very bad.

But in some instances, political pressure is the only way you can correct inequities. And that is the reason why I hope we can, rather than moving forward too fast, that we can take every opportunity to review all of the ramifications of a realignment of authority within the Civil Service Commission that has had really a very bad record over the past years.

Thank you very much, Mr. Chairman.

[The prepared statement submitted by Mrs. Burke follows:]

PREPARED STATEMENT OF HON. YVONNE BRATHWAITE BURKE, A MEMBER OF
CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman and members of the committee, I am testifying today to express the concerns of the Members of the Congressional Black Caucus with respect to the Civil Service Amendments of 1976, introduced as H.R. 12080.

This committee and its' chairman are to be commended for the effort to fashion legislation to protect the federal civil service from political abuse. We all saw during the Watergate era the harmful effects of a campaign mounted by the highest levels of government to use professional civil service positions as rewards for the incumbent party's political loyalists. I should hasten to add that this particular problem is not one that was unique to the previous administration, but only that it was practiced with greater efficiency and scope than seen before.

Nonetheless, it is our concern that any effort to revise the law with respect to the federal civil service system must address as well the equally significant problem of discrimination on the basis of race, ethnic origin and sex in federal employment. The continuing shortcoming in the hiring and promotion of minorities and women, and the consistent opposition of the Civil Service Commission to policies and practices that are necessary to correct that situation, make this an issue which simply cannot be ignored in the context of civil service reform.

As you know, minority employment in the Federal Government has always been low, and minorities have held the lowest-paying positions in the Government. Prior to 1865, blacks were prohibited by law from working for the Federal Government. By the beginning of the 1900's black employment had increased to about six percent of Federal employees, but under the administrations of Presidents Taft and Wilson, racial segregation was established in the Census Bureau, the Treasury Department and the Postal Service. While black Federal employment grew during the second World War to 12 percent, blacks were concentrated in the lowest paying jobs. Many in Washington today remember the segregated facilities, including Government cafeterias, which faced blacks during the 1940's.

Against that background, it is not surprising to find that even as of the latest figures for 1974, minorities held the lowest-paying jobs in the Federal Civil Service in disproportionate numbers, while occupying very few of the best jobs. Minorities made up nearly half of those holding GS-1 positions, nearly a third of the GS-2's and GS-3's, but only 5.5 percent of the GS-13's, 5.2 percent of the GS-14's, 5.0 percent of the GS-15's, 4.1 percent of the GS-16's; 3.6 percent of the GS-17's and 4.0 percent of the GS-18's.

These statistics are compelling testimony of the lack of minority participation in running our Nation's Government through its Civil Service, but more to the point is the total failure of the Civil Service Commission to act to remedy that situation, and in fact its aggressive refusal to undertake the necessary steps to provide opportunities for minorities and women in the Federal service.

As the U.S. Commission on Civil Rights found in its study, "the Federal Civil Rights Enforcement Effort—Volume 5, to eliminate employment discrimination," published just last year, "although Congress expressed deep concern in 1972 that

many of the Civil Service employee selection standards appeared to be discriminatory, the [Civil Service] Commission has failed to carry out its responsibility under title VII to demonstrate empirically that all Federal examination procedures having an adverse impact on minorities and women are manifestly related to job performance."

In response to the detailed criticisms and recommendations made in the Civil Rights Commission's report, the Civil Service Commission set forth its position essentially in opposition to affirmative action and to what we believe to be the law, while attacking a straw figure. The Civil Service Commission said that "a quota system is an approach to personnel management which is not compatible with the basic philosophy of merit system employment or with legal requirements of the Civil Service Act that appointments be made on the basis of merit, and of title VII that personnel actions be free from discrimination based on race, color, religion, sex, or national origin. Moreover, quota systems have always been abhorred by those who truly have supported concepts of equality and civil rights and liberties."

As the Civil Rights Commission recognized, this simply avoids the question of the Federal Government's responsibility to move affirmatively to remedy the effects of past discrimination. The issue is not providing numerical equivalents to the population in civil service, it is simply that numbers are necessary to judge performance, and based on the reasonable expectation that minorities are equally desirous of and able to serve their country, that there should not be a significant disparity between population figures and work force figures.

Moreover, the Civil Service Commission denies that it has the duty to act affirmatively under Title VII of the 1964 Civil Rights Act as amended in 1972 to bring about a more equal and more reasonable representation of minorities and women in the civil service at all levels. Section 717 of the Equal Employment Opportunity Act of 1972 provides for nondiscrimination in Federal employment and provides in subsection (b) that "except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a)." (Non-discrimination).

It is all the more striking, therefore, that Civil Service Commission Chairman Robert Hampton so misinterprets his obligations that he could write on October 8, 1975, to Congressman William Clay in response to Mr. Clay's inquiry on the gross underutilization of minority employees in Federal facilities in the St. Louis area that "in view of the responsibility of individual agencies for taking the actions which contribute to any such overall statistical picture, and in view of their ultimate accountability for those actions and their responsibility for planning future actions, it would appear more appropriate that any questions you might have in this regard be directed to the agencies concerned, rather than to the Civil Service Commission."

Not satisfied with denying responsibility vested in him by statute, chairman Hampton goes on to tell Congressman Clay that "we would hope that any questions you might ask individual agencies will not be so framed as to imply that Equal Employment Opportunity goals are or should be keyed to irrelevant or invalid indices, and attained by other than proper means. In this regard, the observations and questions in your September 11th letter to us are clearly suggestive that the objective of agency equal employment opportunity efforts should be the achievement of proportional representation for minorities and women at all levels of the work force."

I have already spelled out the fundamental error in this position which Mr. Hampton has put forth on behalf of the Civil Service Commission.

The record is replete with instances of a failure by the Civil Service Commission to understand and enforce equal employment opportunity laws in the Federal Government. Congressman Augustus Hawkins, chairman of the Equal Opportunities Subcommittee of the House Education and Labor Committee and a Member of the Congressional Black Caucus, has held hearings which document these facts.

I would just like to point out one additional startling instance of these shortcomings. The October 1973 report on "Personnel Management in the Federal Maritime Commission," prepared by the Civil Service Commission's Bureau of Personnel Management Evaluation said that "interviews with management and supervisors revealed, however, that while they were aware of their responsibility not to discriminate, they did not view positive E.E.O. action as one of their functions . . . statistical data presented in appendix D indicates that minority groups—and to a lesser extent, females—are minimally represented in the mis-

sion related occupations of transportation industry analysis, attorneys, auditors investigators."

In spite of this and similar findings in other agencies, Chairman Hampton in a letter dated September 17, 1975, responding to questions from the Hawkins Equal Opportunity subcommittee, said that "agency officials are aware of their equal employment opportunity program responsibilities, and no agency can be characterized as persistently inadequate or unresponsive."

I have taken the time to give this committee some indication of the extent of the problem of equal opportunity in the Federal Civil Service because I believe that this matter has failed to receive the attention it demands. We are talking about the operation of our nation's governmental system, about decisions made by civil servants which affect very directly millions of Americans, and of course about job opportunities for minorities and women.

It is in that context that I raise the concern about the Civil Service amendments of 1976 as drafted. As you know, the staff of this committee has held a number of meetings with the staff of the Congressional Black Caucus, with Congressman Clay's subcommittee on employee political rights and intergovernmental programs, of the judiciary committee's Civil Rights Subcommittee and of the N.A.A.C.P.

We were deeply concerned that some language that purported to prohibit "preferential treatment" in the employment process could be used by the Civil Service Commission to buttress its position, which we believe violates the present law against affirmative action to remedy the effects of past discrimination. As I understand it, the latest draft of the bill has made changes to address our problem. We have also been concerned about the independence of the appeals review board and about the system of investigating and acting on discrimination complaints in each agency.

I have not had the opportunity to see the language that will be presented to this committee, but I hope that it will address the problems we and others have raised.

Nevertheless, I must tell you that even if the most objectionable language is removed, I will continue to have an uneasy feeling about legislation designed to "reform" the Civil Service System which until 2 days before the committee mark-up had no hearings on the fundamental question of equal opportunity in the system. I appreciate greatly the opportunity the chairman has provided to me and to others to testify today, and I am certain that the failure to address this issue earlier was unintentional. Yet I am concerned that we have not yet fully found the potential problems inherent in the legislation with respect to equal opportunity.

For instance, the Civil Rights Commission recommends a change in the so-called "Rule of Three", whereby only the three top persons on the Civil Service Register can be hired for a given job. The Civil Rights Commission points to the Michigan system which permits selecting of persons from a range of scores which provides flexibility in the selection of candidates and permits affirmative selection of qualified candidates from groups which have been discriminated against in the past.

At the very least, this committee should hold oversight hearings on the crucial question of affirmative action and must draft legislation which will require the Civil Service Commission to conform to the requirements of Title VII of the Civil Rights Act and the executive orders which were issued to ensure full utilization of minorities and women. The Civil Service Commission must amend its policies, its practices and its regulations to meet these requirements. We believe that it would be preferable to do so in the context of this major Civil Service reform legislation, but unless additional time for the bill's consideration is given, that would appear infeasible.

Thank you again for the opportunity to appear before the Post Office and Civil Service Committee on the proposed Civil Service Amendments of 1976.

Mr. DANIELS. Thank you, Mrs. Burke, for your fine statement.

The language appearing in section 301 to which I previously directed your attention, and particularly section 2 of that provision was offered by our good friend Congressman Ford of Michigan. Do you think that that provision of this bill will have an adverse impact on equal opportunity, affirmative action and, if so, what?

Mrs. BURKE. You have to take the language in context. And I think that we know in the interpretation of language ordinarily we look at the legislative history.

Now, the legislative history that will be brought forth in this case will be the former language and what this language changed. So you are going to have to face a situation of where you will interpret it in the context of that history.

The history is that this language substitutes for preferential treatment. This language establishes a minimum rather than an affirmative duty. What it says is that this does not lessen or extinguish a right which the implication was that the preferential treatment did extinguish a right. This says it does not lessen it. But the language here does not go on to place a duty.

It says certainly that there is a responsibility to abide by Executive orders prohibiting discrimination and it should not be interpreted to hold that the Commission is not subject to those Executive orders.

What I am saying is that in view of the way this language evolved, the only way you can be sure that it will not be interpreted as limiting affirmative action is to put in here duties for affirmative action in that language.

Mr. DANIELS. Mrs. Burke, I understand your position and what you are saying.

Now, you refer to the correspondence between our colleague, Congressman Clay, and Mr. Hampton, the Chairman of the Commission. And, as I understand it, Chairman Hampton is of the opinion that the provision that you are recommending should be an amendment to the Civil Rights Act rather than in this bill. Do you have any comment on that?

Mrs. Burke. Yes, I have. Before we get involved in amending the Civil Rights Act, I think that would take a whole year of hearings and I certainly wouldn't want to see it without full investigation of the cases, the implications and all of the things to go into touching that act.

But here we are involved in giving new responsibilities to that Civil Rights Commission, expanding their independence in many instances, because you talk about their independence from political input.

So that it would seem that the appropriate place to clarify it would be in the place where you are addressing now which is in this legislation.

We get involved in many things when you start talking about going over to title VII. You get involved in committee jurisdiction questions. You get involved in a whole myriad of problems that need not be approached when you have here a vehicle that by simply going on to add to this language that is in, that appears on lines 14 through 23 of page 38, it could be clarified that exactly what this section now means.

Again, I have to emphasize it and I know you have been through this yourself so many times. Whenever you get involved in one of these things and people don't know what it means, they say let's look at the debate, let's look at the evolution of the language.

As soon as you go behind these words which you are going to have to do to really interpret the duties it is going to be, you are going to

have some implication that there is—that this language is to be strictly interpreted in view of the fact that the first approach was really to take away some of those affirmative—the whole question of preferential treatment has in the past been used to say we are against affirmative action.

Mr. DANIELS. Have you prepared any language that could be considered as an amendment to this bill?

Mrs. BURKE. No. Not that I have written out. But I would be more than pleased, if I could have the opportunity, to write some language for this.

Mr. DANIELS. All right. We will give you that opportunity.

Mr. Ford?

Mr. FORD. I take it from what you have said, Mrs. Burke, that you completely understand the reasons for this piece of legislation being brought out by the committee?

Mrs. BURKE. Yes.

Mr. FORD. I suppose you are also aware of the fact that there have been criticisms from any places, that as far back as the beginning of the hearings on the Senate side, which came to be known as the Watergate hearings, many of the violations that this committee learned of in the hearings were exposed more fully. It was determined by the Senate committee that there were so many other things that began crawling out of the trees that they were never going to get through if they stopped to clean up everything that they discovered.

We picked up where they left off. We sort of stumbled into it.

There is no question that there was a wholesale organized conspiracy in the finest sense of the definition of a conspiracy to violate the intent and purpose of the Civil Rights Act. And there are many who would be critical if we don't do anything to recognize that because these violations strike everyone as something that someone ought to go to jail for awhile in some instances they are under the present law merely violations of civil service regulations depending on the people who write the regulations.

We have an anomaly involved here in the fact that the Civil Service Commission writes the regulations and then decides whether it actually will enforce it or not.

I know of not other place where we regulate any other kind of human activity where we first try to devise the system and then make the rules by which the system will work. Then we make the rules for enforcement and then judge as to whether we have done a good job in both writing and enforcing the rules.

