

The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law

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The author traces the legislative, administrative, and political problems which prevented the development of the Equal Employment Opportunity Commission into an effective agency, with special attention to its litigation record after Title VII of the Civil Rights Act was amended in 1972. He concludes that the failure of EEOC was not only a consequence of the failure of successive national administrations to give a high priority to civil rights enforcement, but also a consequence of the basic inadequacy in the statutory enforcement scheme. The author indicates that the EEOC ignores the lessons of decades of scholarly study as well as twelve years of its own experience under Title VII, and he makes a series of recommendations for the transformation of the Commission into an effective instrument for the elimination of institutional employment discrimination.

I

THE LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1964

Given the resistance to change by institutions responsible for discriminatory racial employment patterns, it is not surprising that the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964,¹ was the product of an epic legislative struggle. The statute's "torrid conception, its turbulent gestation and its frenzied birth"² are reflected in its sub-

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1. Title VII of the Civil Rights Act of 1964 [hereinafter cited as Act], 42 U.S.C. §§ 2000e to 2000e-17 (1970).

2. *Miller v. International Paper Co.*, 408 F.2d 283, 286 n.13 (5th Cir. 1969).

stantive and procedural provisions. Amended 105 times,³ the Civil Rights Act of 1964 was finally passed after "the measure was considered and debated by the House Judiciary Committee 22 days, by the Rules Committee seven days, by the House six days, and by the Senate 83 days. The extended debate in the Senate lasted 534 hours, 1 minute, and 37 seconds."⁴ Given life only after extensive compromise, Title VII in fact embodies contradictory and conflicting provisions. The most "enlightening" portions of the congressional debates reveal that "totally inconsistent explanations of the bill were offered by its proponents and its opponents."⁵ A federal court seeking interpretive assistance from the legislative history of Title VII found that studies of the floor debates "lend great comfort to both sides."⁶

Passage of Title VII came after a period of some two decades during which more than two hundred fair employment measures had been proposed in the Congress.⁷ When Title VII was debated in Congress, a policy of nondiscrimination in employment had been required of federal government contractors since 1941, and thirty-four states had enforceable fair employment practice laws. But such measures had proved inadequate to eliminate deep-rooted and pervasive discriminatory employment patterns. Voluntary compliance programs under federal executive orders had little effect; legal decisions prohibiting job discrimination were generally abstract in nature and, at best, provided only limited relief; the National Labor Relations Board rarely invoked its powers in this area; and because the government failed to enforce the legal restraints on employment discrimination, major national corporations and many labor unions continued their discriminatory job practices.

By the early 1960s, decisions of the federal courts during the previous decade had created a new perception of law and public policy on civil rights issues involving education, voting rights, and public accommodations. However, long-established patterns of employment discrimination, which for generations had locked blacks and members of other minority groups into a permanent state of economic depression, remained intact. By 1963, pressure had mounted for broad national legislation to eliminate industry-wide discriminatory job practices within both public and private sectors of the economy. For such legislation to be effective, extensive administrative powers and sweeping but flexible legal remedies would be necessary. It was evident that meaningful enforcement of a fair employment law would require drastic changes in both personnel procedures and collective bargaining agreements and indeed would directly affect the practices of virtually all major business enterprises and labor unions.

3. EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 10 (1966) [hereinafter cited as EEOC, LEGISLATIVE HISTORY].

4. *Id.* at 11.

5. *Johnson v. Seaboard Air Line Ry.*, 405 F.2d 645, 649 (4th Cir. 1968).

6. *Dent v. St. Louis-San Francisco Ry.*, 406 F.2d 399, 403 (5th Cir. 1969).

7. History of the Equal Employment Opportunity Commission (unpublished document in the Lyndon Baines Johnson Library, Austin, Texas). See also EEOC, LEGISLATIVE HISTORY at 7-10 (1966).

The Title VII debates suggest, however, that those who favored the proposed legislation in large part took state fair employment practice laws as their models.⁸ In view of the serious inadequacy of such laws, it is fair to assume that the proponents of the bill hardly envisioned Title VII as an instrument for major social change, although at times their words suggest awareness of the need for a full-scale attack on traditional patterns of employment discrimination.

To support their own conflicting perceptions of how the law on fair employment practices should be framed, and to solicit guidance on its enactment, members of Congress invited testimony from diverse interest groups, including politically influential representatives of management and organized labor.

Some employer groups appeared before Congress to voice their opposition. For example, the American Paper and Pulp Association⁹ presented testimony before the General Subcommittee on Labor of the House Committee on Education and Labor.¹⁰ The Association, stating that it spoke for employers in the industry, contended "that there presently exist workable State laws which govern discrimination in employment . . . and additional Federal legislation in this area would create serious conflicts of law."¹¹ The Association further argued: "The proposed legislation fails completely to consider the complexity of job seniority and job sequence, both negotiated and historical, and fails to consider the problems that are inherent in the necessary and continued improvement in technology and automation."¹²

The United States Chamber of Commerce responded to a request from the House Subcommittee on Labor for its views on an early version of the bill that contained a provision relating to discrimination in employment based on age. It submitted a letter dated June 27, 1963: "The national

8. During the congressional arguments on Title VII proponents of the bill frequently invoked state fair employment practice acts. For example, Senator Leverett Saltonstall of Massachusetts, in discussing the relationship of conciliation to court enforcement of antidiscrimination laws, stated that "[i]n Massachusetts, we have had experience with an arrangement of this sort for 17 years; and, as I recall, approximately 4,700 unfair practices complaints have been brought before our Massachusetts Commission Against Discrimination. Only two of them have been taken to court for adjudication. One has been decided, and a second is now in court, but has not yet been decided. That procedure is the basis and theory of this part of the bill, and that is why I support it," 110 CONG. REC. 14,191 (1964) *reprinted in* EEOC, LEGISLATIVE HISTORY at 3311, Congressman Ogden R. Reid of New York, arguing for the passage of Title VII, placed in the record documentation showing the disposition of complaints filed with the New York State Commission on Human Rights from its inception and stated that "[f]rom 1945 to 1963—10,869 total complaints were filed—over 8,000 of these on employment—and the vast majority were settled voluntarily by conference, conciliation, and persuasion. Of the some 1 percent that finally went to public hearings only 12 today are still pending." 110 CONG. REC. 1635 (1964), *reprinted in* EEOC, LEGISLATIVE HISTORY at 3346.

9. In 1962, the American Paper and Pulp Association had sales "totalling approximately \$14 billion, representing the products of some 400 companies with 369 pulpmills, 813 papermills and employing more than 600,000 people." *Equal Employment Opportunities: Hearings on H.R. 405 Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 497 (1963) (statement of American Paper and Pulp Association).

10. *Id.*

11. *Id.*

12. *Id.*

Chamber does not favor additional legislation on this subject, because the problems involve so many considerations that any bill comprehensive enough to cover all of them would, in all probability, do more harm than good."¹³

However, another management group, the National Association of Manufacturers (NAM), adopted a position of formal neutrality and refrained, at least publicly, from attacking the proposed bill during the congressional debates. On this issue Charles A. Kothe, vice-president of the Industrial Relations Division of the NAM, later wrote, "It begs the question to inquire whether NAM stands as a champion of the law. During the debate in Congress, which, incidentally, was the longest in the history of our government, NAM took no position."¹⁴

As expressed, employer opposition to the pending legislation appears to have been rooted in the doctrinal issue of government intrusion into the "private concerns" of management and the assumption that sufficient legislation and other forms of redress already existed to deal with the problem of employment discrimination. Public opposition by business interests was somewhat muted by the desire to avoid a negative reaction during a period of widespread racial turmoil, and it was left to conservative members of Congress, long identified with powerful employer and management groups, to lead the attack on the bill openly and to eliminate or weaken its strongest and most vital sections.

Early in the debates on Title VII, a group of conservative congressmen issued a lengthy Minority Report.¹⁵ This document summarized, perhaps better than any other single statement, the opposition to the "radical" changes that Title VII would cause. The Minority Report is not only a plea for maintaining the status quo; it proclaims racial superiority by innuendo and plays on the fear of change of many interest groups in the economy:

This legislation is the most radical proposal in the field of civil rights ever recommended by any committee of the House or Senate.

The depth, the revolutionary meaning of this act, is almost beyond description. . . .

It is, in the most literal sense, revolutionary, destructive of the very essence of life as it has been lived in this country since the adoption of our Constitution. . . .

If this bill is enacted the farmer (regardless of the number of his employees) would be required to hire people of all races, without preference for any race. If experience has taught the farmer that a member of one race is less reliable than a member of another race, does less for his pay, he will no longer be allowed to hire those he prefers for this reason. If he is of the

13. *Id.* at 496. (Letter from Theron J. Rice, U.S. Chamber of Commerce, June 27, 1963).

14. Kothe, *Background of the Law and Some of Its Implications*, in *A TALE OF 22 CITIES: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964*, at 12 (C. Kothe ed. 1965).

15. Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, H.R. Rep. No. 914, 88th Cong., 1st Sess. 23534 (1963) *reprinted in* EEOC, *LEGISLATIVE HISTORY* at 2062-95 (1966).

belief that members of one race are more prone to accident, less trustworthy, more neglectful of duties, are, in short, less desirable employees than those of another race, he will no longer be allowed to exercise his independent judgment. . . .

A dispassionate study of the power granted in this bill will convince a reasonable person that no bank could operate under its provisions without undue hardship.

If a bank under this bill were to deny employment, a loan, a line of credit or a sales contract to a person, it would have to prove its decision was based on facts that did not, in any way, discriminate against the rejected applicant because of his race

To millions of working men and women, union membership is the most valuable asset they own. It is designed to insure job security and a rate of pay higher than they otherwise would receive. As none knows better than the union member himself, these two benefits are dependent upon the system of seniority the unions have followed since their inception. Seniority is the base upon which unionism is founded. Without its system of seniority, a union would lose one of its greatest values to its members.

The provisions of this act grant the power to destroy union seniority. . . . With the full statutory powers granted by this bill, the extent of actions which would be taken to destroy the seniority system is unknown and unknowable.

To disturb this traditional practice is to destroy a vital part of unionism.¹⁶

After describing a variety of other hypothetical evil consequences that would result from passage of Title VII, the report concludes with a protest against the federal government's "interfering in the contract rights of unions and employers."¹⁷

Conservative members of the House and Senate introduced a bewildering array of amendments to modify or remove various portions of the bill under debate. During the course of the arguments, proposals were also made to eliminate the entire bill from further consideration by Congress.¹⁸

In contrast to the avowed neutrality or relatively subdued public expressions of opposition by employer groups, and in spite of the dire predictions of labor's new-found friends among conservative members of Congress who were warning that it would destroy a "vital part of unionism," organized labor formally supported the enactment of Title VII. At the end of World War II the American Federation of Labor opposed enforceable fair employment practice legislation that would also cover labor unions;¹⁹ how-

16. *Id.* at 2062, 2069-71 (emphasis in original).

17. *Id.* at 2072.

18. For a description of the many amendments adopted and rejected by the House and Senate on Title VII, see EEOC, LEGISLATIVE HISTORY, app., at 1-5, 7-10 (1966).

19. In 1944, a subcommittee of the Senate Committee on Education and Labor held hearings on a bill (S. 2048) to establish the World War II Fair Employment Practice Committee as a permanent government agency. James B. Carey, Secretary-Treasurer of the Congress of Industrial Organizations (CIO), on behalf of its president Philip Murray, testified in support of the proposed measure.

ever, the racial crisis and intensive civil rights protest of the 1960's caused a great variety of organizations to alter traditional policies and to support the Civil Rights Act of 1964, including Title VII, its employment section.

George Meany, president of the AFL-CIO, presented testimony in favor of fair employment legislation at hearings of the House of Representatives in 1963:

First, we need the statutory support of the Federal Government to carry out the unanimously adopted principles of our own organizations, the AFL-CIO. Our conventions have repeatedly endorsed a Federal Fair Employment Practice Commission, armed with all necessary powers. Long before merger, the AFL and CIO separately pressed for such legislation.²⁰ The most recent AFL-CIO convention, in December 1961, while strengthening our own internal civil rights machinery, pleaded again for federal help—help that would apply to the labor movement as well as to employers.²¹

Meany further testified that the proposed legislation was necessary to accomplish what the AFL-CIO had been unable to do internally:

Why is this so? Primarily because the labor movement is not what its enemies say it is—a monolithic, dictatorial, centralized body that imposes its will on the helpless dues payers. We operate in a democratic way, and we cannot dictate even in a good cause. So in effect, we need a Federal law to help us do what we want to do—mop up those areas of discrimination which still persist in our own ranks.²²

See, Fair Employment Practices Act: Hearings on S. 2048 Before a Subcommittee of the Senate Committee on Education and Labor, 78th Cong., 2d Sess., 116-22. William Green, President of the American Federation of Labor (AFL) refused to send a representative. The Federation responded to the Senate subcommittee with a letter from W.C. Hushing, its National Legislative Chairman. After some generalities about the "democratic principle to which the labor movement is pledged . . .," the statement expressed the opposition of the AFL to the pending bill:

The executive council does not believe, however, that imposition of any policy, no matter how salutary, through compulsory Government control of freely constituted associations of workers, accords with the basic right of freedom of association among the American people. While it endorses without reservation the policy of nondiscrimination in employment, the executive council takes strong exception to the compulsory imposition upon unions of this or any other policy interfering with the self-government of labor organizations.

Id., pp. 194-95.

AFL Representative Boris Shishkin again expressed the Federation's policy in November 1944, at a Howard University conference, *The Postwar Industrial Outlook For Negroes*, when he stated that "[l]abor would oppose any regulation of unions, even to prevent discrimination." *Mich. Chron.*; Nov. 11, 1944, p. 1. He added that legislation prohibiting racial and religious discrimination by unions "would open the door to much broader regulations of unions and labor spokesmen could not support it." *Id.*

The AFL in contrast to the CIO continued to oppose, during the post-war period, federal legislative proposals to prohibit discriminatory practices by labor unions and contributed significantly to the demise of the World War II Fair Employment Practice Committee.

20. Meany was factually in error in asserting that the AFL had previously "pressed for such legislation." *See* note 19, *supra*.

21. *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 1791 (1963) (statement of George Meany).

22. *Id.*

Despite the AFL-CIO's public support of Title VII during 1963 and 1964, the subsequent resistance of its affiliates to compliance with the Act reveals the contradictions within organized labor over civil rights laws that directly affect its own racial practices. This ambivalence, and the low priority given to efforts to eliminate discrimination within affiliated unions, was reflected in Meany's testimony that the AFL-CIO would not apply sanctions to unions that might refuse to comply with the employment provisions of the Act, even though these sanctions had been applied in other contexts.²³

When he was asked what sanctions the AFL-CIO could impose upon a union that discriminated, Meany replied that the federation might "withhold certain services" and would "keep up the pressure," but that it would not consider sanctions such as expulsion from the labor federation or the placing of affiliates under trusteeships because "this limits their rights, the rights they would normally have as members."²⁴

After extensive hearings, debates, testimony from 101 witnesses, and a record comprising 2,649 pages—and after innumerable compromises worked out in House and Senate committees—the Civil Rights Act was adopted on July 2, 1964. The Act contained eleven titles, including such matters as public accommodations, voting, public facilities, federally assisted programs, and public education. The most bitterly contested section of the Act, Title VII, covering employment, was not to become effective until one year following enactment. The institutions covered by the Act had a year's grace—until July 2, 1965—to bring their practices into conformity with the regulatory requirements of Title VII.

II

TITLE VII: PROVISIONS, COVERAGE, AND ADMINISTRATION

Among the provisions of the law that most clearly reflect tortuous congressional compromises are the severe limitations imposed on the administrative agency established by Title VII, the Equal Employment Opportunity Commission (EEOC). Unlike such agencies as the National Labor Relations Board, the Federal Trade Commission, the Securities and Exchange Commission, and other regulatory commissions, the federal agency charged with administering Title VII lacked the authority to issue cease-and-desist orders or to initiate legal action in the federal courts. The EEOC was only authorized to make recommendations to the Attorney General that

23. The AFL-CIO expelled several international unions because of alleged domination by criminal elements. Among the most prominent of these were the International Brotherhood of Teamsters, the Bakery and Confectionary Workers' International Union, and the International Longshoremen's Association. (The ILA was later readmitted to the Federation.) Before its merger with the AFL in 1955, the CIO had expelled several affiliates because they were allegedly controlled by Communists; among these were included the United Office and Professional Workers, the Fur and Leather Workers' Union, and the International Longshoremen's and Warehousemen's Union.

24. *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 1792 (1963) (statement of George Meany).

a lawsuit be filed based upon a finding that a "pattern or practice" of discrimination existed, or that the Attorney General should intervene in litigation initiated by a private plaintiff.²⁵ The Commission was allowed to file briefs *amicus curiae* and to bring an action against a respondent who failed to comply with an order of the court in litigation under the Act initiated by a private party.²⁶

Title VII provided for a bipartisan five-member Commission. One member was to serve as chairman and to appoint officers, agents, attorneys, and employees of the Commission in accordance with civil service laws.²⁷ The chairman would also have responsibilities regarding operational matters, would interpret Commission policies to the administrative and legal staffs, and generally function as chief executive officer of the agency. In addition, the chairman would be the leading spokesman for the Commission before Congress, other government agencies, and the general public. Although a vote is required on major policy issues, the chairman sets the direction of the agency.

The EEOC's lack of enforcement powers, which limited the Commission's role to investigation, persuasion, and conciliation, was to remain a source of contention and controversy in future sessions of Congress as well as the major reason it was unable to fulfill its mandate.

As originally enacted, the law covered employers, labor unions, employment agencies, and private or federally supported state employment services.²⁸ With certain exceptions,²⁹ the Act prohibited discrimination based on race, color, religion, sex, or national origin in virtually all phases of the employment process. Employers were forbidden to hire, discharge, or otherwise discriminate (with respect to compensation, terms, conditions, or privileges of employment, including deprivation of employment opportunities or status) in terms of any of these factors.³⁰

A private employment agency could not "fail or refuse to refer for employment, or otherwise discriminate against, any individual because of his race . . . or to classify or refer for employment any individual on the basis of his race"³¹

The 1964 Act made it illegal for a labor union

25. Act § 705(g)(6), 42 U.S.C. § 2000e-4(f)(6) (1970).

26. Act § 706(i), 42 U.S.C. § 2000e-5(i) (1970).

27. Act § 705(a), 42 U.S.C. § 2000e-4(a) (1970).

28. Act § 701, 42 U.S.C. § 2000e (1970). Employers meant persons engaged in industry affecting commerce who had 25 or more workers for each working day during 20 calendar weeks during the year. During the first year after the effective date of the Act, however, persons employing fewer than 100 workers were not covered; during the second year, employers with fewer than 75 workers were not covered; and employers with less than 50 workers were not covered during the third year. The Act was later amended to cover employers who had as few as fifteen employees.

29. Act §§ 702, 703(e) to 703(i), 42 U.S.C. §§2000e-1, 2000e-2(e) to 2000e-2(i) (1970).

30. Act § 703, 42 U.S.C. § 2000e-2 (1970).

31. Act § 703(b), 42 U.S.C. § 2000e-2(b) (1970).

(1) to exclude or to expel from its membership, or otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race . . . ;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.³²

It was also an unlawful employment practice to discriminate against any individual because of race, color, religion, sex, or national origin in admission to, or employment in, any apprenticeship training or retraining program.³³

Retaliation was expressly forbidden against those seeking to invoke the law's processes: employees or job applicants were protected if they opposed unlawful employment practices under the Act or if they had made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing.³⁴ The Act also made it unlawful to print or publish any employment notice or advertisement that indicated any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin.³⁵

Section 706 of Title VII dealt with the implementation of the law. Although what constituted a violation of the law was fairly wide-ranging and clear in concept (the most important limitations on the definition of "unlawful employment practices" will be discussed below), the heated congressional debate that preceded the legislation resulted in complicated and somewhat ambiguous language over the manner in which violations were to be remedied.

Section 706(e), in practical terms that most significant of the 706 provisions, permitted a complainant to institute a civil suit in the federal courts within thirty days after being notified by the Commission that its efforts to secure voluntary compliance had failed.³⁶ Thus it provided a federal remedy for redressing discrimination in employment. The right of private individu-

32. Act § 703(c), 42 U.S.C. § 2000e-2(c) (1970).

33. Act § 703(d), 42 U.S.C. § 2000e-2(d) (1970).

34. Act § 704(a), 42 U.S.C. § 2000e-3(a) (1970).

35. Act § 704(b), 42 U.S.C. § 2000e-3(b) (1970).

36. Act § 706(e), 42 U.S.C. § 2000e-5(f) (1970), reads in part:

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference . . . except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted . . . the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent. . . .

als or groups of workers to file suit in the federal courts made possible the most important challenges to traditional discriminatory employment practices and was opposed, especially by organized labor, in later congressional debates on amendments to Title VII.

