In the

# Supreme Court of the United States

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JEWELL D. CHANDLER,

Petitioner

v.

RICHARD L. ROUDEBUSH, ETC., ET AL.,

Respondents.

No. 74-1599

Washington, D. C.
March 2, 1976

Pages 1 thru 42



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Tuesday, March 2, 1976

The above-entitled matter came on for argument at 11:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOEL L. SELIG, ESQ., Lawyers' Committee for Civil Rights Under Law, 733 Fifteenth Street, N.W., Suite 520, Washington, D. C. 20005
For Petitioner

REX E. LEE, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C. 20530

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-1599, Chandler against Roudebush.

Mr. Selig, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOEL L. SELIG, ESQ.

ON BEHALF OF PETITIONER

MR. SELIG: Thank you, Mr. Chief Justice, and may it Please the Court:

Prior to 1972, Title VII of the 1964 Civil Rights Act did not apply to the Federal Government. In 1972, Title VII was amended so as to make unlawful, under Title VII, discrimination by federal agencies and departments.

The 1972 amendments also provided to federal employees and applicants for employment a right to file a civil action in a United States District Court.

The question in this case is, what is the nature and the scope of that civil action? The Commissioner contends that it is a plenary judicial proceeding and the Respondents contend that it is a review of the administrative record pursuant to a substantial evidence standard.

Petitioner is a black female employee of the Veterans Administration. In 1972, she applied for a GS-13 supervisory claims examiner position. She was designated as highly qualified for the position but a Filipino-American male was selected. She thereupon filed a complaint alleging that

she had been discriminated against on the basis of her race and sex.

An investigation was conducted and after the investigation, Petitioner was offered the option of either receiving a final agency decision on the basis of the investigative file without an administrative evidentiary hearing or the option of receiving a final agency decision after an administrative evidentiary hearing.

She selected the second option. Petitioner is not an attorney. She represented herself at the hearings. She requested that 24 witnesses be called to testify and the examiner declined to call 15 of the 24 witnesses requested.

Nevertheless, the examiner found partially in Petitioner's favor. She found that Petitioner had been discriminated against on the basis of her sex but had not been discriminated against on the basis of her race.

The examiner recommended that Petitioner be promoted immediately and retroactively to the position in question.

The examiner's findings, however, are only recommendations to the head of the agency or his designee and the Veterans Administration accepted the examiner's finding that there had been no race discrimination but rejected the finding that there had been sex discrimination.

Petitioner at that point had the option of filing

suit in district court or appealing to the Civil Service Commission. She chose the second option. The Civil Service Commission affirmed the agency's decision. This suit followed.

In the district court, Petitioner sought discovery. She sought initially to take two depositions and she requested production of documents in these depositions.

The district court, however, granted summary judgment on the basis of the administrative record in favor of the defendants with no discovery and the Ninth Circuit affirmed.

The positions -- the issue in this case is sharply drawn and the positions of the parties are in stark conflict. I think that the issue can be stated in terms of two inter-related questions, one, who is the finder of fact in this kind of case? Is it the court or is it the agency?

And, secondly, what evidence may be considered by the court? May the court consider all relevant evidence or is the court limited to considering the evidence contained in the administrative records?

QUESTION: Do you admit of the possibility that the mode of trial in the district court might be one way had there been no appeal to the Civil Service Commission but in another way if, as in this case, there was?

I suppose you, representing the client you do, would not admit of any possibility of that because your client

did take an appeal to the Civil Service Commission.

MR. SELIG: Well, that is correct, your Honor, and the statute specifically contemplates that suit may be filed in either situation and makes no distinction as to --

QUESTION: I know that, but suit may be filed within thirty days after the final agency decision, as I understand it.

MR. SELIG: That's right.

QUESTION: Or within 15 days after the final agency decision and appeal may be taken to the Civil Service Commission and then there in 180 days further. I know the option.

My question was, do you -- and I probably know your answer because I realize the position that your client is in but it just occurred to me that the answer might be -- the mode of trial might be in one way where there was no appeal to the Civil Service Commission and in one way where there was.

MR. SELIG: Well, of course, I would also point out that the only thing added by the appeal to the Civil Service Commission is a further -- is a review of the record by the Civil Service Commission. There is no additional opportunity -- there is an opportunity to make written representations to the Commission but --

QUESTION: It is the same kind of an appeal as it is in an appellate court, generally.

MR. SELIG: That is correct.

QUESTION: I mean, it is an appeal on the record, right?

MR. SELIG: That is correct.

Petitioner's position on these two interrelated issues is that the court is the finder of fact and that the Plaintiff should be permitted to discover and introduce all relevant evidence pursuant to the standards of the federal rules of civil procedure as applied in all other Title VII cases.

If the Court adopts our theory, plaintiffs in federal sector cases would have no more procedural rights in district courts than plaintiffs in any other Title VII cases and they would have no less rights in district courts than all other plaintiffs.

