THE RIGHT OF FEDERAL EMPLOYEES TO A TRIAL DE NOVO UNDER THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

In *Hackley v. Johnson*[1] and a companion case, *Franklin v. Laird*,[2] the District Court for the District of Columbia held that employees of the federal government, who seek judicial relief from alleged discriminatory promotion practices because of dissatisfaction with the administrative resolution of their grievances, are not entitled to a trial de novo in the federal courts under section 717 of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972.[3] Accordingly, in each case the court upheld the adminis-

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1. 360 F. Supp. 1247 (D.D.C. 1973).

2. *Id.*

3. Equal Employment Opportunity Act of 1972 § 11, 42 U.S.C.A. § 2000e-16 (Supp. 1974), *amending* Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970). This amendment adds section 717 to the Civil Rights Act of 1964. The new provision provides in relevant part:

> (a) All personnel action affecting [federal] employees or applicants for [such] employment . . . shall be made free from any discrimination based on race, color, religion, sex or national origin.
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> (b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section . . . .
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> The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder.
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> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, *an employee or applicant for employment if aggrieved by the final disposition of his complaint, may file a civil action as provided in section 2000e-5 of this title,* in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.
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> (d) The provisions of section 2000e-5(f) through (k), of this title, as applicable, shall govern civil actions brought hereunder.
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> . . . . (Emphasis added.)

trative determinations solely on the basis of the record compiled at the agency level.

The plaintiff in *Hackley* filed a complaint with the Veterans Administration (VA) alleging that, after one year's service as an investigator at the GS-12 level, he had been denied promotion to GS-13 because of racial prejudice.[4] After a hearing which encompassed seven days and produced a record of 985 pages in length, the VA determined that the plaintiff's failure to receive a promotion was attributable solely to his lack of qualifications and was not a result of racial discrimination.[5] The Board of Appeals and Review of the Civil Service Commission affirmed.[6] Having exhausted his administrative remedies,[7] the plaintiff filed a civil action in the district court and demanded a new trial on the issue of discrimination.[8] Relying primarily on the legislative history of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972,[9] the

4. 360 F. Supp. at 1254. The plaintiff alleged that there was a climate of racial prejudice in the Investigation and Security Service division of the VA, which was evidenced by the absence of other blacks in positions comparable to that of the plaintiff, and by the middle-level supervisors' use of racial epithets. The plaintiff attributed his earlier promotions from his hiring level of GS-7 through GS-12 to the influence of a black director of the division who had departed prior to the institution of the initial complaint with the VA.

5. *Id.* The VA Appeals Examiners' findings were summarized by the court:

> Plaintiff's claim is rejected by the administrative agency because (1) he required more training since he was less experienced and (2) the same middle-level supervisors supposedly discriminating against Hackley promoted Hackley to GS-12, promoted a Mexican-American to GS-13 with only 14 months' experience, and denied promotions to whites with far greater experience than Hackley. . . .
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> . . . Not only is there no proof that plaintiff received promotions only because at that time he had a black Director who recognized his worth, but there is repeated affirmative evidence in the administrative record making it crystal clear that plaintiff's promotions to GS-12 and his failure to achieve GS-13 are solely related to his qualifications. Plaintiff entered this field with substantially less than the normal relevant investigative experience. Progression to GS-12 was normal as it is rather automatic to proceed one grade scale in about one year if work is satisfactory. However, the GS-13 level is another matter. Such an investigator is judged to be capable of handling any investigation in any program at any level.
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> . . . [The plaintiff] has very little investigative experience compared to most of his colleagues and therefore quite properly he is required more frequently to assist another investigator in the handling of cases before he gets many complex cases on his own. Moreover, many whites with far more experience have remained at GS-12 for a greater length of time before promotion to GS-13. *Id.* at 1254-55.

6. *Id.* at 1254.

7. See note 54 *infra* and accompanying text.

8. The plaintiff relied primarily upon section 717 of Title VII of the Civil Rights Act of 1964. See note 3 *supra*. The court also noted that the plaintiffs in both cases invoked "other civil rights acts, as well as the Constitution." 360 F. Supp. at 1249. However, these latter provisions are neither delineated specifically nor discussed further by the court.

9. 42 U.S.C.A. § 2000e-16 (Supp. 1974). See note 3 *supra* for the text of the

court denied the motion for a trial de novo and granted the government's motion for summary judgment.[10]

In *Franklin,* the plaintiff alleged that he had been denied appropriate training and promotion from GS-7 to GS-11 because of racial discrimination.[11] After an informal protest and the settlement of an initial formal complaint had failed to provide satisfactory relief,[12] the plaintiff initiated a second formal complaint with the Army Civilian Appellate Review Office, which found no discrimination and rejected his complaint.[13] Plaintiff appealed to the Civil Service Commission, which reversed the Army's decision after a hearing that compiled 250 pages of testimony. The Civil Service Commission Appeals Examiner found that the Army's failure to provide the plaintiff with adequate training was primarily motivated by racial prejudice and recommended an ameliorative program, which the Army then instituted after some modification.[14] Claiming this modification deprived him of a right stemming from the Examiner's order to transfer him into another specific department at a starting level of GS-9 with a target level of GS-13, the plaintiff appealed to the Board of Appeals and Review of the Civil Service Commission. The Board held that the Army's curative action was sufficient to eradicate the harmful effects of the discrimi-

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statute. See notes 25-41 *infra* and accompanying text for the legislative history of the Act.

10. 360 F. Supp. at 1255.

11. *Id.* at 1253. The plaintiff was originally employed as a career intern at the starting level of GS-7 in the Logistics Division of the Supply Management branch of the Walter Reed Army Medical Center. He asserted that, because of his status as an intern, he should have been given the training necessary to enable him to advance to the GS-11 level.

12. After the initial informal protest by the plaintiff, his Army supervisors acknowledged his improper status, promoted him from GS-7 to GS-9, and promised to furnish training which would enable him to advance further. Thereafter, a second misunderstanding arose between plaintiff and his supervisors, which led the plaintiff to institute a second protest by the filing of a formal complaint. After one year of inconclusive proceedings, the grievance underlying this initial complaint was informally resolved and it was withdrawn by the plaintiff. *Id.* at 1253.

