ORIGINAL

In the

Supreme Court of the United States

Clarence Brown,

Petitioner

v.

General Services Administration
Et Al

No. 74-768

Washington, D. C.
March 1, 1976
March 2, 1976

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE BROWN, Petitioner	:	
v.	:	No. 74-768
GENERAL SERVICES ADMINISTRATION ET AL	:	

Washington, D. C.
Monday, March 1, 1976
Tuesday, March 2, 1976

The above-entitled matter came on for hearing at 2:43 o'clock p.m. on Monday, March 1, 1976 until 3:00 o'clock p.m. and was continued for hearing commencing at 10:10 o'clock a.m. the following day, Tuesday, March 2, 1976

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., JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ERIC SCHNAPPER, ESQ., 10 Columbus Circle, New York City, New York 10019 For Petitioner

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor 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 first this morning in No. 74-768, Clarence Brown against General Services Administration.

Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER, ESQ.

ON BEHALF OF PETITIONER

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

In 1972, Congress amended Title VII on the 1965 Civil Rights Act to authorize federal employees who had been the victims of employment discrimination to sue under Title VII.

That amendment precipitated a number of suits by aggrieved federal employees, both under Title VII and, as in the instant case, under other statutes, particularly the 1866 Civil Rights Act which is now codified as 42 U.S.C. Section 1981.

In the resulting litigation, the government has raised a number of procedural issues as to what judicial remedies shall be enjoyed by federal employees. By and large, these are the same procedural issues that were raised in the past by private employers, also seeking to defend Title VII or Section 1981 action.

This case presents two of those issues.

In July of 1971, Petitioner filed an administrative complaint with the General Services Administration, alleging

that his superiors had denied him a promotion on account of his race.

In March of 1973, after almost two years of administrative proceedings, the Agency found itself innocent of those charges.

Having thus obtained final agency action, Petitioner sued on May 7th, 1973 in the United States District Court for the Southern District of New York. Jurisdiction was alleged to exist under a variety of statutes including section 1981.

The Government moved to dismiss on the grounds that none of the statutes alleged on their face conferred jurisdiction over the claim at issue.

On appeal, two somewhat different arguments were raised in the Second Circuit. First, that the 1866 Civil Rights Act, insofar as it conferred jurisdiction over federal employees' claims of employment discrimination had been repealed by Congress in 1972 when it amended Title VII and second, it was suggested that prior to suit under Section 1981, an employee, at least of the Federal Government, must pursue the administrative remedies such as they are all the way through the Appeals Review Board.

The Court of Appeals accepted both of these contentions and affirmed the dismissal.

We sought certiorari, stressing that the decision of the Court of Appeals with regard to the rights of federal employees was in conflict with the decisions of a number of

circuits and this Court, particularly with the right of private employees under the same circumstances.

Subsequent to the grant of certiorari under the Court of Appeals' decision, this Court decided Johnson against the Railway Express Agency and held, with regard to private employees who sue under 1981, that 1981 was not repealed by Title VII and that there is no obligation to exhaust the Title VII administrative procedures and, indeed, under certain circumstances, it is not permissible to try to do so.

We believe that in that regard, Johnson was correctly decided and should be applied here.

Our brief spells out a variety of statutes other than Title VII affording varying remedies to federal employees who have been victims of unlawful employment discrimination. The most important of these is Section 1981 which is, indeed, the same jurisdictional basis as was discussed this morning in Washington against Davis.

The scheme which we have laid out presents, we think, the same pattern of independent overlapping remedies that exists for private employees who are aggrieved by employment discrimination.

The government maintains, however, that all of these statutes, and particularly the 1866 Civil Rights Act, were tacitly repealed by Congress in 1972 when it adopted the amendment to Title VII which I have mentioned.

In dealing with this contention, the Court, hapily, does not have to write on a blank slate, for this is not the first time that the suggestion has been raised in this Court that the 1866 Civil Rights Act has been repealed pro tanto by more recent legislation.

To be exact, this is the fourth time in a decade that that that contention has been raised here. In Jones against the Mayer Company, it was argued that the 1866 Civil Rights Act, insofar as it created a cause of action for individuals aggrieved by housing discrimination, had been repealed by Title VIII of the 1968 Civil Rights Act.

This Court rejected that contention.

A similar contention was raised in Sullivan against Little Hunting Park with regard to the 1866 Civil Rights Act insofar as it gave a cause of action for a victim of discrimination in public accommodations and, again, that argument was rejected. And, of course, most recently, in Johnson against REA, the Court held that the passage of Title VII did not repeal 1981 insofar as it created a cause of action for private employees.

We think that these cases are correct and that the reasoning of them should be applied here.

The statute involved, which is Section 717 of Title VII, does not purport on its face to repeal anything. It simply provides in two sentences that federal employees shall

have the right to sue after certain administrative procedures have been followed and provides that, by reference to the other provisions of Title VII, the procedures once in court shall be essentially the same as the procedures afforded to private plaintiffs.

In our judgment, that language of the statute is essentially the end of the Court's inquiry.

This Court, in Morton against Mancari, held that a clear and unequivocal Congressional intent in order for the Court to conclude that Congress had sub silencio repealed earlier legislation.

That rule, of course, goes back at least a century and there is nothing here to justify any such finding of repeal. Throughout the legislative history of the 1972 amendment, no-one in the Senate or the House, no witness and no report, with the exception I shall come to, made any mention of repealing anything or suggested that any rights federal employees might have might be excessive or suggested that they thought that Title VII in any regard ought to be an exclusive remedy.

The exception, of course, is the amendment proposed by Senator Proscui in the Senate, which would have expressly made Title VII an exclusive remedy and that amendment was rejected.

Now, we think, for this reason, that the Court of Appeals was wrong in concluding that Section 1981 has been

repealed and that statute, and, indeed, the other statutes involved, still exist and can be relied on by federal employees.

QUESTION: Was the Rusk Amendment directed to private employment or to public employment, too?