So it would be tragic if we allowed too much more time to go by without at least getting that element of this legislation into law, making this activity criminal in nature and also setting up separate evaluation and enforcement proceedings.

The third thing is that Mrs. Schroeder amended the bill from its original form to provide that the GAO could proceed independently, not only to investigate the violations of the civil service law and other laws affecting civil service employees, but also to initiate enforcement of redress for those violations independent of action taken by either this Board or the Civil Service Commission.

Unfortunately in our attempts to deal with those problems we find that what he is working with in his hearings seems—and I emphasize that word “seems”—to come into conflict.

As you indicate, you would not like to see this committee attempting to open upon the Civil Rights Act and begin amending it even if we could avoid the jurisdictional fight. Nor would I.

I quite agree with you that anything as important as the Civil Rights Act should not be allowed to go as many years as it has without a complete reexamination.

But I think you will also agree with me that not all of the years during which it has been in existence would have been good years to have this Congress and its predecessors reopen that act and begin tinkering with it.

It is not an act that those who are responsible for its passage are really anxious to open up, at least in the most recent years, without the force of a very strong voice coming from the other end of Pennsylvania Avenue. So the chances of having that kind of an examination in the near future, action on the Civil Rights Act, is not very great.

And if this committee is to wait until that is done, then I am afraid that we are just going to have to trust the fact that the newspapers will make the Civil Service Commission uncomfortable enough that they will quit doing what they were doing before and that the other people in government will quit doing it. It is not a very satisfactory way to legislate.

I can't agree with you that the legislative history we have developed at this point weakens the legislation from your point of view because in point of fact the amendment which was put into the bill arose out of Mr. Clay's decision.

What you see is that the committee backed away. And I think we also agreed to some report language that goes along with this. The committee backed away from language that could be construed because it has the character of code language to some people and would be on the basis of past interpretations used in a way that we wouldn't want to have occur.

In addition to that we tried to strengthen that interpretation with the language that is to be included in the report, and perhaps we can go a step further.

But I don't think there could be any question in anyone's mind that the committee did not intend to place a stamp of approval on any one in the Federal Government, any agency head or the Civil Service Commission using language about special consideration, or any other language, as an excuse for performing anything less than the maximum required by the Civil Rights Act and other acts dealing with the same subject.

After saying all that, the question I really have for us is: Would you feel, if you were satisfied that your questions with regard to this language on page 38 were sufficiently cleared up, either by additional language or report language, that we ought to go ahead with this legislation and let the Judiciary Committee in its wisdom deal with the Civil Rights Act and not in any way have this legislation construed as an amendment to or a change in the Civil Rights Act?

Mrs. BURKE. Well, now, I am not certain exactly—my answer to the question as far as the Civil Rights Act is this, that I feel very strongly that at this point I would not want to see the Civil Rights Act even approached.

And that is for a number of reasons, most of which are the very reasons we are talking about, the pressure, the magazine articles are all based upon this false assumption that someone is receiving reverse discrimination. That is a very popular kind of—you know, it is a straw horse.

I saw a whole magazine devoted to—a national magazine devoted to the issue of reverse discrimination. And this is at a time when you have the kind of figures you have in the Civil Service Commission which show outright lack of any effective affirmative action program.

So that in this context—and if it was just this committee, I wouldn't worry so much about it. But I know if the Civil Rights Act ever gets on the floor of this House or of the Senate, it is going to come out totally weakened and destroyed. I wouldn't want to see the Civil Rights Act touched at this point until we move forward.

Now, let me say this: I totally appreciate what you are attempting to do, and you are to be commended and I started off my statement saying that it is certainly—what we have seen happen in Watergate is something we know you have to try to prevent this from happening again.

My only question is that unless affirmative action is approached, I just am not sure whether you can have language such as appears on page 38 even though it is certainly much better than it started out to be. It is 100 percent better.

But I am not sure that we still don't have a number of loopholes that are opened up, and I would like to see a full investigation, a full review of all of those possible loopholes.

I just don't know whether or not—if there was some way that the things you are trying to do could be done without touching the question of the responsibilities of the Civil Service Commission because, first, of all, you are coming right behind a decision in the case of the Peggy Griffiths case where the Civil Service Commission—and here was a person who was supposed to be decided the cases who was passed over and then according to the decision there was a coverup of the fact that there was discrimination.

So, coming on the heels of that, do you want to give to the Civil Service Commission greater latitude in the area of equal opportunity?

I just don't see how you can do that when, you know, a couple months after you have an outright decision showing that there was even discrimination within the Commission in allocating a position to someone as a hearing officer.

Mr. FORD. One of the changes that was made, I understood, at the behest of people concerned about the civil rights aspect of this legislation, was to make clear that every agency head was in a position of inescapable responsibility for equal employment enforcement.

Mrs. BURKE. Are you satisfied, for instance, that the agency head is given the responsibility of affirmative action, especially in view of the statements of Commissioner Hampton in line with this language?

Mr. FORD. I am not sure that anyone is given a responsibility for affirmative action by this legislation. But I have a question about why

this legislation should do that since it was not designed for that purpose.

Mrs. BURKE. What it is going to do is remove a right, then. And I think the conclusion you have drawn is the exact conclusion that will be drawn by others who view the legislation, taking into consideration the legislative history and the present language.

Mr. FORD. I thought we agreed that we didn't want to get into either the field of the Civil Rights Act or the Equal Employment Opportunities Act.

Mrs. BURKE. We know that there is presently a duty for affirmative action that rests within the Civil Service Commission, that that now exists. Is there any question of that?

Mr. FORD. Within the Commission?

Mrs. BURKE. Right.

Mr. FORD. No. I think that we would prefer—and I may be wrong about this—that the affirmative duty lies within the agencies to determine the personnel needs and selection, promotion, transfers and determination as to who is going to fill a spot, who is going to be things of this kind. That is not something the Commission itself does.

Mrs. BURKE. Isn't the Commission given the authority for examination and appointment, the ultimate appointment authority?

Mr. FORD. In a general sense, they are. But the view I have thought that most of the people who are concerned about equal employment enforcement in the Federal Government have had is that they want to make sure that the agency head who is responsible for making the determination as to who is going to fill a spot, who is going to be promoted and so on, would be the same person who is primarily responsible for enforcement of equal employment promotion rights.

Mrs. BURKE. Where does the review go?

Mr. FORD. The review, as well as the review of all other personnel practices after the passage of this legislation, would be in both the Civil Service Commission and the new independent board, plus under the GAO.

Mrs. BURKE. But the existing law places the review of first the Equal Employment Opportunity and whether or not there is carrying out of the program within the Civil Service Commission.

Now, as soon as you start changing it, I think you are absolutely correct, that under this legislation there is no responsibility in the Commission for affirmative action. But at least today you have some question of whether or not they have a duty. Many argue very strongly that they have a definite responsibility, the Commission and the agencies, to carry out an affirmative action program, because the agencies ultimately have to answer to the Commission, because the Commission is the final review of, for instance, the examination and whether or not those examinations are based upon ability to perform.

The Commission is also the ultimate reviewer of the actual balances within the agencies and the hiring practices within the agencies.

Mr. FORD. Well, at this point, the legislation is neutral as to the question of who has the responsibility for affirmative action. And I thought that is what we were trying to do with the amendments, to make absolutely sure that it was neutral and not suggestive of an escape from affirmative action responsibilities which are required either by the Civil Rights Act or by any legislation calling for equal employ-

ment opportunity or which are affected by any Executive order that might be issued pursuant to either one or independently.

In other words, I don't see how you can take a nonneutral position on an issue like affirmative action in this legislation without invading the territory of EEOC and the Civil Rights Act. And when you do that, it is a sword that cuts both ways, because the door will then be open to do exactly what I thought we agreed you didn't want to do; that is, to use this legislation as a vehicle to affect the intent and purpose of civil rights legislation.

Mrs. BURKE. I don't see how we can even get over into EEOC and their jurisdiction.

Mr. FORD. Well, Mr. Hawkins, under the jurisdiction of his committee, had an EEOC jurisdiction for all except Government employees and has held hearings on the failure of the Federal Government in this area and apparently intends to move on something in that regard.

Mrs. BURKE. I think that we may disagree on what should be done. But I think we now, at least from this discussion, agree on what this does, that this ends up in a neutral position.

Mr. FORD. Yes.

Mrs. BURKE. And a neutral position that is different than the present situation and, certainly, what has been argued to be the present responsibility of the Civil Service Commission. I think this is my point.

Mr. FORD. I hope that the language now in the bill is clear.

Mr. DANIELS. Your time is up.

Mr. FORD. Thank you, Mr. Chairman.

Mr. DANIELS. Mr. Clay?

Mr. CLAY. Mrs. Burke, do you believe that the amendments go far enough, or would you recommend some additional amendments?

Mrs. BURKE. I definitely would recommend additional amendments, and I think this is the core of what we have been discussing. It is very obvious that this is a neutral position. It is a position of where there is a serious question of whether or not the rights of affirmative action have been made clear.

Mr. CLAY. Do you believe the responsibility for enforcement and investigation of equal employment opportunity complaints would be totally independent of the Civil Service Commission?

Mrs. BURKE. Yes, I do. In view of a number of things, their record, their past performance, the very fact of the present components and the picture as we look at the civil servants and the grades that they are lumped in and the record. The record is very, very bad.

Mr. CLAY. In reading your statement, I see that on numerous occasions you have criticized the inability and ineffectiveness of the Civil Service Commission to enforce the antidiscrimination laws. And you have been cited quotes from a letter that Chairman Hampton wrote to me, where he denies that he has the responsibility to enforce such laws, that he just arrogantly misinterprets what his responsibilities are in terms of enforcing these laws.

In view of his record at the Commission and the record of the Commission, do you feel that the language on the bottom of page 38 that was inserted in the bill would have any meaning or any impact on his actions at the Commission?

Mrs. BURKE. I gather that this was your language. But I still think that it is not going to enforce it.

And I would like to point also the findings of the report on personnel management within the Maritime Commission which came about—and this report was in 1973—where the Commission's Bureau of Personnel Management said that they didn't really believe that they were—that they had any responsibility to, not to discriminate, and they were aware that they couldn't discriminate but they were not aware of any obligation they had to have positive EEO action.

So that all of the reports, all of the investigations have indicated that while there was assumed to be a responsibility of positive equal employment opportunity, within the agencies and the Commission there has been no attempt to carry this out so far.

Mr. CLAY. As I have been sitting here recently listening to the arguments about the urgency of passing this particular piece of legislation, it seems to me to boil down to the question of whether or not we are going to pass this legislation which is intended to strengthen the Commission against any outside political influence and increase and strengthen the independence of the merit system. And that question has to be looked at with respect to the enforcement of the civil rights laws as they relate to discrimination. Is that the way you view it?

Mrs. BURKE. I think this is a real problem. And, again, I think what the committee is doing is certainly meritorious. It is to be commended. It is of the highest of goals.

But, unfortunately, along the way some problems have come up. And that is the reason that there has been a great discussion. And the thing that is so funny is that here when you are trying to do something so good, most of the discussion on this piece of legislation has been centered around the detriments that will be suffered.

So that I know you are trying to accomplish something. But what is going to be discussed in the press and what is going to be discussed—and it is getting into even a greater momentum—what is going to be discussed are the things that result in terms of equal opportunity and the detriments rather than the good that you accomplish.

I think that will be a great tragedy, because I know you are trying to correct something that was wrong. But that is not going to be what is talked about. That is not what has been talked about so far on this legislation.

Mr. CLAY. Would you also agree that the mere fact that this Committee held over a year of hearings relative to the problem that it is trying to correct without once considering the adverse and devastating impact it would have on the enforcement of title VII of the Civil Rights Act is perhaps a classic example of the neglect?

Mrs. BURKE. I think it is what happens all the time. I think any of us who have ever been in the legislature, we know that any time you have a massive piece of legislation, you are going to spend half of your time correcting the problems you cause from that piece of legislation. We have been through that.

I think that it doesn't—it is just part of the process. When you undertake a big ball game, you are going to have a few errors. This is my 10th year in a legislative body, and I have never seen it fail.

When you undertake a massive project, you are going to have a lot of legislation to clean up the things that you didn't even imagine.

But when it starts getting under attack and someone starts trying to find loopholes and starts looking at it, the loopholes occur just where you never believed they would.

Fortunately, the problems have come to you before this bill came onto the floor. So I think you are in a good position at this point to realize what has happened. And I am very pleased that it did come to your attention at this stage of the proceeding when it can be corrected; it can be avoided.

Mr. DANIELS. Thank you, Mr. Clay. Mrs. Spellman, do you have any questions?

Mrs. SPELLMAN. Yes. I think all of us without exception feel as you do about the enforcement of affirmative action programs and so forth. What language would you suggest go in here?

Mrs. BURKE. I think that the language has to be specific in setting out a responsibility for affirmative action. And while I do not have a written amendment that I have submitted to you, I would just be delighted as I said before to submit that language and that language would be very specific.

Mr. DANIELS. Might I remind the lady that the full committee will meet on Thursday for the purpose of considering this bill. So I would suggest that you submit it to a member of the committee by that time so that we can consider it.

Mrs. BURKE. Thank you very much.

Mrs. SPELLMAN. If this language were put in, it would be the Civil Service that would have the responsibility for enforcement and not EEO? Is that right?

