

Getting the Fox Out of the Chicken Coop: The Movement Towards Final EEOC Administrative Judge Decisions¹

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Introduction

A federal employee who files an Equal Employment Opportunity (EEO) complaint can request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) administrative judge (AJ).² The AJ will hear the case and issue a *recommended* decision.³ The agency against which the complaint was filed then makes the *final* decision in the case, accepting or rejecting the AJ's recommended decision.⁴

The EEOC recently proposed changes to the regulations governing federal sector EEO complaints processing.⁵ Perhaps the most significant proposal was to make EEOC AJ decisions final, rather than mere recommendations to the agency.⁶ Congress has made similar proposals in draft legislation called the Federal Employee Fairness Act (FEFA), although none have yet passed muster.⁷

This article analyzes the movement to finalize EEOC AJ decisions. It first provides background information on the current federal sector EEO complaints processing system. It then discusses the latest proposals to give EEOC AJs final decision

authority. Next, it focuses on the EEOC's power to make such a change: are AJ final decisions within the EEOC's statutory authority? Finally, this article analyzes whether empowering AJs with final decision authority is good policy.

This article concludes that the EEOC has the statutory authority to make AJ decisions final and that doing so is wise policy.

Background

Commission regulations govern the processing of federal employee EEO complaints. A brief discussion of these procedures is necessary to understand the proposals to make AJ decisions final.⁸

Federal employees who feel that they have been discriminated against must first file an informal EEO complaint with an agency EEO counselor.⁹ The EEO counselor tries informally to resolve the complaint in a manner suitable for all parties.¹⁰ If the complaint is not resolved at the end of the counseling

1. Evan Kemp, while testifying before Congress as Equal Employment Opportunity Commission Chairman during the Bush administration, described the conflict of interest created by having the very agency accused of discriminating involved in investigating and deciding the case. He likened the process to a fox "right there in the chicken coop, eating the chickens." H.R. REP. NO. 103-599, at 37 (1994) (quoting *Joint Oversight Hearing on the Federal Equal Employment Opportunity Complaint Process Before the Subcomm. On Employment Opportunities of the Comm. On Educ. and Labor and the Subcomm. On the Civil Serv. of the Comm. On Post Office and Civil Serv.*, 101st Cong. 3 (1990)).

2. See Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.108(b) (1998). The EEOC regulations governing the processing of EEO complaints filed by federal employees (or applicants for employment) are found in 29 C.F.R. pt. 1614. Persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, handicap, or reprisal may file such complaints. See 29 C.F.R. § 1614.103, § 1614.105.

3. See 29 C.F.R. § 1614.109(g).

4. See *id.*

5. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

6. See *id.* at 8598.

7. See, e.g., Federal Employee Fairness Act of 1997, H.R. 2441, 105th Cong., 1st Sess. (1997) (proposing to amend Title VII of the Civil Rights Act of 1964 to improve the effectiveness of administrative review of employment discrimination claims made by Federal employees). See *infra* text accompanying notes 24-34 (discussing the FEFA).

8. This description of the EEO administrative process will be very basic. For a detailed description of every stage of the complaints process, accompanying time deadlines, and various machinations of the EEO process, see John P. Stimson, *Unscrambling Federal Merit Protection*, 150 MIL. L. REV. 165, 190-96 (1995).

9. See 29 C.F.R. § 1614.105(a). The majority of counselors are agency employees who conduct counseling activities as a collateral duty. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FEDERAL SECTOR REPORT ON COMPLAINTS PROCESSING AND APPEALS BY FEDERAL AGENCIES FOR FISCAL YEAR 1997 18 [hereinafter EEOC 1997 REPORT].

10. See 29 C.F.R. § 1614.105(c).

period, the EEO counselor notifies the employee that he may file a formal EEO complaint.¹¹ If the employee “goes formal”¹² and the agency accepts the complaint,¹³ it is investigated by the agency.¹⁴ The agency forwards the completed investigation to the employee.¹⁵ The employee then decides either to request a hearing before an EEOC AJ¹⁶ or request the agency issue a final decision without a hearing.¹⁷ If requested, an AJ will hear the case and make a recommended decision to the agency.¹⁸ This decision will include findings of fact, conclusions of law, and an order for appropriate relief, if necessary.¹⁹

The agency then issues a final decision on the EEO complaint and adopts, rejects, or modifies the AJ’s recommended decision.²⁰ If the agency does nothing after sixty days, the AJ’s recommended decision becomes the final decision in the case.²¹ The employee may appeal the agency’s final decision to the EEOC²² or sue the agency in federal district court.²³

Proposals to Give EEOC AJs Final Decision Authority

Both Congress and the EEOC have proposed removing the figurative agency fox from the EEO complainants’ chicken coop. Agencies would no longer have the ability to issue final decisions on EEO complaints. The new and supposedly more friendly fox would be EEOC AJs, who would issue final decisions in EEO cases.

Federal Employee Fairness Act

Congress has repeatedly expressed dissatisfaction with the way federal sector EEO complaints are administratively processed.²⁴ Congress has proposed legislation, the FEFA, to address its concerns.²⁵ Although not enacted, the FEFA (or some form of the FEFA) has been introduced in every Congress since 1990.²⁶

11. *See id.* § 1614.105(d). The counseling period is normally 30 days from the date the employee brings the matter to the counselor’s attention. *See id.*

12. *See id.* § 1614.106.

13. Agencies are currently required to dismiss complaints or portions of complaints that fail to state a claim, that state a pending claim or one that has already been decided, that fail to comply with time limits, that are the basis of a pending civil action, that have been raised in a negotiated grievance procedure or in a Merit Systems Protection Board appeal, that are moot, when the complainant cannot reasonably be located, when the complainant has failed to provide requested information, and when the complainant refuses to accept a certified offer of full relief. *See id.* § 1614.107. Dismissals for refusal to accept a certified offer of full relief would be eliminated under recent proposed changes to 29 C.F.R. pt. 1614. *See Proposed Final Rule Revising the Federal Sector Discrimination Complaint Processing Regulations (to be codified at 29 C.F.R. pt. 1614) (proposed Dec. 28, 1998) (advanced copy at 8, on file with author).* The proposed changes would add two new grounds for dismissal. Agencies would have the ability to dismiss complaints that allege unfairness or discrimination in the processing of a complaint (“spin-off complaints”) and those that indicate a clear pattern of abuse of the EEO process. *See id.* at 9, 11.

14. *See* 29 C.F.R. § 1614.108.

15. *See id.* § 1614.108(f).

16. *See id.* § 1614.109.

17. *See id.* § 1614.110.

18. *See id.* § 1614.109(g).

19. *See id.*

20. *See id.* §§ 1614.109(g), 1614.110.

21. *See id.* § 1614.109(g).

22. *See id.* § 1614.401(a). Appeals are filed with and decided by one division of the EEOC, the Office of Federal Operations (formerly named the Office of Review and Appeals). *See id.* § 1614.403; ERNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW & PRACTICE 10 (1998 ed.). The EEOC, which is made up of five members appointed by the President with advice and consent of the Senate, does not typically become involved in adjudicating EEO complaints. *Id.* at 11. It may take up a final decision of the Office of Federal Operations on reconsideration, but the decision to grant reconsideration is discretionary on the part of the EEOC. *See id.*; 29 C.F.R. § 1614.407. The overwhelming majority of requests for reconsideration are denied. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8601 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998). In 1997, the EEOC reversed an order on the merits on reconsideration in only seven cases (about four percent of cases). *Id.*

23. *See* 29 C.F.R. § 1614.408.

24. *See, e.g.,* H.R. REP. NO. 103-599, pt. 2, at 22 (1994) (“Congress has amassed a substantial record on the inequity of the current system for processing [f]ederal employee discrimination complaints.”).

25. *See* Federal Employee Fairness Act of 1997, H.R. 2441, 105th Cong., 1st Sess. (1997).

The FEFA would amend Title VII of the Civil Rights Act of 1964²⁷ to make administrative processing of federal employee discrimination claims more effective.²⁸ The current regulations governing EEO complaints processing are seen not only as ineffective, but also as biased against EEO complainants.²⁹ The federal agency (against which the EEO claim has been filed) conducts the initial investigation and issues the final decision in the case.³⁰ This procedure is viewed as a real as well as a perceived conflict of interest.³¹

The FEFA is designed to “take agencies out of the business of judging themselves.”³² It would accomplish this by transferring the “authority for determining the merits of EEO claims from the agencies to the EEOC, an independent agency with expertise in investigating and evaluating employment discrimination claims.”³³ The EEOC would be required to rewrite its complaints processing regulations to reflect this change in decision authority.³⁴

Proposed Changes to Federal Sector Complaints Processing Regulations

In 1995, then EEOC Chairman Gilbert Casellas initiated a review of the federal sector EEO complaints process.³⁵ A work-

ing group was established to determine the EEOC’s effectiveness in enforcing anti-discrimination statutes in the federal sector.³⁶ The working group recommended many changes to 29 C.F.R. part 1614, the federal sector EEO complaints processing regulations. Probably the most important recommendation (and the most controversial) was to make EEOC AJ decisions final.³⁷

In recommending this change, the working group expressed the same concerns that Congress did when proposing the FEFA. The primary concern was the “inherent conflict of interest” in allowing agencies to decide whether discrimination has occurred.³⁸ Agency involvement in this part of the complaints process is viewed as a “fundamental flaw” in the system.³⁹

The EEOC acted on several of the working group’s recommendations and issued a notice of proposed rulemaking revising 29 C.F.R. part 1614 to make AJ decisions final.⁴⁰ Under the revised regulations, federal agencies would no longer issue final-agency decisions accepting, rejecting, or modifying AJ recommended decisions.⁴¹ Final AJ decisions would be binding, unless the agency or the complainant appeals to the EEOC.⁴²

26. *See id.*; Federal Employee Fairness Act of 1995, H.R. 2133, 104th Cong., 1st Sess. (1995); Federal Employee Fairness Act of 1993, S. 404, 103d Cong., 1st Sess. (1993); Federal Employee Fairness Act of 1992, S. 2801, 102d Cong., 2d Sess. (1992); Federal Employee Discrimination and Equal Employment Opportunity Amendments of 1990, H.R. 5864, 101st Cong., 2d Sess. (1990).

