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THE REGRESSIVE REORGANIZATION OF FEDERAL EMPLOYMENT DISCRIMINATION LAWS

*Lee Modjeska**

"We were all involved in certain tasks, in certain dreams."
Robert Kennedy, 1967**

Introduction

Presidential Reorganization Plan No. 1 of 1978¹ makes sweeping changes in the administrative and enforcement schemes of federal employment discrimination laws. The essential thrust of the Reorganization Plan is a transfer of authority and functions from various federal agencies and departments to the Equal Employment Opportunity Commission (EEOC). Neither the Plan nor concomitant federal legislation, however, expands upon the administrative enforcement powers of the EEOC or otherwise improves upon its effectiveness. This essay analyzes the content of the Reorganization Plan and suggests that the Plan is counterproductive to the goals of national nondiscrimination policy.

I. COMPARISON OF THE ORIGINAL AND REVISED SCHEMES

A. *Title VII of the Civil Rights Act—Federal Employment Discrimination*

1. The Original Scheme

Title VII of the Civil Rights Act of 1964² makes it an unlawful employment practice for an employer, employment agency, or labor organization to engage in employment discrimination against any individual because of such individual's race, color, religion, sex or national origin.³ The non-discrimination prohibitions of Title VII apply to private and public sector employment, including federal employment.⁴

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** QUOTATIONS OF ROBERT KENNEDY (Stanyan Books 1970).

1. 43 Fed. Reg. 19807 (1978), reprinted in 42 U.S.C.A. § 2000e-4 (1978), as amended by 92 Stat. 183 [hereinafter cited as Reorganization Plan or Plan]. See Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978), which partially implements the Reorganization Plan.

2. 42 U.S.C. § 2000e-17 (1976).

3. 42 U.S.C. § 2000e-2 (1976). Because much of the original scheme remains, the present tense is used throughout to avoid confusion.

4. 42 U.S.C. § 2000e (1976). See *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Central administrative authority for the administration of Title VII with regard to private sector and state and local public sector employment is generally vested in the EEOC.⁵ Title VII provides that the EEOC is to endeavor to resolve meritorious charges of unlawful employment practices within its jurisdiction by informal methods of conference, conciliation and persuasion.⁶ If conciliation fails, the aggrieved party or the EEOC may bring a civil action in federal district court.⁷ The EEOC has no independent adjudicatory or enforcement authority.⁸

General administrative authority over discrimination in federal employment is vested in the Civil Service Commission (CSC).⁹ The CSC is given the authority to enforce the federal government nondiscrimination prohibitions through appropriate remedial action, including hiring or reinstatement with back pay.¹⁰ A federal government employee or applicant aggrieved by the disposition of a discrimination complaint by a government agency or the CSC on appeal may bring a civil action in federal district court.¹¹

2. The Revised Scheme

Effective October 1, 1978, the Reorganization Plan transferred to the EEOC all federal equal opportunity enforcement and related functions vested in the CSC pursuant to Title VII.¹² Under the Plan the EEOC may delegate to the CSC or its successor the function of making preliminary determinations on discrimination issues provided the EEOC retains the function of making the final determination.¹³

B. *The Equal Pay Act*

1. The Original Scheme

The Equal Pay Act of 1963¹⁴ makes it unlawful for an employer to pay different wages based upon sex to employees performing equal work

5. 42 U.S.C. § 2000e-4 (1976). See EEOC Regulations, 29 C.F.R. §§ 1600-1612 (1977).

6. 42 U.S.C. § 2000e-5(b) (1976). See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

7. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359-60 (1977); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

8. See authorities cited note 7 *supra*.

9. 42 U.S.C. § 2000e-16 (1976).

10. *Brown v. GSA*, 425 U.S. 820, 832 (1976).

11. *Id.*

12. Reorg. Plan No. 1 of 1978, § 3, 43 Fed. Reg. 19807 (1978). See also EEOC Regulations, 43 Fed. Reg. 60900 (1978); EEOC Regulations, 44 Fed. Reg. 10613 (1979).