Mrs. BURKE. EEO's responsibility as it relates to government employees is limited. At present Civil Service has a basic responsibility to not only just not discriminate but also to have a positive equal employment opportunity effort. So that what I am saying is, we are not changing, what I am proposing is not to create a greater right. What I am afraid is that when you have a neutral position you are putting yourself in a position of saying you're having a lesser right. Do you follow me?

Mrs. SPELLMAN. Yes.

Mrs. BURKE. What bothers me about this language in view of the fact that is started out, and the reason there has been such an uproar with the original language as saying preferential treatment is prohibited, well, while I know what your goal was in saying that, to eliminate political input, preferential treatment is generally a racial or female, sex-oriented term. So you took away from saying there can be no affirmative action. That's how it has been interpreted. You came from a position of saying there can be no affirmative action to saying we don't say that there is not a right to an equal opportunity or there is not a right to the law as they now exist which is what this language says.

So the implication is that there is certainly no responsibility for positive action. And I think this is actually what Congressman Ford feels that the language should be, that it should be neutral on the question of affirmative action.

Mrs. SPELLMAN. In view of what Congressman Ford said about the Hawkins committee and the plans that they have for including Federal employees in the EEO, would you feel, as I do that when you

have duplication nobody minds the chickenhouse? Which one of them would you rather have do it?

Mrs. BURKE. I really hesitate to answer that. To me one of the worst failures in this whole system is the EEOC. Any Commission that has 102 admitted backlog cases where it takes them 18 months to send out an investigator. It's very difficult for me to approach that as a remedy for anything at this point. So I have to take it in context. I am sorry, I come with all of my own biases and my own appraisal of EEOC is that it is probably one of the most ineffective, and I believe it is intentionally ineffective, Commissions that exist in government today.

Mrs. SPELLMAN. Thank you, Mr. Chairman.

Mr. DANIELS. Mr. Harris, any questions?

Mr. HARRIS. Thank you, Mr. Chairman. I would like to thank you for your testimony, also. I do feel that you do support the intent if not the mistakes of this legislation and you do recognize the need to try to move ahead on this legislation as long as we are sure that we have properly protected the responsibility for affirmative action. Is that correct?

Mrs. BURKE. That's correct.

Mr. DANIELS. Mr. Simon, any questions?

Mr. SIMON. One point you make I think is extremely important in your conversation with Mrs. Spellman. My experience in the Federal Government has been that affirmative action programs that are general in nature don't work well. You have a lot of executives who want to ignore programs because they soon become controversial and it's important that you are as specific as possible.

Any amendments you may suggest along that line would be extremely helpful.

Mrs. BURKE. Thank you very much.

Mr. DANIELS. Thank you, Mrs. Burke.

Mr. FORD. Can I ask just one more question?

Mr. DANIELS. Sure.

Mr. FORD. On page 4 you say, "Moreover, the Civil Service Commission denies that it has the duty to act affirmatively under title 7 of the 1964 Civil Rights Act as amended in 1972 to bring about a more reasonable representation of minorities and women." And you point out about the clustering of women and minorities in low-paying jobs.

When you talk about the Civil Service denying its responsibility under the Civil Rights Act of 1964 suggests to me that that should be a red flag for the Judiciary Committee to examine the oversight function. As far as the question is concerned, I would raise the same one that Mr. Clay raised and have them respond back to the committee that has the legislative responsibility and also the expertise.

But the words "at all levels" would present a problem for you if we tried to do it from the standpoint of job classification here. When you talk about more reasonable representation of minorities, what is a reasonable representation of women in jobs that call for members of the bar? Is it 50-50 because that's the number of women in society in the United States?

Mrs. BURKE. 20 percent of the lawyers at this point are women. And what we are saying is that of new admittees you are getting a much larger percentage of women who are admitted.

For instance, in present law school classes you have some instances of where it's coming up to the 50 percent. But right now you're still, you're talking about the 20 percent. But that has not been reflected. Those percentages have not been reflected.

Mr. FORD. Is reasonable representation as you view it the percentage of women who are in the profession of law and have the qualifications that that job description would call for or the percentage of women in society?

Mrs. BURKE. First of all, it's kind of twofold. You have to take, of course, those who are available. And so that you would say probably, your first approach would say that you take the percentage of women in the bar. But what you also find is that a larger percentage of women lawyers seek to be Government-employed rather than in private practice and that's for a number of reasons. As bad as the Civil Service has been, I guess it hasn't been as bad as the law firms. So that what happens is that you have to recognize that even though you have 1 percentage of women in the legal profession, the number who seek to be Government lawyers is probably twice that many. So that you have to take into consideration when you say "reasonable" you have to take into consideration not just one factor but a number of factors in evaluating whether there has been a process that has discriminated and whether or not there is a process that has excluded.

And in this case, if you approach that subject it's just as the whole subject of minority employment. Even though you might have 1 percentage of minorities in the legal profession in any of the professions that would be attracted to Government, the number who would seek Government positions just because of the history of private business is different. And all you have to do is just walk through the post office and you can get an idea.

And if you have a lot of people who are working in the post office as clerks who are attorneys, then you start getting a feel for exactly what the pattern of employment has been. And historically that has been the pattern in the post office before it became—now we don't know what it is. But this has been the pattern. You would have many, many of minorities who were working at those low clerk positions. But some of them have the qualifications where they would have been able to move into higher positions given an opportunity.

So you have to weigh all of these things to arrive at what is reasonable. It's not a simple, one-step thing.

Mr. FORD. When you talk about the Civil Service Commission, you are talking about a little different situation than an industrial employer where you have several different segments of classification and different circumstances. The Civil Service Commission may be setting up a job description for a nuclear physicist, GS-18. Now, if they are setting up a position that requires lawyers and if the reasonable proportion of women in that job position would be equal to their makeup of the total bar, women would be in trouble because by your figures it's 50 percent of the women lawyers who have Government employment, and they are already overrepresented in Government by sex as against those women in the country that are qualified for that job.

Mrs. BURKE. But is it? If you say it's reasonable you have to take into consideration more than one factor. You would not just take percentages.

Mr. FORD. But I am not talking about why. We all know that, because women were able to move faster. We are talking about equal employment in a system that can show statistically that it has been a magnet for minorities because it has led the entire society in providing equal employment opportunities and although it is not good—

Mrs. BURKE. No. I didn't say that 50 percent of the lawyers in Government are women. I said if you take those who would seek to get into Government work, of those who would seek to go into Government you would find that it's probably almost 50 percent. I didn't say that—that's why I say you can't take one factor. If you take the number of lawyers the point is that they don't, women do not make up 50 percent. But I suspect of those who apply you have a higher percentage of women than you would have as far as lawyers because women seek to go into Government employment because in the past they have been excluded from other areas.

But even if, if you take the numbers, if you go into the U.S. attorney's office don't ever think you are going to find that 50 percent of them are women. That's not true.

Mr. FORD. But you will have a higher percentage of women in Government than women as the percentage of the total number of lawyers in the country.

Mrs. BURKE. In certain offices of Government. The U.S. attorney's is not one of those offices. You find them in offices where they do just paperwork.

In those that are trial attorneys and other areas you find the same pattern that you find in private industry.

Mr. FORD. Then I have been misled by some figures I saw produced by the bar. And I am not talking about special schedule people or people who are not under the general schedule of civil service. There it's clear that women and minorities drop right off the end of the world.

But within the levels of control at the civil service, of the civil service system, I suspect in that one profession, just as if you look at the Defense Department schoolteachers who are a very large segment of professional people, I think the ratio there is about 8 or 9 to 1 female.

Mrs. BURKE. No question about that, at the lower levels.

Mr. FORD. You can go over to the other side and get to the chemists, mathematicians, and I think you would find that it doesn't yet come up to that number.

But when you start talking about making this kind of a balance when we are talking about the Civil Service Commission and not society as a whole, there is some danger in proposing a very rigid test.

Mrs. BURKE. I don't think "reasonable" is a rigid test. That's why the word "reasonable" is often used because it gets away from rigidity. When you determine what is reasonable you take into consideration a number of factors. And that's what the word implies.

Mr. DANIELS. Mrs. Burke, we want to thank you for your appearance here this morning. We appreciate hearing from you.

Mrs. BURKE. Thank you very much.

Mr. DANIELS. Our next witness is J. Francis Pohlhaus, who is appearing on behalf of Mr. Clarence Mitchell of the National Association for the Advancement of Colored People.

**STATEMENT OF J. FRANCIS POHLHAUS, COUNSEL, WASHINGTON
BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE**

Mr. POHLHAUS. The National Association for the Advancement of Colored People feels that present consideration of H.R. 12080 by this committee is ill-advised.

From what has preceded today's hearing and from the calling of the hearing, it is obvious that in the drafting and staff consideration of this legislation absolutely no consideration was given to the effect it would have on the Federal Government's equal employment opportunity program.

We appreciate the efforts of Congressmen Clay, Ford, Brodhead and others that have resulted in amending the bill so that its potential for harm has been somewhat reduced, and we are thankful that the chairman has called this meeting to explore the effects the bill may have on the EEO programs. But last minute patchwork and a 1-day hearing are inadequate substitutes for the thorough consideration that should be given to this legislation, not only by this committee but by the committee having jurisdiction over the Civil Rights Act of 1964, which this bill would amend and otherwise affect.

We support the overall objective of this bill—to assure a civil service personnel program free from undue influence. In a perfect world a merit program, completely isolated from outside influences, could no doubt result in each Government job being filled by the best qualified person regardless of race, sex, creed, national origin, age, or physical handicap.

Unfortunately, we do not live in that perfect world. We live in a world in which the merit in the merit system must be placed in quotation marks, in which the bureaucracy that administers the program is in general unsympathetic to the rights of minorities and women, in which the Civil Service Commission, which oversees the program, is engaged in what amounts to a guerrilla warfare of resistance against the duties imposed on it by Congress to enforce the Equal Employment Opportunity Act in the Federal service in the same manner as it is enforced in the private sector.

We do not think that it is wise for the Congress to strengthen the bureaucracy's and the Commission's authority to deal with personnel actions without full consideration being given to the effect this will have on the rights of those who are protected under other provisions of laws and Executive orders relating to discrimination. Such consideration has not been given, as is witnessed by this hastily convened hearing. Until it is, we will call upon our friends in the Congress to oppose this bill.

It may well be that there is no intent of this committee to affect rights under title VII of the Civil Rights Act of 1964. Certainly the amendment of Congressman Ford, which the committee adopted, appears to so state. Unfortunately the Civil Service Commission, in the EEO area, has a history of ignoring congressional intent. It was the intent of Congress to grant to Federal employees the same rights enjoyed by employees in the private sector and those in State and local governmental employment. But that intent has not been realized, and nearly 4 years after the passage of the 1972 amendments to title VII

it is still necessary to litigate to apply to Federal employment some of the basic principles of EEO law that have been applied for years to private employers.

Our basic concern is that given a new statutory standard to apply to Federal personnel action, the Civil Service Commission will take the position that such standard operates to the exclusion of all other standards, that it in effect precludes the Commission from requiring affirmative action, and more importantly corrective action, to eliminate present discrimination and the effects of past discriminatory action. That our concern is not idle speculation is attested by the fact that the Commission now takes the position that its own rules and regulations, which this legislation would set in concrete, do so.

Thus, it has refused to entertain class actions or to correct patterns and practices of discrimination on the grounds that to do so would somehow violate the merit system. We are sure that passage of H.R. 12080 would result in the Commission's taking the position that Congress has placed the stamp of approval on its interpretations of the merit system, to the detriment of enforcement of section 717 of title VII of the Civil Rights Act. We, of course, would not consider that this would be a correct interpretation, but we would no doubt be bound by it until litigation, extended and costly, determines otherwise.

A number of important issues involving Federal personnel are in the process of litigation. Among these are whether a complainant under the Federal EEO procedures has a right to a trial *de novo* when he takes his case to court, whether the 1972 amendments to the EEO Act covering Federal personnel apply to complaints that were pending at the time the amendments became effective; whether Federal employees can file class complaints; whether attorney's fees are recoverable for services rendered in the administrative process; the extent of the relief that may be afforded to a successful complainant.

We feel that until these matters are cleared up by the courts that final action on H.R. 12080 should be held in abeyance. Otherwise, we feel we are letting ourselves in for another 4 or 5 years of litigation, which we have had under the amendments to the Equal Opportunity Act.

Not only has the CSC misinterpreted the EEO Act, but in its rule-making authority under the act, it has set up an obstacle course for those who would pursue a discrimination complaint. It has established what is probably one of the shortest statutes of limitations on record—30 days—for a party to initiate a complaint. Once the complaint has been reduced to writing the complainant cannot go beyond the specifics of the complaint submitted. Until an order in a pending lawsuit becomes fully effective, a complainant cannot file a class action. If in the course of a complaint the complainant is harassed, he cannot pursue this issue unless he files a new, separate complaint. The complaint process is allegedly nonadversary. But the agency is invariably represented by counsel or skilled personnel specialists, regardless of whether the complainant is represented.

One of the landmark cases in EEO litigation is *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), in which the Supreme Court found a nonrelevant testing procedure with an adverse impact on minority applicants to be discriminatory. An employee or applicant in the private sector may challenge such a practice in the course of

filing a charge alleging this and other discriminatory practices. But under rules the CSC has promulgated, a complainant must file two separate complaints under different parts of the Code of Federal Regulations. Fragmentation of the complaint process no doubt has a chilling effect on filing complaints, an effect we suspect is not accidental.