QUESTION: What would be the rule as to the admissibility of the administrative record under your theory, Mr. Selig?

MR. SELIG: It is our assumption -- in the first place, let me say that normally there is no objection by anyone to admission of the administrative record, but we believe that the administrative decision is clearly admissible. There can be no question about that. It is a finding of an agency. It is a business record. It is also our assumption that --

QUESTION: Well, but I don't know that that

necessarily follows. If your theory is, this is a de novo trial, presumably those issues of fact are for the court or the jury and ordinarily you can't admit a business record to prove a fact that is ultimately within the jury's competence.

MR. SELIG: It is our position that, certainly, the agency decision and the Civil Service Commission is admissible.

QUESTION: Well, on what theory, if it is really a de novo trial, starting all over again?

MR. SELIG: It is -- I think the findings of agencies are normally admissible whether or not the judicial proceeding is a de novo proceeding.

QUESTION: Well, aren't you --

MR. SELIG: And it is also in this record.

QUESTION: -- aren't you suggesting a mixed procedure, partly agency review and partly trial de novo?

MR. SELIG: No, your Honor, it doesn't follow from the fact --

QUESTION: What weight would the administrative record be given? What construction?

MR. SELIG: It would depend entirely on the nature of the questions evolved in the case and what is contained in the administrative record and the administrative decision but --

QUESTION: Well, what would the judge charge the jury as to the weight to be given?

MR. SELIG: Well, there is not a jury trial.

QUESTION: Okay, well, what does the judge, what rule does he follow as to the weight that should be given it?

MR. SELIG: Well, this Court, in Alexander against Gardner-Denver Company addressed that question in a footnote and said, we adopt no rule. It depends upon the facts and circumstances of the particular case and I would think that the same applies here, but the important thing about the footnote in Alexander is that it says that the administrative decision is admissible. It may be accorded some weight but that refers to its weight as one piece of evidence along with any other evidence that is admitted.

QUESTION: But that was a contractual grievance proceeding, wasn't it?

MR. SELIG: That is correct, your Honor and I'd like to respond to that but I would like to finish what I was saying about the footnote, which is that the record is admissible. It is entitled to whatever weight makes sense in the particular circumstances but that doesn't mean that it may be used as a reason for excluding other evidence and the Court goes on in the footnote in Alexander to say that it is the duty of the courts to assure the full availability of the judicial forum.

Now, the arbitration process is not a statutory proceeding under Title VII. However, in Alexander, the Court also considered and rejected a proposed rule of deferral to

arbitrarial decisions which the Fifth Circuit had adopted in a case called Rios against Reynolds Metal Company and the conditions which the Fifth Circuit set for deferral were, one, that the contractual right must coincide with rights under Title VII, two, and I -- well, I won't go into them unless the Court wishes, but there were a number of conditions which would have to be satisfied under the Rios test for deferring to an arbitrarial decision and the very first condition was that the arbitrarial, the rights under the contract must be congruent with Title VII and the Court held in Alexander that even if that were so, deferral would be inappropriate and there should be a trial de novo.

Now, the government position is explicitly that the agency is the finder of fact in these matters, subject to substantial evidence review in the courts and that the court should normally defer to the findings and decision of the agency.

Furthermore, the government's position is that in the ordinary case there is no discovery in the district court and the record before the reviewing court must be limited to the record made by the defendant agency.

Under this rule, the Federal Government would be placed in a class all by itself exempt from plenary judicial scrutiny.

We think that it is important to understand what

review on the record pursuant to substantial evidence test means and Professor Jaffe has explained it as follows:

Under the substantial evidence test, the court will be required to sustain a finding which it believes to be incorrect and even against the weight of evidence because it is the agency and not the court which finds the facts.

So long as there is substantial evidence in the record taken as a whole that could support the agency's decision, the court must accept that decision even if it would believe it to be wrong, making an independent judgment. We think that such a posture by a district court in a federal sector Title VII case would be wholly inconsistent with the court's function as the finder of fact and as the decider of what relief should be provided. Now, I'd like to address --

QUESTION: Now, that statement assumes the conclusion, does it not? You say as the finder of facts, the whole issue in this case is whether the court or the agency administrative tribunal is the finder of facts.

MR. SELIG: That is right, Mr. Chief Justice and I was just trying to point out that the government's rule would be completely inconsistent with what the rule is in the private sector and in the state and local sector under the decisions of the court.

QUESTION: But this is true in a great many other areas, is it not, in judicial review of administrative action?

MR. SELIG: Tht is correct, but I think that we have to look at this particular statute, its particular language, its particular legislative history and its particular purpose and certainly we would not deny that review on the record is the rule in large numbers of cases and Congress could have provided for that if it had wanted to do so and in that regard it is particularly significant that the draft legislation which would have provided cease and desist authority to the Equal Employment Opportunity Commission in the private sector would have explicitly provided for review on the record in the courts of appeals pursuant to a substantial evidence standard. This was written into the draft legislation.