13. *Id.*

14. *Id.* The Appeals Examiner recommended (1) that the plaintiff be placed in a new intern program outside of the Logistics Division; (2) that the Army provide a clear definition of the training program and the goal of that program; (3) that the plaintiff's records of leave and production, which had been adversely affected by his efforts to vindicate his employment rights, be expunged; (4) that the plaintiff be given an opportunity to compete equally with his peers; and (5) that the equal employment office monitor the plaintiff's progress.

The Army instituted the recommended program with two exceptions. The plaintiff was not transferred from the Logistics Division, and consequently he was to remain at GS-9, with all training programs targeted only to improve his performance at that level.

nation.[15] Dissatisfied with the remedies provided, the plaintiff instituted suit in the district court and moved for a new trial on this issue. As in *Hackley*, the motion for a trial de novo was denied.[16] The court ordered a modification of the Board's order and, with that modification, granted summary judgment for the defendant.[17]

Congress enacted Title VII of the Civil Rights Act of 1964[18] in an attempt to eliminate employment discrimination based on race, color, religion, sex, or national origin.[19] As originally enacted, Title VII did not apply to employees of the federal government. In recognition of the prior declarations by the Supreme Court that the due process clause of the fifth amendment prohibited invidious discrimination by the federal government,[20] Congress had, before the enactment of Title VII, declared that "it is the policy of the United States to insure equal employment opportunities for [its] employees without discrimination . . . ."[21] Rather than providing for the implementation of this policy through the procedural matrix of Title VII, however, Congress chose to allow the President to guarantee equal employment opportunity through his already existing authority as head of the executive branch.[22] In response to this congressional mandate, both Presidents Johnson and Nixon promulgated executive orders[23] which placed

15. *Id.*

16. *Id.* at 1252-53.

17. *Id.* at 1253-54. The court held that the "essential aspects" of the Board's decision were supported by the evidence in the record:

> Franklin complains of the review decision because his . . . request [which was suggested as a remedy for the first time on appeal before the Board] to be an intern in the Personnel Management Career Program with entrance grade of GS-9 and Target grade of GS-13 was rejected. The rejection is, however, justified. Franklin entered Logistics at GS-7 with a target of GS-9. There is no evidence Franklin was ever given a higher target. GS-9 is considered the journeyman level at which the internship in Logistics is terminated. Thereafter advancement to GS-11 is competitive, and is relatively difficult because Logistics . . . is a small unit warranting but a single GS-11 position . . . . As to entering this particular new field at the same GS-9 level, such corrective action is not possible because Franklin does not possess the necessary two years of specialized experience for entrance into Personnel Management at that level. *Id.* at 1253.

The court did make an important modification by adopting the earlier recommendation of the Civil Service Commission Appeals Officer that the plaintiff be given the opportunity "to transfer to any position at GS-9 for which he is qualified . . . either at or outside [Walter Reed Hospital], in or out of Logistics," and not confined solely to a transfer to the Personnel Department of the hospital. *Id.* at 1254. With that modification of the order, summary judgment for the government was granted.

18. 42 U.S.C. § 2000e (1970).

19. *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 26 (1963).

20. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

21. 5 U.S.C. § 7151 (1970).

22. *Id. See generally* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 853-54 (1972).

23. In the year immediately following passage of the Civil Rights Act of 1964,

the policy of non-discrimination under the direct supervision of the Civil Service Commission.[24]

By 1971, it had become apparent that, despite some progress, the existing system had not succeeded in eliminating employment discrimination from the federal government.[25] In response, the House version of the Equal Employment Opportunity Act of 1972 extended Title VII to cover federal government employees.[26] The House also

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President Johnson issued Exec. Order 11246, 3 C.F.R. 339 (1964-65 Comp.), which prohibited discrimination because of race, religion, or national origin within the executive branch of the federal government. He later issued a supplemental order which covered sex discrimination. Exec. Order 11375, *amending* Exec. Order 11246, 3 C.F.R. 320 (1967 Comp.).

In 1969, President Nixon issued Exec. Order 11478, 3 C.F.R. 133 (1969 Comp.). The Nixon order supplements and extends the Johnson order in several minor respects. *Id.*

24. The Civil Service Commission was empowered by these orders to oversee the implementation of programs for equal employment opportunity by the heads of all executive departments and agencies. Further, the Commission was to establish procedures whereby any person complaining of illegal bias would be guaranteed at least one review within the department or agency with right of appeal to the Commission. Exec. Order 11478, 3 C.F.R. 133 (1969 Comp.).

The Civil Service Commission regulations detailing the requirements for the heads of federal agencies and executive departments are detailed in 5 C.F.R. §§ 713.203-.204 (1973). The regulations governing the filing of discrimination complaints appear at 5 C.F.R. § 713.214 (1973). For a critical discussion of Civil Service Commission procedure in federal employment discrimination cases prior to the enactment of the Equal Employment Opportunity Act of 1972, see Comment, *Racial Discrimination in the Federal Civil Service*, 38 GEO. WASH. L. REV. 265 (1969).

25. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 22 (1971), in which the House Labor Committee stated:

> Despite some progress that has been made in this area, the record is far from satisfactory. Statistical evidence shows that minorities and women continue to be excluded from large numbers of government jobs, particularly at the higher grade levels.
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> . . . .
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> This disproportionatte [sic] distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity.

The Senate Labor Committee concurred in this view. *See* S. REP. No. 415, 92d Cong., 1st Sess. (1971) where the Senate Labor Committee declared:

> The federal government with 2.6 million employees, is the single largest employer in the nation. It also comprises the central policy-making and administrative network for the Nation. Consequently, its policies, actions, and programs strongly influence the activities of all other enterprises, organizations and groups. In no area is government action more important than in the area of civil rights.
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> . . . .
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> Progress has been made in this field, however, much remains to be done. Statistical evidence shows that minorities and women continue to be denied access to a large number of government jobs, particularly in the higher grade levels. *Id.* at 11-12.

