Office of Compliance

102(b) Report

advancing safety, health, and workplace rights in the legislative branch

December 2004

Office of Compliance

2004 Section 102 (b) Report

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This is the fifth biennial report submitted to Congress by the Board of Directors of the Office of Compliance of the U.S. Congress pursuant to the requirements of section 102(b) of the Congressional Accountability Act (2 U.S.C. 1302(b)). Section 102(b) of the Act states in relevant part:

Beginning on December 31, 1996, and every 2 years thereafter, the Board shall report on (A) whether or to what degree [provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including hiring, promotion, demotion, termination, salary, wages, overtime compensation, benefits, work assignments or reassignments, grievance and disciplinary procedures, protection from discrimination in personnel actions, occupational health and safety, and family and medical and other leave) of employees; and access to public services and accommodations] ... are applicable or inapplicable to the legislative branch, and (B) with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch. The presiding officers of the House of Representatives and the Senate shall cause each such report to be printed in the Congressional Record and each such report shall be referred to the committees of the House of Representatives and the Senate with jurisdiction.

Bracketed portion from section 102(b)(1).

Congress can make no law which will not have its full operation on themselves and their friends, as well as the great mass of society … If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature as well as on the people, the people will be prepared to tolerate anything but liberty.

James Madison in The Federalist, No. 57, as referenced in the August 1994 committee report to accompany H.R. 4822, the Congressional Accountability Act

Introduction

During the more than half-century prior to the enactment of the Congressional Accountability Act of 1995 (CAA), Congress enacted major regulatory schemes covering many aspects of workplace health and safety, civil rights, and the employment relationship, while at the same time consistently excluding itself and other instrumentalities of the Legislative Branch from these laws. The nearly unanimous approval of the CAA in the opening days of the 104th Congress reflected a renewed national consensus that Congress must again live under the laws it enacts for the rest of society and return to the constitutional principles declared so eloquently by James Madison.

A fundamental aspect of the CAA is that it was not meant to be static. The Act intended that there be an ongoing, vigilant review of federal law to ensure that Congress continues to apply to itself – where appropriate – the labor, employment, health, and safety laws it passes. To further this goal, the Office of Compliance was tasked with the responsibility of reviewing federal law each Congress to make recommendations on how the CAA should be expanded. Since its creation, the Board of Directors of the Office of Compliance has duly submitted biennial Reports to Congress in 1996, 1998, 2000, and 2002 detailing the limited and prudent amendments that should be made to the CAA. There was also an Interim Report in 2001 regarding section 508 of the Rehabilitation Act of 1973.

A significant step in enacting these recommendations was made in the 108th Congress, with the bipartisan introduction of H.R. 3963, the "Congressional Accountability Enhancement Act." This bill proposed to institute many, though not all, of the recommendations for expanding the CAA that have been made by the Office of Compliance over the years. Unfortunately, H.R. 3963 was never considered in committee or brought to the floor for a vote, and it expired with the end of the 108th Congress. With the exception of a request by Committee on House Administration Chairman Robert Ney for clarification of the recommendations made in the 2000 Report and the Interim Report of 2001, no further action to expand the CAA has been taken by Congress to ensure that it is not still "making legal discrimination in favor of themselves[.]" (James Madison, The Federalist, No. 57)

Now that Congress has had substantial time to reflect on the contents of these reports, it is critical that it continue the example set in 1995 with the enactment of the original provisions of the CAA. Without action on these

recommendations, the noble goal of the Congressional Accountability Act may gradually be eroded through neglect and the passage of time.

The overwhelming bipartisan support for the CAA's passage in 1995 is a testament to the importance of – and support for – the principles the CAA embodies, both in Congress and in the electorate as a whole. While recognizing the enormous importance of many of the other issues faced today by Congress, the Board is hopeful that issuance of this 2004 Section 102(b) Report will result in legislative action to finally implement these recommendations, almost all of which have been outstanding since at least 1998.

Recommendations

In this series of renewed recommendations, we urge that Congress take appropriate steps to apply to itself a number of employment, civil rights, and health and safety laws which still do not apply to Congress or to Legislative Branch instrumentalities. Application of these employment protective provisions to Congress and its instrumentalities will help ensure that the basic principle of the Act remains fully operable. These laws include (see Appendix A):

- Equal accessibility for the disabled to electronic information (section 508 of the Rehabilitation Act of 1973);
- Protections against discrimination in any place of public accommodation (Titles II and III of the Civil Rights Act of 1964);
- A prohibition against discrimination based on an employee's jury duty;
- Banning employment discrimination based on an employee's bankruptcy;
- Forbidding the firing of an employee because his or her wages are garnished for a debt; and
- The safeguards provided by the Whistle Blower Protection Act.

Second, the Board repeats three specific recommended changes to the CAA, initially requested in 1998, to improve inadequate enforcement provisions of the Act. Each of these recommendations arises from the experience of the Office in attempting to effectively enforce the various statutory schemes applied by the CAA. These recommendations are (see Appendix B):

- Granting the General Counsel authority to investigate and prosecute violations of the anti-retaliation requirements of section 207 of the CAA;
- Granting the General Counsel explicit authorization to seek a restraining order in district court in the case of imminent danger under the OSH Act; and
- Adopting all record-keeping and notice-posting requirements included in the various laws enforced under the CAA.

"[I]f a law is right for the private sector, it is right for Congress. Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch..."

Rep. Christopher Shays during debate on HR 1, Congressional Record, H-1379, 1995

In addition, the Board suggests that the Office of Compliance be granted general parity with Executive Branch enforcement agencies with regard to existing Executive Branch enforcement authority of the statutes applied to the Legislative Branch through the CAA. If an enforcement authority is considered by Congress to be appropriate for the private or federal sector, it should be appropriate for Congress and the Legislative Branch as well.

"... [E]xempting Congress from various laws began because we thought we would not have the enforcement power that we should have if executive branches had administrative powers over us, so we would not be a co-equal branch of government."

