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95-34 FEDERAL EMPLOYEE ADMINISTRATIVE HEARING
RIGHTS GUARANTEE ACT

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HEARING

BEFORE THE

COMMITTEE ON CIVIL SERVICE

OF THE

COMMITTEE ON

OFFICE AND CIVIL SERVICE

SE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 6225

A BILL TO AMEND TITLE 5, UNITED STATES CODE, TO
GUARANTEE TO EACH EMPLOYEE IN THE EXECUTIVE
BRANCH WHO HAS COMPLETED THE PROBATIONARY OR
TRIAL PERIOD, THE RIGHT TO A HEARING, A HEARING
TRANSCRIPT, AND ALL RELEVANT EVIDENCE PRIOR TO
A FINAL DECISION OF AN AGENCY TO TAKE CERTAIN
ACTION AGAINST SUCH AN EMPLOYEE, AND FOR OTHER
PURPOSES

JULY 28, 1977

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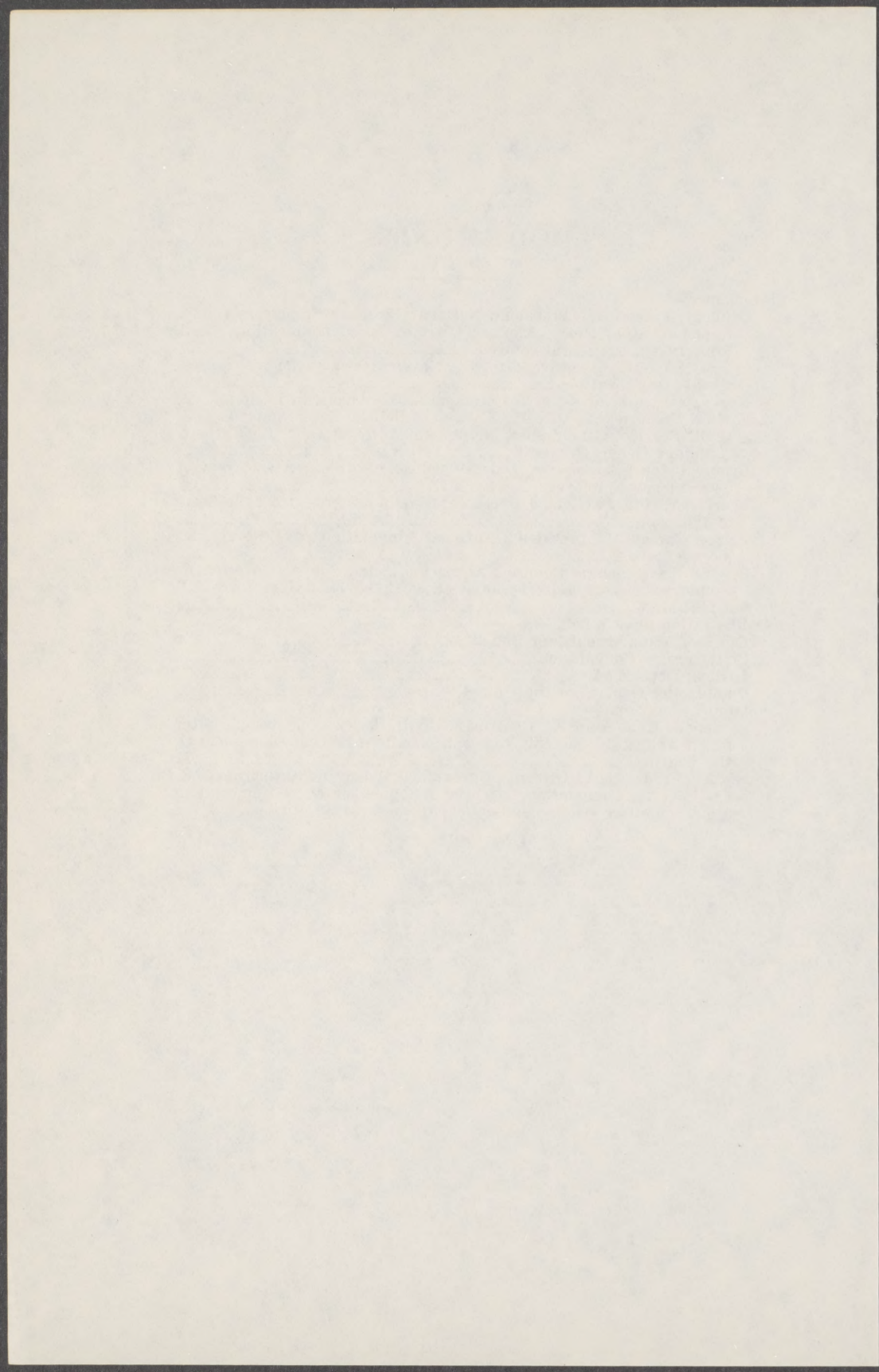
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FEDERAL EMPLOYEE ADMINISTRATIVE HEARING RIGHTS GUARANTEE ACT

THURSDAY, JULY 28, 1977

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

The subcommittee met at 9:45 a.m. in room 304, Cannon House Office Building, Hon. William L. Clay (chairman of the subcommittee) presiding.

Mr. CLAY. This morning the Subcommittee on Civil Service is meeting to consider H.R. 6225, the Federal Employee Administrative Hearing Rights Guarantee Act, which was introduced by my distinguished colleague, Mrs. Schroeder, on April 6 of this year. I was pleased to join Mrs. Schroeder as a cosponsor when she reintroduced this bill, H.R. 7600, on June 3, with eight additional cosponsors.

H.R. 6225 seeks to guarantee to each employee in the executive branch, who has completed the probationary or trial period, the right to a hearing, the hearing transcript, and all relevant evidence prior to a final decision of an agency to take certain adverse actions against such an employee. The bill provides that an employee may be removed, suspended without pay, or reduced in rank or pay, only for such cause as will promote the efficiency of the service. Prior to an adverse action the employee will be entitled to at least 30 days' advance written notice, except when there is reasonable cause to believe the individual is guilty of a crime for which the penalty is imprisonment.

H.R. 6225 provides hearing examiners with subpoena authority, court enforcement of subpoenas, and judicial review of adverse decisions. In addition, the bill provides that the hearing procedure is subject to negotiated agreements arrived at through collective bargaining agreements.

Under the present appeals system, an employee is not provided with a hearing until after an adverse action has taken place. So that during the period between the time the adverse action is taken and the employee's appeal is decided, the employee is left in a state of limbo by being forced to suffer the loss of income, health insurance coverage, and retirement benefits, as well as having the stigma of being separated from the Federal service. The fact is that even with reinstatement and back pay the employee is not "made whole."

H.R. 6225 would eliminate much of this potential damage by providing for a swift and equitable hearing before the adverse action takes place.

Currently, the right to a pretermination hearing in the private sector is negotiable through collective bargaining agreements. This right does not exist in the Federal service.

Prior to the issuance of Executive Order 11787 by President Ford in 1974, nine agencies voluntarily provided the right to a pretermination hearing to its employees. These included the Federal Communications Commission, the National Labor Relations Board, Department of Housing and Urban Development, Department of Health, Education, and Welfare, the Department of Justice, and the U.S. Civil Service Commission. However, Executive Order 11787 abolished adverse action appellate systems of the Federal agencies. All employees were then accorded the right to a single appeal to the Civil Service Commission from adverse actions taken by the agencies.

I believe when we are talking about taking away a person's livelihood, simple justice dictates that this individual should be granted the right to a hearing prior to instituting an adverse action. This legislation aims to do exactly this.

During the 94th Congress, virtually identical legislation was introduced by Congresswoman Schroeder. However, no action was ever taken on that bill, H.R. 4249.

I am pleased to welcome our first witness this morning, the sponsor of H.R. 6225, Mrs. Schroeder.

STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mrs. SCHROEDER. Thank you, Mr. Chairman. It's delightful to be here, and I'm proud to say that it must be a good bill because, once again, the Civil Service Commission doesn't like my bill. I'm getting worried. [Laughter.]

I think my record is 10 for 0. When they endorse something I put my name on I'm going to faint, so it must be a good bill.

I appreciate this opportunity to speak in favor of my bill, H.R. 6225, to grant to Federal employees who have completed the probationary or trial periods of employment, the right to a hearing with certain due process guarantees before an adverse action can take effect against them.

H.R. 6225, and H.R. 7600 which I later introduced with the important cosponsorship of this subcommittee's chairman, represent a clear congressional declaration in an area which I think has gone from bad to worse at the hands of the Civil Service Commission. The bill requires that when an adverse action—removal, suspension without pay, or reduction in grade or pay—is proposed against an employee who has completed a probationary period on the basis of "cause which will promote the efficiency of the service," the employee is entitled to 30 days' written notice of the action, copies of all evidence of the "cause" at the time notice is given, a hearing before an administrative law judge, representation and cross examination by his or her counsel, and a copy of the transcript of the hearing and written findings by the administrative law judge. Appeals could be taken to U.S. district court.

There are a few things quite wrong with the adverse action appeals system now in effect pursuant to Executive Order 11787. I want to run through them and show how H.R. 6225 would correct them.

DELAY IN RESOLUTION

The first fault with Executive Order 11787 is the time which it takes to get a final determination from the Federal Employee Appeals Authority. An employee is initially given 30 days notice of the adverse action during which he or she may stay on the job. Then a protest is filed, a hearing is held, and I understand it takes 60 to 120 days—sometimes longer—for a final determination by the appeals authority. While the average case is settled in 95 days (and this is a far sight better than the 300 days it took prior to Executive Order 11787), I can hardly see what is gained during this 2- to 4-month period of limbo.

This is a period of lingering death for employees. Either they abandon good causes (because they have to eat) and find new jobs, if they can; or they wait it out. Neither is this waiting period good for the efficiency of the agency carrying out the adverse action. The employee's job may have to remain open. The agency's lawyers have to check on the case status from time to time. Morale may go down in the employee's office. There is always the possibility that back pay may be awarded the ousted employee, canceling any "savings" the agency may have in keeping the employee on the streets. And most importantly, there is little incentive on the part of the agency to seek an early resolution of the case since the longer it can hold on, the better the chance the employee will give up.

H.R. 6225 would shorten the period of delay by placing the burden of moving on the case with the agency. An agency proposing an adverse action would have to have its supporting evidence together before it proposed the action, because it would be required to give a copy of this evidence to the employee. The agency would have to move forthwith to obtain a hearing because it could not remove the employee until after the hearing. It could not sit around and win by default.

I believe that H.R. 6225 could thus reduce the time it takes to a final administrative decision on an adverse action case to about 30 days. This will be much more fair to employees wrongfully charged. It will remove correctly charged employees more rapidly. It will eliminate the legal costs associated with lingering, unresolved cases.

FAIR PROCEEDINGS

Under the current appeals process an employee does not have a right to have all evidence and witnesses pertaining to his or her dismissal produced. The agency needs only to make available the information on which they find a basis for "cause." This fine point permits an agency to omit bringing forth evidence which it is privy to which would vindicate an employee. A simple example of this would be a hearing on an adverse action against an employee based on his or her treatment of a member of the public; the agency is under no obligation to produce the public witness.

This problem of fairness has another aspect. An employee who has criticized waste at his or her agency may find an adverse action proposed against him or her on the basis of a 5-year-old charge. This employee, of the breed commonly known as whistleblower, cannot bring in the evidence or witnesses to show that he or she is really being fired because of whistleblowing.

H.R. 6225 contains basic guarantees that a fair record will be developed at an adverse action hearing, that all relevant facts will be disclosed, all witnesses will be available because of the subpoena power, and that the credibility of witnesses will be put to the acid test of cross examination. The present system contains more elements of a star chamber and is a pock mark on the merit system principle that people should be hired and fired on their merits.

SCHEDULE A PROTECTIONS

I have made one change in H.R. 6225 since it was first introduced in 1974. I have added into its protections schedule A employees who have completed their probationary periods. Schedule A employees occupy civil service jobs for which there are no tests given, but for which there are strict standards and qualifications, the best example being Government lawyers. Because schedule A employees do not take competitive service exams they are not in the competitive service, and unless they have veterans preference, they have no protections in an adverse action. The obvious impact of this exception is that those schedule A employees without veterans preference—women lawyers, for example—have no protections against arbitrary adverse actions.

I hope the subcommittee agrees with this change. It is impossible for me to believe that schedule A employees, while not tested, do not go through rigorous competition. For all intent and purposes they are career employees deserving career protection.

SUMMARY

Adverse action proceedings are something which few Federal employees actually face during their careers. But from the discussion I have had, the specter of running up against an adverse action seems to be in the back of nearly every Federal employee's mind.

In my opinion, the present system, with its lingering uncertainties and biased rules, has less going for it than the pink slip and 2 weeks' pay an employee may receive in the private sector. I offer H.R. 6225 as a sound addition to the merit system and urge the subcommittee to take favorable action upon it.

Let me just also add one comment. I'm sure you're going to hear many things said about this and how it's changed, and so forth and so on. Before I came here my position in Colorado was a hearing officer for the State personnel system in the State of Colorado, and so I've had an awful lot of experience in these kinds of cases. I was the judge that went around and sat up there at the hearings. And I want to tell you our State system compared to the Federal system is about 100 years ahead of it. I find it incredible that the Civil Service, with the money and resources they have available, have not been able to deal with this in a much better fashion. We were called upon to go up to the trout fisheries, or the police station out in some corner of the State, or where have you, almost instantly, and put our cases together. They were allowed cross examination; they were allowed appeals; they were allowed to go into the State district court if they didn't like our decision. All of those things were available. And the difference in morale was incredible because everybody knew they got a fair shot and an open fair hearing. The charges would be presented; it would be held like a court system, and if they didn't like their ap-

peal by the State personnel board, which would be equivalent to the Civil Service Board—they certainly had the State court system available and their rights.

So, I find an awful lot of the criticism about this is just “we don’t like any change at all and everything is fine.” I think from what we’ve seen happen, the whistleblowers and other things, you really have to be tenacious, you really have to be willing to find an attorney who’s going to work as a volunteer because you can’t afford to fight these cases, or you just have to give up if your family wants to eat. And, really, you can be subject to great discrimination if someone really wants to abuse this system. There’s a great way to do it because bureaucracy is on the agency’s side.

Mr. CLAY. Thank you, Mrs. Schroeder.

This bill makes some changes in appeals right of employees with veterans preference. Would you elaborate upon these and give us your views on the subject?

Mrs. SCHROEDER. Well, the only major differences—as I pointed out in my testimony—is when I change schedule A. Right now a schedule A employee with veterans preference is a privileged person in that category, because they are the only ones entitled to hearings. Anyone else in the schedule A classification can just be dismissed summarily, period, on an adverse action; there’s no appeal, no hearing, or anything. My bill would change that so that the other people would have the same rights that the veterans have in the schedule A.

Now, when it comes to schedule B or all the rest of the employees, there is no change in the veterans preference. You don’t get extra points if you’re a veteran for bad performance. The veterans preference only comes in for the initial employment.

Mr. CLAY. You noted in your comments that schedule A employees who had completed their probationary period can be summarily dismissed under the existing law. I wasn’t aware of that.

Mr. TAYLOR. Mr. Chairman, I have a great deal of sympathy for what our colleague from Colorado is trying to do. I think this is going on right now, that some schedule A’s who have been summarily dismissed within the past 60 days for no cause, and I think that these people are professional type people and should have protection. They’ve done the job. It happened under the other administration, and it’s happening under this administration. As far as I can see, the Civil Service Commission is reluctant to do anything about it.

I think your effort on behalf of schedule A’s is well founded, and I commend you for it.

Mrs. SCHROEDER. Thank you. And I think that’s important, because if it happened to be a veteran in schedule A, he is protected, that’s it, and I think that doesn’t help the morale of schedule A either.

Mr. TAYLOR. I think there were about 20 schedule A’s summarily dismissed in the Agriculture Department about 5 or 6 weeks ago. Even the veterans in there are being coerced and told, “We are going to move you, we’re going to transfer you until you quit.” I just don’t think this is in the best interest of the merit system regardless of which party it is.

I think the party that preceded this administration was guilty of the same abuses that this administration is following today. Something should be done about it.

Mr. CLAY. Mrs. Schroeder, there are some who say this is a piecemeal approach, and some who say that it should be in a more comprehensive package—that, perhaps, it should be in the labor management legislation which the Congress is presently considering. What is your response to that?

Mrs. SCHROEDER. Well, the bill—first of all—does provide for substitution of labor management agreements if that becomes the case. So, it certainly wouldn't preempt that area if we move in that direction.

As far as making it more comprehensive regarding the whole appeals procedure everywhere—you know—I would certainly agree. It's just will we get that kind of legislation out. And I think you could make that argument with almost any bill you come up with, saying, "All right, that just touches a part of the iceberg." But somehow we've got to chip away at it, and I think that's important. And then when the new one comes out, maybe it's absorbed—it starts at a higher plateau.

Mr. CLAY. Thank you.

Mr. Taylor?

Mr. TAYLOR. I don't have any questions. I haven't had a chance to look at this before.

But Mrs. Schroeder, I'm certainly inclined to be sympathetic with what you're trying to do.

Mrs. SCHROEDER. Thank you. I really appreciate it and, as I said, I think for everyone's sake no one wants to drag these things out and do that, and I think it does inhibit everyone if you feel like you're one of the hunted few, that you can be subjected to this.

Mr. TAYLOR. Federal abuses for Federal employees.

Mr. CLAY. Thank you for testifying.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

Mr. CLAY. The next witness will be Mr. Kistler from the Civil Service Commission.

Mr. KISTLER. Thank you, Mr. Chairman and Mr. Taylor. It's a pleasure to be here before your subcommittee again.

**STATEMENT OF FREDERICK KISTLER, DIRECTOR, BUREAU OF
POLICIES AND STANDARDS, U.S. CIVIL SERVICE COMMISSION,
ACCOMPANIED BY ARTHUR L. BURNETT, ASSISTANT GENERAL
COUNSEL**

Mr. KISTLER. I'm pleased to have with me Mr. Arthur Burnett, who is Assistant General Counsel to the Civil Service Commission.

As the Civil Service Commission sees it, the main thrust of this bill is to radically change the Government's adverse action and appeals process by removing the authority to take adverse action from the head of the agency and giving it to an administrative law judge, by eliminating an appeal to the Civil Service Commission, in fact, eliminating any form of administrative review, and providing the right to a full-scale adversary hearing prior to a decision to take adverse action.

In addition, the bill would both extend adverse action coverage to many employees not now protected, and take away protections from employees who currently have them; it would provide the same procedures for 1-day suspensions as it would for the more serious adverse

actions; and would permit a collective bargaining agreement to implement or substitute in whole or in part for the procedures.

The Civil Service Commission has serious reservations concerning the need for this bill and the impact its enactment would have on the ability of Federal agencies to effect necessary disciplinary actions in a timely manner. The Commission is concerned about the bill's employee and action coverage and its failure to guarantee equal protections for covered employees; indeed, we question its constitutionality.

In my full statement, Mr. Chairman, we give the full litany of the kinds of procedures and protections and processes that are available to the employees who are faced with adverse action. I can restate them if you like, but let me only summarize to say that few employees in the private sector have rights, procedural or otherwise, comparable to those provided Federal employees before adverse actions can be effected.

The Supreme Court has held that the protections now afforded Federal employees meet the requirements of due process. In fact, many critics argue that the required procedures deter agencies from taking those adverse actions necessary for the efficient management of Government functions.

The Commission believes that a statutory right to a predecision hearing for all adverse actions is not only unnecessary, but would have the result of discouraging agencies from taking lesser disciplinary actions and cause further delay in effecting them in a timely manner. Current law and regulation now permit such a hearing as part of the adverse action process; but although at one time nine agencies did provide a predecision hearing, all but one large agency and one small agency have eliminated it because any benefits for employees were not proportional to the extra time required, particularly since an appeal to an outside agency—the Civil Service Commission—is now provided after the agency's decision.

The bill would authorize an administrative law judge to make a final decision on findings and facts and an administratively final decision on conclusions of law. It is our view that such a delegation may well be a violation of section 2 of article II of the Constitution in that it takes away rather than just restricting the authority of the head of an agency to remove and to discipline the agency's employees.

Further, the bill fails to define the relationship of the administrative law judge to the agency or even the President, and makes no provision for administrative review and consideration of his decision.

Aside from these questions about the constitutionality and accountability of the ALJ, the Commission believes that this would be a serious erosion of the management function of the President and heads of agencies, and would hinder the efficient performance of Government functions.

The general extension of adverse action coverage to all executive branch employees and excepted positions, other than those in confidential or policy determining positions, does not seem warranted. We believe there should be a relationship between job protections and methods of appointment.

We're also concerned about the extension of coverage to all employees of the District of Columbia government, in view of the express authorization by Congress to the District government to establish its own personnel system.

We object to taking away coverage from certain employees in the legislative and judicial branches of government, although this may be inadvertent and merely a drafting problem, and believe that the extension of full procedural job protections and hearing rights to suspension of 30 days or less would have the result of wiping out short suspensions as a disciplinary measure.

Finally, the provisions which would permit the parties to a collective bargaining agreement to implement in whole or in part the adverse action procedures provided in the bill, could result in greater or lesser protection for employees of the same status in different agencies or different portions of the same agency depending on their coverage under an agreement.

That summarizes the full statement, Mr. Chairman, and Mr. Burnett and I will be pleased to answer any questions or provide any further information that we can.

