

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: TOGO D. WEST, JR., SECRETARY OF VETERANS  
AFFAIRS Petitioner v. MICHAEL GIBSON

CASE NO: 98-238 e. |

PLACE: Washington, D.C.

DATE: Monday, April 26, 1999

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   TOGO D. WEST, JR., SECRETARY     :

4       OF VETERANS AFFAIRS             :

5                   Petitioner             :

6           v.                             :   No. 98-238

7   MICHAEL GIBSON                    :

8   - - - - -X

9   Washington, D.C.

10                                        Monday, April 26, 1999

11               The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 10:02 a.m.

14 APPEARANCES:

15 BARBARA B. McDOWELL, ESQ., Assistant to the Solicitor  
16       General, Department of Justice, Washington, D.C.; on  
17       behalf of the Petitioner.

18 TIMOTHY M. KELLY, ESQ., Chicago, Illinois; on behalf of  
19       the Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 98-238, Togo West v. Michael Gibson.

5 Ms. McDowell.

6 ORAL ARGUMENT OF BARBARA B. McDOWELL

7 ON BEHALF OF THE PETITIONER

8 MS. McDOWELL: Mr. Chief Justice, and may it  
9 please the Court:

10 The Equal Employment Opportunity Commission has  
11 the authority to award compensatory damages in the  
12 administrative process to redress violations of title VII  
13 by agencies of the Federal Government. That authority is  
14 conferred by two provisions of title 42 read together.  
15 The first is section 2000e-16, which authorizes the EEOC  
16 to award appropriate remedies in the administrative  
17 process against Federal agencies that violate title VII.  
18 The second is section 1981a, which authorizes awards of  
19 compensatory damages in title VII actions against the  
20 Federal Government.

21 QUESTION: But it doesn't specifically say by  
22 the EEOC in that section, does it?

23 MS. McDOWELL: No, it doesn't, Mr. Chief  
24 Justice, but we believe that the two sections, read  
25 together, provide the EEOC with that authority.

1 Essentially, by waiving the Government's sovereign  
2 immunity with respect to compensatory damages, that made  
3 compensatory damages also an appropriate that may be  
4 awarded in the administrative process by --

5 QUESTION: So many administrative agencies award  
6 compensatory damages?

7 MS. McDOWELL: Yes, they do. Agencies  
8 themselves award it, and the EEOC on appeal also awards  
9 them in the administrative process.

10 QUESTION: In those instances is there judicial  
11 review from the amount -- from the agency award?

12 MS. McDOWELL: If an employee or applicant for  
13 employment is dissatisfied with the award that's made at  
14 the administrative level, he can bring an action de novo  
15 in district court.

16 QUESTION: What about the Government?

17 MS. McDOWELL: The agency does not, though.

18 QUESTION: So in the other statutory instances  
19 that you mentioned in your answer to the Chief Justice,  
20 I'm curious to know, are there any instances in which the  
21 Government is bound and cannot have judicial review of the  
22 amount of compensatory damages awarded by an agency?

23 MS. McDOWELL: There are other statutory schemes  
24 that are somewhat similar. For example, the Federal  
25 Employees Compensation Act, which compensates employees

1 who are injured and killed on the job, doesn't have a  
2 judicial review mechanism.

3 QUESTION: So the Solicitor General is arguing  
4 here for the proposition that the Government is subject to  
5 unreviewable damage awards on the part of the EEOC.

6 MS. McDOWELL: Essentially, yes, Your Honor,  
7 that Congress made that determination in 1972 when it  
8 provided that only employees and applicants for employment  
9 can challenge EEOC awards.

10 QUESTION: But at that time there were no  
11 compensatory damages available.

12 MS. McDOWELL: That's correct, Your Honor, but  
13 there were back pay awards and other sorts of awards,  
14 including reinstatement, promotion and so on, that in many  
15 senses are more intrusive to agencies than compensatory  
16 damages.

17 Presently, of course, back pay and compensatory  
18 damages are both available in the administrative process  
19 and the back pay awards exceed the compensatory damages  
20 award by a factor of at least three.

21 QUESTION: The Government would have the usual  
22 appeal if the damages were awarded in the district court.

23 MS. McDOWELL: That's correct, Your Honor.

24 The court of appeals construed section 1981a as  
25 limiting the Government's waiver of sovereign immunity to

1 proceedings in court in which a jury trial would be  
2 available. That position is incorrect for at least three  
3 reasons.

4 First, the court of appeals' position is  
5 inconsistent with the administrative exhaustion  
6 requirement of section 2000e-16(c), which is a condition  
7 on the Government's waiver of sovereign immunity under  
8 title VII.

9 QUESTION: May I just clarify one other thing  
10 about the damages. Supposing that the employee is  
11 dissatis -- gets damages from the EEOC but he's  
12 dissatisfied with the amount. Is it your view that the  
13 employee can go -- still file an action seeking greater  
14 damages?

15 MS. McDOWELL: Yes, Your Honor --

16 QUESTION: Okay.

17 MS. McDOWELL: -- he may.

18 QUESTION: And one further clarification. Is  
19 the EEOC a necessary stop for the employee, or can the  
20 employee go upon the agency to court? If the agency says  
21 no, no discrimination, or discrimination but no back pay,  
22 can the employee skip over the EEOC?

23 MS. McDOWELL: Yes, Your Honor. The EEOC is an  
24 optional choice, although it certainly is a choice that is  
25 made by most employees in the process. For example, in



1 fiscal 1997 approximately 1,000 cases were filed by  
2 employees in court. Approximately 7,00 appeals to the  
3 EEOC were taken. That suggests that the EEOC is a  
4 desirable route for a large number of employees.

5 QUESTION: It might have made sense for Congress  
6 to say, if you want damages you go immediately to court,  
7 and if you don't want damages, you can go to the EEOC.

8 MS. McDOWELL: It might have made sense, but  
9 Congress did not say that. Congress didn't disturb the  
10 administrative exhaustion requirement, which had always  
11 been understood to enable an employee or applicant to  
12 obtain full relief in the administrative process.

13 QUESTION: But you say -- it's not exhaustion  
14 once it's an option that the employee can go there or not,  
15 and the second leg of your argument that I'm having  
16 difficulty with, I don't understand the extent of your  
17 exhaustion, waiver, or whatever.

18 Suppose the employee never asks the agency, it just  
19 said to the agency, you discriminated me -- against me on  
20 the basis of sex, and the agency said, and he doesn't  
21 specify damages. It was a he in this case. Does he  
22 forfeit compensatory damages by not asking for it before  
23 the agency, or does the forfeiture come only from not  
24 asking for it before the EEOC?

25 MS. McDOWELL: It would be our position in that

1 situation that he would forfeit that by not asking for  
2 them at the agency level as well.

3 QUESTION: Is it true that most of these people  
4 at the agency level are not represented by counsel?

5 MS. McDOWELL: I believe that's correct, Your  
6 Honor, at least a large number of them are not. That's  
7 not to suggest, however, that most of them aren't asking  
8 for compensatory damages. Indeed, they are.

9 QUESTION: Well, a lay person, really, terms  
10 like compensatory damages, they're not familiar with those  
11 words. Does the agency or the EEOC have some kind of set  
12 of counsel, instructions, advice that says, when you file  
13 a complaint with us, this is what you can complain about,  
14 these are the possible remedies, so then we could say,  
15 well, the employee saw that, it's an intelligent action?

16 MS. McDOWELL: There's no requirement that an  
17 employee be specifically advised of what sort of remedies  
18 he can receive.