Section 706(a) established that a charge must be filed in writing under oath by a person claiming to be aggrieved, and also that a written charge could be filed by an EEOC commissioner. The Commission was to furnish the employer, employment agency, or labor organization with a copy of the charge. The Commission was to investigate such charges and to use "informal methods"—that is, methods that were not legally binding—to rectify or eliminate unlawful employment practices.³⁷ No charge against a respondent or any information uncovered in the investigation of such a charge was to be made public without the written consent of the parties.³⁸

Other paragraphs of section 706 as originally enacted involved complicated procedural steps. (After the 1972 amendments to Title VII went into effect, there were substantial changes in some of these procedural requirements.) Section 706(b) placed the duty on the charging parties of filing with any existing state or local fair employment practice agency in their area and waiting sixty days (or 120 days under certain circumstances) before filing with the EEOC.³⁹ Section 706(c) allowed a member of the Commission to file a charge of unlawful employment practice, but also required deferral to a state or local fair employment practice agency for a period of sixty or 120 days to allow the agency to act under the state or local law to remedy the alleged violation.

Section 706(d) required a charging party to file with the Commission within ninety days after the alleged unlawful employment practice occurred. This section also provided that a party who had previously filed with a state or local agency could then file with the EEOC within 210 days following the alleged unlawful practice or within thirty days after receiving notice that the state or local agency had terminated its proceedings, whichever was earlier.

The remaining paragraphs of section 706 referred to technicalities that apply to courts and to the Commission. The most important of these was section 706(g), which enabled the courts to enjoin respondents engaged in unlawful employment practices and to order appropriate affirmative action.

The other section of Title VII that dealt substantively with litigation under the law was section 707(a), which enabled the Attorney General of the United States to file a pattern or practice civil action in federal court "whenever the Attorney General has reasonable cause to believe that any persons or group of persons is engaged in a pattern or practice of resistance

37. 42 U.S.C. § 2000e-5(b) (1970) stated: "If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

38. Act § 706(a), 42 U.S.C. § 2000e-5(a) (1970).

39. Act § 706(b), 42 U.S.C. § 2000e-5(b) (1970).

to the full employment of any of the rights secured by this title. . . .'⁴⁰ Section 707 was potentially among the most important sections of the Act as it authorized litigation by the Department of Justice against institutionalized patterns of employment discrimination. When the original Act was adopted, job discrimination was thought to be mainly the result of random individual acts of bigotry and the significance of section 707 was greatly underestimated.

The wording of Title VII prohibited as "unlawful employment practices" virtually every form of racial discrimination practiced by employers and labor unions in the United States. Congress, however, appended important exceptions to the definition of "unlawful employment practices,"⁴¹ and one major limitation on the scope of Title VII which, Congress apparently believed, would protect certain employment practices from the reach of Title VII.

A. *Bona Fide Occupational Qualification*

The first exception in section 703(e) permitted discrimination on the basis of religion, sex, or national origin, but not race, where such a factor was "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."⁴²

The EEOC issued regulations suggesting that the "bona fide occupational qualification" (BFOQ) be narrowly construed.⁴³ The Commission's early decisions placed the burden of proof on employers who invoked BFOQ as a defense against charges of discrimination.⁴⁴

40. Act § 707(a), 42 U.S.C. § 2000e-6(a) (1970).

41. Other exceptions or exemptions from coverage were permitted under the law. Title VII did not extend to the "employment of aliens outside any State," or individuals who perform work for religious associations or societies or for educational institutions if the work performed is connected with the religious or educational activities of these institutions [Act §§ 702 and 703(e), 42 U.S.C. §§ 2000e-1 and 2000e-2(e) (1970)]. Special rights and preferential treatment for Indians living on or near reservations [Act § 703(i), 42 U.S.C. § 2000e-2(i) (1970)] and for veterans [Act § 712, 42 U.S.C. § 2000e-11 (1970)] covered under other laws were to be retained. The law was not to apply to actions or measures taken by employers, labor organizations, or joint labor-management committees against individuals who were members of the Communist Party of the United States or any other organization required to register as a Communist-action or Communist-front organization pursuant to the Subversive Activities Control Act of 1950 [Act § 703(f), 42 U.S.C. § 2000e-2(f) (1970)]; nor were individuals covered whose performance of duties was subject to any requirement imposed in the interest of national security [Act § 703(g), 42 U.S.C. § 2000e-2(g) (1970)]. The Act also allowed differentiation on the basis of sex in determining wages or compensation if such a differential was authorized by provisions of the Fair Labor Standards Act of 1938 [Act § 703(h), 42 U.S.C. § 2000e-2(h) (1970)]; differentials in terms, conditions, or privileges of employment were also permitted in different locations provided that such differences were not the result of an intention to discriminate because of race, color, religion, sex, or national origin [Act § 703(h), 42 U.S.C. § 2000e-2(h) (1970)].

42. Act § 703(e), 42 U.S.C. § 2000e-2(e) (1970).

43. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a) (1975).

44. See, e.g., EEOC Decisions No. YNY 9-047 (1969), 1973 EEOC Decisions (CCH) ¶ 6010 and EEOC Decisions No. YSF 9-060 (1969), 1973 EEOC Decisions (CCH) ¶ 6011.

This construction was adopted by the courts. In *Weeks v. Southern Bell Telephone & Telegraph Co.*⁴⁵ the court stated:

[T]he principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.⁴⁶

In a later case, *Diaz v. Pan American World Airways Inc.*,⁴⁷ the court held that:

The use of the word "necessary" in Section 703(e) requires that we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.⁴⁸

In *Rosenfeld v. Southern Pacific Co.*⁴⁹ the Ninth Circuit expanded the approach developed in earlier decisions on this issue, holding that "sexual characteristics rather than characteristics that might . . . correlate with a particular sex, must be the basis for the application of the BFOQ exception Southern Pacific's employment policy is not excusable under the BFOQ concept or the state statutes."⁵⁰

As a result of its interpretation by the EEOC and the courts, the bona fide occupational qualification exception was rarely an effective defense in Title VII litigation.

B. Employment Tests

Among the major limitations in the 1964 law was the provision on job testing contained in section 703(h).⁵¹ The use of tests was most important in management's insistence on continuing traditional forms of employee selection, although such methods had a discriminatory effect. Testing procedures give the illusion that there exists a scientific method for determining criteria for hiring and promotion.⁵² Although section 703(h) of Title VII provided that tests could not be used for discriminatory purposes, this provision did not address itself to what many have considered the root problem contained in most—if not all—professionally developed employment tests: whether the test is culturally biased or is demonstrably related to on-the-job performance.

45. 408 F.2d 228 (5th Cir. 1969).

46. *Id.* at 235.

47. 442 F.2d 385 (5th Cir. 1971).

48. *Id.* at 388.

49. 444 F.2d 1219 (9th Cir. 1971).

50. *Id.* at 1225-27.

51. Act § 703(h), 42 U.S.C. § 2000e-2(h) (1970).

52. For an analysis of the effects of tests upon black workers see Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

An exception (known as the Tower Amendment, for Senator John Tower of Texas) in section 703(h) states in part:

“. . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate . . .”⁵³

The debates that centered on the adoption of the Tower Amendment reflected the concern of various members of the Senate that court and administrative action would interfere with the use of testing devices to maintain selection criteria for employment and promotion. It was added to Title VII because of a controversial case before the Illinois Fair Employment Practices Commission, which was decided while Title VII was being debated in Congress and to which Senator Tower referred in support of his amendment.

In *Motorola, Inc. v. Illinois FEPC*,⁵⁴ the crucial issue of culturally biased testing was directly raised in connection with discrimination in employment. Leon Myart, a black worker trained to service radio and television receivers, applied to the Motorola Company in Chicago for a semiskilled job and was denied employment on the ground that he “failed” a written test. Myart complained to the Illinois Fair Employment Practices Commission, and the hearing examiner found that the employment test administered by the company was “obsolete” because “[i]ts norm was derived from standardization of advantaged groups. . . . In light of current circumstances and objectives of the spirit as well as the letter of the law, this test does not lend itself to equal opportunity to qualify for the hitherto culturally deprived and the disadvantaged groups.”⁵⁵ The examiner ordered the company to hire Myart, to cease using the biased test, and either to stop all testing or to substitute a test which “shall reflect and equate inequalities and environmental factors among disadvantaged and culturally deprived groups.”⁵⁶ Upon review by the full Illinois commission, it was held that since the complainant had passed a substitute test, the question of adequacy was moot; and the commission substituted \$1,000 in damages in place of an order to hire.⁵⁷ Cook County Circuit Court affirmed the commission’s ruling but denied damages.⁵⁸ On appeal, however, the Illinois Supreme Court concluded that while there was some evidence of discriminatory practices, the preponderance of the evidence did not establish a violation of the Illinois Fair Employment Practices Act.⁵⁹

53. Act § 703(h), 42 U.S.C. § 2000e-2(h) (1970).

54. In re Myart, 9 RACE REL. L. REP. 1911 (Ill. Fair Empl. Prac. Comm’n 1964), enforced sub nom. *Motorola, Inc., v. Illinois FEPC*, 1 Emp. Prac. Dec. ¶ 9708 (Ill. Cir. Ct. 1965), rev’d, 34 Ill. 2d 266, 215 N.E.2d 286 (1966). See Kovarsky, *The Harlequinesque Motorola Decision and Its Implications*, 7 B.C. INDUS. & COM. L. REV. 535 (1966).

55. In re Myart, 9 RACE REL. L. REP. 1911, 1916 (1964).

56. *Id.* at 1917.

57. *Id.* at 1921.

58. *Motorola, Inc. v. Illinois FEPC*, 1 Emp. Prac. Dec. ¶ 9708 (Ill. Cir. Ct. 1965).

59. *Motorola, Inc. v. Illinois FEPC*, 34 Ill. 2d 266, 215 N.E.2d 286 (1966).

Senator Tower stated that his amendment arose "from my concern about what happened in the Motorola FEPC case."⁶⁰ The Senator registered his concern at considerable length:

Senators will recall that in the Motorola case the FEPC examiner found that the test used to select employees was discriminatory to culturally deprived or disadvantaged groups, in the words of the FEPC examiner.

Since the determination in that case, it has been clearly stated by psychiatrists and testing experts that the test was not designed to make a selection from any cultural group, and that the tests are both fair and extremely useful. There is no professional evidence to the contrary.

My amendment is quite simple. It provides that an employer may give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer or act in reliance upon the result of any such test.

Senators will note that I carefully provided in my amendment that the employer must give such tests to all concerned individuals; that is, to all applicants, without regard to the individual's color, religion, sex, or national origin. Thus everyone would get the same fair test, and everyone would get the same fair chance.

The bill is supposed to be designed to assure that a fair chance is obtained by everyone. Therefore it is in this spirit that I offer the amendment.

In the Motorola case a test was given which had been in use since 1949, a test that was devised by trained, professional, reputable psychologists, a test which was available to other corporations. A Negro taking that test was denied employment as a result of that test

The FEPC examiner stated that the test was a denial of a fair employment opportunity, because it discriminated against what he vaguely called culturally deprived or disadvantaged groups.

This is highly unreasonable, because if Title VII were administered in this fashion, it would mean that an employer would be denied the means of determining the trainability and competence of a prospective employee, or the competence of one who is currently employed and who is being considered for promotion.⁶¹

In further defense of tests by "both private business and Government to determine the professional competence or ability or trainability or suitability of a person to do a job," Senator Tower argued that college entrance examinations discriminate against the culturally deprived and disadvantaged, as do civil service examinations, bar examinations, and examinations for medical licensing.⁶²

Other senators pointed out that the Tower Amendment was unnecessary if its only intent was to protect nondiscriminatory tests. Senator Clifford

60. 110 CONG. REC. 13,492 (1964), *reprinted in* EEOC, LEGISLATIVE HISTORY at 3138 (1968).

61. *Id.*

62. *Id.*

Case of New Jersey objected to the Tower Amendment “because, first, it is unnecessary; second, the amendment would tend to complicate and make more difficult dealing with cases of actual discrimination and the elimination of them by persuasion as well as by enforcement procedures provided by the act.”⁶³ What concerned Senator Case was:

If this amendment were enacted, it could be an absolute bar and would give an absolute right to an employer to state as a fact that he had given a test to all applicants, whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute. The amendment is unnecessary and would make much more difficult the elimination of discrimination, which is the purpose of the bill.⁶⁴

Senator Hubert Humphrey of Minnesota also found the amendment unnecessary; since tests were legal unless they were used for purposes of discrimination, “They do not need to be legalized a second time.”⁶⁵ In reply to Senator Tower’s defense of his amendment as a means of preventing future administrative findings such as that of the examiner for the Illinois Commission, Senator Humphrey pointed out:

There is no power . . . in the bill before us, to take any administrative action. The most the Commission can do is to investigate. The most it can do, if it finds a pattern or practice of discrimination, is to recommend to the Attorney General that there be enforcement. That is a far cry from the original bill, under which the Commission could have taken administrative remedial action. . . .

[T]he test upon which this amendment is based related to Commission action that has enforceability.

All that the National Commission could do under the substitute amendment—I regret to say this; I do not like it—would be to investigate. . . . So the language of this provision is a far cry from the Illinois case.

It is not possible to write into the bill every action that will govern the conduct of an agency. The Senator’s amendment would be much more pertinent and relevant if it were directed to a commission that had enforcement powers. But this Commission does not.⁶⁶

Senator Case, one of the sponsors of the Civil Rights Act, assured the Senate that *Motorola* was not pertinent to Title VII: “It would not be possible for a decision such as the finding of the examiner in the *Motorola* case to be entered by a Federal agency against an employer under title VII.”⁶⁷

63. *Id.* at 13,503-04.

64. *Id.* at 13,504.

65. *Id.*

66. *Id.*

67. 110 CONG. REC. 6415 (1964).

Nevertheless, despite the incorporation of the Tower Amendment into section 703(h) and assurances that the *Motorola* case was irrelevant to a commission without enforcement powers, discrimination in testing has come under investigation by the EEOC in many instances. Testing procedures used for initial hiring, promotion, and union membership selection provide numerous opportunities for deliberate or subtle or even unconscious exclusion of blacks and members of other minority groups. In 1966 the EEOC adopted guidelines on testing and other employee selection procedures. According to the Commission:

The language of the statute and its legislative history make it clear that tests may not be used as a device to exclude prospective employees on the basis of race. The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly afford the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.⁶⁸

The purpose of the guidelines was to discourage both testing which is not related to the specific job applied for and the use of tests which, although "professionally developed," take as their "norm" the performance of a culturally advantaged group.

The Commission was also aware that testing can perpetuate past discriminatory practices; its guidelines stated:

Evaluation of test results is but one of several methods available to an employer in screening applicants and selecting new employees. If the facts indicate that an employer has discriminated in the past on the basis of race, sex or other prohibited grounds, the use of tests in such circumstances will be scrutinized carefully by the Commission.⁶⁹

The Commission guidelines said further: "Employers have discovered that they may be inadvertently excluding qualified minority applicants through inappropriate testing procedures. Indeed such testing may discriminate in employment and promotion just as effectively as the once common 'white only' or 'Anglo only' signs."⁷⁰

It was doubtful that the guidelines could be effective without support from the federal courts. In subsequent decisions involving the use of employment tests, the courts have been liberal in interpreting and supporting the Commission's guidelines. In some early cases intelligence and aptitude tests were voided by the courts when they were found to be culturally biased.⁷¹

68. EEOC, *Guidelines on Employment Testing Procedures* at 2 (1966).

69. *Id.*

70. *Id.*

71. *E.g.*, *Hicks v. Crown Zellerbach Corp.*, 319 F. Supp. 314 (E.D. La. 1970).

In 1970 the Commission adopted guidelines for employee selection that contained stronger, more detailed provisions:

In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by title VII may result in the rejection of many who have necessary qualifications for successful work performance

Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate [Commission Rules and Regulations]. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.⁷²

With the issuance of a uniform set of guidelines the EEOC, according to its former chief of conciliations, "rejected the position that the use of *any* test developed by a professional in the field of institutional or industrial testing was protected under Title VII and thus laid to rest one of the arguments presented by employers in conciliation conferences."⁷³

Although the Commission's guidelines on testing had been used since 1966, the matter remained in contention until the Supreme Court's 1971 decision in *Griggs v. Duke Power Co.*⁷⁴ Here the Court held that what matters is the consequences of testing practices, not the intent. When a test serves disproportionately to disqualify black workers as a group, it must be demonstrated that the test is job-related before it can be lawfully used. Any testing procedure that, although neutral on its face, has a discriminatory effect or perpetuates the effect of previous discriminatory practices constitutes an unlawful practice under *Griggs*. The Court stated: "What is re-

72. Guidelines on Employment Testing Procedures, 35 C.F.R. §§ 1607.1(b), 1607.4(a) (1975).

73. Blumrosen, *Strangers in Paradise: GRIGGS V. DUKE POWER CO. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 61 (1972).

74. 401 U.S. 424 (1971).

quired by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.’⁷⁵

C. Seniority and Job Promotion

The history of the first decade of Title VII litigation indicates that maintaining established seniority systems is as important to labor unions as perpetuating traditional testing procedures is to management. Under section 703(h), preferences in promotion and layoff based upon seniority considerations are not prohibited when the seniority system is not discriminatory.⁷⁶ What is not at all clear under section 703(h) is whether a system of seniority which has the effect of establishing the accumulated benefits of past discriminatory practices as a permanent and systematic advantage to those who have been the recipients of such benefits is a “bona fide” seniority system.

Anticipating the areas where direct challenges to the institutional forms of racial discrimination might arise, congressional advocates of both employers and organized labor attempted, with the adoption of section 703(h) (on testing and seniority), to freeze the racial status quo by sanctioning future employment preferences based on the existing seniority advantages of the white majority, as well as adding section 703(j) to protect these advantages from the possibility of preferential treatment that would readjust the imbalance of the present effects of past discrimination.

The insistence of some congressmen on placing such restrictions on the legislation was undoubtedly in response to section 706(g) of Title VII,

75. *Id.* at 431. The Supreme Court later expanded its interpretation by specifying the appropriate standard of proof in determining whether tests are job related. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

In addition to these Supreme Court decisions there is an extensive body of case law suggesting that the courts have accepted the basic standards of test validation under equal employment law in both the private and public sectors. Among these cases are *Stevenson v. Int'l Paper Co.*, 516 F.2d 103 (5th Cir. 1975); *Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975); *Rogers v. Int'l Paper Co.*, 510 F.2d 1350 (8th Cir. 1975); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Walson v. County School Bd. of Nansemond County*, 492 F.2d 919 (4th Cir. 1975); *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

However, in *Washington v. Davis*, 426 U.S. 229 (1976), a case not involving Title VII, the Supreme Court held that a verbal skills test given to police applicants that disproportionately affected minorities was not violative of equal protection in the absence of a discriminatory intent. The court noted that Title VII employment test standards were more strict than those required by the Constitution.

76. Act § 703(h), 42 U.S.C. § 2000e-2(h) (1970) states in part:

[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. . . .

which deals with the rather broad powers granted to federal courts under the 1964 law:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . .⁷⁷

Despite the limitations contained in section 703(h) and 703(j), the courts have increasingly tended to interpret this "affirmative action" provision of the law as a countervailing source of authority for ordering far-reaching relief upon a finding of unlawful employment practices.

Determining whether seniority or merit systems are "bona fide" has posed one of the most difficult legal and conceptual problems in substantive cases decided under Title VII. Rules of seniority determine an employee's expectations of future promotions as well as the order of furlough and dismissal. An analysis made for the EEOC in 1966 found that 90 percent of existing collective bargaining agreements contained seniority provisions.⁷⁸ A 1975 study reported that provisions on seniority were found in 92 percent of union contracts.⁷⁹

Organized labor has enjoyed great freedom in negotiating the seniority systems that are a major part of union contracts. Prior to the adoption of Title VII, courts were reluctant to disturb provisions in labor agreements established through collective bargaining. By overtly or covertly structuring systems of seniority and promotion on a racially segregated basis, many unions have controlled the level of advancement and wages of black workers and have formalized discriminatory practices. Wherever segregated seniority lines exist, investigation has invariably shown that blacks are limited to the unskilled and semiskilled classifications and that whites are hired into lines of promotion leading to higher paying, skilled jobs. Thus, court decisions under Title VII in the area of seniority have had a profound impact on these racial job practices and have challenged some basic assumptions of labor law. Unions and employers have attempted to defend such seniority systems on the ground that they are established for "valid business reasons" and are therefore bona fide under Title VII.

The application of Title VII to discriminatory seniority systems requires two considerations: first, a determination of what constitutes a bona fide seniority system; and second, fashioning a proper remedy for those systems found not to be bona fide. Since seniority systems vary widely in

77. Act § 706(g), 42 U.S.C. § 2000e-5(g) (1970).

78. Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1 (1967), citing BNA, BASIC PATTERNS IN UNION CONTRACTS, Seniority (1965).