QUESTION: That was when? In '65 or '72?

MR. SELIG: No, your Honor.

QUESTION: In '72.

MR. SELIG: In '72, that is correct. And that was defeated. Congress knew how to provide for review on the record if it wanted to do so.

QUESTION: But that was --

MR. SELIG: But they chose not to do so.

QUESTION: Was that proposed provisional as applicable to federal employees only? Or across the boards.

MR. SELIG: No, and that is a second point in our favor, Mr. Justice Stewart, which is that even that draft legislation did not apply to the federal sector and federal

sector cases were governed by a completely different section of the draft legislation.

Now, I think it is important to consider one of the arguments which was made in favor of cease and desist and court of appeals review in the private sector and that argument was that it would be too much of a burden on the district courts to try all these cases de novo.

There was repeated reference to the problem of congestion in the dockets of the lower courts and a repeatedly-expressed reason in favor of agency enforcement rather than court enforcement in the private sector was that this would relieve the burden upon the district courts.

That argument may have been valid but it was rejected by the Congress and I think that that has special significance here.

In that regard, this is why we believe that the comments of Senator Domenick have special significance here. There would be no 1972 amendments without Senator Domenick because cloture could not have been obtained unless the Congress had agreed to Senator Domenick's amendment which would have and did substitute court enforcement in the private sector for cease and desist enforcement in the private sector and Senator Domenick repeatedly expressed his concern that all parties, plaintiffs and defendants, in private industry, in state and local governments and in the Federal Government, should have

their claims adjudicated Aursuant to the same procedures and by the same fact-finders. That is, by an independent United States District Judge who would independently determine the merits of their case.

QUESTION: What was the occasion for providing an elaborate administrative remedy for federal employees?

MR. SELIG: It already existed, Mr. Justice White, in substantially the same form --

QUESTION: That may be so but in saying that you provide the same remedies, well, that just isn't true if there is an elaborate administrative remedy available.

MR. SELIG: Well, they were referring to providing the same remedies in court and I'd also like --

QUESTION: I thought that was what you would say, but nevertheless, the federal employee does have different remedies.

MR. SELIG: Well, it has different remedies with respect to federal agencies. I would also point out, Mr. Justice White --

QUESTION: Well, he does have different remedies. He has an additional remedy. It isn't the same at all.

MR. SELIG: Well, private sector employees and state and local employees frequently have remedies at the state and local level pursuant to state fair employment practices statutes. For example, in Minnesota and Michigan, for example,

and many other states you have a local fair employment practice agency which has cease and desist authority over the private sector and over state and local employees which provides trial-type adversary hearings with discovery and compulsory process and private-sector employees are required to exhaust those procedures before they can even complain to the Equal Employment Opportunity Commission under Title VII.

There may be many employees in that situation who have a full trial-type adversary hearing at the state or local level before they come into federal court.

QUESTION: Aside from Title VII cases, what happens to a federal employee who is discharged and utilizes fully the administrative processes available to him? What happens to him with respect to court review?

MR. SELIG: You mean under other bases or jurisdictions, your Honor?

QUESTION: Yes.

MR. SELIG: He gets review on the record at the court's --

QUESTION: Where?

MR. SELIG: Well, there has traditionally been a remedy in the district courts but the courts are divided as to what the basis for that remedy is. They are divided also with respect to what standard of review is applicable.

QUESTION: Congress has never sent federal employees

to the courts of appeals after Civil Service action.

MR. SELIG: Not to my knowledge and the D. C. Circuit has criticized that on numerous occasions.

QUESTION: Yes, but the fact remains, they haven't.

MR. SELIG: No, that is correct, your Honor.

QUESTION: It is a review on the record in the district court, is it not?

MR. SELIG: That is correct. But the whole point is, I believe, that this apparently existed prior to the 1972 amendment and it did not exist under this statute and the question is, what are the procedures to be followed under this statute?

QUESTION: Wasn't a good deal of the opposition to giving the EEOC cease and desist orders from private employers who felt that it might give them less than a fair shake? Wasn't that most Senator Domenick's position?

MR. SELIG: Well, I think that was a substantial part of his position.

QUESTION: And that same argument certainly wouldn't apply from the point of view of the Federal Government fearing that the Civil Service Commission wouldn't give it a fair shake.

MR. SELIG: No, but it would apply with respect -- from the point of view of the federal employee and applicant for employment and that concern was repeatedly expressed.

I think I'd like to reserve the remainder of my

time at this point.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Lee.

ORAL ARGUMENT OF REX E. LEE, ESQ.

ON BEHALF OF RESPONDENT

MR. LEE: Mr. Chief Justice, and may it please the Court:

Taken in isolation, the language of the statute and its legislative history would support a respectable argument for either record review or de novo trial.

