4-8-1981

[Statement before the Subcommittee on State, Justice, Commerce, the Judiciary and Related Agencies of the Senate Committee on Appropriations]

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STATEMENT OF
J. CLAY SMITH, JR., ACTING CHAIRMAN
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
before the
SUBCOMMITTEE ON STATE, JUSTICE, COMMERCE, THE
JUDICIARY AND RELATED AGENCIES
of the
SENATE COMMITTEE ON APPROPRIATIONS

APRIL 8, 1981

Members of The Commission:
Daniel E. Leach
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Mr. Chairman and Members of the Committee: I am J. Clay Smith, Jr., Acting Chairman of the Equal Employment Opportunity Commission. On Tuesday, March 3, 1981, President Reagan appointed me as Acting Chairman of the Equal Employment Opportunity Commission. I am pleased to appear before you today and present for your review and consideration the proposed Fiscal Year 1982 Budget of the Commission. With me are: Leroy Clark, General Counsel; Preston David, Executive Director; Brooke Trent, Director, Office of Program Planning and Evaluation; and Lefford Fauntleroy, Budget Officer. Each of these individuals has played an active role in the preparation of these budget requests and can answer with specificity any questions you have today.

For FY 82, the Commission is requesting $140,389,000 and 3,468 positions. Approval of resources at the level requested is essential if the Commission is to fulfill its twin objectives to enforce various employment discrimination statutes effectively and efficiently and to exercise oversight and coordination in the federal sector, in order to eliminate duplication, inconsistency, and unnecessary paper work burdens imposed on the respondent community.

The budget request is consistent with the President's recommendations and reflects the painstaking efforts of Commission staff to accommodate necessary cutbacks, without substantially sacrificing or undermining any of the agency's enforcement efforts. Before addressing the specifics of our budget request and proposed activities, however, I would like to highlight the Commission's accomplishments of the last several years.

As the members of this Committee are no doubt aware, the Honorable Eleanor Holmes Norton resigned as Chair of the Commission in mid-February of this year. The Commission under her leadership and with the support of the Commissioners witnessed dramatic improvements in the agency's operations and its credibility, both with protected classes and in the employer and union community. The improvements are manifested throughout many of the Commission's operations and have enabled this agency to carry out its mission more effectively and efficiently.

PROCEDURAL REFORMS

Major procedural reforms instituted in three model offices beginning in September 1977, and subsequently implemented nationwide enabled the Commission to reduce substantially its staggering inventory of backlogged Title VII charges while remaining current in the processing of new Title VII charges. By the end of 1977, the Title VII backlog consisted of 100,000 unprocessed charges. Through the application of specialized backlog reduction procedures, however, by the end of FY 80, the backlog was reduced by 65%; 80% will be eliminated by the end of FY 81. Total elimination, originally projected for FY 82, must now be deferred to the end of FY 83, in light of current budgetary restrictions.

Similarly, the introduction of rapid charge processing procedures, with a clear focus on early factfinding and settlement attempts before evidence becomes stale and parties uncompromising -- has enabled the Commission to resolve Title VII charges, on

the average, within four months of receipt. Forty-six percent of all charges are being resolved through the execution of voluntary negotiated settlement agreements, with resulting monetary benefits averaging $3,400 per charging party. These figures are in stark contrast to those which characterized Commission administrative enforcement efforts in the past, when average processing time was over two years, and only 14% of all cases were successfully resolved at the administrative level.

Broad-based patterns and practices of classwide discrimination are subject to potential Commission enforcement activity through two programs: the Early Litigation Identification program (ELI), which combines the efforts of the legal units and continuing investigation units in each district office; and the Systemic program, operated in accordance with the Commission's statutory authority under Section 707 of Title VII.