13. Reorg. Plan No. 1 of 1978, Accompanying Message of the President. The Reorganization Plan also transfers from the EEOC to the Attorney General the administrative and enforcement functions concerning "pattern or practice" litigation involving state or local governments. Reorg. Plan No. 1 of 1978, § 5, 43 Fed. Reg. 19808 (1978). See Exec. Order No. 12068, 43 Fed. Reg. 28971 (1978); *United States v. Fremont Unified School Dist.*, 592 F.2d 1088 (9th Cir. 1979).

14. 29 U.S.C. § 206(d) (1976).

within any establishment.¹⁵ The prohibitions of the Act apply to private and public sector employment, including federal employment.¹⁶ The Act was promulgated as an amendment to the Fair Labor Standards Act (FLSA)¹⁷ and the statutory scheme of the FLSA governs the administration and enforcement of the Act.¹⁸

Central administrative authority for the administration of the Act with regard to private sector and state and local public sector employment is vested in the Secretary of Labor.¹⁹ General administrative authority regarding federal employment is vested in the CSC.²⁰ The CSC Secretary may enter, inspect and investigate employment premises and records, including the interview of employees, to determine if the Act has been violated.²¹ The Secretary may also supervise the voluntary payment of unpaid wages.²² The Secretary or an aggrieved employee is also authorized to bring a civil action for the amount of unpaid wages and for an additional equal amount as liquidated damages.²³ The Secretary, however, has no independent adjudicatory or enforcement authority.

2. The Revised Scheme

Effective July 1, 1979, the Reorganization Plan transferred to the EEOC all administration and enforcement functions vested in the Secretary of Labor or the CSC under the Equal Pay Act.²⁴

C. *The Age Discrimination in Employment Act*

1. The Original Scheme

The Age Discrimination in Employment Act of 1967 (ADEA)²⁵ makes it unlawful for an employer, employment agency, or labor organization to

15. *Id.* § 206(d)(1). See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Orr v. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975).

16. 29 U.S.C. § 203 (1976). See *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 154-56 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

17. 29 U.S.C. § 201 (1976).

18. See *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 261 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). See also *Wage & Hour Regulations, Equal Pay for Equal Work Under the Fair Labor Standards Act*, 29 C.F.R. § 800 (1977). See generally *Ross & McDermott, The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. INDUS. & COMM. L. REV. 1 (1974); *Johnson, The Equal Pay Act of 1963: A Practical Analysis*, 24 DRAKE L. REV. 570 (1975).

19. 29 U.S.C. §§ 204(a)-204(e) (1976), as amended by 88 Stat. 55.

20. 29 U.S.C. § 204(f) (1976).

21. 29 U.S.C. §§ 211(a)-211(b) (1976).

22. 29 U.S.C. § 216(c) (Supp. I 1977), as amended by 91 Stat. 1252.

23. *Id.* §§ 216(b)-216(c). See *Corning Glass Works v. Brennan*, 417 U.S. 188, 194 (1974); *Denicola v. G.C. Murphy Co.*, 562 F.2d 889, 893 (3d Cir. 1977); *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 227-28 (7th Cir. 1972).

24. Reorg. Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19807 (1978).

25. 29 U.S.C. §§ 621-634 (1976).

engage in employment discrimination against any individual because of such individual's age.²⁶ The prohibitions of the ADEA apply to private and public sector employment, including federal employment.²⁷

Central administrative authority for the administration of the ADEA with regard to private sector and state and local public sector employment is vested in the Secretary of Labor.²⁸ The ADEA provides that the Secretary is to endeavor to resolve meritorious charges of unlawful practices by informal methods of conciliation, conference and persuasion.²⁹ If federal (or state) conciliation fails, the Secretary or an aggrieved party may bring a civil action.³⁰ Such enforcement actions are governed generally by certain provisions of the FLSA.³¹ The Secretary has no independent adjudicatory or enforcement authority.

General administrative authority over age discrimination in federal employment is vested in the CSC.³² The CSC is given the authority to enforce the federal government nondiscrimination prohibition through any appropriate action designed to assure the elimination of any unlawful practice.³³ A federal government employee aggrieved by the disposition of a discrimination complaint by a government agency or the CSC may bring a civil action in federal district court.³⁴

2. The Revised Scheme

Effective July 1, 1979, the Reorganization Plan transferred to the EEOC all administration and enforcement functions that were vested in the Secretary of Labor or the CSC under the ADEA.³⁵

26. 29 U.S.C. § 623 (1976), as amended by 92 Stat. 189. See *Oscar Mayer Co. v. Evans*, 99 S. Ct. 2066 (1979); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975). See generally *Reed, The First Ten Years of the Age Discrimination in Employment Act*, 4 OHIO N.L. REV. 748 (1977); Note, 90 HARV. L. REV. 380 (1976); Note, 50 N.Y.U.L. REV. 924 (1975).