26. H.R. 1746, 92d Cong., 1st Sess. § 11 (1971).

proposed replacing the Civil Service Commission with the Equal Employment Opportunity Commission as the agency directly responsible for resolving complaints of discrimination in the federal bureaucracy.[27] The Senate, however, rejected this proposal,[28] and the final version of section 717 of the Civil Rights Act, as added by the Equal Employment Opportunity Act of 1972, leaves the primary responsibility for resolution of federal employees' discrimination claims with the Civil Service Commission.[29] In order to increase its effectiveness, the

27. *Id.* The House Labor Committee expressed a lack of confidence in the Civil Service Commission's ability to eliminate discrimination from the federal government's employment practices. *See* H.R. REP. No. 238, *supra* note 25, at 23-24:

> The [existing] system, which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict-of-interest.
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> Testimony reflected a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees. Complainants were skeptical of the Civil Service Commission's record in obtaining just resolutions of complaints and adequate remedies. This has discouraged persons from filing complaints with the Commission for fear that it [sic] will only result in antagonizing their supervisors and impairing any hope of future advancement.
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> Aside from the inherent structural defects the Civil Service Commission has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination which exist in the system.
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> To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly . . . . Because the Equal Employment Opportunity Commission is the expert agency in the field of employment discrimination and because it is an independent agency removed from the administration of Federal employment, it is the most logical place for the enforcement power to be vested.

For a critical analysis and illustrative case study of Civil Service Commission procedures prior to the enactment of the 1972 legislation, see Comment, *supra* note 24.

28. S. REP. No. 415, *supra* note 25, at 11-16. The Senate Labor Committee stated:

> The Civil Service Commission's primary responsibility over all personnel matters in the Government does create a built-in conflict of interest for examining the Government's equal employment opportunity program for structural defects which may result in a lack of true equal employment opportunity. Yet, the Committee was persuaded that the Civil Service Commission is sincere in its dedication to the principles of equal employment opportunity enunciated in Executive Order 11478 and that the Commission has the will and desire to overcome any such conflict of interest. *Id.* at 15.

29. Equal Employment Opportunity Act of 1972 § 11, 42 U.S.C.A. § 2000e-16 (Supp. 1974), *amending* Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970). This amendment adds section 717 to the Civil Rights Act of 1964. The new section is reproduced in relevant part in note 3 *supra*. *See* JOINT EXPLANATORY STATEMENT OF MANAGERS AT THE CONFERENCE ON H.R. 1746 TO FURTHER PROMOTE EQUAL EMPLOYMENT OPPORTUNITIES FOR AMERICAN WORKERS, *reprinted in* BNA, THE EQUAL OPPORTUNITY ACT OF 1972, 119, 124-25 (1973). The Civil Service Commission has responded to the congressional mandate by promulgating a new comprehensive set of regulations. *See* 5 C.F.R. § 713 (1973).

Commission was empowered to enforce the policy of nondiscrimination in individual cases through "appropriate remedies including reinstatement or hiring of employees with or without back pay."[30]

As an "adjunct" to the increased powers of the Civil Service Commission, Congress for the first time declared in section 717 that federal employees would have the right to file a civil action against the federal government for a claim of employment discrimination.[31] Recognizing the difficulties that federal employees had previously encountered in the courts,[32] Congress, through section 717, made several provisions of section 706,[33] which governs the rights of private individuals under Title VII, specifically applicable to suits brought for relief from employment discrimination practiced by the federal government.[34] These provisions govern such matters as time limitations,[35] venue,[36]

30. 42 U.S.C.A. § 2000e-16(b) (Supp. 1974), reproduced in note 3 *supra.*

31. *Id.* § 2000e-16(c), reproduced in note 3 *supra.* The Senate Labor Committee explained the bill as follows:

> An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision.
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> . . . The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees or applicants . . . . Aggrieved employees or applicants will also have the full rights available in the courts *as are granted to individuals in the private sector under Title VII.*
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> The bill (section 717(c)) enables the aggrieved Federal employee (or applicant for employment) to file an action in the appropriate U.S. district court after either a final order by his agency or a final order of the Civil Service Commission on an appeal from an agency decision or order . . . . It is intended that the employee have the option to go to the appropriate district court or the District Court for the District of Columbia after either the final decision within his agency on his appeal from the persounel action complained of or after an appropriate appeal to the Civil Service Commission or after the elapse of 180 days from the filing of the initial complaint or appeal with the Civil Service Commission. S. REP No. 415, *supra* note 25, at 16-17.

32. *See* S. REP. No. 415, *supra* note 25, at 16:

> The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a . . . defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies.

See also Sape & Hart, *supra* note 22, at 854-57. The judicial barriers to a civil suit encountered by an aggrieved federal employee prior to the enactment of the Equal Employment Opportunity Act of 1972 are discussed in more detail in notes 42-49 *infra* and accompanying text.

33. 42 U.S.C. § 2000e-5 (1970).

34. Equal Employment Opportunity Act of 1972 § 11(d), 42 U.S.C.A. § 2000e-16(d) (Supp. 1974), *amending* Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970). As previously noted, this amendment adds section 717 to the Civil Rights Act of 1964, which is reproduced in relevant part in note 3 *supra.* The new subsection makes the provisions of 42 U.S.C. § 2000e-5(f)-(k) applicable to civil suits by aggrieved federal employees.

35. 42 U.S.C. § 2000e-5(b) (1970). Section 717 states that the various provisions

expedited hearings,[37] appointment of masters,[38] relief,[39] award of attorney's fees,[40] and appeal.[41]

Prior to the enactment of the Equal Employment Opportunity Act of 1972, the federal courts had placed several obstacles in the way of a successful resolution of a claim of employment discrimination by the federal government. In *Keim v. United States*,[42] the Supreme Court held that the "appointments clause" of the Constitution[43] vested almost complete discretion in the executive branch to hire or dismiss federal employees.[44] While *Keim* represents the leading exposition of the doctrine of executive discretion in federal employment, later cases have also evidenced a notable reluctance on the part of the courts to interfere in the area absent specific authorization from Con-

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of section 706 only govern civil suits by federal employees "as applicable." However, the time limitations provided in section 706 apply only to proceedings before the Equal Employment Opportunity Commission, the agency designated in that section to hear employment discrimination claims brought by employees in the private sector. On the other hand, it has previously been noted that section 717 places this function in the hands of the Civil Service Commission and specifies its own set of time limitations with respect to claims brought by federal employees. It would seem, therefore, that the time limitations in section 717 largely displaced those provided in section 706. *See* 42 U.S.C.A. § 2000e-16(c) (Supp. 1974), reproduced in note 3 *supra*.