The Commission has utilized its systemic authority in the past; however, both ELI and the Systemic program as now designed are products of the organizational and procedural reforms instituted during the past three years. Both programs are operated at the district office level, with corresponding headquarters components to assure consistency of operation and, where appropriate, nationwide coordination. Both programs seek to target for enforcement action those respondents whose discriminatory

employment practices impact adversely on substantial numbers of minorities, women or older workers. Importantly, the targeting criteria utilized in both programs seek to assure that the "worst" respondents will be reached "first." Reliance on the "worst-first" rationale serves a three-fold purpose: first, those individual victims most in need of governmental action to assure protection of their rights receive assistance on a priority basis; second, governmental resources are more effectively used when channeled into combatting practices of the worst offenders of Title VII, the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA); third, and most important, employers and other persons subject to the Commission's jurisdiction who voluntarily seek to remove discriminatory obstacles to equal employment opportunity are provided encouragement and substantial insulation through the assurance that they themselves will not be targeted for enforcement activity. In other words, the strategy is to encourage employers to comply voluntarily while scrutinizing very carefully those who appear not to. The programs have been increasingly successful. In FY 80, our twenty-two district offices processed 850 ELI cases, of which 180 resulted in voluntary conciliation agreements. Sixty-two Systemic investigations were initiated during FY 80. On the whole, during FY 80, the Commission approved the filing of 227 Title VII enforcement actions and 128 ADEA and EPA suits. Substantial benefits were obtained as a result of lawsuits resolved in FY 80.

We believe that as the ELI and Systemic programs become better established, their operation will strengthen the Commission's enforcement efforts substantially. In particular, as the Commission's credibility is enhanced through these programs, even greater voluntary initiatives to remove employment discrimination, as an alternative to Commission and court enforcement, will be stimulated. Thus, while budgetary restraints have necessitated scaling down our previous projections, the Commission remains firmly committed to our Systemic and ELI programs and will endeavor, within resource limitations, to carry out the mandate of Congress to identify and strike down those patterns and practices of discrimination which continue to disadvantage whole classes of people in the workforce.

ORGANIZATIONAL REFORM

Members of this Committee are aware of the major organizational changes instituted within the Commission during the past three years. These substantial changes were implemented both in the field and at the headquarters level. The existing field structure reflects a careful evaluation not only of programmatic needs of the Commission, but also geographical considerations relative to the intake of charges. The original structure of the Commission has changed dramatically. The then-existing district and area offices were carefully scrutinized to determine appropriateness of location. Five regional litigation centers, and seven regional administrative offices were abolished.

Twenty-two district offices and 27 area offices were established in locales with high concentrations of potential charging parties. Legal and administrative staff were placed in the district offices, thus allowing them to provide a full complement of services, both compliance and legal. Area offices are available for charge intake and rapid charge processing.

Title VII has always required the deferral of charges to appropriate state and local agencies. In the past, the Commission's procedures failed to utilize these agencies effectively. As part of the reorganization, however, the Commission established a more efficient state and local program. We currently have work-sharing relationships with 69 state and local agencies, who share in the processing of charges. Among the services provided state and local agencies by the EEOC as a result of these agreements is training in charge processing which is essential to assure high quality processing standards and nationwide uniformity.

Thus, our new partnership has served to provide essential support to state and local agencies, and to further the objectives embodied in the Title VII deferral requirement. In the process, Title VII enforcement has become more rational, by eliminating a substantial amount of duplication and inconsistency. Charging parties and respondents now know that, for the most part, final action by a state agency with respect to a charge processed pursuant to a worksharing agreement, in effect, constitutes final Commission action. While the Commission reviews all state

findings and reserves the option to reject them, where appropriate, this option is rarely exercised. Thus, the prospect of obtaining two bites of the apple -- which is both costly and time consuming -- is minimized.

Organizational restructuring at the headquarters level complements that in the field. The Commission's Office of Field Services has overall operational responsibility for the administrative functioning of each district and area office. The Commission's Office of Policy Implementation provides technical substantive guidance to the various field offices, through the issuance of compliance manuals and Commission decisions with respect to novel or controversial employment discrimination issues. It also plays the critical role of developing various policy statements for presentation to the Commission. These policy statements may take the form of guidelines or Commission resolutions. Guidelines are not binding on the respondent community. Rather, they provide essential guidance as to the state of the law: what the courts, and the Commission, have determined to be violative of Title VII, the ADEA or the EPA. Guidelines also establish uniform standards to be applied on a nationwide basis. They also share the all-important role of providing substantial insulation from enforcement to those respondents who attempt voluntarily to bring their employment practices into line with the policies outlined in the guidelines.