Rep. Steny Hoyer, floor debate of HR 1, 1995

The final – but by no means least important – series of recommendations we submit here concerns the significant separation of powers issues raised by regulatory laws that the Executive Branch still applies to Congress. A fundamental rationale for the CAA was to safeguard the Constitutional principle of separation of powers, precluding the Executive Branch from exercising administrative enforcement and jurisdiction over the Legislative Branch. Indeed, it was separation of powers concerns that in the past led many in Congress to support Congressional exemption from regulatory statutes enforced by the Executive Branch. The 1993 Report of the Joint Committee on the Organization of Congress concluded:

The ... constitutional concern ... [regarding] separation of powers arises since administrative enforcement of federal EEO and labor laws is generally vested in executive agencies. Allowing an executive agency to enforce these laws against Members of Congress might, in some situations, violate the [Supreme] Court's separation of powers standards by 'disrupt[ing] the proper balance between the coordinate branches by prevent[ing] Congress from accomplishing its constitutionally assigned functions.'

Although the CAA helped address many of the separation of powers conflicts, the resolution of this thorny issue remains incomplete. Still to be addressed are many statutes, already applied to the Legislative Branch, which contain so-called "whistle blower" protections designed to protect from retaliation those who help in the statutes' enforcement. These statutes are distinct from the Whistle Blower Protection Act, mentioned above, which does not currently apply to Congress. The Executive Branch still exercises administrative and enforcement authority over the Legislative Branch regarding these statutes. We urge that Congress act to move enforcement authority from the Department of Labor to the Office of Compliance to eliminate the separation of powers conflict they currently represent. The statutes in question include (see Appendix C):

"To respect our constitutional system of checks and balances, we need to sustain the separation of powers ... The Office of Compliance ... is the only entity empowered to enforce employment and information laws in Congress."

Senator Joseph Lieberman, before the Senate Committee on Rules and Administration, 1994

- Toxic Substances Control Act;
- Clean Water Act;
- Safe Drinking Water Act;
- Energy Reorganization Act;
- Solid Waste Disposal/Resource Conservation Recovery Act;
- Air Pollution Prevention and Control; and
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

Conclusion

As we have for many year, the Board of Directors of the Office of Compliance strongly urges the leadership of both houses of Congress to undertake active review and consideration of the recommendations included in this report. As the Congressional Accountability Act of 1995 approaches its tenth anniversary, it is time for a comprehensive analysis and update of the law to ensure that it continues to reflect the commitment by the lawmakers of this nation to democratic accountability.

" ... With passage of this Act ... we said that we in Congress are no better than the businessmen and women in our states... We no longer sit in Washington and tell them how to run their business."

Senator Charles Grassley, "Practicing What We Preach: A Legislative History of Congressional Accountability"

The Board also encourages the leadership to reinvigorate Congress's compliance with section 102(b)(3) of the CAA. Section 102(b)(3) requires that every House and Senate committee report accompanying a bill or joint resolution that impacts terms and conditions of employment or access to public services or accommodations must "describe the manner in which the provisions of the bill or joint resolution apply to the legislative branch" or "in the case of a provision not applicable to the legislative branch, include a statement of the reasons the provision does not apply."

This Board, its executive appointees, and the staff of the Office of Compliance are prepared to work with the leadership, our oversight committees, other interested Members, and instrumentalities in Congress and the Legislative Branch to make these recommendations part of the Congressional Accountability Act during the 109th Congress.

Respectfully submitted,

Susan S. Robfogel, Chair

Barbara Camens

Alan Friedman

Roberta Holzwarth

Barbara Childs Wallace

Appendix A:

Employment, Civil Rights, and Health and Safety Laws which still do not apply to Congress or other Legislative Branch Instrumentalities

These statutes below, with the exception of Section 508 of the Rehabilitation Act, were all first identified by the Board in 1996 as not included among the eleven enumerated laws which were applied to Congress through the Congressional Accountability Act of 1995. The absence of section 508 of the Rehabilitation Act was first identified in our 2001 Interim Report to Congress. We here repeat the recommendations – made in our Reports of 1996, 1998, 2000, and 2002, as well as those of the Interim 2001 Report – that these statutes should also be applied to Congress and the Legislative Branch through the Act. After the Board submitted its 2000 Report and 2001 Interim Report, Chairman Ney of the Committee on House Administration propounded several questions regarding these recommendations, all of which the Board answered in writing.

I. The 1998 amendments to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d)

In November 2001, the Board submitted an Interim Section 102(b) Report to Congress regarding the 1998 amendments to the Rehabilitation Act of 1973 in which the Board urged Congress to make those amendments applicable to itself and the Legislative Branch. The purpose of the 1998 amendments is to:

require each Federal agency to procure, maintain, and use electronic and information technology that allows individuals with disabilities the same access to technology as individuals without disabilities. [Senate Report on S. 1579, March 1998]

As of this time, some six years later, software and other equipment which is "508 compliant" is readily available.

The Board reiterates our recommendation of last Fall that Congress and the Legislative Branch, including the Government Accountability Office, Government Printing Office, and Library of Congress be required to comply with the mandates of section 508.

II. Titles II and III of the Civil Rights Act of 1964 (42 U.S.C. 2000a to 2000a-6, 2000b to 2000b-3)

These titles prohibit discrimination or segregation on the basis of race, color, religion, or national origin regarding the goods, services, facilities, privileges, advantages, and accommodations of "any place of public accommodation" as

defined in the Act. Although the CAA incorporated the protections of titles II and III of the ADA, which prohibit discrimination on the basis of disability with respect to access to public services and accommodations, it does not extend protection against discrimination based upon race, color, religion, or national origin with respect to access to public services and accommodations. For the reasons set forth in the 1996, 1998 and 2000 Section 102(b) Reports, the Board has determined that the rights and protections afforded by titles II and III of the Civil Rights Act of 1964 against discrimination with respect to places of public accommodation should be applied to employing offices within the Legislative Branch.

III. Prohibition against employment discrimination on the basis of jury duty (28 U.S.C. 1875)

Section 1875 provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover Legislative Branch employment. For the reason set forth in the 1996, 1998, and 2000 Section 102(b) Reports, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the Legislative Branch.