19 However, the EEOC does have procedures that  
20 agencies are required to follow, that if an employee says  
21 anything to indicate that he has suffered compensatory  
22 damages, if he mentions emotional distress, for example,  
23 if he mentions that he's seen a doctor, the agency is  
24 supposed to make further inquiry to see whether a  
25 compensatory damages claim is indeed appropriate in that

1 case. The agency and the EEOC are not allowed to rely on  
2 an employee's failure to use particular magic words to  
3 request compensatory damages.

4 QUESTION: Well, how does the agency know, then,  
5 what amount of compensatory damages are being sought when  
6 it's defending these charges in the EEOC?

7 MS. McDOWELL: Well, presumably the employee, if  
8 he has made a claim for compensatory damages, bears the  
9 burden of proof, and the EEOC has held this, of  
10 establishing both the amount and the nexus to the alleged  
11 discrimination.

12 QUESTION: Does the employee file some sort of a  
13 paper that says, you know, I want \$50,000 in compensatory  
14 damages before the -- in the EEOC proceeding?

15 MS. McDOWELL: Well, the second step, actually  
16 the administrative process is the filing of a formal  
17 complaint at the agency level and that typically, as in  
18 this case, asks the employee what relief are you asking  
19 for, and in this case Mr. Gibson requested back pay. He  
20 didn't request compensatory damages.

21 QUESTION: And so -- but under your view he  
22 didn't waive compensatory damages by not asking for them?

23 MS. McDOWELL: That's -- the view that the EEOC  
24 has taken is that he doesn't necessarily have to request  
25 them in his complaint or in particular words --

1 QUESTION: Well then, how --

2 MS. McDOWELL: -- but he does have to identify  
3 the need for compensatory damages at some point.

4 QUESTION: How does the agency know how to  
5 defend against a complaint like that if it doesn't even  
6 request compensatory damages?

7 MS. McDOWELL: Well, typically that is why it's  
8 our position that the employee does need to waive the  
9 compensatory damages claim if the --

10 QUESTION: I thought you said just a minute ago  
11 he didn't have to.

12 MS. McDOWELL: No, certainly he does. He  
13 doesn't have to say compensatory damages in so many words,  
14 or he doesn't necessarily have to say compensatory damages  
15 in his complaint, but at some point in the administrative  
16 process he certainly does have to put the agency on  
17 notice.

18 QUESTION: Well, but could it be at the very --  
19 I mean, if he doesn't have to do it in his complaint,  
20 which is where most claims for compensatory damages are  
21 made, could he do it at the very end?

22 MS. McDOWELL: Well, then there would have to be  
23 an investigation to determine the amount of his claim and  
24 whether it is connected with the alleged discrimination,  
25 so at some point there would be a fact-finding process.

1 In many of these cases there's actually an administrative  
2 hearing before an EEOC administrative judge at the agency  
3 level, and at that point, at times the evidence that's  
4 taken on compensatory damages claims can be quite  
5 extensive, including reports from competing psychiatrists,  
6 and so on.

7 QUESTION: Doesn't it put the agency in a rather  
8 peculiar position? It's defending against a claim, and at  
9 the same time you're telling us that it will advise the  
10 plaintiff exactly what claim he has. You see that if he  
11 sees that -- if the agency sees that there's a basis for a  
12 compensatory claim, the agency will tell them to make a  
13 compensatory claim?

14 MS. McDOWELL: The EEOC has held that it's  
15 appropriate when an employee indicates that he suffered  
16 that kind of damage to make further inquiry to see if what  
17 he is really seeking are compensatory damages

18 QUESTION: I thought you said -- I thought you  
19 were referring about the agency by which he is was  
20 employed. He initially goes to that agency, doesn't he?

21 MS. McDOWELL: That's correct, yes.

22 QUESTION: Now --

23 MS. McDOWELL: And there's a --

24 QUESTION: And you say he has to make the  
25 compensatory claim before that agency, as well.

1 MS. McDOWELL: Yes, although the EEOC has said  
2 that in some instances he may defer raising the claim if  
3 he's not aware of it until he gets to the EEOC level, the  
4 second level. In that case, if he raises it first before  
5 the EEOC, the typical procedure is for it to be remanded.

6 QUESTION: But he ordinarily has to raise it  
7 before the employing agency, right?

8 MS. McDOWELL: Yes.

9 QUESTION: And you're saying that the employing  
10 agency is going, what, out of the goodness of its heart,  
11 to advise him that he has a compensatory claim which it  
12 should pay? It puts the employing agency in a strange  
13 position. It's both defending against the claim, and  
14 supposedly advising the plaintiff as to what claim he  
15 should make.

16 MS. McDOWELL: Yes, he does, it does, and --

17 QUESTION: Well, Ms. McDowell, this --

18 MS. McDOWELL: -- the EEOC has felt that --

19 QUESTION: -- the requirements, this is a  
20 peculiar kind of thing, but the -- isn't the agency  
21 required to have an EEO officer who, when people complain  
22 about discrimination, is there to aid the person, so you  
23 have the agency both as being assistant to the  
24 complainant, and the agency is the adversary, but am I  
25 wrong in thinking that the agency is obliged to have an

1 EEO counselor?

2 MS. McDOWELL: Yes, and that's the very initial  
3 phase of the whole EEO process, is informal counseling,  
4 and this is an effort to try to resolve these complaints  
5 before a formal complaint is filed.

6 QUESTION: By the agency that would be the  
7 adversary?

8 MS. McDOWELL: Yes.

9 QUESTION: The informal counseling.

10 MS. McDOWELL: Yes, that is a counselor of that  
11 agency, yes.

12 QUESTION: And that's kind of a conflict of  
13 interest, where the agency is counseling the employee, and  
14 presumably that's to tell the employee what his rights  
15 are, and then the agency ends up being the target of  
16 whatever complaint the employee files, but the agency does  
17 have that obligation, to be a counselor to the employee.

18 MS. McDOWELL: That's correct, and as a  
19 practical matter there are different people performing  
20 these different functions within the agency. The EEO  
21 counselors are supposed to be independent of those who are  
22 making the determination on the merits of a claim when it  
23 comes to that.

24 QUESTION: Turning back to the sovereign  
25 immunity basic issue, are there any of these other statutes

1 in which the agency has discretion to determine the scope  
2 of a sovereign immunity waiver?

3 MS. McDOWELL: We're not arguing that the agency  
4 has the discretion to determine --

5 QUESTION: Well, I thought you argued Chevron  
6 deference as to what is an appropriate remedy. Are you  
7 withdrawing that part of your argument?

8 MS. McDOWELL: We don't perceive that we were  
9 making precisely that argument, Your Honor. It's our  
10 position that there does need to be a clear waiver of  
11 sovereign immunity, and that was made here in section  
12 1981, that the question of appropriate remedies by leaving  
13 this broad language in the statute enabled the EEOC to  
14 determine --

15 QUESTION: Well, your brief says -- your brief  
16 quotes the Chevron rule that you can fill in gaps that are  
17 left. It seems to me that you're saying that we should  
18 defer to your discretion in determining the scope of the  
19 waiver. Are there -- is there any other statute when an  
20 agency is allowed to do this?

21 MS. McDOWELL: Not that we're aware of, Your  
22 Honor, no.

23 Returning to the administrative exhaustion  
24 requirement of section 2000e-16, that requirement has  
25 always been understood to provide a mechanism for relief



1 in the administrative process to enable employees and  
2 agencies not to have to go to court to litigate these  
3 issues. It would be inconsistent with that statutory  
4 design to require an employee who still, everybody agrees,  
5 must go to the administrative level to exhaust his claims  
6 of liability and equitable relief, then to have to go to  
7 the district court to seek compensatory damages.