36. 42 U.S.C. § 2000e-5(f) (1970). Venue properly lies in any judicial district where the alleged discrimination occurred, where the relevant employment records are kept, where the plaintiff wonld have worked but for the alleged discrimination, or, if the respondent is not found within any such district, where the respondent's principal office is located.

37. *Id.* § 2000e-6(b) makes it incumbent upon the district courts to assign Title VII cases for hearing at the earliest practicable date.

38. 42 U.S.C.A. § 2000e-5(f)(5) (Supp. 1974) authorizes the district court to appoint a master to hear any Title VII case which has not been assigned for hearing within 120 days "after issue has been joined." *See* FED. R. CIV. P. 53.

39. 42 U.S.C. § 2000e-5(g) (1970) provides for injunctive as well as any other appropriate relief, including reinstatement of wrongfully discharged employees, mandatory hiring of applicants wrongfully denied employment, and back pay in both cases.

40. *Id.* § 2000e-5(k) allows the court to award a reasonable attorney's fee to the prevailing party.

41. *Id.* § 2000e-5(j). The statute provides that an adverse determination in any civil action brought under section 706 may be appealed as provided in 28 U.S.C. §§ 1291, 1292 (1970). See note 61 *infra*.

42. 177 U.S. 290 (1900). *See also* United States v. McLean, 95 U.S. 750 (1877); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840); McEachern v. United States, 321 F.2d 31, 33 (4th Cir. 1963).

43. U.S. CONST. art. 2, § 2 provides:

> . . . [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, the Courts of Law, or in the Heads of Departments.

44. In the course of its opinion holding that the federal courts had no power to

gress.[45] Thus, despite the fifth amendment's prohibition of discrimination by the federal government,[46] the victims of that discrimination were forced to cast about for statutory provisions which would give them access to the courts. Among the most notable of the various statutory theories rejected by the courts were those based on the Administrative Procedure Act,[47] the Tucker Act,[48] and the executive or-

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review the dismissal of an employee for "inefficiency," the Court noted that Congress could "by some special and direct legislation [enact a] provision to the contrary . . . ." 177 U.S. at 296.

45. *See generally* Sape & Hart, *supra* note 22, at 854-55. For a more recent case applying the doctrine of executive discretion, see Hargett v. Summerfield, 243 F.2d 29 (D.C. Cir.), *cert. denied*, 353 U.S. 970 (1957). In *Hargett*, the court held that judicial review of a federal employee dismissal was available "only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation." *Id.* at 32. The court specifically rejected the claim that the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1970), had placed the appointment and removal of federal officers within the supervisory powers of the courts.

46. See note 20 *supra* and accompanying text.

47. 5 U.S.C. § 702 (1970). In addition to Hargett v. Summerfield, 243 F.2d 29 (D.C. Cir.), *cert. denied*, 353 U.S. 970 (1957), discussed in note 45 *supra*, cases holding the Administrative Procedure Act inapplicable to claims of discrimination by federal employees include Blackman v. Guerre, 342 U.S. 512, 513 (1952); Gnotta v. United States, 415 F.2d 1271, 1275-76 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970) (dismissal is a matter of agency discretion). *See generally* Comment, *supra* note 24, at 290-92.

48. 28 U.S.C. § 1346(a)(2) (1970). The Tucker Act gives concurrent original jurisdiction to the district courts and the Court of Claims over:

> [a]ny other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. *Id.*

This seemingly broad grant of jurisdiction has been given a particularly narrow construction by the Eighth Circuit in employment discrimination cases, that court holding that the Tucker Act is not applicable without an independent statutory grant of jurisdiction or authorization in an executive order. *See* Gnotta v. United States, 415 F.2d 1271, 1277-78 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970); Love v. United States, 108 F.2d 43 (8th Cir. 1939), *cert. denied*, 309 U.S. 673 (1940). Further, it has been stated that the relationship between the government and its employees is a matter of governmental sufferance and not a "contractual" right within the meaning of the Tucker Act. *See, e.g.*, Garner v. Board of Pub. Works, 341 U.S. 716, 724 (1951) (Frankfurter, J., concurring); Taylor v. Beckman, 178 U.S. 548 (1900); Crenshaw v. United States, 134 U.S. 99 (1890); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951); Denning v. United States, 132 F. Supp. 206 (Ct. Cl. 1955). *See generally* Comment, *supra* note 24, at 288-89. As the Supreme Court noted in a recent decision, however, the "right-privilege" distinction on which this analysis is based has been "thoroughly undermined in the ensuing years." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 n.9 (1972). *See also* Graham v. Richardson, 403 U.S. 365, 374 (1971). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

ders promulgated under the congressional declaration of the policy against discrimination.[49] With respect to the last of these theories, however, the Court of Claims took a contrary position and held in *Chambers v. United States*[50] that the federal courts in discrimination cases had been implicitly granted jurisdiction to review agency action by the executive orders promulgated under the mandate of the congressional declaration of the policy of non-discrimination.[51] Although other courts began to follow the lead of the *Chambers* decision, the question of jurisdiction over federal employment discrimination cases was still unsettled prior to the passage of the 1972 legislation.[52]

Even in those cases where a court was apparently willing to take jurisdiction over a claim in the first instance, the government was frequently successful in interposing a defense of sovereign immunity.[53]

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49. See notes 21-24 *supra* and accompanying text for a discussion of the promulgation of the executive orders regarding federal employment discrimination. The use of these orders as an independent fount of jurisdiction was specifically rejected in Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970).