IV. Prohibition against employment discrimination on the basis of bankruptcy (11 U.S.C. 525)

Section 525(a) provides that "a governmental unit" may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person who is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the Legislative Branch. For the reasons stated in the 1996, 1998 and 2000 Section 102(b) Reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the Legislative Branch.

V. Prohibition against discharge from employment by reason of garnishment (15 U.S.C. 1674(a))

Section 1674(a) prohibits discharge of any employee because his or her earnings "have been subject to garnishment for any one indebtedness." This section is limited to private employers, so it currently has no application to the Legislative Branch. For the reason set forth in the 1996, 1998 and 2000 Section 102(b) Reports, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the Legislative Branch.

VI. Whistle Blower Protection Act

In addition to the "whistle blower" protection provisions of the various environmental statutes which are referenced in Appendix C of this report, there is also a "Whistle Blower Protection Act" for Executive Branch employees which duplicates coverage of employees under the various environmental laws, but goes far beyond the parameters of those laws to cover many other forms of "whistle blowing."

(A) Current coverage of the law

The Whistle Blower Protection Act (WPA) currently applies to "an Executive Agency and the Government Printing Office, but does not include ... (ii) ... as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or (iii) the Government Accountability Office." Section 2302(a)(2)(C). The protections of the Act are set forth in section 2302(b). Subsection (b)(1) prohibits any discrimination against employees in violation of Title VII, ADEA, FLSA (sex discrimination), or section 501 of the Rehabilitation Act. "Covered positions" for the purposes of the WPA include those in the competitive service, career SES, and excepted service which are not policy level. See subsection (A)(2)(B). All regulatory aspects of section 2302 apply to those "covered positions" only.

A threshold issue regarding application of section 2302 to the Legislative Branch (including the Government Accountability Office) is whether there are employees in this branch in positions comparable to the positions covered by section 2302. In this regard, we should mention that 5 CFR 1.2 states, *inter alia*, that the competitive service includes "all positions in the legislative ... branch ... which are specifically made subject to the civil service laws by statute." However, with the possible exception of those employees covered by the Architect of the Capitol Human Resources Act (40 U.S.C. 166b-7)[1], we are aware of no employees in the Legislative Branch who are in the "competitive service" or "career SES" personnel systems, or in systems analogous to those of the competitive service or career SES.

However, most if not all Legislative Branch employees have terms and conditions of employment which are analogous to those covered positions in the "excepted service below the policy level." "Excepted service" is defined as "those civil service positions which are not in the competitive service or the senior executive service." The term also includes the "unclassified civil service" and "unclassified service... ," (5 U.S.C. 2103) and related concepts as referenced in 5 CFR 1.4(c).[2]

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[1] The HR Act requires that the Architect of the Capitol implement a "personnel management system that incorporates fundamental principles that exist in other modern personnel systems ... , [including] fair and equitable consideration of all applicants and employees through open competition." 40 U.S.C. 166b-7(b)(2) and (c)(2)(A)

[2] Recently, in Payne v. Meeks, 2002 U.S. Dist. LEXIS 8052 (E.D.N.Y., 5/1/02), the District Court determined in a case brought under the CAA that: "As an employee of a Member of Congress, Payne qualifies as an 'employee' and as a member of the 'excepted service' under the CSRA." See 5 U.S.C. § 2103(a), 2105(a)(1)(B).

(B) Recommended coverage under the CAA

Subsection (b)(2) of the WPA provides anyone with personnel authority may not "solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of - (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or (B) an evaluation of the character, loyalty, or suitability of such individual..." This section discourages arm's length "political" recommendations in the filling of covered positions. (See also 5 U.S.C. 3303, which prohibits recommendations for appointments in the competitive service from a Senator or Representative "except as to the character or residence of the applicant.") The Board believes that the section (b)(2) rule should be made applicable to all Legislative Branch employing offices other than the two houses of Congress and their penumbral entities listed in section 220(e)(2)(A) - (E) of the CAA.

Subsections (b)(3) through (10) prohibit any personnel decision maker from taking any action to:

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity

(4) deceive or wilfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for the appointment, promotion, advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which the employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of -

(A) any disclosure of information by an employee or applicant for employment because of–

(i) a violation of any law, rule, or regulation, or
(ii) gross mismanagement, a gross waste of funds, an abuse of author – ity, or a substantial and specific danger to public health or safety,
if such disclosure is not specifically prohibited by law and if such infor – mation is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclo – sures of information which the employee or applicant reasonably believes evidences –
(i) [same text as (i) above.]
(ii) [same text as (ii) above.];

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of –
(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);
(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant of any crime under the laws of any State or the District of Columbia, or of the United States;

The Office of Personnel Management (OPM) has concluded that subsection (b)(10) prohibits discrimination based upon sexual orientation. "Sexual orientation," as defined by OPM, means "homosexuality, bisexuality, or heterosexuality." [Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee's Rights.] The Board strongly urges that the substance of each of these provisions be applied to all employing offices other than those listed in section 220(e)(2)(A) - (E) of the CAA.[3]

Subsection (b)(11) provides that a personnel decision maker may not "(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or (B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veteran's preference requirement... " Of course, the CAA already covers the Veterans Employment Opportunity Act (VEOA). However, subsection (e) of section 2302 sets out the various statutory provisions which constitute "veteran's preference requirements." They include numerous provisions of Title 5 of the U.S. Code concerning the

[3] Of course, references to "Special Counsel," etc. must be reformulated to make sense within the structural context of the CAA, as will be discussed, *infra.*

"competitive service," as well as sections from Titles 10, 16, 22, and 39 (as well as Title 38 - VEOA). These non-VEOA sections cover specific personnel contexts within the Executive Branch, and are not relevant to Legislative Branch employment. Therefore, the Board does not recommend that subsection (b)(11) be included within the CAA. [4]

Subsection (b)(12) provides that a personnel decision maker may not "take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles in section 2301 of this title." The merit system principles set out at 5 U.S.C. 2301 are each expressions of high purpose which should guide every Federal employer, regardless of the branch of government involved. However, the Merit Systems Protection Board (MSPB) has determined that these principles are not self-executing, and do not provide an independent source of Board jurisdiction. See D'Leo v. Dep't of Navy, 53 MSPR 44 (1992). Neither does section 2301 provide a predicate for a section 1983 civil rights claim or private right of action. See Wright v. Park 5 F3d 586 (1st Cir. 1993); Phillips v. GSA 917 F2d 1297 (Fed. Cir. 1990); and Schrachta v. Curtis 752 F2d 1257 (7th Cir. 1985). Therefore, the Board does not recommend that subsection (b)(12) be included within the CAA.