FEDERAL SECTOR OVERSIGHT AND ENFORCEMENT

Congress recognized the major strides taken by the Commission in streamlining its operations, and in response, overwhelmingly approved the transfer of certain new authorities to the Commission, in 1979, including jurisdiction over federal sector equal employment opportunity and affirmative action programs. Under this responsibility, the Commission has developed Management Directives and Instructions for submission of Multi-Year Affirmative Action Plans, pursuant to Section 717 of Title VII, throughout the federal sector. The multi-year approach is a significant and meaningful departure from previous efforts at monitoring the achievement of equal employment opportunity goals in the federal sector. Through its focus on results, the multi-year approach is designed to provide an incentive for federal agencies to enhance their equal opportunity posture within reasonable time frames. As is true of Commission efforts in the private sector, the Multi-Year plan instructions seek to encourage voluntary actions by federal agencies, providing the agencies with substantial latitude in determining the means most appropriate for attaining their goals.

In the area of processing federal employee appeals, the Commission succeeded, in FY 80, in eliminating the appeals backlog. Moreover, despite serious deficiencies in resources and an ever-increasing caseload, the staff production rate has increased substantially, and is expected to exceed the FY 80

rate by 28% in FY 81. The appeals operation has met the critical objectives of assuring the consistency of decisions within the federal sector itself and, where appropriate, the full application of standards and law developed in the private sector, thereby eliminating the double standard that too often prevailed between the public and private sectors.

Congress also approved the transfer to the Commission of the responsibility for coordination of issuances by federal agencies relative to equal employment opportunity, in order to eliminate duplication, inconsistency, confusion, and burdensome paperwork. The Commission's efforts at coordination have taken two forms. First, a special office was established whose ultimate responsibility is to meet the objective of eliminating duplication, inconsistency, and burdensome paperwork. This responsibility has been carried out through reviews of numerous proposed sister agency issuances, as well as through a comprehensive survey of over 1,300 private and public employers to ascertain their views on examples of duplication and inconsistency resulting from federal enforcement efforts. The results of this survey have been analyzed and will be used to provide specific long-range direction for coordination efforts in the future. Also in FY 80, as a result of coordination efforts, three major federal agencies withdrew plans to implement reporting systems which would have duplicated reporting requirements of other agencies and imposed an unnecessary burden on respondent employers.

Second, the Commission has approved several initiatives specifically designed to streamline equal employment opportunity enforcement efforts. Very important among these is the new Memorandum of Understanding with the Office of Federal Contract Compliance Programs, designed to assure coordinated -- rather than contradictory -- efforts in the areas where our jurisdictions overlap. Specifically, the Memorandum calls for the deferral of certain complaints received by OFCCP to the EEOC, and vice versa. In addition, it provides for the sharing of vital enforcement information. Implementing instructions are currently being developed. An equally important example of efforts at coordination was the issuance by the Commission of one set of Uniform Guidelines on Employee Selection Procedures, replacing the two differing sets administered previously by government enforcement agencies. Adoption of the guidelines reflected the Commission's commitment to making the federal enforcement effort more uniform and more rational.

AGE AND EQUAL PAY ENFORCEMENT

The Commission also received jurisdiction over enforcement of the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA). Despite an unexpectedly high volume of charges under both statutes, we have successfully assumed these new responsibilities. I should stress, however, that the charge increase was significant. Charge intake under the ADEA grew from a total of 5,400 in FY 79, to 8,800 in FY 80. Similarly, the

FY 79 intake of 1,600 EPA complaints grew to 2,300 EPA complaints in FY 80. Staffing to process this influx of age and equal pay complaints was grossly inadequate. Although approximately 50% of the Department of Labor's employees trained in age and equal pay enforcement transferred with the function, the dramatic increase in complaints necessitated the assignment of Title VII resources into these two programs.

In response to these increases, the Commission developed new procedures for the processing of age complaints in the latter part of FY 80. The procedures, patterned largely after those utilized under Title VII, rely on rapid charge processing and factfinding for resolution of the vast majority of age complaints. A specific percentage of complaints which present the likelihood of providing substantial remedies for large numbers of persons will be designated for extensive investigation and, where appropriate, litigation.

In the equal pay area, the Commission's strategy is to coordinate enforcement efforts under the Equal Pay Act and Title VII as much as possible, since the two statutes have overlapping jurisdictions. Indeed, the Commission anticipates that approximately 75% of all equal pay complaints will be processed concurrently under both Title VII and the EPA. Finally, with respect to both the EPA and the ADEA, guidance has been provided to the field

for the initiation and conduct of directed investigations, instituted pursuant to the Commission's independent investigative authority under each statute.