27. Civil Rights Act of 1964 § 717, 42 U.S.C.A. § 2000e-16 (West 1999) (making it unlawful for federal departments and agencies to discriminate against applicants or employees on the basis of race, color, religion, sex, and national origin). The FEFA would also amend the Age Discrimination in Employment Act and the Rehabilitation Act. *See* H.R. REP. NO. 103-599, pt. 2, at 19; Age Discrimination in Employment Act, 29 U.S.C.A. § 633a (West 1999) (prohibiting age discrimination); Rehabilitation Act of 1973, 29 U.S.C.A. § 791 (West 1999) (prohibiting disability discrimination).

28. *See* H.R. REP. NO. 103-599, pt. 1, at 1.

29. *See Casualties of the Federal Equal Employment Opportunity Complaint Process, Joint Hearing Before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv. and the Subcomm. on Employment Opportunities of the Comm. on Educ. and Labor, 102nd Cong. (1992).*

30. *See* Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.108, § 1614.110 (1998).

31. H.R. REP. NO. 103-599, pt. 1, at 25.

32. 138 CONG. REC. 7480 (1992) (statement of Sen. John Glenn).

33. *Id.* Under the FEFA, AJs and not agencies would issue the “findings of fact,” “conclusions of law,” and a “final order” in cases in which a hearing was requested. *See* H.R. REP. NO. 103-599, pt. 1, at 35.

34. *See id.*, pt. 2, at 13.

35. *See* FEDERAL SECTOR WORKGROUP, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, THE FEDERAL SECTOR EEO PROCESS . . . RECOMMENDATIONS FOR CHANGE I (May 1997).

36. *See id.*

37. *See id.* at 14-16. Other working group recommendations included allowing attorney fee awards for work done in the counseling stage, making training mandatory for agency investigators, giving AJs the authority to calculate attorney fee awards, applying a clearly erroneous standard of review to factual findings of AJs on appeal, eliminating the right to request reconsideration of appeal decisions, allowing complainants to move for class certification at any “reasonable point” in the complaint process, permitting AJs to decide complaints without a hearing in certain limited circumstances, and requiring agencies to establish alternative dispute resolution (ADR) programs. *Id.*

38. *Id.* at 15.

39. *Id.* at 7.

The EEOC received dozens of agency and public comments in response to its proposal to make AJ decisions final.⁴³ In response to agency concerns, the EEOC backed off its original proposal.⁴⁴ The EEOC has now proposed that AJs issue a “decision” after hearing and that *agencies* take final action on the complaint by issuing a “final order.”⁴⁵ If the agency’s “final order” does not fully implement the AJ’s decision (if the agency modifies or rejects it), the *agency* must file an EEOC appeal.⁴⁶

The EEOC believes that this new proposal responds to agency concerns while preserving the “functional goal” of AJ final decisions: “agencies will no longer be able to simply substitute their view of a case for that of an independent decision-maker.”⁴⁷ Under the proposal, agencies would not introduce new evidence or rewrite the AJ’s decision in the “final order.”⁴⁸ This change to the complaints processing regulations is scheduled to take effect ninety days from publication in the Federal Register.⁴⁹

Are AJ Final Decisions within EEOC’s Statutory Parameters?

Whether the EEOC can give its AJs final decision authority is first a question of statutory interpretation. Does the EEOC have the statutory authority to make this change to its rulemaking powers or is new legislation, such as the FEFA, required?

In response to the EEOC’s notice of proposed rulemaking, a number of federal agencies took the latter position.⁵⁰ They argued that Congress meant for federal agencies, and not the EEOC, to have the lead responsibility for eliminating discrimination in federal employment.⁵¹ Allowing AJs to issue final decisions would strip the agencies of the role assigned to them in the Civil Rights Act.⁵²

The EEOC disagrees. It believes it has the “broadest possible authority to restructure” the federal sector complaints pro-

40. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8598 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998). Other changes proposed by the EEOC include requiring agencies to make alternative dispute resolution available during the informal complaint process, permitting agencies to make “offers of resolution” to complainants (similar to offers of judgment under the Federal Rules of Civil Procedure), eliminating interlocutory appeals to the EEOC of partially dismissed complaints, giving AJs the authority to dismiss complaints during the hearing process, revising the class complaints procedures, revising the appeals process, and authorizing AJs to calculate reasonable attorney’s fees in cases where a hearing is requested. *Id.* at 8595-8602. These proposed changes have not generated nearly as much controversy as the proposal to give AJs final decision authority. See Proposed Final Rule Revising the Federal Sector Discrimination Complaint Processing Regulations (to be codified at 29 C.F.R. pt. 1614) (proposed Dec. 28, 1998) (advanced copy at 20, on file with author) [hereinafter Proposed Final Rule].

41. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8598. A complainant’s right to choose between an AJ hearing or an immediate final agency decision without a hearing would remain unchanged under 29 C.F.R. § 1614.108(f). Agencies would continue to issue final decisions in cases in which the complainant elected not to have a hearing. See *id.* A complainant who elects a final agency decision without a hearing would still have an appeal right to the EEOC’s Office of Federal Operations. Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.401(a) (1998). Alternatively, he could file a civil action in federal district court within 90 days of receipt of the agency’s final decision. *Id.* § 1614.408(a).

42. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8598.

43. See Proposed Final Rule, *supra* note 40, at 20. The majority of agencies opposed the change, and non-agency commenters overwhelmingly favored it. *Id.*

44. See *id.* Some agencies argued that the EEOC lacked statutory authority to make AJ decisions final. *Id.* Agencies also argued that the EEOC lacked the resources to handle any increase in hearing requests and that AJ decisions are lacking in quality and consistency. See *id.* at 20-21. One could speculate that the EEOC’s retreat from its proposal for AJ final decision authority stems more from politics and agency pressure than legal and practical concerns. A new EEOC Chairperson, Ida Castro, was confirmed in October 1998. Michael A. Fletcher, *New Opponent Against Discrimination*, NEWSDAY, Dec. 3, 1998, at A69.

45. See Proposed Final Rule, *supra* note 40, at 21. Agencies would take final action on the complaint within 15 days of receipt of the AJ decision. *Id.* Agency final orders would notify complainants whether the agency will fully implement the AJ decision and provide EEOC appeal rights. *Id.* at 22.

46. See *id.* The EEOC has proposed that agency appeals be filed simultaneously with the final order. *Id.* In certain cases, agencies will have to provide complainants with interim relief while the agency appeal is pending. See *id.* Complainant appeals would be filed within 30 days of receipt of the final action. See *id.* at 39, 62.

47. *Id.* at 21.

48. See *id.* at 22; Telephone Interview with Nicholas Inzeo, EEOC Deputy Legal Counsel (Feb. 19, 1999) [hereinafter Inzeo Interview].

49. See Proposed Final Rule, *supra* note 40, at 1. The proposed final rule is currently under review at the Office of Management and Budget and should be published in the Federal Register by mid-year. Inzeo Interview, *supra* note 48.

50. See Proposed Final Rule, *supra* note 40, at 20. While testifying before Congress as EEOC Chairman, U.S. Supreme Court Justice Clarence Thomas took the same view. See *Processing of EEO Complaints in the Federal Sector: Problems and Solutions, Hearing Before a Subcomm. of the House Comm. on Gov’t Operations*, 100th Cong. 51 (1987) (“I would challenge the statutory basis for . . . simply saying that our recommendations are binding when there is no statutory precedent.”).

51. See Memorandum from D. Michael Collins, Deputy for Equal Opportunity, Office of the Assistant Secretary of the Air Force, to Frances Hart, Executive Secretariat, Equal Employment Opportunity Commission 1 (Apr. 21, 1998) (on file with author) [hereinafter Collins Letter] (arguing that Congress meant for the agencies to be “primarily responsible for preventing discrimination in federal employment”).

52. See Civil Rights Act of 1964 §717, 42 U.S.C.A. § 2000e-16 (West 1999).

cess.⁵³ The resolution of this dispute would ultimately come from the Department of Justice⁵⁴ because the constitutional principle of the unitary executive prohibits federal agencies from suing one another.⁵⁵ Some background information is necessary, however, before the question of the EEOC's power to give AJs final decision authority can be addressed.