Before the Congress strengthens the CSC's administration of the merit program (and by impact, the EEO program), it may be advisable to examine a recent case that illustrates how it manages its own programs. This case is of prime importance because it involves the Appeal Review Board, the existing highest appellate authority in most cases before the Commission.

Approximately 6 months before the retirement of the Board chairman, it was decided to fill the vacant post of deputy chairman. None of the then Board members, including Ms. Peggy Griffiths, a black with a pro-employee record, was considered for the vacancy. In what appears to be a classic preselection operation for the upcoming Board chairman's vacancy, an employee from outside the Board was selected deputy, who was then promoted to chairman several months later. Upon Ms. Griffiths' complaint the Commission appointed an *ad hoc* committee to review the appointment and consider other candidates, including Board members. The committee approved the selection, whereupon Ms. Griffiths filed a complaint of race and sex discrimination.

After investigation by a Department of Justice investigator, the Commission's equal employment opportunity director, to whom was assigned the authority to make the final Commission decision, made a finding of discrimination in the appointments to both the deputy and chairman positions. His decision was buttressed by findings of numerous violations of the merit system and improper personnel practices.

If the Commission is incapable of applying its own standards in selection of its highest appellate authority, we question whether it should be granted additional authority at this time over the entire Federal personnel system.

We believe there are other reasons why action on this legislation should be delayed.

At the last session of this committee, it adopted Mr. Harris' amendment to allow the Commission to comment on proposed legislation free from OMB pressure. At that session also the chairman agreed to hold hearings on a bill to expand the Commission to five members. If passed, this bill could drastically alter the makeup of the Commission. Add to that the possibility of a change in administration that would further affect the personnel of the Commission, we could in less than a year be dealing with an entirely different CSC, one whose views this committee might want to hear before reshaping the statutes it administers.

In the meantime little is lost. The view has been expressed by some, including members of the committee, that the situation to which this legislation is directed is the result not of the laws that are being administered, but of the way they are being administered. If so, it would appear revamping the Commission should take precedence over revamping the legislation under which it operates. We feel it is

safer to proceed along these lines than to run the risk of sabotaging vital civil rights laws that have come about at the cost of nearly a century of struggle.

If the committee, notwithstanding the lack of need for this bill, decides to proceed, we would point out some areas in which the bill poses threats to EEO in the Federal system.

We have noted the general threat posed to minority group workers, eligibles and applicants. Although the Ford amendment has improved the bill, any legislation that strengthens the Commission's power over the Federal personnel system will no doubt be interpreted by the present Commission as in derogation of laws and executive orders prohibiting discrimination.

The strengthening of the personnel offices of Federal agencies poses an additional threat if the present trend toward shifting agency EEO operations to the personnel offices continues. It is our experience that many of the problems faced by minority group employees originate in, or are approved by, personnel offices. The opinion in the Griffiths case shows that each of the illegal practices that occurred was cleared with, and condoned by, the personnel office of the Commission. Therefore, we would ask that a provision be placed in the bill prohibiting personnel offices from administering EEO programs. This should be the personal responsibility of the head of the agency or of a full-time assistant responsible directly to him.

Section 1302 (references are to the sections of title 5 of the U.S. Code as amended by the bill) appears to establish a principle we have always advocated—that investigations of agency wrongdoing be taken out of the agency and placed in an impartial body. However, listening to the hearings the committee has conducted has led us to believe that this principle will not be widely applied under the bill as written. Therefore, we urge strengthening of this provision to prohibit an agency accused of violating the law from investigating itself.

I think there is one fallacy here and that is that all of the good guys are on the inside protecting the integrity of the system and all the bad guys are on the outside exerting improper influences.

Now, as an organization, the NAACP through the recent years opposed many of these appointments that have been brought to the attention of the committee. We realize not only were they improper from a civil service standpoint, in many instances they were improper from an agency, I mean from a program standpoint. For instance, in the housing field they would appoint regional directors who were tied into the private housing industry, which bitterly fought the enactment of the laws which they were then going to be appointed to administer.

So, we have tried to exert influence on personnel actions. But we think that in most instances it has been a good influence and we would hope that we would be able to continue this.

And I do want to bring to the attention of the committee that section 717 of the Civil Rights Act of 1967 is not only affected by this bill, it is actually in several places amended and therefore we would again urge that it be referred to the committee that has jurisdiction over the Civil Rights Act.

Or if that is not done, that the language of this bill be reworded in such a way as to delete any specific amendment of the Civil Rights

Act. We are sure that this can be done without doing violence to the bill.

The Appeals Board established under section 7703 must be independent if it is to be effective. We also feel that Senate confirmation should be required lest the present Appeals Board of the Commission be transferred en masse to the new Board.

In summary, we submit that this legislation should not be passed at this time for a number of reasons. First, the potential of damage to the EEO program has not been fully considered. Second, pending court cases affecting the administration of section 717 of the Civil Rights Act should be disposed of before a thorough revamping of civil service procedures should be considered.

Third, pending legislation affecting the size of the Commission and a possible change in the administration could drastically affect the makeup of the Commission and the need for legislation. If the committee decides to proceed, drastic revisions in the bill as outlined today not only by me but I am sure by other witnesses who will appear, should be considered to protect the rights of female and minority groups.

Thank you very much.

Mr. DANIELS. On behalf of the committee I want to express our thanks to you for your careful consideration of the bill and the numerous comments that you have made and also in pointing out to the committee those sections which you believe need further consideration by this committee or any other committee of the Congress having jurisdiction over the Civil Rights Act.

The Chairman, Mr. Henderson, indicated to me that there was a great demand for the moving of this legislation through this committee. As I indicated earlier, it was his intention to bring this bill up for consideration before the full committee on Thursday of this week. I shall bring to his attention the comments that you have made here today and I am sure we will furnish him with a copy of your statement. I recognize the gentleman from Michigan, Mr. Ford.

Mr. FORD. With respect to section 717(b) being amended by changing the language so that the review board would be the Board on Federal Employee Appeals, which is created by this legislation, section 717(c) is similarly amended by striking out the Civil Service Commission and replacing it with the Board on Federal Employee Appeals.

Now, laying aside the general question of whether you want to open up the Civil Rights Act at all, the adoption of a Board of Federal Employee Appeals, the creation of this independent review board, would not have any effect on the enforcement provisions under section 717 unless these changes in the act were made to change the jurisdiction for enforcement of the 1972 amendments, particularly since we are talking about Federal employees who are now covered by the jurisdiction of the Civil Service Commission.

On page 7 of your statement you say, "Section 1302 appears to establish a principle we have always advocated that investigations of agency wrongdoing are taken out of the agency and placed in an impartial body."

Now, assuming that the legislation is to be moved forward, isn't it desirable that the two references on page 53 shifting jurisdiction from the Board of the Civil Service Commission to the Board on Federal

Employee Appeals stay here so that it will be clear that it not only includes all of the Civil Service Act but the enforcement duties that are imposed by the 1972 amendments to the Civil Rights Act?

Mr. POHLHAUS. I think that should be in the bill somewhere. But we have the feeling and I think we did suggest amendments to the staff, that this could be done by cross-reference, rather than by specifically amending the section.

Mr. FORD. But the substance of what is intended here is not what you are objecting to?

Mr. POHLHAUS. No. We are not objecting to that. We don't want the Civil Rights Act opened up for amendment on the floor.

Mr. FORD. We agree with you. And I think if you could suggest to us the legislative device by which we accomplish the substance without making section 717 or even just the two relevant parts of section 717 open to amendment on the floor, I think the committee would definitely agree to that.

Mr. POHLHAUS. I think that can be done.

Mr. FORD. But we would be doing something contrary to what you testified you want us to do if we blocked out the situation where we would make the specific remedies provided for in the 1972 amendments of the Civil Rights Act applicable specifically to Federal employees and would spell out in great detail or substantial detail what those duties are.

Mr. POHLHAUS. I want to make it clear, we are not objecting to the substance. It is just the opening up of the Civil Rights Act.

Mr. FORD. Thank you.

Mr. DANIELS. Mr. Clay.

Mr. CLAY. Thank you, Mr. Chairman.

On page 8 you say that the Appeals Board established under section 7703 must be independent if it is to be effective. Then you further call for Senate confirmation so that the present Appeals Board of the Commission cannot be transferred en masse to the new Board. Although the revised bill does call for Senate confirmation, do you have any suggestions as to how we can assure that the same Board is not transferred?

Mr. POHLHAUS. I would imagine you can go over to the Senate side and testify and let them know that that is not your intention.

Mr. CLAY. All right, thank you.

Mr. Chairman, I think that is all the questions I have to ask. I am going to work with some members on the committee to see if we can write some language to take care of all of the points you have raised in this bill and perhaps we might ask you to join us in that.

Mr. POHLHAUS. Fine.

Mr. DANIELS. Mr. Pohlhaus, again, thank you very much.

Mr. POHLHAUS. Thank you.

Mr. DANIELS. Our next witness is Ms. Janice Mendenhall, executive director of the Federally Employed Women, Inc.

STATEMENT OF JANICE MENDENHALL, EXECUTIVE DIRECTOR, FEDERALLY EMPLOYED WOMEN, INC., WASHINGTON, D.C.

Ms. MENDENHALL. Mr. Chairman and members of the committee, my name is Janice Mendenhall, and I am president of Federally Em-

ployed Women, Inc. FEW is dedicated to improving the status of women who work for the Federal Government. I appreciate the opportunity to appear before this distinguished committee to testify on H.R. 12080, the Civil Service Amendments of 1976.

My testimony is based on the April 28 draft of the bill, which is the most recent one we had at the time.

May I begin by saying that under the current laws, the Civil Service Commission has done a creditable job of carrying out the mandate of Congress in some areas, but more remains to be done. FEW feels that the time has arrived to strengthen and broaden the legal base under which the Commission operates.

There are valuable aspects of this legislation which we support, particularly delineation of the Commission's authority to discipline employees of other agencies. I will limit my comments to those sections which we feel need clarification or strengthening. We support the inclusion of the military service. We note that the committee has drafted this bill in language which for the most part eliminates personal pronouns. However, in those instances in which "he" is used, it should be changed to "he or she."

Section 1302(c) (1) Investigations; enforcement authority; reports. This is necessary to see that agencies carry out directives of the Commission. However, this appears to be inconsistent with section 1303(a) (1) which requires a 30-day notice to employees. It would not be sufficient for an agency to report within the 30-day period that a notice of proposed termination, for instance, had been issued because the action might never take place.

If an agency must give 30 days notice to employees of impending disciplinary or corrective actions, 30 days then becomes too short for the Commission to also notify the General Accounting Office for termination of the employee's salary. Suppose that a supervisor was found to have discriminated and the corrective action was to remove him or her from a supervisory position. If the agency does not act within 30 days, the employee might be deprived of salary, a sanction not warranted by the case, 45 days would be more appropriate.

Section 3001(c) Employment based on merit; preferential treatment prohibited. We would like to see the words "affirmative action" inserted to clarify the meaning. Affirmative action would be in accordance with the definition in Executive Order 11478 and relevant court decisions. We totally support the amended wording in this section with this change. The committee might also wish to consider adding a definition of "merit," limited to objective, job-related criteria.

Section 3324(a) (5) Supergrade positions should not be removed from the competitive service if that is the correct reading of the language, because it could lead to unnecessary politicizing of the career service. Up to now, the filling of these positions under the merit system has seemed to operate well.

Section 7702 Appeals from adverse decisions and 7703 Board on Federal Employee Appeals. It is unclear as to how these provisions will interface with the current regulations for discrimination complaints.

Currently, an employee of the Federal Employee Appeals Authority conducts a hearing and makes a recommended decision prior to the

final agency decision on a complaint. We support a predecision hearing in order to solicit as much information as possible on which to base the decision. We do not see a need for two hearings, one before the agency decision and one before the appeal decision. If we could choose only one, we would support the hearing prior to the agency decision.

An appeal on a discrimination complaint should be before an independent body, such as the proposed Board on Federal Employee Appeals. The composition of this Board is critical. A less cumbersome administrative structure would have one Presidentially appointed agency head.

In preparing our testimony, we did recommend that the presiding officer should be advised by board members who are selected under the merit system. But I would like to withdraw that sentence in view of the comments made here this morning.

If an agency files an objection to a recommended decision of a hearing examiner, the Board should render a final decision within 45 days instead of 120 days which constitutes, we believe, an unreasonable delay.

This Board should receive its own appropriation for personnel and other costs, thereby not depriving the Commission of needed resources to staff the Board.

In conclusion, because of the interest evidenced today, FEW recommends that oversight hearings be held on the operation of the Equal Employment Opportunity in the Federal Service.

I appreciate the chance to appear today and would be glad to answer any questions.

Mr. DANIELS. Ms. Mendenhall, I want to thank you on behalf of the committee, for a very concise and thoughtful statement. Your recommendations will be carefully considered by the full committee. I have no questions.

Mr. Ford?

Mr. FORD. No questions.

Mr. DANIELS. Mr. Clay, any questions?