8 QUESTION: What would happen if the employee  
9 goes to the agency, gets counseled by the EEO advisor, who  
10 doesn't say anything about the various types of damages,  
11 skips over the EEOC, goes directly to the court, at that  
12 point the employee has a lawyer and asks for back pay,  
13 compensatory damages, whatever. Would there be any  
14 forfeiture in such a case?

15 MS. McDOWELL: Yes, Your Honor. the employee  
16 would still be required to have raised his claim for  
17 compensatory damages at the agency level.

18 QUESTION: Even though we are envisioning an  
19 uncounseled employee, and an officer in the agency who has  
20 the obligation to advise this uncounseled person about his  
21 rights?

22 MS. McDOWELL: There's an obligation to advise  
23 about rights, but there's no requirement to advise about  
24 what remedies he should be requesting in the  
25 administrative process, so yes, we would say that his

1 failure to exhaust administrative remedies by not  
2 requesting compensatory damages from the agency would  
3 require the dismissal of his claim. That wouldn't  
4 necessarily mean that his claim would have to be dismissed  
5 with prejudice, however. It's our position that the  
6 exhaustion requirement itself is jurisdictional to the  
7 extent that the issue must be raised before the agency,  
8 but the time limits for exhaustion are not, so in cases  
9 where justice might require, the district court could  
10 dismiss a case without prejudice to enable the employee to  
11 try to go back to his agency and exhaust the remedies that  
12 he failed to exhaust before.

13 QUESTION: It seems to me that if the EEOC is  
14 monitoring their system, it's very odd that there aren't  
15 instructions, as there are in many cases. Agencies will  
16 give a party appeal instructions, if you don't like what  
17 we do you can go here, and not to tell an uncounseled  
18 employee who just says, I want money, what the options  
19 are, and for the Government to be advocating that kind of  
20 a forfeiture, that kind of a waiver, an unintelligent  
21 waiver, seems to me strange.

22 MS. McDOWELL: Well, in many circumstances, Your  
23 Honor, somebody who is seeking relief from the Government  
24 is required to inform himself or herself of what the  
25 statutory remedies provide. Certainly in this case --

1           QUESTION: Yes, well, usually when we go to  
2 court, that's a different kind of setting, but here we're  
3 before the agency, where it's supposed to be not an  
4 adversary relationship at first, at the very first stage.  
5 It's an -- the agency says, here, we'll give you a  
6 counselor. The counselor will tell you all about what  
7 your rights are.

8           And then you say, well, the counsel should have  
9 told him that he waives something he didn't know about.  
10 It just strikes me as strange.

11           MS. McDOWELL: Well, as we say, it wouldn't  
12 entirely preclude an employee who could establish once he  
13 went to court that he had a good reason for not having  
14 raised the claim before.

15           It's our understanding that most employees are  
16 quite well-informed of their ability to obtain  
17 compensatory damages. Currently, I understand, of those  
18 cases that are appealed to the EEOC in which compensatory  
19 damages are theoretically available because they're under  
20 title VII of the Rehabilitation Act that in excess of 80  
21 percent involve requests for compensatory damages, so I  
22 don't think the situation you posit of employees being  
23 uninformed of his rights --

24           QUESTION: Well, who is informing them, then, if  
25 they're now asking for something that a lay person

1 would -- that term, as you said, that magic term wouldn't  
2 come into the head of uncounseled -- so you said -- and  
3 that may be what's happening now, but are they being  
4 advised by someone that there is this possibility?

5 MS. McDOWELL: Well, as I indicated previously,  
6 once an employee puts the agency on notice that he  
7 suffered emotional loss, medical expenses, something of  
8 that nature, then the agency is supposed to make inquiry,  
9 but as a general matter in every case across the board  
10 there's no instruction from the EEOC that employees have  
11 to advise -- employers have to advise employees of any  
12 particular remedies that are available to them, whether  
13 it's back pay or a statement of compensatory --

14 QUESTION: May I ask you a factual question just  
15 to -- in -- you said I think there are 7,000 complaints  
16 with the EEOC every year. Are those involving Government  
17 employees?

18 MS. McDOWELL: That's correct, yes.

19 QUESTION: And in 80 percent of those, damages  
20 have been awarded by the EEOC?

21 MS. McDOWELL: No. In 80 percent of those cases  
22 there's a claim for compensatory damages, which suggests  
23 simply that employees are aware of --

24 QUESTION: And -- but what roughly is the  
25 percent in which claims of compensatory damages are made,

1 do you know?

2 QUESTION: Well, that's the 80 --

3 MS. McDOWELL: That's the 80 percent.

4 QUESTION: Oh, that's the 80 percent?

5 MS. McDOWELL: Yes.

6 QUESTION: Oh, I see, but they're -- now, does  
7 the EEOC write some kind of an opinion when it disposes of  
8 these cases?

9 MS. McDOWELL: Yes, it does.

10 QUESTION: And they're all reported, are they?

11 MS. McDOWELL: They're reported on West Law.  
12 They're reported through other mechanisms as well.

13 They're not reported in a volume like F.Supp. though.

14 QUESTION: And there are cases in which the EEOC  
15 has awarded damages, and then the employee later sued and  
16 got more damages in court?

17 MS. McDOWELL: I'm not aware of any actual cases  
18 in which that happened. However, theoretically that's a  
19 possibility --

20 QUESTION: I see.

21 MS. McDOWELL: -- because an employee if  
22 dissatisfied can go to court.

23 QUESTION: How many cases before the agency  
24 request compensatory damages? Do you know that?

25 MS. McDOWELL: I'm not aware of that at this

1 point, no.

2 QUESTION: And that is probably a much greater  
3 number of cases than the cases that go to the commission.  
4 I mean, most of the cases resolved finally at the agency  
5 level?

6 MS. McDOWELL: Most are. There were  
7 approximately 26,000 cases resolved at the agency level in  
8 fiscal '97 as opposed to 7,000 cases that were appealed,  
9 so one would think a lot of cases are going away at the  
10 agency level. About a quarter of the cases are settled at  
11 the agency level for relief that could include  
12 compensatory damages.

13 QUESTION: Can the agency award compensatory  
14 damages?

15 MS. McDOWELL: Our position is yes, Your Honor.

16 QUESTION: Well --

17 MS. McDOWELL: However, the Eleventh Circuit has  
18 held otherwise.

19 QUESTION: And what would be the authority for  
20 that, the statutory authority?

21 MS. McDOWELL: The statutory authority would be  
22 the same as the authority that applies to the EEOC itself.  
23 There's further authority in section 2000e-16 saying that  
24 the agencies are those who have the primary responsibility  
25 in the Federal Government of enforcing equal employment

1 opportunity.

2 QUESTION: Well, does it say anything about  
3 awarding -- the agency awarding appropriate relief?

4 MS. McDOWELL: No. There's nothing about the  
5 agency itself awarding appropriate relief, although there  
6 is authorization, of course, to the EEOC to award  
7 appropriate remedies and for the EEOC also to promulgate  
8 rules and regulations.

9 QUESTION: Yes. That doesn't help you much with  
10 the agency, though, does it?

11 MS. McDOWELL: No, it doesn't.

12 QUESTION: And it would be a very strange  
13 scheme, it seems to me, if you don't have to ask for  
14 compensatories at the agency level but you do at the EEOC  
15 level, especially since you could come directly from the  
16 agency to district court if you wanted to.

17 MS. McDOWELL: That's correct, and that's why  
18 it's generally our position that one must raise it at the  
19 agency level.