[Mr. Kistler's statement follows:]

PREPARED STATEMENT OF FREDERICK A. KISTLER

Mr. Chairman and members of the subcommittee, I appreciate this opportunity to express the views of the Civil Service Commission on the provisions of H.R. 6225, the Federal Employee Administrative Hearing Rights Guarantee Act, which proposes to guarantee to an employee in the executive branch who has completed a probationary or trial period the right to a hearing, a hearing transcript, and all relevant evidence prior to a final decision to take certain action against the employee.

I would like to make it clear from the beginning that the Commission has serious reservations concerning the need for this bill and the impact its enactment would have on the ability of Federal agencies to effect necessary disciplinary actions in a timely manner. The Commission is concerned about the bills' failure to guarantee equal protections for covered employees and, indeed, we question its constitutionality.

This proposed legislation would repeal subchapter II of chapter 75 and chapter 77 of title 5, United States Code, and would impose substitute restrictions on the authority to take disciplinary and nondisciplinary actions to remove, suspend, or reduce in rank or pay; restrictions which could be changed by the provisions of a collective bargaining agreement.

Federal employees have long enjoyed substantial statutory and regulatory rights which protect them against unwarranted and capricious management adverse actions. Currently, a competitive service employee or an excepted service employee entitled to veteran preference cannot be removed, reduced in rank or pay, furloughed without pay, or suspended for more than 30 days except for such cause as will promote the efficiency of the service. Such an employee is entitled to receive written notice stating all reasons for a proposed adverse action at least 30 days before the action is effected. He or she is entitled to review all evidence relied upon by the agency in proposing the action.

The employee must be given an opportunity and a reasonable amount of official time to reply orally and in writing to the reasons on which the action is based. Except in situations in which an employee's retention on the job might be detrimental to the interests of the Government or injurious to the employee, fellow workers, or the general public, an employee must be kept in a duty and pay status during the notice period. An employee is entitled to a written decision which must consider his or her reply to the charges and which must be made by an official who is at a higher level in the agency than the official who proposed the action. If the action is effected, the employee has a right to appeal to the Civil Service Commission on both the merits and procedures of the adverse action. The Commission affords the employee a right to representation and a right to produce and cross-examine witnesses in a full hearing before an impartial appeals officer who determines whether required procedures were followed and whether the action meets the legal criterion of the efficiency of the service.

The appeals officer has authority to order retroactive correction including backpay. The employee has access to the Federal courts after the decision of the Appeals Authority. In addition, the Appeals Review Board upon request of an employee will reopen and reconsider the decision of the appeals officer when there is new and material evidence, when the appeals officer incorrectly interpreted or applied law or regulation, or when the decision is of a precedential nature involving new policy.

Few employees in the private sector have rights, procedural or otherwise, comparable to those provided Federal employees before adverse actions may be effected. Moreover, employees of private industry (if covered by a labor-management agreement which provides grievance machinery), in most instances grieve a suspension or separation after, not before, the action has been taken by management.

The Supreme Court has held that the current protections provided to Federal employees by statute, Executive order, and regulation meet the requirements of due process. Critics of the Federal personnel system point out that these protections are already so extensive as to deter agencies from taking proper disciplinary actions; actions which are in the public interest in the efficient management of Government functions; and which, if not taken, would lower the morale of competent, productive employees and thus lead to further reduction in the efficiency of operations.

More specifically, enactment of H.R. 6225 would have the effect of:

1. Removing the cause standard, procedural protections, and appeal rights which employees of the General Accounting Office, the Government Printing Office, preference eligible employees of the Postal Service, and certain employees of the Administrative Office of the United States Courts now have;

2. Giving job protections to many employees of the District of Columbia Government, to employees in schedules A and B of the administratively excepted service, and to nonpreference eligible employees whose positions have been excepted from the competitive service by statute;

3. Extending full appeal rights and procedural protections to suspensions of 30 days or less; and

4. Removing protections from employees who are furloughed without pay.

The Commission believe in general that only those employees whose appointments have resulted from open competition and selection on the basis of merit (or whose rights have been accorded by Congress in recognition of honorable military service under the Veterans' Preference Act), whether the employees are in the competitive service or whether they are under another personnel system based on these principles, should be afforded statutory adverse action protections. Thus, it would be unjust to provide job protections for additional employees excepted from the competitive service—especially those in administratively excepted positions in schedules A and B and those excepted by statute when there is no corresponding requirement for competitive selection. At the same time, to take away from some employees certain job protections which they now have would be unfair. The Commission objects to a coverage provision which would have either result.

We also question the appropriateness of extending coverage to all D.C. Government employees, except for those in confidential or policy-determining positions. While we would not recommend removal of the current adverse action protections given to those employees of the D.C. Government who are in the competitive service, we do not think that it is appropriate for the Congress to extend adverse action protections at this time to other municipal employees. Congress has expressly authorized the District Government to establish its own independent personnel system under the District of Columbia Self-Government and Government Reorganization Act.

In addition, procedures such as those provided in the bill would be time consuming and costly for suspensions of 30 days or less. (Some 2,000 short suspensions were taken against competitive service employees in fiscal year 1976.) Such employees currently have no hearing right. A requirement, for example, that a 2-day suspension may not be effected without a full adversary hearing before an administrative law judge, would effectively wipe out the use of short suspensions (30 days or less) as a disciplinary measure, because a more severe action could be taken just as easily. Employees would not be disciplined for minor offenses and any deterrent value of lesser disciplinary actions would be lost.

You may be interested to know that during fiscal year 1976 some 17,500 adverse actions were taken by agencies against covered employees; employees appealed

37 percent of these and thus asked for a hearing. The entitlement to a hearing for all proposed actions guaranteed in this bill would, therefore, materially increase the cost to the Government for administrative procedures.

Second, this bill provides that the employee shall receive at the time of the notice all statements, affidavits, investigative reports, and all other evidence relevant to the proposed action. The Commission believes that the present requirement for an agency to make available all material relied on in taking the action (many agencies actually currently furnish copies of such material) meets all due process requirements and appropriately balances the rights of the employee against those of the agency and the Government. We feel strongly that the official documents themselves should be retained by the Government and that in taking an adverse action either copies must be provided the employee or the original documents be made available for his review. We also believe that an employee is entitled only to that material related to the reasons for the adverse action; that is, that material which either tends to prove or disprove the reasons for the action.

Third, H.R. 6225 provides for a hearing, prior to the decision to take an adverse action, before an administrative law judge who makes a final decision on findings of fact and conclusions of law. As stated above, current law and regulation provide the employee with a reasonable time to reply both orally and in writing and to furnish affidavits in support of the reply to the charges on which the proposed action is based; the reply is made to an official who can either make or recommend the decision; the employee is granted a reasonable amount of official time to prepare and make the reply; the decision to take the action must be made by an official who holds a position at a higher level than the official who proposed the action; the deciding official must consider the employee's reply in making the decision; and the employee has a right to appeal an adverse decision to the Federal Employee Appeals Authority of the Commission, an appellate body reporting directly to the Chairman and independent of all other functions of the Commission.

It is not clear whether the administrative law judge would be an agency employee or an employee of a central agency such as the Civil Service Commission; nor is it clear how the administrative law judge for a particular case would be selected. In addition to the failure of the bill to define the relationship of the ALJ to the agency, it raises a serious question of constitutionality. Section 2 of article II of the Constitution vests the power of appointment, and as a corollary, the power to remove, in the President with the advice and consent of the Senate. It also authorizes Congress to vest by law the appointment of inferior officers in the President alone, the courts, or heads of departments.

We believe that it would be unconstitutional to delegate, by statute, to an administrative law judge the authority to make final factual decisions on adverse actions taken against employees, decisions not administratively reviewable by the head of the agency, by the President, or anyone else under effective Presidential control. Its impact would be a serious erosion of the management function of the President and heads of agencies and would hinder the efficient performance of Government functions.

Even if there were no question of constitutionality, the Commission would still have several serious concerns with this provision of the bill.

Currently, an agency frequently decides to impose a lesser penalty than the one originally proposed, or in some cases, to cancel the proposed action altogether after it has considered the employee's reply to the proposed action. H.R. 6225 would eliminate this opportunity for an agency to change its mind after informal communication. Thus, it is our opinion that a requirement for a formal hearing before an employee has had an occasion to bring any extenuating circumstances or a simple plea for a second chance to the attention of a higher level official, would be disadvantageous both to the employee and the Government.

We note also that the bill gives the individual who receives an adverse decision the right to file suit for judicial review of the conclusions of law relied upon in the administrative law judge's decision. Since enactment would take away an agency's authority to take necessary adverse actions against its employees and give it to an administrative law judge, we believe that the agency should have an equal right to obtain judicial review.

It is not clear whether a request for court review would stay the adverse action. If so, given current time schedules and all the administrative procedures provided for in the bill, it might take several years for an agency to effect an appropriate adverse action. During such time the agency would be in a position of

retaining an employee, with whom the agency has an adversary relationship, in a duty and pay status.

Not only do we believe that current protections meet the requirements of due process, we also feel that they strike a balance between the public interest in efficient government, the interest of government agencies in accomplishing their functions, and that of employees in protection from arbitrary and capricious adverse actions.

Fourth, H.R. 6225 would permit the parties to a collective bargaining agreement to elect whether or not to implement its provisions. Any procedural protection or lack of procedural protection for Federal employees covered by such an agreement would, therefore, depend on whatever was bargained by the agency and the labor organization. Federal employees with like status, but not covered by such an agreement would no longer be guaranteed the same minimum protections. Some would have more and some less. At the present time, by regulation or collective bargaining agreement, agencies may supplement but not diminish the employee rights provided by statute, Executive order, and Commission regulation; these supplemental provisions are enforced by the Commission's Appeals Authority. The Commission questions the advisability of this provision especially since it would be a piecemeal approach to labor management relations legislation.

Mr. CLAY. Yes, thank you.

Mr. TAYLOR, do you have any questions?

Mr. TAYLOR. Mr. Kistler, you state that this bill would take away protection from some and give protection to others. Would you care to expand on that, please?

Mr. KISTLER. Yes, sir, I would.

As we read the bill, that the cause standard, the procedural protections, and the appeal rights of employees of the General Accounting Office, the Government Printing Office, preference eligible employees in the Postal Service, and those persons in the Administrative Office of the U.S. Courts now covered under the adverse actions appeals system, would not be covered under the provisions of this bill.

Similarly, as we read the bill—or as we read H.R. 6225—the full panoply of adverse action procedures and rights and guarantees would be extended to all employees in what we call schedules A and B of the expected service. So, we gain some, lose some.

Mr. TAYLOR. Schedule A and schedule B in expected service?

Mr. KISTLER. Schedules A and B are in the expected service; yes, sir.

Mr. TAYLOR. All right. Then is your interpretation of schedule A to be a nonpolicymaking, nonconfidential position?

Mr. KISTLER. That is correct, and for which the Commission finds itself unable to conduct an examination; yes sir.

Mr. TAYLOR. And those people, once they're brought abroad to serve their probationary period, under the present law do they have protection?

Mr. KISTLER. No, sir; they do not unless they have veterans preference.

Mr. TAYLOR. In other words, they can be summarily discharged without any cause—any obvious cause?

Mr. KISTLER. They may be removed at the discretion of the appointing officer; that is correct, sir.

Mr. TAYLOR. Now, if they are veterans and they do not have status, then they do have protection.

Mr. KISTLER. That's right; they're entitled to the full range of notice and opportunity to reply and to appear before the accuser. They're entitled to a written decision and a further appeal to the U.S. Civil Service Commission, with representation in the process.

Mr. TAYLOR. Let me ask you this, Do you think it's right and correct than an agency would call a schedule A veteran and, say, ask for his resignation and say, "If you don't resign we're going to—we have asked the Commission to—put you into noncareer status"—I understand the Commission has this before it now—"and if they don't do this, then we're going to open it up, we're going to give an examination and we're going to select from a pattern at 3-A and you will not be one of them." The schedule A will say, "Have I done something wrong?" They'd say, "No, your record is good."

Is this the type of abuse that we should condone?

Mr. KISTLER. I have no knowledge of this specific case you're talking about, Mr. Taylor. But certainly what you describe does not sound right to me.

Mr. TAYLOR. It has gone on this week across this country in almost every State.

Mr. KISTLER. When employees are coerced into resigning and such coercion is in lieu of the adverse action procedures that they are otherwise entitled to, then the adverse action system and procedures as administered by the Civil Service Commission entitle the employee, under regulation, to carry the question of a coerced resignation to the Civil Service Commission, if that employee is otherwise covered under the procedures, that is the veteran preference employee in schedule A. Then the Commission will accept such an appeal, look at it, and adjudicate it in the same fashion as an adverse action.

Mr. BURNETT. And if the Commission finds that there has been a coerced resignation, that person will be ordered reinstated with back pay.

Mr. CLAY. How long does that procedure take?

Mr. TAYLOR. What does this fellow do during the time? I think this is one of the points Mrs. Schroeder raises. What happens to this person during the time that it's being litigated?

Mr. KISTLER. An employee who is separated by an action of the agency, of course, has this appeal right; Mrs. Schroeder acknowledged in her statement that the processing of these appeals can run somewhere between 90 to 100 or 120 days.

Mr. TAYLOR. Let's take the procedure that happens. If these people who have been told this week: "You resign or we're going to get you some other way," they're very blunt about it, all right? He says, "you know, I'm a schedule A, I'm a veteran; I think I've got protection." They say, "All right, we're going to write you a letter. We'll write a letter and give you 30 days."

Then, as I understand it, this employee will answer that letter, and then a higher echelon will answer that and the agency, presumably the Secretary or Under Secretary—

Mr. KISTLER. That is a requirement of Commission regulations.

Mr. TAYLOR. Of course, you know this is all—we know what's going to happen there. Then, what is his next step? He appeals to whom, to the regional Civil Service Commission, or to—does he appeal here?

Mr. KISTLER. He appeals to the Federal Employee Appeals Authority, and he appeals to that office of the Federal Employee Appeals Authority which is located in the area of his employment.

Mr. TAYLOR. And then how long does that take? What happens to him in the meantime; he's gone, I guess, isn't he? Does he leave his job and he's gone?

Mr. KISTLER. That is correct. If the agency effects a separation action, then that person is off the rolls and is unemployed. If that action was later found to be improper, that employee under a back pay statute enacted by Congress is entitled to a full recompensation for the loss of pay and benefits.

Mr. TAYLOR. And reinstated?

Mr. KISTLER. And reinstated—directed by the Civil Service Commission; that's correct, sir.

I want to emphasize, Mr. Taylor, that even if I knew something about the cases you're referring to, which I don't, it's probably inappropriate for me as a management official in the Commission to try and speak to the merits of those cases that are before the Appeals Authority because it is a separate and independent adjudicative body in the Civil Service Commission not associated with me or with the subject matter specialists or other management officers of the Commission. It was created this way to preserve its independence. The questions of the merits and the appropriateness of the adverse action and the processing, and adjudication of an appeals case is solely the province of that adjudicatory part of the Commission.

Mr. TAYLOR. Exactly what is an adverse action, Mr. Kistler?

Mr. KISTLER. An adverse action is defined under the statute as, "removal, reduction in rank or pay, or suspension for more than 30 days."

Mr. TAYLOR. For a cause?

Mr. KISTLER. For cause.

Mr. TAYLOR. The cause has to be determined and it has to be laid before the employee?

Mr. KISTLER. That is correct, sir.

Mr. CLAY. Will the gentleman yield?

Mr. TAYLOR. Sure.

Mr. CLAY. You don't know anything personally about the case that he is describing, but do you know anything about the *Griffiths* case?

Mr. KISTLER. Not directly. I would have no exposure to that.

Mr. CLAY. Do you, Mr. Burnett?

Mr. BURNETT. Only what I have read in the newspapers; again, because the General Counsel's office feels that it should not become involved in the appeals process in order to preserve its independence. We do not get involved in the merits of a case from newspaper readings and so forth. That is being handled in the court and through a separate appeals system.

Mr. CLAY. Wasn't it found that there was an EEO violation in her case?

Mr. BURNETT. That's been a decision that's been made by Mr. Clinton Smith and I believe by Judge Bryant—at this point, I think, the question before Judge Bryant is what relief should be ordered.

Mr. CLAY. Where is she now?

Mr. BURNETT. She's still at the Commission in her present position.

Mr. CLAY. Are you sure about that?

Mr. BURNETT. That's my understanding.

Mr. CLAY. I understand she's way out in the boon docks.

Mr. KISTLER. It's important, Mr. Clay, to perhaps make a point of clarification without getting into the *Griffiths* case. This bill, as I read it, does not impact on that case one way or the other. It is not drafted

to speak to the *Griffiths* case; it would not cover the *Griffiths* case. It would provide no change in the processing of the *Griffiths* case.

Mr. CLAY. I think it establishes the fact that the Appeals Board is not an independent board. That's the point that I was making. The whole system is just shot through and through with the kinds of things that make it impossible for employees to get a fair and just adjudication or relief.

Now, from my experience here, through letters and from people who come to see me—these employees have no confidence in this system. First of all they feel that the Civil Service Commission does not represent them.

Now, is it your opinion that the Civil Service Commission is an impartial agency to protect both employees and management?

Mr. KISTLER. Yes, sir, that is my opinion. The role of the Civil Service Commission is to administer the statute, including that portion of the statute that says an employee—covered employee—will be discharged only for such cause as will promote the efficiency of the service. And I believe that the Commission is equipped to and does, in fact, so perform.

If I can comment on your observation about employee confidence, sir, we do not have the same sense of that that you do, and I don't think that the statistics bear it out. First of all, if we could take a sample year of fiscal 1976, and if I can round the numbers, approximately 18,000 Federal employees suffered an adverse action during that period of time. One-third of those chose to petition the Civil Service Commission because they felt that adverse action was inappropriate—or approximately 6,000 Federal employees.

I would like to point out that this bill would provide appellate type procedures for all 18,000 of those employees—as I read the bill.

Furthermore, of the appeals that were adjudicated—and this would not necessarily be the same block of appeals—of the appeals that were adjudicated in that same period of time, a full one-third of the employees succeeded on those appeals.

Mr. CLAY. And what happened to the one-third of the management people who made the decisions to cause these actions against those people?

Mr. KISTLER. They found themselves required to take those employees back and to put them on the job and to pay them back pay, and to reinstate them and bring them back into the work force.

Mr. CLAY. Isn't that something. But nothing happened to the management people.

Mr. KISTLER. I don't know that to be the case, Mr. Clay. I don't know; I don't have that kind of data.

Mr. CLAY. Let me say this to you: The Chairman of the Civil Service Commission has told us in hearings that he could not comment on the labor-management relations bill, H.R. 13, for at least 1 year. So, I'm going to give him a little advance warning here and now. I intend to propose a bill which will abolish the Civil Service Commission as such, and let the employees elect members to a panel to decide who's going to make decisions affecting their lives. I bet you they'll be much more responsive knowing that they've got to face their constituency the same as we have to face ours. They'll be much more responsive to the needs of those employees.

Mr. Taylor?

Mr. TAYLOR. Mr. Chairman, I don't think I have anymore questions, except that I would like to ask him:

When do you think the Civil Service Commission is going to act on this proposal to change schedule A's to career positions so they can't be fired?

When is the Commission going to make this decision? I understand it's been down there a long time. The other Commission had it before them.

Mr. KISTLER. If there is, indeed, a pending request to convert some jobs from schedule A to schedule C—is this what I heard you say, Mr. Taylor?

Mr. TAYLOR. Yes.

Mr. KISTLER. I would certainly be most willing to go back and find out where that is, the status of it, and when a decision can be expected on it, and I'll get that information to you. I'll try to get back to the committee this afternoon.

Mr. TAYLOR. Well, we have heard—you know—last year this committee heard the testimony about the abuses of the previous administration. I think they were there; I certainly concur. But I think it's time to stop it. I just believe it's time to stop it because I think we're losing the merit status of our career system. I think the people involved in it feel that they're not being treated fairly, and I think some of them have cause for feeling this. I think if we allow this to continue to go on it's going to fester and get worse, and our merit system is going to be severely damaged.

I would hope that the Commission, in all fairness, would stand between the agency and employee, and would see that these people were treated fairly in this matter.

Mr. BURNETT. Mr. Taylor, I might just respond and say that the Commission, of course, is aware of the various complaints about the appeals system and that we are studying the present system to see if improvements can be made, that is, whether the appeals system should be separated from the Commission as a separate board—like NLRB or the U.S. Parole Commission—and that the Federal personnel management project will consider these questions.

So, we're not saying that the system is 100-percent perfect as it is, but what we're saying is that the bill before this committee has certain problems with it—not that improvements can't be made and we won't be looking to make those improvements.

Mr. TAYLOR. The whole point is this, Mr. Burnett. Here are people who have been told by the agency, "You're doing nothing wrong. We're just going to do this to you."

Why should they be put through this terrible grind, through appeals, appeals, appeals, being laid off—out of a job—held in limbo while this is being decided?

Mr. BURNETT. I fully understand and sympathize with that situation, and I'm sure we'll be looking at that type of situation.

Like I say, we do have a mechanism now. In coerced resignation, if an employee is out of a job 6 months or 9 months if the FEAA, an independent authority, finds that it has been, in fact, a forced resignation, the man will be put back and made whole, or the woman will be put back and made whole.

Mr. TAYLOR. As far as I'm concerned, if this continues we're going to have more hearings. I just don't believe that this committee or any fair Member of Congress can leave this alone. I think we will have more hearings if this type activity on behalf of these agencies that has gone on before and is continuing—has continued to exist—I think we're going to have to address ourselves to it.

Thank you, Mr. Chairman.

Mr. CLAY. Thank you.