Subsection (c) of section 2302 states:

The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation. [emphasis added]

The Board urges that the underlined portions of this provision be incorporated within the CAA, since the "prohibited practices" set out at section 2302(b)(2) should also be applied. (See above)

The final subsection (d) of section 2302 requires that section 2302 not be interpreted to "extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under..." the same list of CAA covered statutes referenced in subsection (b)(1). The concept of "affirmative action" has a much more questionable role in equal employment opportunity today. With that observation, the Board also notes that the "excepted service" is within the "civil service," and that the philosophy guiding

[4] However, should there be additional adoption of personnel systems in the Legislative Branch analogous to the "competitive service," this issue should be revisited.

the CAA is that the Legislative Branch should be brought under the same requirements (be they controversial, anachronistic, or not) under which the Executive Branch or the private sector labors. Therefore, the Board recommends that this section be included under the CAA.

(C) Recommended enforcement mechanism

Currently, the process for remedying prohibited practices rests within the authority of the Office of Special Counsel and of the MSPB. Pursuant to 5 U.S.C. 1214, the Office of Special Counsel must review every assertion by a covered employee that a prohibited practice has occurred. The Special Counsel may then petition the MSPB on behalf of the complaining employee. However, even if the Office of Special Counsel decides not to go forward with an alleged prohibited practice claim, the employee can take the matter before the MSPB within a certain period after being informed that the Office of Special Counsel will not proceed with the matter.

The procedure for processing prohibited practice claims is set out at 5 U.S.C. 1214. That procedure can be adapted for the CAA enforcement environment by replacing all references to the "Office of Special Counsel" with references to the "General Counsel of the Office of Compliance." References to the "Merit System Protection Board" should be replaced by references to the "administrative dispute resolution procedures in sections 402, 403(d), 405, 406, and 407 of the CAA." The references to a "member of the Merit Systems Protection Board" at section 1214(b)(1)(A)(i) should be changed to "Member of the Board of Directors." Any references to "the President," "the Office of Personnel Management," "Office of Management and Budget," or any officials thereof should be excised. References to the "Attorney General" should be amended to reference "Senate Select Committee on Ethics, House Committee on Standards of Official Conduct, or other appropriate oversight committee or body."

Pursuant to 5 U.S.C. 1221, employees who have unsuccessfully exhausted their administrative remedies before the Office of Special Counsel are accorded an "individual right of action" or "IRA" to bring their claim directly to the MSPB. This right should also be extended to Legislative Branch employees under the CAA. The Board recommends that the most appropriate procedure would be to authorize employees whose complaints have not been processed favorably by the General Counsel to initiate the Office's dispute resolution process themselves at the mediation stage (section 403 of the Act).

The Board recommends that Congress provide whistle blower protection to Legislative Branch employees comparable to that provided to Executive Branch employees under 5 U.S.C. 2302(b)(8), and 5 U.S.C. 1221.

Appendix B:

Regulatory Enforcement Provisions for Laws which are already applicable to Congress under the Act

I. Additional enforcement mechanisms

The Board recommends three specific changes to the CAA respecting the application of these currently inapplicable enforcement provisions:

(A) Authority to investigate and prosecute violations of § 207 of the CAA, which prohibits intimidation and reprisal

The Board recommends that the Office should be granted enforcement authority with respect to section 207 of the CAA because of the strong institutional interest in protecting employees against intimidation or reprisal for the exercise of the rights provided by the CAA or for participation in the CAA's processes. Investigation and prosecution by the Office would more effectively vindicate those rights, dispel the chilling effect that intimidation and reprisal create, and protect the integrity of the Act and its processes.

Enforcement authority with respect to intimidation or reprisal is provided to the agencies that administer and enforce the CAA laws in the private sector.[1] In contrast, under the CAA, the rights and protections provided by section 207 are vindicated only if the employee, after counseling and mediation, pursues his or her claim before a hearing officer or in district court. Experience in the administration and enforcement of the CAA argues that the Office should be granted comparable authority to that exercised by the Executive Branch agencies that implement the CAA laws in the private sector. Covered employees who have sought information from the Office respecting their substantive rights under the Act and the processes available for vindicating these rights have expressed concern about their exposure in coming forward to bring a claim, as well as a reluctance and an inability to shoulder the entire litigation burden without the support of agency investigation or prosecution. Moreover, employees who have already brought their original dispute to the counseling and mediation processes of the Office and then perceive a reprisal for that action may be more reluctant to use once again the very processes that led to the claimed reprisal.

Whatever the reasons a particular employee does not bring a claim of intimidation or reprisal, such unresolved claims threaten to undermine the efficacy of the CAA. Particularly detrimental is the chilling effect on other employees who may wish to bring a claim or who are potential witnesses in other actions under the CAA. Without effective enforcement against intimidation and reprisal, the promise of the CAA that "Congressional employees will have the civil rights and social legislation that ensure fair treatment of

[1] See Appendix I to the Board's 1998 Section 102(b) Report. The only exception is the WARN Act, which has no enforcement authorities.

workers in the private sector"[2] is rendered illusory.

Therefore, in order to preserve confidence in the Act and to avoid discouraging Legislative Branch employees from exercising their rights or supporting others who do, the Board has concluded that the Congress should grant the Office the authority to investigate and prosecute allegations of intimidation or reprisal as they would be investigated and prosecuted in the private sector by the implementing agency. Enforcement authority can be exercised in harmony with the alternative dispute resolution process and the private right of action provided by the CAA, and will further the purposes of section 207 of the Act.