20 QUESTION: I see.

21 MS. McDOWELL: There are those --

22 QUESTION: Yes, but it really is one hypothesis  
23 built on another. I mean, you have questionable authority  
24 for requiring it to be raised before the EEOC, and your  
25 only authority for requiring it to be raised and allowing

1 the original agency to grant compensatory damages is, God,  
2 if you allow it at the EEOC it doesn't make any sense not  
3 to allow it at the agency.

4 MS. McDOWELL: Well, there's one other point,  
5 Justice Scalia, and that is that everybody agrees that an  
6 agency can settle a claim for an amount that includes  
7 compensatory damages.

8 The general rule there is that an agency can  
9 settle a claim for any sorts of damages that could be  
10 awarded ultimately in court, and so many of these cases in  
11 which compensatory damages as actually are paid over at  
12 the agency level involve settlements --

13 QUESTION: Well, we're --

14 MS. McDOWELL: -- so there's a reason to exhaust  
15 just for that purpose.

16 QUESTION: We're talking a lot of cases that  
17 will be dumped directly into district courts. I mean,  
18 more than the, what was it, 7,000 from the EEOC. It may  
19 well be that a large number of cases that never got to the  
20 EEOC that were resolved at the agencies with compensatory  
21 relief would not be resolved there any more but would have  
22 to come to the district courts if the plaintiff wanted  
23 compensatory relief.

24 MS. McDOWELL: That's correct, and if the court  
25 decided the case in a manner that precluded the agencies



1 from awarding it as well.

2 QUESTION: Is there any sort of a contested  
3 proceeding before the agency? I mean --

4 MS. McDOWELL: Yes.

5 QUESTION: -- really the only -- I thought the  
6 only way an agency could handle the case would be to  
7 settle it or else to deny relief.

8 MS. McDOWELL: No. The agency conducts an  
9 investigation and ultimately issues a decision on the  
10 merits if the case hasn't previously been settled or  
11 dismissed on procedural grounds. The employee can request  
12 a hearing as well before an administrative judge of the  
13 EEOC. That is requested in a third to a half of all  
14 cases.

15 QUESTION: Does the -- do we find cases in which  
16 the agency awards compensatory damages against itself?

17 MS. McDOWELL: Yes. It's not a large number of  
18 cases, but there are some.

19 QUESTION: Could you focus for just a second,  
20 please, on the jury trial argument? I take the argument  
21 against you as being that 1981 says that in an action  
22 brought under 717, and this is an action brought under  
23 717, a party can ask for compensatory damages, so you  
24 would have thought they could.

25 But it says in (c) that if a complaining party

1 seeks compensatory damages any party may demand a trial by  
2 jury, and since it's obvious the EEOC is not a place where  
3 you'd have a trial by jury, it's obvious that this doesn't  
4 apply to the EEOC, the waiver that's in 1981.

5 That's the argument, and I'd like you to respond  
6 to that argument.

7 MS. McDOWELL: We think that the most  
8 appropriate construction of the jury trial provision as  
9 applied to Federal employee cases is that if, indeed, a  
10 case reaches district court because the employee was not  
11 satisfied with either the administrative agency's award or  
12 the EEOC's award, then either party can, indeed, request a  
13 jury trial, but this doesn't foreclose the EEOC from doing  
14 it.

15 QUESTION: Now, has that ever been determined?  
16 I ask that because the argument continues, the Government  
17 isn't going to be able to ask for a jury trial. They're  
18 going to be bound by the EEOC. Do you mean that a private  
19 party files the complaint for compensatories, they're  
20 denied, and then does the whole thing over again in the  
21 trial court? Is that your position, that that's what that  
22 provision means?

23 MS. McDOWELL: Yes. It's important to know --

24 QUESTION: Has it ever been interpreted?

25 MS. McDOWELL: Pardon me?

1 QUESTION: Has it ever been interpreted  
2 authoritatively?

3 MS. McDOWELL: No, not that I'm aware of.

4 QUESTION: But the Government's position is that  
5 means that if you don't get compensatories before the  
6 agency, you have a right under that provision to have the  
7 issue done anew in the trial court.

8 MS. McDOWELL: That's correct, yes.

9 It's important to recognize that the jury trial  
10 provision is a general provision. It was not directed  
11 specifically at the Federal Government. It's part of a  
12 provision that applies to all title VII cases whether  
13 against the Government or against private employees. This  
14 provision is already in the legislation that became  
15 section 1981a before Senator Warner offered his amendment  
16 to extend compensatory damages to Federal employees as  
17 well.

18 QUESTION: Of course, the words appropriate  
19 remedies were also in 2000e-16 before they included  
20 compensatory damages, weren't they?

21 MS. McDOWELL: That's correct, and Congress was  
22 certainly award of that provision at the time that it  
23 enacted section 1981a. If it had intended at that point  
24 to limit the available remedies to appropriate equitable  
25 remedies, presumably Congress would have said so, but it

1 didn't.

2 QUESTION: No, but the amendment in 1981a, the  
3 jury trial point, it emphasized it focuses on actions for  
4 damages. You think of a judicial proceeding, and that  
5 indirectly is amending in your view also the authority of  
6 the EEOC under 2000e-16.

7 MS. McDOWELL: Yes.

8 QUESTION: Yes.

9 MS. McDOWELL: It's also important to recognize  
10 that all of this legislation was enacted against a  
11 historical background of Congress' historical aversion to  
12 jury trials on monetary claims against the Government.  
13 Certainly that's reflected in the Tucker Act and the  
14 Federal Tort Claims Act, where a condition of the  
15 Government's waiver --

16 QUESTION: Yes, but the Government -- there is a  
17 right to a jury trial on both sides once you get to court,  
18 in your view.

19 MS. McDOWELL: That's correct, so this is a  
20 somewhat different provisions but in order to jump from  
21 the existence of this provision to a condition on the  
22 waiver of sovereign immunity is a greater --

23 QUESTION: Well, but this is less favorable to  
24 the Government than simply having no jury trial for either  
25 party. Here, the plaintiff gets to go to district court

1 if he's dissatisfied. The Government doesn't get to go at  
2 all.

3 MS. McDOWELL: Yes, and that's a choice that  
4 Congress made back in 1972, Your Honor.

5 QUESTION: You say that Congress made this  
6 choice when it favors your position, but then you say that  
7 traditional sovereign immunity principles suggest that the  
8 Government doesn't like jury trials. The Government  
9 certainly would rather have a jury trial than no trial at  
10 all, I would think.

11 MS. McDOWELL: Well, Congress decided otherwise  
12 when it determined that finality was more important than  
13 whatever extra accuracy would be obtained by judicial  
14 proceedings with respect to equitable relief, back pay and  
15 so on, under title VII. That's --

16 QUESTION: Of course, when the Government has no  
17 trial at all, it's the Government's own fault, right,  
18 because it's the Government itself which has given  
19 judgment against itself at the agency instance, right,  
20 so --

21 MS. McDOWELL: Well, to a certain exten --

22 QUESTION: Yes.

23 MS. McDOWELL: -- one could look at it that way.

24 QUESTION: You could blame it on itself.

25 (Laughter.)