27. 29 U.S.C. §§ 630, 633(a) (1976).

28. *Id.* § 625. See *Wage & Hour Regulations, Age Discrimination in Employment*, 29 C.F.R. §§ 850-860 (1977).

29. 29 U.S.C. § 626 (1976). See *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974).

30. See authorities cited note 29 *supra*. See, e.g., *Oscar Mayer Co. v. Evans*, 99 S. Ct. 2066 (1979); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *Hodgson v. Approved Personnel Serv., Inc.*, 529 F.2d 760, 764 (4th Cir. 1975); *Goger v. H.K. Porter Co.*, 492 F.2d 13, 15 (3d Cir. 1974).

31. 29 U.S.C. § 626(b) (1976). See *LaChappelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975). See generally Note, *Damage Remedies under the Age Discrimination Act*, 43 BROOKLYN L. REV. 47 (1976); Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. CHI. L. REV. 457 (1977).

32. 29 U.S.C. § 633a(b) (1976).

33. *Id.*

34. 29 U.S.C. § 633a(c) (1976).

35. Reorg. Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19807 (1978).

D. *The Rehabilitation Act*

1. The Original Scheme

The Rehabilitation Act of 1973³⁶ proscribes employment discrimination based upon handicap in government contracts,³⁷ federal grants³⁸ and federal employment.³⁹

The government contract discrimination prohibition and affirmative action obligations are administered and enforced by the Secretary of Labor.⁴⁰ Noncompliance can result in administrative contract termination or debarment, as well as judicial enforcement action by the Secretary.⁴¹ Private causes of action generally have not been implied under the government contract nondiscrimination program.⁴² The federal grant discrimination prohibition and affirmative action obligations are administered and enforced by the Secretary of Health, Education and Welfare.⁴³ Noncompliance can result in administrative termination of federal financial assistance.⁴⁴ The rights, procedures and remedies of Title VI of the Civil Rights Act of 1964⁴⁵ are available to any person aggrieved by handicap discrimination in employment by a federal grantee.⁴⁶ A private cause of action may exist in limited circumstances.⁴⁷

36. 29 U.S.C. § 701 (1976), as amended by 92 Stat. 2984.

37. 29 U.S.C. § 793 (1976), as amended by 92 Stat. 2987.

38. 29 U.S.C. § 794 (1976), as amended by 92 Stat. 2982, 2987.

39. 29 U.S.C. § 791 (1976). See generally Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 BALT. L. REV. 183 (1978).

40. Exec. Order No. 11758, 39 Fed. Reg. 2075 (1974). See generally Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 EMORY L.J. 65 (1977).

The extensive Government Contract Equal Employment Opportunity Program has recently been consolidated into the Office of Federal Contract Compliance Programs (OFCCP), Department of Labor. See Exec. Order No. 12086, 43 Fed. Reg. 46501 (1978). The Reorganization Plan reserves until 1981 presidential review of the respective EEOC and OFCCP consolidations.

41. See OFCCP Regulations on Affirmative Action Obligations of Contractors and Subcontractors for Handicapped Workers, 43 Fed. Reg. 49276 (1978). See also *Timken Co. v. Vaughan*, 413 F. Supp. 1183 (N.D. Ohio 1976).

42. E.g., *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir.), cert. denied, 389 U.S. 977 (1967); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3 (3d Cir. 1964). But see *Lewis v. Western Airlines, Inc.*, 379 F. Supp. 684 (N.D. Cal. 1974).

43. Exec. Order No. 11914, 3 C.F.R. 117 (1976 Compilation).

44. *Id.* See HEW Regulations on Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. 84 (1977). See generally Comment, § 504 and the HEW Regulations: Effectuating the Rights of the Handicapped, 5 OHIO N.L. REV. 107 (1978).

45. 42 U.S.C. § 2000d (1976).

46. 29 U.S.C. § 794(a)(2) (1976).