(B) § 215(b) of the CAA, which makes applicable the remedies set forth in § 13(a) of the OSH Act, gives the General Counsel the authority to seek a restraining order in district court in case of imminent danger to health or safety

With respect to the substantive provisions for which the Office already has enforcement authority,[3] the Board's experience to date has illuminated a need to revisit only one area, section 215(b) of the CAA which provides the remedy for a violation of the substantive provisions of the OSH Act made applicable by the CAA.[4] Under section 215(b) the remedy for a violation of the CAA shall be a corrective order, "including such order as would be appropriate if issued under section 13(a)" of the OSH Act. Among other things, the OSH Act authorizes the Secretary of Labor to seek a temporary restraining order in district court in the case of imminent danger. The General Counsel of the Office of Compliance, who enforces the OSH Act provisions as made applicable by the CAA, takes the position that section 213(b), by its terms, gives him the same standing to petition the district court for a temporary restraining order in a case of imminent danger as the Labor Department has under the OSH Act. However, it has been suggested that the language of section 213(b) does not clearly provide that authority.

Although it has not yet proven necessary to resolve a case of imminent danger by means of court order because compliance with the provisions of section 5 of the OSH Act has been achieved through other means,[5] the express authority to seek preliminary injunctive relief is essential to the Office's ability promptly to eliminate all potential workplace hazards. If it should become necessary to prosecute a case of imminent danger by means of district court order, action must be swift and sure. Therefore, the Board recommends that the CAA be amended to clarify that the General Counsel has the standing to seek a temporary restraining order in federal district court and that the court has jurisdiction to issue the order.

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2 141 CONG. REC. S441 (daily ed. Jan. 9, 1995) (statement of Senator Charles Grassley).

3 The CAA provides enforcement authority with respect to two private-sector laws, the OSH Act and the provisions of the ADA relating to public services and accommodations. The CAA adopts much of the enforcement scheme provided under the OSH Act; it creates an enforcement scheme with respect to the ADA which is analogous to that provided under the private-sector provisions but is *sui generis*.

4 Section 215(b) of the CAA reads as follows: "Remedy. The remedy for a violation of subsection (a) shall be an order to correct the violation, including such order as would be appropriate if issued under section 13(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 662(a))."

5 See generally *General Counsel of the Office of Compliance, Report on Safety & Health Inspections Conducted under the Congressional Accountability Act* (Nov. 1998).

(C) Record-keeping and notice-posting requirements of the private sector CAA laws

Experience in the administration of the Act leads the Board to recommend that all currently inapplicable record-keeping and notice-posting provisions be made applicable under the CAA. The Board recommends that the Office be granted the authority to require that records be kept and notices posted in the same manner as required by the agencies that enforce the provisions of law made applicable by the CAA in the private sector.

Most of the laws made generally applicable by the CAA authorize the enforcing agency to require the keeping of pertinent records and the posting of notices in the workplace. Experience has demonstrated that where employing offices have voluntarily kept records, these records have greatly assisted in the speedy resolution of disputed matters. Especially where the law has not been violated, employing offices can more readily demonstrate compliance if adequate records have been made and preserved. Moreover, based upon its experience and expertise, the Board has concluded that effective record keeping is not only beneficial to the employer, but in many cases is necessary to the effective vindication of the rights of employees.

Posting notices that the employing office and its employees are covered by the rights and responsibilities of the CAA is a critically important educational tool and reminder both to employers and employees that they are subject to the rights and remedies of the CAA. Where posting is required or authorized as a remedial sanction (an authority the Office already has under the OSH Act and Federal Service Labor Management Relations Statute [FSLMRS]), the Office should have all such authority, as well. Such posting is required under the applicable statutes, and the Board discerns no reason why the same requirements should not apply to the Legislative Branch.

Additionally, living with the same record-keeping and notice-posting requirements as apply in the private sector will give Congress the practical knowledge of the costs and benefits of these requirements. Congress will be able to determine experientially whether the benefits of each record-keeping and notice-posting requirement outweigh the burdens. Application of the record-keeping and notice-posting requirements will thus achieve one of the primary goals of the CAA, that the Legislative Branch live under the same laws as the rest of the nation's citizens.

(D) Other enforcement authorities exercised by the agencies that implement the CAA laws for the private sector

To further the goal of parity, the Board also recommends that Congress

grant the Office the remaining enforcement authorities that Executive Branch agencies utilize to administer and enforce the provisions of law made applicable by the CAA in the private sector. Implementing agencies in the Executive Branch have investigatory and prosecutorial authorities with respect to all of the private sector CAA laws, except the WARN Act. Based on the experience and expertise of the Office, granting these same enforcement authorities would make the CAA more comprehensive and effective. The Office can harmonize the exercise of investigatory and prosecutorial authorities with the use of the model alternative dispute resolution system that the CAA creates. By taking these steps to live under full agency enforcement authority, the Congress will strengthen the bond that the CAA created between the legislator and the legislated.

Appendix C: Employee Protection Provisions of Environmental Statutes

Over the years, Congress has separately included provisions within many of the environmental protection laws which protect employees and others from retaliation because of actions taken by the employees or others in support of the goals of these laws. Because these protective provisions are all enforced through the same administrative procedures in the Department of Labor, we are treating them together.

I. Employee protection provisions that should be applied to Congress

(A) Introduction

This recommendation concerns the employee protection provisions of a number of statutory schemes: the Toxic Substances Control Act, Clean Water Act, Safe Drinking Water Act, Energy Reorganization Act, Solid Waste Disposal Act/Resources Conservation Recovery Act, Clean Air Act, and Comprehensive Environmental Response, Compensation and Liability Act. In the Board's 1996 Section 102(b) Report, we stated:

It is unclear to what extent, if any, these provisions apply to entities in the Legislative Branch. Furthermore, even if applicable or partly applicable, it is unclear whether and to what extent the Legislative Branch has the type of employees and employing offices that would be subject to these provisions. Consequently, the Board reserves judgement on whether or not these provisions should be made applicable to the Legislative Branch at this time.