The EEOC and Private Sector Employment Discrimination

The EEOC was created by Title VII of the Civil Rights Act of 1964.⁵⁶ Congress intended that the EEOC "be the primary [f]ederal agency responsible for eliminating discriminatory employment practices in the United States."⁵⁷ Contrary to this strong mandate, the EEOC's original powers were actually quite weak. The 1964 Act limited the EEOC's enforcement authority to "informal methods of conference, conciliation, and persuasion."⁵⁸

The 1964 Act gave the EEOC authority to investigate charges of *private sector* employment discrimination, to determine whether there was probable cause to believe Title VII⁵⁹

had been violated, and to conciliate the claim.⁶⁰ It did not give the EEOC power to determine employer liability or to issue judicially enforceable orders.⁶¹ If the claim was not resolved,⁶² the EEOC issued a right to sue letter.⁶³ The employee was then entitled to pursue the claim in court.⁶⁴

Congress soon realized the EEOC needed more power. Despite the EEOC's "heroic" efforts in the fight against employment discrimination, the "machinery created by the Civil Rights Act of 1964" was simply inadequate.⁶⁵ The 1964 Act's scheme to eliminate private sector employment discrimination through voluntary compliance was "oversimplified"⁶⁶ and a "cruel joke" for those alleging discrimination.⁶⁷ Congress' failure to give the EEOC meaningful enforcement powers was a "major flaw," making Title VII "little more than a declaration of national policy."⁶⁸

Congress attempted to remedy this problem in the Equal Employment Opportunity Act of 1972.⁶⁹ Although both the Senate and House generally agreed that the EEOC's enforcement powers needed to be increased,⁷⁰ there was much debate over how to do so.⁷¹ Congress compromised by giving the

53. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8599 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

54. Telephone Interview with Nicholas Inzeo, EEOC Deputy Legal Counsel (Oct. 13, 1998) [hereinafter Inzeo Interview].

55. Executive power, created by Article II of the Constitution, is vested exclusively in the President. See U.S. CONST. art. II, § 1, cl. 1; Myers v. United States, 272 U.S. 52, 61-64 (1926). Federal agencies, including the EEOC, are part of the executive branch. If federal agencies were to sue one another, it would put the President in the "untenable position of speaking with two conflicting voices." 7 Op. Off. Legal Counsel 57, 64 (1983).

56. 42 U.S.C.A. § 2000e-4.

57. S. REP. NO. 92-415, at 4 (1972), reprinted in 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 413 (1972).

58. *Id.*

59. Title VII refers to the portion of the 1964 Act pertaining to employment discrimination. See 42 U.S.C.A. §§ 701-718.

60. See 42 U.S.C.A. § 2000e-5.

61. See H.R. REP. NO. 92-238, at 2 (1972), reprinted in 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 62 (1972).

62. The EEOC achieved conciliation in less than half of the cases in which reasonable cause to believe Title VII had been violated was found. *Id.* at 4.

63. See 42 U.S.C.A. § 2000e-5(f).

64. See *id.*

65. H.R. REP. NO. 92-238, at 3.

66. *Id.* at 8.

67. S. REP. NO. 92-415, at 8 (1972), reprinted in 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 413 (1972).

68. *Id.* at 4.

69. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending the Civil Rights Act of 1964).

70. See H.R. REP. NO. 92-238, at 3; S. REP. NO. 92-415, at 4.

71. The Labor Committees of both the Senate and House forwarded bills that would give cease and desist powers to the EEOC, but those proposals were ultimately rejected out of fear of creating an "overzealous" agency acting as "investigator, prosecutor, and judge." Rebecca Hanner White, *The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 64-66.

EEOC prosecutorial power, which is the ability to file suit against private employers once conciliation efforts fail.⁷² Even though the EEOC's powers were increased by the 1972 Act, the courts retained the role of ultimate fact-finder and adjudicator of private sector cases.⁷³

The Evolution of Federal Sector Equal Employment Opportunity

The Civil Rights Act of 1964 was meant to eliminate discrimination in employment; however, it did not originally apply to federal employees.⁷⁴ The first attempt to eliminate discrimination in federal employment came in an Executive Order of President Roosevelt in 1940.⁷⁵ Subsequent Presidents espoused similar policies against federal sector discrimination, which the Civil Service Commission (CSC)⁷⁶ was responsible for implementing.⁷⁷

By 1972, Congress had "significant evidence" that the policies against discrimination in federal employment were ineffective.⁷⁸ Specifically, women and minorities were denied access to federal jobs, the CSC's EEO process was "unduly weighted in favor of [f]ederal agencies," and remedies were inadequate

to deter discrimination.⁷⁹ Congress responded with a statute prohibiting discrimination in the federal sector, the Equal Employment Opportunity Act of 1972.⁸⁰

In addition to strengthening the EEOC's private sector enforcement power, the 1972 Act amended the Civil Rights Act of 1964 to make it applicable in the federal sector.⁸¹ The 1972 Act gave the CSC, rather than the EEOC, the job of coordinating and enforcing "all aspects of equal employment opportunity in the Federal workplace."⁸² The EEOC's role remained in the private sector. This changed in 1979 when the CSC was abolished and responsibility for federal sector EEO transferred to the EEOC.⁸³ For the first time, the EEOC was responsible for enforcing both private sector and federal sector equal employment opportunity.⁸⁴

When it took over the federal sector task from the CSC, the EEOC did not create a new system for EEO complaints processing. Instead, it merely adopted the procedures formerly used by the CSC.⁸⁵ Although the EEOC has made some revisions to its federal sector regulations since that time,⁸⁶ those regulations have kept final decision authority with the agencies.⁸⁷

72. *Id.*

73. See Equal Employment Opportunity Act of 1972 § 4 (amending § 706 of the Civil Rights Act of 1964). Congressional Republicans preferred a larger role for the courts because they were concerned about the EEOC's "image as an advocate for civil rights." White, *supra* note 71, at 64.

74. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

75. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 42 U.S.C.A. § 2000e-4, at 413 (West 1999), *and in* 92 Stat. 3781 (1978).

76. The CSC was the federal government's "master personnel agency," responsible for all aspects of federal personnel management. Stimson, *supra* note 8, at 205. In 1979, its functions were transferred to the EEOC and the newly created Merit Systems Protection Board, the Office of Personnel Management, and the Office of Special Counsel. See *id.* (citing Reorg. Plan No. 2 of 1978, 3 C.F.R. 323 (1978), *reprinted in* 5 U.S.C. app. at 1577 (1994), *and in* 92 Stat. 3783 (1978)).

77. H.R. REP. NO. 92-238, at 2 (1972), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 82 (1972). Congress also expressed a policy against federal employment discrimination. See Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 523 (1966). ("[It is] the policy of the United States to insure equal employment opportunities for [f]ederal employees without discrimination because of race, color, sex, or national origin.")

78. H.R. REP. NO. 103-599, pt. 1, at 23 (1994) (citing *Hearings on H.R. 1746: Equal Employment Opportunity Enforcement Procedures Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92nd Cong. (1971)).

79. *Id.*

80. *Id.*

81. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C.A. § 2000e-16 (West 1999)).

82. H.R. REP. NO. 103-599, pt. 1, at 23. The 1972 Act also gave federal employees the right to file a civil action in federal district court for a de novo review of discrimination claims. See 42 U.S.C.A. § 2000e-16(c).

83. See Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 42 U.S.C.A. § 2000e-4, at 413 (West 1999), *and in* 92 Stat. 3781 (1978).

84. The EEOC's roles in the private and public sector are very different and should not be confused. Although this article's sole focus is federal sector equal employment opportunity, a brief description of the EEOC's private sector role is necessary to examine the powers Congress gave to the EEOC in the 1964 and 1972 Acts. See *supra* text accompanying notes 58-64, 72-73 (describing EEOC's private sector role); *supra* text accompanying notes 16-22 (describing EEOC's federal sector role).

85. See Equal Employment Opportunity in the Federal Government, 43 Fed. Reg. 60,900 (1978) (codified at 29 C.F.R. pt. 1613 (1979)); see also COMM. ON GOV'T OPERATIONS, OVERHAULING THE FEDERAL EEO COMPLAINT PROCESSING SYSTEM: A NEW LOOK AT A PERSISTENT PROBLEM, H.R. REP. NO. 100-456, at 2 (1987) (explaining that the EEOC continued the CSC procedure of having agencies investigate and decide their own cases).

The EEOC's Statutory Authority

The legislation making Title VII applicable to federal employees, the 1972 Equal Employment Opportunity Act, should answer whether the EEOC has the power to make AJ decisions final.⁸⁸ A brief history of the 1972 Act is necessary in order to address this question of statutory interpretation.

The 1972 Equal Employment Opportunity Act—The 1972 Equal Employment Opportunity Act initially arose as the “Hawkins Bill” in the House of Representatives.⁸⁹ That bill gave the EEOC, rather than the CSC, the authority to enforce equal employment opportunity in federal employment.⁹⁰ The House Labor Committee emphasized that the EEOC was right for the job because of its expertise and because of the CSC’s conflict of interest in sitting “in judgment over its own practices and procedures.”⁹¹

During what was largely a debate over whether to give the EEOC cease and desist power for use in its private sector cases, the Hawkins Bill was amended by the “Erlenborn substitute.”⁹² The substitute gave the EEOC prosecutorial power in private

sector cases in lieu of cease and desist authority.⁹³ It did not address federal sector equal employment opportunity.⁹⁴ Title VII coverage for federal employees was essentially lost in the debate over how to strengthen the EEOC’s private sector enforcement power.⁹⁵ The Erlenborn substitute passed the House by a narrow margin.⁹⁶

Unlike the House bill, the Senate’s version of the bill expanded Title VII coverage to include the federal sector.⁹⁷ The bill gave the CSC expanded authority to enforce federal sector equal employment opportunity—a task already assigned to it by Executive Order.⁹⁸ In its report, the Senate Labor Committee acknowledged the CSC’s “built-in conflict of interest.”⁹⁹ The Committee was persuaded, however, that the CSC was “sincere” in its dedication to equal employment opportunity principles and that it had the “will and desire to overcome” the conflict.¹⁰⁰ The Committee strongly urged the CSC to seek out the EEOC’s experience and knowledge and to work closely with the EEOC in developing federal sector equal employment opportunity programs.¹⁰¹

The Senate ultimately prevailed,¹⁰² and the 1972 Equal Employment Opportunity Act included Title VII coverage for the federal sector.¹⁰³ The Act assigned the CSC the task of

86. See Federal Sector Equal Employment Opportunity, 29 C.F.R. pt. 1614 (1998). For a historical overview of the EEOC’s difficulties and delays in developing federal sector regulations, see H.R. REP. NO. 100-456, at 13.