Even prior to the introduction of new procedures, however, our closure rate, with benefits to charging parties was fairly high. During FY 80, 1,600 EPA and 6,500 ADEA cases were resolved administratively. We anticipate that the introduction of new procedures will enable us to increase substantially the closure rates under each statute, as well as the monetary benefits to aggrieved persons. In addition, the development of strategies for identifying the most egregious violations and violators of both statutes will enable us to utilize Commission resources most effectively, while at the same time minimizing the burden on employers and maximizing the likelihood of meaningful relief for victims of discriminatory practices.

I would only add at this point that the Commission's efforts to transform itself as an agency have not gone unrecognized. A recent independent study by the Office of Personnel Management, released in January 1981 and entitled "Management Initiatives and EEOC's Improved Productivity," cites the Commission's progress of the last several years, characterizing the Commission as a model for other agencies to follow. Similarly, the Office of Management and Budget, in its October 1980, Management Memo,

highlighted the achievement of the EEOC, noting that the procedural and organizational changes discussed above "have led to greatly improved program performance, already apparent in 1979 and continuing strongly in 1980." The OMB stated further that "the EEOC experience should be of special interest to other agencies with responsibilities for investigating complaints from the public and those that require timely and accurate reporting on operational progress from extensive networks of field offices."

FISCAL YEAR 1982 BUDGET

Against this backdrop, I will turn now to the FY 82 budget request and a brief discussion of activities proposed for funding. As noted, we are requesting a total of $140,389,000 and 3,468 employees for Commission activities. The proposed FY 82 budget represents no increase in positions from the current year and a dollar decrease. While we believe that we can absorb these reductions in staff and financial resources without serious damage to our enforcement efforts, processing times will be lengthened. Specifically, backlog reduction will continue, though at a slower rate than originally projected. Total elimination of the backlog, originally projected for FY 82, is now projected to occur in FY 83; over 90% will be eliminated by the end of FY 82. The rate of productivity in rapid charge processing will be maintained, but the open inventory of charges will grow,

perhaps substantially. With respect to inventories, we anticipate the following impacts of the budgetary reductions:

1. Title VII inventory will increase from 6 months to 9 months by the end of FY 82;
2. ADEA inventory time will increase from 7 months to 11 months by the end of FY 82; and
3. EPA inventory time will increase from 8 months to 12 1/2 months by the end of FY 82.

The Commission's original plans for enforcement of equal employment opportunity in the federal sector have also been modified. While we hope to maintain a high level of productivity in the processing of federal hearings and appeals, processing time, again, will increase. Specifically, the inventory of federal hearings will increase from 9 months to 10 months by the end of FY 82; and for federal appeals, the increase will be from 10 months to 13 months by the end of FY 82. The Commission will not attempt to absorb the entire federal equal employment opportunity complaint process, including the initial investigation of complaints, as originally contemplated. Rather, our efforts will be limited to the development of procedural issuances and providing technical assistance to improve and clarify procedural and substantive issues relating to the processing of federal EEO complaints.

As you will note, we are not proposing any new programs or a substantial expansion of Commission activities. Our objective is, as always, to enforce efficiently the various equal employment opportunity statutes under our jurisdiction, with the long-range goal of eliminating employment discrimination as a standard operating procedure of American industry. This objective can be realized only through the combined activites of resolving individual charges of discrimination and attacking broader-based classwide patterns, through the institution of systemic or directed investigations under Title VII and the ADEA and EPA. While we believe that we can carry out our mission with those resources requested in our proposed FY 82 Budget, we recognize that unanticipated increases in charge intake or costs of enforcement activity may necessitate future requests for increased funding.

Ours is an agency statutorily required to receive and investigate charges of employment discrimination. Consequently, the resource needs of the agency are dependent on the extent to which individual aggrieved persons choose to take advantage of our services. We are not in a position to predict with certainty what the demand for Commission enforcement will be. Historically, charge intake has consistently grown: this is particularly true with respect to age charges. Thus, our submission to you today

reflects only our best judgment of what the demand will be and the manner in which we can utilize available resources to meet that demand.

I appreciate the support of this Committee over the past several years. Your sensitivity to the reforms we sought to implement and your responsiveness during appropriations hearings made our task an easier and, ultimately, more successful one. I trust that your support continues.