Further, in the 1998 Report we concluded that, while it remained unclear whether some or all of the environmental statutes apply to the Legislative Branch, "[t]he Board recommends that Congress should adopt legislation clarifying that the employee protection provisions in the environmental protection statutes apply to all entities within the Legislative Branch."

In preparation for this Report, the Board has again refined our review of the various environmental regulatory statutes. We have attempted to answer two questions regarding each statutory scheme:

(1) Does the underlying regulatory statute already generally apply to the Legislative Branch?
(2) Does the specific employee protective provision already apply to the Legislative Branch?

The answers to these questions provide an appropriate framework for our recommendation regarding each employee protective provision. If the un-

derlying statutory scheme clearly does not already apply to any entity in the Legislative Branch, we will not recommend that the employee protective provision of that statute be applied to the Legislative Branch, since there exists no applicable regulation for which an employee needs protection from retaliation.[1] Only the Toxic Substances Control Act (with one section excepted) has been withdrawn from our 1998 recommendations because of our conclusion that the overall statute does not apply to the Legislative Branch.

On the other hand, if the underlying regulatory statute does apply to the Legislative Branch, then we address the application of the employee protections to the Legislative Branch. The result of this refinement is a more detailed statute-by-statute recommendation. The employee protection provisions of each of the seven environmental protection statutes discussed below are currently enforced by the U.S. Department of Labor in one unified administrative procedure. We will discuss that procedure after our description of the seven statutes.

(B) Seven specific statutes for which the Board recommends that enforcement authority be transferred from the U.S. Department of Labor to the Office of Compliance

(1) 15 U.S.C. 2622 - Toxic Substances Control Act

Section 2622 of the Toxic Substances Control Act requires at subsection (a):

No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) has - (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter; (2) testified or is about to testify in any such proceeding; or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

The term "employer" is not defined in the "definition" provision at section 2602 of Title 15. Neither is there in this subchapter regarding control of toxic substances any provision setting out the responsibilities of Federal departments, agencies, and instrumentalities, or any form of waiver of sovereign immunity by the Federal Government. Consequently, the Labor Department's Administrative Review Board determined in Berkman v. U.S. Coast Guard Academy, ARB Case No. 98-056 (2000) that the United States did not waive its sovereign immunity regarding section 2622. The Board is of the opinion that the employee rights under this provision do not currently apply to the Federal Government. Consequently, we do not recommend that

[1] However, the Board reserves the right and responsibility to review the substance of an environmental regulatory statute which clearly does not apply to the Legislative Branch to determine whether it should apply to the Legislative Branch because the occupational safety and health of Legislative Branch employees would be protected, thereby.

the employee protective standards of the Toxic Substances Control Act be applied to the Legislative Branch.[2]

However, the Toxic Substances Control Act also includes at 15 U.S.C. 2688 a Federal facilities compliance requirement regarding lead-based paint hazards. Section 2688 states in relevant part, as follows:

Each department, agency, and instrumentality of executive, legislative, and judicial branches of the Federal Government ... shall be subject to, and comply with all Federal, State, interstate, and local requirements, both substantive and procedural ... respecting lead-based paint, lead-based paint activities, and lead-based paint hazards in the same manner, and to the same extent as any nongovernmental entity ... The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement.

The Board concludes that the clear applicability of section 2688 to the Legislative Branch suggests that section 2622 rights also be accorded to all covered employees under the CAA, including those employed by the Government Accountability Office, Government Printing Office, and Library of Congress. The Board so recommends.

(2) 33 U.S.C. 1367 - Clean Water Act

Chapter 26 of Title 33 concerns "water pollution prevention and control." Section 1323(a) of Chapter 26 specifically states that "[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government ... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity ... This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, and employees under any law or rule of law...." Pursuant to section 1323(a), the Legislative Branch is clearly subject to water pollution regulation.

Pursuant to section 1367(a) of Title 33:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provision of this chapter.

[2] Whether the Toxic Substances Control Act should be applied to the Legislative Branch because it pertains to the "occupational safety and health" of Legislative Branch employees is a subject for review by the Board.

Because the general water pollution statutory regulations apply to the entire Legislative Branch, and because DOL has applied section 1367 employee protections to the Federal government, we recommend that the employee protective provision at section 1367(a) of Title 33 be applied to all covered employees under the CAA, including those employees of the Government Accountability Office, Government Printing Office, and Library of Congress.

(3) 42 U.S.C. 300j-9(i) - Safe Drinking Water Act

Section 300j-9(i) is a portion of subchapter XII of Chapter 6A ("Public Health Service") of Title 42, and concerns "Safety of Public Water Systems." The term Aperson," as used in the subchapter, includes any "... Federal agency (and includes officers, employees, and agents of any ... Federal agency)." 42 U.S.C. 300f(12). "Federal agency" is defined as "any department, agency, or instrumentality of the United States." 42 U.S.C. 300f(11). Subchapter XII includes a number of regulatory provisions prohibiting any "person" from contaminating a public water supply. For instance, section 300g-6 prohibits the use of lead pipes, solder, and flux; section 300i-1 prohibits tampering with a public water system. Moreover, section 300j-6(a) ensures that:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal government -

(1) owning or operating any facility in a wellhead protection area;
(2) engaged in any activity at such facility resulting, or which may result, in the contamination of water supplies in any such area;
(3) owning or operating any public water system; or
(4) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water ... Shall be subject to and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural ... in the same manner and to the same extent as any person is subject to such requirements .... The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement ....

Legislative Branch agencies and entities are generally subject to compliance with public water system regulation.

The employee protection provision at subsection 300j-9(i) provides that:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of

employment because the employee (or any person acting pursuant to a request of the employee) has - (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State, (B) testified or is about to testify in any such proceeding, or (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

The Department of Labor currently applies this employee protection provision to the Federal Government. We recommend that employee protective provisions of section 300j-9(i) be applied to all covered employees under the CAA, including employees of the Government Accountability Office, Government Printing Office, and Library of Congress.