87. See 29 C.F.R. § 1614.110.

88. The Supreme Court has recently granted *certiorari* to consider the question of the EEOC’s power in another context: whether the EEOC has statutory authority to order federal agencies to pay compensatory damages during the administrative process. See *Gibson v. Brown*, 137 F.3d 992, 993 (7th Cir. 1998), *cert. granted*, 119 S. Ct. 863 (Jan. 15, 1999) (No. 98-238). The circuits are split on the issue. The United States Courts of Appeals for the Seventh and Eleventh Circuits have held that Congress did not give the EEOC such authority when it made federal agencies subject to liability for compensatory damages in the Civil Rights Act of 1991. *Id.* at 996; *Crawford v. Babbitt*, 148 F.3d 1318, 1326 (11th Cir. 1998); see 42 U.S.C.A. § 1981(a) (West 1999). The Fifth Circuit, however, has found that the EEOC has such authority. *Fitzgerald v. Dep’t of Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997). The EEOC’s power to order agencies to pay compensatory damages is a different question than that of its power to give AJs final decision authority. The former requires interpreting Congress’ intent in § 1981a of the Civil Rights Act of 1991, while the latter requires interpreting § 717 of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972).

89. See H.R. 1746, 92d Cong. (1971); 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1685 (1972).

90. See H.R. REP. NO. 92-238, at 22 (1972).

91. *Id.* at 24.

92. See 92 CONG. REC. 31,979-81 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 247-48 (1972).

93. See 92 CONG. REC. 4929 (1972), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1744 (1972).

94. See S. CONF. REP. NO. 92-681, at 21 (1972), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1819 (1972).

95. See 92 CONG. REC. 32,094 (1971).

96. See 92 CONG. REC. 4929 (1972).

97. See S. 2515, 92d Cong. (1971); see also S. REP. NO. 92-415, at 2 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 411 (1972) (explaining the provisions of Senate Bill 2515).

98. See *id.*

99. *Id.* at 15.

100. *Id.*

101. *Id.* at 16.

enforcing federal equal employment opportunity¹⁰⁴—a task eventually reassigned to the EEOC.¹⁰⁵ Thus, any present-day authority of the EEOC to make AJ decisions final stems from the powers given to its predecessor, the CSC, in the 1972 Act.

Interpreting the 1972 Act—The starting point in interpreting the 1972 Act is the language of the statute itself. Unless there is “clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”¹⁰⁶ If the statute’s words are unambiguous, the inquiry ends, and the plain meaning of the text must be enforced.¹⁰⁷

The CSC’s federal sector enforcement powers are found in Section 11 of the Act.¹⁰⁸ That Section amended Title VII of the Civil Rights Act of 1964 by adding new Section 717, “Nondiscrimination in Federal Government Employment.”¹⁰⁹ Section 717(a) provides that federal personnel actions shall be made free from discrimination.¹¹⁰ Section 717(b) gives the CSC the “authority to enforce the provisions of subsection (a) through appropriate remedies . . . as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.”¹¹¹ It further directs federal agencies and departments to “comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder.”¹¹²

Taken alone, Section 717(b)’s plain meaning is clear. The statute authorizes the EEOC (as CSC’s successor) to issue rules and regulations governing federal sector equal employment opportunity and directs the other federal agencies to obey. This

broad authority would undoubtedly empower the EEOC to make its AJ decisions final, rather than recommended.

Section 717(c) complicates the plain meaning analysis. That section provides federal EEO complainants the right to file civil actions if they are dissatisfied with the administrative disposition of their complaints.¹¹³ In somewhat confusing language, it provides that

within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a), or by the [CSC] upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination . . . , or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the [CSC] on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment . . . may file a civil action as provided in [S]ection 706.¹¹⁴

Reading this language alone and giving the words their “ordinary, contemporary, common meaning,”¹¹⁵ a conclusion could be reached that Congress authorized only the federal agencies to issue final decisions on EEO complaints (absent an appeal to the CSC). Of course, neither Section 717(b) nor 717(c) can be interpreted standing alone, as “each statutory provision should be read by reference to the whole act.”¹¹⁶

102. See S. CONF. REP. NO. 92-681, at 21 (1972), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1819 (1972).

103. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *reprinted in* 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1831 (1972).

104. *Id.*

105. See *supra* note 83 and accompanying text (federal sector EEO responsibility transferred to the EEOC under Reorganization Plan No. 1 of 1978).

106. *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

107. *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989).

108. Equal Employment Opportunity Act of 1972 § 11.

109. *Id.*

110. See *id.*

111. *Id.*

112. *Id.*

113. See *id.*

114. *Id.*

115. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

When read together, the two sections conflict in their meaning. By using the phrase “*final action taken by a department, agency, or unit*” in Section 717(c), did Congress intend to foreclose the CSC (and the EEOC as successor) from having final decision authority on EEO complaints? The EEOC thinks not. It interprets Section 717(b)’s “broad language” to give it complete authority to make such a change in federal EEO complaints procedure.¹¹⁷ The EEOC’s interpretation is entitled to deference unless it is contrary to the statute’s plain meaning or is unreasonable.¹¹⁸

Ambiguities in a statute’s language may also be resolved by considering legislative history.¹¹⁹ The 1972 Act’s legislative history contains some discussion of the EEO complaints procedures established by the CSC (by authority of Executive Order) and used in the federal government up until that time. Under those procedures, the “accused” federal agency was responsible for investigating and judging itself, meaning that the agency head made the final determination as to whether discrimination occurred within the agency.¹²⁰

Both Labor Committees reporting on the bills were highly critical of this arrangement and recognized it as a conflict of interest.¹²¹ House Report 238 described the CSC’s complaints process as “[a] critical defect of the [f]ederal equal employment program.”¹²² It also specifically noted that the legislation would

allow the EEOC¹²³ to “establish appropriate procedures for an impartial adjudication” of EEO complaints.¹²⁴

The Senate Labor Committee reporting on the bill likewise criticized the CSC’s complaints processing procedure and said it deserved “special scrutiny” by the CSC.¹²⁵ It noted that each agency was “still responsible for investigating and judging itself,” with the agency head making the “final agency determination” on the case.¹²⁶ The Committee felt this procedure “may have denied employees adequate opportunity for impartial investigation and resolution of complaints.”¹²⁷ Most significantly, it noted that the “new authority given to the [CSC] in the bill is intended to enable the [CSC] to reconsider its entire complaint structure and the relationships between the employee, agency and [CSC] in these cases.”¹²⁸

This legislative history shows that Congress was dissatisfied with the complaints processing procedures in existence when the 1972 Act became law, particularly the inherent conflict of interest resulting from agencies issuing final decisions on their own cases. Further, Congress fully expected and intended that the CSC use the authority provided to it in the 1972 Act to revise its complaints procedures to eliminate this conflict of interest. The CSC never did so, nor did the EEOC after acquiring federal sector responsibility from the CSC.¹²⁹ The basic scheme criticized by Congress in 1971 is the same one¹³⁰ the

116. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 324 (1994) (listing the canons of statutory construction used or developed by the Rehnquist Court).

117. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8598-99 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

118. See ESKRIDGE, *supra* note 116, at 324; *Hudson v. Reno*, 130 F.3d 1193, 1201 (6th Cir. 1997) (“[D]eference is only appropriate with respect to ambiguous language; the EEOC’s interpretation is entitled to no deference when its position is at odds with the plain language of the statute.”) (citation omitted); *accord Gibson v. Brown*, 137 F.3d 992, 996 (7th Cir. 1998), *cert. granted*, 119 S. Ct. 863 (Jan. 15, 1999) (No. 98-238) (“We have no difficulty affording the EEOC a measure of deference—even when interpreting its own powers under a statutory scheme—so long as the interpretation is consistent with the plain language of the statute.”); *Fitzgerald v. Department of Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997) (“We afford considerable weight and deference to an agency’s interpretation of a statute it administers if Congress has not spoken directly to the precise question at issue.”).

119. See ESKRIDGE, *supra* note 116, at 325.

120. See H.R. REP. NO. 92-238, at 24 (1971).

121. See *id.* at 24-25; S. REP. NO. 92-415, at 15 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 423 (1972). According to “The Rehnquist Court’s Canons,” committee reports are “authoritative legislative history but cannot trump a textual plain meaning.” ESKRIDGE, *supra* note 116, at 325.

122. H.R. REP. NO. 92-238, at 23.

123. House Report 238 refers to the EEOC because the version of the bill on which it was reporting gave federal sector EEO responsibility to the EEOC rather than the CSC. The Minority View in House Report 238 does not discuss federal sector EEO, except to note that it generally opposed expanding EEOC’s “jurisdiction” when it was “struggling to control a burgeoning backlog” of private sector cases. *Id.* at 67. The bill that eventually became law gave federal sector responsibility to the CSC. See *supra* text accompanying notes 98-104.