MR SCHNAPPER: The debate focused on the question of private employees. There is some question as to whether the statute, if adopted, would have covered federal employees.

As you wil recall, Section 717D provides that Section 706 F throught K shall apply to federal employment litigation and the Harusk Amendment would have been Section 706F. Whether, because of the language of that statute referring to employers it would or would not have been technically applicable to federal employees is, I think, a somewhat open question.

But it certainly doesn't -- certainly, Congress' silence in that regard -- and that is the most that it is -- doesn't involve the clear and manifest Confressional intent that this Court required in Morton against Mancari to find a repeal of any preexisting statute.

QUESTION: Well, how about some clear evidence that Congress intended to waive sovereign immunity except with respect to what it clearly said it was waiting for?

MR. SCHNAPPER: Well, legislative justification of our contention that these other statutes waived sovereign immunity is, of course, not to be found in 1972 when other

litigation, other legislation was before Congress. In that regard, one would have to look to the legislative history of the very statutes involved.

But at the outset, there are a number of claims raised by this case that would be litigable even in the absence of the waiver of sovereign immunity for what is alleged here is a violation of the law of employment discrimination which violates, among other things, the Fifth Amendment, an Executive Order, a regulation and three statutes.

Now, if the defendant individual supervisors were engaged in such unlawful conduct, they didn't do so as arms of the sovereign but were engaged, rather, in the matter of the defense of Ex Parte Young in, essentially, a frolic and detour of their own and sovereign immunity simply wouldn't protect them.

QUESTION: Well, do you think that we must find that to sustain your 1981 claim, some evidence that Congress waived sovereign immunity with respect to causes of action under that statute?

MR. SCHNAPPER: You need not, because there are individual defendants in this action who would be liable for injunctive relief. In addition, as we have noted in our brief, with regard to back pay we are in a somewhat unusual situation in that a ministerial duty to pay back pay exists under the regulations.

Under that somewhat unusual circumstance, injunctive relief, or mandamus, if you will, would like to compel the payment of back pay, although other kinds of monetary relief would require --

QUESTION: Well, what about a 1981 case for back pay?

MR. SCHNAPPER: Well --

QUESTION: What about a 1981 case for a promotion?

MR. SCHNAPPER: Well, if Petitioner was the most qualified person for the promotion he was seeking, if his supervisors decided to promote someone else purely on the basis of race, that decision was not a decision protected by sovereign immunity any more than the decision of the Secretary of State to deny a commission of Justice of the Peace, as Mr. William Arbury was and I don't see a whole lot of distinction there. I am sure if it is argued --

QUESTION: So you are saying those kinds of 1981 suits certainly existed prior to 1972?

MR. SCHNAPPER: Oh, they certainly did. That's --

QUESTION: Always have existed, you think?

MR. SCHNAPPER: Yes, they have, but like some 1982 suits with regard to public housing, public accommodations, they were only recently discovered.

QUESTION: Or even private housing.

MR. SCHNAPPER: Or even private housing but that is

different than the situation with regard to the Agency Civil Rights Act generally.

QUESTION: But you don't think a promotion suit necessarily involves, requires a showing of a sovereign immunity waiver?

MR. SCHNAPPER: It does not. I can't understand how it could if a suit to get a commission as a Justice of the Peace wouldn't require a waiver of sovereign immunity and this Court held, in one of its earliest decisions that no such waiver was required.

The fact of the matter is that if the defendant individuals denied the promotion for the reasons alleged, they had no lawful authority to do so and we are acting here as private attorney generals, getting to respond once again to the will of the sovereign.

I'd like to turn next to the problem of exhaustion of administrative remedies. Again I'll note that this question was considered and resolved with regard to private employees in Johnson against REA and we think that the decision in that case should be applied here.

The facts of this case are, in this regard, somewhat important. In June of 1971, Petitioner came forward and affirmatively complained of employment discrimination, in that instance to an EEO counselor. That complaint, however, under the regulations, was not sufficient to trigger a plenary Civil

Service Commission inquiry. Instead, all it got the Plaintiff was some counseling.

Second, on July, 1971, Plaintiff again came forward and again complained that he was aggrieved by employment discrimination, this time indicating that he was dissatisfied with the informal counseling he received. That second act, however, was also not sufficient to trigger plenary inquiry. All it got Petitioner was a letter of permission to file a written complaint. That written complaint was filed July 15th of 1971 and at the time the complaint was filed, the government's own regulations required that any administrative complaint of employment discrimination be processed through final agency action within 60 days.

Six hundred and seventeen days later, on March 23rd, 1973, the finaly agency action occurred and the General Services Administration concluded that it had not been guilty of employment discrimination as Petitioner charged.

At that point, to be sure, as now, the regulations did not purport to require a complainant to process that appeal the one remaining step which existed, namely, to the Appeals Review Board of the Civil Service Commission.

Plaintiff thereupon sued in the United States District Court for the Southern District of New York. At the time, it was asserted and not denied that by proceeding all the way through final agency action, Petitioner had adequately

Petitioner had adequately exhausted administrative remedies.

The government did not deny that in the District Court and, indeed, in the Court of Appeals, in its briefs, didn't deny that contention.

However, in June of 1974 at oral argument, the government advanced what I'll characterize as its first exhaustion rule, namely that a federal employee had to pursue any claim of employment discrimination all the way through the Appeals Review Board and essentially without exception.

Second, in opposing certiorari in March of 1975, the government suggested a second rule, namely, that an aggrieved employee could sue after final agency action but only if he did so within 30 days of that action.

And, finally, in its brief of October, 1975, a full 29 months after the suit was begun, the government suggested yet a third rule, namely that an aggrieved employee could sue if the government had delayed unduly in processing his complaint, provided he had exhausted his administrative remedies for such delay.

None of these rules, of course, were known or, indeed forefeeable at the time when Plaintiff decided to bring this action. The case and the briefs before the Court present a variety of possible rules that might be adopted with regard to exhaustion.