Mr. Kistler, in your statement you say that you question the constitutionality of this provision. On what is that based?

Mr. KISTLER. Art, do you want to speak to that?

Mr. BURNETT. Well, our concern, Mr. Chairman, is that the Constitution speaks of Congress being able to give appointment powers to the President alone, to a court, or to heads of departments. Of course, at the time the Constitution was written, we didn't have agencies separate from departments.

It is our reading of the law and court decisions that coequal with the power of appointment is the power of removal; so, therefore, the power of removal resides in the heads of departments, and while certainly Congress and the courts have recognized that Congress can condition and set standards for appointments and removals, it can't take that power totally away from the heads of departments or the heads of agencies.

And our concern is predicated—based—upon the *Myers* case, the *Humphreys* case, and the recent case in the ninth circuit dealing with the power of the President to remove a U.S. marshal, which case, *Martin v. Tobin*, for the record is 451 F. 2d 1335. And what we say here is the way that this bill is structured, the administrative law judge makes the final decision on the facts. The head of the agency does not have any authority to accept, reject, or modify. That decision is final.

Even when you go into the court, the only question before the court is the question of law, not of the facts. We could have 500 administrative law judges, each making decisions, coming up with 500 different factual decisions. So, what we're doing is putting the removal power into an administrative law judge that is a part of the executive branch, but completely tying the hands of the heads of departments to do anything about an aberrational decision of an administrative law judge who may not be calling "the spade" like it should be called. Now, that's our concern.

Mr. CLAY. Let me ask you this, Mr. Kistler. Has the right to a prior hearing ever been provided by a Federal agency to its employees?

Mr. KISTLER. Yes; a number of agencies have done that in the sense of building right into the notice and reply process a regular full-blown, full-scale, hearing where witnesses are produced and evidence is introduced, and all the rest of it. Some agencies have done that off and on over the years. The Civil Service Commission has done that at various times as an agency for its own employees. At least two agencies that I am aware of still do that, the Department of Health, Education, and Welfare and, I believe, the National Labor Relations Board. There may be some others; those are the only two that I am familiar with.

An agency may do this at any point in time, either on its own initiative or as a result of a negotiated agreement which provides these kinds of procedures for its employees.

Mr. CLAY. Is the Civil Service Commission one of those agencies that does this?

Mr. KISTLER. I do not believe we do it now; no, sir. I believe we did it at one point in time, but I do not believe we do now.

Mr. CLAY. In the processing of an adverse action under existing procedure, if the agency is relying upon statements of a non-Government witness, is the Government obligated to present that witness at a hearing if requested to do so by the affected employee?

Mr. BURNETT. Well, the problem we have now, of course, is that we have no subpoena power, and the presence of non-Government—

Mr. CLAY. You don't want us to grant you that, too.

Mr. BURNETT. Well, at this point I can't speak for the Commission. We've had some concern—apprehensions—as to whether or not we should have that power for a non-Government witness, because that person is not, of course, subject to management control, but that is possibly an area of concern which we'll be looking at. How we will finally come out, I'm not sure. But, personally, I am concerned about the absence of the subpoena power or a formal means to get a non-Government witness before such a hearing.

Mr. CLAY. If the witness does not show up, what happens in that case?

Mr. KISTLER. The current Commission regulations give the appellate authority, that is, the appeals officer, the authority to give a favorable construction to the testimony that would have been produced if the agency taking the action fails to produce a witness that is relevant, appropriate, and that the appeals officer concludes ought to be produced.

Mr. BURNETT. The question was "non-Government" witness?

Mr. CLAY. Yes.

Mr. KISTLER. The agency must make available all evidence that it uses to charge an employee, and the agency may not use evidence that it cannot make available to the employee; so, at least in the form of an affidavit, there would need to be this kind of information available.

Mr. CLAY. I see some problems there in that when a person accused is not confronted by the accuser so that he cannot interrogate, cross-examine, et cetera. You mean we still permit those affidavits to bear on the outcome of the employee of the case?

Mr. KISTLER. We have to distinguish between the taking of an adverse action by an agency and the appeal of the action. The action process may or may not include a hearing, but will always allow the employee to request an oral appearance before the deciding officer. The investigative file can include affidavits, it can include whatever evidence is appropriate, but that evidence—all evidence that is relied upon by the agency must be made available to the employee for that employee's scrutiny so that the employee can make a solid response to the charges.

Now, when it comes to the Civil Service Commission, then the system shifts to a hearing entitlement with a verbatim transcript and our appeals officers are empowered to accept affidavits and give them whatever weight they appropriately deserve under the circumstances.

Mr. CLAY. They also accept hearsay evidence from this non-Federal employee? In other words, you say that a hearing officer is empowered to give information as to what the witness, who did not show up, said.

Mr. KISTLER. No; I'm saying that he is empowered to give the most favorable construction for the employee's case in that kind of circumstance.

Now, and I might, perhaps, while we're looking at this, I could pull out a portion of the Commission's specific regulations on this point and be sure that I give the committee a solid answer.

Section 772.307(c) (2) of the Commission's regulations provides as follows, Mr. Chairman:

"Both parties are entitled to produce witnesses and to introduce signed sworn statements or letters of interrogatory." I would like to emphasize this is in the appeals process now, before the appeals authority. "The Appeals Authority is not authorized to subpoena witnesses. Any agency that has employees entitled to appeal to the Appeals Authority under this part shall make its employees available to furnish sworn statements or to appear as witnesses at the hearing when requested by the Appeals Authority after consideration of a request by either party to the appeal, unless it is administratively impracticable to comply with the request of the Appeals Authority.

"In the event that a witness requested by the Appeals Authority is employed by a Federal agency other than the appellant's agency, the witness shall be made available by the employing agency with appropriate reimbursement by the appellant's agency." And, I'll skip through some of the provisos.

"If the employing agency determines that it is not administratively practicable to comply with the request of the Appeals Authority, it shall submit to the Appeals Authority its written reasons for the declination. If the appeals officer determines that the reason for the declination is adequate, the appeals officer shall insert the explanation in the record, notify the requesting party that the witness(es) will not be provided and of the reasons therefor, and, when appropriate, inform both parties to the appeal of the procedures under which a signed sworn statement or letter of interrogatory will be obtained from the witness(es).

"If the appeals officer deems the reasons inadequate, and further determines that the requested witness is likely to possess special or peculiar knowledge about the matters in dispute, the appeals officer may, in assessing the totality of evidence in the case, infer that the absent witness would have given testimony unfavorable to the employing agency. The Federal employee should be in an official duty status," and so on and so forth.

Now, this does not address, I agree, the non-Federal employee, and I am not prepared at the moment to describe exactly how that is treated in a similar circumstance. I'd be glad to provide that information to the committee for the record. I don't have it in front of me.

Mr. CLAY. Will you, please, get it for us?

Mr. KISTLER. Yes; I'd be glad to do so.

[The information follows:]

The Commission has found that it is unusual to have cases in which the critical witness is not a Federal employee. Usually, when the appellant wishes a person who is not a Federal employee to testify for him or her, it is as a character witness. The Appeals Authority will invite such a witness to be present; if he or she is unable to attend, the Authority will accept an affidavit or even an unsigned statement. If the agency needs the facts that may be supplied by a non-Federal witness, it is responsible for assuring the witness's presence at the hearing, unless it wishes to produce the same facts in an affidavit. In unusual

situations, the Appeals Authority may ask an investigator to conduct an interview of a witness who is unable to testify at a hearing.

However, we believe the greatest problem concerning the presence of witnesses has been already solved. This involved the instances where agencies had not supplied necessary Federal employees as witnesses when requested to do so by the Appeals Authority. A recent regulatory change, quoted in Commission testimony, strengthens the authority of the appeals officer by authorizing him or her to determine whether the agency's reasons for not supplying a requested witness are valid, and if not, to infer that the absent witness's testimony would have been unfavorable to the agency. Thus, the greatest problem of unavailable witnesses has been taken care of.

Mr. CLAY. Mr. Burnett, did you want to elaborate?

Mr. BURNETT. That's what I wanted to bring out. The question I thought you asked was what do we do with the employee who is not on the Government payroll.

Mr. CLAY. That was the question.

Mr. KISTLER. And that I will provide for you.

Mr. CLAY. Thank you.

Mr. HARRIS, do you have any questions?

Mr. HARRIS. No.

Mr. CLAY. Are there any further questions?

Mr. TAYLOR. Let me ask you this: Does this mean the administration is opposed to this bill?

Mr. KISTLER. Yes, sir; it does.

Mr. TAYLOR. If the schedule A positions are changed to noncareer as has been requested by the agency so that they may be dismissed, or if, on the other hand, they're changed to career positions—and I understand there is a gray area—will this take the action of the Civil Service Commission to change them to a career position also, as well as change it to noncareer?

Mr. KISTLER. That is correct.

Mr. TAYLOR. Either way, it would take an action by the Civil Service Commission?

Mr. KISTLER. That's correct.

Mr. TAYLOR. In other words, we're going to do away with schedule A's, going to be noncareer or it's going to be career; either change would have to be the result of action by the Commission.

Mr. KISTLER. That is correct.

Mr. BURNETT. There was one problem, however, with attorneys. And that is, sometime ago, back in the 1940's, Congress wrote into the civil service law that we cannot examine for attorneys; because we cannot examine for attorneys, we cannot give them competitive status. And that's why they are in schedule A.

Now, if the Commission could, in fact, examine for attorneys, they could be put in the competitive service, if Congress lifted that restriction. But the problem with attorneys being schedule A's is due to a specific statute passed by Congress on the subject.

Mr. KISTLER. And of course, flowing from that is the nonprotection for nonveteran attorneys which was specifically alluded to in Mrs. Schroeder's statement.

Mr. CLAY. Do I understand you hinting at whether or not this could become an area of Presidential patronage?

Mr. TAYLOR. Yes; I was referring to that.

What happens to these people if the Commission decides that these people are to be replaced. They were hired on schedule A, they thought

they had protection, they were in a nonpolicy making, nonconfidential position.

Now, if they do change, these people are employees. They're changed their life styles; they've bought homes, they've done all of these things. Are they doing to be protected, or will they eradicate all of them and start all over? What kind of protection will these people have?

Mr. BURNETT. If the positions are changed to schedule C, you're saying what protection does the schedule A incumbent have?

Mr. TAYLOR. Hired as a schedule A, thinking they had protection as a schedule A as effective.

Mr. KISTLER. If the employee is a veteran, the employee will continue to have the full range of protection that we have been talking about this morning; but if the employee is a nonveteran, the employee's protections will be no different than they are now, and as we have stipulated before—

Mr. TAYLOR. In these issues the nonveterans have already been summarily dismissed. And I agree with the chairman; I don't see why we've got that difference. But it's there; it's part of the law.

But what I'm wondering is, what would happen to these people if they said, "We're going to give you a letter; we're going to file adverse action against you." And I know they can go through this whole range of appealing and so forth and so on, but it would seem to me that if the Commission was going to make a determination for the agency that they've asked them to make for some ill-advised reason, either change to career or change to noncareer, in any instance—"so that we can get rid of some people that we want to get rid of"—that's what they're going to do.

Then, are these people who were hired on schedule A in good faith, who thought they had protection, shouldn't the Commission, in your judgment, say, "If you're going to do this in the future, at least don't keep these people around that have changed their life style and have dependents"—you know, at these people's age it's a little hard for them to do something else.

Mr. BURNETT. I know in the past—it's been some time—changes of this type have been made to affect future incumbents, and the person who was in the job was given the protection to stay in the job until he voluntarily resigned, retired, or was reassigned.

Mr. TAYLOR. It only seems fair to me that he be given that protection.

Mr. BURNETT. I'm certain that's a fact that we'd consider, or at least the General Counsel's office will be looking at that issue.

Mr. TAYLOR. OK, thank you very much.

Mr. BURNETT. And one other point I did want to bring to the committee's attention, and that is the question of the use of administrative law judges in this procedure. The APA specifically, in section 554, excludes from the performance, as being within the APA, the selection and tenure of personnel. Section 559 specifically says that if the APA is to be amended, modified, or repealed, it must be done so expressly.

This bill—6225—nowhere expressly amends the APA to delete from the exclusions of the APA the selection and tenure of personnel or to designate this as a function administrative law judges can perform. So, I think if the committee is going to consider this issue, it

has to consider dovetailing the functions of administrative law judges with the provisions of the Administrative Procedure Act.

Mr. CLAY. You're absolutely right, and that will be done. Thank you for your testimony.

Mr. KISTLER. Thank you, sir.

Mr. CLAY. The next witnesses are from the National Treasury Employees Union.

STATEMENT OF VINCENT L. CONNERY, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION, ACCOMPANIED BY JERRY KLEPNER, DIRECTOR OF COMMUNICATIONS; AND ROBERT TOBIAS, GENERAL COUNSEL

Mr. CONNERY. Thank you, Mr. Chairman.

My name is Vincent L. Connery; I am president of the National Treasury Employees Union. Our union is the exclusive representative of over 95,000 Federal employees in the U.S. Treasury Department and the Federal Energy Administration. I am accompanied here this morning, on my right, by Mr. Jerry Klepner, the NTEU director of communications, and on my left by Mr. Robert Tobias, the NTEU general counsel.

We are here today to express NTEU's full and unqualified support for H.R. 6225, the Federal Employees Administrative Hearing Rights Guarantee Act, as introduced by Representative Patricia Schroeder, Democrat, of Colorado. This bill would provide Federal employees with a right currently enjoyed by millions of other public and private sector workers—the right to a hearing before removal or suspension. We are hopeful that these hearings will hasten the enactment of this very important legislation which would remedy many of the inequities in the present adverse action appeals system.

From the very beginning of the civil service system, Federal employees have been given only the most cursory protections against unjust firing and suspension. The original civil service law, the Pendleton Act of 1883, was designed primarily to combat the "spoils system" practice of filling Federal jobs through political patronage, and as such, provided no protection against arbitrary dismissal. In 1912, Congress passed the Lloyd-LaFollette Act which prohibited the removal of an employee in the classified service "except for such cause as will promote the efficiency of the service." This act requires that employees be given advance notice of any action to be taken against them, and a written statement of the charges upon which the action is based.

In 1944, the Veterans' Preference Act created additional procedural requirements, including the opportunity to respond in writing and orally to charges, and the right to appeal an agency adverse action decision to the Civil Service Commission.

This, however, applied only to veterans of military service, and it was not until 1962, when President Kennedy issued Executive Order 10988, that similar procedural rights were granted to nonveterans in the competitive service. These provisions of Executive Order 10988 were incorporated into Executive Order 11491 which was issued in 1969 and still serves as the governing document for labor relations in the Federal sector.

Under the current system, a Federal employee must be provided with 30 days' written notice of any proposed adverse action. He or she is entitled to review information used by the agency to support the initiation of the adverse action, but not to copy documents or cross-examine anyone who has provided such information. In addition, during this time, the employee may present to a designated management official a written and/or oral reply to the charges.

This procedure vests the final decision to implement an adverse action with the same agency management that initiated the action in the first place. Not surprisingly, those who hear and review the reply normally rubber stamp the decisions of their managerial cohorts, and recommend to higher agency officials that the proposed action be implemented. Obviously, this procedure fails to assure employees any semblance of an impartial decision.

Once removed or suspended, the employee then begins the long and arduous road through an appeals process within the Civil Service Commission that often takes well over a year to result in final judgment. The first step of an appeal is to the Federal Employees Appeals Authority where the employee is afforded a hearing before an FEAA hearing examiner. Because there is no time limit within which a decision must be reached on a given appeal, the FEAA often takes months to complete its consideration of a case.

If the adverse action is upheld by the FEAA, the employee can request a review of the decision by the Appeals Review Board, a nine-member body appointed by the Chairman of the Civil Service Commission. The ARB is not required to accept all requests to review cases, and as such, does not represent an automatic next step in the appeal process. Even in those cases it does accept, however, the ARB, like the FEAA, is under no requirement to render a decision within any specified time frame.

All decisions of the ARB are subject to the review of the Civil Service Commissioners who may reopen cases at their discretion or at the request of an employee or an agency. Like the ARB, the Commissioners only consider selected cases. Because of this power, the Commissioners serve, in effect, as a court of review over the ARB, thus representing the highest step in the administrative appeals process.

Just as the oral reply stage is totally controlled by agency managers, the appeals process is dominated by management from beginning to end. Both the FEAA and ARB are creatures of the Civil Service Commission. They are hired by the Commission, paid from Commission funds, and housed in Commission offices. It is, therefore, not surprising that their decisions also reflect the Commission's own management bias. For example, in fiscal year 1976, the FEAA adjudicated over 2,000 appeals, yet in only 211 cases—or 11 percent—did they reverse the agency's decision based on the merits.

Likewise, the Appeals Review Board is dominated by the philosophy of the Commissioners. Since the members of the ARB are appointed by the Chairman of the Commission, they can also be removed at his will. Their first and foremost responsibility is to the Chairman. Knowing that Commissioners can review and reverse any of their decisions, the members of the ARB shape their rulings or findings to reflect the opinions of the Commissioners.

Furthermore, the unchecked power to reopen cases as they see fit solidifies the Commissioner's total control over the appeals process. The basic injustice and possibility for abuse in this system was illustrated recently in the case of two Internal Revenue Service employees who were separated from their positions for failure to file their income tax returns on time even though both were due a refund.

With NTEU representation, the employees appealed their removal to the FEAA which reversed the IRS's action and ordered the employees reinstated. The IRS appealed this decision to the ARB, then called the Board of Appeals Review, which upheld the recommendations of the FEAA and ordered the employees returned to their jobs.

Following the ARB's decision, however, the former Commissioner of the IRS, Donald Alexander, contacted the Chairman of the Civil Service Commission and requested that the case be reexamined. Had Alexander sought this review in order to introduce new evidence, the request would have been proper, but the only reason he gave for seeking the reopening was that the IRS "could not agree" with the ARB's decision.

Without even informing the employees that he was reopening their case, Robert Hampton, who was then chairman of the Commission, agreed to Alexander's request. Hampton and his fellow Commissioners subsequently overruled the ARB and sustained the removal of the employees without providing them any written explanation of their decision.

NTEU then filed suit on behalf of the employees in the U.S. Court of Claims, which reversed the Commissioner's action and ordered the employees reinstated. In reaching their decision, the court admonished the IRS for the excessive punishment meted out to the employees, saying "the penalty of dismissal was in no way warranted given the circumstances of this case."

Addressing the action of the Commissioners, the court said:

The CSC reopened the decision of the ARB without affording full participation rights to the employees to argue against the reconsideration. More importantly, the CSC reversed the ARB and found the penalties of dismissal appropriate without providing reasons for its own decision.

In such a situation, it is impossible to conclude that the CSC properly exercised its discretion because we cannot ascertain the basis for its decision . . . Generally, agency penalties will be reviewed as a matter within agency discretion. However, in the fact of this case such discretion has been abused due to the disproportionate harshness of the penalty.

Not only are the current procedures completely controlled by management, to make matters worse, an employee could face months or even years of unemployment before a final decision is rendered on his or her appeal. What the Commission has chosen to ignore, but what this subcommittee must consider, are the severe, debilitating effects this system has on employees.

Every day off the Government payroll can bring new hardship for an employee involved in an extended appeal. Besides the gnawing uncertainty over the future of their careers, many employees must contend with the inability to meet everyday financial obligations such as mortgage payments or rent, utility, food, and clothing bills.

At such a time, any unexpected expense is transformed into a major burden. To a separated employee whose health and life insurance

coverage has been suspended, even a slight illness becomes a cause for fear and concern. The mental stress brought on by unemployment is compounded by the grief and anguish that comes from seeing one's family suffer through dwindling life savings, deferred dreams of higher education, or even the loss of their home.

This actually happened to an IRS employee in Albuquerque, N. Mex. several years ago. The employee was fired for allegedly falsifying a travel voucher, in the amount of \$13. Though the employee claimed that he had made an honest mistake in computing his travel expenses, the agency called it a willful action and terminated his employment.

After the employee's appeal had dragged on for months, he received a notice that his mortgage would be foreclosed in 10 days unless he demonstrated an ability to meet his already sizable debt. In desperation, he contacted the IRS director of personnel, explained his dire situation, and requested a quick decision so that he could at least ascertain his future ability to met the mortgage payment. Despite the employee's plight, the IRS personnel director callously delayed any decision for another 30 days, and then upheld the employee's termination. As a result, the employee lost the home he had worked years to obtain.

To add to their problems, separated Federal employees oftentimes find it impossible to secure other employment. Dismissal from the Government service, even more so than from private employment, is usually the economic equivalent of capital punishment, placing the employee under a cloud of doubt and suspicion in the eyes of many employers. If the employee is fortunate enough to find another job at all, the pay and level of skill entailed will most likely be well below that of his or her Government position.

Because of these obstacles to finding gainful employment, a separated employee is often forced to sacrifice his or her possessions one by one in order to meet the continuing financial demands of daily living. Many once productive Federal employees, after exhausting their savings and liquidating their assets, have even been forced onto the welfare rolls. Not only does this constitute another drain on Government resources, but the toll on the well being of the employee's family and on his or her own self respect is impossible to determine.

Even if the employee's removal is overturned and a "make whole" remedy of back pay is awarded, this does not erase the months, or even years, of suffering that he or she has undergone. How do you compensate someone for the anguish of watching his or her children do without decent food, clothes or adequate medical care? How can you make someone "whole" for the sneers of neighbors or the thousand of small humiliations suffered each day off the Federal payroll?