124. H.R. REP. NO. 92-238, at 26.

125. S. REP. NO. 92-415, at 14.

126. *Id.*

127. *Id.*

128. *Id.*

EEOC recently attempted to fix with its proposal to make AJ decisions final.¹³¹

In light of this expression of congressional intent, the use of the phrase “*final action taken by a department, agency, or unit*” in Section 717(c) is best interpreted as simply a delineation of when a complainant can take his case to court.¹³² To find that Congress meant Section 717(c) to mandate final decisions by agencies rather than the EEOC would be an interpretation inconsistent with the policy of Section 717(b).¹³³ A more reasonable interpretation is that Congress used the language of Section 717(c) merely to lay out the complainant’s right to sue the federal government based on the complaints procedures existing at that time.¹³⁴

The legislative history supports this interpretation of Section 717(c). Senate Report 415 discusses the provision not as the right of the agency head to issue final decisions, but as federal employees’ “private right of action in the courts.”¹³⁵ It also notes the requirement for employees to exhaust their administrative remedies before going to court and the employees’ need for “certainty as to the steps required to exhaust such remedies.”¹³⁶ Under the administrative procedures existing when Section 717(c) was enacted, the last step in the administrative process came when the agency took final action on the case (or when the CSC did so by deciding the appeal).¹³⁷ Congress’ use of this exact language in Section 717(c) can be explained as simply putting federal employees on notice of when their

administrative remedies were exhausted and when their right to go to court was triggered.

It is illogical to interpret Section 717(c) as prohibiting the EEOC from making AJ decisions final. This interpretation would require a finding that Congress codified just one small part of the EEO complaints procedure in Section 717(c)¹³⁸ and at the same time gave the EEOC’s predecessor free rein over the rest of the complaints processing procedures in Section 717(b). Further, a finding that Congress meant to codify final decision procedure clashes with a legislative history clearly showing Congress’ unhappiness with the conflict of interest created by then-existing CSC procedures.

Interpreting Section 717(c) to prohibit AJ final decisions is also illogical because EEOC decisions ultimately bind federal agencies. It is well established that when a complainant appeals a final agency decision to the EEOC, the EEOC’s appeal decision is binding on the federal agency.¹³⁹ Unlike complainants, federal agencies are not permitted to challenge an adverse EEOC decision in federal district court.¹⁴⁰ Congress established this “one-way appealability rule” in the 1972 Act and codified it in Section 717(c).¹⁴¹ In other words, Congress chose to give the EEOC the “final say” over agencies in the form of binding EEOC appeal decisions. Giving AJs the authority to issue final rather than recommended decisions does not change who gets the “final say” on complaints. Like complainants, agencies would have the ability to appeal adverse AJ decisions to the EEOC for a final (and binding) appeal decision.¹⁴²

129. See *supra* text accompanying notes 85-87.

130. See Federal Sector Equal Employment Opportunity, 29 C.F.R. pt. 1614 (1998).

131. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

132. The phrase “*final action taken by a department, agency, or unit*” apparently arose in the Senate’s bill. See S. 2515, 92d Cong. (1971). The original bill introduced in the House (and rejected by the Erlenborn substitute) used the more general term “*final disposition*.” See H.R. 1746, 92d Cong. (1971).

133. See ESKRIDGE, *supra* note , at 324 (identifying one of the canons of statutory construction as “[a]void interpreting a provision in a way that is inconsistent with the policy of another provision”).

134. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8599 (adopting the same interpretation of Section 717(c)).

135. S. REP. NO. 92-415, at 16 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 423 (1972).

136. *Id.*

137. See *id.* at 14.

138. Cf. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8599 (arguing nothing in the language of Section 717 indicates Congress intended to codify any parts of the existing administrative procedures).

139. See *Morris v. Rice*, 985 F.2d 143, 145 (4th Cir. 1993); *accord Gibson v. Brown*, 137 F.3d 992, 993 (7th Cir. 1998), *cert. granted*, 119 S. Ct. 863 (U.S. Jan. 15, 1999) (No. 98-238); *Moore v. Devine*, 780 F.2d 1559, 1562-63 (11th Cir. 1986); see also Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.502(a) (1998) (“Relief ordered in a final decision on appeal to the EEOC is mandatory and binding on the agency.”).

140. See 42 U.S.C.A. § 2000e-16(c) (West 1999); Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.504(a) (1998).

141. *Crawford v. Babbitt*, 148 F.3d 1318, 1325 (11th Cir. 1998).

142. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8598, 8605.

The 1978 Reorganization Plan—In 1978, President Carter submitted a Reorganization Plan to Congress in an attempt to consolidate in the EEOC a wide range of federal equal employment opportunity activities.¹⁴³ Among other things, the Plan would transfer responsibility for federal sector EEO from the CSC to the EEOC.¹⁴⁴ Under the Reorganization Act of 1977, the plan would become effective unless the House or Senate passed a resolution of disapproval.¹⁴⁵ Neither did so, and the task of coordinating and enforcing federal sector EEO transferred to the EEOC in 1979.¹⁴⁶

In forwarding the Reorganization Plan to Congress, the President noted a variety of deficiencies in the federal sector EEO program as administered by the CSC.¹⁴⁷ One of his main concerns was the existence of “conflicts within agencies between their program responsibilities and their responsibility to enforce the civil rights laws.”¹⁴⁸ The President believed this conflict could be resolved by transferring federal sector EEO functions to the EEOC, an agency with “considerable expertise” in the field.¹⁴⁹

Congress did not disagree with the President. If it was concerned about giving the EEOC the ability to adjudicate federal sector EEO complaints and to impose binding decisions on federal agencies, this was its chance to speak up by disapproving the Reorganization Plan. Some members of Congress did express concern over transferring adjudicatory powers from the CSC to the EEOC, arguing that the EEOC was conflicted by its

role of advocate in private sector cases.¹⁵⁰ Those views did not prevail, however, as both the House and Senate committees studying the Reorganization Plan recommended it favorably to their respective Houses.¹⁵¹

The legislative histories of both the 1972 Equal Employment Opportunity Act and Reorganization Plan Number 1 show that the EEOC does have the authority to change its regulations to make AJ decisions final.¹⁵² New legislation such as the FEFA is not required before the EEOC could implement such a change. Is AJ Final Decision Authority Good Policy?

Making AJ decisions final is not just a question of the EEOC’s statutory authority. It is also a policy question: is AJ final decision authority wise? Not surprisingly, federal agencies overwhelmingly answer the question in the negative.¹⁵³ Equally unsurprising is the view of EEO complainants, private attorneys, and federal employee unions, who overwhelmingly support taking away the agencies’ power to issue final decisions.¹⁵⁴ There are good arguments on both sides.

Taking Away Final Decision Authority from Federal Agencies is Unwise

Agency Final Decisions Serve as a “Safety Net”—Some believe that agency final decisions serve as a “safety net,” allowing agencies to overcome bad decisions by AJs.¹⁵⁵ Army statistics from 1993-1997 illustrate the argument. Administra-

143. See Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), reprinted in 42 U.S.C.A. § 2000e-4, at 413 (West 1999), and in 92 Stat. 3781 (1978).

144. See *id.*

145. Reorganization Act of 1977, Pub.L.No. 95-717, 91 Stat. 29. To overcome constitutional concerns created by the Reorganization Act’s scheme for a one-house legislative veto, Congress subsequently ratified all prior reorganizations and then amended the Act to require a joint resolution in support of any reorganization plan. See Stimson, *supra* note , at 165 n.4.

146. See Reorg. Plan No. 1 of 1978. The House rejected a resolution of disapproval. H.R. Res. 1049, 95th Cong. (1978). A resolution of disapproval was not brought to a vote in the Senate, but the Committee on Governmental Affairs unanimously recommended against passage of a resolution of disapproval. S. Res. 404, 95th Cong. (1978); S. REP. NO. 95-750, at 6 (1978).

147. See Message of the President, in Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), reprinted in 42 U.S.C.A. § 2000e-4, at 415 (West 1999).

148. *Id.*

149. *Id.*

150. See 95 CONG. REC. 11,331 (1978).

151. See S. REP. NO. 95-750, at 6; H.R. REP. NO. 95-1069, at 3 (1978).

152. In an Executive Order implementing Reorganization Plan Number 1, President Carter reiterated the language of Section 717(b). See Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1978), reprinted in 42 U.S.C.A. § 2000e-4, at 419 (West 1999) (“The [EEOC] . . . shall issue such rules, regulations, orders, and instructions . . . as it deems necessary and appropriate to carry out this Order.”).

153. See Letter from Earl Payne, Director, Department of Defense Civilian Personnel Management Service, to Frances Hart, Executive Secretariat, Equal Employment Opportunity Commission 3 (Apr. 21, 1998) (on file with author) [hereinafter Payne Letter]; Proposed Final Rule, *supra* note 40, at 20.

154. See Letter from Alma Riojas Esparza, Executive Director, Federally Employed Women, to Frances Hart, Executive Secretariat, Equal Employment Opportunity Commission 5 (Apr. 20, 1998) (on file with author); Proposed Final Rule, *supra* note 40, at 20.

155. See *id.* at 21 (“Agencies also questioned the quality and consistency of [AJ] decisions in opposing the change.”).

tive judges recommended findings of discrimination in 145 Army cases during that period.¹⁵⁶ The Army issued final agency decisions rejecting ninety-four of those recommended findings, or nearly sixty-five percent of AJ decisions against it.¹⁵⁷ On appeal to the EEOC's Office of Federal Operations, the Army was reversed only six times.¹⁵⁸ This means that of cases appealed, the EEOC sustained the Army's rejection of AJ decisions nearly ninety-four percent of the time.¹⁵⁹

Given these statistics, it would seem that agencies need final decision authority as a means to overcome incorrect AJ decisions. The need for this agency "safety net" may not be as great as it initially appears, however. First, AJ recommended findings of discrimination are relatively few: only about nine percent of cases heard.¹⁶⁰ Second, agencies would have the right to appeal adverse AJ final decisions to the EEOC.¹⁶¹ The EEOC appeal would serve as the new agency "safety net" against bad AJ decisions. The Army's appeals data show that this "safety net" can be highly effective, as the EEOC sustains the agency in the great majority of cases appealed.¹⁶²

Distrust and Lack of Confidence in the EEOC—A prime source of agency opposition to the finality of AJ decisions may be a historical distrust and lack of confidence in the EEOC. "Historically, the EEOC has been viewed as 'toothless,' a 'poor, enfeebled thing' as compared to other federal agencies."¹⁶³

Federal agencies do not seem to be alone in their lack of confidence in the EEOC. For example, the courts may have reserved a greater lawmaking role in the employment discrimination area by suggesting "a lesser role for the EEOC on questions of statutory interpretation than is enjoyed by most independent agencies."¹⁶⁴ Congress has also noted widespread complaints about the EEOC's competence and efficiency in both its private and federal sector programs.¹⁶⁵ This shows agency fears that AJ final decision authority should not be discounted. Instead, the EEOC must do a better job to build the confidence of its "clients," which include agencies as well as complainants.