The first rule, and one we think preferable is not

to require exhaustion at all for federal employees, just as it is not required for state and local government employees or for private employees.

A second possible rule, suggested by the government's brief in Chandler, is that the government is entitled only to notice of the claim and to cooperation with any investigation the government chooses to pursue. That, of course, was given in this case.

A third possible rule would be essentially congruent with that with regard to Title VII, namely, that after final agency action, a federal employee is free to sue without further exhaustion.

Or the Court might hold that after completion of the 180-day deadline set by the government on regulation, an employee was free to sue.

Fifth, the Court could -- and I think certainly would be required in any case to adopt the rule that in any particular case, an aggrieved employee would be entitled to show, as to his particular case, that further exhaustion would have been futile.

MR. CHIEF JUSTICE BURGER: I think we'll resume there in the morning.

[Whereupon, at 3:00 o'clock p.m., the Honorable Court was adjourned until the following morning at 10:00 o'clock a.m.]

MR. CHIEF JUSTICE BURGER: We'll resume arguments at this time in Brown against General Services Administration.

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

MR. SCHNAPPER: Mr. Chief Justice, and may it Please the Court:

Yesterday I delineated several possible rules that the Court might adopt with regard to the question of exhaustion in Section 1981 cases brought by federal employees.

We believe that the Court should adopt, among these, the same rule that was adopted by this Court last term in Johnson against the Railway Express [Administration] Agency.

As you recall in Johnson, the issue was whether an employee of the REA who wanted to sue under Section 1981 should or indeed could postpone that Section 1981 action until he had exhaused the administrative remedies created by Title VII.

This Court held unanimously that such an employee need not exhaust those remedies and, indeed, under certain circumstances, could not postpone his 1981 action while he did so. We believe the same rule should be applied to federal employees and we ground that contention on a variety of considerations.

First, as this Court noted in Morton against Mancari, Congress in 1972 concluded that the administrative procedure which is involved here was ineffective for the most

part and had served to impede rather than advance the Congressional national policy of eliminating discrimination in employment. That Congressional determination, of course, was based on extensive hearings and a broad factual inquiry.

In 1975, the Commission on Civil Rights conducted a similar extensive inquiry and also reached the same conclusion, namely, that the administrative proceedings involved had not changed since Congress' first investigation and that they continued to fail to afford to federal employees a meaningful and fair opportunity for indication of their claims of employment discrimination.

We believe that these findings should be accepted by the Court and that they undercut completely any basis for an exhaustion rule under these circumstances.

We believe that the policy of exhaustion fundamentally rests on there being a reasonable possibility that the pursuit of the procedure involved will, in fact, yield the relief that the employee wants and therefore, obviate the need for judicial intervention.

There simply is no realistic possibility that that will occur in the administrative process and in that regard this case, of course, presents a somewhat unique situation because normally we don't have these kinds of findings by the Congress or the Civil Rights Commission as to the defectiveness of the procedure and because of those findings, we think that

any presumption that the process was efficacious simply can't be indulged in .

Second, even without regard to those findings, any federal employee who sued prior to proceeding all the way through the administrative process would be entitled to claim that, in fact, it would have been futile for him to do so or to go further than he did and in view of the Congressional and Commission findings that he would certainly be able to establish a prima facie case on that and so we find that the courts in any one of these cases was involved in a complex and time-consuming factual inquiry as to whether or not further proceedings would have been warranted.

For example, in this case, it might be possible to have a trial as to whether or not going to the Appeals Review Board would be efficacious. We think, for the reasons set out by the Court in Alexander versus Gardner-Denver, that it makes more sense for the Court simply to proceed and devote their time directly to a trial on the merits than to what, in many cases, would be a much more cumbersome and time-consuming proceeding as to whether or not the administrative process involves what was in fact and under the circumstances likely to be efficacious.

QUESTION: The alternative, of course, would be the opposite rule that has been followed in many cases of presumption is in favor of exhaustion and it is up to the person who claims that exhaustion would be futile to make a rather

specific showing to that effect.

MR. SCHNAPPER: Well, with regard to my second contention, we think the employee would be entitled to make that specific showing and the resulting trial would be more cumbersome than trial on the merits but I think with regard to presumption, it is true in a sense that a presumption is the only way you are ever going to find that this process is effective because if you look at the process with the findings of Congress and the Civil Rights Commission, you will have to conclude otherwise.

QUESTION: Well, to what extent do the findings of the Civil Rights Commission conclude this Court?

MR. SCHNAPPER: Well, they are not binding.

QUESTION: I would think not.

MR. SCHNAPPER: The conclusions of Congress are entitled to some substantial weight.

QUESTION: Well, I would think that the way you would interpret that is to say that if they are entitled to weight, that it supports an intent on the part of Congress to not require exhaustion, that you don't use that as an independent lever by which this Court simply concludes on its own that exhaustion isn't required.

MR. SCHNAPPER: Well, I think what the government invites the Court to do is to fashion a rule with regard to exhaustion that if it is based on the assumption that the

administrative process is efficacious and what we are suggesting is that Congress and the Civil Rights Commission have found that they are not and you can't blink that reality. I man, any request for an exhaustion rule ultimately puts that in issue and normally, it would be resolved on a case by case basis but we think in view of those findings and of the general policy in this area of independent overlapping remedies that it would make more sense to just have the simple and straightforward and more administerable rule that exhaustion not be required.

It would be possible to follow the procedure you suggest but then in this case, for example, we would have to have a trial about the Appeals Review Board and we would have to conduct an investigation about that.

QUESTION: Well, is that -- but I mean, is that true in the normal administrative situation where you have a presumption that the administrative remedies are going to be exhausted? Do you have a trial in every individual case as to whether with respect to this particular litigant he might or might not have gotten some relief?

MR. SCHNAPPER: Well, normally, this Court does, in fact, inquire whether under the specific circumstances of the case it would have been probably efficacious to go forward.