Simply stated, you cannot. Yet because of the inequities inherent in the present system, countless Federal employees have undergone such ordeals. In the last 2 years alone, nearly 2,500 Federal workers have been separated from Government service. The hardships and suffering we have described are not merely isolated examples, they are very real and present to thousands of employees.

This subcommittee, however, can take a positive step to end this needless human suffering by giving its speedy approval to H.R. 6225. This legislation would promote greater justice in the Federal sector by simply providing a Federal employee who is subject to an adverse action with the right to a full hearing before the initiation of such action.

Under the provisions of H.R. 6225, an employee is entitled not only to 30 days notice of a proposed adverse action, but also copies of all statements and investigative reports relating to the proposed discipline. Within the 30 days, the employee must be granted a hearing before an administrative law judge who could be empowered to administer oaths, examine and subpoena witnesses or relevant material, and to enforce the power of subpoena. H.R. 6225 also provides that an employee or his or her counsel may cross-examine the witness and, after the hearing, receive a copy of the verbatim transcript. In such hearings, the decision of the administrative law judge would be final and any further appeal would be directly to the U.S. District Court.

Another important feature of H.R. 6225 would allow the parties to a collective bargaining agreement to negotiate binding arbitration in adverse action cases. The benefits of arbitration are many. It is a speedy process that guarantees employees an impartial decision by an independent third party. Our experience underscores the fairness of arbitration as compared to the present system. Prior to 1974, when the right to advisory arbitration was still available to Federal workers, NTEU brought 38 adverse action cases to arbitration. In 26 of these, or 68 percent, the arbitrator recommended reversal of the agency's action against the employee. In contrast, the FEAA in 1976 upheld the agency's initial decision in 67 percent of the cases it adjudicated.

The right to negotiate an arbitration procedure is only one of many provisions that make the process established in H.R. 6225 vastly superior to the present system. The bill's greatest strength is that it provides Federal employees with the right to a full and impartial hearing prior to the initiation of an adverse action. This would be a one-step procedure which would guarantee an employee full due process rights. Any appeal would be directly to the courts, thus eliminating the need for the present administrative appellate tribunals.

The right to a prior hearing before an administrative law judge would insure competent and impartial decisions in adverse action cases rather than subject employees to the management bias inherent in the current system. At present, the FEAA does not even require that their hearing examiners be attorneys, while an administrative law judge must have at least 7 years legal experience. If, as Executive Order 11491 permits, unfair labor practice cases are important enough to be heard by administrative law judges, then we believe that adverse action cases, where the potential for an employee's economic and professional downfall is ever present, also warrant the presence of these highly trained individuals.

Another major benefit of H.R. 6225 is the fact that it would foster a tremendous saving in tax dollars. While the FEAA currently estimates the cost of processing an appeal to be nearly \$600, the cost to the Government of the present adverse action system is much more. This figure does not include any expenditures associated with the oral or written reply, nor with appeals of FEAA decisions. Under this legislation, the oral and written reply stage of the current procedure would be eliminated as would the Appeals Review Board and their attendant costs.

Furthermore, the savings to the Government could be even greater under H.R. 6225 if any agency and the union holding exclusive recognition choose to substitute binding arbitration for the statutory procedure. Normally, both parties share the cost of the arbitrator's services and we would expect this to continue under the legislation.

But the greatest savings that would be effected by H.R. 6225 is the savings of untold human resources. No longer would an employee be left to hang in limbo while his or her appeal is being processed.

Through the simple, but humane act of providing employees with a full hearing before the effective date of an adverse action, this legislation would end the needless anguish and uncertainty caused by the long delays so often encountered in the present system. By insuring that lives and careers will not needlessly be disrupted, H.R. 6225 would improve the morale of the Federal workforce, and, by so doing, contribute to greater efficiency in the Government service.

The enactment of H.R. 6225 is more important now than ever, since it is the only avenue through which the present system can be changed. Initially, Federal employees sought the aid of the courts in order to secure the right to a prior hearing. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Supreme Court considered whether the discharge of a Federal employee, without a prior hearing, was violative of the constitutional guarantee of procedural due process. Although the Court found that such a hearing was not required, the failure of a majority of the Justices to agree on a single opinion has left a cloud hanging over this issue.

In *Arnett v. Kennedy*, the Court handed down no less than four separate opinions. Justice Rehnquist, in the plurality opinion concurred in by Chief Justice Burger and Justice Stewart, held that a Federal employee's procedural protections in an adverse action are limited to those contained in the statute creating the right to appeal. Since the Lloyd-LaFollette Act, which defined those rights, makes no provision for a prior hearing, the plurality maintained that none was required.

This rationale was specifically rejected by the rest of the Court. The remaining six Justices held that a Federal employee's right to continued employment is constitutionally protected and cannot be deprived without due process of law. In determining whether the requisites of procedural due process demanded that a Federal employee be granted a hearing prior to being denied continued employment, the remaining Justices applied a balancing of interest test. In so doing, they weighed the Government's interest in removing an unsatisfactory employee against the interest of the individual in retaining his or her employment.

Justices Powell and Blackmun, in their concurring opinion applied the balancing of interest test and found that a prior hearing would result in prolonged retention of unsatisfactory employees as well as impose additional costs of the Government. "Thus," they reasoned, "the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." On the other hand, the Justices found that the wrongfully discharged employee would be entitled to reinstatement and back pay. The Justices concluded that the interest of the Government was greater than the temporary loss of income to the employee.

Justice Marshall, in his dissenting opinion concurred in by Justices Brennan and Douglas, and Justice White in his separate opinion, took issue with Justice Powell's application of the balancing of interest test. Justices Marshall, Brennan, and Douglas found that the interest of the employee in not being erroneously terminated was greater than any loss of time or money to the Government.

Writing for the dissenting Justices, Justice Marshall stated:

Many workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages. Few public employees earn more than enough to pay their expenses from month to month . . . Like many of us, they may be required to meet substantial fixed costs on a regular basis and lack substantial savings to meet those expenses while not receiving a salary. The loss of income for even a few weeks may well impair their ability to provide the essentials of life—to buy food, meet mortgage or rent payments, or procure medical services.

We agree with the conclusion of Justices Marshall, Brennan, and Douglas. But even if one accepts the application of the balancing of interest test set forth by Justice Powell and Blackmun that the Government's interest in expeditiously removing an unsatisfactory employee and limiting the cost of adverse action appeals outweighs the interest of the employee, we believe that H.R. 6225 addresses these concerns.

As we have stated, H.R. 6225 would save time over the present system, not require more. The Government is already required to grant an employee an oral and/or written reply within 30 days of the notice of a proposed adverse action, and the employee remains on the Government payroll during that period. By simply replacing the reply with a full evidentiary hearing within the same 30-day time frame, H.R. 6225 neither costs the Government any additional expenditure of time nor prolongs the retention of an unsatisfactory employee beyond that required by the present system.

In addition, because H.R. 6225 replaces the current system of appeals with a one-step hearing procedure, it would not result in greater expenditures, as Justice Powell feared. Instead, the bill would instead reduce the cost to the Government by eliminating the need for the costly and multistep process that currently exists. In light of the fact that H.R. 6225 would not prolong the time necessary to process an adverse action and would result in greater cost savings to the Government, the scales have been tipped against Justice Powell's application of the balancing of interest test.

We reiterate our total support for H.R. 6225. The legislation would streamline the appeals process and promote savings of both time and money. But most important of all, the bill would remove the threat or arbitrary adverse actions and the resulting human anguish that exist under the current appeal system.

SUMMARY

The National Treasury Employees Union, in representing the 95,000 Treasury Department employees which are under our exclusive recognition, have seen for many, many years the need for this type of legislation.

Now, we have seen for many years, and have labored under and borne, as the employees we represent have borne, these types of disingenuous responses from the U.S. Civil Service Commission. They have been studying, they have been looking at, they have been going to be sympathetic to all of the things that have been addressed from the Chair this morning. But here we are. And I think, speaking from my own personal experience as an officer of this union, going back to 1965, we have been getting the same kind of responses that Mr. Taylor got to his questions and that you got to yours. They have done nothing.

ing about this. I do not believe, as all the people that we represent do not believe, that they are about to unless they are forced to, and that is why we are here in support of this type of legislation.

The employees do not believe in this system. This system is unfair. It is just this type of thing that Mr. Taylor was alluding to. They go through a great charade; they employ legions of people. They let people be beat up at the police station but give them all kinds of ceremonial regard in a hearing room. They know what goes on; they know that everyone of those legions is under the control of that Chairman at the Civil Service Commission. If that guy gets out of line, he's through, and they do nothing about these things.

Like you, I'm not an attorney. We employ dozens of very fine attorneys for this very reason. My union employs more attorneys than any other union in the United States, public or private, in relationship to our membership. Now, there are Federal unions, for example, that are four times our size, and we have eight times the number of attorneys; but for this very damn reason, we are not getting a shake. These people are not being treated fairly. They know it; they willingly contribute their dues to support this staff of attorneys for the very reasons that were brought out this morning, and all we ever get from these Commission people that were here is that "We're taking a look at it." And that's it.

And so I would go to your questions. I'm accompanied here by our General Counsel, Mr. Tobias, who is totally familiar with these things, as I am, and we would be glad to try to answer any questions.

Mr. CLAY. My first question for the record, Mr. Klepner, is, could you comment on the statement made by the previous witness as to the constitutionality?

Mr. CONNERY. Mr. Tobias.

Mr. CLAY. Mr. Tobias, would you care to comment on that statement?

Mr. TOBIAS. Well, I was astounded at the statement that there is a constitutional problem, and that the authority that was cited, that somehow agency heads have authority and that can't be statutorily altered when, in fact, the present system allows for the Appeals Review Board—somebody outside of an agency, somebody other than an agency head—to make a final decision as to whether or not someone should be discharged or not discharged. So, the present system is unconstitutional if we follow the same reasoning that was presented today by the gentleman from the Civil Service Commission.

And second, I don't see that the language in any way is unconstitutional on its face because the agency head is making a decision, and what the Congress would be providing with this legislation is a procedure for reviewing that decision. And that's what we're about, and I don't see that as unconstitutional at all.

Mr. CLAY. Mr. Connery, is the right to a prior hearing now provided to public employees on the State and local level?

Mr. CONNERY. I would defer on these responses to Mr. Tobias, Mr. Chairman.

Mr. TOBIAS. Mr. Clay, it's indeed ironic that Mr. Kistler would point to the private sector as to the place where he would draw an analogy as to whether or not these pretermination hearings, because the Supreme Court, in *Board of Regents v. Roth* case and *Perry v. Sinder-*

man, established the principle that the non-Federal public sector employee, as a matter of due process right, is entitled to a pretermination hearing.

And so we see that all of these other people out there in the public sector, so long as they're not Federal employees, have the right to a pretermination hearing, but the Federal employee work force does not.

Mr. CLAY. Was there ever a time when this right was provided for Federal employees?

Mr. TOBIAS. Yes; it was provided to Federal employees in at least nine agencies prior to 1974 when the authority of an agency to establish procedures was much broader, but President Ford, in 1974, issued an Executive order which took away the authority of the agencies to provide pretermination hearings, and now it's an extremely difficult, highly gerrybuilt, procedure for an agency to establish pretermination hearings. I believe that there are only two now that do it as opposed to the nine that did it prior to 1974.

It's interesting that the statistics that were developed by the administrative conference showed that the agencies that used pretermination hearings got the final decisions faster than those that went before the Civil Service Commission.

Mr. HARRIS. I didn't hear that last point.

Mr. TOBIAS. What I was saying, Mr. Harris, was that one of the arguments against pretermination hearings is that it extends the procedure, that it's much more time consuming. But what the statistics reveal on these nine agencies that used pretermination hearings prior to 1974, was that, actually, a final decision was reached, the appellate process was completed, faster when there was a pretermination hearing as opposed to the post-termination procedure and appeals to the Civil Service Commission.

Mr. HARRIS. Mr. Chairman, could I have one other question on that point?

Mr. CLAY. Yes; go right ahead.

Mr. HARRIS. It seems to me that the criticism was more likely that the time an employee stays on after termination decision has been made is extended rather than how quickly the termination comes.

Mr. TOBIAS. Well, that's correct. You see, under the present system, what is provided is that an employee receives a notice of a proposed adverse action. The employee then stays on the rolls a minimum of 30 days, and provides a response, a written and/or oral reply. Now, most of these take much longer than 30 days, so we know that the decision has been made when that letter is issued, so then the final decision comes down.

Now, what I'm saying is, from the time the initial letter goes out, until the time that the final decision, even to discharge, has been made, which is somewhere—I don't remember exactly what the statistics are—well over 30 days, these agencies were conducting pretermination hearings within that time frame.

Mr. HARRIS. Well, Mr. Chairman, this really is beginning to confuse me a little bit, if I may just pursue this point a little bit.

There are letters that go out with regard to a, decision to terminate, that do not necessarily specify 30 days, and may be open as to when termination is going to occur.

Mr. TOBIAS. Under the present procedure—you, as a Federal employee, would receive a letter under the present procedure which says:

We, the agency, hereby propose to discharge or otherwise discipline you. You have a right to respond orally and/or in writing, and no action will be taken for a minimum of 30 days.

Mr. HARRIS. And what you said was a lot of times they don't do it in 30 days; a lot of times they may go 60 or even longer days?

Mr. TOBIAS. That is correct.

OK, now, once all the material is in, the agency considers the material and issues a final decision—discharge. At that point, the employee has the right to appeal to the Civil Service Commission, the Federal Employee Appeals Authority, ultimately to the ARB, and ultimately to the courts.

Now, what I am saying is that those agencies which still had gerry-built a pretermination hearing system into their regulations provide for a hearing at that oral and/or written reply state of the procedure, so that instead of just me coming into you and presenting evidence in writing, we have an actual hearing where I can bring in witnesses, I can bring in documents, I can cross-examine, and so forth.

And, you see, it's that kind of a system which is drafted into H.R. 6225, because H.R. 6225 eliminates the oral reply and puts it immediately into a hearing, thereby compressing the whole time period for final decisionmaking.

Mr. HARRIS. I want to ask just one final question, Mr. Chairman.

Mr. CLAY. Take all the time you want.

Mr. HARRIS. You said that these hearings, as part of the reply procedure, had been more common before an order that President Ford issued which terminated the authority for such hearings, is the way you put it.

Mr. TOBIAS. Yes.

Mr. HARRIS. How can some agencies go ahead and have the hearings procedure if the authority has been terminated?

Mr. TOBIAS. OK, what they did was, it was easier prior to 1974, because what some agencies would do would have an oral reply, make a final decision, and then the next stage would be they would still keep the employee on the roll and have a pretermination hearing, once the hearing was completed, then have an appeal to the Commission. OK?

So, now with the elimination of that authority to establish a hearing as a second step in the agency, they have these agencies which still have combined oral reply procedure with the hearing procedure.

Mr. HARRIS. Thank you very much, Mr. Chairman. That clears up something in my mind.

Mr. CLAY. Thank you.

Mr. Taylor?

Mr. TAYLOR. Thank you, Mr. Chairman.

I think you have shed some light on that.

Do you believe that this bill would substantially cut the redtape that is now involved in these Federal employees—

Mr. TOBIAS. I sure do, Mr. Taylor.

I think Mr. Kistler's response about if they make a mistake people are "made whole" is particularly egregious, because we represent an awful lot of people who—

Mr. TAYLOR. Once they get the ax, not many of them come back, do they?

Mr. TOBIAS. And those who come back, I mean—you tell me how it's possible to hand a person a check who's off the rolls for 5 years with five kids, welfare and food stamps, because they can't get a job, and you explain to those five kids who've lived that way for 5 years that, "Now, you're all whole again and everything's OK, and everything's cool." I mean, for someone who has run around from the age of 10 to 15 on welfare and food stamps because their mother couldn't get a job, because they're discharged from the Internal Revenue Service, there's no way of making that person "whole."

Mr. TAYLOR. The person is terminated, 40 years old, and finds it very difficult to find a job in that 5 years' time.

Mr. TOBIAS. Well, I tell you we just had a case where there were two women who were discharged, one of them had five kids—sole support—and during the period of 5 years had 182 job applications and interviews and was rejected at every place because she was discharged from the Internal Revenue Service and nobody would touch her.

And, so, to say that—you know—it's great now, we're going to give this woman a check for all of her back pay—she's in the process of receiving it—but I tell you, you're not going to make up for those five years off the roll.

Mr. TAYLOR. Do you believe that this legislation would have a tendency to stop the—I guess you could say—trumped up charges many time that someone in an agency comes up with just to get rid of someone if they know that there's going to be a hearing of the facts and have to immediately support those arguments, and with the information that would support those charges.

Mr. TOBIAS. I certainly do.

Mr. TAYLOR. It seems to me they really don't have to have a charge under the present circumstances.

Mr. TOBIAS. That's correct, because even in the present circumstance if they don't have a charge, the person is off the rolls, and the manager is well long gone by the time the employee is reinstated.

Under this procedure that manager has to face the fact that the employee is going to be around, and immediately there's going to be a hearing, and immediately he's going to have to put up or shut up with the facts. And that, it seems to me, would have the effect of eliminating trumped up charges to a very large degree.

Mr. TAYLOR. Mr. Connery, on page 1 of your statement you state that this bill would provide Federal employees with the right currently enjoyed by millions of other public and private sector workers, the right of a hearing before removal or suspension.

The witness who preceded you for the administration said that few employees in the private sector have rights comparable with those provided in the Federal sector. It seems that there's a great deal of conflict between these two statements.

I wonder if you'd care to comment on this discrepancy?

Mr. CONNERY. I defer to Mr. Tobias again, Mr. Taylor.

Mr. TOBIAS. Mr. Taylor, the answer is, as I indicated to Mr. Clay, that Mr. Kistler was focusing on the private sector. The actual fact is that as a result of the *Board of Regents v. Roth and the Perry v.*

Sinderman cases, which were both decided in 1972, the right to a termination hearing is provided to all non-Federal public employees. And that's the universe we're comparing ourselves to, not the private sector.

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. CLAY. Mr. Connery, whenever we make the statement on this side of the table that Federal employees are most unhappy with most of the decisions rendered by the Civil Service Commission, we always get the answer from the other side—from the Commissioners—that that is not true, and their experience has been that the vast majority of employees have no complaints.

How would you feel if the Commissioners were called upon to serve a 12-year period with a proviso that there would be a referendum every 4 years among the employees to either vote to retain them or dismiss them?

Mr. CONNERY. Well, the answer to that, perhaps, in two parts. I think that that could very well be salutary. Personally, I think, very definitely, that this Government and the various agencies within it could operate in a much more efficacious manner if there were no such thing as Civil Service commissioners.

Mr. CLAY. And what would you replace them with?

Mr. CONNERY. I would replace this with having these agencies reporting and held responsive to a management—to a Federal management. These agencies are allowed to get lost and lose their sense of responsibility and responsiveness because of just this very layering and layering of people and commissioners and commisars or whatever.

The fact of the matter is that when somebody comes into an agency to be the boss of that agency, he should be held to the fire just like everybody that has to work in the agency and answer to a group of people that put them wherever they are. But these people get lost.

When I worked with Internal Revenue, I used to call the district director, his \$100,000 end fields. You see, this was before the days of inflation. He just had a bunch of people around him. He was totally insulated. And this goes for all of these offices I've ever seen in my 18 years with Internal Revenue. These people hide in their offices and have these front men out there dodging around, and so forth, and none of them are responsible. Well, back in those days they had a whole bunch of \$25,000-a-year men, and if they had gotten one damn manager and paid him about \$55,000 or \$60,000, the Federal sector would be paying for that kind of responsibility, and that's the kind of performance they would get.

One of the things that's wrong with the Government is that they employ too damn many managers, layer after layer after layer, and that they pay them all a modest sum. That's true. But they get very modest performance as a result.

Mr. TOBIAS. The idea of the Commission as a central personnel authority issuing those regulations, allowing those managers to hide behind the nine volume work issue issued by Mr. Kistler and his minions—"It isn't me, it's that Commission." Mr. Connery is saying the real issue is to get rid of the Commission as having that authority and invest the manager with the idea that he is responsible for the personnel policies and practices, and then, I think, there would be a change.

Mr. CLAY. We would like to further explore this subject matter with you at some other time.

Mr. TAYLOR. Mr. Chairman.

Mr. CLAY. Yes?

Mr. TAYLOR. I know you're contemplating this bill. It's a little bit like the gal that was asked if she believed in capital punishment, and she said, "Well, I am if it's not too severe." [Laughter.]

But I was just wondering if you have any information as to what the cost to the taxpayers is of the operation of the Civil Service Commission and all of its agencies throughout?

Mr. CLAY. I have no idea.

Mr. TAYLOR. Would you?

[Negative response.]

Mr. TAYLOR. Pretty good bureaucracy within itself; is it not?

Mr. CONNERY. Oh, yes.

Mr. TOBIAS. All you have to do is drive by 19th and E Streets; you see the headquarters, and then they have a whole lot of regional offices—the bastion at 19th.

Mr. CLAY. Mr. Harris?

Mr. HARRIS. I'm trying to get my mind carried just one step farther. I happen to have been working on the type of legislation, frankly, that you're talking about, that would really change the Civil Service Commission concept all the way around. It seems to me that if you did, a manager with this kind of responsibility, though, would still need some kind of an independent appeals procedure as apart from that manager.

Mr. TOBIAS. If, as part of the collective bargaining legislation, which is also before this committee, the Civil Service Commission's role as the central personnel authority is eliminated and allows those employees covered by exclusive recognition to negotiate on all of those regulations contained in the FPM, but for those employees who are not covered by or under units of exclusive recognition, the answer would be yes, there would have to be some form of an independent appeals authority to hear those appeals and resolve those matters. And for those people it certainly would be imperative that someone other than the FEAA and ARB, and, ultimately, the commissioners, make the decision, because it's clear that the commissioners set the tone. It's just like the Supreme Court sets the tone.