50. 451 F.2d 1045 (Ct. Cl. 1971). *See also* the companion case of Allison v. United States, 451 F.2d 1035 (Ct. Cl. 1971). Both cases are noted in 47 N.Y.U.L. REV. 358 (1972) and *1971 Developments* 238.

51. 5 U.S.C. § 7151 (1970). See note 21 *supra* and accompanying text.

52. For post-*Chambers* decisions granting jurisdiction, see Polcover v. Secretary of Treasury, 477 F.2d 1223 (D.C. Cir. 1973); Holden v. Finch, 446 F.2d 1311 (D.C. Cir. 1971); Harris v. Nixon, 325 F. Supp. 28 (D. Colo. 1971). Prior to *Chambers*, several courts undertook a review, albeit one of limited scope. *See, e.g.*, Williams v. Zuckert, 372 U.S. 765 (1963) (per curiam), *vacating* 296 F.2d 416 (D.C. Cir. 1961) (review for denial of procedural due process at administrative hearing); Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968); Dabney v. Freeman, 358 F.2d 533 (D.C. Cir. 1965); Studemeyer v. Macy, 320 F.2d 797 (D.C. Cir. 1963); Eustace v. Day, 314 F.2d 247 (D.C. Cir. 1962). Other courts, however, refused to take jurisdiction over federal employment discrimination cases. *See, e.g.*, Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970); Hargett v. Summerfield, 243 F.2d 29 (D.C. Cir.), *cert. denied*, 353 U.S. 970 (1957); Boylan v. Quarles, 235 F.2d 834 (D.C. Cir. 1956); Benenati v. Young, 220 F.2d 383 (D.C. Cir. 1955); Williams v. Cravens, 210 F.2d 874 (D.C. Cir.), *cert. denied*, 348 U.S. 819 (1954); Kohberg v. Gray, 207 F.2d 35 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 937 (1954); Powell v. Brannan, 196 F.2d 871 (D.C. Cir. 1952); Carter v. Forrestal, 175 F.2d 364 (D.C. Cir.), *cert. denied*, 338 U.S. 832 (1949). *See generally* Sape & Hart, *supra* note 22, at 853-57; Comment, *supra* note 24, at 288-95.

53. The cases have not clearly specified whether sovereign immunity precludes subject matter jurisdiction or provides the government with a defense against an otherwise cognizable claim. *See, e.g.*, Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972), *noted in* 41 GEO. WASH. L. REV. 657 (1973); Blaze v. Moon, 440 F.2d 1348 (5th Cir. 1971); Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970); Palmer v. Rogers, 33 AD. L.2d 893 (D.D.C. 1973) (taking a position contrary to the *Hackley* case, *supra* note 1, that the Equal Employment Opportunity Act of 1972 does not apply retroactively and, therefore, that sovereign immunity bars a discrimination action filed prior to passage of the Act); CORE v. Commissioner, Social Security Administration, 270 F. Supp. 537 (D. Md. 1967). *See generally* Comment, *supra* note

Further, the courts uniformly required employee-plaintiffs to completely exhaust the administrative remedies available to them prior to invoking judicial relief.[54] This exhaustion of administrative remedies requirement was logical in view of the universally accepted rule that the district courts would not grant an aggrieved government employee a trial de novo on his claim of discrimination,[55] but rather would ren-

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24, at 280. *But see* Allison v. United States, 451 F.2d 1035 (Ct. Cl. 1971); Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971) ("absent . . . a clear manifestation that access to the courts is prohibited . . . it is the intent of Congress that the general jurisdictional statutes are controlling").

54. The general rule requiring exhaustion of administrative remedies in federal employment discrimination cases was stated by the Court of Appeals for the Fifth Circuit in the recent case of Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972):

> We adhere to the time-tested requirement that available administrative remedies be exhausted prior to the institution of a mandamus action. The federal bureaucracy's efforts to police its own practices with respect to discrimination in employment on the basis of race should not be undermined. This would be the predictable effect of sanctioning resort to the federal courts before completion of the administrative review process. *Id.* at 1139.

The importance of the doctrine can be illustrated by a comparison of the two cases, Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971), and Allison v. United States, 451 F.2d 1035 (Ct. Cl. 1971). In *Chambers*, the court relied upon an administrative finding that the plaintiff had in fact been victimized by discrimination in its decision to grant an award of back pay. The court reasoned that its decision did not encroach upon administrative discretion inasmuch as the agency had already made the finding of discrimination, thereby removing all discretionary elements from the case. *Id.* at 1054. In *Allison*, however, the court remanded the case to the agency because the agency had not itself made the crucial determination of whether discrimination had been practiced against the plaintiff or not. The court refused to imply a finding of discrimination from the facts disclosed in the agency record. Thus, the plaintiff was, in effect, forced to begin anew the process of seeking relief. *See* 47 N.Y.U.L. REV. 358, 365-66 (1972).

For other cases requiring the exhaustion of administrative remedies in federal employment cases, see Connelly v. Nitze, 401 F.2d 416 (D.C. Cir. 1968); Davis v. Secretary, HEW, 262 F. Supp. 124 (D. Md.), *aff'd per curiam*, 386 F.2d 429 (4th Cir. 1967); Pine v. United States, 371 F.2d 466 (Ct. Cl. 1967); Dargo v. United States, 176 Ct. Cl. 1193, 1201 (1966).

But cf. Penn v. Schlesinger, 490 F.2d 700 (5th Cir. 1973). In *Penn*, a panel of the Fifth Circuit split three ways on the question of the exhaustion of administrative remedies requirement in a case brought by federal employees under the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 *et seq.* (1970). Judge Tuttle held that complete exhaustion of administrative remedies is not required where the agency itself discourages the employee from pursuing his administrative remedies. Judge Morgan concurred specially on the narrow ground that exhaustion is not required in cases brought under § 1981. Judge Godbold dissented and argued that the exhaustion requirement should not be waived solely because of the agency's attempt to discourage plaintiff from seeking relief at the agency level. For a fuller discussion of Penn v. Schlesinger, see Note, *Exhaustion of Federal Administrative Remedies in Cases Under Section 1981 of the Civil Rights Act*, 1974 DUKE L.J. 408, in *1973 Developments*.