For reasons that are set forth in our brief, we believe the more persuasive view of the legislative history is that it supports the record review interpretation but the most persuasive insight in the Congressional intent is provided by the fact that beyond any dispute, Congress intended to vest and did vest the frontline responsibility for insuring equal employment opportunity in the federal sector in the Civil Service Commission.

QUESTION: And yet it is very clear that an employee claiming discrimination can wholly avoid such review and go into the federal district court after his agency has acted. Isn't that right?

MR. LEE: It depends, Mr. Justice Stewart, on how broadly you consider the Civil Service Commission and its responsibility in this area. It is true that up to the point of

appeal to the appeals review board of the Civil Service Commission, that it is a shared responsibility between Civil Service Commission and agency.

QUESTION: And agency.

MR. LEE: But everything that that agency does from the beginning of the conciliation process through the investigation, through the attempt at adjustment of the complaint and including the hearing itself is conducted pursuant to Civil Service Commission regulations according to procedures that have been prescribed by the Civil Service Commission and at the time that you get to the hearing -- and there is no way that you can skip that and go into court --

QUESTION: That is, the hearing.

MR. LEE: Unless the complainant waives it but at the time that you go to the hearing --

QUESTION: In your agency.

MR. LEE: That is correct. That is the only place there is the hearing, in the agency.

QUESTION: Right.

MR. LEE: That hearing is conducted, is presided over by a full-time Civil Service Commission examiner certified and trained by the Civil Service Commission. He is not an agency employee. So that really, and I appreciate your pointing this out. When I talk about the Civil Service Commission,and this is the thrust of our position, we are

really talking about a shared agency responsibility, Civil Service Commission and agency. But there is no question that the entire procedure is consucted under the aegis of the Civil Service Commission pursuant to its regulations and under its overall supervision and control.

QUESTION: Is what you say applicable to the very first processing of the very first administrative complaint?

MR. LEE: The very first. The very first step starts on page 28-A of our Appendix. It talks about the counseling procedure and that is pursuant to the Civil Service Commission's regulations.

QUESTION: Is that done by Civil Service personnel?

MR. LEE: No, not personnel. The personnel comes into the point at the hearing examiner --

QUESTION: That is what I thought.

MR. LEE: -- pursuant to Civil Service Commission regulations. It is further significant that whereas we are concerned today with the adjudication of a particular complaint, this adjudication process is a part -- an integral part of a much larger whole equal opportunity effort by the Federal Government. It is all subject the direction of -- it is under a single office under a single director and additional component parts of this overall effort are in addition to the adjudication process.

There is a continuing process carried out by the

Bureau of Personnel and Management Evaluation which evaluates programs on a continuing basis.

In addition, the statute charges the Civil Service Commission with the review and approval of equal employment opportunity plans on a regional and national level and, finally, the Civil Service Commission is charged with training and upward mobility, affirmative action programs throughout the entire Federal Government so that the federal judge, when he considers a particular equal employment opportunity case, gets the picture that is presented by that case.

The Civil Service Commission, by contrast, has the adjudication process as a component part of a much broader overall program and this was the thrust of Judge Gezell's opinion in Hackley versus Johnson. He made the very significant observation, which is true, that it is almost impossible in the usual case, federal case, to differentiate between the claims of pure discrimination on the one hand and the related problems, necessarily-related problems of promotion, hiring, training and general affirmative action in -- no, promotion, hiring and training and the great majority of the cases are promotion cases.

Judge Gezell's conclusion, in a single statement, in a single sentence, which I quote is, that "The Commission's growing expertise in civil rights matters, coupled with its preeminent expertise in the latter areas, emphasizes that an

automatic trial de novo will not serve the laudable purpose of the act.

It is further instructive to note, as was pointed out by Mr. Justice White, that regardless of how you decide this case, the government is going to be in a class by itself.

Congress simply did not go the same route with regard to the private sector and the federal sector.

QUESTION: Are there any even conceivable conditions under which a federal employee could go to the EEOC? There are not, are there?

MR. LEE: No, there are not. They just don't have jurisdiction.

QUESTION: That's what I thought.

MR. LEE: That is right. That was, I guess next to the question of cease and desist authority, that was the biggest debate in Congress and the contrast is remarkable. This EEOC simply does not have substantive remedial authority. It lost that one in Congress and as a consequence, the limit of what they can do is conciliation and persuasion. That is really the first step in the federal sector.

The federal employee, by contrast, has really two points, arguably three, at which he can win and win affirmatively and have the kind of back pay reinstatement, promotion, whatever, prior to the time that he ever gets into court so the concept of equality is not a relevant one. That is a matter

that is simply precluded because of the structure of the act as set out by Congress.

QUESTION: Will you review those steps, Mr. Lee? The employees options, first within the agency, briefly.

MR. LEE: I'd be happy to, Mr. Chief Justice.

The first step is that he complains of an act of discrimination. At that point, a counselor is appointed, an equal employment opportunity counselor is appointed --

QUESTION: Within the agency.