Increasing AJ training and classification/pay grade levels may be one way of accomplishing this. Equal Employment

156. Payne Letter, *supra* note 153, at 4.

157. *Id.*

158. *Id.* Government-wide data is not available. On an annual basis, the EEOC publishes an extensive compilation of data concerning federal sector EEO complaints. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FEDERAL SECTOR REPORT ON EEO COMPLAINTS PROCESSING AND APPEALS (1996) [hereinafter EEOC 1996 REPORT]. The most recent published report is from fiscal year 1997. Data for 1998 are not yet available. Inzeo Interview, *supra* note 48. Although EEOC annual reports contain statistics on the number of AJ recommended decisions rejected or modified by final agency decisions, they do not report how many final agency decisions are sustained by the EEOC's Office of Federal Operations on appeal by complainants. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8598 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

159. Air Force final agency decisions were upheld by the EEOC Office of Federal Operations over 93% of the time for the years 1995-1998. See Collins Letter, *supra* note 51. In arriving at this figure, the Air Force did not distinguish final agency decisions issued after an AJ hearing from final agency decisions issued in cases where the complainant elected *not* to have an AJ hearing. Telephone Interview with Sophie Clark, Director, Air Force Civilian Appellate Review Office (Feb. 25, 1999).

160. See EEOC 1997 REPORT, *supra* note 9, at T-39 (reporting findings of discrimination in 8.8% of cases). In 1996, AJs recommended findings of discrimination in 9.2% of cases. See EEOC 1996 REPORT, *supra* note 158, at T-36. In 1997, only 35% of the requests for AJ hearings resulted in an AJ decision. See U.S. GOV'T ACCT. OFF., RISING TRENDS IN EEO COMPLAINT CASELOADS IN THE FEDERAL SECTOR 45 n.13 (Jul. 1998) [hereinafter GAO REPORT] (noting that at the hearing stage, a case can be settled by the parties, withdrawn by the complainant, remanded to the agency for further action, or decided by the AJ).

161. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8598, 8601 (proposing that both complainants and agencies be allowed to appeal final AJ decisions to the EEOC). Under the current regulations, only complainants (and class agents in class complaints) have the right to appeal to the EEOC. See Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.401 (1998).

162. See *supra* notes 158-159 and accompanying text. If an agency loses on appeal, it can request reconsideration by the full EEOC. See 29 C.F.R. § 1614.107; see *supra* note 22. An EEOC proposal would severely limit the reconsideration of EEOC appeal decisions. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8601; Proposed Final Rule, *supra* note 40, at 40. Under the proposed rule, the EEOC will only grant requests for reconsideration when the requester demonstrates that the EEOC appeal decision involved a "clearly erroneous interpretation of material fact or law or when the appeal decision will have a "substantial impact on the policies, practices, or operations of the agency." *Id.* The EEOC has proposed this change because it believes the current "broad availability of reconsideration has not significantly enhanced the overall decision-making process." Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8601. The EEOC believes that reforming the reconsideration process will allow it to redirect resources to improve the timeliness and quality of appeal decisions by its Office of Federal Operations. See *id.*

163. White, *supra* note 71, at 51 (addressing why the Supreme Court might be reluctant to find a congressional delegation of statutory interpretive authority to the EEOC). The Merit Systems Protection Board, on the other hand, is traditionally viewed as an efficient, effective adjudicator and protector of the merit principles of federal employment. See Stimson, *supra* note 8, at 216.

164. White, *supra* note 71, at 51.

165. See COMM. ON GOV'T OPERATIONS, OVERHAULING THE FEDERAL EEO COMPLAINT PROCESSING SYSTEM: A NEW LOOK AT A PERSISTENT PROBLEM, H.R. REP. NO. 100-456, at 12 (1987).

Opportunity Commission AJs are largely at a grade level lower than similar officials in other agencies.¹⁶⁶ The EEOC frequently loses quality AJs to other agencies such as the Merit Systems Protection Board.¹⁶⁷ One reason for EEOC AJs' lower pay grade is their limited authority to issue recommended and not final decisions.¹⁶⁸ An increase in pay should, therefore, go hand-in-hand with AJ final decision authority.¹⁶⁹

EEOC Conflict of Interest—Some believe the EEOC has a conflict of interest because it is designed to be a protector of employees who suffer workplace discrimination. Thus, EEOC AJs can never be truly “neutral” and disinterested decision-makers.

To appreciate this argument fully, the EEOC's private and federal sector roles must be distinguished. While wearing its federal sector “hat,” the EEOC is an adjudicator and decision-maker.¹⁷⁰ Its private sector responsibilities are quite different. In private sector cases, the EEOC may only act as investigator, conciliator, and if that fails, as prosecutor.¹⁷¹ While the EEOC may pursue a claim in court on behalf of a private sector party, the court has the role of adjudicator.¹⁷²

The EEOC's private sector enforcement power was limited in this manner because

congressional Republicans were concerned with conferring fact-finding responsibilities on the EEOC. The agency had “attained an image as an advocate for civil rights,” and thus there was a reluctance to make a “mis-

sion” agency the finder of facts. The opposition to increasing the EEOC's enforcement authority centered on the fear that an overzealous agency would be acting as investigator, prosecutor, and judge.¹⁷³

Because of its historical role as “protector” and private sector advocate against discrimination, the EEOC has been viewed by some as lacking objectivity and tending to be claimant-oriented.¹⁷⁴ Whether real or perceived, this bias undoubtedly causes some federal agencies to feel that AJ final decisions cannot be fair.

An example of this conflict is found in recent EEOC proposals to “strengthen” the federal sector class complaints' process.¹⁷⁵ The EEOC wants to change its regulations so that more class complaints are filed and certified at the administrative level.¹⁷⁶ It believes that “[c]lass actions play a particularly vital role in the enforcement of the equal employment laws. They are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims.”¹⁷⁷

This language emphasizes a potential conflict of interest. On one hand, the EEOC must promote policies and procedures designed to eradicate the broad patterns of workplace discrimination that are typically found in class actions. On the other hand, its own AJs (and its appellate staff) will be the adjudicators of the class complaints that arise as a result of the EEOC's improved efforts. These dual roles create at least a perceived conflict of interest.¹⁷⁸

166. *Id.* at 6.

167. Inzeo Interview, *supra* note 54.

168. *See* H.R. REP. NO. 100-456, at 6.

169. In the past, Congress has also recommended that the EEOC “move promptly” to increase AJs' support personnel and make more equipment available to them. *Id.*

170. *See* Civil Rights Act of 1964 § 717, 42 U.S.C.A. § 2000e-16 (West 1999); Federal Sector Equal Employment Opportunity, 29 C.F.R. pt. 1614 (1998).

171. *See* 42 U.S.C.A. § 705.

172. *See id.*

173. White, *supra* note 71, at 65 (citations omitted). One historian has described the role of the EEOC as “murky,” a “kind of bastard compromise between a quasi-judicial regulatory commission, an administrative agency, and an educational and conciliation bureau.” *Id.* at 60 n.70.

174. *See id.* at 64-65 (describing this view as being held by Chief Justice William Rehnquist when he was the head of the U.S. Attorney General's Office of Legal Counsel).

175. *See* Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8600 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

176. *Id.* at 8599.

177. *Id.*

178. The EEOC has three major divisions performing federal sector EEO duties. The Hearing Program Division administers federal sector complaints processing and provides “technical guidance and assistance” to federal agencies and employees concerning complaints processing. It also provides guidance and sets standards for EEOC AJs. The Affirmative Employment Program Division develops and implements policies regarding the hiring, placement, and advancement of minorities, women, and handicapped persons. The Office of Federal Operations administers the EEOC's appellate responsibilities. *See* HADLEY, *supra* note 22, at 10.

Assuming, *arguendo*, that the EEOC does have a conflict of interest, is the problem so big that AJs should not be empowered with final decision authority? Probably not, as AJs recommend relatively few findings of discrimination.¹⁷⁹

The EEOC has always had an adjudicative role in the federal sector EEO process. Complainants have always appealed final agency decisions to the EEOC. When an agency's final decision is reversed on appeal (meaning the EEOC has found discrimination) the agency is bound by that "final Commission decision."¹⁸⁰ Thus, from a practical standpoint, giving AJs final decision authority would not alter an already-existing conflict of interest in the current regulations.

Further, if appeal is likely anyway, the system becomes more efficient by getting the appeals process over sooner, rather than later.¹⁸¹ Making AJ decisions final would eliminate the time-consuming and costly step of sending AJ recommendations back to the agency for final decision.¹⁸²

EEOC Backlogs and Increased Delays—AJ final decision authority may increase EEOC backlogs and delays in complaints processing.