55. *See* Polcover v. Secretary of Treasury, 477 F.2d 1223, 1225-26 (D.C. Cir. 1973) ("[E]mployee discharge cases, although cast in the mold of original actions in the district court . . . are disposed of on the basis of the administra-

der their decisions solely upon the administrative record.[56] The standards of review used by the courts in discrimination cases have varied from a cursory examination to insure the absence of procedural error,[57] through a test of whether the agency's action was "arbitrary or capricious,"[58] to the current evaluation of whether the administrative

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tive record and should be governed by the principles generally applicable to judicial review of administrative action"); Adams v. Laird, 420 F.2d 230, 234 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970) ("The record in the District Court was the administrative record compiled in the agency proceedings."); Goldwasser v. Brown, 417 F.2d 1169, 1171 n.1 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); Connelly v. Nitze, 401 F.2d 416, 417 n.1 (D.C. Cir. 1968); Goodman v. United States, 358 F.2d 532 (D.C. Cir. 1966); Dabney v. Freeman, 358 F.2d 533, 535 (D.C. Cir. 1965); Allison v. United States, 451 F.2d 1035 (Ct. Cl. 1971); Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971). *See also* Pelicone v. Hodges, 320 F.2d 754 (D.C. Cir. 1963); Saggary v. Young, 240 F.2d 865 (D.C. Cir. 1956); Pine v. United States, 371 F.2d 466 (Ct. Cl. 1967); Dargo v. United States, 176 Ct. Cl. 1193, 1201 (1966). *See generally* Sape & Hart, *supra* note 22, at 857; Note, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 55 CORNELL L. REV. 178, 185 (1972).

56. See cases cited in note 55 *supra*. A few cases have been remanded to the district courts for hearings on a specific issue. *See* Williams v. Zuckert, 372 U.S. 765 (1963) (per curiam), *rev'g* 296 F.2d 416 (D.C. Cir. 1961) (remand for hearing on the issue of whether plaintiff made timely and sufficient effort to obtain presence of witnesses at his hearing); Studemeyer v. Macy, 320 F.2d 797 (D.C. Cir. 1963) (remand for hearing on timeliness and sufficiency of request for witnesses at administrative hearing). However, these cases seem to represent the exception rather than the rule. It is more common for the courts to remand the case for a new hearing at the agency level. *See, e.g.*, Holden v. Finch, 446 F.2d 1311 (D.C. Cir. 1971) (remand for hearing improperly denied by Civil Service Commission); Connelly v. Nitze, 401 F.2d 416 (D.C. Cir. 1968) (remand to Dept. of Navy for hearing improperly denied); Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965), *second appeal*, 402 F.2d 644 (D.C. Cir. 1968) (remand because of failure of record to support agency determination); Goodman v. United States, 358 F.2d 532 (D.C. Cir. 1966) (remand for new hearing at agency level on "voluntariness" of resignation); Dabney v. Freeman, 358 F.2d 533 (D.C. Cir. 1965) (approving district court's remand to agency by consent of the parties).

57. *See, e.g.*, Hargett v. Summerfield, 243 F.2d 29, 32 (D.C. Cir.), *cert. denied*, 353 U.S. 970 (1957); Boylan v. Quarles, 235 F.2d 834 (D.C. Cir. 1956).

This rather superficial standard of review was used in earlier cases when the courts were more constrained by the doctrine of executive discretion in the employment field. See notes 42-45 *supra* and accompanying text.

It should be noted that although the court of appeals decisions have enunciated the governing standards of review, the standards are equally applicable in the district courts, inasmuch as the district courts have conducted only a review of the administrative record and not a trial de novo. See note 60 *infra* and accompanying text.

58. *See, e.g.*, Scott v. Macy, 402 F.2d 644, 652 (D.C. Cir. 1968) (dissenting opinion of Judge [now Chief Justice] Burger); Dabney v. Freeman, 358 F.2d 533, 537 (D.C. Cir. 1965); Eustace v. Day, 314 F.2d 247 (D.C. Cir. 1962). The use of the "not arbitrary or capricious" standard of review seems to indicate an initial reluctance on the part of the Court of Appeals for the District of Columbia Circuit to intervene in the resolution of employment discrimination cases to any great extent.

determination is supported by substantial evidence in the record.[59] The net result was that the district courts undertook an examination of the administrative record not unlike the review of other agency determinations directly appealable to the courts of appeals.[60] Because the generally available right of appeal from federal district courts to the courts of appeals provides the same type of review,[61] the District of Columbia Circuit has concluded in several cases that the intervention of the district court in the process of resolving a claim under section 717 is an unnecessary duplication of judicial effort and a waste of plaintiff's time.[62] The opinions in these cases have therefore recommended that Congress act to eliminate district court review as a step in the process.[63]

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59. The "substantial evidence" test does not seem to be firmly entrenched as the standard of review to be used in employment discrimination cases. The Court of Appeals for the District of Columbia Circuit does, however, seem to be gravitating toward the use of this test. Thus, in Dabney v. Freeman, 358 F.2d 533, 535, 537 (D.C. Cir. 1965), the court applied both the arbitrary or capricious and the substantial evidence tests to the administrative record before it. In the more recent case of Polcover v. Secretary of Treasury, 477 F.2d 1223, 1226 (D.C. Cir. 1973), the court mentioned both tests but actually applied only the substantial evidence test.

In *Hackley*, the district court moved toward what appears to be an even more stringent standard: "Accordingly, the administrative decision is . . . supported by a *preponderance of the evidence* . . . ." 360 F. Supp. at 1253 (emphasis added).