1 MS. McDOWELL: If there are no further  
2 questions, I'd like to reserve the remainder.

3 QUESTION: Very well, Ms. McDowell.

4 Mr. Kelly, we'll hear from you.

5 ORAL ARGUMENT OF TIMOTHY M. KELLY

6 ON BEHALF OF THE RESPONDENT

7 MR. KELLY: Mr. Chief Justice, and may it please  
8 the Court:

9 I'd like to address initially Justice Ginsburg's  
10 concerns about the issue as to how an employee goes about  
11 requesting compensatory damages. I think if you take a  
12 look at the appendix, the joint appendix in this case, at  
13 the two fold-out pages in the center, I believe pages 23  
14 and 24, you'll see the actual EEO form that Mike Gibson  
15 filled out back in 1992 when this case initially arose,  
16 and you'll see in that form that there's really no place  
17 for an employee to indicate that he wants compensatory  
18 damages.

19 The only question that's asked on this form  
20 relating to any kind of remedy at all, it asks not what  
21 injury you suffered, but what corrective action are you  
22 seeking. It's our position that this request for  
23 corrective action is in direct lineage with the  
24 interpretation of the Federal employee section of title  
25 VII, which has always held that only equitable remedies

1 were available for either Federal employees or private  
2 employees of discrimination until the 1991 act was passed.

3 QUESTION: And I suppose it goes to the  
4 obligation to raise the issue at the agency level. I  
5 mean, if I were reading that form I would not get a hint  
6 from the section referring to corrective action that it  
7 might be appropriate for me to ask for damages.

8 MR. KELLY: And that's exactly our position  
9 both in the district court and in the Seventh Circuit with  
10 respect to Mike Gibson's exhausting his administrative  
11 remedies and the argument that the Government ought to be  
12 estopped from raising the bar of exhaustion in this  
13 particular case, because the facts are undisputed that  
14 Mike Gibson was never advised of a right to compensatory  
15 damages.

16 QUESTION: Mr. Kelly --

17 MR. KELLY: Yes, Your Honor.

18 QUESTION: -- the records, your client's name is  
19 Michael Gibson on the record. Is there any particular  
20 reason you refer to him as Mike?

21 MR. KELLY: Only because that's how I know him,  
22 Judge.

23 QUESTION: Well, this is a court, not a jury.

24 MR. KELLY: Mr. Chief Justice, and I apologize.

25 QUESTION: You have a bad form there. Maybe

1 they should amend the form.

2 MR. KELLY: Well --

3 QUESTION: The fact that that doesn't clearly  
4 say -- and I agree with you, corrective action does not  
5 suggest compensatory damages. It suggests back pay,  
6 reinstatement, and so forth, so they should devise a new  
7 form.

8 MR. KELLY: Well, and --

9 QUESTION: I mean, they have to make -- well,  
10 I'm -- I shouldn't be critical. This may win your case,  
11 but it doesn't -- but not on the ground that you're  
12 arguing for, not on the ground that the statute doesn't  
13 require it to be asked for. Maybe on the ground that your  
14 client was misled or something, but --

15 MR. KELLY: Well, and Justice Scalia we have  
16 argued all three of those grounds. The Seventh Circuit  
17 decided the case on the sovereign immunity issue, but we  
18 have maintained the argument that Mike Gibson was  
19 deceived, and in fact that Mike Gibson --

20 QUESTION: Well, we didn't grant cert on that,  
21 did we, and if it came to that we would probably -- my  
22 guess is remand to let them figure that out.

23 MR. KELLY: You did not, Your Honor, but the  
24 opinions of this Court indicate that it's the judgment  
25 that's reviewed not the reasoning of the court of appeals,



1 and all of the arguments that we've presented are strong  
2 reasons to affirm the judgment of the court of appeals if  
3 not according to the same reasoning, and we do agree with  
4 the reasoning of the Seventh Circuit.

5 I point this out because not only did the form  
6 draw Mike Gibson in a different direction, the  
7 regulations, the EEOC regulations specifically require the  
8 agency and the EEOC to advise Mike Gibson of his rights  
9 and to oversee this instruction of pro se litigants  
10 through the administrative system, and that was never  
11 done.

12 QUESTION: Well, that -- I repeat, that's really  
13 not the issue that we're interested in. Why don't you  
14 assume for purposes of your argument that this form were  
15 required to be corrected, as the Government would  
16 doubtless say it ought to be, to say what -- not what  
17 corrective action are you seeking, but what remedies of  
18 any sort, including compensatory damages, are you seeking.  
19 Then what would your argument be?

20 MR. KELLY: Well, in that event, Your Honor, we  
21 have argued also that Mike Gibson invoked the compensatory  
22 damage remedy by telling the investigator from the  
23 Veterans Administration that he was seeking a monetary  
24 cash award.

25 The EEOC has ruled that a request for an

1 appropriate cash reward is a request for compensatory  
2 damages, and for the agency to take the position that  
3 monetary cash award is a request for compensatory damages,  
4 and appropriate cash reward is not a request, or vice  
5 versa, we think is a return to the hypertechnical  
6 exhaustion requirement that predates giving Federal  
7 employees access to the Federal courts in 1972.

8 With regard to the sovereign immunity issue, we  
9 have argued not only the jury trial provision of section  
10 1981a, and I believe that the -- Ms. McDowell misreads  
11 section 1981a(c), because the jury trial provision does  
12 not begin with, if a case gets to Federal district court,  
13 then you have a right to trial by jury. It says, if a  
14 complaining party --

15 QUESTION: Where are you reading from, Mr.  
16 Kelly?

17 MR. KELLY: I'm reading from section 1981a(c).

18 QUESTION: And where will we find that in the  
19 brief?

20 MR. KELLY: Your Honor, that's in the appendix  
21 to the cert petition, page -- that's page 32a.

22 QUESTION: Thank you.

23 MR. KELLY: The statute says, if a complaining  
24 party seeks compensatory or punitive damages, then either  
25 party may demand a trial by jury.

1           In this case, it must be conceded that a Federal  
2 employee asking for compensatory damages at the  
3 administrative level is a party seeking compensatory or  
4 punitive damages. The definition of complaining party  
5 specifically includes both actions and proceedings, and so  
6 that provision must refer to all instances when a party --

7           QUESTION: And yet clearly no party can demand  
8 a trial by jury before the EEOC.

9           MR. KELLY: Clearly, which is why we interpret  
10 section 1981a to provide for compensatory damages at the  
11 Federal district court level, not at the administrative  
12 level. In addition to the right to a jury trial, section  
13 1981a(a)(1), which is on page 31a of the appendix,  
14 provides in the operative language granting the right to  
15 compensatory damages for compensatory damages in an  
16 action, and skipping down to the bottom of the provision,  
17 in addition to any relief authorized by section 706(g) of  
18 the Civil Rights --

19           QUESTION: This is (a)(1) you're reading from?

20           MR. KELLY: This is (a)(1) of 1981a. In  
21 addition to any relief authorized by section 706(g) of the  
22 Civil Rights Act of 1964. Those provisions, both by  
23 referring to an action as opposed to a proceeding, and by  
24 referring to the judicial remedy provision of title VII,  
25 which is 706(g), specifically refer to actions, civil

1 actions in Federal district court, and not to  
2 administrative proceedings.

3 In title VII, as the Court recognized in New  
4 York Gaslight Club v. Carey, in general the term action  
5 refers to civil action, and when Congress is referring to  
6 more general issues of State and local and administrative  
7 enforcement, it almost always uses the word, proceeding,  
8 or proceedings.

9 QUESTION: Well, I don't -- I -- going back for  
10 a second to your jury trial, which is the point that is  
11 confusing me at the moment, I might agree with you -- I  
12 don't see how -- the Government originally said that if  
13 it's not an administrative action there'll be a lot of  
14 extra time, expense, disruption, delay to give them -- you  
15 remember that in their brief, or petition for cert.