79. BNA, BASIC PATTERNS IN UNION CONTRACTS 85 (1975).

type and purpose, and even a bona fide system may be affected, it is difficult to generalize the validity of each under Title VII, but it is possible to take note of the more common types that violate the Act. In cases where there is an obvious disparity of treatment between whites and blacks or other minority groups—particularly where the jobs performed by both blacks and whites are similar or are functionally related but are classified in separate seniority lines—the seniority system giving superior rights to white workers is not bona fide and is an obvious violation of Title VII.⁸⁰ Where there is a uniform application of seniority rules that are fair on their face yet result in a great disparity between whites and minority groups, the burden of proving that race is a factor in establishing that particular system becomes more difficult.

The cases decided under Title VII have differed in their treatment of discriminatory seniority systems. In the early period of litigation under the 1964 Act, some courts refused to order broad reform of seniority systems that operated to the detriment of black and other minority workers, holding that such systems serve legitimate business purposes aside from their discriminatory effects.⁸¹ But by 1968 courts had begun to order changes in collectively bargained seniority structures that systematically denied black workers equal employment and promotion opportunities.⁸²

In early Title VII litigation, a factor that complicated the determination of whether a particular seniority system was bona fide was the relevance of discrimination that occurred before the effective date of Title VII.⁸³ Courts were not uniform in their determination of the admissibility and probative value of pre-Act discrimination to establish violations after the effective date. Evidence of pre-Act discrimination has been especially crucial in cases where the seniority system was fair on its face and uniformly applied but had the effect of perpetuating past discrimination.

Timothy L. Jenkins, in his study for the EEOC, noted that "it is not the imbalance of the past that violates Title VII but rather the enforced hardships that past acts work in the present."⁸⁴ In cases where years of overt discriminatory policies have denied black workers the right to apply accrued seniority rights to promotion or upgrading to better jobs held by white

80. See, e.g., *Central of Ga. Ry. v. Jones*, 229 F.2d 648 (5th Cir.), cert. denied, 352 U.S. 848 (1956).

81. E.g., *Taylor v. Armco Steel Corp.* 2 Empl. Prac. Dec. ¶ 10,024 (S.D. Tex. 1969), rev'd, 429 F.2d 498 (5th Cir. 1970); *United States v. H.K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968). For the pre-Title VII approach see *Whitfield v. Steelworkers Local 2708*, 263 F.2d 546 (5th Cir. 1959), cert. denied, 360 U.S. 902 (1959).

82. E.g., *United States v. Local 189, United Papermakers*, 282 F. Supp. 39 (E.D. La. 1968), aff'd, 416 F.2d 980 (5th Cir. 1969). In the building trades, referral priorities, comparable to seniority in an industrial setting, have been altered by the courts. See *Local 53, Heat and Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), and *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968).

83. The effective date of Title VII was July 2, 1965. Act § 716(a), 42 U.S.C. § 2000e-15(a) (1970).

84. Jenkins, *Study of Federal Effort to End Job Bias: A History, A Status Report, and A Prognosis*, 14 *How. L.J.* 259, 311 (1968).

workers, the cessation of active discrimination affords little relief. Thus, evidence of discrimination that occurred before the effective date of the Civil Rights Act has been weighed by some courts in an effort to determine whether, although the illegal practices may be discontinued *in futuro*, the present effects of past discrimination continue to limit the opportunities of black workers.⁸⁵ As a result of litigation under Title VII there was increased recognition that seniority rights are not vested and immutable interests,⁸⁶ rather, they are expectations of future employment status which exist subject to operation of law.⁸⁷ Since Title VII renders illegal seniority systems that are not bona fide, those systems which are discriminatory are, therefore, subject to alteration in accordance with the Civil Rights Act of 1964.

Often more difficult than the determination of whether a particular seniority system is discriminatory is the question of a proper remedy. Since seniority systems that determine a worker's opportunity for promotion, transfer, and wage increments vary widely, it was difficult in the early stages of Title VII litigation to ascertain the propriety of specific remedies. The courts and the EEOC have applied a variety of remedies on a case-by-case basis.⁸⁸

85. A recurrent problem has arisen where minority workers have been discriminatorily hired only for jobs in the less desirable lines of progression, and have been "locked in" to that job line because the seniority system is on a departmental basis. Where the discriminatory hiring practice occurred after the passage of the Civil Rights Act, courts are not reluctant to exercise their remedial powers and order broad reform. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). A complication arises when the otherwise neutral seniority system perpetuates discriminatory hiring practices that existed prior to the enactment of Title VII. Some courts, citing the legislative history of section 703(h), have decided that the framers of the Act did not intend to modify existing seniority rights to rectify pre-Act discrimination. See *Jersey Cent. Power & Light Co. v. Local 327, IBEW*, 508 F.2d 687, 704-05 (3rd Cir. 1975), *vacated and remanded sub nom.*, *EEOC v. Jersey Cent. Power & Light Co.*, 425 U.S. 987 (1976). Others have ordered reform, holding that even neutral systems may preserve past intentional discrimination and thus violate section 703(h). *E.g.*, *Rodriguez v. East Tex. Motor Freight*, 505 F.2d 40 (5th Cir. 1974), *cert. granted*, 425 U.S. 990 (1976).

86. See Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967). See also, Gould, *supra* note 78, at 50.

87. In 1971, for example, in *United States v. Jacksonville Term. Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), the court ruled that a railroad seniority system that had been developed through fifty years of collective bargaining agreements was not immune from remedial measures intended to provide relief to black workers. It held that work rules and other provisions in union contracts in the railroad industry were no less susceptible to court ordered remedies and relief from racial discrimination than any other industry. According to the Fifth Circuit, union agreements do not "carry the authoritative imprimatur and moral force of sacred scripture, or even of mundane legislation." *Id.* at 454.

88. In *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 520-21 (E.D. Va. 1968), the court allowed the departmental structure, which had formerly been established along racial lines, to remain intact while providing access for Negroes into the formerly all-white job classifications. In *United States v. Local 189, United Papermakers*, 282 F. Supp. 39 (E.D. La. 1968), the court ordered a complete reorganization of the company's departmental seniority system, finding no valid basis for its maintenance. In the *Newport News Shipbuilding Co.* conciliation agreement of 1966, the Commission and the company agreed to conduct a thorough manpower review of all the company's job classifications to determine the extent of misclassification and underemployment of the company's 5,000 Negro employees. Those found to be underemployed were offered opportunities for upgrading and transfer into different lines of seniority, with guarantees that they would not suffer a cut in pay by transfer and promotion.

What has emerged from case law and the Commission's own experience under the Act are two general types of remedies or approaches to be applied after a seniority system has been found to be discriminatory. The first allows white workers to hold the seniority advantages they have accrued in job-progression lines under the discriminatory system. It leaves "the seniority rights of white workers intact, at least where giving current effect to these rights would not involve the direct application of a racial principle."⁸⁹ Seniority based on positions already achieved in the job hierarchy is preserved, leaving black workers unable to improve their status relative to white incumbents who have benefited from the accrued advantages of a seniority system that previously was discriminatory. This approach, in effect, forgives past discrimination and allows white workers to continue to possess an advantage they presumably could not have achieved under the new law. It limits the mandate of Title VII to order affirmative action to compensate blacks and other minorities for past discrimination. Indeed, this form of relief perpetuates the consequences of the previous unequal system.⁹⁰ The second approach recognizes that a perpetuation of the effects of past discrimination is a continuing violation of Title VII. With this approach, black workers are allowed to bid on new vacancies in formerly all-white job classifications, with bids based on total seniority accrued through length of service with the employer. Although black workers do not displace white workers who were promoted under the past discriminatory system, this remedy limits the future expectations of white workers based upon the previous discriminatory seniority system. Instead, qualified black workers with greater plant-wide seniority are permitted to fill new vacancies in higher job classifications before white incumbents who are senior to the

89. *Title VII, Seniority Discrimination and the Incumbent Negro*, *supra* note 86, at 1268.

90. This "status quo" approach was exemplified in *Whitfield v. United Steelworkers*, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959). Some of the legislative history concerning the adoption of section 703(h) also appears to contemplate that relief was not to disturb existing seniority rights. For instance, an interpretive memorandum prepared by floor leaders Senators Case and Clark stated that:

[I]t has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race.

110 CONG. REC. 7207 (1964).

But, this position is necessarily inconsistent with requiring effective reform of discriminatory seniority systems. See *Title VII, Seniority Discrimination and the Incumbent Negro*, *supra* note 86 at 1271.

The Fifth Circuit Court of Appeals in *Taylor v. Armco Steel Corp.*, 429 F.2d 498, 499 (5th Cir. 1970), expressly repudiated *Whitfield* and noted that seniority provisions in collective bargaining agreements "often . . . carry forward past discrimination inherent in the original establishment of a 'skilled' (white) line of progression and an 'unskilled' (black) line of progression."

black workers in the specified (formerly all-white) job category or line of progression. In Title VII cases this general remedy has been found particularly appropriate in industries where production and other operations have been structured on a departmental basis and where black workers have been limited exclusively to departmental lines of seniority, without opportunity to transfer into all-white departments.⁹¹

Cases decided under Title VII have differed on the extent to which alterations in existing systems are necessary to provide equal employment opportunities for black workers. Even though a particular seniority system may apparently serve many legitimate business purposes, the courts have determined that if the established system creates a disparity in employment opportunities between black and white employees, it violates Title VII.⁹² Generally, the trend in the evolution of Title VII law has been in the direction of broader remedies to eliminate occupational segregation for racial minorities and women. However the Supreme Court will have an opportunity to decide the law in three cases that were pending before the Court in early 1977.⁹³

During its first year of operation the Commission received hundreds of complaints involving discriminatory seniority systems, but while it processed many such charges, it failed to adopt a policy on this matter.⁹⁴ In discussing whether pre-Title VII acts of discrimination may properly be used to determine the validity of a present seniority system, the Commission's *First Annual Report* evaded the issue by stating, "It is clear that cases such as this cannot be solved by a general rule."⁹⁵

However, there was concern within the Commission that its failure to formulate comprehensive guidelines on the propriety of various seniority

91. Also known as the "rightful place" theory, this approach was acknowledged to be an appropriate remedy for rectifying discriminatory seniority systems. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

92. See generally Gould, *Seniority and the Black Worker: Reflections on QUARLES and Its Implications*, 47 TEX. L. REV. 1039 (1969).

93. *International Bhd. of Teamsters v. United States*, No. 75-636; *East Tex. Motor Freight Co. v. Rodriguez*, No. 75-718; *United Airlines, Inc., v. Evans*, No. 76-333.

94. In contrast to its forthright action in issuing comprehensive guidelines on testing, EEOC did not issue guidelines on seniority although it is known that the Commission internally debated the subject for many months. See *Laying Off Employees Pursuant to a Seniority System*, BNA SPECIAL REPORT, No. 36 at 11-13. The EEOC was evidently reluctant to adopt a policy on seniority practices because the issue was politically volatile and because of intense opposition from organized labor. See *Statement by AFL-CIO Executive Council on Seniority and Layoffs*, (Washington D.C., May 6, 1975); *Statement by AFL-CIO Executive Council on Title VII and the Seniority System*, (Chicago, Illinois, July 30-31, 1975). During March 1975, EEOC circulated proposed guidelines on seniority to member agencies of the Equal Employment Opportunity Coordinating Council. U.S. COMM'N ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT* at 509 (1975). EEOC finally deferred to the Coordinating Council, which failed to act on the issue. The Equal Employment Opportunity Coordinating Council was established by section 715 of the Equal Employment Opportunity Act of 1972 and consists of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Rights Commission, and the Chairman of the United States Civil Service Commission.

95. 1 EEOC ANN. REP. 37 (1967).

systems would jeopardize the success of conciliations on such matters and create confusion in the courts. During its second year of operation the Commission became more forthright in dealing with discriminatory seniority systems. To a greater degree than it had been willing to do in its first year, the Commission articulated a set of general principles to help determine the validity of a particular seniority system:

1. A seniority system which has the intent or effect of perpetuating past discrimination is not a bona fide seniority system

2. The fact that a seniority system is the product of collective bargaining does not compel the conclusion that it is a bona fide system.

3. Seniority systems adopted prior to July 2, 1965 (the effective date of the Act), may be found to be discriminatory where the evidence shows that such systems are rooted in practices of discrimination and have the present effect of denying classes of persons protected by the statute equal employment opportunities.

4. No seniority system, whether based on plant-wide, departmental, on-the-job seniority, or otherwise, is *per se*, lawful or unlawful under the Act. The critical factor in analyzing a particular system is the effect of such a system upon the competitive opportunities of employees. Accordingly, the question of whether any given seniority system conforms to the requirements of the Act will be resolved in light of the particular facts and circumstances of the case in which the issue arises.⁹⁶

In contrast, the World War II Fair Employment Practice Committee did not consider discriminatory seniority systems during its investigations or hearings except, to a limited extent, in the railroad industry.⁹⁷ Although black workers have historically been victimized by them, the complexity and sophistication of such systems have often hidden their effects and protected them from critical investigation. Despite Title VII's exemption of bona fide seniority systems from the prohibitions against "unlawful employment practices," it has only been since the enactment of Title VII that the courts have confronted the issue of the discriminatory effects of seniority systems.

D. "Reverse Discrimination"

Section 703(j), the provision that limited the scope of Title VII, was designed to assuage congressional fears of "reverse discrimination" by barring the use of racial quotas in hiring or in union membership:

Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or

96. 2 EEOC ANN. REP. 43-44 (1968).

97. FAIR EMPLOYMENT PRACTICE COMM'N, FINAL REPORT (1946).

percentage of persons of any race . . . employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section or other area.⁹⁸

The courts have recognized in Title VII cases that employment discrimination is by its nature class discrimination and have held that the preferential treatment prohibition of Title VII does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices. In *Local 53 Heat and Frost Insulators v. Vogler*,⁹⁹ the Fifth Circuit upheld, as an appropriate means of overcoming the present effects of past discrimination, injunctive relief which provided for both the immediate admission into union membership of thirteen minority workers who had been denied admission or job referrals and an affirmative action order requiring referral of black and Spanish-surnamed workers on an alternating basis with whites until objective membership criteria were developed.

In *United States v. Local 38, IBEW*,¹⁰⁰ the Sixth Circuit Court of Appeals held that the "anti-preferential treatment" section of Title VII does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices. The court emphasized that "[a]ny other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964."¹⁰¹

A similar conclusion was reached by the Ninth Circuit in *United States v. Ironworkers Local 86*.¹⁰² After the district court ordered the defendants to comply with an affirmative action program,¹⁰³ the construction labor unions appealed the order arguing that it imposed racial quotas and racial preferences in violation of section 703(j). But the appellate court rejected this argument:

There can be little doubt that where a violation of Title VII is found, the court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the nonexistence of future barriers to the full employment of black workers . . . Without such powers, the district court would be unable to effectuate the desire of Congress to eliminate all forms of discrimination.¹⁰⁴

98. Act § 703(j), 42 U.S.C. § 2000e-2(j) (1970).

99. 407 F.2d 1047 (5th Cir. 1969).

100. 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970).

101. *Id.* at 149-50.

102. 315 F. Supp. 1202 (W.D. Wash. 1970), aff'd, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

103. 315 F. Supp. 1202 (W.D. Wash. 1970).

104. 443 F.2d 544, 553 (9th Cir. 1971).

In *NAACP v. Allen*,¹⁰⁵ a federal district court found that the Alabama Department of Public Safety's thirty-seven year old policy of systematically excluding blacks from the force and employing nonwhites in the department only as nonmerit system laborers constituted blatant discrimination. The district court enjoined these practices by the State Highway Patrol and ordered that one black trooper be hired for each white trooper hired, until approximately twenty-five percent of the Alabama state trooper force was comprised of blacks. The same requirement was imposed for department support personnel. The department was further ordered to adopt and implement a program of recruitment and advertising to advise black citizens fully of these new employment opportunities.¹⁰⁶ On appeal, the Fifth Circuit found no abuse of discretion in the district court's order of quota relief to eradicate the continuing effects of past discrimination.¹⁰⁷

Other cases have also established ratios for hiring and training to correct racial imbalances resulting from past discrimination.¹⁰⁸

E. Enforcing Title VII

Despite the exceptions and limitations incorporated in the 1964 Act, the courts have creatively interpreted Title VII and have found its meaning in the basic, underlying purposes of the statute. The first stage consisted of litigation to define discrimination in employment and to establish the scope of a plaintiff's claim. Employers and labor unions who were defendants in Title VII cases repeatedly challenged the right to bring class action suits, but

105. 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974).

106. *Id.* at 706.

107. *Id.* at 707.

108. Decisions ordering a preferential remedy include *Southern Ill. Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); *United States v. Wood, Wire and Metal Lathers Local 46*, 328 F. Supp. 429 (S.D.N.Y. 1971); *United States v. Central Motor Lines, Inc.*, 338 F. Supp. 532 (W.D.N.C. 1971); *United States v. Sheet Metal Workers Local 10*, 3 Empl. Prac. Dec. ¶ 8068 (D.N.J. 1970). In *Carter v. Gallaher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972), the court held that an absolute preference was unconstitutional but sustained affirmative action. *See also* *Associated Gen. Contractors of Mass. v. Altshuler*, 361 F. Supp. 1293 (D. Mass. 1973), *aff'd*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), and *Contractors Ass'n of E. Pa. v. Shultz*, 442 F.2d 159, 173 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

Those who attack the use of "quotas" often argue that affirmative action programs will penalize innocent whites who are not responsible for past discriminatory practices. This argument turns on the notion of individual rights and sounds very moral, but it ignores basic social reality. For example, black workers have not been denied jobs as individuals but as a class—no matter what their personal merits and qualifications. Women have not been denied training and jobs as individuals, but as a class regardless of their individual talent or lack of it. Correspondingly, white males as a class have benefitted from this systematic discrimination.

The Supreme Court held in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), that exceptions such as the bona fide occupational qualification provision in section 703(e) and the seniority provision in 703(h) do not limit the authority of the courts to order adequate remedies. The Court also affirmed the judicial application of a slightly modified version of the affirmative action provision in section 706(g) in awarding retroactive seniority.

such efforts to prevent attacks against institutionalized forms of discrimination were rejected in the early development of Title VII litigation.

In *Hall v. Werthan Bag Corp.*¹⁰⁹ the district court stated: "Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all members of the class."

The Fifth Circuit, in *Oatis v. Crown Zellerbach Corp.*,¹¹⁰ agreed that racial discrimination is class discrimination and held that "to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice . . ." ¹¹¹

The federal courts have also rejected a myriad of procedural and technical defenses invoked by defendants to limit the effectiveness of court-ordered remedies in Title VII cases. In *Culpepper v. Reynolds Metals Co.*¹¹² the approach of the federal judiciary in liberally construing Title VII in order to carry out the legislative intent was formulated in the following terms:

Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics.¹¹³

The courts were equally responsive in interpreting Title VII prohibitions against employment discrimination on the grounds of sex. In *Weeks v. Southern Bell Telephone & Telegraph Co.*,¹¹⁴ the Fifth Circuit emphasized that women are to be given equal treatment and rejected the company's defense that it excluded women from desirable work because the jobs were either dangerous or unclean:

Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous,

109. 251 F. Supp. 184, 186 (M.D. Tenn. 1966).

110. 398 F.2d 496 (5th Cir. 1968).

111. *Id.* at 499.

112. 421 F.2d 888 (5th Cir. 1970).

113. *Id.* at 891.

114. 408 F.2d 228 (5th Cir. 1969).

obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on an equal footing.¹¹⁵

Since EEOC lacked enforcement power, the responsibility for enforcing Title VII fell to the federal courts and a significant new body of equal employment law developed. This was due in large part to the crucial role of the civil rights bar in pressing for compliance on behalf of private litigants intent on obtaining their rights and also to the courts' changing perception of racial matters in the aftermath of *Brown v. Board of Education*.¹¹⁶ Thus, ironically, the many efforts to weaken Title VII by denying the EEOC enforcement powers turned out to be of significant benefit. Instead of an inexperienced commission of bureaucrats appointed for short terms and subject to political and budgetary pressures from hostile congressional committees and private interest groups, the responsibility for shaping the basic law of Title VII was assumed by federal judges who were appointed for life.

Nevertheless, among the most important considerations in evaluating Title VII as an agent for social change are the methods used to enforce the statute. As already noted, in order to obtain congressional approval for a law prohibiting discrimination in private employment, numerous compromises were made that severely restricted the power of the EEOC. Among the legislative expedients were the Mansfield-Dirksen amendments, one of which denied the Commission cease-and-desist powers and also prohibited the Commission from taking direct action in federal court to prosecute violators of Title VII.¹¹⁷ The only exception to this rule under the 1964 Act was section 706(i), which stated: "In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order."¹¹⁸ Other than this, the Commission was restricted to *amicus curiae* presentations in the courts.

As a result, the Commission acted as a mere screening agent for potential court suits. In retrospect, it is evident that the most important aspect of Title VII was that it established a legal basis for private parties to initiate litigation charging employment discrimination. Furthermore, the principal means of enforcement has been through suits brought by victims of discrimination.