(4) 42 U.S.C. 5851 - Energy Reorganization Act

Although section 5851 establishes employee protections regarding activities regulated by the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq), this provision is not codified in that Act, but in another chapter of Title 42 regarding "Energy Sources Development." Within the Atomic Energy Act itself, the term "agency of the United States means the Executive Branch of the United States, or any Government agency, or the Legislative Branch of the United States, or any agency, committee, commission, office, or other establishment in the Legislative Branch ...." 42 U.S.C. 2014(a).

At first blush, it seems improbable that any nuclear energy or material regulation would have any applicability in the Legislative Branch. However, particularly as regards restricted information and Legislative Branch utilization of experts and information from the Executive Branch, there is Legislative Branch involvement in nuclear regulatory issues. For instance, section 2259(d) of the Atomic Energy Act states:

The committees of the Senate and the House of Representatives which, under the rules of the Senate and the House, have jurisdiction over the development, utilization, or application of nuclear energy, are authorized to use the services, information, facilities, and personnel of any Government agency which has activities or responsibilities in the field of nuclear energy which are within the jurisdiction of such committees: Provided, however, that any utilization of personnel by such committees shall be on a reimbursable basis ....

Section 2277 mandates fines to be levied upon an "employee of an agency of the United States ... [who] knowingly communicates ..." restricted data. These and perhaps other aspects of the Atomic Energy Act's regulatory

scheme can directly involve employing offices and employees in the Legislative Branch. Therefore, the Legislative Branch is covered by the Atomic Energy Act.

The employee protection provision at subsection (a) of section 5851 states:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –
(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act...;
(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act ...;
(C) testified before Congress or at any Federal or State proceeding regarding a proceeding (or proposed proceeding) of this chapter or the Atomic Energy Act ..;
(D) ... commenced a proceeding under this chapter or the ... Act ...;
(E) testified ...;
(F) assisted or participated ... in any other manner ....

(2) For purposes of this section, the term 'employer' includes–
(A) a licensee of the Commission or of an agreement State ...;
(B) an applicant for a license from the Commission or such agreement State;
(C) a contractor or subcontractor of such a licensee or applicant, and;
(D) a contractor or subcontractor of the Department of Energy ....

Because the Legislative Branch is regulated to some extent through the underlying Atomic Energy Act, we recommend that the employee protections of section 5851(a) of Title 42 also be applied to all covered employees under the CAA, including the employees of the Government Accountability Office, Government Printing Office, and Library of Congress.

(5) 42 U.S.C. 6971 - Solid Waste Disposal Act/Resource Conservation Recovery Act

The "chapter" in which section 6971 is placed, is Chapter 82 of Title 42, and concerns "Solid Waste Disposal." In subsection 6903(4) of the "definitions" section, the term "Federal agency" means "any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office."

Section 6964 of Chapter 82 makes further reference to coverage of the Federal Government. Even though the title of the section is "Application of solid waste

disposal guidelines to Executive agencies," the text of subsection (a), "Compliance," states at paragraph (2): "Each Executive agency or any unit of the Legislative Branch of the Federal Government which conducts any activity - (A) which generates solid waste, and (B) which, if conducted by a person other than such agency, would require a permit or license from such agency in order to dispose of such solid waste, shall ensure compliance with such guidelines and the purposes of this chapter in conducting such activity."[3] (Emphasis added.) Therefore, it is reasonable to assume that the regulatory coverage of this statute extends beyond GPO to all Legislative Branch agencies.

This subsection (a)(4) further stipulates that "[t]he President or the Committee on House Oversight [presently the Committee on House Administration] of the House of Representatives and the Committee on Rules and Administration of the Senate with regard to any unit of the Legislative Branch of the Federal Government shall prescribe regulations to carry out this subsection."[4]

Section 6961(a) of Chapter 82 states:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirements for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements .... The Federal ... substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature .... The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).

This provision, in its current form, represents the Congress's response to a 1992 decision of the Supreme Court in U.S. Dep't. of Energy v. Ohio, 503 U.S. 607, 112 S Ct 1627 (1992). There, the Court narrowly interpreted the previous language waiving sovereign immunity in section 6961(a). In PL 102-386, the Federal Facility Compliance Act, the Congress strengthened the waiver language in the section. In H.R. Rep. No. 11, 102d Cong., 2d

[3] Subsection (a)(1) includes similar language regarding the same categories of Federal entities regarding "solid waste management activities."

[4] Inquiries to both Committees indicate that no regulations have been promulgated for the Legislative Branch.

Sess. 2 (1992), the House reported:

In the Committee's view the language of the existing law was sufficiently clear to waive federal sovereign immunity for all provisions of solid and hazardous waste laws, including the imposition of criminal fines, civil or administrative penalties and all other sanctions. Thus, this legislation reaffirms existing law, and applies to all actions of the federal government, past and present, which are subject to solid or hazardous waste laws.

See, Charter Int'l Oil Co. v. U.S. 925 F Supp 104 (D.R.I. 1996).

At least since the 1992 amendment to section 6961, there can be little question that the Legislative Branch is comprehensively subject to the regulatory and enforcement scheme regarding disposal of solid waste.

Subsection (a) of section 6971 regarding employee protection states:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

We are of the opinion that all such entities in the Legislative Branch are already liable under the whistle blower provision in section 6971(a), and that Executive Branch enforcement procedures currently apply to the Legislative Branch of government.

Therefore, we recommend that the employee protective provisions in section 6971(a) be placed within the CAA, and applied to all covered employees, including employees of the Government Accountability Office, Government Printing Office, and Library of Congress.

(6) 42 U.S.C. 7622 - Air Pollution

Section 7622 is a portion of Chapter 85 of Title 42, entitled "Air Pollution Prevention and Control."

The waiver of sovereign immunity in Chapter 85 is found at section 7418(a):

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility or (2) engaged in any activity resulting, or which may result, in

the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal ... requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural..., (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any rule of law....