Now, that may or may not require trial. It may be apparent on the undisputed facts that it would or would not

have been but in the case of the administrative procedure, there are a variety of defects, some of which are apparent on the face of the regulations, some of which are more complicated.

For example, we have noted problems of discrimination in the selection of the personnel who administer the procedure, that substantive Title VII law is not, in fact, followed by these decisions, that the people who administer the procedure are not familiar with Title VII law and have no expertise in the area.

Now, you could not, in a particular case, require exhaustion on the assumption that all of that wasn't true and while, perhaps, in most cases, those claims would seem sufficiently extraordinary as not to warrant plenary judicial inquiry, in this case, of course, those contentions are the same contentions advanced and sustained by the Congress and the United States / the Civil Rights Commission and I think that at the least we would be entitled to a trial on it.

But the same problem existed in Alexander versus Gardner-Denver with regard to whether there should be deference to the decision of an arbitrator and the Court concluded that while it might be appropriate in some cases and not in others, it was administratively simpler just to go ahead and have the case tried and that is what we think should occur here.

QUESTION: Mr. Schnapper, perhaps you have covered this. I want to be positive, though, in my own notes. I take

it you concede that the '72 Amendment is retroactive as far as the Petitioner is concerned?

MR. SCHNAPPER: We believe that it is. We believe that it is.

Finally, with regard to exhaustion, we think that the general policy of independent overlapping remedies, which was acknowledged and stressed in this Court's decision in Johnson, should be applied here. In Johnson, of course, the Court noted that the administrative procedure involved had been set up under Title VII and that Title VII had not required that that procedure be followed by a private employee suing under 1981.

We think that the same rule should be applied here. It is important to bear in mind that the clear and unequivocal Congressional intent behind Title VII was to give federal employees the same judicial remedies that are already enjoyed by private employees.

This Court, in Bolling against Sharpe, of course suggested that it would be unthinkable as a matter of substantive law that the rules in the area of discrimination applying to Federal Government should be any less stringent than the rules applying to state and local governments.

We think the same thing is true with regard to judicial remedies.

If Mr. Brown had worked for the Railway Express

Agency, if he had worked for the State of Illinois or if he had worked for the City of Richmond, there is no question that he would have been able to maintain this suit and we think he should enjoy no less efficacious judicial remedies merely because he worked for the United States.

I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

ON BEHALF OF RESPONDENTS

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

This case and the next case to be argued, Chandler against Roudebush, will, to a large extent, determine the future efficacy of the administrative process which has been established pursuant to statute as a remedy for claims of employment discrimination within the Civil Service and the respective role of the courts and the administrative process in determining the merits of the thousands of claims that are filed each year.

Both cases involve promotion situations in which in accordance with the normal Civil Service practice, the applicants were screened for qualifications by those responsible for personnel management and both the Complainant and the person selected were rated as highly qualified in each case for

the particular vacancy for which the promotion was to occur and then the decision as to which of the highly-qualified individuals should be promoted was made by the supervisor with the program responsibility.

In Chandler, the complainant differed from the person selected in sex and race and claimed discrimination on the basis of sex and race.

In Brown, the complainant differed from the person selected in race and claimed discrimination on the basis of race.

Now, looking at the Brown complaint more specifically to see what was at issue, the Brown complaint was carried administratively through the hearing process as well as the informal counseling processes that precede it and through the agency decision based on the recommendation of the complaints examiner. That recommendation is reproduced in the appendix to this case and turning to page 37a in the findings of fact and conclusions, the examiner first noted, and this is the basis on which the appointing authority acted, that both Mr. Robert Ownbey -- and it is at the bottom of page 37a -- who was selected and the complainant, Mr. Brown, were rated as highly qualified for the position.

Under the circumstances, the relative experience, education and background of both Mr. Ownbey and Mr. Brown are irrelevant to the issues inasmuch as the rating of highly

qualified placed these two individuals in the same area of competition for the position.

Now, that is irrelevant for purposes of determining whether there was discrimination. There may have been reliance by the appointing authority on these differences, but the inquiry was into what did the appointing authority rely on and this is spelled out in some detail on the next four pages of the Appendix.

For one thing, there was testimony on page 38a, just bove the middle, from the candidates' supervisors who unanimously recommended Mr. Ownbey over Mr. Brown and termed Mr. Brown uncooperative and an example is noted of an instance in which Mr. Brown had been requested by one of his supervisors to perform a management survey of the Federal Telecommunications Records Center but had refused because he thought the request had been made as a favor.

QUESTION: What does that mean?

MR. WALLACE: Well, this is the basis on which the supervisor acted. What I am trying to bring to the Court's attention --

QUESTION: Well, my question was, what does that mean, as a matter of fact -- but had refused because he thought that Mr. Gallo had made this request as a favor. I don't understand the meaning of that.

MR. WALLACE: Mr. Brown's testimony was that the

reason he had not done the assignment was that he thought that it was not a work assignment but just a favor that had been requested of him in the course of Mr. Gallo's carrying out of his own responsibilities.

Then, going on, the evidence was that the recommendations were based on context with both men on a day-to-day basis over a period of years, noting --

QUESTION: Well, all this evidence was in the form of affidavits, wasn't it?

MR. WALLACE: That is correct. There is a notation here that Mr. Brown did not seek to cross-examine these witnesses. They could have been brought into the hearing if he had done so. That is noted on page 40a, at the top of the first full paragraph on page 40a.

QUESTION: Of the Appendix?

MR. WALLACE: Of the Appendix, yes.

QUESTION: This is still part of the --

MR. WALLACE: Part of the complaint examiner's --

QUESTION: Part of the complaint examiner's report, right?

MR. WALLACE: That is correct, your Honor and there toward the bottom of 38a, the evaluation that Mr. Ownbey had always displayed complete cooperation and willingness to accept responsibility whereas Mr. Brown on occasion would offer some excuse or refuse assignments.

There are references to the difference in the work attitudes of the two of them on page 39a including complaints received from a member of the data processing unit with whom Brown's unit had to work, about lack of cooperativeness on Brown's part and that is again developed in some detail on page 41a.