To be sure, the original Act provided that whenever the Attorney General has "reasonable cause" to believe that there exists a "pattern or practice of discrimination intended to deny the full exercise of an individual's

115. *Id.* at 236.

116. 347 U.S. 483 (1954).

117. *See, e.g.,* *Thomton v. East Texas Motor Freight, Inc.*, 454 F.2d 197 (5th Cir. 1970).

118. Act § 706(i), 42 U.S.C. § 2000e-5(i) (1970).

rights under Title VII, he may sue to enjoin the discrimination.¹¹⁹ In reality, however, litigation by the Attorney General under Title VII was not a major or an effective enforcement method because the Justice Department filed so few suits and even settled a number of those prior to trial, obtaining only minimal benefits for the complainants.¹²⁰ The complicated and time-consuming nature of section 707 suits, in conjunction with the small staff and inadequate funding of the Civil Rights Division of the Department of Justice, has been suggested as a reason for the Department's laxity. But these factors alone do not explain the almost twenty-five-to-one ratio of private suits filed under section 706 to Justice Department suits filed under section 707 from the effective date of the law to 1971, particularly since in many of the private suits the courts have found patterns or practices of discrimination.¹²¹

The Justice Department was able to file pattern or practice suits on its own authority without having to process charges through the EEOC or the Labor Department's Office of Federal Contract Compliance, but the statute gave special weight to those agencies' referrals of cases to the Attorney General for government action. Nevertheless, of the 115 cases referred by the EEOC to the Justice Department from July 1968 to May 1970, only eight lawsuits were filed by the Department,¹²² and a total of forty-eight cases previously referred from the Commission to the Department during the period 1966 to 1968 were returned to EEOC by April 25, 1969, with no action taken.¹²³ Among the most important cases originally rejected by the Department of Justice were those against Newport News Shipbuilding and

119. Act § 707(a), 42 U.S.C. § 2000e-6(a) (1970).

120. See, e.g., *United States v. Wood, Wire and Metal Lathers Local 46*, 2 Empl. Prac. Dec. ¶ 7,749 (S.D.N.Y. 1972).

121. This estimate was made by the NAACP labor department based upon information provided by EEOC.

122. U.S. COMM'N ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT*, at 398 (1970).

123. Interview with Russell Specter, Acting General Counsel, EEOC, in Washington, D.C. (Feb. 6, 1970). In addition to referrals from EEOC, the Justice Department initiated litigation based upon its own investigations. From 1966 to 1973, the Department filed a total of 101 lawsuits. The cumulative figure includes EEOC referrals.

Number of Cases Filed by the Department of Justice
Under Title VII by Year

1966	2
1967	8
1968	25
1969	13
1970	8
1971	16
1972	16
1973	13

Source: Employment Section, Civil Rights Division, U.S. Department of Justice.

Drydock Co.¹²⁴ and Colgate-Palmolive,¹²⁵ which were subsequently filed as private party suits.

The federal government was not an initiating party in any of the Title VII cases decided by the Supreme Court through 1976. Moreover, in *Crosslin v. Mountain States Telephone & Telegraph Co.*,¹²⁶ the first Title VII suit decided by the Supreme Court, the government argued against the Court's granting *certiorari* in the first instance. The National Association for the Advancement of Colored People, in its *amicus curiae* brief supporting the plaintiff's position, contended:

The Department of Justice has yet to establish an adequate program to compel compliance with Title VII, having filed only 56 cases under Section 707 of the Title since July 2, 1965, the date Title VII became effective. On the other hand, more than 1200 class suits have been filed by private persons under Section 706. The Department of Justice has shown little interest in the prosecution of this litigation . . . and has filed briefs as *amicus curiae* in only a handful of cases.¹²⁷

The minimal number of lawsuits initiated by the Department of Justice on recommendation of the EEOC for the fiscal years 1970 and 1971 is noted by the United States Commission on Civil Rights: "A total of 26 EEOC cases were accepted for referral by the Justice Department in Fiscal Year 1970. Only two of these resulted in the filing of a lawsuit by the Department. In Fiscal Year 1971 only one EEOC case was accepted for referral by the Department of Justice."¹²⁸ And the Commission commented elsewhere, "Respondents appear to be less concerned than before about the prospect of a lawsuit by the Department of Justice, particularly since Justice has concentrated on actions that establish law rather than suits to secure individual rights; and, to date, Justice has initiated very few suits."¹²⁹ An analysis in the *Harvard Law Review* concluded that:

[T]he Justice Department has taken a restrictive view of its role in Title VII enforcement. It has seen a significant part of its role to be securing favorable court interpretations of the statute, while deferring in large part to the EEOC and the Office of Federal Contract Compliance for actual enforcement of the Act. Within the limited role it has defined for itself, the Justice Department has done an excellent job; it claims not to have lost a case, obtaining reversal on appeal of its few losses in the district courts. *Yet it makes little*

124. *Darden v. Newport News Shipbuilding & Drydock Co.*, No. CA 95-69-NN (E.D. Va., filed Aug. 9, 1969).

125. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

126. 422 F.2d 1028 (9th Cir. 1970), *cert. granted, vacated and remanded*, 400 U.S. 1004 (1971).

127. Brief of NAACP as *amicus curiae* at 4 n.2, *Crosslin v. Mountain States Tel. & Tel. Co.*, 400 U.S. 1004 (1971).

128. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER at 29 (1971).

129. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT at 350 (1970).

sense for the Justice Department to leave to the EEOC a primary enforcement role under the Act, for that agency has almost no enforcement powers.¹³⁰

The *Harvard Law Review* study underscored the basic problem of the statutory restrictions of Title VII in obtaining implementation of the Act's provisions prohibiting "unlawful employment practices." With the "limited role" the Department of Justice has chosen to play, and given the fact that the EEOC was granted neither enforcement powers nor (until 1972) the right to initiate litigation on its own, the burden of enforcing the law fell on the courts through suits brought by private individuals, frequently with the assistance of civil rights organizations and public interest law centers.¹³¹ But private parties and civil rights organizations do not have the vast resources required to eliminate the extensive patterns of discrimination that exist throughout much of the economy. Only the government has the necessary resources, including federal investigative agencies, to attack all practices of employment discrimination maintained by national corporations and organized labor. Generally, the individual right to sue, standing alone, is a poor method of enforcing social legislation designed to alter institutional patterns of behavior.

EEOC chairman William H. Brown III testified before a congressional committee that:

[T]he disadvantaged individual is told that in the pinch he must become a litigant, which is an expensive proposition and traditionally the prerogative of the rich. Thus minorities are locked out of the proffered remedy by the very condition that led to its creation, and the credibility of the Government's guarantees is accordingly diminished.¹³²

The law as then structured, he said, is "seriously deficient," and he predicted that "neither minorities nor employers will regard the title with the respect due to law until realistic avenues of enforcement are made available."¹³³

After passage of the Civil Rights Act of 1964, the next major legislative battles took place in the area of finding "realistic avenues of enforcement." By the end of the first year that Title VII was operative—mid-1966—it became evident, from the nature of the many charges filed with EEOC, that elimination of discriminatory job practices in recruitment and dismissal

130. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1231-32 (1971) (footnotes omitted, emphasis added).

131. Among these are the National Association for the Advancement of Colored People, NAACP Legal Defense and Educational Fund, Inc., various local groups affiliated with the Lawyers Committee for Civil Rights Under Law and the National Employment Law Project.

132. *Equal Employment Opportunities Enforcement Procedures: Hearings on H.R. 6228 and H.R. 13517 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong., 1st & 2d Sess. 34 (1969-70).

133. *Id.*

would affect only the tip of the iceberg. In its *First Annual Report*, covering the fiscal year ending June 30, 1966, the Commission noted that:

Most of the cases handled in EEOC's first year point up patterns of discrimination toward workers already on the job. Of charges analyzed, only 30% dealt with hiring and firing complaints; most of the rest dealt with problems of promotion, training and apprenticeship, segregated facilities, wage differentials, seniority and benefits.¹³⁴

It was this uncovering of "patterns of discrimination toward workers already on the job" that led to stiffened resistance among both employers and organized labor against broadening the Commission's enforcement powers through amendments to the Act. The United States Commission on Civil Rights reported:

EEOC enforcement activity has been largely ineffective as a remedy for employment discrimination. . . . The damaging effects of lack of enforcement powers on EEOC's complaint handling procedures have been generally acknowledged. . . . According to the Commission, it is "currently the only regulatory agency in the Federal structure that must function without such [enforcement] power."

. . . [I]ts lack of enforcement power is the principal reason its attempts at conciliation have been frustrated.¹³⁵

III

THE STRUGGLE TO AMEND TITLE VII

In view of the many limitations and inadequacies of Title VII, it is not surprising that efforts to improve the statute and to give direct enforcement powers to the EEOC were begun soon after adoption of the original Act.¹³⁶

In 1967 the chairman of the EEOC, Stephen N. Shulman, stated: "We're out to kill an elephant with a fly gun."¹³⁷

In 1969, EEOC Chairman Brown acknowledged that the Commission was "plagued with deficiencies"¹³⁸ and that aggrieved individuals who filed

134. 1 EEOC ANN. REP., *supra* note 95, at 17.

135. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT at 109 (1970).

136. Among these was a bill introduced by James Roosevelt in 1965, H.R. 8998, 89th Cong., 1st Sess. (1965), *Equal Employment Opportunity: Hearings on H.R. 8998 and H.R. 8999 Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor*, 89th Cong., 1st Sess. (1965), which, in addition to extending the coverage of Title VII, proposed to grant the EEOC the authority to issue cease-and-desist orders enforceable in federal courts. In 1967 bills were introduced in the House by Representative Emmanuel Celler, H.R. 5700, 90th Cong., 1st Sess. (1967), and in the Senate by Senator Philip A. Hart, S. 1026, 90th Cong., 1st Sess. (1967), to provide cease-and-desist powers to the Commission. These proposals were defeated, as were other measures introduced in 1968 [S. 3465, 90th Cong., 2d Sess. (1968)] and in 1969. See *Equal Employment Opportunities Enforcement Act: Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. (1969).

137. Wall St. J., Apr. 12, 1967, at 1, col. 6.

138. Wash. Post, Aug. 30, 1969, at 8, col. 1.

complaints with the EEOC were "becoming impatient and disillusioned with the prospect of relief under this . . . program."¹³⁹ Toward the end of 1971 the Commission was handicapped by a backlog of more than 23,000 unresolved complaints of discrimination, and the Commission on Civil Rights criticized the EEOC for its failure to enforce conciliation agreements as well as for its inadequate administrative procedures.¹⁴⁰

The Commission's lack of litigation power often had serious consequences for aggrieved workers. For example, Earl Johnson, a black train porter employed by Seaboard Air Line Railroad, applied for a promotion to conductor in 1965. Seaboard employed only white men as conductors, and he was refused the job. Soon thereafter he filed a complaint with the EEOC. The Commission found for him but was unable, through the conciliation process, to persuade the company to promote him. Because it is expensive to bring a case to the federal courts and because Johnson did not have the necessary funds, there was a four-year search for a law firm that would file his case in court without charge. Johnson never received his promotion and his case was never settled; he died during the litigation.¹⁴¹

Because of the EEOC's administrative and enforcement difficulties, and because lawsuits are both lengthy and costly (particularly for private individuals), efforts continued to be made in Congress to amend Title VII in order to achieve the purposes for which it was originally enacted. Soon after the initial legislative proposals to amend the Act were introduced, it became evident that employers were vigorously opposed to any measure designed to increase the effectiveness of the law. Business interests conducted an intensive lobbying campaign against the various proposals to extend Title VII coverage, provide enforcement power to the EEOC, or strengthen the antidiscrimination statute in any way.

The testimony of James W. Hunt, labor relations manager of the United States Chamber of Commerce, at Senate hearings was typical of the continuing employer opposition. "The proposed amendments . . . are unnecessary," he said, and he argued:

Instead of a friendly climate where the parties sit down to reason together, [the amendments] would substitute a formal adversary proceeding in which public charges and countercharges are disputed by the parties. Rather than searching for areas of agreement so as to reach a settlement, the parties must center on substantiating the hearing record for possible judicial appeal It would create resistance where none presently exists, and reverse the trend toward successful accomplishment of Title VII goals through mediation.¹⁴²

139. *Id.*

140. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER, at 28-30 (1971). See also, *Equal Opportunities*, NEW REPUBLIC, Oct. 30, 1971, at 10.

141. Rosenbaum, *At Last a Weapon for the Commission*, N.Y. Times, Feb. 27, 1972, sec. 4 at 3, col. 1.

142. *Equal Employment Opportunities: Hearings on S. 1308 Before the Subcomm. on Em-*

Hunt insisted that voluntary compliance was meeting with "great success."¹⁴³

Organized labor, for its part, would not support measures intended to give the Commission enforcement powers without a concurrent elimination of other vital aspects of the law. The AFL-CIO, which had supported the enactment of Title VII, later opposed certain major aspects of its enforcement.¹⁴⁴ There is reason to believe, given the many references to state fair employment practice laws in the legislative debates on the 1964 Act,¹⁴⁵ that organized labor believed it was supporting only a federal version of the ineffective state fair employment laws, which had rarely created any serious problems for discriminatory labor unions.

Since the inception of Title VII, the AFL-CIO has had a highly contradictory response to the statute. The labor federation supported the 1964 Act at first, but then in case after case its affiliates defended practices that were found by the EEOC and the courts to violate the law. The AFL-CIO was part of a legislative coalition, the Leadership Conference on Civil Rights,¹⁴⁶ but it did not hesitate to join with anti-civil rights forces to limit the effectiveness of Title VII after its adoption.

When it became clear during 1966-1968 that the private right to sue and the resulting federal court decisions made possible for the first time the enforcement of legal prohibitions against job discrimination, especially in

ployment, Manpower and Poverty of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 150, 152 (1967) (statement of James Hunt).

143. *Id.* at 153.

144. Before the courts interpreted the application of Title VII to seniority issues, the AFL-CIO exerted much pressure upon the EEOC to abstain from applying Title VII in the matter of discriminatory seniority systems. An example of this was the conference on May 5, 1966, when a group headed by William Schnitzler, secretary-treasurer of the AFL-CIO, and Thomas E. Harris, general counsel of the AFL-CIO, met with the EEOC, and together with the representatives of several international unions insisted that the Commission must refrain from acting on complaints filed by black workers involving discriminatory job classifications and seniority provisions in union agreements. The Commission, and later the courts, rejected this view. At the end of its second fiscal year the EEOC stated that "in various Commission decisions during the fiscal year, certain broad principles were articulated which are applicable to a determination of whether a seniority system meets the requirements of section 703(h).

1. A seniority system which has the intent or effect of perpetuating past discrimination is not a bona fide seniority system within the meaning of section 703(h) of Title VII.

2. The fact that a seniority system is the product of collective bargaining does not compel the conclusion that it is a bona fide system."

2 EEOC ANN. REP., *supra* note 96, at 43.

The refusal of AFL-CIO unions to eliminate discriminatory seniority structures in many industries led to extensive litigation, even after the federal courts repeatedly held certain traditional seniority provisions in labor-management agreements to be unlawful until Title VII.

145. See note 8 *supra*.

146. The Leadership Conference on Civil Rights developed out of the 1950 National Emergency Civil Rights Mobilization, which brought more than four thousand delegates to Washington to seek executive and legislative action against employment discrimination. By the time of the congressional debates on amending Title VII, the Leadership Conference was a legislative coalition of some eighty national organizations, including a wide variety of civic, fraternal, labor, religious, and civil rights groups. Its chairman was Roy Wilkins, Executive Director of the NAACP.

relation to traditional union seniority systems and job assignment practices, organized labor sought to destroy that right.

As black workers began to use the newly available private right to sue established by section 706 of Title VII, and the federal courts ordered broad remedies directly affecting traditional labor practices in many unionized industries, organized labor not only resisted compliance with the law,¹⁴⁷ but also altered its attitude toward further Title VII legislation. Beginning in 1966, when bills were first introduced in Congress proposing to give the EEOC authority to issue cease-and-desist orders, and through 1968, the AFL-CIO refused to support such measures unless the private right to sue provision, the major means of enforcing the law, was eliminated from Title VII.

In this two-year period the Leadership Conference on Civil Rights took no official position on pending legislation to strengthen the employment section of the Act because the organization could not resolve its internal conflict over the private right to sue. The NAACP and other civil rights groups insisted on retaining that right, but the AFL-CIO demanded that the right of private suit be stricken from the statute before it would agree to proposals granting cease-and-desist powers to the EEOC. This was a significant development, as the AFL-CIO maintained one of the most effective lobbying operations in Washington.

Joseph L. Rauh, Jr., Counsel for the Leadership Conference, comments on the prolonged struggle:

147. Respondents—both employers and labor unions—often delayed relief to minority workers for extensive periods by introducing complex challenges of a procedural nature. A West Coast case demonstrates how change was postponed by creating delays in the courts. Black longshoremen in Portland, Oregon, filed charges with the EEOC against the International Longshoremen's and Warehousemen's Union, an independent labor organization whose president is Harry Bridges. On November 2, 1967, the first charge of racial discrimination was served on the ILWU. For the next seven years, the international union, together with its local affiliate and the employers association, succeeded in preventing the courts from considering the merits of the case. After a lower court finding on procedural issues, the case was appealed to the Court of Appeals for the Ninth Circuit, which in June 1972 reversed and remanded. At trial, in August 1974, the judgment was against the plaintiffs. In November 1974, the black workers filed for a new trial, alleging falsification of records; the motion was denied, and the plaintiffs again appealed to the ninth circuit. *See Gibson v. Local 40, Super-Cargoes & Checkers*, 4 EPD ¶ 7911 (D. Ore. 1970); 465 F.2d 108 (9th Cir. 1974). In November 1976, the appeals court, having found that the blacks who attacked the system of hiring at the port had established a prima facie case of discrimination in violation of Title VII, reversed and remanded. 543 F.2d 1259 (9th Cir. 1976). Ten years after the filing of the original charge, this case was again scheduled for trial in the district court.

A close observer of the West Coast longshoremen's union writes that:

Despite the policy of the national union, reaffirmed in convention resolutions time after time . . . as recently as the sixties there were ports on the Coast where for days you could watch ships being loaded without once seeing a black longshoreman. In some, a remote lumber port up in the Northwest like Coos Bay, you might believe the explanation that the port was all-white because there weren't any blacks in the community. But in others—Portland and Los Angeles, for example—the lily-white labor force was obviously the product of a policy of exclusion.

C. LARROWE, HARRY BRIDGES: THE RISE AND FALL OF RADICAL LABOR IN THE U.S. 366-67 (1972).

We realized, certainly by 1966, that the absence of cease-and-desist powers was having a very bad effect on the enforcement of Title VII. Naturally, the simplest remedy was to restore the cease-and-desist powers that Senator Dirksen had removed as the price of enactment of Title VII. In 1966 Congressman Augustus Hawkins of California put in a bill doing just that. Shortly thereafter the AFL-CIO indicated that they would not support the Hawkins bill unless the private right of suit was removed from Title VII. Their explanation was that they did not want to be subject to attack by many different agencies of the government. They wanted the whole thing in one place, they said. The AFL-CIO insisted on this as the price for their support of cease-and-desist powers. Jack Greenberg of the Legal Defense Fund, Clarence Mitchell of the NAACP, Tom Harris of the AFL-CIO, and I worked out a rather dubious compromise weakening the right of the individual to sue and making some of the other changes requested by the AFL-CIO. But this compromise got nowhere in Congress in 1967. Then in 1968 Greenberg wrote me a letter withdrawing from the compromise agreement and insisting on retaining the undiluted right of private suit.

I really had my back to the wall. Both Greenberg and the NAACP insisted on the private right to sue and the AFL-CIO would not support cease-and-desist with the private right to sue in the legislation. Sometime in 1968 or 1969, after it became clear that civil rights organizations could not agree to bargaining away the private right to sue, the AFL-CIO changed its position and said they would be willing to support cease-and-desist without impairing the private right to sue if the Office of Federal Contract Compliance were transferred to the EEOC. Even this compromise wasn't universally accepted. Marian Wright Edelman, director of the Washington Research Project, strongly opposed the transfer of OFCC, as did the Americans for Democratic Action and other organizations. Even though I personally opposed the transfer of OFCC, I accepted the compromise and loyally tried to get the OFCC transferred as the price of AFL-CIO support for a bill that would give cease-and-desist powers to the EEOC.¹⁴⁸

The letter Rauh refers to, from Jack Greenberg, Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., explained the importance of private party suits to civil rights organizations:

You will recall the problems the Leadership Conference faced last year when some groups opposed private suit as a means of enforcing Title VII and insisted as a price of acquiescence for the EEOC power to enter cease and desist orders that private suit be abolished.