60. *See, e.g.*, Clayton Act § 11(d), 15 U.S.C. § 21(d) (1970) (exclusive jurisdiction of courts of appeals over anti-monopoly orders entered by the ICC, FCC, CAB, Federal Reserve Board, or FTC); Federal Trade Commission Act § 5(d), 15 U.S.C. § 45(d) (1970) (exclusive jurisdiction of the courts of appeals to review cease and desist orders of the FTC); 28 U.S.C. § 2342 (1970) (exclusive jurisdiction in courts of appeals to review final orders of the FCC, Secretary of Agriculture, Federal Maritime Commission, AEC, and Federal Maritime Administration); National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (1970) (exclusive jurisdiction in the courts of appeals to review orders of the NLRB).

In Polcover v. Secretary of Treasury, 477 F.2d 1223, 1227 (D.C. Cir. 1973), the Court of Appeals for the District of Columbia Circuit recognized the similarity between the district and circuit court's review of a section 717 claim by stating:

> In other words, we conduct the identical review we are so often called upon to use in statutorily provided judicial review of other agency orders, *e.g.*, F.C.C., N.L.R.B., F.T.C. The only difference is that in this instance our review follows identical review in the district court.

61. 28 U.S.C. §§ 1291, 1292 (1970). These provisions govern the customary appeal from an adverse determination in the district court to the court of appeals.

62. *See* Polcover v. Secretary of Treasury, 477 F.2d 1223, 1225 (D.C. Cir. 1973); Adams v. Laird, 420 F.2d 230, 234 n.2 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); Goldwasser v. Brown, 417 F.2d 1169, 1171 n.1 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); Scott v. Macy, 402 F.2d 644, 647 n.6 (D.C. Cir. 1968); Connelly v. Nitze, 401 F.2d 416, 417 n.1 (D.C. Cir. 1968); Dabney v. Freeman, 358 F.2d 533 (D.C. Cir. 1965).

63. See cases cited in note 62 *supra*. In Connelly v. Nitze, 401 F.2d 416, 417 n.1 (D.C. Cir. 1968), for example, the court of appeals stated:

> We have pointed out before that these employee discharge cases, although

The plaintiffs in *Hackley v. Johnson*[64] and *Franklin v. Laird*[65] contended that Congress, in adding section 717 to the Civil Rights Act of 1964,[66] had acted in exactly the opposite direction—namely, to give the district courts a more meaningful role in the vindication of federal employment rights by insuring a trial de novo on an appeal to them from an adverse agency determination. The District Court for the District of Columbia disagreed, however, and held that section 717 was not intended to change the existing procedure of dual review of the administrative record by both the district court and the court of appeals.[67] Noting that to grant a new hearing on factual matters already considered at the agency level would further delay the available relief and impose a heavy burden upon the district courts,[68] the court stated further that a "search of the legislative history and consideration of the Act's language reveals no clear-cut congressional determination to require trial de novo as a matter of right . . . ."[69] The decision not to grant a new trial in every case was buttressed by what the court saw as renewed congressional faith in the expertise and integrity of the Civil Service Commission.[70] The court also declared

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in form original actions in the District Court, are in reality agency review proceedings and are normally treated as such by all parties . . . . This creates difficulties, as here, in our ability to give, effectively and expeditiously, the most appropriate kind of relief. It also raises questions as to why Congress should not provide for statutory direct review of Civil Service Commission determinations in employee cases, comparable to that now employed in respect of other major federal administrative agencies.

64. 360 F. Supp. 1247 (D.D.C. 1973). See notes 1, 3-10 *supra* and accompanying text.

65. *Id.* See notes 2, 3, 11-17 *supra* and accompanying text.

66. Equal Employment Opportunity Act of 1972 § 11, 42 U.S.C.A. § 2000e-16 (Supp. 1974), *amending* Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970). This amendment, adding section 717 to the Civil Rights Act of 1964, is reproduced in note 3 *supra*.

67. 360 F. Supp. at 1250. The court stated:

> The grant of jurisdiction to the Federal Courts leaves open how that jurisdiction should be exercised. Traditionally the courts have been somewhat loath to interfere with federal employment standards. Gradually the courts have moved from a flat denial of jurisdiction to a review limited to statutory compliance and procedural due process, to requiring proof of an affirmative exercise of discretion, to a search for substantial evidence supporting the action, and recently, to the rational-basis test. . . . These have been the progressive standards in discharge and other federal employment cases *but resolution of the controversy has always been on the administrative record.* (Emphasis added).

68. *Id.* at 1249, 1252. The court noted that nineteen claims of discrimination against a wide variety of federal agencies were still pending before it at the time of its decision in *Hackley*. *Id.* at 1249 n.2.

69. *Id.* at 1250. The court did, however, reserve the right to take supplemental testimony in cases where the agency record did not affirmatively establish an absence of discrimination by "the clear weight of the evidence." *Id.* at 1252.

70. *Id.* at 1251. The court noted the promulgation of new regulations by the Civil Service Commission in response to its newly-created powers under the 1972 amend-

that the congressional decision to make those Title VII rights available to employees in the private sector likewise applicable to federal employees[71] was intended to guarantee *access* to the courts, but not necessarily a new hearing.[72] In fact, the court found that the statutory authorization to appoint a master in cases which have been delayed over 120 days[73] indicated that ordinarily the district court would confine its review to the administrative record, inasmuch as that record is tantamount to a master's report.[74]

The legislative history of section 717[75] is, as the district court stated, not "clear-cut"[76] on the issue of whether a plaintiff in a federal employment discrimination action is entitled to a trial de novo as a matter of right. An examination of the evils which the statute was intended to curb, however, seems to support a result contrary to that reached by the court. By the passage of section 717, Congress intended to take the long-needed step of bringing federal employees within the ambit of Title VII of the Civil Rights Act of 1964.[77] With the major exception that the Civil Service Commission, rather than the Equal Employment Opportunity Commission, was the agency designated to police the bureaucracy,[78] federal employees were given those procedural rights already enjoyed by employees in the private sector. The district court's reading of section 717 in *Hackley*, however, effectively deprives victims of federal employment discrimination of the rights given to them by the 1972 legislation. Under the *Hackley* rule, the federal employee-plaintiff does not have an unqualified right to a hearing in the

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ments. See notes 29, 30 *supra* and accompanying text. Further, the court asserted that the Commission's greater expertise would enable it "to differentiate between pure discrimination claims and the underlying intricacies of civil service regulations governing job qualification selection for promotion, training and the like" more effectively than the district courts. *Id.* at 1252.