MR. LEE: Within the agency. That is correct. And he attempts at that point, at the very most informal level, to achieve some kind of an agreement, to find out what it is that has happened and to see if he can't work it out at that level and a large percentage of them are worked out at that level.

If, within 21 days that has not been done, then the aggrieved employee files a formal complaint and at that point there is an investigator who is appointed to make an investigation. The investigator comes from within the agency, but he cannot be under the supervision of the person who is alleged to have discriminated.

The investigation is really the heart, initially, of the inquiry into discrimination. He has full authority to ask questions, to interview. It is not an adversary process. It is an inquisitorial process. And he prepares an investigation file which is a report of what he has found.

The next step is that an attempt at adjustment of the complaint is attempted on the basis of that investigation.

In the event that an adjustment of the complaint cannot be achieved, then the complainant indicates that he wants a hearing and that is when the Civil Service Commission appoints its hearing examiner and the hearing is held within the agency.

Fortunately we have a good record in this case and I would simply commend to the Court that you might want to read the record of the hearing in this case because I think it is an example of how a hearing can operate. The individual is entitled to be represented by counsel. It is not required to.

In this case, Mrs. Chandler represented herself and, frankly, in my opinion, she did a good job.

There is a representative of the agency present as well. In this case, it would appear that the representative of the agency was not a lawyer but in any event, it did not take a vigorous adversary procedure.

The complaints examiner renders a recommended decision and makes, in effect, findings of fact. That is forwarded to the agency itself which makes a decision and from that point, the complainant has two options. He can either go direct to court or he can appeal to the appeals review board of the Civil Service Commission and following 180 days of the filing either with the Civil Service Commission or with the

agency, he has the right to go into court.

The issue, it seems to us, is that whether it is more consistent with these overall Civil Service Commission's responsibilities and the fact of integration of the adjudication process with the much broader federal equal employment opportunity effort to relegate the Civil Service Commission to the role of an examiner or the provider, if you will, of a dress rehearsal, the traditional tandem of agency and court in effecting congressional policy and in utilizing scarce federal resources for this purpose works best when the agency brings its expertise to bear on substantive policy matters, integrating its broader rule-making authority with its adjudicatory authority and the courts doing what they do best, correcting errors of law, errors of procedure, excesses of statutory power or constitutional right and correcting factual errors only when they rise to the level of excesses of substantial evidence and this, we submit, is what Congress must have meant by integrating the complaint-adjudicating process as a part of the Commissions broader equal employment opportunity and federal merit system responsibilities and giving the commission unparalled remedial powers.

Senator Willaims stated at the conclusion -- at the time that all of the amendments were made and the Senate Committee Report also states early in the legislative history, that an important adjunct to the strength and Civil Service

Commission responsibilities is the statutory provision of a private right of action of review of the agency proceedings.

That "right of review" is Senator Williams language later on. That right of review language does not appear in the Senate Committee report.

But the point I would like to make is, that both regarded it as an adjunct to the strengthened Civil Service Commission responsibilities.

It is significant in this regard that this Court's decision in Alexander versus Gardner-Denver, as I read it, relies principally on the fact that in the private -- in the arbitration context, up until the time that you got into court, the complainant had not had the access to any official body of the Federal Government that had either the authority or the responsibility for implementing and for fleshing out the details and implementing of equal employment opportunity policy.

The statement is made a number of ways in a number of different places in the Gardner-Denver opinion but the thrust is always the same, that the responsibility of the arbitrator is to implement the contract, whereas, the responsibility of the Civil Service Commission, by contrast, is to implement the statute. The arbitrator simply has no responsibility to implement the federal policy contained in the 1972 amendment. By contrast, the Civil Service Commission

does and that is its principal responsibility.

Now, Justice Stewart asked the question whether there would be any difference whether you appeal directly to the appeals -- whether you appeal directly from the agency or you go through the Appeals Review Board and I think it is apparent now that my answer to that question is no and the reason is that under either circumstance it is, we do have this tandem of agency responsibility and court responsibility with each doing the kind of things that they do best.

QUESTION: You mean, each would be reviewing the same record?

MR. LEE: That is correct. That is correct.

QUESTION: The Civil Service Commission would review the record last made or if he took the route to the District Court, that would be the basis of the judicial review.

MR. LEE: That is correct, Mr. Chief Justice and I am saying one more thing, and that is, that whether you go directly from the agency into court, it is a review of the administrative record or if you go from the Civil Service Commission in the court it is a review of the administrative record because under either circumstance, you have the agency having brought its expertise to bear on the problem.

Now, to be sure, if it is direct from the agency, it is a shared responsibility between Civil Service Commission and the agency but it is still that kind of a tandem

responsibility between the court and agency.

Mr. Selig has pointed out that Congress knew how to provide for substantial evidence review. That is very correct. We also know that Congress knows how to provide for de novo review and the fact of the matter is that in this case, the language of the statute doesn't lend itself to either interpretation. There is the language -- on the one hand there are the statements of Senator Williams that clearly point to record review.