16 MR. KELLY: I do, Your Honor.

17 QUESTION: All right. I accept that that's not  
18 so if you're going to give two bites at the apple to every  
19 plaintiff, but in their brief on the merits here they  
20 don't say the plaintiff gets two bites at every apple.  
21 What they say is, maybe there isn't a jury trial right,  
22 but they say may -- in footnote 19, do you remember that?  
23 When they go into that, they say, maybe there is, maybe  
24 there isn't. It says, arguably, at least, the Federal  
25 employee is not proceeding under this section. Do you

1 remember that?

2 MR. KELLY: In --

3 QUESTION: And it's under this section you get  
4 the jury trial right.

5 MR. KELLY: And it's --

6 QUESTION: My question is, can you elucidate  
7 that a little bit? I mean, I'd get your point completely  
8 if it's really true there's a jury trial right, but I'm  
9 not sure they've conceded that in their brief, and so I'd  
10 like a little bit of elaboration on the assumption that  
11 there isn't a jury trial right for a plaintiff who says, I  
12 want -- he says to the agency, I want a compensatory  
13 action. You get that before the agency, but maybe you  
14 don't get it in court.

15 I've got it on the assumptiOn you do get it in  
16 court, but what if it isn't, if you don't have a jury  
17 trial right?

18 MR. KELLY: I'm sorry, Justice, I'm not  
19 understanding in what circumstance you might not get a  
20 jury -- the right to a jury trial if you went to court.  
21 By my reading --

22 QUESTION: What they say in their brief is, a  
23 Federal employee may not be proceeding under this section,  
24 within the meaning of section 1981a(c)(1), which he seeks  
25 compensatory damages under the administrative process. He

1 is instead proceeding under 42 U.S.C. 2000e-16(b), which,  
2 as discussed above, gives the EEOC the authority to  
3 enforce title VII remedies. Maybe I didn't understand  
4 that properly.

5 MR. KELLY: As I understand the Government's  
6 argument, it is that they're proceeding under section 717,  
7 or section 2000e-16, that is, rather than under section  
8 1981a, and I think that there are several problems with  
9 that approach.

10 QUESTION: Mr. Kelly, before you describe the  
11 problems, did you understand that to -- the Government to  
12 be saying that there's no right to jury trial in the  
13 court? I thought that this was just an explanation of why  
14 there is no right to jury trial before the agency.

15 MR. KELLY: That's the way that I understood it,  
16 Your Honor.

17 QUESTION: Maybe that's the explanation. Maybe  
18 that -- okay. Sorry. Skip it.

19 QUESTION: It's the only reason I didn't  
20 underline footnote 19 in red when I read the brief.

21 QUESTION: We can ask the Solicitor General to  
22 clarify that, but it seems absolutely clear that when  
23 you're in district court you get a jury trial. That's  
24 what Congress provided, and -- but your reading of this  
25 does seem to me a little strange, because you're talking

1 about, oh, they waive sovereign immunity, the Government  
2 waives sovereign immunity but only in district court, not  
3 at the lower level, and yet Congress is acting in the  
4 interest of the Government.

5 When you get into court with a jury, there is  
6 the possibility of a bigger box than what you would get  
7 before the agency, so in the Government interest to get  
8 the thing wrapped up at the agency level, so if they're  
9 going to waive sovereign immunity before a jury, then it  
10 seems most likely that they will say, of course we'd  
11 rather have it disposed of without making it a Federal  
12 case and without the possibility of a jury making the  
13 award.

14 MR. KELLY: Well, and Judge, I think that the  
15 answer to that is that the title VII procedures for  
16 Federal employees have always been perceived as primarily  
17 a conciliatory mechanism and not necessarily an  
18 adjudicatory one. The idea in the agency is to resolve  
19 the problem, get the employee back on track and working,  
20 and working at the level that he should be working, and  
21 that can be done by offering compensatory damages, by  
22 offering equitable relief, and there's no bar in the  
23 statute to voluntary mechanisms for achieving that.

24 What the problem comes in is having the agency  
25 award compensatory damages, or having an EEOC force an

1 agency to spend money in compensatory damages to an  
2 employee.

3 I think that there are really four reasons that  
4 Congress would have conferred this right in a Federal  
5 district court and not in an administrative agency. The  
6 first is the independence and objectivity of the judicial  
7 branch. These employment discrimination suits are mainly  
8 intramural events between executive branch officials and  
9 their agencies, or between the agencies and the EEOC.

10 QUESTION: Before you go onto that, can you go  
11 back to what you said before, because I'm not sure I  
12 grasped it. I thought -- are you saying that if the  
13 agency wants to, it -- what authority, in your view, does  
14 the agency and EEOC have to -- with respect to  
15 compensatory damages?

16 MR. KELLY: It -- Judge, it's -- it's our -- I'm  
17 sorry, Justice Ginsburg, it's our understanding that the  
18 Government, like a private litigant, is able to offer  
19 relief or damages in settlement in anticipation of a  
20 liability. The liability for compensatory damages at the  
21 Federal district court level we believe authorizes the  
22 agency to offer a settlement. This is done voluntarily,  
23 not under compulsion, not -- and only --

24 QUESTION: But I didn't know that the agencies  
25 had authority to voluntarily waive sovereign immunity



1 unless Congress sanctioned that.

2 MR. KELLY: Well, it's our position that they  
3 don't have the ability to voluntarily waive sovereign  
4 immunity.

5 QUESTION: But you just said that they could  
6 make a settlement that included --

7 MR. KELLY: And --

8 QUESTION: -- compensatory damages.

9 MR. KELLY: And it's my understanding that the  
10 Federal Government is able to make a settlement, to engage  
11 in voluntary negotiation in the same way that a private  
12 party is, which is different than the exercise of  
13 Government --

14 QUESTION: There's some general settlement  
15 statute, isn't there? I think there used to be, anyway.

16 MR. KELLY: I believe that this is -- and  
17 there's -- the Comptroller General's Office has issued  
18 regulations that indicate that a settlement in  
19 anticipation of litigation is an appropriate means for --

20 QUESTION: Isn't that the answer? They can  
21 always anticipate that at some point the claimant will end  
22 up in court, and they know that if the claimant ends up in  
23 court, there can be damages, so therefore their settlement  
24 authority would include the payment of something with  
25 respect to compensatory damages. That would -- isn't that

1 the answer to sort of the waiver problem?

2 MR. KELLY: That's much more succinct than --

3 QUESTION: The trouble is, I don't know of any  
4 settlement authority to settle for more than is asked for,  
5 and what you're allowed to ask the agency for is  
6 restitution, you know, back pay and reinstatement. It's  
7 hard to come under a settlement authority when, you know,  
8 you're asking for \$100,000 and the agency says, well,  
9 we'll settle for two. I doubt whether that comes within  
10 the settlement authority.

11 QUESTION: May I -- I'm sorry, have you answered  
12 his question?

13 MR. KELLY: I'm not -- I'm not sure if it was a  
14 question.

15 QUESTION: That's what you're saying, isn't it,  
16 that you can come before an agency with no compensatory  
17 claims, just reinstatement and back pay, and say, you  
18 know, I want \$100,000 and the agency says, well, you know,  
19 we'll settle for two. Can the agency do that?

20 MR. KELLY: Like any other litigants, if the  
21 complainant says, if you don't give me \$100,000 I'll take  
22 you to court, I think that the agency has the ability to  
23 take into consideration a compensatory damage claim that  
24 will be made in the future in order to settle the case  
25 in --

1 QUESTION: So all he has to say is, I want back  
2 pay, I want reinstatement, and I want \$100,000.

3 MR. KELLY: Right.

4 QUESTION: And if you don't give it to me, I'm  
5 going to go to court.

6 MR. KELLY: That's right, and it's clear that  
7 Congress -- whether he's correct or not in wanting  
8 \$100,000 for compensatory damages, it's clear that  
9 Congress gave him the right to go to court whether he gets  
10 it or not.