Mr. CLAY. Thank you, Mr. Chairman. I notice on page 2 of your testimony, you state some reservations about removing supergrades from the competitive service. Is it your interpretation that that is what this bill would do?

Ms. MENDENHALL. In the brief time I had available to review the bill, I was struck by the language which might possibly do that and I wanted to raise it as a point which should be looked into further.

Mr. CLAY. Mr. Chairman, can we ask the counsel for an interpretation of what that section does, because I tend to agree with the witness, that that's what the section is doing.

I think we need to change it.

Mr. DANIELS. Do you want to go into that now?

Mr. CLAY. I think he can just tell us briefly.

Ms. MENDENHALL. The wording is to insert a new paragraph regarding the section dealing with 16 to 18. A new subparagraph 5. I wasn't sure about the exact legislative interpretation of the wording.

Mr. MARTINY [counsel]. The sole purpose of that provision is to remove the requirement that the Civil Service Commission must approve the qualifications of the individuals who are appointed in the excepted service.

Under this bill, the head of the agency must approve the qualifications.

Ms. MENDENHALL. I agree that the Commission shouldn't have to approve the qualifications of political appointees. But this seems to apply to all grades 16 through 18.

Mr. MARTINY. It doesn't. It applies only to those excepted by the Commission under the subsection (a) on page 40, lines 7 through 8, which are the political appointees.

Ms. MENDENHALL. All right. Thank you for the clarification.

Mr. CLAY. Thank you.

Mr. DANIELS. Mr. Ford, do you have any questions?

Mr. FORD. Yes.

In your statement, you make specific reference to section 3001(c), employment based on merit, page 38 of the bill which we have previously discussed and which the committee has spent a great deal of time working on. You say we would like to see the words "affirmative action" inserted to clarify the meaning. How would you go about doing that?

Ms. MENDENHALL. Just a moment. Let me turn to that section.

Again, I do not have the final wording. But it would be under subparagraph (c) and it could be in either subparagraph under (c) (1) or (2), perhaps to relieve any officer or employee of his responsibility to assure nondiscrimination and of his responsibility to assure affirmative action. I could work on some wording and submit it later. I would like to point out that nondiscrimination is very good, but I would also like to see the positive step of affirmative action inserted.

Mr. FORD. You then say that you would, that someplace else, in the legislation, you would define affirmative action because you say affirmative action would be in accordance with the definition.

Ms. MENDENHALL. I was suggesting what is in Executive Order 11478 and some of the relevant court decisions for the wording to put in here. If you would like me to, I would be glad to work on some wording and submit it before Thursday.

Mr. FORD. If you can come up with a definition of "affirmative action" before Thursday, you will be performing something very meritorious.

Ms. MENDENHALL. I will be glad to try.

Mr. FORD. I am suggesting to you in all seriousness that it can't be done. That's one of the reasons why we abandoned attempts to deal with those words, because they are, in a variety of ways, artful words in the law, and the exact dimensions of those artful words are even now being decided in a number of cases pending before the Supreme Court.

And when you direct "affirmative action," how do you prevent, how do you put programers on affirmative action, that would do what you perceive "affirmative action" to be, without doing what Mr. Maleck perceived "affirmative action" to be?

If you just throw that term out, without a clear definition of what you mean by it, it causes real troubles. That's why we stayed away from it.

Mr. MENDENHALL. Currently, the Federal service operates under Executive Order 11478, which calls for affirmative action for Federal services. I would like to see if there is appropriate wording in there.

Mr. FORD. Thank you.

Mr. DANIELS. Thank you, again, Ms. Mendenhall.

Our next witness is Mr. Jack Greenberg, director of the NAACP Legal Defense and Educational Fund.

STATEMENT OF JACK GREENBERG, DIRECTOR, NAACP, LEGAL DEFENSE AND EDUCATIONAL FUND

Mr. GREENBERG. Thank you, Mr. Chairman.

I have submitted a lengthy statement, but will read a brief summary of it.

Mr. DANIELS. Without objection, your complete statement will be entered into the record.

[The complete statement follows:]

PREPARED STATEMENT OF JACK GREENBERG, DIRECTOR COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

INTRODUCTION

Chairman Henderson, thank you for this opportunity to testify before the committee on the potential impact of H.R. 12080 on equal employment opportunity and affirmative action programs within the federal civil service. While generally supporting the purposes and outlines of the present bill, I believe H.R. 12080 should forthrightly come to grips with the failure of the federal equal employment opportunity program, which is not now addressed. I am happy that you have invited our organization to participate in initiating such a scrutiny.

The NAACP Legal Defense and Educational Fund has prosecuted lawsuits in behalf of the civil rights of black persons for many years in such areas as voting, education, housing, and employment. Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., guaranteeing equal employment opportunity, the Legal Defense Fund has devoted considerable time and resources to assuring effective implementation of Title VII by the courts.

Thus, lawyers of the Legal Defense Fund brought the early cases of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) in which the Supreme Court made clear that Title VII prohibits apparently neutral employment practices, such as hiring tests, with unjustified adverse impact on black employees and *Phillips v. Martin Marietta Corp.*, 400 U.S. (1971), the first decision by the present Supreme Court on sex discrimination. Of particular relevance to H.R. 12080 are two recent Supreme Court decisions in cases brought by Legal Defense Fund lawyers which emphasize that courts construe Title VII to require optimally effective enforcement of equal employment opportunity guarantees. First, last term the Supreme Court held that compensatory back pay relief for black employees subject to discrimination is required in most cases in order to make the employees whole and to effectuate the purposes of the Act in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Second, less than two months ago in *Franks v. Bowman Transportation Co.*, 44 U.S.L.W. 4356 (March 24, 1967) the Court held that seniority relief to help black employees subject to discrimination in their career advancement reach their rightful place is similarly required.

These decisions are applicable as well to persons subject to other forms of discrimination prohibited by Title VII such as sex and national origins. With the extension of Title VII guarantees and protections to federal employees in 1972, the Legal Defense Fund has extended its litigation efforts to federal employment. At present, we have approximately thirty (30) pending cases throughout the nation against agencies and departments such as the Army, Navy, Post Office, NASA, Agriculture and Civil Service Commission for racial discrimination in employment. My comments are based on this experience.

FAILURE OF CSC EQUAL EMPLOYMENT OPPORTUNITY POLICIES AND H.R. 12080

While the rights of private and state or local government employees to full relief under Title VII are clear, unfortunately this is not so for employees of the federal government. The Congressional 1972 amendments to Title VII which were intended to give federal employees the same rights as all other employees have gone largely unrecognized and unenforced by the United States Civil Service Commission.

As I will describe in greater length: (1) Congress in 1972 criticized the Civil Service Commission for its prior administrative enforcement of equal employment and affirmative action. (2) Congress demanded that the Civil Service Commission take certain specific actions to assure that Title VII be enforced. (3) The Civil Service Commission has nevertheless done almost nothing that Congress required and, indeed, has set up obstacles to federal employees who seek vindication of their rights. (4) H.R. 12080 or any other comprehensive civil service reform must, in part, be premised on a complete and thorough study of and take into account the Civil Service Commission's continuing illegal course of behavior and flouting of Congressional directives in the area of employment discrimination. Otherwise, federal employees will continue to have fewer rights under Title VII than all other employees and the federal government lesser obligations under Title VII than all other employers. The federal government, in short, will never be what Congress intended it to be, the nation's model equal opportunity employer, unless action is taken.

Initially, however, let me generally endorse the present version of H.R. 12080's proposed amendments to 5 U.S.C. § 3001 which deals with the substantive reach of the reforms. Section 3001 contains a savings clause stating that the bill does not contemplate any effect on preexisting rights and remedies with respect to equal employment opportunity conferred by authorities such as Title VII. This makes clear that obligations and enforcement imposed on the Civil Service Commission and agencies by Title VII and other authorities are not diminished or limited in any way by the substantive reach of the bill and new enforcement powers of the Civil Service Commission with respect to prohibited political considerations in federal employment. We also generally endorse the proposed amendments to 5 U.S.C. §§ 7701-03 to create a board independent of the Civil Service Commission to hear and review certain matters, including administrative Title VII discrimination complaints. It is certainly a step in the right direction to reduce the powers of the Civil Service Commission, the major obstacle in the path of more vigorous Title VII enforcement for federal employees, over these matters. Additional study and measures, however, are required to make sure that this independent board not repeat the manifest inadequate enforcement of the Civil Service Commission.

CONGRESSIONAL CRITICISM OF CSC EQUAL EMPLOYMENT OPPORTUNITY POLICIES IN 1972

In 1972, Congress criticized the Civil Service Commission's equal employment opportunity programs in an across-the-board fashion. Although the Commission had sought to show otherwise, the House and Senate committee reports¹ agreed with civil rights advocates and made broad findings of fact exposing the gross inadequacies of Civil Service Commission performance.

First, Congress found "Despite some progress that has been made in this area, the record is far from satisfactory. Statistical evidence shows that minorities and women continue to be excluded from large numbers of government jobs, particularly at the higher grade levels." The conclusion Congress drew from the statistics was that, "[t]his disproportionate distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy and of equal opportunity."²

Second, Congress attributed part of the problem to the inadequate mechanism for complaint resolution: "A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal

¹ H.R. Rep. No. 92-238, on H.R. 1746, 92nd Cong., 1st Sess. at 23-26; S. Rept. No. 92-415, on S. 2515, 92nd Cong., 1st Sess. at 12-17. The committee reports are summaries of the record compiled during Labor Subcommittee and House and Labor Committee hearings.

² H.R. Rep. No. 92-238, supra at 23, compare S. Rep. No. 92-415, supra at 12-14.

employment . . . [and] denied employees adequate opportunity for impartial investigation and resolution of complaints."³

Third, Congress attributed the Civil Service Commission's poor performance to abject ignorance of the systemic nature of discrimination: "Aside from the inherent structural defects the Civil Service Commission has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination which exist in the system . . . The Civil Service Commission seems to assume that employment discrimination is primarily a problem of malicious intent on the part of individuals. It apparently has not recognized that the general rules and procedures it has promulgated may actually operate to the disadvantage of minorities and women in systemic fashion."⁴

Fourth, Congress found that, "[d]espite the series of executive and administrative directives on equal employment opportunity, Federal employees, unlike those in the private sector to whom Title VII is applicable, face legal obstacles in obtaining meaningful remedies. There is serious doubt that court review is available to the aggrieved federal employee."⁵

CONGRESSIONAL DIRECTIVES FOR CSC REFORMS IN 1972

Consistent with its across-the-board criticism of Civil Service Commission performance, Congress demanded that across-the-board actions be taken to change the status quo.

First, in order to redress failure to pursue its policy of equal opportunity, Congress enacted a provision (§ 717(b), 42 U.S.C. § 2000e-16(b)) that, inter alia, specifically authorized and required (a) Commission administrative power to remedy discrimination; (b) annual submission of agency plans for affirmative programs of equal employment opportunity; (c) review and approval of such plans and collection of relevant statistical data by the Commission; and (d) agencies to comply with final actions taken on complaints of discrimination.⁶

Second, in order to clear up the detrimental complaint resolution process, Congress specifically directed that, "[t]he new authority given to the Civil Service Commission in the bill is intended to enable the Commission to reconsider its entire complaint structure and the relationship between the employee, agency and Commission in these cases."⁷

Third, as to the Commission's failure to perceive systemic discrimination, Congress directed that:

"Another task for the Civil Service Commission is to develop more expertise in recognizing and isolating the various forms of discrimination which exist in the system it administers. The Commission should be especially careful to ensure that its directives issued to Federal agencies address themselves to the various forms of systemic discrimination in the system. The Commission should not assume that employment discrimination in the Federal Government is solely a matter of malicious intent on the part of individuals. It apparently has not fully recognized that the general rules and procedures that it has promulgated may in themselves constitute systematic barriers to minorities and women. Civil Service selection and promotion techniques and requirements are replete with artificial requirements that place a premium on "paper" credentials. Similar requirements in the private sectors of business have often proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (see e.g., *Griggs v. Duke Power Co.* . . .) The inevitable consequence of this kind of a technique in Federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or educationally disadvantaged suffer a very heavy burden in trying to meet such artificial qualifications.

"It is in these and other areas where discrimination is institutional, rather than merely a matter of bad faith, that corrective measures appear to be urgently required." For example, the Committee expects the Civil Service Commission to undertake a thorough re-examination of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met. S. Rep. No. 92-415, *supra*, at 14-15.

³ H.R. Rep. No. 92-238, *supra*, at 23-24; compare S. Rep. No. 92-415, *supra*, at 14.

⁴ H.R. Rep. No. 92-238, *supra*, at 24.

⁵ H.R. Rep. No. 92-238, *supra*, at 25; compare S. Rep. No. 92-415, *supra*, at 16.

⁶ See S. Rep. No. 92-415, *supra*, at 15-1.

⁷ See S. Rep. No. 92-415, *supra*, at 14.