I reluctantly agreed to the bill that finally emerged but we clearly contemplated that all of us would reassess our positions should the matter come up at some subsequent Congressional session. Moreover, as you know, the Attorney General and the Civil Rights Division went along with us most reluctantly and were rather surprised that we had given up as much as we had. Continuing experience with enforcement of Title VII persuades me that I was definitely wrong in agreeing to the compromise. We have since that time obtained the decision of the United States District Court in

148. Interview with Joseph L. Rauh, Jr., in Washington, D.C. (Jan. 4, 1973).

Virginia in the Philip Morris case which is a major advance in the law. We have, moreover, continued to bear the brunt of litigation under Title VII.

Cease and desist powers and government litigation are essential but I think it is equally essential that they be supplemented by private action and I hope the Leadership Conference will come out with a bill this time which will give the government increased powers but at the same time not deprive the Negro workers' lawyers of the right to proceed without regard to what the government decides to do or, indeed, has the capacity to do.¹⁴⁹

The same conflict surfaced again over a similar bill which Senator Joseph Clark of Pennsylvania introduced in 1968. Clark's bill, like the earlier ones, was defeated.

At the opening of the Ninety-First Congress in January 1969, Senator Philip A. Hart of Michigan introduced a bill to give the EEOC cease-and-desist powers while at the same time retaining the right of private party suits under Title VII. When that bill did not pass, Senator Hart and thirty-three co-sponsors introduced an omnibus civil rights bill proposing cease-and-desist powers.¹⁵⁰ This also failed, but the issue of the private right to sue remained in contention. Later in 1969 a new bill (S. 2453)¹⁵¹ was introduced by Senator Harrison A. Williams of New Jersey and Senator Jacob K. Javits of New York which again proposed cease-and-desist powers for the EEOC without impairing the private right to sue. It was this bill that was to be the subject of intense debate for the remainder of the Ninety-First Congress.

Civil rights groups concentrated their efforts on retaining the provision granting individual victims of discrimination the right to go to court. At Senate subcommittee hearings Greenberg testified that maintenance of the private right to sue was crucial for effective enforcement of Title VII:

[O]ur experience in the field of racial discrimination demonstrates that this Bill wisely preserves the rights of private suits alongside administrative enforcement by the government. The entire history of the development of civil rights law is that private suits have led the way and government enforcement has followed.¹⁵²

The chairman of the EEOC also testified that he thought the private right to sue should be retained: "Individual initiative in the courts has historically furnished the main impetus to civil rights progress, and is indispensable as a complementary tool in building a body of Title VII law."¹⁵³

The Williams-Javits bill (S. 2453) contained another provision that was to become a focus for continuing controversy. It called for the transfer of the functions of the Office of Federal Contract Compliance (OFCC) to the

149. Copy in files of NAACP Legal Defense and Educational Fund, Inc. (New York).

150. See S. 2029, 91st Cong., 1st Sess. (1969).

151. 91st Cong., 1st Sess. (1969).

152. *Hearings on S. 2453, supra* note 136, at 71.

153. *Id.* at 41.

EEOC. The reason for contention here was that such a transfer was widely regarded as a means of diluting the regulatory powers of the OFCC.

The OFCC was established by executive order to enforce the nondiscrimination clause in contracts awarded by federal agencies to private companies providing goods and services to the federal government and prohibited job discrimination by government contractors and subcontractors. Although five Presidents had issued eight executive orders on the subject,¹⁵⁴ the contractual prohibitions against employment discrimination had not been enforced. The 1971 report of the United States Commission on Civil Rights observed critically that "[t]he failure of OFCC to provide specific guidance on affirmative action requirements gave rise to the use of indefinite or otherwise ineffectual standards by contracting agencies," and that "[i]n many cases OFCC was unaware of the fact that the agencies were not operating in accordance with its regulations and in some cases where the facts were known, it failed to insist upon strict compliance with policies."¹⁵⁵

Despite the repeated failure of the OFCC to fulfill its responsibilities in enforcing executive orders, its potential as a weapon for eliminating discrimination in the area of government contracts remained enormous. As a result, much of the debate during the attempt to amend Title VII between 1968 and 1972 centered on the attempt to nullify the threat of federal contract sanctions.

Mass demonstrations during the 1960s in many cities protesting widespread job discrimination at federally-funded construction sites and a growing number of court decisions that found building trades unions in violation of the law¹⁵⁶ finally caused the government to take action through the

154. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941); Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943); Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951); Exec. Order No. 10479, 18 Fed. Reg. 4899 (1953); Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961); Exec. Order No. 11114, 28 Fed. Reg. 6485 (1963); Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965); Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967).

155. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT at 51 (1971).

156. Among the cases involving the discriminatory racial practices of building trades unions are the following: *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969); *Local 53, Heat and Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *NLRB v. Local 2, Plumbers*, 360 F.2d 428 (2nd Cir. 1966); *United States v. Plumbers Local 73*, 314 F. Supp. 160 (S.D. Ind. 1969); *EEOC v. Plumbers Local 189*, 311 F. Supp. 468 (S.D. Ohio 1970), *vacated*, 438 F.2d 408 (5th Cir. 1971); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968); *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967); *Lewis v. Ironworkers Local 86*, 2 Fair Empl. Prac. Cas. 700 (Wash. Super. Ct.), *appeal dismissed*, 3 Fair Empl. Prac. Cas. 344 (Wash. Super. Ct. 1970). A report released on September 28, 1969, by the EEOC, based upon a nationwide reporting system known as the Local Union Report EEO-3, revealed a pattern of black exclusion from building trades craft unions. Black workers comprised 0.2 % of the Sheet Metal Workers, 0.2 % of the Plumbers Union, 0.4 % of the Elevator Contractors, 0.6 % of the Electrical Workers, 1.6 % of the Carpenters, 1.7 % of the Iron Workers, and 0.9 % of the Asbestos Workers' Union. See EEOC, *Local Union Equal Employment Opportunity Report*, EEO-3, at 2 (1967). The 1970 report observed that "almost three of every four Negroes in the building trades were members of the Laborers Union." EEOC, *Local Union Equal Employment Opportunity Report*, EEO-3, at 1 (1968). A year later, on February 8, 1971, the EEOC released the results of the 1969 Local Union Report EEO-3, con-

OFCC. With the ensuing developments the potential of the OFCC became evident. In 1967, the OFCC began to impose new affirmative action standards requiring the employment of a minimum number of black workers and members of other minority groups in specific crafts at each stage of construction in certain designated federal projects.¹⁵⁷

Labor unions in the construction industry have traditionally been among the most intransigent of all unions in excluding black workers and members of other minority groups from desirable jobs. Executive Order 11246,¹⁵⁸ which went into effect on October 24, 1965, strengthened prohibitions against discrimination in government employment and in employment by government contractors and subcontractors. It also contained provisions specifically requiring equality of job opportunity on federally-assisted construction.

In an attempt to begin enforcement of these provisions, the Office of Federal Contract Compliance developed "special area plans" requiring minimum numerical goals and timetables for the employment of minorities hitherto barred from jobs in the construction industry. As part of the "Operational Plan for Construction Compliance," the government for the first time threatened to withhold federal construction funds in four cities: St. Louis, San Francisco, Cleveland, and Philadelphia.¹⁵⁹ (In Seattle, a federal court imposed a similar plan in 1967.) This approach, using stated numerical goals for minority hiring to be achieved within a specific time period, has come to be known as the Philadelphia Plan.¹⁶⁰ Basic information was to be gathered continuously on the available work force in the industry, population ratios, recruitment sources for minority participation, and the anticipated volume of construction in the geographic area. Under that plan the goal was to develop a minimum of 20 percent minority participation in construction jobs within a four-year period. The Philadelphia Plan, which contained affirmative action requirements and potentially provided a basis for job equality in the construction industry, provoked the bitter opposition of the building trades unions and the AFL-CIO.¹⁶¹

cluding that the percentage of blacks in the skilled craft occupations had actually decreased. See *N.Y. Times*, Feb. 9, 1971, at 20, col. 3.

157. See, Jones, *The Bugaboo of Employment Quotas*, 1970 *Wis. L. Rev.* 341.

158. Exec. Order No. 11246, 30 *Fed. Reg.* 12319 (1965).

159. U.S. COMM'N ON CIVIL RIGHTS, *FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT* at 53 (1971).

160. OFCC Order, Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally Involved Construction to the Heads of All Agencies, June 27, 1969. The Order covered construction in five Pennsylvania counties in the Philadelphia area: Bucks, Chester, Delaware, Montgomery, and Philadelphia. 34 *Fed. Reg.* 9957.

161. Opponents of affirmative action programs containing numerical goals have argued that the Philadelphia Plan was created by the Nixon Administration to provoke hostility between organized labor and the black community. (See, for example, Rustin, *The Blacks and the Unions*, *HARPER'S*, May 1971, at 73.) But this argument ignores history and is contradicted by the facts. Nixon did not create the Philadelphia Plan. The use of goals and timetables to enforce the legal prohibitions against job discrimination in the construction industry had its origin in a fourteenth amendment case, *Ethridge v. Rhodes*, 268 *F. Supp.* 83 (S.D. Ohio 1967). In 1967 the remedy developed in *Ethridge* was in-

Because of their opposition to the OFCC's special area plans, the politically powerful building trades unions and the AFL-CIO insisted that the 1969 Williams-Javits bill to give cease-and-desist powers to EEOC should also contain a proposal to transfer the OFCC to EEOC. Organized labor believed that the transfer would sufficiently weaken OFCC so that it would be administratively unable to enforce its new approach. If the re-

incorporated by the Department of Labor (under a Democratic administration) into the Cleveland Plan, the prototype of the Philadelphia Plan, which contained minimum percentages of minority workers in specified crafts as a condition for contract awards. The Cleveland Plan was challenged in the courts and in *Weiner v. Cuyahoga Community College Dist.*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970), the Ohio Supreme Court affirmed the decision of the Ohio State Court of Common Pleas, which held that:

[T]he Civil Rights Act of 1964, Title VII is constitutional. The Act provides a remedy for a long-continued denial of vital rights of minorities To assure obedience to the law is a duty inherent in the government. It may reasonably instruct its agencies how to proceed toward enforcement. There has, as the evidence here shows, come a time when firmness must be used against *all* who do not feel able or inclined to cooperate in the equal employment effort. The statute and the Executive Order implementing it are in the court's opinion in full keeping with the constitutional guarantees of the rights of all citizens. *Weiner v. Cuyahoga Community College Dist.*, 15 Ohio Misc. 289, 297, 238 N.E.2d 839, 844 (C.P. 1968) (emphasis in original).

Soon after George P. Shultz became Secretary of Labor in the first Nixon Administration, the Commission on Civil Rights submitted a forty-one page document critical of the government's contract compliance operations, together with a four-page covering letter from the chairman of the Commission urging the use of written affirmative action plans and the continuation of certain effective programs already underway. Letter from John A. Hannah, Chairman, U.S. Comm'n. on Civil Rights, to George P. Shultz, Secretary of Labor (Feb. 4, 1969). Schultz and Assistant Secretary of Labor Arthur A. Fletcher, who was in charge of the OFCC, applied the ruling established in the *Ethridge* case and the affirmative action requirements of the Cleveland Plan to Philadelphia, where there had been years of protest and community disturbances because of the systematic exclusion of black workers from federally-financed construction jobs. As in Cleveland, the Philadelphia Plan was challenged and in *Contractors Assoc. of E. Pa. v. Shultz*, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971), the court, in ruling against the plaintiff, sustained the Department of Labor:

If this Plan is properly administered it will be a Plan of inclusion rather than of exclusion. This we feel is necessary as our times demand skilled craftsmen who have learned their craft and who must have an opportunity to make use of their abilities and skills. The strength of any society is determined by its abilities to open doors and make its economic opportunities open to all who can qualify. It is fundamental that civil rights, without economic rights, are mere shadows [I]t is our conclusion that the Philadelphia Plan is not inconsistent with the requirements of Title VII of the Civil Rights Act of 1964.

311 F. Supp. at 1010. The Third Circuit sustained the decision of the district court as a valid exercise of executive authority, and the Supreme Court refused to review.

It should be noted that the first supplementary executive order specifically prohibiting job discrimination in federally-assisted construction, Exec. Order No. 11114, 28 Fed. Reg. 6485 (1963), was issued by President Kennedy, and it was his executive order, together with the legal decisions rendered prior to the Nixon Administration, that required the federal government to take action to eliminate discriminatory job patterns in the building trades in Cleveland, Philadelphia, and elsewhere. (See, *The Philadelphia Plan: Equal Employment Opportunity in the Construction Trades*, COLUM. J. OF LAW AND SOC. PROB., May 1970 at 187; Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341; Statement of Herbert Hill, National Labor Director, NAACP, on the Philadelphia Plan before the Subcommittee on Separation of Powers of the Senate Subcommittee on the Judiciary, Oct. 28, 1969. (For a detailed analysis of the Philadelphia Plan and its aftermath, see Hill, *Labor Union Control of Job Training: A Critical Analysis of Apprenticeship Outreach Programs and the Hometown Plans*, 2 OCCASIONAL PAPER, HOWARD UNIV. INST. FOR URB. AFF. AND RESEARCH (1974)).

quirements of numerical goals and timetables for the employment of black workers and members of other minority groups in federally assisted construction projects were effectively applied, organized labor saw an immediate and future danger to long-established hiring-hall and other referral systems in all unions with such job control. If enforced over a long period of time, plans requiring ratios of minority employees could erode exclusive—and racially restrictive—union control of jobs in the construction industry.¹⁶²

Senator Alan Cranston of California voiced the concern of civil rights organizations regarding consolidation of the OFCC and the EEOC in one administrative agency. At the Senate subcommittee hearings on the Williams-Javits bill he said: "I am hesitant to create within the Federal Government a solitary target upon which all equal employment opponents can concentrate their efforts to stymie and defeat the guarantees of title VII of the Civil Rights Act of 1964 EEOC consolidation could be a disastrous course at this time."¹⁶³

Senator Javits expressed grave doubts about the consolidation of the OFCC with the EEOC and indicated that he was reconsidering the proposal:

This committee will also have to consider very carefully the proposal embodied in S. 2453 to transfer the Office of Federal Contract Compliance and the Civil Service Commission's functions with regard to equal employment opportunity for Federal employees to the EEOC. Given the tremendous backlog of cases now pending before the Commission, the additional work which will have to be undertaken by the Commission if it gets cease and desist order powers, the difficulty of obtaining adequate funding for the Commission, and, finally, the signs that under the leadership of Secretary Shultz and Assistant Secretary Arthur Fletcher the OFCC is serious about implementing Executive Order 11246, I am doubtful as to the desirability of transferring OFCC at this time.¹⁶⁴

The *New York Times* quoted Joseph Rauh, speaking on behalf of the Leadership Conference on Civil Rights, as saying that an agreement had been reached to accept organized labor's insistence on the transfer of OFCC as the price for its support of cease-and-desist orders for the EEOC. Rauh

162. John Herbers, reporting from Washington, wrote:

If the Philadelphia Plan stands up in court, observers here believe it may be of both symbolic and substantive importance in the employment of Negroes. Federal construction makes up a substantial part of building in the large cities where there is a concentration of unemployed blacks and can influence hiring practices throughout the industry.

In Philadelphia, where the population is heavily black, some of the unions employ less than 2 percent Negroes, according to official findings, and similar situations prevail in most other cities, despite years of litigation and statements by the unions that they are open to all.

Labor and Blacks Part Company, N.Y. Times, Dec. 28, 1969, Sec. 4, at 4, col. 1. See also, Tom Wicker, *In the Nation: Philadelphia, Chicago and Meany*, N.Y. Times, Jan. 18, 1970, Sec. 4 at 14, col. 5.

163. *Hearings on S.2453*, supra note 136, at 36.

164. *Id.* at 38.

acknowledged, "We did make such an agreement with labor, and we are keeping that agreement," but he added that "the leadership conference will continue its efforts to get the bill as it is now, but with the transfers that labor wants."¹⁶⁵ The *National Journal*, reporting on the division between civil rights groups and organized labor over the threat to defeat the bill if it did not include transfer of the OFCC, quoted AFL-CIO lobbyist Kenneth Meiklejohn as saying there were "some inconsistencies and disagreement between the major groups supporting the legislation."¹⁶⁶ Another civil rights leader stated that the labor-civil rights coalition was "on the brink of disaster" before the agreement was finally reached.¹⁶⁷

But it was not only within the Leadership Conference on Civil Rights that organized labor made known its views on transferring OFCC. At the hearings of the Senate subcommittee on S. 2453, Thomas E. Harris, general counsel of the AFL-CIO, limited his testimony almost exclusively to the OFCC proposal. He described the OFCC's power to terminate or cancel contracts as "a sanction far more formidable . . . than any remedy available to the Labor Board [NLRB]. It is a sanction so formidable that it has never been necessary actually to employ it; the mere threat has brought to heel such companies as Newport News Shipbuilding & Drydock and Crown Zellerbach."¹⁶⁸

Harris was factually incorrect. Litigation under Title VII against Newport News Shipbuilding & Drydock continued well past the date of his testimony, as did the litigation against Crown Zellerbach. He compounded his inaccuracy by subsequently testifying that "last-ditch resistance" by management and labor had "thus far occurred only against the NLRB, not title VII of the Civil Rights Act."¹⁶⁹ The *Newport News Shipbuilding*¹⁷⁰ and *Crown Zellerbach*¹⁷¹ cases were in fact two examples of the kind of last-ditch resistance Harris was describing when he said in his testimony:

If any employer, or union, is determined to resist the NLRB, or title VII, to the utmost, and its counsel use every possible delaying device, enforcement will be very slow, and that is true whether initial enforcement is placed in an administrative agency or in the Federal district courts.¹⁷²

Harris further expressed AFL-CIO opposition to maintaining OFCC and EEOC as separate agencies by testifying that this separation was responsible for ". . . the pointless harassment of unions and employers,"¹⁷³ and

165. Delaney, *Rights Unit Agrees to Back Labor on Two Job Bills*, N.Y. Times, Sept. 26, 1970 at 35, col. 1.

166. *Civil Rights Report*, NAT'L J., Sept. 26, 1970, at 2088.

167. Delaney, *supra* note 165, at 35.

168. *Hearings on S. 2453*, *supra* note 152, at 206.

169. *Id.* at 207.

170. *Darden v. Newport News Shipbuilding and Drydock Co.*, No. CA 95-69-NN (E.D. Va., filed Aug. 9, 1969).

171. *United States v. Local 189, Papermakers*, 282 F. Supp. 39 (E.D. La. 1968).

172. *Hearings on S. 2453*, *supra* note 136, at 207.

173. *Id.* at 209.

that the functions of each of these agencies should be merged into the EEOC:

We are strongly of the view that unions should be not subjected to these multiple proceedings, or employers either for that matter. The AFL-CIO believes that equal employment opportunity is a vital national policy which must be fully effectuated; and title VII would never have been created without the vigorous support of the AFL-CIO.

But that does not mean that we can support duplicative and overlapping enforcement procedures which are unduly and unnecessarily burdensome to our unions.

S. 2453 would greatly improve this situation, by centering in the EEOC the authority now divided between that agency, the Department of Labor [which housed OFCC], and the Department of Justice.¹⁷⁴

The AFL-CIO made it quite clear that it would support an expansion of EEOC authority only if the federal contract compliance program were transferred. Organized labor was not alone in pressing for transfer. The National Association of Manufacturers (NAM) joined with the labor federation in demanding the transfer of OFCC to the Equal Employment Opportunity Commission. The NAM also attacked the proposal for granting cease-and-desist power to the Commission, stating that "no convincing case has been made" for adding such powers, but on the issue of transferring OFCC, the NAM virtually repeated the AFL-CIO arguments:

We have long questioned the need for the existence of the Office of Federal Contract Compliance. Even if one grants the authority of the Executive to impose additional terms and conditions and threaten with powerful sanctions those who would do business with the federal government, there still remains the central question of whether it is necessary or proper to do so. We agree with the moves designed to reduce duplication of effort within the federal government and, if the transfer of OFCC would result in less harassment of business; it would produce a diminution in voluminous requests for information and records now received; indeed, if it would make it any easier for a businessman to comply with the law and still run his business; then we would favor such consolidation. We do not, however, favor a grant of authority either by the Congress or by the Executive whereby an agency of the federal government is empowered to suspend, cancel, terminate and/or black-list a government contractor. We see no reason why such additional sanctions should be attached to doing business with the government.¹⁷⁵

James Mooney, legislative counsel for EEOC, commented: "The American Federation of Labor in its antagonism to federal contract compliance has cooperated with and gotten support from reactionary members of the Con-

174. *Id.* at 210-11.