In many cases, complainants elect an "immediate final decision" from the agency rather than an AJ hearing.¹⁸³ These final agency decisions without hearings occur in a significant number of cases, about sixty-four percent from 1995 to 1997.¹⁸⁴ Even with AJ final decision authority, agencies would continue to decide cases in which the complainant elects against a hearing.¹⁸⁵

More complainants may opt for hearings if AJs had final decision authority.¹⁸⁶ This may lead to even more delay in the system, as final decisions with hearings generally take longer to issue than those without hearings.¹⁸⁷ An increase in hearings may also result from an overall increase in EEO complaints.¹⁸⁸ It is questionable whether the EEOC has the necessary budget or staff to handle a sharp increase in hearings volume. Some members of Congress, for example, feel the EEOC is "already struggling with its burgeoning caseload" and may not have the capability to take on additional responsibilities.¹⁸⁹

Increased hearings volume as a result of AJ final decision authority is speculative at this point.¹⁹⁰ Administrative judge final decision authority may cause more complainants to elect a hearing because they see AJs as more likely to decide in their favor.¹⁹¹

179. See *supra* note 160 and accompanying text (AJs find discrimination in about 9% of cases). This statistic is consistent with reports that the EEO complaints process is burdened with a large number of frivolous cases. See GAO REPORT, *supra* note 160, at 2. Some employees use the EEO process to get "a third party's assistance in resolving workplace disputes unrelated to discrimination." *Id.* The EEOC reports that a "sizable number" of cases stem from "basic communications problems in the workplace" rather than discrimination. *Id.* (citing U.S. EQUAL OPPORTUNITY COMM'N, ADR STUDY (Oct. 1996)). The claim that AJs are biased in favor of complainants is also defeated somewhat by the relatively low rate at which they find discrimination.

180. See Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.502(a) (1998); see also *Moore v. Devine*, 780 F.2d 1559, 1562-63 (11th Cir. 1986) (holding that final EEOC decisions are binding on the agency).

181. Although precise data are not available, statistics show that appeal is highly likely in most cases. Complainants appealed final agency decisions to the EEOC in about 81% of cases in 1997. See EEOC 1997 REPORT, *supra* note 9, at 61, T-36. In 1996, about 89% of final agency decisions were appealed to the EEOC. See EEOC 1996 REPORT, *supra* note 158, at 67, T-27. These percentages are approximate because data are not available to account for the overlap of fiscal years. For example, final agency decisions issued at the very end of fiscal year 1997 would be appealed at the beginning of fiscal year 1998. (Complainants have 30 days from receipt of the final agency decision to appeal to EEOC. See 29 C.F.R. § 1614.402). Thus, they would not be counted as appealed cases until 1998. A large number of EEOC appeals, about 25%, come from Department of Defense complainants. See EEOC 1997 REPORT, *supra* note 9, at 62.

182. The EEOC does not report data on the amount of time used by agencies to issue final decisions after the receipt of AJ recommended decisions. See EEOC 1996 Report, *supra* note 158 (reporting no such data); GAO REPORT, *supra* note 160, at 46 (noting that EEOC reports the average time taken by agencies to process a complaint by type of closure rather than by each stage of the complaint process). Agencies are supposed to issue the final decision within 60 days of receiving the AJ recommended decision. See 29 C.F.R. § 1614.110.

183. See 29 C.F.R. § 1614.108(f), § 1614.110. "Immediate final decisions" by agencies are also called agency decisions without hearings.

184. See EEOC 1997 REPORT, *supra* note 9, at T-30 (reporting 5393 agency decisions without hearings); EEOC 1996 REPORT, *supra* note 158, at T-30 (reporting 4686 agency decisions without hearings); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FEDERAL SECTOR REPORT ON EEO COMPLAINTS PROCESSING AND APPEALS T-30 (1995) [hereinafter EEOC 1995 REPORT] (reporting 4996 agency decisions without hearings).

185. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8598 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998).

186. See, e.g., Payne Letter, *supra* note 153, at 4 (stating that Department of Defense agencies would have more complaints "going directly to EEOC for a hearing" if AJ decisions became final).

187. See GAO REPORT, *supra* note 160, at 47 (reporting for fiscal year 1996 that agencies took an average of 558 days to issue a final agency decision without a hearing and 613 days to issue a final agency decision in cases in which an AJ issued a recommended decision). Of course, AJ final decision authority might equalize these figures, as AJ decisions would no longer have to go back to the agency for final action.

188. See H.R. REP. NO. 103-599 pt. 1, at 97 (1994) (suggesting that the volume of complaints filed with the EEOC would increase if the FEFA became law).

189. *Id.*

If decisions became even more delayed with AJ final decision authority, however, complainants may opt for an agency decision without a hearing in order to get their cases to court faster.¹⁹² A more optimistic view is that more cases will settle once agency alternative dispute resolution (ADR) programs are in place, thereby decreasing the number of complainants who elect AJ hearings.¹⁹³

Nonetheless, the potential for increased backlog is a serious concern that should be addressed by the EEOC before AJ final decision authority is granted. The EEOC might be able to avoid this potential problem by reducing AJ processing time.¹⁹⁴ It is doubtful the EEOC could achieve this without hiring more AJs.¹⁹⁵

Giving AJs Final Decision Authority Is Wise

The federal sector complaints processing system has been universally criticized.¹⁹⁶ The most common criticisms are that it is an overly complex system, agencies are delegated the

responsibility for investigating and deciding their own employees' complaints, there are long delays in getting final agency decisions, and there is a lack of sanctions against agencies for inadequate investigations and delays.¹⁹⁷

This is not mere complaining by dissatisfied complainants and their attorneys. Congress and the General Accounting Office have repeatedly voiced these complaints, and Congress is particularly troubled with agencies deciding their own cases.¹⁹⁸ In short, the federal sector complaints processing system "is an embarrassment to the [f]ederal [g]overnment" and something "Rube Goldberg would have been proud of."¹⁹⁹

Agency Conflict of Interest—The most persuasive and frequently heard argument is that agencies should not issue final decisions because they have a conflict of interest. When a federal employee files an EEO complaint, the agency becomes the "accused," the investigator, and then the decision-maker. "Think for a moment of the public outrage if the government permitted IBM or General Motors . . . to investigate and take final action on complaints that violated . . . the Civil Rights Act."²⁰⁰

190. For example, one might speculate that the number of hearing requests would increase as the number of complaints increased. However, data show that requests for hearing do not necessarily correspond with the number of complaints filed. In 1994, the number of complaints filed increased 10%, and the number of requests for AJ hearing increased 21%. See EEOC 1996 Report, *supra* note 158, at 20, 52. In 1995, the number of complaints filed increased 12%, but requests for hearing decreased about 2%. See *id.* In 1996, the number of complaints filed decreased 4%, but requests for AJ hearing increased about 2%. See *id.* In 1997, the number of complaints filed increased almost 10%, and requests for AJ hearing increased almost 5%. See EEOC 1997 REPORT, *supra* note 9, at 20, 51. Increases in the number of complaints filed since 1994 were largely driven by postal workers' complaints. See GAO REPORT, *supra* note 160, at 39. Postal workers also had a "disproportionately high" and "increasing share" of hearing requests and EEOC appeals. *Id.* at 37.

191. This view holds that giving new EEO "rights" causes employees to file more EEO complaints. *Cf. id.* (attributing increases in federal sector EEO complaints in part to the Civil Rights Act of 1991, which allows awards of up to \$300,000 in compensatory damages).

192. See Federal Sector Equal Employment Opportunity, 29 C.F.R. § 1614.408 (1998) (allowing complainants to file a civil action if a final decision has not been issued after 180 days from the date the complaint was filed).

193. The EEOC's proposed final rule requires agencies to establish ADR programs; however, agencies are free to develop whatever program best suits their needs. See Proposed Final Rule, *supra* note 40, at 5. Agencies must make ADR available during both the pre-complaint (counseling) and formal complaint process, but agencies have discretion to decide whether it is appropriate to offer ADR on a case-by-case basis. *Id.*

194. AJ case processing time is on the increase. In 1994, it took an average of 154 days for an AJ to hear a case and issue a recommended decision. EEOC 1997 REPORT, *supra* note 9, at 51. That processing time went up to 187 days in 1995, 234 days in 1996, and 277 days in 1997. *Id.* AJs are supposed to issue recommended decisions within 180 days. See 29 C.F.R. § 1614.109(g).

195. The pending case inventory of AJs nearly doubled between 1994 and 1997. At the close of fiscal year 1994, AJs had 5177 cases pending. EEOC 1997 REPORT, *supra* note 9, at 51. At the end of fiscal year 1997, there were 10,016 cases pending. *Id.* Although the number of AJs available for hearings has increased (from 53 in 1991 to 75 in 1996), the influx of hearing requests outpaced the increase in AJs. See GAO REPORT, *supra* note 160, at 52-53. The EEOC has requested additional funding to hire more AJs. *Id.* at 54.

196. See H.R. REP. NO. 103-599 pt. 2, at 34 (1994).

197. See *id.* Agencies are required to complete investigations within 180 days from the date the complaint was filed. See 29 C.F.R. § 1614.108(e). In 1997, only 24% of agency investigations were completed within that time. EEOC 1997 REPORT, *supra* note 9, at T-24 (listing investigation completion times for all federal agencies).

198. See COMM. ON GOV'T OPERATIONS, OVERHAULING THE FEDERAL EEO COMPLAINT PROCESSING SYSTEM: A NEW LOOK AT A PERSISTENT PROBLEM, H.R. REP. NO. 100-456, at 2 (1987); U.S. GOV'T ACCT. OFF., FEDERAL EMPLOYEE REDRESS: A SYSTEM IN NEED OF REFORM (Apr. 1996) (stating that the EEO complaint process is inefficient, time consuming, and costly).