The broad and imperative tone of this waiver provision stems, at least in part, from actions Congress took in 1977 to reverse the effect of the Supreme Court's decision in Hancock v. Train, 426 U.S. 167, 96 S. Ct. 2006 (1976). There the Court determined, with regard to State enforcement of air quality requirements, that while the earlier version of section 7418(A) required Federal entities to meet all required "standards," there was no immunity waiver sufficient to permit such entities to be subjected to State enforcement procedures. PL 95-96, section 116(a) added the language to subsection (a) of section 7418 enumerating the legal and administrative areas to which the compliance requirements apply and directing that agencies, officers, agents, and employees not be immune from regulatory control. That amended language also includes all Federal substantive and procedural requirements.

Section 7622(a) states:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) - (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan, (2) testified or is about to testify in any such proceeding, or (3) assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

Since the Legislative Branch is subjected to the regulatory requirements of section 7418, the Department of Labor enforces the section 7622 whistle blower protections in the Legislative Branch.

Because the underlying regulatory statute clearly applies to the Legislative Branch, we recommend that the employee protective provisions of section 7622(a) be applied to all covered employees under the CAA, including the employees of the Government Accountability Office, Government Printing Office, and Library of Congress.

(7) 42 U.S.C. 9610: CERCLA B Current Enforcement Authority

Section 9610 of Title 42 is part of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which generally addresses the process and responsibility for cleanup of hazardous material releases. The bulk of CERCLA is codified as Chapter 103 of Title 42. Section 9610(a) states:

No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

Section 9620 covers the subject of applicability of Chapter 103 to Federal facilities. Subsection (a)(1) states:

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

The breadth and application of this broad waiver was discussed by the D.C. Circuit in East Bay Municipality Utility District v. U.S. Dep't. of Commerce 142 F3d 479 (D.C. Cir. 1998).[5] There, the Circuit Court concluded that "CERCLA abrogates state and local government immunity in terms virtually identical to the waiver of federal immunity, see 42 U.S.C. 9601(20)(D) ..." 142 F3d, at 484. The Court reached a conclusion that the CERCLA waiver is broad, clearly encompassing the Federal Government's three branches, based in part upon the fact that:

[A]lthough the precise meaning of § 9260(a)(1)'s waiver language was not directly before the [Supreme] Court in [Pennsylvania v.] Union Gas Co., 491 U.S. 1, 109 S. Ct. 2273 ... [1989], it characterized § 9601(20)(D), the almost identically worded provision subjecting states to liability, as "unequivoca[l]" and "unqualified," 491 U.S. at 10, 109 S Ct at 2279, indicating that the statute's most authoritative reader may not be inclined to view the waiver as hedged by unwritten exceptions.

Id. Therefore, the Board recommends that the employee protection provi-

5 Section 9606 empowers the President to order the Attorney General to obtain immediate relief regarding any "imminent and substantial endangerment to the public health or welfare ...." Section 9607 concerns recoverable costs and damages for remedial actions resulting from a cleanup of hazardous materials.

sion at section 9610(a) be applied to all covered employees under the CAA, including those of the Government Accountability Office, Government Printing Office, and Library of Congress.

(C) These environmental "whistle blower" rights are currently all enforced through the same administrative tribunal in the Department of Labor

The administrative enforcement process for each of these employee protection provisions utilizes the same tribunal within the Department of Labor: the Administrative Review Board (ARB). Recently, in Florida v. United States, 133 F.Supp.2d 1280 (N.D.Fla. 2001), the District Court described the DOL procedure as follows:

Congress has included "whistle blower" provisions in the six environmental statutes at issue in this case: the Clean Air Act, the Water Pollution Control Act, the Toxic Substances Control Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").... Each of the whistle blower provisions ... authorizes an employee who believes he has been fired or discriminated against in violation of these provisions to file a complaint with the Secretary of Labor. Each statute requires the Secretary to investigate any such complaint, including by affording the parties an opportunity, upon request, to present evidence at a public hearing. If the Secretary finds a violation, the Secretary may order appropriate relief, including reinstatement of a wrongfully fired employee, with compensation. Any such decision of the Secretary is subject to judicial review and, if upheld, may be enforced through an action brought by the Secretary in the appropriate District Court. [133 F. Supp.2d, at 1282-3, footnotes omitted.]

The Energy Reorganization Act provision (42 U.S.C. 5851) is also governed by the same procedure. The regulations implementing this process are set out at 29 C.F. R. 24.1 et seq. These regulations provide that an ALJ issue a recommended decision in each matter, which becomes final unless a party files a request for review with the Administrative Review Board. The ARB issues the final administrative decision of the Secretary. Therefore, all current enforcement of these employee protection provisions lies within the Executive Branch.

To eliminate the separation of powers conflict inherent in this enforcement procedure, and as noted in our Report, the Board of Directors makes the following recommendations:

(D) Recommendation for transfer of enforcement authority

(1) Because the Toxic Substances Control Act itself does not apply to the Legislative Branch, the Board does not recommend that the employee protection provision of 15 U.S.C. 2622 be made applicable to the Legislative Branch, except that section 2622 whistle blower coverage should be applied to all covered employees, including those of the Government Accountability Office, Library of Congress, and all employees of the Government Printing Office, solely with regard to the lead-based paint requirements set out at section 2688 of Title 15.

(2) The remaining statutes, those involving Solid Waste (42 U.S.C. 6971) Clean Water (33 U.S.C. 1367), Safe Drinking Water (42 U.S.C. 300j-9(i)), Atomic Energy (42 U.S.C. 5851), Air Pollution (42 U.S.C. 7622), and CERCLA (42 U.S.C. 9610), are already applied to the Legislative Branch through the Labor Department. We recommend that these provisions be brought under the CAA enforcement scheme, and that their application to the Government Accountability Office, Government Printing Office, and Library of Congress be reflected in the CAA, as well.

(3) We recommend that complaints under these provisions be processed pursuant to the procedure outlined in section 401 of the Act (2 U.S.C. 1401).

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