There is the statement of Senator Domenick that might lend itself to the other interpretation, though I would point out that Senator Williams' statements in this regard are more to be -- not trusted, but are more persuasive in this context than those of Senator Domenick because all of Senator Domenick's comments were given, or virtually all, were given in the context of one who opposed a particular provision in that statute and that was cease and desist authority in the EEOC, whereas Senator Williams was the man who introduced the bill that eventually became the law.

There is no one who is more familiar with this bill as it went throughout the various steps than was Senator Williams.

QUESTION: Mr. Lee, on the point of whether Congress might have said so explicitly, taking the other side's position, explicitly, are there any other federal statutes that

have been construed to limit court review to the administrative records where the statute has not expressly so stated?

MR. LEE: I am confident that there are, Mr. Justice Stevens. There are -- the two statements that we have quoted in our brief come from the Bianci case and which was a Wunderlich Act review and that one does expressly provide for substantial evidence, as does Consolo and that makes the statement in those cases dictum but it is very clear dictum and for that reason, I can't give you an example, but this Court has declared in the clearest possible language that that is the general approach and once again, I find it very persuasive that Congress did say that it regarded the right of civil action as an adjunct to strengthen Civil Service Commission procedures.

The Petitioner finds significant the fact that in the majority of cases there is no hearing. We consider this to be neutral insofar as the interpretation of this statute is concerned. If there has been no hearing, it is because the Complainant has so elected and has concluded, in effect, that the investigation is sufficient and provides a sufficient basis for the record.

QUESTION: The Complainant has an absolute right to that hearing.

MR. LEE: That is correct.

Moreover, if the complainant elects not to have a hearing, that does not mean there is not an administrative

record to review. The administrative record for review in those circumstances is the investigation file.

Similarly, it has been urged by the amicus that the average administrative proceeding takes 201 days, which is longer than the 180 days, and that in some cases it is much higher.

As a matter of fact we are advised by the Civil Service Commission that at the present time it is just a little bit higher than that.

QUESTION: That is talking about elapsed time from beginning to end, not the time consumed in that number of days. Is that right?

MR. LEE: What we are talking about, Mr. Chief Justice, is the period of time that it takes from the filing of the complaint up until the time that the administrative record is complete. You have 180 days at the agency level and you also have 180 days at the Civil Service Commission Appeals Review Board in the event that they elect that option.

But -- and I should also point out that with the proposed adoption of class action procedures, we are likely ot have other cases in which the elapsed time is even greater.

We do not see this as a significant problem as far as the present issue is concerned for this reason. In the average case, where, beit the 201 or the 218, by the time the court reaches the issue, there will be an administrative record

because with 180 days just in the time to file an answer, it would be up to the 218 days.

But let's take the case in which it is not 218, maybe it is 300. It is our view that what the Court should do under those circumstances, for the reasons that we have been talking about, is that the Court should entertain a stay motion and should first inquire to determine what the reason is for the delay.

If the Court finds that it is for any reason other than the fault of the agency, the Court should then favorably entertain a stay motion and should wait for the completion of the administrative record.

In the event that the delay is due to the agency's fault, then it would be appropriate for the Court to proceed with de novo review or to take other steps that are within the discretion of the reviewing court.

Finally, the point has -- or, it has also been argued that there is a problem insofar as the procedures are concerned with the examiner being the only one who has had the opportunity to observe the -- the credibility problem, the demeanor problem.

In that respect, there are some cases in which credibility and demeanor may occupy a large part of the case. In those instances, if the agency and the Commission have not followed the examiner's decision, then, under the traditional

rules of review that were established by this Court in the Universal Camera case, the court can reverse on that ground alone, that inadequate consideration was given to what the examiner did and, similarly, another alternative would be simply to remand the case for further consideration.

In this particular case, credibility was not a large issue. There really wasn't a substantial issue insofar as what happened and who was telling the truth and who wasn't.

The principal issue in this case was whether it is more important in selecting section chiefs to rely on individual specific kinds of skills such as the ability to read computer print-outs and experience in specific phases of the agency's work or whether the larger, more subjective kind of skills such as the ability to motivate people was --

QUESTION: But they did find difficulty with the sex thing. They didn't find difficulty with the race point, so wouldn't credibility be something in there?

MR. LEE: Mr. Justice Marshall, if you look carefully at what the examiner concluded with regard to sex, it did not depend in any way on what the witnesses said or on the matter of credibility of one having said one thing and one having said another and which was telling the truth.

She relied on three considerations, all of which were judgment balancing kinds of considerations which can be as well by a reviewing body as by the one who has heard the

evidence.

In conclusion, we submit that Congress has made a comprehensive effort to assure equal employment opportunity in the Federal Government. It is an effort that consists of several interlocking components, including review of equal opportunity, employment opportunity plans, training, upward mobility, affirmative action, adjudication of grievances, complete with full remedial authority that is unparalled anywhere else, either within government or outside.