Now, when Mr. Brown went to court, the recourse that was available to him if he was dissatisfied with the administrative decision based on this record was an appeal to the Civil Service Board, the appellate board which passes on these matters and turning back to Mr. Brown's complaint, which is on page -- well, I am looking at page 4a and 5a of the Appendix, at the very bottom, the complaint itself specifies when he went and made a resort to court, "The United States Civil Service Commission has been joined as a party defendant because in entertaining and ruling upon the plaintiff's complaint of racial discrimination, it acted in an arbitrary and capricious manner by failing to make the in-depth inquiry into the alleged racial discrimination as it was to do under the act.

Now, the fact is, this complaint was filed -- it happened that he neglected to name all the parties that he meant to name, including the Civil Service Commission which became the subject of further motions proceedings but the fact is, this complaint was filed before the Appeals Review Board of the Civil Service Commission was given any opportunity to

review the decision of the agency which was made on the basis of an examination of the complaint in a hearing conducted on behalf of the agency by a Civil Service Commission-trained examiner.

The Civil Service Commission itself had not had an opportunity to act on this complaint.

Now, we are told that once the facts are known in a case like this, it is just a legal matter as to which the Civil Service --

QUESTION: I notice that the examiner's report is dated February the 9th, 1973. The complaint was filed on May 7th, 1973. Now, what should Mr. Brown have done to trigger the review within the Commission?

MR. WALLACE: Well, he --

QUESTION: Of the report of February 9.

MR. WALLACE: He was informed at every step of the procedure or had the opportunity to be informed of exactly what he could do at the next step.

The record here shows at page 43a and 44a that after the agency decision was made, he was specifically advised by letter -- and it was certified mail and his receipt is reproduced in the Appendix following this letter -- that he had the right to appeal to the Civil Service Commission Board of Review -- at the bottom of 43a and this appeal must be filed within 15 calendar days of receipt of this letter and at the

top of 44a, ut"If you choose to appeal.....you retain the right to file a civil action in Federal district court within 30 days after receipt of the Board's final decision."

If you do not choose to appeal, you also have the right to file a civil action within 30 days of receipt of this letter, or 180 days after filing an appeal with the Board of Appeals and Review if no decision has been made.

It is true that the regulations are complex, but a complainant is not left to fend for himself in the regulations. He has counseling within the agency. He can get further help from the Equal Employment officer of his agency and he is informed specifically of his procedural rights at each step.

QUESTION: Did he do anything at all after receipt of that letter of March 23 until the complaint was filed on May 7th?

MR. WALLACE: Nothing is shown in the record. Footnote three of the Petitioner's brief indicated that he determined that he would sue and talked with the clerk of the court, who advised him to get counsel and that his suit was not filed within 30 days because three attorneys and several Civil Rights organizations turned his claim down and he had trouble getting a lawyer.

Well, his claim on the merits is unimpressive and this may be one reflection of that. The record doesn't show why he had difficulty getting a lawyer. The fact is, he did

not file his suit within 30 days as the letter specified he would have to do. This was all --

QUESTION: Isn't is so, though, as in footnote three, that within a week of getting the letter he did go to the district court?

MR. WALLACE: The record doesn't reflect it. I don't know, Mr. Justice. In any event, the kind of inquiry to be made in a case like this, essentially, is a matter well within the Civil Service Commission's expertise, namely, whether the kinds of considerations brought out in this report of the hearing are the kinds of considerations that are plausibly relied upon in selecting someone for promotion when the individual applicants do not differ from each other on the basis of race, as is often the case and this is a matter well within the confidence and experience of the Civil Service Commission. Most of the policies of exhaust of administrative remedies are fully applicable here.

The administrative process is able to give the complete relief asked for in the complaint in the court and thereby obviate the need for any resort to the court if the case is meritorious.

There is a role to be played by the application of expertise in assessing the factual situation because it is basically a factual case -- not as it reaches this Court, but the claim was basically a factual case and there would at least

be an opportunity for narrowing the issues for judicial review, the considerations that have normally been cited as reasons for requiring exhaustion of administrative remedies are all fully applicable to this situation.

Now, we are told that nonetheless, this Court held [Agency] in Johnson against Railway Express Company that at least as to claims under Section 1981 administrative remedies need not be exhausted and, indeed, cannot be exhausted in some situations under Title VII but Johnson, it seems to us, reserved the kind of issue involved here, was written much more narrowly and carefully than that.

The issue in Johnson was whether resort to the EEOC conciliation processes was required before a 1981 suit could be filed in a private employment situation in which Congress has not provided a federal administrative remedy which can afford complete relief sought in a 1981 suit and the Court carefully noted footnote three of the Johnson opinion in dealing with an alternative argument -- and this is on page 456 and 457 of 421 U.S. -- that the complainant there had failed to exhaust his administrative remedy under the Railway Labor Act where Congress had provided a complete administrative remedy that could give him relief according to the claim, that it did not have to reach that issue because of its holding on the limitations issue which was the controlling issue in Johnson that the suit was filed out of time and therefore we have no occasion here to

express a view as to whether a section 1981 claim of employment discrimination is ever subject to a requirement that administrative remedies be exhausted in a situation where Congress has provided a full administrative remedy that can give the relief sought in the suit and again on page 466, the opinion is carefully tailored to the private employment situation.

So one of our contentions is that the Court of Appeals correctly ruled in this case that the complaint should be dismissed for exhaustion of administrative remedies.

That was an alternative holding of the Court of Appeals in affirming the dismissal of the complaint by the district court for want of subject matter jurisdiction. Once the district court granted the government's motion to dismiss for want of subject matter jurisdiction, of course, the question of exhaustion didn't arise in the district court.

The Court of Appeals was interested in that as an alternative ground for affirming the dismissal of the --

QUESTION: Wasn't this with respect to both 1981 and the --

MR. WALLACE: With respect to all of the claims and the Court of Appeals did not specifically pass on whether relief under any of these theories would be available.