So, for these people to say that the ARB and the FEAA are separate and apart and are impartial is to ignore the actual facts.

Mr. HARRIS. Thank you, Mr. Chairman.

Mr. CLAY. Thank you. We certainly want to thank you for your testimony.

Mr. CONNERY. Thank you.

Mr. CLAY. The next witnesses are representatives of the American Federation of Government Employees.

**STATEMENT OF LEO PELLERZI, GENERAL COUNSEL, AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES, ACCOMPANIED BY
JAMES LYNCH, LEGISLATIVE DIRECTOR**

Mr. PELLERZI. Thank you, Mr. Chairman.

My name is Leo Pellerzi. I'm the general counsel of the American

Federation of Government Employee, and I convey to you, Mr. Harris, and Mr. Taylor the respects and regrets of Mr. Blaylock. He wanted to be here personally to present this statement, but he was unable to do so; so I am serving as his mouthpiece.

The statement, Mr. Chairman, with your permission, will be submitted for the record. If I may, I would like to make some comments on the earlier testimony on this bill that are not covered in our statement, and elaborate on some of the points made in our statement.

Mr. CLAY. Go right ahead.

Mr. PELLERZI. On page 6 of our statement, we point out, along the lines that Mr. Taylor was suggesting, from the statistics of the Civil Service Commission itself, what is the profile of the average appellant within the system that this bill deals with. He tends to be a male veteran, 44 years of age, with 17 years of Federal service. The employing agency is the Department of Defense, by virtue of its size it would be the one to be chosen. His average grade is a GS-8 or WG-9. The entrance level salary for a GS-8 is \$12,763 a year, and the rate for a WG-9 varies with the labor market, but they're in the same general area.

And that is who is involved as the average appellant in this system. He is in the age where it is very difficult to become employed. He's at the age where he has committed to long-range financial and educational commitments. If he's a family man he's got a family on his hands to support.

As you may well know, the American Federation of Government Employees took the now famous *Kennedy* case to the Supreme Court. The whole purpose of that litigation, in which I was counsel along with Chuck Barnhill from Chicago, was to establish what this bill is attempting to provide; that was that a Federal employee should be entitled to a pretermination hearing.

Now, the significant thing that the Supreme Court did establish in that landmark case was that the interest that a nonprobationary Federal employee has in his job tenure constitutes a property interest which warrants protection under the due process clause of the U.S. Constitution. What a plurality of the judges found in that case was that due process did not require a pretermination hearing.

As a corollary to that case, the Supreme Court found in another case, *Samson v. Murray*, the almost unbelievable conclusion that those disabilities and those consequences that follow from normal discharge by the Government do not constitute irreparable harm for purposes of the injunction statutes. And what that meant to Government employees, was that where you have a totally unjustified dismissal facing you, totally without cause, totally arbitrary and capricious, you can't get it enjoined before it happens. You can't go get an injunction because to get an injunction you have to show irreparable harm; to show irreparable harm you have to show injury. And the Supreme Court, in *Samson v. Murray*, said the fact that you're discharged from the Government, the fact that you can't pay your mortgage, the fact that you can't afford your automobile, that you can't feed your children, does not constitute irreparable harm for purposes of stopping the action by injunction.

And it has put us in a very difficult position. If anything, underscores the need for the legislation before this committee it is those

conditions that have been imposed upon Federal employees by the state of the law.

Now, I can tell you as a former general counsel of the Civil Service Commission for the years 1965 to 1968, I had proposed—and I'm revealing a confidence here because I had proposed it and it was distributed to all agencies of government in 1967, it was distributed to the unions in 1967—a system that is substantially identical to the one in this bill. It provided, not for administrative law judges as hearing officers, but it provided for trained lawyers at grade 13 and above who had had trial or adjudicatory experience.

Now, your bill—and I commend it most highly—provides that these hearings be conducted by administrative law judges. It has also been my privilege to be the president of that association for 2 years back in the early 1960's, and I can tell you that the decisional independence of the administrative law judges under the Administrative Procedures Act is absolutely crucial to fair determinations in areas such as this where motions run high, where the frictions and temperament of the worksite get injected into the action, and where there is often an intertwining of equal employment considerations—racial, religious, national origin, sex, and age—creeping into the employment decisions. You need somebody with complete decisional independence and competence presiding at the hearing and undering the decision.

Now, look at the present system. What kind of hearing officers do we have? No. 1, they're not required to be attorneys. No. 2, approximately 60 percent, I was told by the FEAA, have some legal training. No. 3, for a competent, well-trained attorney trying to protect the person who is about to lose the means to a livelihood before a non-lawyer untrained in the law is one of the most frustrating experiences you can have. It's a great and enormous waste of legal talent, because there is no audience to play to, there is no response to those arguments that encase the values that any fair system of justice encases because they're not understood. The value system of the hearing officer is different from ideal of lawyers.

So, I think that this is a critical distinction. I was not only surprised, I was shocked, to hear the Government of the United States come before this committee and say this bill is unconstitutional, because by providing an independent fact finder you have, therefore, removed the removal authority from the agency head which the Constitution says is one of the places that the Congress can delegate that authority. Under that type of legal reasoning there is absolutely no adjudicatory system, including the present one, that Congress could enact that would allow any system of review over an agency head's decision.

In other words, what the Government seems to be telling the Congress is that under the Constitution the agency head is prosecutor, judge, and jury, and you constitutionally can't do anything about that. And that, to me, is total legal nonsense.

And I would suggest most earnestly to this committee that it request the legal memo because I think you can get it where we can't. But I did ask Mr. Kistler privately for it—that if he had that legal memorandum that sustained that conclusion—I would like to see it. We'd certainly like to have the opportunity to respond to it.

Mr. CLAY. The committee will request the same.

Mr. PELLERZI. Thank you, Mr. Chairman. If we could have that we'd be glad to try to assist the committee, and if the bill is unconstitutional as drafted, so be it. But I can tell you as a lawyer who's been tramping around in this vineyard for a number of years, that that shocked me and I don't see the constitutional problem in this bill. If we did we'd come up here and point it out to you.

The present systems, contrary to the assertions of the Civil Service Commission, do not provide due process of law. As a matter of fact, we have in litigation now before various courts the due process issue implicit in the present systems. We say they do not provide due process of law under the Constitution, or the process due under the Constitution, and we are attacking them.

One particularly bad aspect of the present system is the requirement that you put together an EEO case and an adverse action and have to choose which procedure you're going to follow. If you're fired, and you say, "I'm being fired because I'm black, or I'm yellow, or I'm brown, or I'm a Catholic, or a Jew, or because of my age," then you have to choose. You can go to the EEO route, and if you go to the EEO procedures under FP 713, you never get beyond the agency in the sense that the agency head will make the final decision, and you go through an investigatory type hearing, which is not adjudicatory. And you have no control over what goes into the record.

Then, if you have to select because it's also an adverse action, and you go to the adverse action route, then you lose the benefit of the EEO procedures, and you lose the benefit, I believe—I've got it in litigation right now—of the presumptions that the Supreme Court says goes with the EEO procedures. The shifting burdens of proof, where you make a *prima facie* case. There's all kinds of conflicts.

Mr. CLAY. Is this because of law, or because of regulation?

Mr. PELLERZI. Because of regulations.

Mr. CLAY. Because of regulations.

Mr. PELLERZI. Now, there were nine agencies that did provide pre-termination hearings. We had them covered very thoroughly in our briefs in the Supreme Court in the *Kennedy* case, and they included the Department of Justice, which I thought was interesting, and the Civil Service Commission, and HEW. And HEW, as one of the witnesses prior to me pointed out, still follows that procedure. We find that procedure, insofar as the impact upon the employees, and insofar as the perception of the employees in the agency is concerned as to the fairness of that procedure, to be eminently more fair. There is a greater feeling of respect and integrity in those processes where you have pre-termination hearings than in those agencies where you do not.

So, if this committee needs in microcosm vindication for its judgment that it's working on the problem of the employees' perception of fairness in the system, I think you can get the evidence out of HEW. We address this in our statement, that employees do have that perception.

I have another matter, Mr. Chairman I do want to point out. I thought that one of the prime witnesses was somewhat taken aback when they were indicating that one of the deficiencies in the present system was the lack of subpoena power. You indicated, "Well, are you opposing us giving it to you."

The Civil Service Commission, and particularly the general counsel of the Civil Service Commission, now has subpoena power in State Hatch Act cases, to prosecute State Hatch Act cases. There's a long story or why he has it and why he doesn't have it in the Federal cases that I won't go into, but they are not unfamiliar in the Civil Service Commission with the use of the subpoena power for prosecuting Federal employees.

And I think it's only fair that, to the extent that that Commission has the role of protecting Federal employees, it be given the tools to do that properly. I can tell you as an attorney who has represented thousands of these people, that you can't do your job without subpoena power. And you should have it, and I believe that your procedures here will eliminate cost to the Government and cost to employee representatives because I think you immediately elevate the ethic and the integrity of the system upon which adverse actions presently operate in the agencies where you have subpoena power.

There's one concern that I have, reading the bill, and I must confess to you, Mr. Chairman, that my schedule is such that I didn't get to this until late last week. That pertains to the present Administrative Procedures Act, notwithstanding Mr. Burnett's statement about excluding personnel appointment tenured employees. That provision relates to the statutory hearing but it doesn't relate to the judiciary review provisions of the APA. Under the APA a discharged federal employee now can obtain from the court a substantial evidence review. The court will review the factual record to determine if there was substantial evidence to sustain the agency's action.

This bill seems to imply that this review will be taken away. I don't necessarily object to that; I think it's a matter of clarification where you put an ALJ into the adjudicatory process and make his decision final. We would have no objection in taking away substantial evidence of judicial review under the APA. But, again, I think if that is what you are doing, then I think the matter should be dealt with expressly in order not to have legal complications arise from that in the future.

The other point that we want to commend the committee on is the fact that in subsection (e), you have made it clear to the agencies, as a policy matter, that they can negotiate procedures consistent, or incorporate the procedural protections of the bill. We think that is critically important because we have been unable to do so with management, even though, theoretically, the ability now exists.

The reasons for that are practical reasons. No. 1, you can't do it unless you're dealing with an entire agency. Now, we have some 22 national exclusive certifications, and we have some 22 existing national contracts. But, here again, then you've got to get agency policy established to where they're going to negotiate. Up until the present time, we have been unable to get any agency to agree to negotiate an adverse action system.

The fact that you put in the bill that agencies can negotiate shows a great depth of study and foresight, and we feel it to be very useful to us.

Now, that concludes my statement, Mr. Chairman. I apologize for its being off the top, but we appreciate very much the opportunity to present it, and to present Mr. Blaylock's statement.

Mr. CLAY. It was an excellent statement "off the top."

Mr. PELLERZI. We'd be happy to answer any questions you have.

Mr. HARRIS. I don't have any questions at this point, although I do have some food for thought, Mr. Pellerzi. I want to compliment you for this statement. It's very helpful to me.

Mr. PELLERZI. Thank you, sir.

Mr. HARRIS. It's an area that I've been working on in a general perspective, and I had not focused down on some of these specific problems. And I find, quite frankly, that there are a lot of people who are confused about the specific situation now. I think a whole lot of people imagine that there is a uniform situation in our Government, and there appears to be a notion that there is a great deal of diversity as to the way that these things are being handled. I think a lot of people have the notion that termination notices were automatically 30 days. I had that notion; they're not.

I think that there is a lot of misconception here, and I just want to compliment the chairman moving on this because I think this is an area that just needs our attention very promptly. I don't think we can wait for maybe overall reform to get through.

Mr. PELLERZI. We share that view, and I think in an order of priorities of employee concerns, that again I would commend the chairman and the committee. I think you're right on target, and I emphasize we fully support this bill.

If I had one more second, Mr. Chairman, I would like to cover one matter that I didn't cover, and that is the business that the Commission discussed about employees being "made whole" under the back pay act—being restored.

Well, there was some light in that tunnel in the *Fitzgerald* case. In the District of Columbia, a district judge said, "Well in the *Alyeska* case the Supreme Court said you can't award attorney's fees unless there is express authority from the Congress to do so." Judge Bryant in *Fitzgerald* said that, "Well, that case doesn't restrict the administrative hearing. We'll award attorney's fees to Mr. Fitzgerald for the administrative portion of this hearing before the Civil Service Commission."

Unfortunately, the Government appealed that case. It was reversed in a court of appeals, and it will be going up to the Supreme Court, I'm informed by Mr. Fitzgerald.

I would like to say that we know you have another bill pending concerning the right to counsel, and you are handling these things piecemeal, and I want to commend the committee again because it is the other string to the bow.

I think this committee in a very deliberate and scholarly way is attacking these problems whole although you are proceeding piecemeal. I think that is a very effective approach and we appreciate it very much.

Mr. CLAY. Thank you. We appreciate your testimony.

Mr. PELLERZI. Thank you again, Mr. Chairman.

Mr. CLAY. The meeting is adjourned.

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

[The statement submitted by the American Federation of Government Employees, and other statements and letters received subsequent to the hearing, follow:]

PREPARED STATEMENT OF KENNETH T. BLAYLOCK, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. Chairman, the American Federation of Government Employees, which represents over 700,000 Federal workers in exclusive recognition agreements under Executive Order 11491, welcomes the opportunity to appear and testify on a bill to provide an employee with a hearing, a hearing transcript, and all relevant evidence prior to the final decision of an agency to take an adverse action against that employee.

We will shortly testify before this same Subcommittee on a related bill, H.R. 3793, to provide all Federal employees with the same right to representation during the informal stages of a disciplinary proceeding which their private sector counterparts now possess.

Both legislative initiatives address themselves to a central issue: Reform of the existing adverse action appeals system, with the goal of ensuring that the rights of employees are not ignored or abused by the employer when the employee is threatened with deprivation of his job or income.

The bill under consideration by this Subcommittee, entitled the "Federal Employee Administrative Hearing Rights Guarantee Act", would, if enacted, represent another great stride towards this goal, and for this reason we endorse it without reservation.

The Civil Service Commission has itself in the past recognized the need to simplify and standardize the protections and procedures provided under statute and executive order to Federal employees involved in adverse action proceedings. In fiscal 1972, for example, they identified as a priority area for study a review of the effectiveness of existing appellate systems. Their goal, as defined in the 1973 Annual Report of the Civil Service Commission, was to, "build an adverse action system that is intrinsically fair and that properly balances the interests of employees, the interests of the Government as an employer, and the public interest."

The review and study led to the first major overhaul of the system since its inception—a period covering some ninety years. The recommended changes were implemented through issuance of Executive Order 11787, which provided, among other things, that there would be established within the Civil Service Commission a unified, one-level appeals system, called the Federal Employee Appeals Authority, which became the sole administrative remedy for employees covered by that system. The previously existing agency adverse action appeals systems established under E. O. 10987 were abolished.

Abolition of the agency appeals system had a catastrophic impact on some Federal employees. Workers in some eight agencies were deprived at one stroke of their existing rights to a pretermination hearing before an adverse action decision. The agencies were the Department of Health, Education, and Welfare, Justice, Housing, and Urban Development, the Civil Service Commission, the Federal Communications Commission, the National Labor Relations Board and the Civil Aeronautics Board, and the Panama Canal Company.

Instead, Federal employees who wished to retain or obtain this right were given two things in return, the possibility of negotiating such a provision in a contract under Executive Order 11491, and the totally inadequate statutory safeguards contained in section 7501, title 5, United States Code.

As to the first, we cannot argue that employee organizations with exclusive recognition agreements do not have the authority to include a provision providing a pretermination hearing in a contract with their employer. What is permitted within the scope of bargaining, however, and what is achievable are two quite different things.

Such a provision could never be included in a local contract, or even in a contract at the bureau or sub-agency level, for one simple reason: The mechanism of setting up a separate hearing appeals system is practical only on the national level. In other words, this approach is available only to the small minority of Federal employees represented in national exclusive agreements. AFGE now has twenty-three such agreements, and none contain such a provision. We do not anticipate that much further progress will be made in this area.

Existing statutory protections provide an even bleaker picture. Section 7501, title 5, United States Code, reads:

"(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

"(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to—

"(1) notice of the action sought and of any charges preferred against him;

"(2) a copy of the charges;

"(3) a reasonable time for filing a written answer to the charges, with affidavits; and

"(4) a written decision on the answer at the earliest practicable date. Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay."

These few paragraphs are literally all that exist in the way of statutory protection for the vast majority of Federal employees subject to an adverse action proceeding. At the present time, the sole opportunity for a hearing and full due process proceedings exists through appeal to the FEAA within the Civil Service Commission only after the initial adverse determination has been made.

The existing statutory appeals system is overly complex, cumbersome and incomprehensible to the vast majority of Federal employees it is designed to protect. Contained within it are serious defects which prevent even disposition with justice and equity.

There exists a complete lack of procedural safeguards which are taken for granted in any fair adjudicatory system. Civil Service Commission regulations, for example, fail to specify that the agency has the burden of proof in adverse action cases, or that it must present its case first before a hearing officer, thus giving the accused employee an opportunity to examine the charges and evidence for preparation of an adequate defense. The regulations simply do not state who bears the burden of coming forward with evidence and of persuading the finder of fact, although in practice the agency usually goes first.

The employee is exceedingly vulnerable in such circumstances, and frequently lacks access to material he may need to prepare a defense. At present, the hearing officer is *barred* from ordering an employing agency to produce witnesses or documentation that he believes may be relevant to an employee's case. Under these conditions, it does not surprise us that pressure has steadily built over the years for reform of the appeals systems.

A further problem lies in the variation within and between agencies in the competence and expertise of Hearing Officer personnel. AFGE has first-hand experience with problems created by unqualified, inexperienced, and poorly trained agency staff whose improper decisions and procedures set the expensive appeals process in motion.

Enactment of H.R. 6225 would provide that experienced Administrative Law Judges, under the provisions of the Administrative Procedures Act, would hear all cases. They would have full decisional independence, and the authority to issue subpoenas requiring the attendance and testimony of witnesses and the production of documentary evidence bearing on the case. Only under these conditions can a fair hearing occur.

Thousands of Federal employees have followed the FEAA appeals route, convinced that justice was not served at the agency level. The most recent figures available from the Federal Employee Appeals Authority indicate the magnitude of the present problem.

Adverse personnel actions taken against Federal employees during fiscal 1976 have shown a staggering 50-percent increase over fiscal 1975 from 11,682 to 17,577, with most of these resulting from reductions-in-grade. Of the total, 37 percent were appealed to the Civil Service Commission. Approximately one out of five of these cases was rejected by the FEAA on the basis of their not being filed within prescribed time limits or because they did not come within the jurisdiction of Commission regulations. These injured employees will never receive a hearing; they were denied full due process rights despite the fact that in filing for appeal and review it was felt that an unjust unwarranted penalty against them had been applied.

Of those thousands of cases reviewed by the FEAA, fully one out of three agency adverse actions were reversed; two-thirds of these reversals were based on procedural grounds, and one-third on merit.

At this point, we would like to provide you with a profile of the "average" appellant, as determined by the Civil Service Commission. He tends to be a male veteran, 44 years of age, with some 17 years in the Federal service. The employing agency is the Department of Defense, and his average grade is GS-8 or

WG-9. The entrance level salary for GS-8 is \$12,763 per year, and the rates for WG-9 vary with the labor market area.

This profile provides us with a clearer picture of the actual personnel who most frequently find themselves in need of the full due process protection which this legislation seeks to provide. It indicates that the appellant tends to be a person of lower-middle class income who has served the United States Government literally his entire life, and who is faced with the loss of a job or a reduction-in-grade and income when financial responsibilities are greatest. At the age of 44, it is likely that the individual is carrying a mortgage on a home and has children of college age, with all the attendant expenses.

We find it shocking, considering this profile, that arbitrary or wrongful terminations have accounted in some years for as many as 24 percent of those cases appealed to the FEAA. And though the appeals system may in the long-run uphold the claim of the employee, this may occur weeks or months after the initial determination has been handed down. According to figures from the FEAA, in fiscal year 1975 it still took 129 days for the adverse action appeal requiring a hearing.

The elapse of time between the removal and the reversal allows serious and unjustified harm to the employee. The mortgage may have been foreclosed on his home; an intolerable strain placed on his marriage; and great damage done to the employee in the eyes of his family and his community.

The absence of adequate "make-whole" remedies for employees who have successfully appealed an adverse action indicate that, in this situation, an ounce of prevention is worth a pound of cure. The major statutory authorization protecting employees who have undergone an unjustified or unwarranted personnel action is the Back Pay Act of 1966, administered by the Civil Service Commission. Although the Comptroller General has recently issued a number of decisions broadening the applicability of the Act, a GAO report (B-180021, March 20, 1976) points out that there are still gaps in existing law and regulations with the result that innocent employees are unjustly penalized. Years may go by before an employee's right to compensation is established and back pay is received. No interest may be paid on any back pay or allowance and differentials recovered. Losses not directly attributable to the personnel action are not covered by the Act, such as the loss of one's home or automobile, or the denial of promotion and training opportunities.

Furthermore, there are several other ways in which employees unfairly charged are automatically unfairly penalized. Despite the fact that such an employee may expend large sums of money in obtaining a legal remedy for an adverse personnel action, these expenses are for the most part not recoverable. There exist no provisions for the reimbursement of commercial health premiums paid by the employee during the period of his removal from the Federal service, or the cost of health benefits where a policy cannot be obtained.