The administration of this total integrated whole is charged to the Civil Service Commission, already experienced and unique in its expertise in areas of hiring, training and promotion which are the consistent touchstones of equal opportunity issues.

To wrench from this integrated whole one interlocking component would work serious damage to the careful scheme intended by Congress.

For this reason, we respectfully urge that the Court affirm the judgment of the court below.

QUESTION: The alternative that your friends are suggesting is that this be entrusted to 403 or 425 federal district judges who treat the matter as any other independent kind of litigation, trying it de novo.

MR. LEE: That is true and that, Mr. Chief Justice, specifically is the problem. There are 423. We wish there were

473 but there are 423 of them, one of whom is charged with the total, unifying responsibility.

The only place in the judicial system where that kind of total, unifying responsibility could possibly rest is right here in this Court.

By contrast, the Civil Service Commission does have the total responsibility.

Thank you.

QUESTION: Mr. Lee, your opponents also suggest that Congress wasn't all that convinced that the Civil Service Commission had the high degree of expertise in the field of equal opportunity, in fact, that it had been lagging some and that that is the reason they advanced. Isn't there some indication in the legislative history that that was the feeling of Congress?

MR. LEE: Surely and that is totally irrelevant as far as the present issue is concerned. In fact, it even cuts our way. The fact is that notwithstanding that concern, Congress said several things. One is, that notwithstanding that concern, the Civil Service Commission -- they did choose the Civil Service Commission and in that respect, in order to assist it, yet the committee was persuaded the Civil Service Commission is sincere in its dedication to the principles of equal employment.

In order to assist the Commission in accomplishing

this goal, to make clear the Congressional expectation, it was given responsibilities to function in developing a comprehensive equal employment opportunity program.

The fact of the matter is that notwithstanding those concerns, which were thoroughly aired in Congress, it was the total responsibility that was clearly placed in the Civil Service Commission and I don't want to give the impression that I don't think that it is working.

You look at that statement by Chairman Hampton. My friends have indicated the performance of the EEOC with regard to back-pay awards. Well, that is all, really, that the EEOC can get through the courts is back-pay awards.

But in the federal sector, far more important than back-pay is GS grade because that relates not only to money, it also relates to future status and to other employment considerations that are equally as important as money and as that report shows, at the same time that federal employment has been going down, we have had a perceptible improvement at all of the GS levels insofar as minorities are concerned.

But the principal point is, that whether it is succeeding or not, if the Commission has acted in excess of its statutory responsibility, then that is the basis for complaint in court. That is the kind of thing that courts do well.

If, in fact, they are saying that Congress made the

wrong judgment in giving this kind of responsibility to the Civil Service Commission, then the remedy there is in Congress. But you can't simply say -- you can't simply make a subjective judgment that the Civil Service has not been doing as well as it ought to do and therefore reject the judgment that Congress made that this is where the responsibility lies.

QUESTION: Mr. Lee, I have a question for you before you sit down, if I may.

Throughout your brief, you emphasize and repeat that the rule that you propose of review on an administrative record should be the rule in the ordinary case, that it should be the general rule and you make it very explicit that you can see there may be and are exceptions -- exceptions when there has been inordinate delay of the administrative review and another exception you suggest but when a witness has not been amenable to compulsory process because he is not a government employee and you suggest there may be others.

Is this -- do you know of any other situation where a court has an option of either reviewing something on the administrative record or not?

MR. LEE: I think, Mr. Justice Stewart, in -- that generally, the review of the administrative record necessarily implies, and I think this has been the consistent practice that the court has to have a certain discretion. Now --

QUESTION: Is that true in Labor Board cases, for

example, and review by the courts of appeals?

MR. LEE: Well, I would think that if --

QUESTION: Have you ever heard of one where the court of appeals took additional evidence?

MR. LEE: Well, the court of appeals --

QUESTION: Well, that is the reviewing agency.

MR. LEE: Yes, I understand.

QUESTION: Of many administrative --

MR. LEE: Rather than sending it back, you mean?

QUESTION: Yes.

MR. LEE: No, I don't. Of course, the Court of Appeals is not quite as well set up to take the --

QUESTION: No, but it is the court of appeals that is the reviewing court in most matters, as you well know.

MR. LEE: That's right.

QUESTION: And do you know of any analog to what you suggest?

MR. LEE: No, I don't. But I think that it follows from this kind of statutory structure and that it simply makes sense in the discretion of -- to allow this kind of discretion in the district court for those two kinds of circumstances.

QUESTION: And you suggest that there may be others?

MR. LEE: There may be. We can't --

QUESTION: If you have a careful lawyer -- or a

cautious lawyer.

MR. LEE: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Selig.

REBUTTAL ARGUMENT OF JOEL L. SELIG, ESQ.