175. *Id.* at 241.

gress and from the big defense industrial contractors who are also opposed to contract compliance efforts.¹⁷⁶

Before the Senate subcommittee's hearing, the Nixon Administration had submitted an alternate bill, which was defeated. S. 2806, sponsored by Senator William L. Prouty of Vermont, proposed that EEOC be empowered to proceed directly to court to enforce Title VII in place of being granted cease-and-desist authority. EEOC Chairman Brown assisted in writing the bill and in preparing the Administration's position on both the issue of cease-and-desist power and the implications of the differences that were emerging between civil rights organizations and organized labor. In a memorandum to Leonard Garment, special consultant to the President, Brown expressed the opinion that the Administration should support either cease-and-desist power or the power of direct access to the federal courts by the Commission, but that the Administration should not take a firm stand on either proposal:

The proper role of the Administration then, would seem to be that of honest broker, i.e., as a mediating force among the various interests concerned . . . Administration insistence on its own enforcement scheme or nothing would be counter-productive in that such a stance would be demonstrably incompatible with our announced purpose of seeking the "strongest" kind of enforcement power possible.¹⁷⁷

Recognizing the political significance of the conflict between civil rights groups and the AFL-CIO and the fact that it would be extremely difficult to pass legislation without the support of organized labor, Brown added:

This summation, of course, allows for several options. One would be for the Administration at large to maintain a low profile with this agency [EEOC] taking the lead in working out a compromise. Another would be for the White House to act directly in pressing for a bi-partisan compromise bill; the effect of such a move on the apparent division between the civil rights organizations and labor would be, to say the least, interesting.¹⁷⁸

As the Senate vote on the Williams-Javits bill approached, the Nixon Administration began to consider even more carefully the conflict between civil rights groups and organized labor over the question of OFCC transfer. In another memorandum to Garment, Brown outlined the alternatives the Administration might support:

S. 2453 has at various stages contained a number of other provisions which might provide a basis for a revised policy stance on the part of the Administration.

1. Transfer of OFCC to EEOC. Organized labor wants this badly, and will probably hold up any legislation pending inclusion of such a provision.

176. Interview with James Mooney, Legislative Counsel, EEOC, in Washington, D.C. (Oct. 14, 1970).

177. Memorandum from William Brown to Leonard Garment (Sept. 24, 1970).

178. *Id.*

2. Deletion of the Attorney General's "pattern or practice" authority, or transfer of such authority to EEOC. Again, this would be a concession to labor.

3. Deletion of the private right of action.

Same comment as above.

The above items have been stumbling blocks in the course of this legislation, and the adoption of any or all of them as Administration supported measures would ease passage of a bill

Another alternative would be for the Administration to reverse its position on cease and desist, and press hard for a bill free of other (OFCC, pattern or practice, etc.) provisions. This course would force the civil rights organizations away from labor and has the highest probability of success.¹⁷⁹

At the Senate subcommittee hearings Brown testified in support of the Administration's proposal to give the Commission power to proceed directly to court to enforce Title VII, but, in tacit acknowledgment of organized labor's position on transfer of the OFCC, he refrained from making a statement on that issue. Brown's silence and Secretary of Labor Shultz's open opposition to OFCC transfer must be taken as an indication that the Administration did not support the proposal.

When the Senate Subcommittee on Labor reported S. 2453 out of the Committee on Labor and Public Works to the Senate floor, its accompanying report approved the grant of cease-and-desist power to EEOC, but not the transfer of OFCC to the Commission.¹⁸⁰ In response, the AFL-CIO threatened to withdraw its support of the bill. The AFL-CIO seemed convinced that it was both necessary and possible to nullify the power of the OFCC by placing its functions within the administrative operation of the EEOC. Many unions had learned how to frustrate state fair employment practice laws and the EEOC through evasion, circumvention, and delaying strategies, although by this time Title VII litigation was beginning to have an impact on the racial practices of organized labor. It is clear from the intense lobbying both inside and outside Congress that the AFL-CIO, long dominated by the building trades unions, regarded the OFCC as the main enemy and therefore insisted on its demise. When the Senate committee failed to include the provision for transferring the OFCC, the *New York Times* reported: "A threat by organized labor to withdraw its support for two bills designed to strengthen the enforcement powers of the Equal Employment Opportunity Commission has jeopardized passage of the bills."¹⁸¹

Assistant Secretary of Labor Fletcher openly accused the AFL-CIO of trying to sabotage the OFCC by working for its transfer to the Commission: "Organized labor doesn't like the idea that the Labor Department has a black constituency as well as a union constituency."¹⁸² He believed that the

179. Memorandum from William Brown to Leonard Garment (Sept. 25, 1970).

180. Sen. Rep. No. 1137, 91st Cong., 2d Sess. 20 (1970).

181. N.Y. Times, Sept. 23, 1970 at 29, col. 3.

182. Fair Employment Practices—Summary No. 151 (BNA), at 1 (Dec. 3, 1970).

AFL-CIO was attempting to impede and weaken the OFCC and that the construction craft unions "would like nothing better than to see OFCC slowed down."¹⁸³

The AFL-CIO's efforts failed in the Senate: the cease-and-desist bill passed on October 1, 1970, by a vote of forty-seven to twenty-four, with no provision for the transfer of OFCC functions to EEOC.

The AFL-CIO's lobbying efforts intensified, now centering on the House, where a similar bill was pending, introduced by Representatives Augustus Hawkins of California and Ogden Reid of New York. In 1966 and 1968 the House had passed cease-and-desist legislation but it had failed in the Senate. Now that the Senate had passed such a bill, there seemed no doubt that the House would concur and that cease-and-desist power would become a reality for the EEOC. So strong was the belief in this likelihood that Brown wrote in a strategy memorandum for Garment:

The opportunity for choice between enforcement schemes has thus been precluded by the Senate's expression of will, for there is virtually no likelihood that the House would favor court enforcement. The issue is now reduced to whether there should be any realistic enforcement powers at all; it is cease and desist or nothing. . . .

It seems to me that the astute course for the Administration at this time would be to acquiesce to the expressed preference of the Senate, and support cease and desist as the only obtainable proposition. If the bill emerges from the Rules Committee (as it is likely to), it will almost certainly be passed by the House, and there is no reason why we should not share the credit for what we must admit to be an improvement over Title VII's current weak state.¹⁸⁴

Despite the optimism of those supporting the bill, cease-and-desist power for the Commission did not become law. The Senate had passed its bill because, "[i]n the end, the AFL-CIO could find no pro-labor senator willing to offer its amendments"¹⁸⁵ proposing OFCC transfer. In the House, however, organized labor had been able to find such friends among traditionally anti-labor conservative congressmen.

Representative William Colmer, a Mississippi Democrat and chairman of the House Rules Committee, refused to clear the House bill for a vote on the floor, describing it as "vicious."¹⁸⁶ Despite the urging of Speaker John McCormack and other congressmen, Colmer adamantly refused to schedule hearings on the bill in 1970, thus killing the legislation in the Ninety-first Congress. The *Washington Post* commented editorially:

This little—but mighty—drama is far from the lives of those minority group members currently seeking jobs and turned away for illegal reasons. Few, if

183. *Id.*

184. Memorandum from William Brown to Leonard Garment (Nov. 5, 1970).

185. N.Y. Times, Oct. 2, 1970 at 7, col. 1.

186. N.Y. Times, Dec. 3, 1970 at 30, col. 3.

any, are even aware of what a rules committee is all about. Yet that is where the legislation now sits, under the eye of Chairman William Colmer . . . a long-time opponent of civil rights.

Perhaps because little attention has been given to the passage of this crucial domestic legislation, Representative Colmer believes he can let it fade away. If so, the EEOC will remain without basic enforcement powers, of the kind that other regulatory agencies take for granted, and the alienation and bitterness of minority groups will deepen all the more.¹⁸⁷

Early in 1971 Congress began debate on several new proposals to extend coverage of Title VII and to give the EEOC enforcement powers. Of these proposals, H.R. 1746,¹⁸⁸ introduced by Representative Hawkins, successfully passed through subcommittee and committee debate, and the House Labor Committee reported it out on May 4, 1971. Among its provisions were several major proposals, which may be summarized as follows:

(1) To grant the Equal Employment Opportunity Commission power to issue enforceable cease-and-desist orders.

(2) To extend Title VII coverage to employees of local and state governments, to federal employees, to certain employees of educational institutions, and to employers and unions with eight or more workers.

(3) To transfer the pattern or practice jurisdiction as defined by Section 707 of the 1964 Act from the Department of Justice to the EEOC. This would give the Commission the authority to initiate litigation.

(4) To provide subpoena powers to the EEOC similar to those granted the National Labor Relations Board.

(5) Most important, the pending bill expressly preserved the private right to sue in federal district courts.

Senator Williams, chairman of the Committee on Labor and Public Welfare, introduced a companion measure in the Senate (S. 2515) while the House was debating the Hawkins bill.¹⁸⁹ In its report on the pending measure, the committee presented arguments for passage of the proposed amendments to Title VII:

Despite several aspects of the operation of Title VII during these last six years which reflect major advancement . . . the results are, nevertheless, disappointing in terms of what minorities and women have a right to expect

187. Wash. Post, Oct. 6, 1970 at 20, col. 1.

188. H.R. 1746, 92d Cong., 1st Sess. (1971).

189. For a detailed account of the provisions of these bills and related proposals, together with the transcript of testimony, see *Equal Employment Opportunities Act of 1971: Hearings on S. 2515, S. 2617 and H.R. 1746 Before the Subcom. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. (1971). See also SUBCOMMITTEE ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, *92d Cong., 2d Sess., LEGISLATIVE HISTORY OF THE EQUAL OPPORTUNITY ACT OF 1972* (Comm. Print 1972). [Hereinafter cited as S. LAB. COMM., LEGISLATIVE HISTORY].

under the provisions of the law. . . . [I]t has, in most respects, proved to be a cruel joke to those complainants who have in good faith turned to the Federal government with the complaint of discrimination only to find, after a lengthy investigatory and conciliatory process, that the government cannot compel compliance.

. . . the time has come for Congress to correct the defects of its own legislation. The promises of equal job opportunity made in 1964 must be made realities in 1971.¹⁹⁰

The debates of 1971 and 1972 repeated many of the arguments made in the preceding Congress. The United States Chamber of Commerce and the National Association of Manufacturers campaigned vigorously against the proposal for cease-and-desist powers.¹⁹¹ In addition to the two national employer associations, many trade organizations and national corporations also lobbied actively against cease-and-desist powers for the EEOC.

Organized labor brought up the same issues and repeated the same arguments it had made in the previous session.¹⁹² As the new bill (S. 2515) was being debated in the Senate, Tom Wicker summarized the problem:

Tucked into the Senate bill is a provision transferring the Office of Federal Contract Compliance to the EEOC. Organized labor is its chief sponsor; and it was labor that helped tie up the 1970 bill in the Rules Committee until this provision was included. By the time it was, there was no time left for action on the House floor.

It happens that the O.F.C.C. is responsible for the Philadelphia Plan and other programs to get "affirmative action" for increased minority representation in the construction and other unions. Labor has opposed the Philadelphia Plan. Some Senators believe labor thinks it can diminish the powers of the O.F.C.C. by transferring it out of the big and relatively strong Labor Department to the smaller, weaker E.E.O.C. That would incidentally increase the work load of the latter.¹⁹³

The proposal to transfer the OFCC to EEOC was defeated in the Senate by a vote of forty-nine to thirty-seven. Senator Javits, who along with Senator Williams was again a principal sponsor of the EEOC bill, eventually voted against the transfer after receiving a pledge from Secretary of Labor

190. S. Rep. No. 415, 92d Cong., 1st Sess. 8 (1971).

191. Wall St. J., Jan. 27, 1972 at 2, col. 2.

192. During the debate on this issue the black press was increasingly critical of organized labor. A lead editorial in the New York Amsterdam News was typical:

The AFL-CIO would like to eliminate the power of the OFCC. We believe this is why they propose the inclusion of its functions in the Senate bill on the EEOC. Transfer of the OFCC out of the Department of Labor will bring about the administrative death of federal contract compliance. If the price civil rights organizations must pay for AFL-CIO support of S-2515 is incorporation in that bill of a section transferring OFCC out of the Labor Department, we say the price is too high. Our political leaders should insist on 'cease-and-desist' power but strongly oppose the administrative castration of federal contract compliance.

Amsterdam News, Jan. 29, 1972, at 4.

193. Wicker, *Power for the EEOC*, N.Y. Times, Jan. 23, 1972, Sec. 4, at 13, col. 6.

James D. Hodgson that OFCC would be reorganized into a more effective agency.¹⁹⁴ Up to then, during subcommittee hearings Senator Javits had been critical of OFCC's unwillingness to carry out its own mandates. One report described his attitude:

OFCC was unable to supply the committee staff concrete information showing the actual results of some of the programs they have initiated, or that it is actually applying the executive order in a manner differently than Title VII would be applied. It was also unable to supply accurate information on the number of employers supposedly "passed over" for failure to submit acceptable affirmative action plans. But more serious, Javits said, was the fact that during the seven years of OFCC, just one debarment order has been issued against a federal contractor, one with only 10 employees. It was "inexplicable," he added, that "OFCC has been unable or unwilling to take the actions necessary to establish its credibility in effectuating an executive order."¹⁹⁵

The Nixon Administration opposed the proposal of the new Williams-Javits bill (S. 2515) to grant cease-and-desist power to the EEOC and supported a substitute proposal to allow the EEOC to initiate court suits to enforce Title VII. The Administration-backed bill was passed in the House of Representatives on September 16, 1971, by a majority of 202 to 197, after two days of intense debate.

In the Senate, Senator Peter Dominick of Colorado, along with Senators Sam J. Ervin, Jr., of North Carolina, and James B. Allen of Alabama led the attack against the cease-and-desist plan and against provisions in the bill extending the coverage of Title VII to employers and labor unions with eight members. Senator Dominick was the chief advocate of the Administration-supported effort to obtain power for the EEOC to initiate suits in federal courts. On February 15, 1972, voting on a compromise

194. Senator Javits placed in the CONGRESSIONAL RECORD a letter from the Secretary of Labor dated January 25, 1972, in which Mr. Hodgson acknowledged that "the program is clearly capable of improvement and the Department of Labor will continue to strive to improve the quality and magnitude of our efforts." 118 CONG. REC. 1395 (1972). Javits stated:

I would like to submit for the *Record*. . . a letter addressed to me . . . from the Secretary of Labor in which he wishes us to believe that his recent action to shift Richard Grunewald to the position of Assistant Secretary for Employment Standards was a calculated move to really shake up the OFCC and see to it that its management be made more aggressive than it has been, which implies that whatever other shifts are necessary in personnel will be made in order to give it backbone, and is undertaken by the Secretary to have that effect.

Id. at 1394.

In April the OFCC was reorganized and placed in the Employment Standards Administration. George Holland, director of the OFCC, in a letter of resignation which was to take effect on July 1, 1972, charged that the new program was "cosmetic and illusory" and added, "I am not willing to become an accessory to an OFCC program alignment and orientation which, in my judgment, will not move the program and our nation toward achievement of the reality of equal employment opportunity for all citizens." Wall St. J., June 14, 1972, at 1, col. 3. The NAACP protested the elimination of the OFCC as a separate agency within the Department of Labor. 80 LAB. REL. REP. (BNA) (News & Background Info.) 270 (1970).

195. Bureau of National Affairs, Construction Labor Report, No. 854, Feb. 9, 1972, at A-15.

proposal to break a filibuster that had lasted more than a month, the Senate rejected cease-and-desist powers and adopted the Dominick Amendment limiting the EEOC to court-enforcement powers.¹⁹⁶

Commenting on the Senate's action, which gave the EEOC the right to sue in federal courts but no direct enforcement authority through cease-and-desist power, the *Wall Street Journal* reported on its front page: "The vote ended a five-week battle that civil rights groups essentially lost and employer organizations won."¹⁹⁷ Tom Wicker had noted in the *New York Times* that "the compromise adopts, in effect, the administration's position which is already embodied in a bill that passed the House. It is intended to be a soft position rather than a tough stand against job discrimination."¹⁹⁸ In the same article he described what he foresaw as the consequences of the bill's passage:

Since the Federal courts are already clogged, and the average delay in disposition of cases is about ten months, it is apparent that adding a whole new area of litigation to their burdens is not an expeditious way to handle job discrimination; it is more nearly another way to bog down judges and prosecutors already unable to manage their workloads. Moreover, lengthy trials, plus the long appeals process, are bound to be more costly to complainants than the administrative remedy that had been proposed for the EEOC: the result will be to leave much discrimination essentially unchallenged.¹⁹⁹

Differences between the Senate bill and the previously passed House bill were resolved in conference between the House and the Senate, and finally, on March 6, 1972, the Senate passed by a vote of sixty-two to ten the compromise bill written by Senators Williams and Javits which empowered the EEOC to seek federal court orders against employers, labor unions, and certain agencies of local government found to be violating Title VII.²⁰⁰ The Equal Employment Opportunity Act of 1972 was signed into law by President Nixon on March 24, 1972. It was to go into effect immediately.

Several aspects of the legislative history of the 1972 amendments are worthy of note. Although the authority to issue cease-and-desist orders was not obtained, the EEOC was granted the power to initiate civil action against respondents in the private sector when it is unable to conciliate. Furthermore, Title VII coverage was significantly expanded to include public employees, and there was a variety of other improvements in the statute. A merger of the OFCC and the EEOC, the issue that had caused such extensive controversy during the legislative debates, lost significance as the AFL-CIO

196. N.Y. Times, Feb. 16, 1972 at 1, col. 3.

197. Wall St. J., Feb. 23, 1972, at 1, col. 3.

198. Wicker, *The Same Old Story*, N.Y. Times, Feb. 10, 1972, at 43, col. 1.

199. *Id.*

200. N.Y. Times, Mar. 7, 1972 at 43, col. 8.

effected a political rapprochement with the Nixon Administration and used other means to eliminate OFCC as a civil rights enforcement mechanism.²⁰¹

Above all, the private right to sue was retained intact, and the Senate Committee on Labor and Public Welfare approved in essence the substantive law that had developed in Title VII litigation since passage of the original Act.²⁰²

IV

THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

The most important changes of the 1972 legislation gave EEOC the authority to initiate civil suits in federal district courts, seeking injunctions and other remedies for unlawful practices committed by employers, labor unions, joint labor-management committees, employment agencies, and other institutions covered by the Act. A new Office of the General Counsel

201. "George Meany, president of the AFL-CIO and a former plumber and building trades leader in New York, has been the personification to many of a hawk on Vietnam and was one of the first national leaders to voice support of President Nixon's decision to move United States forces against North Vietnamese sanctuaries in Cambodia." *N.Y. Times*, May 13, 1970 at 18, col. 6. In St. Louis, Chicago, Miami, New York, and other cities several AFL-CIO unions demonstrated in support of Nixon and in some instances violently attacked opponents of the Administration's war policies. (See, for example, the *N.Y. Times*, May 13, 1970 at 1 col. 1.) In the presidential election of 1972 the AFL-CIO executive council—with only three dissents—adopted a policy of "neutrality," thereby giving valuable aid to Nixon. Most of the building trades unions actively supported Nixon, as did the maritime unions and some others. (Paul Hall, president of the Seafarers International Union and a member of the AFL-CIO Executive Council, was head of the Labor for Nixon campaign.) The administration had already reversed its position on the Philadelphia Plan and on enforcing executive orders to eliminate the racial exclusion practices of the construction industry. It now supported the "voluntary hometown solutions" endorsed by the building trades unions. Assistant Secretary of Labor Arthur Fletcher, the highest ranking black official in the Administration and the most vigorous supporter of the Philadelphia Plan within the government, resigned effective January 1, 1972. As a result of investigations provoked by the Watergate scandal, it was later revealed that officials of the Nixon Administration "promised some unions that the White House would relax its non-discrimination efforts after the 1972 election." *N.Y. Times*, July 1, 1973 at 1, col. 8, cont. at 22, col. 6. On August 11, 1972, the President issued a letter to all federal agencies warning against the use of "quotas" in civil rights enforcement efforts, and a month later Secretary of Labor James D. Hodgson issued a memorandum directing that numerical goals in the hiring of racial minorities and women by federal contractors no longer be required by contract compliance agencies. [Memorandum to All Heads of Agencies, from James D. Hodgson, Secretary of Labor (Sept. 15, 1972)]. In 1973 Peter J. Brennan, the president of the AFL-CIO New York Building and Construction Trades Council, was appointed Secretary of Labor. This was the same person who "in 1970, shortly after large-scale antiwar demonstrations in response to the Cambodian invasion, led a counterdemonstration in New York City in support of the Vietnam War. He later presented Mr. Nixon with a hard hat and an American flag lapel pin at a highly publicized meeting at the White House." *N.Y. Times*, July 1, 1973, at 1, cont. at 22, col. 3. A later report of the United States Commission on Civil Rights cited examples of "the contract compliance program's widespread tolerance of violations of the Executive Orders and its virtual failure to impose any sanctions. The message being communicated to government contractors is that there is no threat of debarment or other sanctions, and the effect is to obliterate any credibility in the program." U.S. COMM'N ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT-1974*, at 342 (1975).