In addition, it is extremely difficult for a discharged Federal employee to find alternative employment after his discharge. First, if he is honest, he will inform any prospective employer that he was wrongfully discharged from the previous job, and that he has appealed the decision against him in the hope of returning. Second, discharge from the Federal service carries a stigma not unlike a dishonorable discharge from the armed forces.

It does little good for the terminated employee seeking a position to argue that he was treated unfairly; that he was never given the opportunity to cross-examine witnesses or test the veracity of any of the allegations against him; that no impartial official heard his case, but rather that the roles of complaining witnesses, prosecutor, and judge were lodged in the same agency head; or that he had no real capacity to present favorable witnesses or even the benefit of a reasoned decision based on evidence tested through proper due process. Rather, at this moment of great financial insecurity, he is forced onto the labor market, hat in hand, with a major blot upon his record.

The legislation under consideration by this Subcommittee, H.H. 6225, would restore to all non-probationary employees of the Federal government, with few exceptions, the right to a "prompt evidentiary hearing conducted by an impartial official prior to his removal or suspension without pay". In passing this bill, Congress would ensure that the goals elaborated in 1972 by the Civil Service Commission in restructuring the adverse action appeals system would be fully met and equitably applied throughout the Federal service.

For those who say that setting up such a government-wide agency hearing appeals system is unworkable, we would like to point to the experience of the Department of Health, Education, and Welfare, which at its discretion has provided employees with this procedure over the past several years. If the Subcommittee were to contact employees in this agency who have become involved in adverse action proceedings, and compare their experience with those of employees in other agencies, you would find enthusiastic endorsement of enlightened management leadership at the DHEW. The spin-off benefits in terms of improved employee morale, higher employee productivity, and the improved climate of labor-management relations are obvious, and would be felt government-wide were this legislation to be enacted.

We would like to note at this time that the negotiated grievance and arbitration procedure is our preferred vehicle for adjudicating all employee complaints in one forum, including those previously covered under statutory appeals procedures. Under such a system the employee would be guaranteed an impartial hearing when any form of disciplinary action against him is proposed. Arbitrators are trained, experienced, objective and impartial fact finders, sensitive to the needs of both labor and management. In addition, the major virtues of the grievance arbitration process are speed, flexibility, and the ability to bring equity to the workplace.

Until the enactment of comprehensive labor-management legislation for the Federal sector, including binding arbitration as an option in place of the present maze of statutory appeals systems, the need to adequately protect the due process rights of Federal employees remains clear and compelling.

Therefore, we call upon the Congress to speedily enact H.R. 6225 and extend to all Federal employees the essential elements of fair process which traditionally accompany the adjudication of entitlement to property interests under our legal system. In a very real sense, a government employee faced with either a temporary or permanent loss of income should be entitled to a fair administrative hearing before that injury is done to him. Anything less constitutes arbitrary and capricious official action and should not be tolerated by the largest employer in the United States.

STATEMENT OF AUSTIN E. KERBY, DIRECTOR FOR ECONOMICS, THE AMERICAN LEGION

Mr. Chairman and members of the subcommittee, I wish to express my sincere appreciation to the Chairman and the members of this Subcommittee for this opportunity to express the views of The American Legion in connection with H.R. 6225, a bill to amend title 5, United States Code, to guarantee executive branch employees who have completed a probationary or a trial period, the right to a hearing, a hearing transcript and all relevant evidence before final action is taken against such employees.

An identical bill, H.R. 7600 was reintroduced on June 3, 1977. However, in our statement we will refer to H.R. 6225, the original bill.

As The American Legion understands the legislative proposal in H.R. 6225, it would guarantee employees in the executive branch, or the District of Columbia, except those employees whose positions are of a confidential or a policy determining character, or those employees of the Postal Service whose appointments are made under section 1001 of title 39, United States Code, a prompt evidentiary hearing conducted by an impartial individual prior to removal or suspension without pay.

As the Subcommittee is aware, The American Legion is a progressive organization and certainly looks with favor toward constructive legislation which would be instrumental in creating an effective appeals system in the federal service. However, it does not appear to The American Legion that the proposed legislation, namely H.R. 6225 will improve the current appeals system.

In the first place the proposed procedures would be too complicated and technical for the average federal employee and who for the most part would be required to seek legal counsel. Second, federal employees already have adequate statutory and regulatory rights to protect them against arbitrary, capricious and unwarranted agency personnel actions. Presently, employees in the competitive civil service and those employees in the excepted service as well as those in the Postal Service entitled to veterans' preference cannot be removed, reduced in rank or pay, or suspended for more than 30 days except for such cause as will promote the efficiency of the service. The regulations pertaining to the

employee's rights are set forth in the federal personnel manual. Copy of subchapter 1, of chapter 752, is attached hereto.¹ Additionally, after the employee has exhausted all administrative remedies, including an appeal to the three civil service commissioners, he has access to the federal courts.

Thirdly, H. R. 6225 is silent on suspension of 30 days or less. So we would assume a two, five or ten day suspension would require a complete adversary hearing before the administrative law judge. If this is the case, it would be unreasonably costly for a brief suspension, which would encourage agencies to take more stringent adverse action which could be taken just as easily. Therefore, as we see it, this would serve to eliminate the short term suspension for 30 days or less, as a disciplinary measure. Thus, employees would not be disciplined for minor offenses and any deterrent value of lesser adverse action would be eliminated.

Fourthly, but certainly not last, H. R. 6225 would eliminate certain appeal rights now afforded preference eligible employees with the Postal Service. In this connection we would emphasize that The American Legion is unalterably opposed to any legislation, or administrative action, which would seek to destroy or eliminate, any features of the Veterans' Preference Act of 1944, as amended, which include appeal rights of veterans' preference employees with the Postal Service. Our national organization continuously has adopted resolutions which mandate us to oppose any weakening of veterans' preference. This basic intent was reiterated in attached Resolution No. 186 adopted at our Annual National Convention.

With the foregoing thoughts in mind, and after careful review of H. R. 6225, we will attempt to proceed in chronological order to give our analysis of this bill by offering certain amendments.

Commencing with page 2 under section 3, subsection 7501(a), line 11 and 12, the phrase "confidential or a policy determining character" needs to be defined. If left undefined it could be an inroad in weakening the provisions of the Veterans' Preference Act.

Continuing in this same subsection, page 2, line 14 following the word "Code" we respectfully recommend that the following clause be added: "and who is not a preference eligible employee as defined in section 1005(a)(2) of such title."

Section 1005 (a) (2) of the Postal Reorganization Act of 1970 states that: "The provisions of title 5 relating to a preference eligible (as that term is defined under section 2108(3) of such title) shall apply to the Postal Service in the same manner and under the same conditions as if the applicant, officer, or employee were subject to the competitive civil service under such title."

This provision in the Postal Reorganization Act, of course, includes appeal rights to the Civil Service Commission for preference eligible employees. H. R. 6225 as written would repeal that right. The American Legion dogmatically opposes such repeal and urges that our proposed amendment affording preference eligible employees with the Postal Service their statutory right to exercise their appeal rights in case of adverse actions be accepted.

Turning our attention now to subsection 7501(d) page 599, following the word "Columbia" we recommend that the phrase "or the Court of Claims" be added. This would afford an individual a choice in the event it is necessary to seek judicial review.

Further in the same subsection 7501(d), at the conclusion thereof on line 10 following the word "decision." The American Legion recommends that the period be changed to a comma and the phrase "back pay or other appropriate relief" be added. In past years before the back pay law was enacted, agencies on many occasions would not pay back pay claims, and it was frequently necessary for a successful appellant to go through costly court proceedings to collect back pay and other employee benefits to which they were legally entitled. Our suggested amendment would alleviate this need.

Finally, with further reference to subsection 7501(a), we believe in order to give all parties, both the individual and the employing agency, the same right of judicial review that the proposed legislation, if enacted, should provide that an agency have equal right.

Now with respect to subsection 7501(e) page 5, line 14, after the word "agreement," The American Legion recommends that the period be changed to a comma and that the following clause be added: "provided that a preference eligible employee as defined under section 2108(3) of this title shall have the right to elect the procedures in his case."

¹ Retained in the subcommittee files.

The immediately above amendment is in agreement with other statutes pertaining to preference eligible employees, including the 1970 Postal Reorganization Act. Without this offered amendment The American Legion would strenuously oppose this subsection as written, which seems to provide rather ambiguously that the parties to a collective bargaining agreement may elect whether or not to utilize the provisions of H.R. 6225 if enacted.

Lastly, we refer to subsection 7501(f), page 5, line 15. At this point we note the legislation is silent on any necessary and binding authority for the payment of back pay and the restoration of employee benefits for those federal employees who have been improperly deprived of same. The American Legion therefore recommends that subsection (f) be changed to (g) and a new subsection (f) be added as follows:

"(f) the agency shall take the corrective action ordered by the administrative law judge within 30 days after receipt thereof; if the head of the agency fails to carry out the instructions of the administrative law judge, the latter shall furnish a copy of the decision to the head of the agency concerned and certify the facts to the Comptroller General of the United States and thereafter no payment shall be made of the salary or wages accruing to the head of the agency."

The American Legion has had unforgettable experiences with various government agencies over the past years in an effort to have them comply with decisions of the United States Civil Service Commission wherein they have recommended complete restoration of preference eligible employees after a successful appeal. We therefore urge that any legislation of this nature have ample enforcement authority. The above amendment which we have recommended would make it more binding on the agency and it would not be necessary for a successful appellant to pursue corrective remedy in the courts.

In conclusion, The American Legion is strongly opposed to the enactment of H.R. 6225 as written. We already have adequate appeal procedures for federal employees, including preference eligible employees. The appeal procedures as set forth in the proposed bill would be too formal and costly to the adversely affected employee. And above all, the legislation would eliminate certain benefits now afforded preference eligible employees.

The American Legion, therefore, urges that, if serious consideration is given to this proposed legislation (H.R. 6225), the amendments we have recommended herein be incorporated in the legislation.

In closing, I want to thank this Subcommittee for this opportunity to present the views of The American Legion on this proposed legislation.

FIFTY-EIGHTH ANNUAL NATIONAL CONVENTION OF THE AMERICAN LEGION,
SEATTLE, WASH., AUGUST 24-26, 1976

Resolution No.: 186.

Committee: Economic.

Subject: Reaffirm opposition to any and all attempts to weaken or reduce veterans rights and benefits in Federal employment.

Whereas, the American Legion has traditionally favored and supported veterans preference in Federal employment; and

Whereas, any attempt to weaken or destroy the present system of the veterans Preference Act of 1944 and the Veterans Readjustment Act of 1966 (both Acts codified in Title 5, United States Code) has given its stamps of approval to the concept of veterans preference in Federal service; and

Whereas, serious efforts have been made, and are continuing to be made, to weaken, dilute, or circumvent the existing veterans preference laws; and

Whereas, any attempt to weaken or destroy the present system of the veterans preference as set forth in Title 5, United States Code, is contrary to the established policies of The American Legion; *Now, therefore, be it*

Resolved, by The American Legion in National Convention assembled in Seattle, Washington, August 24, 25, 26, 1976, That The American Legion reaffirm its traditional policy and hereby strenuously oppose any and all attempts to weaken or reduce veterans rights and benefits in Federal employment as provided and set forth in Title 5, United States Code.

NATIONAL FEDERATION OF
PROFESSIONAL ORGANIZATIONS
1220 19th Street, N.W.
Washington, D. C. 20036

August 30, 1977

Honorable William L. Clay, Chairman
Subcommittee on Civil Service
U.S. House of Representatives
406 Cannon House Office Building
Washington, D.C. 20515

Re: H.R. 6225

Dear Mr. Chairman:

We are a federation of 11 Federal professional societies composed of Federal employees, and we wish to submit our views with respect to H.R. 6225, a bill that would guarantee to employees of the Executive Branch a right to a hearing prior to removal or suspension by their agencies.

We believe that the purposes sought to be accomplished by this bill are meritorious, but that the effect of its language would so substantially reduce the present procedural and legal rights of employees, as to cause it to be objectionable.

I.

The general purpose sought to be accomplished by the bill, which is to give an employee subject to removal or suspension a right to a hearing before his agency before the effectiveness of the action, would be an important and beneficial right to all Federal employees. Although Section 7501(b)(3) does not provide what agency will grant the employee this hearing -- that is, whether it will be his agency or the Civil Service Commission -- we assume that the bill intends the hearing to be granted by the employee's agency. What the bill would do, in essence, would be partially to restore a system that existed before it was abolished by the President and the Civil Service Commission effective September 9, 1974. Before that time, an employee who was served with charges proposing his removal or suspension was entitled to a hearing before his agency. If, after hearing, the agency sustained the adverse action, the employee was then removed from the payroll. He then had a right to appeal to the Civil Service Commission where he was again entitled to a hearing, this time by an impartial body. However, during this appeal he was removed from the payroll and was without funds. In 1974 the Supreme Court held that a due process hearing, after the employee's discharge, with reinstatement and back pay should the decision be held wrongful, was constitutional. Arnett v. Kennedy, 416 U.S. 134 (1974). H.R. 6225 would, in part, alter that decision by providing that the employee shall be entitled to a due process hearing within his agency before his discharge.

As stated above, we are wholly in support of this purpose. We are also pleased to note that the agency hearing shall be before an administrative

law judge. Under the system that existed prior to September 9, 1974, the agency hearing officer need not be an administrative law judge, or even be a lawyer for that matter.

However, we are disturbed to note that the bill does not state whether the decision of the administrative law judge shall be the final agency decision, or whether it shall be only a recommended decision to an agency operating official within the line of supervision above the employee who is the subject of the proceeding. One of the main problems with the former agency hearing procedure was that the agency hearing official made a recommended decision back to an agency supervisor, who was frequently the man who had directed the employee discharge in the first place and who frequently refused to accept the recommendation of the hearing officer. To obviate this problem we would recommend that a sentence be added to Section 7501(b)(5) reading, "The decision of the administrative law judge shall be the final agency decision."

II.

The provisions of the bill which cause us to oppose it are contained in Section 7501(d) which provides that the decision of the administrative law judge shall be final as to findings of fact, except that the employee may bring an action in a United States District Court for judicial review of the conclusions of law in the decision of the administrative law judge. This is the provision that substantially reduces the present rights of Federal civil servants. To enumerate:

1. At the present time an employee who has been discharged or suspended by his agency has a right to appeal to the United States Civil Service Commission, where he is entitled to a hearing before the Commission's Federal Employee Appeals Authority, and then to an appeal to the Commission's Appeals Review Board. This right would be completely eliminated by H.R. 6225. It is not at all satisfactory for an employee's sole right to a due process hearing to be a hearing before the same agency that is proposing the adverse action. He should be entitled to an impartial review before an impartial agency. This right should not be taken away from him, as this bill would do.

We understand that it was Mrs. Schroeder's intent to eliminate the role of the Civil Service Commission in employee adverse action appeals, because of the long delays that occur at the Commission level. It is true that such delays exist, both before the Federal Employee Appeals Authority and the Appeals Review Board. During the period between 1962 and 1974 when the agency appeals system was in existence, a large percentage of employee adverse action appeals were disposed of at this level. During this period the agency reversed or modified its own action on appeals within the agency in about one-third of all cases. In the two-thirds of the total cases in which the agency action was sustained, the employee accepted the agency action in two-thirds of these, and in one-third appealed to the Civil Service Commission. Since 1974, the Commission has received all employee appeals. Although both the Federal Employee Appeals Authority and the Appeals Review Board have greatly augmented their staffs, they are still falling farther and farther behind in their workload. The remedy for this is not to completely remove the Civil Service Commission from the appellate review process, as this bill

would do, but to restore the agency system which disposed of a large percentage of all adverse action appeals. If that were done, the Civil Service Commission could dispose of its workload expeditiously.

2. At the present time an employee whose dismissal or suspension is upheld by the Civil Service Commission is entitled to resort either to a United States District Court or to the Court of Claims. One of the principal functions of the Court of Claims is to hear Federal employee adverse action cases. We believe that it probably decides as many employee cases as do all of the United States District Courts combined. It has great expertise in the field. We know of no reason why this traditional function of the Court of Claims should now be eliminated. Within the last several years the jurisdiction of the Court of Claims has been enlarged to permit it not only to render money judgments to employees who have been wrongfully discharged, but also the limited equity jurisdiction to direct their reinstatement. At one time the Court of Claims had full authority to render money judgments, but no authority to direct reinstatement, while the District Courts had full authority to direct reinstatement, but could not render money judgments in excess of \$10,000. It was frequently necessary for an employee to file suit with both courts in order to get full relief. That was obviated by P.L. 92-415, approved August 29, 1972, which gave the Court of Claims authority to provide full relief. This bill would not only reverse P.L. 92-415, but would also oust the Court of Claims of its basic jurisdiction, which it has always had, to hear adverse action cases at all.

3. The provision that if the employee goes to a United States District Court, he may not contest the findings of fact of the agency administrative law judge, but only his conclusions of law, greatly narrows the rights that the employee now has. At the present time an employee who resorts to a United States District Court or the Court of Claims to review an agency administrative decision is entitled to the full scope of review provided by the Administrative Procedure Act, 5 United States Code, Section 706. The court may hold unlawful and set aside an agency decision if the findings or conclusions are found to be arbitrary, capricious, an abuse of discretion, not in accordance with law, contrary to constitutional right, in excess of statutory jurisdiction or limitations, or short of statutory right, without observance of procedure required by law, or unsupported by substantial evidence. We know of no reason why the findings of fact of an administrative law judge should not be subject to review if they are not supported by substantial evidence or are arbitrary and capricious.

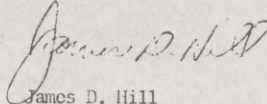
If this bill is to achieve its beneficial purpose of granting to Federal employees a pre-discharge due process hearing, without wiping out the procedural rights that such employees now have, we would think it necessary to remove Section 7501(d) from the bill and to substitute in its place the following:

(d) An employee who is dissatisfied with the decision of his agency shall be entitled to appeal the decision to the Civil Service Commission, where he shall be entitled to an impartial review of the agency decision under procedural rules to be established by the Commission. The Commission shall be empowered to vacate or modify the agency decision, and to direct the agency to comply. An employee who is dissatisfied with

the decision of the Civil Service Commission shall be entitled to bring an action in the Court of Claims, or in the United States District Court for the district in which he resides, or the district in which he was employed, or in the United States District Court for the District of Columbia, where he shall be entitled to a review of the Commission's decision as provided by 5 United States Code, Section 706.

We greatly appreciate the opportunity to submit these comments.

Sincerely,

A handwritten signature in dark ink, appearing to read "James D. Hill", written in a cursive style.

James D. Hill
Executive Director

JDM:aac

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C. 20415

Honorable William L. Clay
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, DC 20515

AUG 16 1977

Dear Mr. Chairman:

This is a reply to your letter of August 11, 1977, concerning testimony made by Mr. Frederick A. Kistler on H.R. 6225 in which he made reference to a constitutional issue.

We have no memoranda on the constitutionality of pretermination hearings since we do not question their constitutionality per se. Predecision hearings are currently permitted by statute and Commission regulation and at least two agencies now voluntarily use such as a step in the adverse action procedural process.

Our constitutional question dealt with the bill's authorization to an Administrative Law Judge, after a predecision hearing, to make a final decision on findings of fact and an administratively final decision on conclusions of law. The essence of the Commission's doubt of the constitutionality of this provision is contained in our written and oral statements and are found on:

- Page 6 of the Commission's formal written comments on H.R. 6225 to the Committee which were approved by the Administration;
- Pages 7-8 of the Commission's written testimony which was submitted for the record in a hearing before the Subcommittee on July 28, 1977;
- Pages 17-18 of the hearing transcript of Mr. Kistler's oral summary of the Commission's comments on the bill; and
- Pages 31-33 of the hearing transcript in which Mr. Arthur L. Burnett, the Commission's Assistant General Counsel, answered a question concerning the basis for our doubt of constitutionality.

These statements which voice the Commission's uncertainty regarding the constitutionality of taking removal responsibility away from the agency head and giving it to an Administrative Law Judge include our legal reasoning. Our internal procedures require clearance of all conclusions of law with the Office of the General Counsel. Therefore, the above conclusion concerning constitutionality was a considered opinion with which the Commission's General Counsel concurred.

I assume that you would like a more detailed statement which includes citations of court cases and our analysis of their applicability. I have asked that this be done and will have it forwarded to you as soon as possible.

Sincerely yours,

Alan K. Campbell
Chairman

95TH CONGRESS
1ST SESSION

H. R. 6225

IN THE HOUSE OF REPRESENTATIVES

APRIL 6, 1977

Mrs. SCHROEDER (for herself, Mrs. SPELLMAN, Mr. CHARLES H. WILSON of California, and Mr. FORD of Michigan) introduced the following bill; which was referred to the Committee on Post Office and Civil Service

A BILL

To amend title 5, United States Code, to guarantee to each employee in the executive branch who has completed the probationary or trial period, the right to a hearing, a hearing transcript, and all relevant evidence prior to a final decision of an agency to take certain action against such an employee, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Federal Employee
4 Administrative Hearing Rights Guarantee Act".

5 SEC. 2. It is the purpose of this Act to guarantee to
6 employees in the executive branch, except those employees

1 whose positions are of a confidential or policy determin-
 2 ing character, a prompt evidentiary hearing conducted by
 3 an impartial individual prior to his removal or suspension
 4 without pay.