Fourth, in order to overcome the lack of meaningful legal remedy, Congress created a specific right of action modeled on private Title VII actions (§§ 717(c) & (d), 42 U.S.C. §§ 2000e-16(c) & (d)) in order that, "[a]grieved employees or applicants will also have the full right available in the Courts as are granted to individuals in the private sector under Title VII."⁸

CSC REFUSAL TO FOLLOW 1972 CONGRESSIONAL DIRECTIVES

In response to the 1972 amendments to Title VII, the Civil Service Commission has simply refused in almost every material respect to follow the initiatives Congress required to implement effective equal employment opportunity and affirmative action. The United States Commission on Civil Rights has so documented in its recent report, "The Federal Civil Rights Enforcement Effort—1974, Vol. V. To Eliminate Employment Discrimination" (July 1975). As a result of recent challenges to various aspects of the Civil Service Commission's administrative authority, judicial condemnation of present Commission performance is beginning, see *infra*.

First, the Civil Rights Commission study demonstrates that the same *prima facie* statistical showing of employment discrimination in which black, other minority and women are concentrated in low-level, low-paying positions, and excluded from supervisory, managerial and other high-level jobs persists. The planning, reporting, review and approval measures Congress required are observed in form only. In substance, the Civil Service Commission has abdicated its duty to assure that agency affirmative action efforts in fact work. Indeed, the Commission has taken steps in the design of upward mobility and affirmative action programs that try to stifle whatever agency initiatives to cure discrimination exist. Thus in our litigation we have found that where the Civil Service Commission finds shortcomings, it does little or nothing to require agency reform. More common, the Commission approves agencies affirmative action plans which cannot and do not have the slightest chance of improving the lot of black, other minority and women employees: admissions of discrimination and problems remain uncorrected year after year; goals supposed to have been met and actions supposed to have been taken carried over unfulfilled year after year; upward mobility programs which provide inadequate training; upward mobility training for nonexistent jobs; upward mobility programs used for the advancement of white male employees; continuing existence of dead-end jobs and career advancement for minority and women employees, etc. Particularly disturbing are administrative complaint decisions of the Civil Service Commission Appeals Review Board which nullify effective agency equal employment opportunity programs and block advancement of employees subject to discrimination to their rightful place in their agencies.

To put the matter in perspective, federal employees cannot expect from the Civil Service Commission and agencies what the courts require in the way of effective relief for discrimination from private and state or local government employers. For instance, the monetary compensatory required in *Albermarle Paper Co. v. Moody*, *supra*, and the seniority relief to put employees in their rightful place required in *Franks v. Bowman Transportation Co.* are not even recognized by the Civil Service Commission as legal requirements.

Second, the Civil Service Commission responded to Congressional indictment of the complaint resolution process and call for restructuring by reissuing almost word-for-word the same regulations and leaving unchanged the structural deficiencies condemned.⁹ The Civil Rights Commission's analysis of this flouting of Congressional will has been reiterated in no uncertain terms by Judge Skelly Wright's opinion for the District of Columbia Circuit in *Hackley v. Roubush*, 520 F.2d 108 (D.C. Cir. 1975).¹⁰

Among the deficiencies of the administrative complaint resolution process are precomplaint counseling requirements and time deadlines applicable only to employees which result in discouraging the making of complaints; defendant agency control of investigation and decision-making which results in conflict of interest; lack of opportunity to conduct discovery and provision of attorneys which results in exclusive defendant agency control of all information and

⁸ S. Rep. No. 92-415, *supra*, at 425.

⁹ See Civil Service Commission FPM Letter No. 713-17, Revisions in Equal Opportunity Regulations (Part 713), Nov. 3, 1972.

¹⁰ See also Brief of the NAACP Legal Defense and Educational Fund, Inc., As Amicus Curiae in *Chandler v. Roubush*, Sup. Ct. No. 74-1599, *infra* at Appendix A.

representation of the agency only by legal counsel in most proceedings; inadequately trained investigators, hearing examiners and equal opportunity officers which results in unfair determinations and little chance of success; failure to apply substantive Title VII law which results in illegal determinations; and failure to in fact provide effective remedies.

Thus, in 87 percent of all complaints decided on the merits, the agency finds itself innocent of discrimination and the Civil Service Commission's Appeals Review Board affirms findings of no discrimination in 98 percent of all appeals on the merits. Recently, an investigation conducted by a team of Justice Department investigators provided information that led to a finding that a black woman member of the Appeals Review Board, Peggy Griffiths, was subject to discrimination by the Commission in denial of a promotion in favor of the present Chairman of the Board. Other examples illustrate the fact that the complaint resolution process continues to "impede rather than advance the goal of the elimination of discrimination in Federal employment."

Third, the Civil Service Commission responded to the Congressional injunction to attack features of systemic discrimination essentially by ignoring the directive, thus requiring legal action. Two examples are discriminatory employment tests and treatment of systemic or class discrimination in the administrative process. The D.C. Circuit had to declare the FSEE discriminatory under the standards set by the Supreme Court in *Griggs v. Duke Power Co.*, *supra*, in *Douglas v. Hampton*, 512 F. 2d 976 (D.C. Cir. 1975). Similarly, a federal district court in the District of Columbia has issued both declaratory and injunctive relief against the Civil Service Commission for refusing to treat relevant systemic or class discrimination in individual complaints of discrimination, *Barrett v. Civil Service Commission*, 11 F.E.P. 1089 (D.D.C. 1975). In both cases, the courts had to step in because the Commission refused to take very specific action Congress took pains to expressly set forth.

Fourth, the Civil Service Commission, its attorneys in the Civil Division of the Justice Department, and agencies have responded to enactment of a private right of action in the federal courts in 1972, by throwing up a series of procedural obstacles in order to render nugatory judicial review of federal employment policies and practices. Thus, the federal government argues that federal employees, alone among employees covered by Title VII, are not entitled to plenary judicial proceedings or trials de novo; instead the federal government wants only a cursory review of the record compiled in the wholly inadequate administrative complaint resolution process.¹¹ Similarly the government tries to remand properly filed lawsuits to the administrative process so that it can be assured of a forum in which it is more likely to win.¹² The federal government also is trying to deprive federal employees of the right to bring class actions in federal district court in order to insulate agencies from the very scrutiny of systemic or class discrimination Congress demanded in 1972.¹³

In conclusion, the Civil Service Commission has indicated its intent not to make the substantive efforts to eliminate discrimination, including racial discrimination, in federal employment that Congress required. Indeed, the Commission has given every indication of consistent and pervasive bad faith and abuse of power in the area of equal employment opportunity and affirmative action of tragic proportions.

MORE STUDY FOR H.R. 12080

In light of the foregoing, the impact of comprehensive legislation such as H.R. 12080 on the Civil Service Commission-administered equal employment opportunity should be carefully weighed by this and other committees with related jurisdiction. In 1972, Congress enacted amendments to Title VII to bring federal employment under its scope only after months of study, investigation and plenary hearings at the House and Senate Education and Labor Committee and Subcommittee levels. If H.R. 12080 is to be truly effective, it will have to take account of these same matters as well as the post-1972 illegal course of behavior of the Civil Service Commission. Thus it will be necessary to investigate problems, Commission and agency policies and practices, trends and patterns of

¹¹ See, e.g., *Chandler v. Roudeshush*, Sup. Ct. No. 74-1599, decision pending; *Hackley v. Roudeshush*, *supra*.

¹² See, e.g., *Grubbs v. Butz*, 514 F.2d 1323 (D.C. Cir. 1975).

¹³ *Barrett v. Civil Service Commission*, *supra*.

nonenforcement, ways in which the new independent hearings and review procedures should be structured to avoid replication of present inadequate enforcement, etc. Employees, interested outside groups, the Civil Rights Commission, the Civil Service Commission, agencies, the Justice Department and others will have to be heard from. An adequate factual record is required for legislative initiatives that will make the promise of nondiscrimination in federal employment a reality.

SUMMARY TESTIMONY

Mr. GREENBERG. I want to thank you for this opportunity to testify before the committee on the potential impact of H.R. 12080 on equal employment opportunity and affirmative action programs within the Federal civil service. While generally supporting the purposes and outlines of the present bill, I believe H.R. 12080 should forthrightly come to grips with the failure of the Federal equal employment opportunity program, which is not now addressed. I am happy that you have invited our organization to participate in initiating such a scrutiny.

The NAACP Legal Defense and Educational Fund has prosecuted lawsuits in behalf of the civil rights of black persons for many years in such areas as voting, education, housing, and employment. Since the passage of title VII of the Civil Rights Act of 1964 guaranteeing equal employment opportunity, the legal defense fund has devoted considerable time and resources to assuring effective implementation of title VII by the courts. Of particular relevance to H.R. 12080 are two recent Supreme Court decisions in cases brought by legal defense fund lawyers which emphasize that courts construe title VII to require optimally effective enforcement of equal employment opportunity guarantees.

First, last term the Supreme Court held that compensatory backpay relief for black employees subject to discrimination was required in most cases in order to make the employees whole and to effectuate the purposes of the act in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

Second, less than 2 months ago in *Franks v. Bowman Transportation Co.*, 44 U.S.L.W. 4356 (Mar. 24, 1976), the Court held that seniority relief to help black employees subject to discrimination in their career advancement reach their rightful place was similarly required.

With the extension of title VII guarantees and protections to Federal employees in 1972, the legal defense fund has extended its litigation efforts to Federal employment. At present, we have approximately 30 pending cases throughout the Nation against various agencies and departments. My comments are based on this experience.

While the rights of private and State or local government employees to full relief under title VII are clear, unfortunately congressional 1972 amendments to title VII, which were intended to give Federal employees the same rights as all other employees, have gone largely unrecognized and unenforced by the U.S. Civil Service Commission.

Initially, however, let me generally endorse the present version of H.R. 12080's proposed amendments to 5 U.S.C. 3001, which deals with the substantive reach of the reforms. Section 3001 contains a savings clause making clear that obligations and enforcement imposed on the Civil Service Commission and agencies by title VII and other authorities are not diminished or limited in any way by the substantive

reach of the bill and new enforcement powers of the Civil Service Commission with respect to prohibited political considerations in Federal employment. We also generally endorse the proposed amendments to create a board independent of the Civil Service Commission to hear and review certain matters, including administrative title VII discrimination complaints. It is certainly a step in the right direction to reduce the powers of the Civil Service Commission, the major obstacle in the path of more vigorous title VII enforcement for Federal employees, over these matters. Additional study and measures, however, are required to make sure that this independent board not repeat the manifestly inadequate enforcement of the Civil Service Commission.

In 1972, Congress criticized the Civil Service Commission's equal employment opportunity programs in an across-the-board fashion. First, Congress concluded that:

Disproportionate distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policymaking and supervisory positions indicates the Government's failure to pursue its policy of equal opportunity.

Second, Congress found that:

A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment.

Third, Congress attributed the Civil Service Commission's poor performance to abject ignorance of the systemic nature of discrimination. Fourth, Congress found that:

Despite the series of executive and administrative directives on equal employment opportunity, Federal employees, unlike those in the private sector to whom title VII is applicable, face legal obstacles in obtaining meaningful remedies.

Consistent with its across-the-board criticism of Civil Service Commission performance, Congress demanded that across-the-board actions be taken to change the status quo. In order to redress failure to pursue its policy of equal opportunity, Congress enacted a provision that, *inter alia*, specifically authorized and require affirmative action plans and reporting of progress. In order to clear up the detrimental complaint resolution process, Congress specifically directed that:

The new authority given to the Civil Service Commission in the bill is intended to enable the Commission to reconsider its entire complaint structure and the relationship between the employee, agency, and Commission in these cases.

As to the Commission's failure to perceive systemic discrimination, Congress directed that:

Where discrimination is institutional, rather than merely a matter of bad faith * * * corrective measures appear to be urgently required. For example, the committee expects the Civil Service Commission to undertake a thorough reexamination of its entire testing and qualification program to insure that the standards enunciated in the *Griggs* case are fully met.

In order to overcome the lack of meaningful legal remedy, Congress created a specific right of action modeled on private title VII actions.

But in response to the 1972 amendments to title VII, the Civil Service Commission has simply refused, in almost every material respect, to follow the initiatives Congress required to implement effective equal employment opportunity and affirmative action.

First, the Civil Rights Commission has demonstrated that the same prima facie statistical showing of employment discrimination in which black, other minority, and women are concentrated in low-level, low-paying positions and excluded from supervisory, managerial, and other high-level jobs persists. The planning, reporting, review, and approval measures Congress required are observed in form only. In substance, the Civil Service Commission has abdicated its duty to assure that agency affirmative action efforts in fact work.

Thus, in our litigation, we have found that where the Civil Service Commission finds shortcomings, it does little or nothing to require agency reform. More common, the Commission approves agencies affirmative action plans which cannot and do not have the slightest chance of improving the lot of black, other minority, and women employees.

To put the matter in perspective, Federal employees cannot expect from the Civil Service Commission and agencies what the court require in the way of effective relief for discrimination from private and State or local government employers. For instance, the monetary compensatory required in *Albermarle Paper Company v. Moody*, and the seniority relief to put employees in their rightful place, required in *Franks v. Bowman Transportation Company*, are not even recognized by the Civil Service Commission as legal requirements.

Second, the Civil Service Commission responded to congressional indictment of the complaint resolution process and call for restructuring by reissuing almost word for word the same regulations and leaving unchanged the structural deficiencies condemned. Thus, in 87 percent of all complaints decided on the merits, the agency finds itself innocent of discrimination and the Civil Service Commission's Appeals Review Board affirms findings of nondiscrimination in 98 percent of all appeals on the merits. Recently, an investigation conducted by a team of Justice Department investigators provided information that led to a finding that a black woman member of the Appeals Review Board, Peggy Griffiths, was subject to discrimination by the Commission in denial of a promotion in favor of the present Chairman of the Board.