202. S. LAB. COMM., *LEGISLATIVE HISTORY*, 410-426.

was authorized to conduct litigation on behalf of the Commission,²⁰³ which may proceed into court when reasonable cause is found in charges of discrimination and after its conciliation process has failed. Within thirty days of receipt of a charge, EEOC (through the General Counsel), under section 706(f)(1), may initiate its own action in federal court if it has found reasonable cause and been unable to obtain a conciliation agreement. When the defendant in such an action is a government or governmental agency, the Commission must refer the case to the Attorney General. A private aggrieved party has the right to intervene in any such suit, and the EEOC (or the Attorney General) may intervene in a private party suit if it certifies that the case is of general public importance. Two years after enactment of the Amendments, the Attorney General's jurisdiction over pattern or practice cases was to be transferred to the EEOC.²⁰⁴ In the interim there was to be concurrent jurisdiction under section 706(d) and (e). The 1972 Amendments apply to all charges pending before the EEOC on the date of enactment (March 24, 1972) and to all charges filed thereafter.

A. Expanded Coverage

The amended Act extends Title VII coverage to every employer "engaged in an industry affecting commerce" with fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year and to unions with fifteen or more members.²⁰⁵ This expanded coverage adds an estimated six million private industry employees to EEOC's jurisdiction.

By expanding the definition of an employer, Congress brought the entire field of public employment under Title VII. With two minor exceptions,²⁰⁶ state and local government employees or applicants for employment may now bring suit against their employers or prospective employers under sections 703 and 706 after satisfying the procedural requirements of the Act. Employees or applicants for employment with state and local police, fire, sanitation, welfare and hospital departments, and boards of education are now covered by Title VII.²⁰⁷ The inclusion of "employees subject to the civil service laws of a State government, governmental agency, or political subdivision"²⁰⁸ adds another estimated ten million covered employees.

203. Act § 705(b), 42 U.S.C. § 2000e-4(b) (1970 & Supp. V 1975).

204. Act § 707(c), 42 U.S.C. § 2000e-6(c) (1970 & Supp. V 1975).

205. Act § 701(b),(d), 42 U.S.C. § 2000e(b),(d) (1970 & Supp. V 1975).

206. The first exception is for federal government employees, who are covered by a separate provision, section 717, and are required to file complaints through the Civil Service Commission rather than the EEOC. The other exception is for elected officials and their immediate appointed assistants; they are not considered employees under the Act and have no remedy under Title VII. Act § 701(f), 42 U.S.C. § 2000e(f) (1970 & Supp. V 1975).

207. Act § 701(a),(f), 42 U.S.C. § 2000e(a),(f) (1970 & Supp. V 1975).

208. *Id.*

Section 717 requires that all personnel practices involving federal employees are to be free of discrimination and that this policy is to be enforced by the United States Civil Service Commission (CSC). The Civil Service Commission shall:

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency . . . shall submit in order to maintain an affirmative program . . . for all such employees and applicants for employment; (2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and (3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.²⁰⁹

Each agency is responsible for establishing, under CSC supervision, an internal grievance procedure and a program to train personnel for advancement. Aggrieved parties have access to the courts after fulfilling specified procedural requirements.²¹⁰

In addition to bringing governmental units under Title VII coverage, section 702 of the amended Act also deletes the previous exemption for educational institutions. Employees and applicants for employment in teaching, administrative, and clerical positions in both public and private school systems are brought under Title VII protection.²¹¹

B. Amended Procedural Requirements

Under section 706(e) of the amended Act, an aggrieved party must file his or her charge within 180 days of the date of the alleged violation. The legislative history clearly states that this extension of the prior ninety-day requirement does not erode the previous juridically developed liberal interpretation of procedural issues under Title VII.²¹² When a complainant is required to file first with a state or local fair employment practice agency, his or her subsequent EEOC charge must be filed within 300 days of the alleged

209. Act § 717(b), 42 U.S.C. § 2000e-16(b) (1970 & Supp. V 1975).

210. *Id.*

211. There are exceptions for religious schools, which are of course private institutions. Sections 701(j), 702, and 703(e)(2) combine to maintain the exemption from the Act for religious discrimination by religious corporations, associations, or societies, including educational institutions. It is important to note that such employers are permitted to discriminate in employment practices on the basis of religion in all their activities (Section 702), not only, as previously, in those activities connected with their religious purposes. The amended Act also redefined religious discrimination under Section 701(j) so as to require employers to accommodate employees' religious observance or practice unless they can show that such accommodation will cause a serious hardship to their business. This provision gave legislative sanction for the EEOC Guidelines on Discrimination Because of Religion 29 C.F.R. 1605.1 (1976), which were upheld in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *affirmed by a divided court* 402 U.S. 689 (1971).

212. S. LAB. COMM., LEGISLATIVE HISTORY, *supra* note 189 at 1771-72.

violation (not 210 days as before) or within thirty days (unchanged from the original Act) of receipt of notice of termination of action by the state or local agency, whichever is less.²¹³ The period for deferral to state and local agencies remains sixty days, but increases to 120 days during the first year after the enactment of a state or local statute.²¹⁴ However, the legislative history expresses congressional approval of the type of expedited procedures permitted in *Love v. Pullman Co.*²¹⁵ and *Vigil v. A.T. & T.*²¹⁶

Under section 706(f)(1) a complainant must wait for referral to the EEOC (or a finding on the charge, whichever is later) 180 days after filing before he or she is entitled to a "right to sue letter" from the EEOC (as opposed to thirty days previously); but complainants also have an extended period of ninety days after receipt of the right to sue letter in which to file a complaint in a federal district court. The longer period for EEOC disposal is evidently in consideration of its well-known inability to act within the thirty days formerly required.

Another important change is that a charge to the EEOC may be filed "by or on behalf of a person claiming to be aggrieved." The revised EEOC regulations²¹⁷ require that although the aggrieved party or parties need not be identified in the charge, the person or organization filing the charge must provide the Commission with names and addresses of those affected. These are to be kept confidential by both the EEOC and any state or local agency involved, as a protection against reprisals.²¹⁸

C. Deferral to State and Local Agencies

Under section 706(b) of the amended Act the EEOC is required to "accord substantial weight to final findings . . . made by State or local law." This provision has caused the Commission to re-examine the appropriateness of deferral to each state and local agency. Shortly after adoption of the 1972 Amendments the EEOC issued modified regulations requiring less difficult procedures for filing charges.²¹⁹ In reformulating the necessary procedures, the Commission took into consideration its past experience in dealing with designated state and local deferral agencies.²²⁰

213. Act § 706(e), 42 U.S.C. § 2000e-5(e) (1970 & Supp. V 1975).

214. Act § 706(c), 42 U.S.C. § 2000e-5(c) (1970 & Supp. V 1975).

215. 404 U.S. 522 (1972).

216. 4 Empl. Prac. Dec. ¶ 7672 (10th Cir., 1972).

217. 29 C.F.R. § 7606.6 (1976). This became effective May 6, 1972.

218. Act § 706(b), 42 U.S.C. § 2000e-5(b) (1970 & Supp. V 1975).

219. 37 Fed. Reg. 9214 (1972).

220. *Id.* The previous method of deferral received strong criticism:

It appears that the deferral process has had only negative results. It involves "delay for charging parties, two investigations for the respondent, and duplication of the Federal Government [effort]." It has also placed constrictions on the EEOC's ability to amend or broaden charges during an investigation, since an amended charge would require referral. Nor has the deferral process alleviated EEOC's case load, since many State Commissions are limited and/or ineffective. As stated by the Commission Chairman, "Many [State agen-

The Commission indicated its awareness that the extension of coverage of Title VII "to employees of State and local governments, governmental agencies, political subdivisions, and educational institutions renders the practice of identifying agencies to whom charges should be deferred on behalf of persons making charges burdensome and unreliable."²²¹ It also recognized the inability of many agencies to resolve charges in conformance with the Act:

The problem of employment discrimination as defined by Federal law is one whose resolution requires not only expertise but also the technical perception that discrimination exists in the first instance. This kind of expertise is not found in administrative or legal arms of some State or local agencies.²²²

In setting forth changes necessary to implement the 1972 Amendments, the Commission recognized its responsibility to provide complainants, even where deferral to state or local agencies was required, with "rights and remedies comparable in scope to those provided under Title VII."²²³

The EEOC relied heavily on court interpretations of Title VII in reformulating its procedures, reflecting the Commission's own experiences and federal court findings that "the nature of employment discrimination is complex, pervasive, and institutionalized, and that those filing charges may not fully comprehend the distinctions among its various forms."²²⁴ If the EEOC failed to obtain maximum benefits for those who could not handle the technical difficulties of filing, it would be failing in its obligation to safeguard the rights of all the intended beneficiaries of the law. To substantiate its perception of its obligation to safeguard such rights, the Commission quoted from the decision in *Sanchez v. Standard Brands, Inc.*²²⁵ that protection under the Act extended to persons "untutored in the technicalities of the law and who may not, at that time, be able to fully articulate their grievances or be aware of the full panoply of discriminatory practices against them or others similarly situated"²²⁶

The Commission also acknowledged that at the time a charge is filed the Commission itself may not be able to discern all its ramifications. Therefore it again relied on the courts: "There is substantial possibility that a charge which initially alleges only limited violations of Title VII 'may

cies] do not adequately protect the rights of charging parties."

U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT at 101 (1971).

221. 37 Fed. Reg. 9214 (1972).

222. *Id.*

223. *Id.* at 9215.

224. *Id.*

225. 431 F.2d 455 (5th Cir. 1970).

226. 37 Fed. Reg. 9215 (1972). In fact, this quotation is from the amicus brief of the Commission filed in the *Sanchez* case, not the decision of the court. The Federal Register passage makes several technical errors in quoting the brief, but is substantially correct. The errors have been corrected to quote the court accurately.

properly encompass any such discrimination like or reasonably related to the allegations of the charges and growing out of such allegations'²²⁷

The EEOC was concerned that the Act's requirement for deferral of charges prior to the Commission's action on them required it to defer only to those agencies "whose laws prohibit essentially all of the practices prohibited by title VII, by essentially all of the persons by whom such practices are illegal under title VII, and on essentially all of the grounds covered by title VII."²²⁸ The Commission interpreted the Act's requirements of deferral to state and local fair employment agencies to mean that such deferral would not limit the full applicability of Title VII. As a result, all agencies to which the EEOC had previously deferred were put on provisional status pending their applications for renewal of deferral status until July 1, 1973. Not until an agency demonstrates that it operates effectively and with laws offering protection comparable to federal law is the EEOC to give such agency's findings the "substantial weight" mandated by section 706(b).²²⁹

As of March 12, 1976, the EEOC was deferring complaints to fifty-seven state and local agencies under section 706(c) and (d).²³⁰

227. *Id.* Here the Commission cites the decision in *King v. Georgia Power Company*, 295 F. Supp. 943, 947 (N.D. Ga. 1968). Again, the Commission makes several technical errors in quoting the passage, but is substantially correct. The errors have been corrected to quote the court accurately.

228. 37 Fed. Reg. 9215 (1972).

229. 29 C.F.R. § 1601.12 (1976).

230. The complete list of official "706 agencies" consists of the following:

- Alaska, Commission for Human Rights.
- Allentown, Human Relations Commission.
- Arizona, Civil Rights Division.
- Baltimore, Community Relations Commission.
- Bloomington, Human Rights Commission.
- California, Fair Employment Practices Commission.
- Charleston (W. Va.), Human Rights Commission.
- Colorado, Civil Rights Commission.
- Connecticut, Commission on Human Rights and Opportunities.
- Dade County (Fla.), Fair Housing and Employment Commission.
- Delaware, Department of Labor.
- District of Columbia, Office of Human Rights.
- East Chicago, Human Relations Commission.
- Fairfax County (Va.), Human Rights Commission.
- Gary, Human Relations Commission.
- Idaho, Commission on Human Rights.
- Illinois, Fair Employment Practices Commission.
- Indiana, Civil Rights Commission.
- Iowa, Commission on Civil Rights.
- Kansas, Commission on Civil Rights.
- Kentucky, Commission on Human Rights.
- Maine, Human Relations Commission.
- Maryland, Commission on Human Relations.
- Massachusetts, Commission Against Discrimination.
- Michigan, Civil Rights Commission.
- Minneapolis, Department of Civil Rights.
- Minnesota, Department on Human Rights.
- Missouri, Commission on Human Rights.

D. Equal Employment Opportunity Coordinating Council

The 1972 legislation directs that "there shall be established an Equal Employment Opportunity Coordinating Council . . . composed of the Secretary of Labor, the chairman of the Equal Employment Opportunity Commission, the Attorney General, the chairman of the United States Civil Service Commission, and the chairman of the United States Civil Rights Commission, or their respective delegates."²³¹ The Council is responsible for developing and implementing agreements, policies, and practices designed to increase efficiency and eliminate duplication of effort among federal agencies responsible for equal employment activities. On or before July 1 of each year, the Council must submit to the President and Congress a

Montana, Commission for Human Rights.
 Montgomery County (Md.), Human Relations Commission.
 Nebraska, Equal Opportunity Commission.
 Nevada, Commission on Equal Rights of Citizens.
 New Hampshire, Commission for Human Rights.
 New Jersey, Division on Civil Rights,
 Department of Law and Public Safety.
 New York City, Commission on Human Rights.
 New York State, Division of Human Rights.
 Ohio, Civil Rights Commission.
 Oklahoma, Human Rights Commission.
 Omaha, Human Relations Department.
 Oregon, Bureau of Labor.
 Pennsylvania, Human Relations Commission.
 Philadelphia, Commission on Human Relations.
 Pittsburgh, Commission on Human Relations.
 Rhode Island, Commission for Human Rights.
 Rockville (Md.), Human Rights Commission.
 Seattle, Human Rights Commission.
 Springfield (Ohio), Human Relations Department.
 South Dakota, Human Relations Commission.
 Tacoma, Human Rights Commission.
 Utah, Industrial Commission.
 Virgin Islands, Department of Labor.
 Washington State, Human Rights Commission.
 West Virginia, Human Rights Commission.
 Wheeling, Human Rights Commission.
 Wichita, Commission on Civil Rights.
 Wisconsin, Equal Rights Division, Department
 of Industry, Labor and Human Relations.
 Wyoming, Fair Employment Practice Commission.

The "Notice Agencies"—agencies only receiving notice of charges filed with the EEOC within their jurisdiction—are:

Arkansas, Governor's Committee on Human Resources.
 Florida, Commission on Human Relations.
 Georgia, Governor's Council on Human Relations.
 Montana, Department of Labor and Industry.
 North Dakota, Commission on Labor.
 Ohio, Director of Industrial Relations.
 South Carolina, Human Affairs Commission.

Source: Office of the Executive Director, EEOC.

231. Act § 715, 42 U.S.C. § 2000e-14 (1970 & Supp. V 1975).

report of its activities together with recommendations for legislative and administrative changes it believes desirable.²³²

E. Limitation on Back Pay Liability

Should a court find a respondent guilty of employment discrimination, "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."²³³ Other remedies previously established remain unaffected by the 1972 Amendments.

F. EEOC Litigation Since 1972

In the period immediately after Congress authorized EEOC to initiate litigation, the Commission filed only a few lawsuits in federal district courts. A suit against the Container Corporation of America and four international and six local unions was typical of the early cases.²³⁴ It charged that both women and blacks were discriminated against at the company's manufacturing plant in Fernandina Beach, Florida. According to the Commission, "An EEOC investigation found that both women and blacks were virtually excluded from higher positions in all its operations. Women were limited to clerical positions; blacks were used mainly in custodial and laboring jobs. The company is the only major industrial employer in the immediate area, which has a heavy black population."²³⁵

The Commission also contended that the "defendant unions, all signatories to collective bargaining agreements with the company . . . aided and abetted"²³⁶ the discriminatory employment practices of the company, which "maintained segregated lines of progression and segregated facilities, used unvalidated tests as screening devices, and limited training opportunities for good jobs to white males."²³⁷

The original charge had been filed against the company and the unions in 1967, but the Commission's attempts at conciliation had failed, and until the passage of the 1972 Amendments the Commission had been powerless to bring further action to obtain compliance with the law.²³⁸

232. *Id.*

233. Act § 706(g), 42 U.S.C. § 2000e-5(g) (1970 & Supp. V 1975).

234. The unions named were the International Association of Machinists and Aerospace Workers, AFL-CIO, and Island Lodge No. 40; the International Brotherhood of Electrical Workers, AFL-CIO, and local unions 1924 and 2018; the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, and Buccaneer Local 802 and Fort Clinch Local 415; and the United Brotherhood of Painters, Decorators and Paper Hangers of America, AFL-CIO, and Local 164. EEOC Files First Suit Under New Enforcement Power, EEOC News Release at 2 (May 11, 1972).

235. *Id.* at 1.

236. *Id.*

237. *Id.*

238. On November 2, 1973, the Container Corporation of America and the unions signed a consent decree in which they agreed to conduct an affirmative action program providing equal job

Early in 1973 the EEOC established new regional litigation centers in Atlanta, Chicago, Denver, Philadelphia, and San Francisco. According to William H. Brown III, the Commission's chairman, the EEOC intended to mount a program of "heightened enforcement effort through a steady and mounting flow of lawsuits."²³⁹ Through the regional litigation centers the Commission filed twenty lawsuits in eighteen cities during the first quarter of 1973.²⁴⁰

In its *Seventh Annual Report* the EEOC announced its litigation objectives under the amended Act:

With the granting of enforcement powers to the EEOC, the entire nature of the Commission's operations takes on a new perspective The Commission will focus on cases involving respondents against whom a large number of charges have been filed so as to secure a restructuring of those employment policies and practices which affect the greatest number of people. The Commission will also select cases for litigation which involve novel issues or significant areas of the law so as to further the judicial interpretation and crystalization of Title VII.²⁴¹

opportunity for women and minorities; the employer paid \$48,000 to thirty-nine women who charged that they had been discriminated against; and a special group transfer arrangement was established to facilitate the promotion of minority workers. EEOC Wins Settlement In Two Actions; Files Four Job Discrimination Suits, EEOC News Release at 1 (Nov. 29, 1973).

Other early litigation initiated by the EEOC under the 1972 law included suits against the following defendants:

Union Planters National Bank, Memphis, Tenn., charged with race and sex discrimination.

General Motors Corporation, three manufacturing plants in Cleveland, Ohio, and Locals 45, 1015, and 1045 of the United Auto Workers union, charged with religious discrimination.

Chrysler Corporation in Dayton, Ohio, and the International Union of Electrical, Radio and Machine Workers, AFL-CIO, and its Local 775, charged with race and sex discrimination.

Ameco, Inc., an electronics corporation in Phoenix, Arizona, charged with sex discrimination.

The International Union of Operating Engineers, AFL-CIO, in Granville, Ohio, and its Local 18, charged with excluding blacks from apprenticeship training programs through the use of nonvalidated tests and other discriminatory procedures.

Times-Picayune Publishing Corp., in New Orleans, La., charged with discriminating against blacks in hiring and with maintaining segregated job classifications.

NAT'L J., June 23, 1973, at 918.

239. EEOC, News Release (Mar. 12, 1973).

240. The following organizations, among others, were charged with violating Title VII:

The Chesapeake and Ohio Railroad and the Seafarers' International Union, AFL-CIO, in Newport News, Virginia—race discrimination.

Metropolitan Life Insurance Co., New York City—race discrimination.

International Longshoremen's Association, AFL-CIO, and the Pensacola Stevedoring Association, in Pensacola, and New York City—race discrimination.

The Bartenders Union, Oakland, California, an affiliate of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO—race and national origin discrimination.

International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, in Buffalo, New York—race and national origin discrimination.

Missouri Pacific Railroad, St. Louis—race discrimination.

EEOC Files 20 Lawsuits—Nearly Doubles Total, EEOC News Release at 1 (April 6, 1973).

241. 7 EEOC ANN. REP. 20 (1973).

However, the anticipated active program of innovative litigation did not materialize. At the conclusion of its 1972 fiscal year the Commission had filed only six lawsuits.²⁴² Between March 24, 1972, and March 31, 1975, the EEOC filed a total of 290 lawsuits and sixty interventions and sought eighteen preliminary injunctions.²⁴³ During the first quarter of fiscal 1976 the Commission initiated 104 suits and filed twenty settlement agreements with the courts.²⁴⁴ (These figures include cases filed under both section 706 and section 707. For data on the litigation record in each category, see pages 83-84, *infra*).