MR. SELIG: Mr. Justice Marshall, credibility certainly was in issue in this case and I would direct the Court's attention to pages 63 through 67 of the certified administrative record. The pages are not produced in the Appendix. It is part of the testimony of the selective supervisor.

The Civil Service Commission, in affirming the agency decision repeatedly relied upon the explanations of the selecting supervisor as to why he selected Mr. Dineros rather than Mrs. Chandler and if you look at the pages that I am citing you to, I think you will see the reason why the complaints examiner, at least, found no credibility in those explanations.

The court, of course, had no opportunity to hear Mr. Holland testify and one of the first acts the Petitioner did in the district court was to try to take Mr. Holland's deposition and I suppose she would have called him as a witness in the district court.

Now, it is also suggested that these cases are so complicated and it is so difficult to distinguish between discrimination and a valid personnel procedure that the courts will not be able to understand these cases and deal with them.

At page 11 in footnote 14 of our reply brief, we have cited the case of United States against United States Steel Corporation. That is a case in which the government was the plaintiff.

We would commend that to the Court's attention and there are several different opinions in there.

That is a case which is extremely complicated and yet the Court was able to deal with it. The lines of progression, the way in which the United States Steel in Birmingham operates requires a great deal of expertise even to begin to understand what is going on at the United States Steel Corporation and yet the courts have to deal with this kind of thing every day.

They also have to deal with testing, which is extremely complicated.

Now, we think it is significant with respect to the question of the hearing that the statute does not require that these cases be determined after a hearing, nor does the commission.

In the draft legislation providing for cease and desist review in the private sector and review on the record in the court of appeals, the committee bill, the Hawkins Bill, those draft legislation required that hearings be conducted by the EEOC. They also contained the stay provision to which counsel referred. Of course, neither the stay provision or the

provision requiring a hearing in the private sector is contained in the statute as enacted and I don't think that it is the function of the Court to read things into the statute which are not there, particularly when they were there under antecedent draft legislation. I'd like to --

QUESTION: Is my understanding correct that here a complainant has an absolute right to a hearing --

MR. SELIG: That is correct.

QUESTION: -- in each agency.

MR. SELIG: That is correct, your Honor.

QUESTION: And only he may waive it.

MR. SELIG: That is correct.

Now, of course, I would like to say something about the middle positions which have been assumed by some of the courts of appeals. Obviously, this Court is not bound by the positions advocated by either party, but we feel very strongly that these middle positions are also completely inadequate and we have discussed the reasons for this at some length in our brief. Indeed, we think the government's position implicitly recognizes that there is no middle ground in this area.

Either the court is the finder of fact or the agency is the finder of fact.

QUESTION: Well, the government takes, if not a middle position, it doesn't take -- it admits of exceptions to the rule that it advocates.

MR. SELIG: Very narrow exceptions, your Honor, I would suggest.

QUESTION: Yes, but it concedes, pro tanto, that the rule it advocates may be inadequate or defective in certain circumstances. Is that correct?

MR. SELIG: That is correct but I think that the exceptions that they are recognizing are very narrow.

But, Mr. Justice Stewart, I think the problem -- there are several problems with these middle rules, which some of the lower courts have adopted and which are not being advocated by the government, but one big problem with them is that they put the burden on the wrong party. They put the burden on the plaintiff to show a need to go beyond the administrative record.

They put a burden on the plaintiff to show that it is necessary to have discovery, that it is necessary to have other witnesses testify.

Well, under the Federal Rules of Civil Procedure, if discovery is inappropriate, it is the defendant's burden to show that it is inappropriate under the rules and under the applicable case law.

QUESTION: But you are not starting from scratch here, as you would be in a civil action in a district court in its primary jurisdiction, are you?

MR. SELIG: Well, you are starting -- well, first of

all, Mr. Chief Justice, I don't think it is contended by anyone that the commission has primary jurisdiction in the normal sense of that word but you are starting from scratch as far as the complainant having control over the dissolving of his case.

QUESTION: Well, I am suggesting that the complaining party has had a good deal of procedure up to that time.

MR. SELIG: Well, as we have said, we assume that the administrative record is admissible. We also assume that duplication without a purpose can be prevented by the district court. But I think the important phrase, as Judge Leventhal stated it, is duplication without a purpose. Sometimes there is a purpose in duplication.

Frequently, in antitrust cases, there are large numbers of depositions that have been taken and this is true in many areas of the law.

I think, finally, that, of course, it is conceded by the government -- as it would have to be conceded in the light of Morton against Mancari, that what we are up to here is providing the same substantive law, the same substantive rights in the federal sector as in the private sector.

It is our position, basically, that you cannot separate substance and procedure in this area and this is why we believe the Court noted in Alexander that the choice of forums inevitably affects the scope of the substantive right to be vindicated and this is why we believe that the general

principle which is applicable here is the principle stated in the House Committee report and quoted by the Court in Mancari and that is, that the present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination and there is no reason why government agencies should not be treated similarly.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 12:00 o'clock noon, the case was submitted.]