47. See *University of Missouri School of Law Scholarship Repository*, 1158 (4th Cir. 1978), *rev'd on other grounds*, 99 S. Ct. 2361 (1979). See also *Tragesser v. Libbie*

The Act establishes a federal Interagency on Handicapped Employees to provide a focus for federal and other employment of handicapped individuals, and to periodically review in cooperation with the CSC the adequacy of hiring, placement and advancement practices of each federal executive department, agency or instrumentality concerning handicapped individuals.⁴⁸ Each executive department, agency or instrumentality is required to develop and submit to the Interagency Committee and the CSC an affirmative action program for the hiring, placement and advancement of handicapped individuals.⁴⁹

2. The Revised Scheme

Effective October 1, 1978, the Reorganization Plan transferred to the EEOC all enforcement and related functions vested in the CSC and the Interagency Committee under the Rehabilitation Act.⁵⁰ In addition, in 1978 Congress amended the Rehabilitation Act to give federal employees aggrieved by handicap discrimination in employment recourse to Title VII procedures, rights and remedies.⁵¹

II. COMMENTARY ON THE REORGANIZATION PLAN

The essential purpose of the Reorganization Plan is to centralize administrative and enforcement responsibility for major federal employment discrimination legislation in the EEOC. The superficial appeal of this purported centralization does not withstand scrutiny. The Reorganization Plan pours new wine into an old bottle that is already cracked and overflowing.

Title VII was the first major comprehensive piece of federal legislation prohibiting discrimination in private employment based upon race, color, religion, sex or national origin.⁵² The initial bill sparked by President Kennedy almost twenty years ago⁵³ carried with it the agonies as well as the

Rehab. Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3814 (June 19, 1979), and cases cited therein.

48. 29 U.S.C. § 791(a) (1976).

49. *Id.* § 791(b).

50. Reorg. Plan No. 1 of 1978, § 4, 43 Fed. Reg. 19808 (1978).

51. 29 U.S.C. § 794(a)(1) (1976), *as amended* by 92 Stat. 2982. *See* Trageser v. Libbie Rehab. Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3814 (June 19, 1979).

52. Morton v. Mancari, 417 U.S. 535, 545 (1974). The Reconstruction-era civil rights statutes, 42 U.S.C. §§ 1981, 1983 and 1985, had not yet been judicially resurrected as a limited remedy for some private employment discrimination. *See* McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273 (1976); Johnson v. Railway Express Agency, 421 U.S. 454 (1975). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442 n.78 (1968).

53. *See* Note, *Title VII: Legislative History*, 7 B.C. INDUS. & COMM. L. REV. 431, 431-33 (1966). *See also* Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 IND. REL. L.J. 1 (1977).

hopes and dreams of the nation's disadvantaged minorities. The proposed legislation was the personification of a vision and an ideal that was long overdue for expression and vindication.

The devastating social, psychological and economic costs of employment discrimination, for the individual as well as the collective, are intolerable in a civilized society.⁵⁴ The invidious denial of job opportunities degrades and defeats not only the victim but all of us who are party or witness. We were delinquent in the proscription and elimination of employment discrimination. The legislation meant so very much.

The emergent Title VII was a profound disappointment. Congressional consideration of the legislation was marked by tremendous conflict and controversy. The admixture of vigorous proponents and opponents managed to produce a compromise statute whose provisions are complex, confusing, contradictory and inadequate.

Title VII purports to be declarative of a national nondiscrimination policy. Indeed, the Supreme Court has declared that "national labor policy embodies the principles of nondiscrimination as a matter of highest priority."⁵⁵ To this extent the statute retains its remedial and humanitarian underpinnings.⁵⁶ Congress failed, however, to create a strong and vigorous mechanism for the effectuation of this policy.

The EEOC, the administrative agency established by Congress to administer Title VII, was given no meaningful, independent prosecutorial, adjudicatory or enforcement authority. Cooperation and voluntary compliance were chosen by Congress as the preferred means for achieving the goal of equal employment opportunity.⁵⁷ The EEOC was directed to attempt resolution of employment discrimination complaints by conference, conciliation and persuasion.⁵⁸ The EEOC can neither adjudicate claims nor impose administrative sanctions. As Professor William B. Gould has stated, "[T]he agency was given no teeth."⁵⁹

Forces in opposition to giving the EEOC adjudicatory authority, including the power to issue cease-and-desist and other remedial orders, prevailed in both the 1964 Act and the 1972 amendments.⁶⁰ Title VII is

54. See generally A. SMITH, *EMPLOYMENT DISCRIMINATION LAW CASES AND MATERIALS* 1-138 (1978).

55. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 66 (1975). See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

56. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See also *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970).

57. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974).

58. *Id.*

59. W. GOULD, *BLACK WORKERS IN WHITE UNIONS* 39 (1977).

60. For summaries of the debates and various arguments on the issue, see *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361-66 (1977); *Chandler v. Roudabush*, 425 U.S. 840, 848-58 (1976); W. GOULD, *BLACK WORKERS IN WHITE UNIONS* 38-46 (1977).

enforced by means of private party or EEOC *de novo* civil actions in federal court. Development and effectuation of national nondiscrimination policy is thus left to a federal judiciary which is already "struggling desperately to keep afloat in the flood of federal litigation."⁶¹

Since its inception the EEOC has been plagued with organizational and administrative problems which have severely hampered its efficiency and compromised its effectiveness.⁶² The EEOC's casehandling methods and procedures have been inadequate,⁶³ its backlog and delays have been horrendous,⁶⁴ and its record of successful conciliation and settlement has been poor.⁶⁵

The EEOC's problems undoubtedly reflect the ambivalence of the congressional commitment embodied in the statute. With no adjudicatory authority or administrative sanctions in reserve the EEOC is rendered rather impotent in the conciliation and settlement process.⁶⁶

The EEOC's difficulties are undoubtedly also caused by individual and societal resistance to the fundamental changes inherent in the policies of Title VII. Again, however, the inadequacy of the enforcement mechanism limits the extent to which the EEOC can overcome this resistance, especially in the case of systemic discrimination.

As dedicated as the federal judiciary may be to making Title VII work, *de novo* federal court litigation is simply no substitute for the remedial efficacy of administrative litigation. Administrative adjudicatory processes, with an independent public prosecutor representing the aggrieved individual, offer expeditious as well as expert relief.

The Reorganization Plan transfers to the EEOC the additional responsibility for the administration and enforcement of the Equal Pay Act, the Age Discrimination in Employment Act, and federal employment discrimination. There is no correlative congressional increase in the

61. Board of Trustees v. Sweeney, 99 S. Ct. 295, 296 (1978) (Stevens, J., dissenting).

62. See U.S. COMM'N ON CIVIL RIGHTS REPORT 176-242 (1977). For these and other reasons, including inter-agency interpretative conflicts, the Supreme Court has not accorded significant deference to EEOC expertise. *E.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). See generally Modjeska, *The Supreme Court and the Diversification of National Labor Policy*, 12 U. CAL. D.L. REV. 37 (1979).

63. See authorities cited note 62 *supra*.

64. See Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 362, 364 n.24 (1977); Johnson v. Railway Express Agency, 421 U.S. 454, 465 n.11 (1975). As of April 30, 1977, the EEOC's steadily increasing backlog of charges had reached 130,000. U.S. COMM'N ON CIVIL RIGHTS REPORT 211 (1977).

65. From March 1973 to August 1977 the EEOC's settlement rate ranged from 25% to 31.5%. U.S. COMM'N ON CIVIL RIGHTS REPORT 197 (1977). This rate can be compared to the 95% settlement rate achieved by the National Labor Relations Board (NLRB). 43 NLRB ANN. REP. 9 (1978).

66. See H. FILE, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 49-51 (1977).

agency's administrative power. It is therefore extremely difficult to see how this transfer of additional major duties to an already beleaguered and overloaded agency improves the situation. In fact, the reorganization would appear to make the entire situation worse for almost all concerned.

National labor policy declares employee organizational and collective bargaining rights to be of fundamental importance.⁶⁷ Congress has created a strong and effective quasi-judicial agency, the National Labor Relations Board (NLRB), for the vindication of those rights.⁶⁸ Surely the nation's disadvantaged minorities are entitled to at least as much protection and arguably much more. If national labor policy truly regards employment nondiscrimination as a matter of the "highest priority,"⁶⁹ then the EEOC must be strengthened.