QUESTION: Well, I suppose this ties into the next case, then. Suppose that there was the exhaustion requirement applicable to 1981? The claim was rejected in the administrative

process. Would the 1981 suti then go forward in court or would there be -- there couldn't be a review on the record, could there?

MR. WALLACE: Well, our contention is that Congress intended Title VII to be the exclusive remedy , but --

QUESTION: Well, I understand that, but what is --

MR. WALLACE: -- but if it were not the exclusive remedy, it seems to us that the normal rule would apply when a lawsuit is brought after exhaustion of the administrative remedy, the suit should be based on a review of the record and the administrative decision.

QUESTION: Well, yes, but do you suggest that the Congress -- that there is any evidence in the act in terms of the procedure and the hearings that the administrators would take 1981 into consideration?

MR. WALLACE: Not at all. What they were to take into consideration was the substantive standard idea -- Title VII, which are for these purposes, basically the same.

QUESTION: Well, it seems to follow, though, that if the administrative rejected whatever claim it was they were considering, that the 1981 suit would then go on in the court de novo.

MR. WALLACE: Well, that is related, as you say, to the issue in Chandler. We don't believe that after this elaborate administrative inquiry into what is essentially a

factual claim that a de novo suit would be warranted and the first point to be made with respect to that is that Congress was, as we view the legislative history, establishing what we regard as the exclusive remedy to handle these federal employment discrimination claims, a remedy which combines both the administrative process and judicial review of these claims with administrative responsibilities to administer effective measures of what might be considered preventive medicine as a very important part of this process.

The new statute, Section 717, which is reproduced on page 16a and 17a of the Appendix to our brief in this case, has elaborate provisions in subsection B about the responsibility of the Civil Service Commission to supervise the agencies of the government in establishing equal opportunity plans of employment and reviewing those plans and the procedures used with the various programs that are known as affirmative action, upward mobility, the federal women's program, et cetera.

This is, to a large extent, where the action has been, so to speak, in this field and I asked the clerk to distribute to each member of the Court testimony last June given by Chairman Hampton of the Civil Service Commission to the Subcommittee on Equal Opportunities.

QUESTION: Is that somewhere in the record, Mr. Wallace?

MR. WALLACE: No, but these hearings are published.

The committee has published these hearings.

QUESTION: Yes, but has opposing counsel had any notice of this distribution?

MR. WALLACE: I gave it to him yesterday, but --

QUESTION: That is a little bit late, it seems to me.

MR. WALLACE: Well, these are public records and the point to be made is that the complaint process and the examination of the complaint process is not the only method that Congress specified or, indeed, that Congress is looking into in its continuing supervision of this area in alleviating problems in the federal civil service and the statistical report gave some examples of the increase in minority groups representation at various grade levels during the period from 1971 to 1974 at a time when overall federal employment was decreasing and the notation with respect to grade GS-9, which is what the application was for in this case, and that is on page 4, in the course of giving these statistics indicated that there has been an increase of some 2,800 minority personnel in that particular grade level and there are comparable figures, more than 2,000 increase with respect to grade GS-12, et cetera.

Now, to a small extent, those increases may reflect the resolution of the complaint procedures of the kind that are involved in this case but for the most part they represent the implementation of the affirmative action program that the

Commission has undertaken and the review that it conducts through its Bureau of Personnel Management evaluation of the Equal Employment Opportunity plans that the agencies are required to have and one of the advantages of the administrative process that was established in the '72 act is that in the course of ruling and investigating the individual complaint, the complaints examiner is also trained to evaluate the overall program of the agency in this area and to make recommendations to make that overall program more effective regardless of what he finds with respect to the claim of the particular individual, whether that individual's claim discrimination against himself has merit or not and the regulations that we have reproduced in the Appendix to our brief -- the regulation on the hearing specifies on page 38a that the examiner is to look into not only the matter which gave rise to the complaint but also the general environment out of which the complaint arose and he is to make his recommended decision to the agency on the merits of the complaint, including the recommended remedial action where appropriate and also his recommendations with regard to the general environment out of which the complaint arose.

And that, in a case such as the present one and these promotion cases -- this is not particularly atypical. Many of them, of course, don't even reach the courts. These promotion cases are the most frequent of the Equal Employment Opportunity complaints.

In a case such as this one it seems likely to us that that aspect of the complaint examiner's function is more likely to be fruitful than a ruling on the merits where it is very difficult for any tribunal, administrative or judicial to second-guess the determination of the person responsible for the program as to which of the persons rated highly qualified he wants to rely on to carry on the program.

So long as he has reasons that are independent of racial considerations and such matters. Now --

QUESTION: Mr. Wallace, would you clarify something for me? I may not have followed your argument completely, but does the government agree that prior to 1972 there would have been a 1981 claim?

MR. WALLACE: We have not taken a position on that issue because the Court of Appeals did not reach that question and as we understood the petition for certiorari, the first question presented was the question with respect to the issue the Court of Appeals decided. It has been rephrased in Petitioner's brief so as to present that issue but we didn't think it had been presented to the Court. Now, what is --

QUESTION: Isn't it necessarily involved?

MR. WALLACE: Well, the Court of Appeals --

QUESTION: If your postion is correct that seven, whatever the number is, is the exclusive remedy, that conclusion could only be reached by holding that the '72 statute amended

1981 if, in fact, there is a 1981 complaint. Isn't that right?

MR. WALLACE: Well, that is one way of looking at this but the fact is, there have been a number of cases in this Court in which the Court has concluded that a comprehensive remedy established to deal with the particular subject matter was intended to be the exclusive remedy without determining whether other more generally-worded statutes would otherwise be applicable.

One that we discuss in some detail in our brief is the Preiser case and that is exactly the approach that the Court took in Preiser against Rodriguez and I refer you particularly to 411 U.S. at 488 and 489.

There have been a series of other cases that are not cited in the brief to which I do want to call the Court's attention in which the same conclusion was reached with respect to compensation statutes, both prisoner's compensation and seamen's compensation statutes and I did inform counsel of these cases yesterday also, Mr. Justice.