11 QUESTION: Are you -- you were in the midst of  
12 four reasons, and the first one was the, I guess relative  
13 objectivity of the court.

14 MR. KELLY: That's right. The judiciary acts as  
15 a check in that instance on executive officials awarding  
16 nonpecuniary compensatory damages to --

17 QUESTION: Yes, but isn't the danger not that  
18 executive officials are going to give the bank away, but  
19 that a jury is going to give the bank away?

20 MR. KELLY: Well, and that's the second reason,  
21 Your Honor, and that's the expertise of the Federal  
22 district court and juries in awarding compensatory  
23 damages. Compensatory damages have been committed to the  
24 judgment of juries and judges for at least a couple of  
25 hundred years.

1 QUESTION: Of course, your --

2 QUESTION: The expertise of juries?

3 QUESTION: That's the reverse Chevron doctrine.

4 (Laughter.)

5 QUESTION: Your argument has to be the same, I  
6 take it, for punitive damages.

7 MR. KELLY: Well, there are no punitive damages  
8 available against the Federal Government.

9 QUESTION: You're basically -- you've clarified

10 QUESTION: May I ask a question about this -- I  
11 really am confused about this statutory scheme, I have to  
12 confess. I had read, before getting more confused during  
13 the argument --

14 (Laughter.)

15 QUESTION: -- the 2000e-16(b) as the kind of  
16 authority to EEOC where the EEOC was the original, you  
17 might say the nisi prius tribunal, where an original  
18 complaint is filed with them, but actually in the system  
19 as it actually works, the EEOC is sort of an appellate  
20 tribunal. It reviews what the separate agencies do.

21 Is there any statutory language anywhere that  
22 says that what they're supposed to do, that they have a  
23 review function that in fact passes on --

24 MR. KELLY: The --

25 QUESTION: -- and if so, where is it?

1 MR. KELLY: The same section, subsection (b),  
2 indicates that the EEOC may promulgate rules, regulations,  
3 orders --

4 QUESTION: Right.

5 MR. KELLY: -- and so forth.

6 QUESTION: But decide cases on review of  
7 decisions by other agencies, does anything say that?

8 MR. KELLY: Well, there's a -- kind of a  
9 glancing blow that idea in section 2000e-16(c), which  
10 refers to the procedure that needs to be followed before  
11 the case goes to Federal district court. That refers to  
12 the time limits after an agency decision, and if --

13 QUESTION: I see. Yes, right. I see.

14 MR. KELLY: -- there is an appeal to the EEOC --

15 QUESTION: Thank you.

16 MR. KELLY: -- then the time limit after the  
17 EEOC.

18 QUESTION: Do you just -- one quick thing.  
19 Surprisingly enough, you did clarify the role of the jury  
20 in my mind. The other thing I'm not certain on is, I  
21 gather in -- historically speaking there's -- what I heard  
22 was the Government say about 80 percent of these types of  
23 complaints before the EEOC do ask for some kind of  
24 compensatory damages in some way or other. Have you any  
25 rough idea as to how many cases they were granted in? Is

1 this zero? Is this the first one? Is it -- do we have  
2 any rough idea of what the history is?

3 MR. KELLY: There are some published statistics.  
4 Unfortunately, the EEOC doesn't keep its statistics  
5 according to the number of compensatory damages cases  
6 where awards were made, and so it's impossible to say how  
7 many -- in how many cases compensatory damages were  
8 awarded, but there has been money awarded both at the EEOC  
9 level and at the agency level for compensatory damages,  
10 according to the statistics.

11 QUESTION: So there's some kind of practice and  
12 history of them awarding compensatory damages.

13 MR. KELLY: Well, beginning in 1992 with the  
14 Jackson decision, which by the way is not published, and  
15 was not published in West Law or any of the private  
16 reporters, not all EEOC decisions are published in those  
17 sources, but beginning in 1992, agencies grudgingly began  
18 to award compensatory damages, or at least consider awards  
19 of compensatory damages in certain cases, and the EEOC  
20 generally has remanded cases for consideration of  
21 compensatory damages rather than awarding them itself, but  
22 there are some cases where the EEOC has awarded  
23 compensatory damages.

24 QUESTION: Can you go back and finish your  
25 fourth -- I mean --

1 QUESTION: Three and four. Our attention span  
2 is really not that long.

3 (Laughter.)

4 QUESTION: I'm glad you didn't have seven or  
5 eight points, because -- what are three and four? Could  
6 you tell us quickly?

7 MR. KELLY: The third reason I think is parity  
8 of Federal employees and private employees, and in this  
9 situation, finally I think Congress has managed to put  
10 Federal employees and private employees on an equal  
11 standing with regard to compensatory damages. When  
12 they've attempted that in the past they've failed for  
13 various reasons.

14 QUESTION: But they have not put private  
15 employers and Federal employers on a parity, have they,  
16 for damages?

17 MR. KELLY: They -- with respect to --

18 QUESTION: So far as the right to go from the  
19 agency to court.

20 MR. KELLY: With respect to all of the damages  
21 except punitive damages, I believe that they are on a  
22 parity.

23 QUESTION: Well, a private employer can appeal  
24 an EEOC award to the district court, can it not?

25 MR. KELLY: The EEOC doesn't make awards against

1 private employers. The function of the EEOC in private  
2 cases is entirely conciliatory in mediation. There's  
3 no --

4 QUESTION: So it has to go to court itself to --

5 MR. KELLY: Those cases go to court, or they're  
6 settled before they get to court.

7 QUESTION: And how does it work with the  
8 legislative employees, because that's yet another scheme.  
9 We have the private sector, we have the Federal  
10 Government, and what is for the legislative employees?

11 MR. KELLY: Well, the congressional  
12 Accountability Act sets up I think yet another scheme,  
13 administrative scheme for awarding compensatory damages,  
14 and that's an election system.

15 After 90 days, the Federal -- or the  
16 congressional employee has the option of either staying in  
17 an administrative process where the administrative agency  
18 is explicitly given the power to award both equitable and  
19 compensatory damage type relief, or he can elect to go  
20 outside the administrative system and straight to Federal  
21 district court.

22 QUESTION: In the -- for the legislative  
23 employee, if he elects the administrative route, the EEOC  
24 route, is -- can he, as in the case of an executive  
25 employee, go to court at the end of the line for de novo



1 review if he's dissatisfied?

2 MR. KELLY: No. It's not technically the EEOC  
3 that he goes to. It's an administrative agency within the  
4 Congress.

5 QUESTION: Right.

6 MR. KELLY: But no. Those cases are appealed --

7 QUESTION: So it's self-contained. It's either,  
8 you get court route, or you get the administrative route,  
9 but you don't get, as with executive employees you can go  
10 to the EEOC if you want to, but you've always got a right  
11 in the end to come to court.

12 MR. KELLY: That's correct, Judge.

13 QUESTION: I give up, Mr. Kelly. I'm not going  
14 to wait for your fourth point.

15 MR. KELLY: The fourth --

16 (Laughter.)

17 QUESTION: I have a question that has perplexed  
18 me. What happens when you -- when a claimant brings an  
19 action or a proceeding before -- administratively, is  
20 unsatisfied with the result, and therefore may institute  
21 suit in district court for the back pay and the  
22 reinstatement remedy, right?