5 SEC. 3. Section 7501 of title 5, United States Code, is
 6 amended to read as follows:

7 **“§ 7501. Cause; procedure**

8 “(a) An individual who has completed a probationary
 9 or trial period as an employee in the executive branch or
 10 as an employee of the government of the District of Colum-
 11 bia, except an employee whose position is of a confidential
 12 or policy determining character, or an employee whose
 13 appointment is made under section 1001 of title 39, United
 14 States Code, may be removed, suspended without pay, or
 15 reduced in rank or pay, only for such cause as will promote
 16 the efficiency of the service.

17 “(b) An individual who may be removed, suspended
 18 without pay, or reduced in rank or pay only for such cause
 19 as will promote the efficiency of the service, is, prior to any
 20 removal or suspension without pay, or reduction in rank,
 21 pay, or grade, entitled to—

22 “(1) at least thirty days’ advance written notice
 23 off the action sought, except when there is reasonable
 24 cause to believe such individual is guilty of a crime for
 25 which a sentence of imprisonment can be imposed stat-

1 ing any and all reasons specifically and in detail, for the
2 proposed action;

3 “(2) receive, at the time of the notice required
4 under paragraph (1), all statements, affidavits, in-
5 vestigative reports, and all other evidence relevant to
6 the proposed action;

7 “(3) a hearing before an administrative law judge
8 at which such individual may be represented by counsel,
9 present evidence, and cross-examine witnesses;

10 “(4) a copy of the verbatim transcript of the hear-
11 ings; and

12 “(5) a written decision by the administrative law
13 judge stating the findings of fact and conclusions of law
14 upon which the decision is based.

15 “(c) For purposes of subsection (b) —

16 “(1) The administrative law judge shall, upon
17 application of any party to a hearing under subsection
18 (b) (3), issue subpoenas requiring the attendance and
19 testimony of witnesses or the production of any evi-
20 dence in such proceeding or investigation requested in
21 such application. Within five days after the service
22 of a subpoena on a person requiring the production of
23 any evidence in the possession or under the control of
24 such person, such person may petition the administra-
25 tive law judge to revoke such subpoena. The administra-

1 tive law judge shall revoke such subpoena if in his or her
2 opinion the evidence of which production is required
3 does not relate to any matter under investigation, or
4 any matter in question in such proceedings, or if in his
5 or her opinion such subpoena does not describe with
6 sufficient particularity the evidence of which production
7 is required. The administrative law judge may admin-
8 ister oaths and affirmations, examine witnesses, and re-
9 ceive evidence. Such attendance of witnesses and the
10 production of such evidence may be required from any
11 place in the United States or any territory or possession
12 thereof, at any designated place of hearing.

13 “(2) In case of contumacy or refusal to obey a sub-
14 pena issued to any person, any district court of the United
15 States or the United States courts of any territory or pos-
16 session, or the District Court for the District of Columbia,
17 within the jurisdiction of which the inquiry is carried on
18 or within the jurisdiction of which the person guilty of
19 contumacy or refusal to obey is found or resides or trans-
20 acts business, shall upon application by the party seeking
21 compliance have jurisdiction to issue such person an order
22 requiring such person to appear before the administrative
23 law judge, or, if so ordered, to produce evidence or to
24 give testimony touching the matter under investigation

1 or in question. Any failure to obey such order of the court
2 may be punished by such court as a contempt thereof.

3 “(d) The decision of the administrative law judge shall
4 be final as to findings of fact, except that, an individual suffer-
5 ing an adverse action decision may bring an action in the
6 district court of the United States for the district in which
7 the individual resides, the district in which such adverse deci-
8 sion was made, or in the District Court for the District of
9 Columbia, for judicial review of the conclusions of law of
10 such decision.

11 “(e) The parties to the negotiated collective-bargaining
12 agreement may agree to implement or substitute in whole
13 or in part the above procedure as part of a collective-bargain-
14 ing agreement.

15 “(f) This section does not apply to suspension or re-
16 moval of an employee under section 7532 of this title.”.

17 SEC. 4. (a) Subchapter II of chapter 75 of title 5,
18 United States Code, is hereby repealed.

19 (b) Section 7701 of title 5, United States Code, is here-
20 by repealed.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUL 29 1977

Honorable Robert N. C. Nix
Chairman, Committee on Post Office
and Civil Service
Suite 309 Cannon House Office Building
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

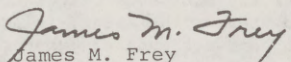
This is in reply to the Committee's request for the views of this Office on H.R. 6225, "To amend title 5, United States Code, to guarantee to each employee in the executive branch who has completed the probationary or trial period, the right to a hearing, a hearing transcript, and all relevant evidence prior to a final decision of an agency to take certain action against such an employee, and for other purposes."

Under present law and regulation, a full appellate hearing conducted by the Civil Service Commission is provided after an agency has removed, suspended or otherwise taken disciplinary action against an employee. The principal purpose of H.R. 6225 is to repeal the post-termination hearing requirement, and substitute a requirement that the agency provide a formal judicial-type evidentiary hearing before such action is taken. These pre-decision hearings would be required to be conducted by an Administrative Law Judge who would be vested with final authority to decide the adverse action. Appeal would be direct to the U.S. District Courts, with no administrative review by the employing agency or the Civil Service Commission.

In their reports, the Civil Service Commission and the Department of Justice state a number of reasons for strongly opposing enactment of H.R. 6225.

We concur in the views expressed by these agencies and, accordingly, strongly recommend against enactment of H.R. 6225.

Sincerely,


James M. Frey
Assistant Director for
Legislative Reference

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

July 26, 1977

Honorable Robert N.C. Nix
Chairman, Committee on Post
Office and Civil Service
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in further reply to your request for the Civil Service Commission's views on H.R. 6225 (reintroduced on June 3, 1977, as H.R. 7600), a bill "To amend title 5, United States Code, to guarantee to each employee in the executive branch who has completed the probationary or trial period, the right to a hearing, a hearing transcript, and all relevant evidence prior to a final decision of an agency to take certain action against such an employee, and for other purposes."

H.R. 6225 would guarantee to employees in the executive branch except those employees whose positions are of a confidential or policy determining character, or those employees whose appointments are made under section 1001 of title 39, United States Code, a prompt evidentiary hearing conducted by an impartial individual prior to their removal, suspension, or reduction in rank or pay. We will begin our report with some preliminary observations.

Federal employees have long enjoyed substantial statutory and regulatory rights which protect them against unwarranted and capricious management action to remove, reduce in rank or pay, or suspend without pay. Currently, a competitive service employee or an excepted service employee entitled to veteran preference cannot be removed, reduced in rank or pay, or suspended for more than 30 days except for such cause as will promote the efficiency of the service. Such an employee is entitled to receive written notice of a proposed adverse action at least 30 days before the action is effected; he is entitled to review all evidence relied upon by the agency in proposing the action; he must be given opportunity and a reasonable amount of official time to reply orally and in writing to the charges on which the action is based; except in situations in which an employee's retention on the job might be detrimental to the interests of the Government or injurious to the employee, his fellow workers, or the general public, an employee must be kept in a duty and pay status during the notice period; an employee is entitled to a written decision which must consider his reply to the charges and which must be made by an official who is at a higher level in the agency than the official who proposed the action; and if the action is effected, the employee has a right to appeal to the Civil Service Commission on both the merits and procedures of the adverse action. The Commission affords the employee a right to representation and to produce and cross-examine witnesses in a full hearing before an impartial appeals examiner who determines whether appropriate procedures were followed and whether the action meets the legal criterion of effi-

ciency of the service. The appeals examiner has authority to order retroactive correction. Finally, the employee has access to the Federal courts.

Few employees in the private sector have rights, procedural or otherwise, comparable to those provided Federal employees before adverse actions may be effected. In most instances, employees of private industry and business (if covered by a labor-management agreement which provides grievance machinery), grieve a suspension or separation after, not before, the action has been taken by management.

The requirements of "due process" are met by the current protections afforded Federal employees. In the Supreme Court decision in Arnett v. Kennedy (416 U.S. 134, 1974) Justices Powell and Blackmun weighed the interest of the Government (maintenance of employee efficiency and discipline) against the interest of the employee (continuance of his income) and concluded that a post-termination hearing satisfies the requirements of due process. Mr. Justice White expressed his belief that the statutory requirement of 30 days' prior notice and an opportunity to answer the charges against them in writing satisfies the requirements of due process in taking adverse personnel actions against Federal employees. Three other justices held that no additional procedural protections are required by the Constitution for Federal employees beyond those expressly provided by statute.

The proposed appeal procedures in the bill appear to be so formal that an employee would not feel sufficiently confident of his/her ability to pursue an appeal without legal counsel. The Commission has long felt that it should not be necessary for an employee to be forced to retain an attorney to represent him in order to receive a complete hearing and an impartial decision on an appeal. For that reason, the Commission has conducted adverse action hearings in a relatively informal manner which does not require knowledge of the Administrative Procedures Act. We believe that an appeal from an adverse action is essentially an employee-employer dispute and that dependence on formal procedures would not serve the best interests of either the appellant or the agency.

We would like to point out that critics of the Federal personnel system believe that in some cases the current protections afforded Federal employees go so far as to deter agency management from taking adverse actions in proper cases. This results in impairment of the efficiency of the service, in some cases lowered morale among competent employees, and a decreased ability for the affected agency to accomplish its mission. While we recognize that any process may result at times in detriment to governmental efficiency, the pretermination hearing requirement in the bill would compound the risks of governmental inefficiency without a concomitant or substantially proportionate benefit to the employee interest that the proposals purport to protect.

H.R. 6225 would amend section 7501 of title 5, U.S. Code, and repeal subchapter II of chapter 75 and chapter 77 of that title. A sectional analysis and specific Commission comments follow:

Subsection 7501(a)

This subsection covers all employees of the executive branch except those who serve in confidential or policy determining positions or are appointed under section 1001 of title 39, U.S. Code (U.S. Postal Service

employees). It prohibits the removal, suspension without pay, or reduction in rank or pay of covered employees except for such cause as will promote the efficiency of the service. The effect of this section is to:

- Extend the statutory adverse action coverage to nonveteran competitive service employees in the executive branch; and
- Extend adverse action coverage to nonpreference eligibles in the excepted service, except for employees in the Postal Service and those whose appointments are of a confidential or policy determining character, and to employees of the D.C. Government.

This means that preference eligibles in the Postal Service who are now protected by the cause standard in Subchapter II of chapter 75, title 5, U.S. Code, and competitive service employees in the Government Printing Office and General Accounting Office now covered by section 7501 of that title would lose their present protection. It also means that employees in Schedules A and B of the administratively excepted service, most employees of statutorily excepted agencies, and nonpreference eligibles in the D.C. Government may not be removed, suspended without pay, or reduced in rank or pay in the future except for such cause as will promote the efficiency of the service.

The Commission believes that only those employees whose appointments have resulted from open competition and selection on the basis of merit, whether the employees are in the competitive service or whether they are under another personnel system based on these principles, should be afforded statutory adverse action protections. Thus, it would be unjust to provide job protections for employees excepted from the competitive service--especially those in administratively excepted positions in Schedules A and B and those excepted by statute when there is no corresponding requirement for selection on merit. At the same time, to remove the job protections from employees now in the competitive service would be unfair. The Commission objects to a coverage provision which would have either result.

In addition, we question the appropriateness of extending coverage to all D.C. Government employees. While we would not recommend removal of the current adverse action protections given to those employees of the D.C. Government who are in the competitive service, we do not think that it is appropriate for the Congress to extend adverse action protections at this time to other municipal employees. Their rights are best determined by the city government.

Subsection 7501(b)

This subsection guarantees the following procedural rights to those employees covered by subsection 7501(a):

- (1) At least thirty days written advance notice which includes the reasons specifically and in detail for the proposed action;
- (2) Receipt at the time of the notice of all statements, affidavits, investigative reports, and all other evidence relevant to the proposed action;
- (3) A hearing before an administrative law judge at which the employee may be represented by counsel, present evidence, and cross-examine witnesses;

- (4) A copy of the verbatim transcript; and
- (5) A written decision by the administrative law judge stating the findings of fact and conclusions of law upon which the decision is based.

Currently, in addition to advance written notice of the proposed action as provided by (1) above, an employee must be given a reasonable time to reply orally and in writing to the charges on which the action is based. In a number of cases, the agency now cancels the proposed action or imposes a lesser penalty after it is given an opportunity to receive and consider the employee reply to the proposed adverse personnel action. H.R. 6225 eliminates this opportunity for an agency to change its mind based on such informal communication. Thus, it is our opinion that a requirement for a formal hearing before an employee has a chance to bring any extenuating circumstances to the attention of a higher level official in the agency would be disadvantageous to both the employee and the agency.

The Commission also firmly believes that procedures such as those provided in the bill should not apply to suspensions of 30 days or less. A requirement, for example, that a two-day suspension may not be effected without a full adversary hearing before an administrative law judge, would effectively wipe out the use of short suspensions (30 days or less) as a disciplinary measure, both because of the cost and because a greater action could be taken just as easily. Employees would not be disciplined for minor offenses and any deterrent value of lesser disciplinary actions would be lost.

The following comments are keyed to the procedural rights described above:

- (2) Commission regulations now require that the material on which a notice of proposed adverse action is based must be made available to the employee for his review. They further provide that material which cannot be disclosed to the employee may not be used by the agency to support the reasons in the notice. Upon appeal, the employee is also entitled to review any evidence submitted to the FEAA as justification for its action. We believe that these provisions provide an employee with all the information he needs in order to prepare a "defense". The language of the bill requires the agency to provide employees with all "statements, affidavits, investigative reports, and all other evidence relevant to the proposed action." (Underlining added.) Unless clarified to show that evidence relevant to the proposed action includes only that material related to the charges on which the adverse action is based, i.e., that material which either tends to prove or disprove the charges, there would be confusion concerning its meaning. It should be evident that an employee is not authorized to obtain other materials.

The language of the bill appears to require that the employee receive the official documents. The Commission believes that the present requirement that an agency make available all material relied upon in taking the personnel action meets all due process requirements and appropriately balances the rights of the employee against those of the agency and the Government. We feel strongly that the official documents themselves should be retained by the Government and that in taking an adverse action either copies must be provided the employee, the original documents be made available for his review, or both.

- (3) This part of the bill provides for a hearing before an administrative law judge. It is not clear whether the administrative law judge is to be an agency employee, an employee of a central agency such as the Civil Service Commission, or if he or she is a contract employee selected to hear a particular case; nor is it clear how the administrative law judge for a specific case would be selected. In addition to the failure of the bill to clearly define the relationship of the administrative law judge to the agency, we see two fundamental legal problems with this provision. First, under current law (which is not amended by the language of H.R. 6225) the administrative law judge positions could not be established on a full-time basis to hear the appeals covered by the bill. Personnel matters ("the selection or tenure of an employee") are specifically excluded from coverage under the Administrative Procedures Act by §554(a)(2), of title 5, U.S. Code, and hence are not adjudicable by administrative law judges except as an adjunct duty when such is not inconsistent with the regular duties. Furthermore, §559 of title 5, U.S.C., provides that the provisions of the Administrative Procedures Act can be superseded or amended by subsequent legislation only insofar as it is done expressly. Since H.R. 6225 does not modify or supersede the exclusion of personnel cases from the APA, administrative law judge positions could not be legally established to adjudicate such cases on a full-time basis.

Second, we believe that the final authority given to the administrative law judge in any contested proposal to remove, suspend, or reduce in rank or pay Federal employees raises a serious question of constitutionality. Section 2 of Article II of the Constitution vests the power of appointment, and as a corollary, the power to remove, in the President with the advice and consent of the Senate. It also authorizes Congress to vest by law the appointment of inferior officers in the President alone, the courts, or heads of departments.

We believe that it may be unconstitutional to delegate by statute to an administrative law judge the authority to make final factual decisions on adverse actions taken against employees, decisions not administratively reviewable by the head of the agency, by the President or anyone under effective Presidential control. Even assuming the constitutionality of the provision, it would be a serious erosion of the management function of the President and heads of agencies and would hinder the efficient performance of government functions.

Subsection 7501(c)

This subsection authorizes the administrative law judge to issue subpoenas requiring the attendance and testimony of witnesses or the production of any evidence requested by any party to the hearing. This authority is supported by the power of any District Court to order compliance with the subpoenas. The administrative law judge is given authority to revoke a subpoena upon application by the person who receives the subpoena whenever he or she determines that the evidence that would be produced is not relevant or adequately described. The Commission believes that it would be more economical and efficient to require the party who has requested the witness or evidence to justify the request in terms of relevancy. It should be noted that although the Commission's appeals officers do not

have subpoena power, they experience few problems in obtaining relevant evidence and witnesses from agencies. In the event that an appeals officer is unable to obtain cooperation and a requested witness is likely to possess special or peculiar knowledge about the matters in dispute, he or she may, when assessing the totality of evidence in the case, infer that the absent witness would have given testimony unfavorable to the employing agency.

Subsection 7501(d)

This subsection provides that the administrative law judge's decision is final as to findings of fact. Currently, an agency frequently decides to impose a lesser penalty than the one originally proposed, or in some cases, to cancel the proposed action altogether after it has considered the employee's reply to the proposed action. H.R. 6225 would eliminate this opportunity for an agency to change its mind after informal communication. Thus, it is our opinion that a requirement for a formal hearing before an employee has had an occasion to bring any extenuating circumstances or a simple plea for a second chance to the attention of a higher level official, would be disadvantageous both to the employee and the Government.

We note that the bill provides that only the individual suffering an adverse decision may file suit for judicial review of the conclusions of law relied upon in the administrative law judge's decision. Since enactment would take away an agency's authority to take necessary adverse actions against its employees and give it to an administrative law judge, the agency should have an equal right to obtain judicial review.

It is not clear whether a request for court review would stay the adverse action. If so, given current time schedules and all the administrative procedures provided for in the bill, it might take several years for an agency to effect an appropriate adverse action. During such time the agency would be in a position of retaining an employee with whom the agency has an adversary relationship in a duty and pay status.

Subsection 7501(e)

This subsection appears to provide that the parties to a collective bargaining agreement may elect whether or not to implement the provisions of H.R. 6225. Any procedural protections or lack thereof for Federal employees covered by such agreements would, therefore, depend on whatever was bargained by the agency and the labor organization. Federal employees with like status would no longer be guaranteed the same minimum protections; some would have more and some less.

In summary, the Commission strongly opposes enactment of H.R. 6225 because:

- (1) it would result in the over-judicialization of administrative determinations by requiring formal procedures conducted by highly trained administrative law judges;
- (2) the present informal procedures now serve the public interest in efficient government by permitting agencies to effect expeditiously necessary actions while at the same time employees are afforded extensive protections;
- (3) it would not guarantee equal protection for all government employees because of the provision that collective bargaining could provide a multiplicity of alternate procedures; and

(4) it would be an infringement on the constitutional authority of an agency head to appoint and remove employees under his jurisdiction.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,

Kenneth Poston
Acting
Chairman

Department of Justice
Washington, D.C. 20530

AUG 3 1977

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

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 6225, a bill "To amend title 5, United States Code, to guarantee to each employee in the executive branch who has completed the probationary or trial period, the right to a hearing, a hearing transcript, and all relevant evidence prior to a final decision of an agency to take certain action against such an employee, and for other purposes."

H.R. 6225 would provide a pre-termination hearing for a Federal employee who has completed his probationary period, before the effective date of an agency decision to remove, suspend, or reduce in rank or pay that employee. However, the bill would not apply to employees in confidential or policy-making positions. Additionally, H.R. 6225 would require these pre-termination hearings to be conducted by an administrative law judge, who would be empowered to subpoena Government employees and private citizens to testify at these hearings. The decision of the administrative law judge would be final, subject to judicial review in the United States District Courts. Finally, the provision of law (5 U.S.C. § 7701) providing for review of such agency-initiated actions by the U.S. Civil Service Commission (Commission) would be repealed, thereby eliminating administrative review of these actions.

Currently, these adverse action procedures are governed by 5 U.S.C. §§ 7501-7512 and 7701, and 5 C.F.R. Parts 752 and 772. Presently, these statutory and regulatory provisions do not require an evidentiary hearing prior to a final agency decision to take an adverse action against an employee. Further, the hearings currently provided for are not conducted by an administrative law judge, and there is no power of subpoena in the presiding hearing officer.

Section 2 of H.R. 6225 would mandate an evidentiary hearing prior to a final agency decision to remove, suspend, or reduce in grade or rank an employee. However, the requirement of a pre-termination evidentiary hearing is not essential to due process in light of the Supreme Court's decision in Arnett v. Kennedy, 416 U.S. 134 (1974), and such a requirement could be inimical to the public interest by disrupting the efficient operation of the Government. While we recognize the need for adequate protection for employees against arbitrary and capricious agency action, we feel that an appropriate balance, between the Government's need to conduct its business and an employee's right to protect his or her property interest, is required. A cumbersome process to suspend an employee for one day serves neither the public interest nor the Government's interest. With a full-blown evidentiary hearing, including a verbatim transcript, it could cost several thousand dollars to suspend an employee for one day. Simply put, the expense of taking such an action outweighs the benefit to be achieved.

Another problem with Section 2 of the bill is that it does not define positions of a "confidential or policy determining character," which are excepted from the bill. While presumably Schedule C and supergrade, i.e., GS-16, 17, and 18, positions would be covered by this exception, it is not clear whether the bill intends to adopt the current Commission definition of a confidential or policy-determining position contained in 5 C.F.R. § 123.3301.