71. See notes 32-41 *supra* and accompanying text.

72. 360 F. Supp. at 1252.

73. See note 38 *supra*. The function of a master is to find the facts from which the court draws conclusions of law. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS 436 (2d ed. 1970).

74. 360 F. Supp. at 1252 n.10.

75. See notes 25-41 *supra* and accompanying text.

76. 360 F. Supp. at 1250. Prior to the decisions in *Hackley*, one set of commentators had concluded that section 717 *does* contemplate a trial de novo in the district court. *See* Sape & Hart, *supra* note 22, at 857, wherein the authors state:

> Even more significant is the scope of the court's jurisdiction. Unlike review of ageucy action pursuant to section 10 of the Procedure Act whereby the court merely determines whether an agency's action is supported by substantial evidence, *an action by an aggrieved federal employee under the 1972 Act requires a trial de novo.* (Emphasis added.)

77. See notes 25, 26 *supra* and accompanying text.

78. See notes 27-29 *supra* and accompanying text.

impartial forum of a federal district court—a right that is enjoyed by private plaintiffs under section 706.[79] Instead, the federal employee must first attempt to prove his case before the very agency which allegedly discriminated against him. Following an adverse determination by the agency, the plaintiff can again attempt to prove his allegations before the Civil Service Commission. Yet, it was the failure of that very Commission to combat federal discrimination effectively that led to the adoption of section 717 in the first instance.[80] Even conceding the fact that Congress expressed renewed faith in the Commission's ability to eradicate discriminatory employment practices,[81] it would seem that to grant a new hearing in the district court would further the larger purposes of the statute.[82] A review of the printed record of agency proceedings, no matter how stringent the standard,[83] simply cannot replace the court's first-hand observation and appraisal of the evidence.[84] Further, such an appraisal would serve to insure

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79. 42 U.S.C. § 2000e-5 (1970).

80. See note 25 *supra*.

81. See notes 27-29 *supra* and accompanying text.

82. *But see* Hackley v. Johnson, 360 F. Supp. 1247, 1252 (D.D.C. 1973), where the court noted that the legislative history indicated that

> Congress wanted prompt and consistent decisions in these discrimination matters. A trial *de novo* does not accomplish this but rather works in the opposite direction for a wholly new record must be made and opportunity for reasonable discovery provided.
>
> . . . [A]n interpretation that embraces an automatic requirement of trial *de novo* in all instances with all its inherent uncertain and substantial delays will defeat rather than advance the Act's objectives.

83. For a discussion of the standards of review used by the courts reviewing agency determination in discrimination cases, see notes 57-59 *supra* and accompanying text. *But see* Hackley v. Johnson, 360 F. Supp. 1247 (D.D.C. 1973). The *Hackley* court concluded that the proper method of ensuring non-discrimination in federal employment was to "establish an especially high standard of review . . . ." *Id.* at 1252. The court stressed that "[p]recious rights of individuals are involved and these must not be obfuscated by procrustean adherence to standards of review that are more semantic than substantial." *Id.*

84. *See*, e.g., FED. R. CIV. P. 52(a); United States v. Singer Mfg. Co., 374 U.S. 174, 194 n.9 (1963); Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 291 (1960); Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 609-10 (1950); United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948); C. WRIGHT, *supra* note 73, at 429-32.

The district court in *Hackley* argued that the statutory authorization to appoint a master in delayed cases countenances a district court review limited to the administrative record. See notes 38, 73, 74 *supra* and accompanying text. The court reasoned that both procedures result in a review of a written record rather than original observation of the evidence. 360 F. Supp. at 1250-51. The court's argument is of questionable validity. In the first place, the court has the power to appoint a master in whom it has confidence. *See* FED. R. CIV. P. 53(a); C. WRIGHT, *supra* note 73, at 436. The court, of course, has no corresponding control over who is appointed to hear evidence in discrimination proceedings in the various agencies or the Civil Service

that the Civil Service Commission is indeed proceeding in a fair and purposeful manner to eliminate employment decisions based upon illegally biased considerations. This degree of scrutiny is granted to the victims of discrimination in the private sector,[85] and it would seem, therefore, to be more in keeping with the expressed intent of Congress to make the federal government a model of fair employment practices[86] to accord the same right to federal employees.

The decision in *Hackley* has the unfortunate connotation of accommodating the convenience of the court at the expense of aggrieved federal employees. While the conservation of judicial time and energy is certainly necessary and desirable, the rights of victims of alleged discrimination by the federal government should not be sacrificed to the attainment of that end; more especially when the purposed "saving" of judicial resources actually results in a net loss. As the Court of Appeals for the District of Columbia Circuit has pointed out on at least six occasions, the review of the agency record by the district court is essentially a wasted duplication of effort because the very same review is undertaken again at the appellate level.[87] Given the experience of the courts of appeals in reviewing agency proceedings, there is no necessity for the interjection of the district court, unless that court conducts its own de novo examination of the evidence. By holding that a trial de novo is available to aggrieved federal employees following an adverse agency determination, the district courts would insure for themselves a more meaningful role in the struggle against employment discrimination in the federal government.

Commission. Secondly, the statute authorizes appointment of a master only whenever a hearing is delayed over 120 days. See note 38 *supra*. The statute thus seems to contemplate that the district court will itself hold a hearing, at least in those cases that are not delayed over 120 days.

85. *See* Evans v. Local 2127, Elec. Workers, 313 F. Supp. 1354, 1362 (N.D. Ga. 1969); King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968). See note 33 *supra* and accompanying text.

86. See note 25 *supra*.

87. See notes 60-63 *supra* and accompanying text. It is true that, were the district courts to undertake de novo hearings in these cases, there would be a substantial duplication of the efforts already expended at the agency level. See text accompanying notes 4, 5 and 13, 14 *supra*. In view of the greater impartiality of the courts, however, it seems more justifiable to have the district courts retread the path previously taken by the agency and Commission, rather than duplicate the role of the court of appeals.