23 MR. KELLY: Correct.

24 QUESTION: Now, that same claimant under your  
25 system, if he had a compensatory damages claim, would have

1 filed a compensatory damages claim in district court.

2 MR. KELLY: Correct.

3 QUESTION: Do those two district court actions  
4 now proceed separately?

5 MR. KELLY: It's my understanding that the  
6 Federal employee is still required to exhaust  
7 administrative remedies with respect to the equitable  
8 relief and therefore it would not be until after the  
9 administrative process was exhausted --

10 QUESTION: Right.

11 MR. KELLY: -- that he would make both the claim  
12 for equitable relief and the compensatory damages --

13 QUESTION: Why? Why would he make them all  
14 together? I mean, why couldn't he file a suit immediately  
15 for the compensatory relief while he's asking for the  
16 other relief administratively, if there's no exhaustion  
17 requirement?

18 MR. KELLY: Well, it would be difficult to point  
19 to the statute and say what the answer to that question  
20 is, but in *Brown v. General Services Administration* this  
21 Court interpreted section 2000e-16(c) to mean that the  
22 Federal employee is required as a prerequisite to going  
23 into Federal court to exhaust administrative remedies.

24 QUESTION: But you're telling us there's no  
25 exhaustion. I mean, I thought your whole case was that

1 there's no exhaustion requirement in this situation.

2 MR. KELLY: There's no requirement to present  
3 the compensatory damage claim to the agency. There's a  
4 right to present a compensatory damages claim in the first  
5 instance to the Federal district court. I believe that  
6 there's merit in the suggestion that a Federal employee  
7 could bring a compensatory damage claim separately. I  
8 wonder whether --

9 QUESTION: If he brought them all together, if  
10 he waited for the agency to deny his back pay and  
11 reinstatement claim, and then he could bring them all  
12 together and get a jury trial on the back pay and  
13 reinstatement, which he would not get otherwise.

14 MR. KELLY: I don't think that that's the way  
15 that it would work, Your Honor.

16 QUESTION: Well, if you're entitled to a jury,  
17 you're entitled to a jury on all the factual questions in  
18 the case. You can't have the jury deciding the facts one  
19 way and the judge deciding it another for the other two  
20 issues. I mean, surely the jury would determine all the  
21 factual matters, wouldn't it?

22 MR. KELLY: I believe that the jury would  
23 determine the factual matters in that it would determine  
24 whether discrimination occurred and what amount of  
25 compensatory damages was available.

1 QUESTION: And --

2 MR. KELLY: I think that the judge could then  
3 determine, after the jury had decided those facts, based  
4 on the facts, whether equitable relief in addition to the  
5 compensatory damages was appropriate in that circumstance.

6 QUESTION: But the amount of back pay due, that  
7 factual matter would be decided by the jury, I guess,  
8 wouldn't it?

9 MR. KELLY: The amount of --

10 QUESTION: And the level of reinstatement to  
11 which he was entitled, I would assume that's a factual  
12 matter. That would be decided by the jury.

13 MR. KELLY: I --

14 QUESTION: I don't know. I mean, it just  
15 changes the scheme a whole lot, that's what I'm saying  
16 here, when you pour them all into one action.

17 MR. KELLY: I -- and I agree that it does change  
18 the scheme. I understand that in at least most cases, in  
19 all of the cases that I've seen, the jury's determination  
20 as to discrimination and compensatory damages would  
21 determine the outcome of the equitable relief except  
22 for --

23 QUESTION: Well, you don't have to read  
24 subsection (c) the way you're reading it. It says, if a  
25 complaining party seeks compensatory or punitive damages

1 under this section, any party may demand a jury trial.  
2 You could read that as limiting the right to jury trial to  
3 the demand for compensatory damages.

4 MR. KELLY: That's correct. I was refer -- I'm  
5 sorry, I was referring to 2000e-16(c), which is the  
6 Federal employee section of title VII, not the new  
7 compensatory damage remedy, and that provision has been  
8 determined by the court in Brown v. General Services  
9 administration to require exhaustion prior to --

10 QUESTION: But Mr. Kelly, I thought your point  
11 was that, to the extent that there are common fact  
12 questions like, was there discrimination, how long did it  
13 go on, if you have a combined legal and equitable claim,  
14 the jury goes first, and the jury's findings of fact  
15 become issue preclusive on the judge. That was settled in  
16 Beacon Theaters and Dairy Queen decades ago by this Court.

17 MR. KELLY: I believe that's correct, Your  
18 Honor.

19 QUESTION: Thank you, Mr. Kelly.

20 Ms. McDowell, you have 2 minutes remaining.

21 REBUTTAL ARGUMENT OF BARBARA B. McDOWELL

22 ON BEHALF OF THE PETITIONER

23 MS. McDOWELL: To respond to Justice Breyer's  
24 question --

25 QUESTION: No, no, you needn't. I think I

1 understand it. The key are the words, this section. This  
2 section refers to 1981, not 717.

3 MS. McDOWELL: Yes. It is the Government's --

4 QUESTION: Okay. You don't need to go further.  
5 You have 2 minutes.

6 MS. McDOWELL: -- position that there is a jury  
7 trial if the case ripens into an action into district  
8 court. It's our position that the jury in that sort of  
9 case would determine issues of liability as well as issues  
10 of compensatory damages, although equitable relief would  
11 continue to be awarded by the Court following the jury's  
12 decision.

13 In terms of the question about the historical  
14 practice of awarding compensatory damages at the  
15 administrative level, we don't have a count on the exact  
16 number of cases. However, in fiscal 1997, \$3.5 million  
17 worth of compensatory damages were awarded at the agency  
18 level. Since often these awards are quite --

19 QUESTION: Agency level, do you mean EEOC, or  
20 the original --

21 MS. McDOWELL: No, the agency level, the initial  
22 level. Since often these rewards are really quite small,  
23 \$500, \$1,000, \$2,000, that could be a large number of  
24 cases, but we don't have a count on that.

25 If there are no further questions from the

1 Court --

2 QUESTION: Yes, I have one --

3 MS. McDOWELL: Oh.

4 QUESTION: -- further, and that's again on the  
5 forfeiture, or waiver, whatever you call it. It seems  
6 that if you are insisting that the employee ask for this  
7 before the agency, ask for it before the EEOC, instead of  
8 taking it out of a general demand for relief, then you're  
9 asking for an exactness in the administrative proceeding  
10 that 54(c) says, in court -- it says, the court will give  
11 you the relief to which you're entitled even if you  
12 haven't asked specifically for it.

13 MS. McDOWELL: Yes. The 54(c) talks about  
14 relief that you have actually proven, and that's  
15 consistent with the EEOC's position here, that if you have  
16 proven compensatory damages in the administrative process,  
17 yes, you can recover them, but an agency and the EEOC  
18 shouldn't be forced to guess at what damages you may have  
19 suffered.

20 Thank you.

21 CHIEF JUSTICE REHNQUIST: Thank you,  
22 Ms. McDowell.

23 The case is submitted.

24 (Whereupon, at 11:02 a.m., the case in the  
25 above-entitled matter was submitted.)

## CERTIFICATION

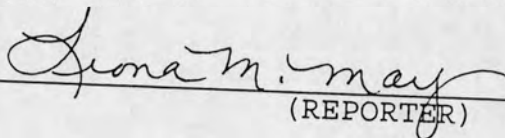
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The United States in the Matter of:

TOGO D. WEST, JR., SECRETARY OF VETERANS AFFAIRS Petitioner v. MICHAEL  
GIBSON

CASE NO:        98-238

and that these attached pages constitutes the original transcript of  
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