Third, the Civil Service Commission responded to the congressional injunction to attack features of systematic discrimination essentially by ignoring the directive, thus requiring legal action. The D.C. Circuit—had to declare the FSEE discriminatory under the standards set by the Supreme Court in *Griggs v. Duke Power Company*, *Douglas v. Hampton*, 512 F. 2d 976 (D.C. Cir. 1975). Similarly, a Federal district court in the District of Columbia had to issue both declaratory and injunctive relief against the Civil Service Commission for refusing to treat relevant systemic or class discrimination in individual complaints of discrimination, *Barrett v. Civil Service Commission*, 11 F.E.P. Case 1089 (D.D.C. 1975).

Fourth, the Civil Service Commission, its attorneys in the Civil Division of the Justice Department, and agencies have responded to enactment of a private right of action in the Federal courts in 1972, by throwing up a series of procedural obstacles in order to render nugatory judicial review of Federal employment policies and practices.

In conclusion, the Civil Service Commission has indicated its intent not to make the substantive efforts to eliminate discrimination, includ-

ing racial discrimination, in Federal employment that Congress required. Indeed, the Commission has given every indication of consistent and pervasive bad faith and abuse of power in the area of equal employment opportunity and affirmative action of tragic proportions.

In light of the foregoing, the impact of comprehensive legislation, such as H.R. 12080, on the Civil Service Commission-administered equal employment opportunity should be carefully weighed by this and other committees with related jurisdiction.

If H.R. 12080 is to be truly effective, it will have to take account of illegal course of behavior of the Civil Service Commission in the employment discrimination area.

I hope this presentation is of some assistance in the committee's work, and that you will call on me for details.

If I may, I would like to make a comment on two of the remarks made earlier, one is, do we have any proposals for specific legislation?

In the area of administrative procedure Congressman Hawkins has before him for consideration a series of administrative reforms to be introduced into agencies which will be considering complaints of employment discrimination.

And we think that these proposed Hawkins regulations would be a good start for consideration by anyone and perhaps might even be adopted in toto.

Second, there was a question as to how to start out with a clean slate with new personnel and a new review board. There was a suggestion of Senatorial confirmation. That appears to be entirely appropriate to write that into the legislation.

Thank you.

Mr. DANIELS. Thank you, Mr. Greenberg.

Mr. Pohlhaus, who appeared earlier, recommended to the committee that it defer action on the pending legislation. Are you of the same opinion or do you think we ought to move ahead on it?

Mr. GREENBERG. Yes, I am, unless appropriate revisions can be made between now and Thursday, which, I think, is impossible.

Mr. DANIELS. Thank you.

Mr. Ford, any questions?

Mr. FORD. Yes.

I would like to ask you something, and I didn't have a chance to ask Mr. Pohlhaus. With respect to Mr. Pohlhaus' statement on page 7, § 3307 of the bill, he speaks about the fact that the bill would further isolate Federal administrators or the civil service system from people with administrative responsibilities and says the recommendation should be permitted to be made on a broader basis. And here is the language that intrigues me. If, for instance, a person is technically qualified for a position but is opposed to the program he is to administer, such information should be made known to the appointing official.

I have two questions in regard to that. And I recognize you as one of the great and quick legal minds of our time in this area. If we could do something and it would only work—by the way, it appeals to me as a desirable thing. But in reality I wonder how you could permit, how after you gave the appointing official the subjective information that an applicant otherwise qualified didn't like the program that he was going to be working in you could restrict him from applying that in the wrong way?

Mr. GREENBERG. Since Mr. Pohlhaus is here I prefer that he comment on that. I gather the question was intended for him initially.

Mr. FORD. I am asking you about the legal aspect of this. Let me preface it by saying both the chairman and I serve on the Education and Labor Committee, and we probably have been witnesses to more programs ruined by deliberate action as well as inaction, people who didn't like the programs. Just look at the poverty program, there is a casebook study there of how you could take a program with problems and turn it into a disaster simply by repeatedly appointing people at every level to administer the program who had their minds set on the fact that the program ought to be abolished, and they did that in the face of everything we were able to do legislatively.

Now, it is suggested that we might want to allow a person making an appointment to examine—we are talking about the classified service now and not the political appointees—the question of the person's bias for or against a program.

I suspect that at one stage, and perhaps continuing today, the bias against the program would be a plus while it should always be a minus in terms of good government.

But legally how can we inject into the classification service that kind of a subjective determination?

Mr. GREENBERG. Mr. Ford, I have not thought about that. And I really don't know. It is possible there is some way of doing it. But I don't know.

Mr. FORD. Thank you very much.

Mr. DANIELS. That will be all, Mr. Greenberg. Thank you for your appearance.

Our next witness is Mr. Manuel Fierro, director of El Congreso, Washington, D.C.

[Witness does not respond.]

Mr. DANIELS. If he has a statement he desires to submit for the record, he may do so and I will ask unanimous consent that in the event the statement is sent in that it be incorporated into the record. Is there any objection?

[No response.]

Mr. DANIELS. Without objection, so ordered. The hearing is adjourned.

[Whereupon at 11:45 a.m., the hearing was adjourned.]



LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

CABLE ADDRESS: LAW CIV, WASHINGTON, D. C.

May 10, 1976

HAND DELIVERED

Honorable David N. Henderson
Chairman
Committee on Post Office
and Civil Service
United States House of Representatives
309 Cannon House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your letter of May 7, 1976 (copy attached) inviting us to testify at the May 11 Committee hearing or to submit a written statement for the record in connection with H. R. 12080. In light of the time constraints, we respectfully submit this written statement.

We represent the petitioner in the case of Chandler v. Roudebush, No. 74-1599, which was argued in the Supreme Court on March 2, 1976, and which should be decided by the end of this Term (June 30, 1976). In this case, the Supreme Court will be addressing the question of the proper roles of and relationship between the federal agencies, the Civil Service Commission, and the federal courts in cases of alleged discrimination in employment covered by section 717 of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972,

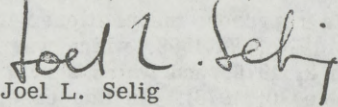
42 U.S.C. §2000e-16. Specifically, the question to be decided by the Supreme Court is whether the district courts in federal sector Title VII cases are required to conduct plenary judicial proceedings ("trials de novo"), or whether they may limit judicial proceedings to a review of the administrative record compiled by the employing agency and the Civil Service Commission.

In view of the pendency of the Chandler case in the Supreme Court, we believe that no amendment to section 717 of Title VII should be considered or enacted at this time. Whatever the intent of such an amendment, the risk is present that any change in section 717 might create confusion as to the effect of the Supreme Court's decision in the Chandler case, which will construe section 717 as presently written. This kind of confusion, were it to occur, could possibly lead to another four years of litigation over the issue which the Court is considering in Chandler--an issue that has already spawned four years of extensive litigation since the 1972 amendments to Title VII, and upon whose resolution much depends. In our view, your Committee and the entire Congress will be much better able to assess the full implications of any proposed amendments to the federal sector provisions of Title VII after the Chandler case has been decided and analyzed.

For the foregoing reasons, we believe that to the extent that H. R. 12080 deals with matters relating to section 717 of Title VII--as it does in proposed section 7701(4) at page 19, lines 12-17 of the Committee Print, and in the proposed amendments to sections 717(b) and (c) of Title VII at page 25, lines 3-14 of the Committee Print--it is inappropriate for consideration and its possible consequences cannot fully be assessed at this time.

We appreciate the Committee's consideration of the foregoing.

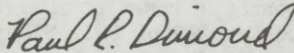
Sincerely,



Joel L. Selig

Attorney

Government Employment Project



Paul R. Dimond

Director

Lawyers' Committee For
Civil Rights Under Law

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

MAY 19 1976

Honorable David N. Henderson
Chairman
Committee on Post Office and
Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In March 1972, Congress enacted, and the President signed, amendments to Title VII of the Civil Rights Act of 1964. This legislation, known as the Equal Employment Opportunity Act of 1972, had a principal effect of extending the coverage of equal employment opportunity law to public employers, including the Federal Government itself. There was, prior to the 1972 legislation, considerable discussion regarding the locus of administrative and enforcement responsibility for equal employment opportunity (EEO) in the Federal sector. This responsibility had been lodged in the Civil Service Commission by Executive order since 1965. Notwithstanding that this Executive decision itself reflected the well-founded view that public policy on equal employment opportunity could most appropriately and effectively be implemented as an integral part of Government's personnel system by its central personnel agency, some were critical of this arrangement, doubted its efficacy, and proposed legislation which would have divorced the two.

This view did not prevail, and Congress acted wisely, we believe, in assigning overall responsibility for EEO program leadership in the Federal employment sector to the Civil Service Commission.

Like most laws, the Equal Employment Opportunity Act of 1972 has not lacked detractors, nor, like most Governmental entities, has the Civil Service Commission. We in the Commission do not discourage criticism; rather we try to learn from it. No one seriously contends that Federal agencies are perfect, just as no one seriously claims that laws are perfect.

A case in point are the circumstances which gave rise to the recent introduction in the House of Representatives of legislation (H.R. 12080) designed to assure that appointments in the civil service are on the basis of merit, and to prevent the kinds of

violations of Federal personnel laws and abuses of merit principles in Federal employment which had been disclosed in investigations conducted by the Civil Service Commission and by the House Subcommittee on Manpower and Civil Service of the Committee on Post Office and Civil Service. Among other things, the bill would strengthen the regulatory and enforcement authority of the Civil Service Commission to uncover and correct such violations and abuses.

The Administration and the Civil Service Commission agree on the need for this legislation, and I so indicated in testimony before the Subcommittee on March 17, 1976. We have, in fact, suggested a number of changes in the bill and have worked closely with the staff of the Subcommittee in an effort to assure that legislation in this area will be completely workable.

In our testimony and in our other contacts with the Subcommittee we have specifically made it clear that we do not see the bill as intending to in any way diminish the authority or responsibility of the Civil Service Commission and all Federal agencies to continue and increase their affirmative efforts toward the achievement of equal employment opportunity in the Federal service.

While it is clear to us that no such intention is behind the legislation, we would agree that its language should be specific in this regard if there is need for specific language to resolve any questions others might have. We would hope, moreover, that any such questions would reflect genuine concern about potential misinterpretations of the bill, and not reflect doubts as to the intent of either the Congress or the Civil Service Commission with regard to Federal policy on equal employment opportunity.

We believe the intent of Congress is clear in equal employment opportunity law. H.R. 12080, which is motivated by a desire to strengthen the legal protection of the Federal Government's career civil service against improper political interference, would in no way conflict with equal employment opportunity law or weaken the equal employment opportunity program. On the contrary, the clarification and strengthening of Civil Service Commission authorities intended by the bill would also serve to further strengthen the Commission's hand in assuring equal employment opportunity.

We also believe that the intent of the Commission is evident in its actions to carry out the provisions of equal employment opportunity law and to enforce its requirements and prohibitions. In our view,

these actions, together with the results that have been achieved, speak for themselves.

It does not always follow, however, that to speak is to be heard. The continued repetition of criticism of the Civil Service Commission's equal employment opportunity performance suggests the need for us, once again, to set the record straight, lay the facts before the Congress and the public, and hope that reason and straightforward accounting can prevail over emotion and rhetoric.

Fact number one is that the principal minority groups have for some years been well represented in the Federal work force--significantly better represented, in fact, than in the industrial work force of the nation.

- In 1969, the year the current Executive Order (11478) on equal opportunity in Federal employment was issued, 19.2 percent of all Federal employees were Blacks, Hispanic Americans, American Indians, or Oriental Americans. In 1969, only 13.6 percent of non-farm employees in the private sector were members of these minority groups.
- In 1972, the year the Equal Employment Opportunity Act became law, minorities comprised 20 percent of the Federal work force; 14.7 percent of the private industrial work force.
- As of May 30, 1975, minorities were 21 percent of the Federal work force. Data for 1974, the latest available on private employers, showed minorities holding 16.3 percent of non-farm private sector jobs.

Fact number two is that, under Civil Service Commission equal employment opportunity program leadership, minorities have gained increasing numbers and percentages of the better paying and more responsible "white-collar" positions in the middle and upper grade levels of Government's 18-grade General Schedule (GS) pay plan.

- In 1969, minorities held 16.7 percent of jobs at grades GS-5 through GS-8. By 1972, the minority percentage had risen to 19.1 percent, and by 1975 to 21.5 percent. The current pay range for jobs at these grade levels is \$7,976 through \$15,885 per annum.

- In 1969, minorities held 7.8 percent of jobs at grades GS-9 through GS-11; in 1972, 9.2 percent; in 1975, 11.5 percent. Pay range for these grades: \$13,482 - \$21,133.
- In 1969, minorities held 4.2 percent of jobs at grades GS-12 and 13; in 1972, 5.4 percent; in 1975, 6.8 percent. Pay range for these grades: \$19,386 - \$29,782.
- In 1969, minorities held 3.2 percent of jobs at grades GS-14 and 15; in 1972, 4.5 percent; in 1975, 5.4 percent. The current pay range for these grades is \$26,861 through \$37,800, the statutory ceiling for General Schedule salaries.
- In 1969, minorities held 1.8 percent of the top "supergrade" jobs at grades GS-16 through 18; in 1972, 3.4 percent; in 1975, 4.3 percent. Salary range--\$36,338 through \$37,800 (the statutory ceiling).