199. H.R. REP. NO. 100-456, at 13. Rube Goldberg was a Pulitzer prize winning cartoonist, sculptor, and author who believed there are two ways to do things, the simple and the hard way, and that a surprising number of people preferred doing things the hard way. His cartoons of "absurdly-connected machines" that accomplished by "extremely complex, roundabout means what seemingly could be done simply" have associated the name "Rube Goldberg" with any convoluted solution to a simple task. Alex Wolfe, *The Official Rube Goldberg Web Site* (visited Feb. 12, 1999) <<http://www.rube-goldberg.com/bio.htm>>.

The argument may be somewhat overstated. The agency does not have the final say in all cases, such as those when the dissatisfied complainant appeals the agency's decision to the EEOC or files a civil suit in federal district court.²⁰¹

There is an additional argument for agency conflict of interest in the investigatory stage, also controlled by the agency.²⁰² Investigators who are biased in favor of agency management theoretically have the ability to create a record favorable to the agency early on in the process.²⁰³ Equal Employment Opportunity counselors (who are agency employees) could do so as well because they are the first information-gatherers in the complaints process.²⁰⁴ This conflict of interest problem is not resolved by giving AJs final decision authority, as agencies would retain their pre-hearing investigatory responsibilities.²⁰⁵ It may become less of a problem however, as the majority of federal agencies now contract out their investigations rather than do them in-house.²⁰⁶

Nonetheless, the current regulations create at least a perception of unfairness towards EEO complainants, which has been recognized as a very serious problem in the complaints processing system.²⁰⁷ Agencies reject or modify the majority of AJ findings of discrimination but accept nearly all AJ findings of no discrimination.²⁰⁸ Of course, if agency decisions are more likely than AJ decisions to reach correct factual and legal results, this perception of unfairness might be considered a necessary, although unfortunate cost of doing business.²⁰⁹ In the end, however, agency final decisions are not necessary for correct results in EEO cases. If AJs had final decision authority, agencies would gain the right to appeal adverse decisions to the EEOC's Office of Federal Operations.²¹⁰ Agencies, like complainants, would ultimately rely on the Office of Federal Operations to reach the correct result on review.²¹¹

Consistency—Administrative judge final decisions should lead to more consistent results in federal sector cases. Decision-making in discrimination cases would be centralized in

200. H.R. REP. NO. 103-599 pt. 1, at 37 (1994) (quoting former EEOC Chairwoman Eleanor Holmes Norton).

201. See 29 C.F.R. § 1614.401(a), § 1614.408. Complainants appeal the majority of agency decisions to the EEOC. See *supra* note 181 and accompanying text. The EEOC does not report statistics on how many EEO complaints end up in federal district court. See EEOC 1996 REPORT, *supra* note 158.

202. 29 C.F.R. § 1614.108(a) provides that “[t]he investigation of complaints shall be conducted by the agency against which the complaint has been filed.”

203. Under EEOC directives, agencies have discretion to use a number of fact-finding methods during the investigation and are responsible for maintaining the personnel and resources necessary to investigate complaints. See EEOC 1997 REPORT, *supra* note 9, at 29.

204. Complainants are required to consult with agency EEO Counselors prior to filing a formal complaint. See 29 C.F.R. § 1614.105. During this stage of the complaints process, which is called “pre-complaint processing,” counselors gather information and conduct “counseling activities” in accordance with EEOC directives. *Id.* In one study conducted by the Washington Council of Lawyers, some EEO counselors reported “great scrutiny” during this process and subtle pressure not to find discrimination. H.R. REP. NO. 103-599 pt. 1, at 25-26 (citing *Processing EEO Complaints in the Federal Sector: Problems and Solutions Before the Subcomm. On Employment and Housing of the Comm. On Gov't Operations*, 100th Cong. (1987)).

205. See Proposed Final Rule, *supra* note 40.

206. See EEOC 1997 REPORT, *supra* note 9, at 2. About 60% of federal agencies contracted out all or part of their investigations in 1997. See *id.* Agencies reported spending over \$10 million on contract investigations in 1997, at an average cost of \$2128 per investigation. See *id.* at T-21. Agencies spent over \$18 million in 1997 on in-house investigations, at an average cost of \$1823 per investigation. See *id.* The quality of both in-house and contract investigations is questionable. The written material is often voluminous, yet “too superficial” and unhelpful to the finder of fact. H.R. REP. NO. 103-599 pt. 1, at 28, 42. While EEOC Chairman, Justice Clarence Thomas argued that the EEOC's lack of centralized quality control violated the “obligation to the American citizenry to operate a system that does not waste tax dollars.” *Id.* pt. 2, at 33.

207. See COMM. ON GOV'T OPERATIONS, OVERHAULING THE FEDERAL EEO COMPLAINT PROCESSING SYSTEM: A NEW LOOK AT A PERSISTENT PROBLEM, H.R. REP. NO. 100-456, at 4 (1987).

The decentralized system under which agencies investigate and act on discrimination charges against themselves in a clear conflict of interest. With ‘the fox in charge of the henhouse,’ the system lacks credibility with employees. Fundamental fairness—and importantly, the perception of fairness—require that an independent third party be the adjudicator of discrimination complaints.

Id.

208. Federal Sector Equal Employment Opportunity, 63 Fed. Reg. 8594, 8598 (1998) (to be codified at 29 C.F.R. pt. 1614) (proposed Feb. 20, 1998). In 1997, agencies rejected or modified AJ recommended findings of discrimination 67% of the time. See EEOC 1997 REPORT, *supra* note 9, at 52. Agencies accepted AJ recommended findings of no discrimination nearly 98% of the time. See *id.*

209. There are currently no government-wide data to test whether agency final decisions are more accurate than AJ recommended decisions. See *supra* note 158 (EEOC reports do not contain data showing how often agency decisions that reject AJ findings of discrimination are sustained by the EEOC on appeal).

210. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8598.

211. There is reason to believe that agencies can have faith that the correct results will be reached. Although government-wide data are unavailable, the EEOC Office of Federal Operations sustains Army and Air Force final decisions on appeal well over 90% of the time. See *supra* notes 156-159 and accompanying text.

one agency, the EEOC, rather than in ninety-seven different federal agencies.²¹² This would eliminate many differing interpretations and applications of the discrimination laws.²¹³

AJ final decisions should also lead to an improved appellate process. The Office of Federal Operations would no longer review after-the-fact final decisions written by agency personnel removed from the hearings process. Instead, it would review decisions written by AJs, who conduct the hearings and hear the evidence first-hand.²¹⁴

Improved Efficiency and Complaints Processing Times— Having agencies “reconsider” and issue decisions on cases already heard by AJs not only looks bad, but is also duplicative, inefficient, and costly. Eliminating final agency decisions after AJ hearings would remove a step from complaints processing and may lead to some improvement in the “inordinate delay” that plagues the current system.²¹⁵ Whether they have a valid case or not, in complainants’ eyes “justice delayed is justice denied.”²¹⁶ Delay encourages complainants to “initiate litigation in [f]ederal district court at the earliest possible moment in lieu of using the administrative process through to completion.”²¹⁷ This “perverse consequence” is something to be seriously avoided, given that the stakes and costs of civil litigation are extremely high.²¹⁸

AJ final decisions are wise from a policy perspective. Most agency concerns about losing final decision authority are legit-

imate, but they do not override the need for a fairer and more effective federal sector complaints processing system.

Conclusion

The universal criticism of the federal sector complaints processing regulations should not be solely attributed to mismanagement by the EEOC and federal agencies. Instead, the problems with the current regulations are deeply rooted in their “Rube Goldberg” design. Congress intended that the “critical defect” of agencies judging themselves be eliminated from the system. Having adopted the CSC’s procedures of agency self-investigation and decision-making, the EEOC has not effectuated Congress’ intent.

Although AJ final decision authority will not cure all the problems of the current system, getting the “fox out of the chicken coop” is a necessary step in the right direction. The EEOC already has the statutory authority to make this change. The EEOC’s recent retreat from its proposal to make AJ decisions final, however, shows that legislation, such as the FEFA, will be required before this controversial change can be accomplished.

212. See EEOC 1997 REPORT, *supra* note 9, at 14-17.

213. One example of how differently agencies interpret the facts and law may be found in the rates at which they accept AJ findings of discrimination. For example, in the last three reporting years the Department of Veterans Affairs accepted AJ findings of discrimination in only 21% of cases. See *id.* at T-38; EEOC 1996 REPORT, *supra* note 158, at T-36; EEOC 1995 REPORT, *supra* note 184, at T-36. Department of Defense agencies accepted AJ findings of discrimination at a significantly higher rate, in 52% of cases. See *id.* at T-34; EEOC 1997 REPORT, *supra* note 9, at T-37; EEOC 1996 REPORT, *supra* note 158, at T-34.

214. When it originally proposed AJ final decision authority, the EEOC also proposed a substantial evidence standard of review for appeal of AJ decisions. See Federal Sector Equal Employment Opportunity, 63 Fed. Reg. at 8601. Agency decisions without hearings would be subjected to a *de novo* standard of review. See *id.* The EEOC believes that “applying the *de novo* standard of review to the factual findings in [AJ] final decisions after hearings would be an inefficient use of EEOC’s limited resources.” *Id.*

215. H.R. REP. NO. 103-599 pt. 1, at 29 (1994). See *supra* note 187 (reporting an average of 613 days for a final agency decision to be issued in cases that went to hearing).

216. *Id.*

217. *Id.*

218. *Id.*