"Attainment of a great national policy [may be produced] through expert administration in collaboration with limited judicial review. . . ."⁷⁰ Effective remedial authority requires, at a minimum, the adjudicatory power to issue cease-and-desist orders and to order hiring or reinstatement with back pay. The President is urged to reintroduce and vigorously support such legislation and not to muddy the waters by simply dumping more work on the EEOC.

Apart from problems of EEOC inefficiency or ineffectiveness, there are additional factors which militate against the main aspects of the Reorganization Plan. The Equal Pay Act and the Age Discrimination Act are administered and enforced in accordance with the provisions of the FLSA. The FLSA is no playground. It is one of the most technical, complex and highly specialized of all the specialized labor laws. The Department of Labor has been administering the FLSA for over forty years, and it has proven expertise in the effectuation of that statute. Moreover, the Department, and particularly its Wage and Hour Division, has a track record of efficiency, thoroughness and toughness, coupled with fairness and competence, in the enforcement of the FLSA.

Furthermore, there is clear investigative and enforcement overlap between FLSA and Equal Pay Act violations, and also some overlap with Age Discrimination Act violations.⁷¹ The EEOC has neither experience nor expertise in FLSA matters. For these additional reasons it seems foolish to withdraw responsibility from the Department of Labor and transfer it to the EEOC.

67. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

68. The NLRB has consistently maintained an exemplary record of casehandling performance. *E.g.*, 43 NLRB ANN. REP. 1-22 (1978).

69. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 66 (1975).

70. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188 (1941).

71. See generally Kilberg, *Recent Developments Under the Equal Pay and Wage Discrimination in Employment Acts, 1977* SW. LEGAL FOUNDATION, LAB. L. DEV. 421.

Transfer of responsibility over federal employment discrimination from the CSC to the EEOC may simply be a stalemate. It is apparently common knowledge in some quarters that the CSC has not been a responsive or effective forum for handling federal employee discrimination complaints.⁷² The President has obviously elected to transfer the non-discrimination function to the EEOC rather than attempt to improve the CSC's performance. Transfer of functions from one delinquent agency to another does not appear to be a meaningful improvement. Again, the EEOC's workload simply gets heavier.

The Reorganization Plan also highlights the inadequacy and unfairness of the federal law governing handicap discrimination in employment, and exacerbates the existing situation.⁷³ The Plan transfers from the CSC to the EEOC administrative and enforcement authority over handicap discrimination involving federal employees. Further, the Plan extends to such federal employees the rights, procedures and remedies of Title VII.

Meanwhile, government contractor employees aggrieved by handicap discrimination basically are confined to recourse before the Department of Labor and to whatever limited and uncertain administrative and contract remedies exist under the government contract program. Aggrieved federal grantee employees basically are confined to equally limited and uncertain recourse and remedies before the Department of Health, Education and Welfare and under Title VI. The remaining majority of victims of handicap discrimination receive no federal statutory protection. They are relegated to fleeting and occasional relief under constitutional doctrine and to the vagaries of state law.⁷⁴

One direct and obviously beneficial solution to this patchwork scheme of handicap discrimination law is the congressional enactment of legislation which includes handicap discrimination within the prohibitions of Title VII and which extends the protections and remedies of Title VII to the discriminatees. The President is urged to introduce and promote such legislation and not be content with the partial and inadequate changes effected by the Reorganization Plan.

72. See *Chandler v. Roudebush*, 425 U.S. 840, 849-58 (1976); *Brown v. GSA*, 425 U.S. 820, 825-28 (1976).

73. E.g., *Gurmankin v. Costanzo*, 556 F.2d 184 (3d Cir. 1977). But see *Neeld v. American Hockey League*, 439 F. Supp. 459 (W.D.N.Y. 1977). See generally Achtenberg, *Law and the Physically Disabled: An Update With Constitutional Implications*, 8 SW. L. REV. 847 (1976); Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501 (1973).

74. See generally Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 BALT. L. REV. 183, 221-24 (1978).

Conclusion

We have journeyed for almost twenty years toward a nondiscrimination goal in an unseaworthy vessel which was outmoded at the outset. We have not traversed far. On a journey which has taken us from Camelot to Vietnam to Watergate, it may be unrealistic to have expected more. Would it really now be all that difficult to build a better vessel or for the President to at least ask Congress to try?