Fact number three is that employment of women in Federal "white-collar" jobs under the General Schedule and other pay plans has also increased, in recent years, and there have been increases in the percentages of jobs in the middle and upper grade and pay ranges held by women.

- In 1969, 33.4 percent of all full-time white collar Federal employees (including those in the U.S. Postal Service) were women; in 1972, 33.7 percent; and in 1974, the latest year for which complete data are available, 34.9 percent. Excluding the Postal Service, women held 40.4 percent of Federal white-collar jobs in 1972; 41.7 percent in 1974.
- In 1969, women held 22.1 percent of all non-Postal Federal white-collar jobs at General Schedule grades GS-7 through 12 and equivalent grades in other pay systems; in 1972, 23.6 percent; and in 1974, 25.6 percent. The pay range for these grades is \$11,046 through \$25,200 per annum.
- In 1969, women held 3.9 percent of the jobs at grades GS-13 through 18; in 1972, 4.2 percent; in 1974, 4.7 percent. Pay range for these grades: \$22,906 through \$37,800 (the statutory ceiling). Within this grouping, women held 1.2 percent of the top GS-16 through 18 "supergrade" jobs in 1969; 1.5 percent in 1972, and 2.1 percent in 1974. The pay range for these jobs is \$36,338 through \$37,800.

We believe it should be self-evident in these figures that the Federal Government's equal employment opportunity program, under Civil Service Commission leadership, is moving rapidly in the direction of assuring minorities and women a fuller share, not only of the tangible benefits of public employment, but also of participation in the decisionmaking processes which occur at higher levels in the work force. It is particularly significant, moreover, that these advances for minorities and women have occurred during a period when the total Federal work force actually declined. Between 1969 and 1975, the years cited above, the base figure of total Federal employment surveyed decreased by nearly 112,000 jobs, while minority employment increased by over 15,000. Between 1969 and 1974, employment of women in white-collar jobs increased by nearly 20,000.

Behind the statistical evidence of ever-improving status for minorities and women in the Federal Government is an all-out affirmative effort on the part of the Commission and Federal managers everywhere to accomplish what law and Executive order call for--the elimination of discrimination based on race, ethnic origin or sex, and the reality of equal opportunity for employment and advancement without regard for such factors, which are in any case irrelevant to employment decisions in a system based by law on the merit principle.

For decades, it has been well known, and almost universally acknowledged, that equal opportunity means more than merely the elimination of overt--or even unintentional--discrimination, as fundamental a requirement as that may be. Opening doors once closed is not enough. Segments of the population formerly shut out or not wholeheartedly welcomed must be sought out and encouraged to enter. The Civil Service Commission has directed the Federal Government's EEO program in an affirmative action mode. The advances for minorities and women referred to in detail above did not just happen. They came about because of the institution and vigorous implementation of full-range positive programs which include outreach recruiting to attract minorities and women to Federal jobs and imaginative techniques for facilitating their entry into the Federal employment system, along with job redesign, training, and counseling to assist them to advance within the system in accordance with their potential as individuals.

These affirmative action programs have been carried out, are being carried out, and will be carried out within the overall context of equal employment opportunity law and civil service law. The latter

requires that employment decisions be made with sole reference to merit and fitness. The former forbids that employment decisions include consideration of such specific non-merit factors as race, color, religion, sex, or national origin. The merit concept and the concept of equal employment opportunity are not only completely compatible, but mutually reinforcing. Moving towards the realization of both within the same administrative and regulatory framework makes good sense. We believe any speculation as to the efficacy of this approach has long been outdated by the facts.

Yet speculation, however outdated, persists. We do not doubt the sincerity of some who question whether equal employment opportunity programs and merit systems can work in tandem and even blend into indistinguishability. Both are administered by people, and their operation is subject to human error or inadequacy. When this works to the disadvantage--real or perceived--of any individual, then it is understandable if he or she expresses disillusionment. What is less understandable is the readiness of some otherwise reasonable observers to jump to conclusions that the broad operation of the system is characterized in these aberrations.

We have, in fact, gone to great lengths to provide an avenue under which persons who believe they have been discriminated against in any aspect of their employment situation by a Federal agency can seek redress, cause the facts of the matter to be brought to light, and obtain corrective action if that is warranted by the facts. The discrimination complaints system provided for in the Civil Service Commission's regulations affords due process and relief to individuals, and at the same time identifies systemic deficiencies so that they can be corrected. In terms of the administrative due process afforded, the design of this system may well be unique in the civil rights arena. Nearly all formal complaints are accepted and processed, for example. Except on a few grounds related to timeliness and legal purview, there is no administrative "screening out" of complaints for perceived lack of "probable cause" or other reasons. Complaints are not "warehoused" or "backlogged." They are investigated promptly. A hearing--before a third-party examiner appointed by the Civil Service Commission--is available to every complainant, and every complainant is entitled to appeal an agency decision which he or she considers adverse or inadequate. Every complainant has the right to seek court review of his or her case.

Every effort is made to assure that complaints of discrimination are processed promptly as well as correctly. While it is a responsibility of each agency to provide for independent investigation of complaints brought by its own applicants and employees, the Commission can and does step in when an agency fails or is unable to discharge this responsibility in a timely manner. In one recent week, the Commission

assumed jurisdiction in, and assigned its own investigators to 181 complaints in a single agency to avoid further unwarranted processing delays in those cases.

The complaint system works well and has stood the test of time; nevertheless, it is not a static system. Based on constant study of legislation, case law, and our own experience, we amend regulations and revise procedures as necessary to assure responsiveness to the needs of individuals and comportment to legal and constitutional requirements. The Commission recently published in the Federal Register proposed regulations for the processing of class complaints, and is receiving and reviewing comments on those proposals from a wide audience of interested groups and individuals. Following extensive consultation, we plan to publish later this year a number of proposed amendments intended to improve the individual complaint process.

No less dynamic than the complaint system are the affirmative action program and the merit employment system. Both are examined constantly to detect any evidence or possibility of conflict where concept is translated into practice. The effect of the equal employment opportunity program on merit system operations has been extensive; and we have made and will continue to make systemic changes to further the program. Equal employment opportunity considerations have top priority in all aspects of the Civil Service Commission's management of Federal personnel programs, so that recruiting, examining, evaluations, work force statistical analysis, training and development, qualifications and classification standards, and other subject-matter areas are constantly scrutinized to assure that everything we do in the Commission is fully supportive of our responsibilities for equal employment opportunity program leadership. Some eight million dollars of the Commission's budgeted funds for Fiscal Year 1977 have been earmarked for headquarters and field office activities and projects directly identified with management and improvement of the EEO program. Governmentwide, Federal agencies forecast a total outlay in Fiscal Year 1977 of over \$187 million for equal employment opportunity in their own work forces.

The scope of these planned expenditures suggests the seriousness of Government's commitment to equal employment opportunity. This commitment of resources, moreover, is by no means intended merely to support and continue a status quo, but rather acknowledges the need--and the potential--for building upon the progress that has already been made.

The statistical data referenced above, for example, show continued and frequently dramatic increases over recent years in the percentage of higher level positions in Federal agencies held by minorities and women. Nevertheless, the numbers of minorities and women in top grade and salary brackets are still small. We need to move beyond the point where selection of a woman or a member of a minority group to fill a high-level executive post in any agency or in any occupational area is regarded as a "breakthrough" or cited as a "first."

We expect continued progress in this direction. A study of the Federal executive population (those in "supergrades" GS-16 through 18 and equivalent salaries) published in 1974 showed that, as a group, minority executives have achieved this status more rapidly and at an earlier age than their nonminority colleagues. On the average, minority executives are four years younger and have spent ten years less in the Federal service than the total executive population. While the median age for women executives is the same as for men, the median time in service is six years less for women than for the total executive population.

We are confident that this trend of accelerated upward movement of minorities and women into executive ranks will continue as more and more of them move into the senior level positions, just below the "supergrade" level, that comprise the pool from which many of tomorrow's executives will be drawn.

Given the most favorable of all possible situations, however, even the vigorous equal employment opportunity program efforts planned and underway will not result in the overnight change which many seem to expect and which some even demand. We believe expectations should be freely expressed, but that they are meaningless if they are not realistic. We believe demands are appropriate if what is demanded is possible and just. We believe expectations and demands are counter-productive if they ignore the facts.

We believe the facts would indicate to an objective observer that, from the standpoint of the employer--Federal or non-Federal--the most favorable of all possible situations simply does not yet exist for realizing short term dramatic increases in the numbers of minority and women executives, or for that matter the number of minorities and women in professional positions at subexecutive levels.

To understand this it is necessary to point out that the grade level in the General Schedule (GS) under which most Federal "white-collar" positions are classified is essentially a price tag for a position. The grade reflects the level of the duties and responsibilities of

a particular job in a particular occupational specialty relative to other jobs in the same or different occupational areas. These relationships are prescribed in law and defined precisely in standards developed and published by the Civil Service Commission to implement the law. They are intended to assure that pay throughout Government is substantially equal for work that is substantially equal.

There is thus a range of grade levels--and therefore of salaries--for positions in each of some 400 occupational specialties which comprise the Federal white-collar work force. The grade level depends on the difficulty and complexity of the job, and the knowledges, skills and abilities required to perform it. A recent survey shows for example, that professional and administrative positions account for over 90 percent of all Federal positions at grades GS-11 and above. Approximately one-fourth of all Federal employees at these grade levels are professional engineers, architects, and physical or biological scientists, and an additional 19 percent of the positions at GS-11 and above require professional training and skills in the fields of accounting, budget, mathematics, law, medicine, veterinary science, business and industry.

The fact is that minorities and women trained, skilled and experienced in most of these fields are still in relatively short supply. Fortunately, along with positive changes in societal attitudes and in the educational preparation of minorities and women, changes are occurring in the labor force pool from which Federal employees are drawn. The Federal Government as an employer has more than kept pace with these changes, and is well ahead of other employers in the employment of minorities and women in most professional and administrative fields. We have led the way as an equal opportunity employer, and will continue to lead the way.

In addition to tapping the skills available in the minority and female segments of the general work force, we have concentrated a high level of attention, as mentioned above, on upward mobility programs. These programs, tailored by individual agencies and installations to their own employee and staffing needs, assist onboard employees at the lower grade levels, including those who may be educationally or otherwise disadvantaged as a result of past societal discrimination or for other reasons, to gain the kinds of skills they need to compete successfully for advancement in the service. At higher levels, expanded employee and executive development programs improve opportunities for professional employees to broaden the base of their knowledge and experience so that their full potential can be realized, to their own benefit as well as that of the service.

In short, we believe the Federal Government, under Civil Service Commission leadership, has made laudable progress in providing equal opportunity for its employees and to those who wish to enter the Federal service. We find it not only tiresome but unproductive to be called repeatedly to account for nonexistent failings and to be accused of failure when the evidence points to success. We have never attempted to stifle criticism and we would not attempt to do so now or in the future even if we could; but we believe it is high time for the appearance of a more constructive line of criticism.

We have acknowledged on many occasions that much still needs to be done before we or anyone else can claim that equal opportunity is a practical reality throughout our society. Similarly, we have acknowledged that the ideal of merit employment suffers from some-time inept administration and even from occasional deliberate subversion at operating levels. We have been strong advocates of equal opportunity, and we have been responsive to many reasonable suggestions for positive change to facilitate its realization. We have also been watchful of the operation of the Federal personnel system and have acted vigorously and forthrightly to put a stop to abuses of the merit principle where we have discovered abuses ourselves or where they have been brought to our attention by others. Sometimes, the very fact that we do our job in this regard becomes somehow distorted so that we are criticized for having done it. Such unfounded criticism does not deter us from carrying out our responsibilities, of course, but it is certainly not helpful to us in doing so.

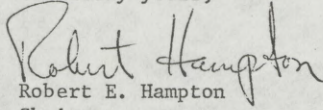
Neither is it helpful--either to us or to minority groups and women--to have evidence ignored and facts distorted to make it appear that we are less than fully committed to equal employment opportunity, or to suggest that any strengthening of the merit system would be inimical to the interests of minorities and women. The fact that over a half-million minorities and nearly three-quarters of a million women are gainfully employed and are pursuing rewarding careers in a system governed by merit principles would seem to us to belie any notion that they cannot compete successfully for employment given a fair and equal opportunity to do so.

We believe, along with detractors of the merit system and its operation, that further change is needed. To the extent that systemic change is part of the need--and we are sure that it is--we will continue to improve the employment system so that it is responsive to particular problems attributable to past discrimination against any societal segments. We believe these improvements can be made and

should be made without fragmenting the career Federal work force itself into two societies--one in which status is achieved on the basis of merit, and one in which race, ethnic origin or sex is the deciding factor in individual employment decisions. We doubt that the American people believe otherwise. If they do, their elected representatives have not so indicated in the law.

Inasmuch as the equal employment opportunity posture of the Civil Service Commission has been discussed and, in fact, critized, in hearings held in connection with your Committee's consideration of H.R. 12080, it is respectfully suggested that this letter, which reflects examination of that posture in a different light, be inserted into the record.

Sincerely yours,


Robert E. Hampton
Chairman

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