Section 3 of H.R. 6225 would implement the objectives of Section 2 by establishing procedures and criteria for taking an adverse action against a non-probationary employee subject to the bill. However, except "when there is reasonable cause to believe such individual is guilty of a crime for which a sentence of imprisonment can be imposed," H.R. 6225 does not have any provision that would allow for the emergency suspension of an employee pending other adverse action (removal or indefinite suspension) when such an employee would be a hazard to himself or herself or others, or to Government property. The bill, as currently written, would require a hearing before any such emergency suspension. Additionally, this provision does not differentiate between misdemeanors and felonies.

The requirement in Section 3 of the bill that an administrative law judge conduct the evidentiary hearing is both impractical and unnecessary. Presently, there is a shortage of qualified eligibles on the Commission register

for administrative law judges. Furthermore, this problem is compounded by recent legislative enactments which require the use of administrative law judges in various types of administrative adjudications. Accordingly, H.R. 6225 would exacerbate rather than alleviate this shortage.

Also, an adverse action is primarily an administrative personnel matter concerning a breach of the employer-employee relationship. Therefore, knowledge and experience in the fields of personnel administration and/or labor-management relations are more important to a hearing officer conducting an adverse action hearing than extensive experience in the field of law. While many of these hearing officers (called "appeals examiners") are attorneys -- a requisite for all administrative law judges -- the experience of the Department of Justice is that a law degree is a useful but not an essential criterion. In fact, the Department has successfully employed former Federal employees, many of whom are not lawyers, to conduct grievance and adverse action hearings involving Departmental personnel. Hence, mandating the use of administrative law judges for these proceedings is not (according to the Department's experience) necessary.

Section 3 of H.R. 6225 also provides that the hearing officer will be vested with subpoena powers which are judicially enforceable, unlike the present adverse action procedures. Clearly, this authority may be helpful in the resolution of certain cases, particularly those concerned with off-the-job misconduct or misconduct against members of the public. Nevertheless, the issuance of a judicially enforceable subpoena to a member of the public over an issue that is essentially an internal agency personnel matter seems unwarranted. Additionally, such a process can create secondary litigation, thereby complicating and delaying resolution of the underlying disciplinary proceeding.

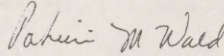
A matter of principal concern to the Department is the bill's apparent expansion of its procedural protections to employees in the excepted service (other than preference eligibles in the excepted service who already enjoy such protections), except, as noted earlier, to those in confidential or policy-making positions. Under existing law, non-preference eligibles in the excepted service may be discharged at will. Sections 2 and 3 of H.R. 6225, however, would extend the bill's coverage to all attorneys (5 C.F.R. § 213.3101) and to all employees of the Federal Bureau of Investigation (28 U.S.C. § 536). Before extending competitive-service-type protections to either group of employees, we believe the Congress should re-examine whether the rationales which caused these groups of employees to be taken out of the competitive service are still valid or not. Moreover, the intended effect of the bill is to make it more difficult to take serious adverse action against a Federal employee and to make it substantially more difficult to suspend employees for even short periods, by providing a pre-action hearing in all cases. Whether or not these policies are desirable, as noted above, they are not constitutionally required. For these reasons, we believe that extension of these expanded protections to attorneys and other excepted service personnel is neither timely nor justified.

Finally, we strongly believe that the extent of the Government's obligation to release to the employee involved in the proceedings all evidence relevant to the proposed action should be more narrowly defined, and that only evidence upon which the action is based should be made available to the employees. In many situations, the Government will have evidence, other than exculpatory, which it may decide should not be used in the best interests of the Government. Also, the bill fails to protect informants and other sources of the information made available.

In summary, for the reasons set forth in this letter, the Department of Justice strongly recommends against enactment of H.R. 6225.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,



Patricia M. Wald
Assistant Attorney General
Office of Legislative Affairs

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FPC-77-46
B-40342

July 8, 1977

The Honorable Robert N. C. Nix, Chairman
Committee on Post Office and Civil Service
House of Representatives

Dear Mr. Chairman:

Your letter of April 22, 1977, requested our report on H.R. 6225, 95th Congress, 1st Session, a bill to guarantee certain employees in the Executive Branch the right to evidentiary hearings and other procedural protections prior to removal, suspension without pay, or reduction in rank or pay.

The bill proposes several major changes to existing adverse action rights and procedures. Section 2 of H.R. 6225 would provide employees in the executive branch with statutory entitlement to a prompt evidentiary hearing conducted by an impartial individual prior to removal, suspension without pay or reduction in rank or pay.

Section 3 of the bill amends 5 U.S.C. section 7501 to define individuals who may be removed, suspended without pay, or reduced in rank or pay only for such cause as will promote the efficiency of the service to include all individuals who have completed a

probationary or trial period and who are employed in the executive branch or the Government of the District of Columbia with the exception of employees whose positions are of a confidential or policy determining character. Employees of the Postal Service appointed under 39 U.S.C. section 1001 are specifically excluded from this provision. It is not clear, however, whether all employees of the legislative and judicial branches of the Government would be excluded from the provisions of the bill.

Subsection (b) of the amended section 7501 would require, among other things, with respect to removal, suspension without pay, or reduction in rank or pay, that the following rights be accorded an individual prior to such actions.

- (1) At least 30 days advance written notice, except when there is reasonable cause to believe the individual is guilty of a crime for which the penalty is imprisonment;
- (2) To receive concurrently with notice, all statements, affidavits, investigative reports, and all other evidence relevant to the proposed action;
- (3) An evidentiary hearing before an Administrative Law Judge;
- (4) To receive a copy of the verbatim transcript of the hearing; and
- (5) A written decision by the Administrative Law Judge stating the findings of fact and conclusions of law upon which the decision is based.

Subsection (c) of the amended section 7501 would empower the Administrative Law Judge to issue subpoenas for witnesses and the production of evidence, to administer oaths and affirmations, examine witnesses and receive evidence. In case of refusal to comply with a subpoena of an Administrative Law Judge, the party seeking production of witnesses or evidence would have a right to apply to a United States District Court for an order requiring compliance, failure to comply being subject to punishment for contempt of court.

Subsection (d) of the amended section 7501 would provide an individual receiving an adverse decision from an Administrative Law Judge the right to judicial review of the conclusions of law of such a decision by a United States District Court. In this connection, we note that there is no indicated timeframe in which a court action must be brought. Also, it is not clear what the status of the employee will be nor the decision of the Administrative Law Judge when judicial review is sought. We note that no express provision is made concerning the finality of the Administrative Law Judge's conclusions of law.

Section 4 of the bill would repeal subchapter II of chapter 75 of title 5, United States Code, relating to preference eligible employees. The first section of the subchapter, section 7511, defines a preference eligible employee, as well as the meaning of the term "adverse action." It is the second section of the subchapter, section 7512, that contains the procedures for suspension or removal of such employees. Since preference eligible employees enjoy many privileges

contained in other sections of the code which in turn refer back to section 7511 for a definition of the term "preference eligible," we think it is unwise to eliminate this section altogether. Accordingly, we suggest that section 4(a) be amended to read:

"Section 7512 of title 5, United States Code, is hereby repealed."

The bill would also repeal section 7701 of title 5 which now confers upon preference eligible employees the right to appeal adverse action decisions to the Civil Service Commission. Executive Order 11491 as amended accords employees in the competitive service the right to appeal adverse action decisions to the Civil Service Commission and such appeals are to be processed in an identical manner to that provided for appeals under section 7701 of title 5 of the United States Code. The appeal right is not available prior to the adverse action; however, the Commission procedures provide for a full evidentiary hearing before a qualified examiner.

The procedures set forth in the bill regarding notice, hearing and transcript requirements, etc., apply with equal force to a 1-day suspension of an employee without pay as they do to the removal of an employee. We believe that an agency official faced with the requirement to comply with these costly and time-consuming safeguard procedures in minor disciplinary cases, would either escalate the punishment to make it appear to justify the procedures or choose not to punish an employee at all except for the most serious infractions. Either of these courses of action would have a depressing effect on employee morale, discipline and efficiency in the Federal Service. Thus, while the safeguard procedures appear to have merit for serious adverse actions such as: (1) removal; (2) suspension without pay for more than 30 days; (3) reduction in rank or pay, such safeguard procedures do not appear warranted or appropriate for suspensions without pay for periods of 30 days or less, especially when the procedures would serve to deter the imposition of the milder type of disciplinary action. In this connection we point out that historically the Civil Service Commission has in its implementing regulations on adverse actions distinguished between suspensions of 30 days or less and suspensions of longer durations and has prescribed different procedures for each of these adverse actions. Accordingly, we believe that the bill should not apply the procedural safeguards to suspensions without pay of 30 days or less. Thus we recommend that section 3 of the bill, on page 2, line 20, should be changed as follows: "***removal or suspension without pay for more than thirty days, or reduction in rank***." On page 5, beginning on line 11, we would insert a new section (e) as follows:

"(e) An individual in the executive branch whose suspension without pay for 30 days or less is sought is entitled to reasons in writing and to--

"(1) notice of the action sought and of any charges preferred against him;

"(2) a copy of the charges;

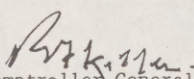
"(3) a reasonable time for filing a written answer to the charges, with affidavits; and

"(4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the suspension without pay for 30 days or less. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of suspension without pay for 30 days or less, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission."

Subsections (e) and (f) of the amended 5 U.S.C. 7501, would be redesignated as sections (f) and (g) respectively.

Sincerely yours,


Deputy Comptroller General
of the United States

**UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF POLICIES AND STANDARDS
WASHINGTON, D.C. 20415**

SEP 30 1977

Honorable William L. Clay
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Chairman Campbell has asked me to provide you with a more detailed statement of the Commission's official comments on the question of constitutionality of the provision of H.R. 6225 which would have the effect of taking removal authority away from the agency head and giving it to an Administrative Law Judge. Following are specific citations together with our analysis of their application.

The Power to Appoint and Remove

The U.S. Constitution, Article II, Section 2, states:

"...He (the President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

13 Op. Atty. Gen. 516, August 31, 1871, on the appointment of subordinate officials states that Congress has power to distribute, at its pleasure, the appointment of inferior officers between the President, courts of law, and heads of departments, or to vest such appointments exclusively in one or two of these depositaries; but it has no power to vest appointment elsewhere directly or indirectly. Also, Congress cannot restrict the choice of the head of a department to the point where he would have no choice, but it is not unconstitutional for an examining board to furnish a certain number of names obtained by a test from which the head of a department shall make selections.

Notes of Decisions, Sec. 7501, 5 USC, Note 28 on the general authority for employment and removal states that "...Appointment to public office carries with it right of removal, except where some law of Congress declares to the contrary. (*Maghan v. Board of Com'rs of District of Columbia*, 1944, 141 F.2d 274, 78 U.S. App.D.C.370. Also, *Watson v. U.S.*, 1957, 137 Ct.Cl. 557, certiorari denied 78 S.Ct. 18, 355 U.S. 14, 2 L.Ed.2d 23.)

Additional court cases.

In the absence of constitutional or statutory restriction, the power of appointment carries with it, as an incident, the power to remove when no definite term is attached to the office by law. (*U.S. v. Lap, Ohio*, 1917, 244 F. 377, 157 C.C.A.3. Also, *Levy v. Woods*, 1948, 171 F. 2d 145, 84 U.S. App.D.C. 138.)

The power of appointment in the federal classified civil service includes the power of removal. (*Kohlman v. Smith*, D.C.Pa. 1947, 71 F.Supp. 73.)

Where an authority vested by law with the power of appointment removes an employee whose term of office is not for a fixed period, and the right to remove is not forbidden by the Constitution or statute, the court will not review the causes of removal. (*Costello v. U.S.*, 1916, 51 Ct.Cl. 257.)

United States v. Perkins, 116 U.S. 483 (1886) held that the Congress may limit and restrict the power of removal in the public interest. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926); and *Martin v. Tobin*, 451 F. 2d 1335 (9th Cir. 1971) support the position that the head of a department or agency cannot be totally deprived of his power to make, in the first instance, the decision to remove those "inferior executive officers" which he has authority to appoint.

CSC Conclusions

It appears to the Civil Service Commission that it has been clearly established that:

- Congress may vest appointment authority in the President, the Courts, or the heads of departments or agencies but not elsewhere;
- The removal authority of the agency head is derived from his authority to appoint; and
- Congress may limit or restrict in the public interest the removal authority of the head of an agency but it may not totally deprive the agency head of the authority to make a decision to remove an employee whom he has appointed.

H.R. 6225 would authorize the ALJ to make a final decision on findings of fact and an administratively final decision on conclusions of law. The Commission believes that this proposed statutory delegation of the authority to make the final administrative decision to remove is not just a restriction on the authority of the head of the agency but rather has the effect of depriving the agency head of the exercise of his authority. The Commission distinguishes such a statutory requirement from a voluntary delegation by the agency head to an ALJ or hearing examiner to make the decision for him since a voluntary delegation permits the agency head to retain ultimate authority on the removal decision.

Sincerely yours,

Frederick A. Kistler
Director

Statement for the record by James M. Peirce, President of the National Federation of Federal Employees, concerning HR.6225, the Federal Employees Administrative Hearing Rights Guarantee Act.

The purpose of HR.6225 is to give Federal employees the right to a hearing prior to the effective date of certain disciplinary actions. The NFFE has long supported this concept. We believe that a prior hearing is a fundamental due process requirement that ought to be incorporated into the Federal personnel system. It is, in our estimation, virtually impossible for a Federal employee to receive a fair hearing after the discipline has been effectuated. The action taken is a prejudgement which renders a fair hearing impossible.

It is argued that a hearing after disciplinary action is effectuated is adequate, since the employee is entitled to back pay if he is successful on appeal. We do not accept that logic. It overlooks certain basic facts of life. An employee who has been removed or otherwise disciplined suffers enormous embarrassment and prejudice. Moreover, being absent from the job for a considerable period of time makes reentry difficult not only for the employee but for co-workers as well.

For the reasons we have suggested we believe the system must be revised. Unfortunately, although we fully support the concept of HR.6225 and wish to complement the authors of this bill, we believe that as drafted it is confusing and inadequate. Section 2 provides that:

"It is the purpose of this act to guarantee to employees in the Executive Branch, except those employees whose positions are of a confidential or policy determining character, a prompt evidentiary hearing...."

The question that must be asked is, what circumstances apply to employees such as "confidential" secretaries? It would appear that those employees who are classified as "confidential" or who occupy "policy-determining" positions would be deprived of this right to a hearing. This section, as well as what is meant by the words "confidential" and "policy-determining" must be clarified. We could not support a provision which would grant one group of employees a benefit at the expense of another group of employees.

Section 7501(a) makes the provisions of this bill applicable to reduction in rank or pay. We argue that this is appropriate whenever the reduction in rank or pay is the result of a disciplinary action. We question, however, whether the machinery created by this bill would be adequate to handle the vast number of downgrades that we are now experiencing. Downgrades involve technical questions which can be more appropriately handled in an administrative setting, rather than in the adversary procedures created by this bill. We are concerned that the sheer number of downgrades would simply overwhelm the system and, rather than speeding up the process, further slow it down. For this reason we believe it should be preferable to reform the present system of dealing with downgrades and to preserve the system created by the bill for disciplinary actions.

Our final and most serious concern with this bill is that for all practical purposes, it abrogates all appeal rights. As currently drafted, the decision of the administrative law judge is "...final as to finding of fact...." Therefore, if an individual is not satisfied with the ruling of the ALJ, the only right of redress is to petition a United States District Court to review the conclusions of law reached by the ALJ. This, of course, presumes that the individual has enough money to retain an attorney to file the required action in district court. However, if the individual is represented by a union, the financial burden may shift. But whether or not the burden shifts, the bill creates a financial impact which will have the effect of denying employees the right to appeal. Further, even if one assumes that all employees will be able to meet the financial burden, a still more serious question remains. The bill clearly provides that the ALJ's decision is final as to "findings of fact." Judicial review may be had only as to the conclusions of law reached by the ALJ. Therefore,

if the ALJ is correct on the law but wrong on the facts, an individual could not successfully appeal a wrongful removal. We submit that it is the facts which determine the outcome of the vast majority of disciplinary actions. Either an employee did or did not do certain things which warranted disciplinary action. If an employee can neither challenge those findings of fact nor appeal them, for all intents and purposes the employee does not have a right to appeal.

As we indicated earlier, we fully support the concept of HR.6225. We cannot, however, support the bill as drafted for the reasons already stated. We therefore urge that the subcommittee correct the defects we have noted and report this very important bill out as soon as possible.

STATEMENT OF PETER T. LYONS, ASSISTANT GENERAL COUNSEL, NATIONAL
ASSOCIATION OF GOVERNMENT EMPLOYEES

Mr. Chairman, Members of the Subcommittee, I appreciate the opportunity of providing you with the views of the National Association of Government Employees on H. R. 6225. The bill entitled the "Federal Employee Administrative Hearing Rights Guarantee Act" would afford to federal employees, the right to a hearing, the hearing transcript, and all relevant evidence prior to a final decision of an agency to take certain adverse actions against an employee. The National Association of Government Employees believes that such rights should inure to the benefit of federal employees and is in full support of the legislation which is before this Committee today.

Under the present system, full due process proceedings are not afforded federal employees until initial adverse determinations have been made. Thus, federal employees can be separated from service, reduced in rank or suspended before they receive a hearing on such matters. Under existing law, the employees,

confronted with adverse actions, are, in effect, guilty until proven innocent. The procedures for adverse actions are set out in Title 5 of the United States Code at section 7501, it reads:

- "(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service (emphasis added)
- (b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to:
 - (1) notice of the action sought and of any charges preferred against him;
 - (2) a copy of the charges;
 - (3) a reasonable time for filing a written answer to the charges, with affidavits; and
 - (4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided at the discretion of the individual directing the removal or suspension without pay."

This statute provides little or no protection for the beleaguered employee for once the stigma of removal or suspension is placed on him it is very hard to get the initial decision overturned.

On close examination, the statute is ambiguous and capable of various interpretations. Under sub-section (a) of Section 7501 we see that suspension or removal is warranted "for such cause as will promote the efficiency of the service". I ask the Members of this Committee for their interpretation of this phrase. If each of you were asked individually, I'm sure that I'd receive five or six different opinions. Well, Ladies and Gentlemen of this Committee, I submit to you that this

is exactly what occurs in actual practice. The National Association of Government Employees represents over 100,000 federal employees and thus is confronted with many adverse actions which affects its membership. Management officials always seem to be able to construe this statute in their favor and by so doing effectuate many unwarranted suspensions and removals each year. Under Section 7501 of Title 5 of the United States Code, federal employees are not given the right to present evidence or confront witnesses against them until their removal or suspension has been implemented. Where does this leave the hapless employee? It leaves the employee in financial havoc for he or she is confronted with the problems of mortgage foreclosures or eviction from rented dwellings, inability to feed their children and inability to meet financial obligations which have been incurred. The agencies argue that the employees will be made whole if they receive a favorable decision in their appeal proceedings, but I submit to the Members of this Committee that the damage has been done and no amount of money could ever restore the losses sustained by the employee. The employee must start anew and try to recapture the lifestyle he was accustomed to before being subjected to the inequities of the adverse action system of the federal government. Removal or suspension from service without pay should not be implemented without affording the employee the opportunity to a full hearing on the alleged misconduct. The hearing must be held at a meaningful time, i.e., before the deprivation of the employee's liberty or property takes place.

The issue of whether a federal employee in the competitive service, entitled by statute to serve in his job without fear of dismissal except for cause (5 USC 7501), must be given an evidentiary hearing before he or she is discharged was

confronted in the case of Arnett Vs. Kennedy (416 US 134). Although the court struck down the issue in a six (6) to three (3) decision, the strong dissenting opinion adhered to the position taken by the National Association of Government Employees here today. The Association concurs with the dissenting opinions of Mr. Justice Marshall, Mr. Justice Douglas and Mr. Justice Brennan and asks the Congress to implement this legislation so as to ensure federal employees that their due process rights will be protected. In the dissenting opinion of Arnett Vs. Kennedy (416 US 134) Mr. Justice Marshall states:

"Even if we accept the appellants assertion that a subsequent hearing affords the discharged employee an opportunity to clear his name, the worker still has a significant interest in retaining his job pending a full hearing. Almost a fourth of all appeals from agency dismissals result in a finding that the termination was illegal. And, the delay from discharge to ultimate vindication at a hearing on appeal is far from insubstantial. More than 75% of adverse personnel actions take more than two months to process, over half take more than three months and a not significant number take more than a year. The longer the period between the discharge and the hearing, the more devastating will be the impact of the loss of employment".

Mr. Justice Marshall goes on to state that;

"Even aside from the stigma that attends a dismissal for cause, few employers will be willing to hire and train a new employee knowing that he will return to a former Government position as soon as an appeal is successful".

These problems are the ones which the federal employees are confronted with and we feel that this legislation would help alleviate most of these inequities.

In dicta from the Board of Regents Vs. Roth (408 US 564) case, it is noted that;

"This Court has often had occasion to note that a denial of public employment is a serious blow to any citizen... Employment is one of the greatest, if not the greatest, benefits that governments offer in modern day life."

The National Association of Government Employees agrees with the concept and believes that a pre-termination hearing should be afforded these employees.

In conclusion, the National Association of Government Employees would like to reiterate its support for this piece of legislation. We call for the enactment of HR 6225 for we believe that the arbitrary and capricious termination or suspension of employees without a hearing constitutes a denial of these employees' due process rights. Just because the present system has been allowed to persist does not necessarily make it right. Under the present statutory provision, justice delayed may well be justice denied. I would like to thank you Mr. Chairman and the Members of this Committee for the opportunity to express the union's views on this important piece of legislation.