One is Johansen against the United States 343 U.S. 427; Patterson against the United States 359 U.S. --

QUESTION: What was the citation, 343 U.S.?

MR. WALLACE: 427.

QUESTION: 427.

MR. WALLACE: Patterson against the United States 359 U.S. 495 and United States v. Dempco 385 U.S. 149. Now, the --

QUESTION: Mr. Wallace, would you just -- on the assumption that there was a 1981 action prior to 1972, which I think you must -- if you don't take a position on that, you must say that we are entitled to assume that there was. Just start with that assumption and then arrive at your conclusion, just to see --

MR. WALLACE: All right.

QUESTION: -- how do you unroll that?

MR. WALLACE: Well, for one thing, the proposition that repeals by implication are not favored which the Court applied in Morton against Mancari was a proposition applicable there to two disparate federal policies reflected in two different statutes, one favoring Indian Self-Government through the Indian preference in the Bureau of Indian Affairs and the other the discrimination in employment law which the Court found not to be irreconcilable and in the absence of any Congressional indication that it was seeking to supercede one with the other, the Court held that the two should be given effect and could be given effect.

That was quite different from the kinds of cases I just mentioned in which it was determined that Congress undertook to deal comprehensively with a particular problem and thereby to supercede any judicial remedy that might otherwise exist under more generally-worded statutes which had not, at the time Congress was dealing with the issue, been applied to

that problem and that is what we are involved with here.

The committee reports in both the House and Senate, and they are set out in some detail on page 31 of the Chandler brief that we filed, both in the text and the footnote there --

QUESTION: Well, but your position --

MR. WALLACE: -- show that Congress thought that there was no other remedy and was an --

QUESTION: Well, I know, but it was done under the assumption that there was.

MR. WALLACE: But Congress then was acting --

QUESTION: Then Congress was mistaken.

MR. WALLACE: Congress, in acting here, decided that this was the remedy that should exist in a situation in which it assumed that this was the only remedy that would exist. That is quite different from the discussion of the related question in Jones against Mayer in which both the hearings and the discussion on the floor had indicated that that case was in litigation, that there might be a remedy under 1982 and that nonetheless this alternative remedy was needed, that both remedies were needed.

The same thing was true with respect to the application of Title VII to private employment. It was specifically noted that there were remedies under state fair employment practices laws and that of the National Labor Relations Board and that the intention was to preserve the preexisting

remedies and to add a remedy that would supplement them rather than supplant them, as the Court said.

With respect to 1981, however, the indications in Congress was that they thought that there was not access to the courts in any other way and that they would set up a comprehensive plan to deal with this through an amalgam of administrative and judicial remedies and there was good reason for Congressional doubt that the sovereign immunity had otherwise been waived.

Jones against Mayer had indicated in footnote 13 of that opinion that 1982, the companion provision, was couched merely in declaratory terms and provides no explicit method of enforcement but that, of course, does not prevent a federal court from fashioning an effective equitable remedy. That is not the kind of thing the Court says about waivers of sovereign immunity and there has been no holding that these statutes authorize suit against the government.

Heard against Hodge in which it was held that the District of Columbia is a state or territory within the meaning of those statutes was a companion case to Shelley against Kramer involving suit between private individuals to enforce a restrictive covenant. There has never been a case holding that suit against the government has been authorized by 1981 or 1982.

QUESTION: Well, what about suits against individuals?

Individual officers?

MR. WALLACE: Well, there the courts had indicated that when those suits are attempting you have got a promotion within the Civil Service, they are effectively a suit against the United States. That was what the Eighth Circuit had held in the Ghotta case and the --

QUESTION: That hasn't been resolved here though, has it?

MR. WALLACE: It has not been resolved here but it was the premise on which Congress acted and the -- it has been resolved by one Justice here but not by the Court.

[Laughter.]

MR. WALLACE: And it was the premise on which Congress acted as reflected in those committee reports.

QUESTION: I am beginning to think -- [inaudible.]

QUESTION: I have a few questions before you sit down. I can wait.

MR. WALLACE: Yes, Mr. Justice.

QUESTION: I can wait.

QUESTION: Mr. Wallace, maybe we had better back up and rewrite REA and Gnotta / and Morton against Mancari.

MR. WALLACE: WEll, as --

QUESTION: You would be in the middle in all of them.

MR. WALLACE: As I have indicated, I think they are all carefully written --

[Laughter.]

MR. WALLACE: -- not to cover cases that weren't before the Court.

QUESTION: My questions are these. First of all, there seems to be issue in this case -- please tell me if I am mistaken -- as to the retroactive application of 717c to a situation where the claim arose before the enactment of the 1972 -- its enactment.

MR. WALLACE: Both parties have agreed that when the administrative claim was still pending on the effective date of the statute, that under Bradley against Richmond School District that the new statute applies.

QUESTION: There is no issue therefore on that.

MR. WALLACE: There is no issue between the parties as to that and it is left with the ruling of the Court of Appeals.

QUESTION: Yes, I knew that but it apparently was litigated in the Court of Appeals.

MR. WALLACE: It was litigated in the Court of Appeals. At that time the government had not resolved what position to take in the Court on that question. We since have. We have filed a response to a still-pending petition for rehearing on that issue in the case called Plex against Weinberger in which we have confessed error on that question in the particular case.

QUESTION: That is somewhere in the --

MR. WALLACE: That is still pending before the Court. It is the petition for rehearing that was filed last term and to which our response was filed by request last term.

QUESTION: Right. And do I misapprehend the structure of your argument when I state my understanding that your part two of your brief, all of your argument with respect to the need to exhaust is -- becomes relevant only if your answer to Mr. Justice White's question was wrong.

MR. WALLACE: Well --

QUESTION: If 717 is exclusive, that is the end of this case. Correct?

MR. WALLACE: That is correct. Or, on the other hand --

QUESTION: And --

MR. WALLACE: -- if the Court agrees with us on the exhaustion issue it needn't reach the other issue. Either one could be dispositive of --

QUESTION: It is mutually exclusive and by itself would be dispositive.

MR. WALLACE: Either one by itself could be dispositive, yes, Mr. Justice.

QUESTION: But part two, your whole exhaustion argument, is premised upon the arguendo hypothesis that remedies other than 717C are available.

MR. WALLACE: That is correct, Mr. Justice, because the complainant did not comply with the 30-day time limitation --

QUESTION: Right. Right.

MR. WALLACE: -- for filing the suit under Title VII.

QUESTION: So the whole exhaustion is premised upon the hypothesis that other remedies are available.

MR. WALLACE: Yes, your Honor.

QUESTION: Okay. Thank you.

MR. WALLACE: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Schnapper, you have some time left.

REBUTTAL ARGUMENT OF ERIC SCHNAPPER, ESQ.

MR. SCHNAPPER: I'd like to respond to a number of things raised by the government in this case and I turn first to the question of whether Title VII repealed all these other statutes.

The government suggests that the usual rule against repeal by implication applies only when the substantive rules involved are different and not when they are supplementary or complimentary remedies. Now, that is just not the law, at least since Wood versus the United States in 1848, the law has been exactly to the contrary and we have set out in our reply brief a number of cases involving supplementary remedies applying this rule against a repeal by implication.

The government distinguishes Jones against Mayer by

noting that at the time of Jones, Congress had reason to believe that there might be another remedy available but when Title VII w adopted in 1964, as we have noted in our reply brief, there were numerous statements on the floor of the House and Senate to the effect that Congress thought there were no other remedies.

The legislative history in which Congress indicated that it thought there were additional judicial remedies is from 1973 but of course, the statute involved was in 1964 and not 1972.

QUESTION: Was there any express saving language in the 1964 Act?

MR. SCHNAPPER: I don't believe there was. Moreover, in Sullivan versus Little Hunting Park, the government maintained -- and we think correctly -- that it really doesn't matter whether the government thought there was an independent remedy available or not.

With regard to Gnotta, we, I must confess, do think it was not correctly decided but as indeed I think maybe the -- certainly the Civil Service Commission was of that opinion when it advised Congress on this matter several years ago and I do understand the Solicitor General in opposing cert in Gnotta to have also taken that position.

QUESTION: Which case are you talking about? Gnotta?

MR. SCHNAPPER: Gnotta versus the United States.

It's the decision by Mr. Justice Blackmun when he was on another court.

But be that as it may, Gnotta expressly stressed that in that case, which was a suit based on discrimination on the grounds of national origin, there was no provision applicable to that plaintiff comparable to Section 1982.

Well, there is such a statute here and it is 1981.

With regard to the problem of exhaustion, I think I should state in clear terms what the difference is between the government's perception of this administrative procedure and ours. We believe that it is an extremely complex procedure controlled, as in Glover, by the defendants, out of which at the end, there is no relief granted, in fact.

Now, the government has indicated in its papers, and we have noted similar statistics, that of out of approximately 26,000 complaints of employment discrimination against the Federal Government that were initiated with EEO counselors, back pay was awarded to approximately 50 people in an entire year.

Now, that compares quite dramatically with the statistics for the EEOC conciliation procedure which over the same period of time had twice as many complaints but got back pay for 49,388 people and to suggest, as the government does, that a lawsuit should be required here because the federal procedure is better than EEOC, we suggest is, at the least, not

supported by the results of the systems.

QUESTION: Well, your statistics might simply indicate that the government, as an employer, is more aware of the requirements of nondiscrimination in employment than are many of the employers in the private sector.

MR. SCHNAPPER: Well, that is, of course, possible, but, of course, Congress thought just the contrary when it adopted Title VII. I mean, the legislative hearings and committee reports are replete with conclusions that, in fact, the problems in employment discrimination in the Federal Government were very serious.

The government suggested that all the relief that is sought in this case could have been gotten in the administrative process.

Now, without laying aside for the moment our contention that even what is technically available in the administrative process is never, in fact, given, there are a variety of things that simply are not available.

There is a 30-day statute of limitations for awards of back pay in the administrative process and that, of course, is not the statute of limitations in federal court. The government has what is known as --

QUESTION: What do you mean by 30-day statute of limitations? Do you mean that at the time of the award the maximum back pay that can be awarded is 30 days?

MR. SCHNAPPER: No, the way the system works is that you have to -- if the -- the probe of the kind of discrimination of which we are complaining exists over a period of time, the government will only run back to 30 days before the complaint was filed.

Now, this particular plaintiff complains that he has been discriminated against for promotion as a rule of an ongoing practice that goes back for several years. He simply couldn't get relief from most of that under the administrative procedure. It is not allowed.

Second, the government has what is known as -- in the practice -- as a "but for" rule which provides that once discrimination is shown, the burden of proof is on the employee to show that the practice of discrimination was, in fact, the cause of his nonpromotion.

Now, the rule in Title VII law in the courts is exactly the opposite and the difference is of some substantial importance because in the vast majority of cases in which the Federal Government finds this discrimination, it does not award back pay anyway.

QUESTION: Mr. Schnapper, in this case, of course, your client did make an administrative complaint to his agency and then had a hearing before a certified complaints examiner. Is it your position that not even that much exhaustion of administrative remedies is required?

MR. SCHNAPPER: Well --

QUESTION: That instead of doing that, he could have gone directly into the federal district court? Is that your claim?

MR. SCHNAPPER: That is our position. We played at a variety of rules and of course, there are some rules pursuant to which that would have been required but we think on the facts of this case further exhaustion just makes no sense.

QUESTION: I am not talking about further exhaustion. I am talking about your position that he need not have even made an original complaint of discrimination.

MR. SCHNAPPER: That is our preferred position but there are a number of other possible rules under all of which we would win which would encompass at least that much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:02 o'clock a.m., the case was submitted.]