The disparity between the number of unconciliated cases and those brought to trial was alarming. By June 1973, EEOC district offices had referred to EEOC litigation centers 1,319 cases that they had been unable to conciliate; 124 cases were approved by the centers, but only eighty-one lawsuits had actually been filed fifteen months after the agency was given the power to litigate.²⁴⁵ As the Commission's case load later increased, with the consequent accumulation of unresolved charges, there is reason to believe that the proportion of unconciliated cases not brought to trial also increased.²⁴⁶

On March 24, 1974, the EEOC, as provided in the 1972 Amendments,²⁴⁷ assumed all responsibility for the litigation functions previously performed by the Attorney General in regard to filing pattern or practice

242. Office of the Executive Director, EEOC.

243. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, TO ELIMINATE EMPLOYMENT DISCRIMINATION, at 539 (1975). [Hereinafter cited as 1974 CIVIL RIGHTS COMM'N REP.] The EEOC often failed to use its powers to seek appropriate preliminary relief pending final disposition of a charge when such action was necessary to effect compliance with the law. In *United States v. Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969) an appellate court held that where a defendant was found to be engaged in a pattern or practice of discrimination in violation of Title VII, affirmative and mandatory preliminary relief was available and, indeed, required to carry out the purpose of Title VII. But in the three-year period after the EEOC had obtained the authority to seek such relief, it had filed suit for preliminary injunctions in very few cases—an average of about six per year. During fiscal 1975 the Commission pursued this approach somewhat more actively, filing thirteen suits for preliminary injunction. "Job Bias Suits Filed by EEOC" 89 LAB. REL. REP. 299 (1975). According to the Senate Committee on Labor and Public Welfare, *Hayes* established "the appropriate standard" in seeking preliminary relief. S. LAB. COMM., LEGISLATIVE HISTORY, *supra* note 188, at 430. However, the EEOC apparently requires substantially more evidence before seeking a preliminary injunction than that required in *Hayes*.

244. EEOC. News Release (Jan. 23, 1976). These figures include cases filed under both section 706 and section 707.

245. 1974 CIVIL RIGHTS COMM'N REP., *supra* note 243, at 539.

246. As of July 31, 1974, the EEOC's complaint backlog exceeded 100,000. According to Senators Williams and Javits, "[The] ineffectiveness of the investigative-compliance process has led to a significant number of unsuccessful conciliations being forwarded to the litigation centers. The length of time required for approval of cases is over three months, and each case that is referred is already an average of three years old. In spite of the large number of cases referred, the number of cases actually initiated or filed by the centers is far below the goals they set. . . ." Letter from Senators Harrison A. Williams, Jr. and Jacob K. Javits to John H. Powell, Jr., Chairman, EEOC (September 10, 1974).

247. Act § 707(c),(e), 42 U.S.C. § 2000e-6(c),(e) (1970 & Supp. V 1975).

lawsuits. But the Commission, which had failed entirely to use the concurrent power it held with the Department of Justice during the period between March 24, 1972, and March 24, 1974,²⁴⁸ filed only one section 707 suit during fiscal year 1975 under its exclusive power to initiate litigation.²⁴⁹

Most significant has been the lack of litigation against job discrimination in the public sector. During fiscal 1973 the EEOC received 15,968 charges against state and local governments.²⁵⁰ In that same year, the United States Commission of Civil Rights noted that "State and local governments are among the largest employers in the nation" but reported that "[t]he Commission has not referred a State or local government case to the Department of Justice for court action. . . ." ²⁵¹ Even by 1977 the Commission had developed no new litigation programs in this important area and had established no priority to expedite the processing of charges against employers in the public sector.²⁵²

The litigation record, in addition to demonstrating little activity,²⁵³ also revealed the absence of a coordinated strategy to eliminate discrimination by

248. 1974 CIVIL RIGHTS COMM'N REP., *supra* note 243, at 543-44.

249. *Id.* at 544 n.1643.

250. 8 EEOC ANN. REP. 36 (1975).

251. 1974 CIVIL RIGHTS COMM'N REP., *supra* note 243, at 85-86.

252. *Id.* at 511.

253. The U.S. General Accounting Office, in its report on EEOC operations, was critical of the Commission's high litigation rejection rate. The data suggest that after the 1972 Amendments became effective, the Commission did not change its investigatory methods and procedures in recognition of the possibility that it might initiate litigation if conciliation efforts were unsuccessful. Investigation that may be adequate for findings of cause or no cause is not sufficient for the requirements of litigation. According to the GAO, ". . . EEOC's fiscal year 1975 workload statistics showed that about 80 percent of the charges reviewed by the litigation centers were rejected as unsuitable for litigation. Rejected charges are returned to the district offices which then inform the charging parties of their right to litigate at their own volition.

Charges recommended for litigation by the litigation centers are forwarded to EEOC headquarters for further review and consideration. The headquarters review, in turn, generally, results in a number of additional rejections. Detailed data on charge rejections at the headquarters level was not readily available; however, the reasons for such rejections were similar to those of the litigation centers. From fiscal year 1972 through fiscal year 1975, a total of 696 cases were authorized for litigation, and of these, 467 cases were filed in court (the latter included 229 cases filed in fiscal year 1975 which were less than the goal of 352 cases planned for that year). EEOC's charge litigation activity through fiscal year 1975 is summarized below.

	Fiscal year				Total
	1972	1973	1974	1975	
Cases authorized for litigation	10	166	210	310	696
Cases filed	6	114	118	229	467
Favorable court settlements	—	5	29	79	113
Dismissed—no appeal	—	(a)	15	23	38

(a) Information not available

As of June 30, 1975, 545 litigation cases were in EEOC's workload: 229 cases authorized for litigation but not filed and 316 cases pending litigation or appeal. In addition, some of the cases authorized for litigation were settled informally before suit was filed, but nationwide data on the extent

major corporations and labor unions. Through most of 1974, over 40 percent of EEOC's lawsuits were against respondents having work forces of between 25 and 300 persons. Another 20 percent of the respondents employed between 300 and 1,000 workers, 30 percent between 1,000 and 10,000 employees, and 4 percent had over 10,000 employees.²⁵⁴ The data reveal that the Commission failed to use its powers to attack discriminatory practices by the largest employers in each sector of the economy, and there is no indication that litigation against smaller employers dealt with critical issues.

G. National Programs Division

In 1973, EEOC chairman William H. Brown III, in an attempt to correct deficiencies in the operation of the Commission and to utilize the additional powers granted to the agency under the 1972 legislation, initiated a strategy to be conducted by the newly created National Programs Division in the Commission's Office of Compliance. The new Division had its origin in the staff investigation and preparation for litigation that led to the much-publicized agreement negotiated with the American Telephone and Telegraph Company requiring the payment of \$38,000,000 to workers who were discriminated against by the company.²⁵⁵

David A. Copus, Deputy Chief of the National Programs Division, explained that the unit's function was "to attack the most important employers and unions in each industry responsible for institutional discrimination on the basis of race, sex, and national origin."²⁵⁶ Copus also stated, "Seven years of conciliation convinced Congress and the Commission that voluntary efforts to end discrimination had in large part been unsuccessful."²⁵⁷ As part of the establishment of the National Programs Division, the Commission formulated a priority or "track" system for identifying types of cases. Designated to be on track 1 would be the dominant corporations and labor unions within each industry which had a large number of charges pending against them and a record of noncompliance with Title VII.²⁵⁸

of these settlements was unavailable at EEOC. However, information at three litigation centers indicated that such settlements were few." U.S. General Accounting Office, *THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION* 30-31 (1976). [Hereinafter GAO REPORT].

254. 1974 CIVIL RIGHTS COMM'N REP., *supra* note 243, at 541.

255. Interview with David A. Copus, Deputy Chief, National Programs Division, Office of Compliance, EEOC, Washington, D.C. (Dec. 5, 1973).

In the first consent decree, AT&T agreed to an expenditure of \$38,000,000. *EEOC v. American Tel. & Tel.*, [1973] 1 Empl. Prac. Guide (CCH) ¶ 1860 (E.D. Pa. Jan. 18, 1973). The Company later agreed to pay certain designated employees specified sums to compensate for delays in hiring and promotion, thus bringing the total amount to approximately \$100,000,000. Supplemental Agreement, *EEOC v. American Tel. & Tel.*, No. 73-149 (E.D. Pa. 1975). For an extensive analysis of these agreements see *EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE*, (P. Wallace ed. 1976).

256. Interview with David A. Copus, *supra* note 255.

257. DeWitt, *Labor Report, Strengthened EEOC Accelerates Action Against Business, Labor Employee Discrimination*, 5 NAT'L J. 919 (1973).

258. *Id.* at 916.

On September 17, 1973, “[f]our national corporations, the industrial unions with whom they have collective bargaining agreements, and a major construction union, the contractors and contractors’ associations with whom they collectively bargain” were charged by the EEOC with violating Title VII on a national scale.²⁵⁹

In announcing the first actions by the National Programs Division, the Commission stated: “This strategy was developed to resolve cases of major national significance and to reduce the burden of multiple investigations on nationwide employers and unions.”²⁶⁰ Because of confidentiality requirements, the Commission did not name the organizations charged, but it soon became known that the General Motors Corporation, the Ford Motor Company, the General Electric Company, and Sears, Roebuck & Company were under investigation.²⁶¹ The major construction union involved was the International Brotherhood of Electrical Workers, AFL-CIO, and its local affiliates in twelve cities.²⁶² Other unions named were the United Auto Workers; the International Union of Electrical Workers, AFL-CIO; and the United Electrical Workers.²⁶³

Because there were many charges pending with the Commission and much resistance to compliance with the law by employers and labor unions in the construction industry, the National Programs Division coordinated a joint action against the National Electrical Contractors Association, consisting of 6,000 affiliated construction companies, and the International Brotherhood of Electrical Workers, one of the most important unions in the building trades and one that controlled hiring and determined racial job patterns in its jurisdiction. On August 30, 1973, the chairman of the EEOC filed a commissioner charge against the employers’ association and the IBEW and its local unions in twelve designated Standard Metropolitan Statistical Areas.²⁶⁴ In response to the Commission’s investigation, the Contractors Association agreed to provide data on the racial composition of the work force for the twelve cities under review,²⁶⁵ but the IBEW failed to cooperate. The International Union would not give the Commission the requested information and its local unions also refused.²⁶⁶ Copus repeatedly

259. *EEOC Special Investigation Unit Files First Discrimination Charge*, EEOC News Release at 1 (Sept. 17, 1973).

260. *Id.*

261. Philip Shabecoff, *Job Bias Charged to 4 Companies and Major Unions*, N.Y. Times, Sept. 18, 1973, at 1, col. 8. Fair Employment Practices—Summary, No. 225 (BNA)(Oct. 4, 1973) at 1.

262. Tim O’Brien, *Two New Groups Charged with Job Bias by EEOC*, Wash. Post, Sept. 21, 1973, at A3, col. 1.

263. Shabecoff, N.Y. Times, *supra* note 261.

264. Commissioner Charge TNP4-C4000. Authority to file commissioner’s charges is derived from section 706(b) of the 1972 Act, 42 U.S.C. § 2000e-5(b) (1970).

265. These were New York City, Philadelphia, Washington, D.C., Detroit, Chicago, Phoenix, Atlanta, Dallas, Denver, Houston, Los Angeles, and San Francisco.

266. Interview with David A. Copus, Deputy Chief, National Programs Division, Office of Compliance, EEOC, Washington, D.C. (June 5, 1975).

sought assistance from the AFL-CIO but to no avail; "its civil rights department was of absolutely no help. They did not even acknowledge receipt of the Commission's letter."²⁶⁷ The EEOC issued subpoenas during December 1973 but the International Union refused to be subpoenaed. In September 1974, new subpoenas were served on the International Union and its locals. The matter of subpoena enforcement was crucial for the EEOC, and in an effort to force the IBEW to comply with the law, the Commission filed suit in April 1975 in the federal district court in Houston, Texas.²⁶⁸ The Commission's application for an order to show cause was granted on April 1, 1976, and this was followed by an order of enforcement of subpoena by the District Court for the District of Columbia.²⁶⁹ During this period the Commission also intervened in private lawsuits under section 706 of Title VII, filed in Washington, D.C., and Chicago, against the IBEW and construction industry contractors.²⁷⁰

Three years after the creation of the National Programs Division, it was still unable to complete its major projects. As of mid-1976 the Division was continuing its investigations of the General Motors Corporation, the Ford Motor Company, the General Electric Company, and Sears, Roebuck & Company.²⁷¹ In addition to the fact that these nationwide investigations were complex and time-consuming, the program had also suffered from serious bureaucratic delays. According to Copus, "Every time a new chairman is appointed, respondents become more intransigent in their resistance and refuse to cooperate until the new chairman publicly demonstrates his attitude toward the National Programs Division."²⁷²

Because the National Programs Division represented a new approach for the agency,²⁷³ there were serious internal problems including an ambiva-

267. *Id.*

268. EEOC v. IBEW, No. 75H717 (S.D. Tex., filed Apr. 25, 1975).

269. EEOC v. Nat'l Electrical Benefit Fund, Misc. No. 76-0017 (D.D.C., Apr. 1, 1976) (Memorandum and Order).

270. Interview with David A. Copus, Deputy Chief, National Programs Division, Office of Compliance, EEOC, Washington, D.C. (April 27, 1976).

271. *Id.*

272. *Id.* Soon after John H. Powell, Jr. became chairman of the EEOC he told the New York Times in an interview that he planned to review the new strategy of bringing charges against unions, companies, and entire industries as a way of combatting job discrimination. Mr. Powell said that he had some reservations about the use of the strategy known as the "tracking system" and said, "There is a question of how far back should you go in bringing charges and how much data should a company be required to give." He added that he was initiating the review as a prerogative of the chairman without involving the four other commissioners. Delaney, *Action Reviewed on Bias Charges*, N.Y. Times, Feb. 12, 1974, at 36, col. 1.

Powell created obstacles for the agency by initially encouraging respondents not to cooperate in the hope that the Division would be abolished. He tried to shift the investigations to the Office of the Voluntary Programs, one of the weakest in the agency; but as this procedure was not practical, he later reversed himself and authorized the National Programs Division to resume its investigations.

273. William H. Brown III, invoking his authority as chief administrator of the EEOC, had ordered the establishment of the National Programs Division without a vote of the other commissioners. Although the Commission never formally approved the establishment of the National Programs Division, it later approved its budget as a line item within the budget of the Office of Compliance.

lent attitude toward the program within the Commission, and a lack of adequate staff. The staff problem became especially acute in the course of investigations of such vast enterprises as the General Motors Corporation. The National Programs Division was the EEOC's most important attempt to exercise the new powers granted by the 1972 Act, but by mid-1977 its potential was yet to be realized.

H. Office of the General Counsel

In the course of the Congressional debates on the 1972 Amendments to Title VII there was a considerable effort to make the General Counsel independent of the Commission.²⁷⁴ When the EEOC was denied the power to issue cease-and-desist orders, the proposal for a completely independent General Counsel was modified because its purpose—separation of the functions of prosecution and adjudication—was no longer warranted. Instead, section 705 of the amended Act provided for the establishment of a new Office of the General Counsel with the holder appointed by the President but not autonomous from the Commission.²⁷⁵

By giving the EEOC authority to file lawsuits, the 1972 Amendments made possible the transformation of the Commission into an enforcement agency. That this potential was not realized is indicated by EEOC's substantial failure to reorganize and expand its litigation operations.

Not only did the Commission fail to make the changes required for a basic shift in emphasis from conciliation to enforcement, it also did not take full advantage of authorized staff expansion. According to the United States Commission on Civil Rights:

Early in 1976 the name of the National Programs Division was changed to Special Investigation and Conciliation Division. Interview with David A. Copus, Director of Special Investigation and Conciliation Division, Office of Compliance, EEOC, Washington, D.C. (April 27, 1976).

274. 118 CONG. REC. 582-89 (1972) (remarks of Senators Schweiker and Williams).

275. The Office of the General Counsel consists of three divisions with specialized responsibilities. The Litigation Division supervises the work of the Regional Litigation Centers in Philadelphia, Chicago, Atlanta, Denver, and San Francisco; recommends and conducts all litigation and coordinates all federal district court matters involving subpoenas, sections 706, 707, 709, 711, and other suits initiated by the Commission; and directs interventions and other legal activity involving employment discrimination law as applied to parties who are subject to Title VII.

The Appellate Division conducts all litigation in the circuit courts of appeals (and, as appropriate, in federal district courts); reviews and recommends cases for appeal; prepares and files motions, briefs, and other court papers; and presents oral argument before the courts. It recommends to the Attorney General actions pertaining to appellate litigation in the U.S. Supreme Court, and conducts appellate *amicus curiae* litigation in all courts; decides in which cases to participate; prepares and files all papers; and presents oral argument before the courts in all *amicus curiae* cases.

The Legal Counsel Division gives legal advice and counsel to the Commission and to state FEP agencies, and provides a variety of internal legal services for the agency. It handles all litigation in which the Commission is a defendant (excluding section 706 and section 707 cases) and represents the Commission at various administrative hearings. Training and recruitment needs of the Office of the General Counsel are also planned and coordinated through the Legal Counsel Division. Memorandum to Julia Cooper, Acting General Counsel, EEOC, from Bernard Yim, Acting Director of Management, EEOC. SUBJECT: Mission and Functional Statements (July 25, 1975).

The Office of the General Counsel, for example, one year after it obtained the power to file suit, had 105 vacancies out of 270 positions. Thus, the Office charged with administering the agency's most powerful compliance tool was operating at less than two-thirds of its capacity. Further, as late as January 1974, more than 20 percent of authorized investigator and conciliator positions were vacant. By August 1974, many of EEOC's vacancies had been filled. For example, only 9 percent of the positions in the regional and district offices were vacant. In the Office of the General Counsel, however, as of February 1975, there were still vacancies in more than 14 percent of its authorized positions.²⁷⁶

By May 1976 fifty-eight attorney positions were vacant, including twenty in the Commission's headquarters.²⁷⁷

Transformation of the EEOC from a conciliation agency to a litigation agency would require a reallocation of staff resources, but there is no indication that this change was contemplated. In fiscal year 1973, the EEOC had an authorized staff level of 1,909 positions, of which 1,143 were allocated to compliance activities, but the Office of the General Counsel had only 270 authorized positions.²⁷⁸ In fiscal 1976 authorized staff level for the EEOC was 2,584, of which 524 positions were authorized in the Office of the General Counsel.²⁷⁹ The percentage of staff allocated to the General Counsel's Office increased from 14.20 percent in 1973 to 20.28 percent in 1976.²⁸⁰ However, since there were seventy-five vacancies in the Office of the General Counsel (including fifty attorney positions), in contrast to ninety-two vacancies for the rest of the Commission, the actual percentage of total agency staff working in the General Counsel's Office on June 30, 1976, was 18.02 percent.²⁸¹

Another major weakness in the operation of the General Counsel's Office is that the Counsel is required to obtain approval from the Commission to litigate each specific case.²⁸² If the Office of the General Counsel is to function effectively, the Counsel should be able to make an independent judgment—that is, have the power to decide where and when to litigate, to establish priorities, and to select cases at the investigative level for potential litigation.²⁸³

276. 1974 CIVIL RIGHTS COMM'N REP., *supra* note 243, at 500.

277. Holsendolph, *Job-Equality Complaints Piling Up*, N.Y. Times, June 14, 1976, at 52, col. 8.

278. 1974 CIVIL RIGHTS COMM'N REP., *supra* note 243, at 496-500.

279. Interview with Alvin Golub, Deputy Executive Director, EEOC, Washington, D.C. (July 23, 1976).

280. *Id.*

281. *Id.*

282. Interview with Roberta V. Romberg, Assistant General Counsel for Litigation Services, EEOC, Washington, D.C. (July 18, 1975).

283. In 1974 serious conflict developed between EEOC Chairman John H. Powell, Jr., and William A. Carey, the first presidentially appointed General Counsel under the 1972 Act. The nature of the dispute is revealed in the following memorandum dated September 30, 1974, from Carey to Powell, Re: *EEOC v. Purex Corp.*, Civil Action No. 73C458(2) [7 Empl. Prac. Dec. ¶ 9208 (1974)]:

I. Commissioner Charges

Although the 1972 Amendments authorized the EEOC to file lawsuits, it made such litigation completely dependent upon a specific charge filed by an aggrieved party or a member of the Commission. In the original Act the Justice Department was empowered under section 707(a) to file a lawsuit when the Attorney General had reason to believe that there was a violation of Title VII. Under the Amended Act, section 707(e) authorizes the Commission to litigate pattern or practice violations, but the power to do so depends on the charge mechanism defined in section 706(b). This requirement seriously limits the Commission's ability to function as an effective enforcement agency. The emphasis should be on pattern or practice litiga-

This memorandum is my objection to what I consider unwarranted and unauthorized interference by you with the Office of General Counsel's conduct of the litigation in the captioned Purex Corporation case which is presently pending in the United States District Court for the Eastern District of Missouri.

This interference seems plain from your letter of September 16, 1974, to Robert L. Warlick, a vice-president of the Purex Corporation This letter reflects that in the course of my office's litigation efforts in this case, Purex was told by you that:

- (1) My Chicago Litigation Center staff was perhaps involved in a "regrettable misunderstanding" with Purex representatives.
- (2) You had personally injected yourself into trial strategy in this case by instructing the Chicago Litigation Center to meet with a Purex representative and then to provide you with a "status report" by September 30, 1974, concerning this case (even though such reports, as you know, are routinely prepared in the regular course of business by this Office concerning all litigation matters).
- (3) You had earlier conducted a meeting in Washington with Purex concerning this litigation in the absence of any General Counsel representative. You also asserted that District Office staffs would be "capable and willing" to assist you in your compliance efforts.

At the heart of this memorandum is the fact that the Office of General Counsel and its staff (which of course includes the Chicago Litigation Center) were wholly unaware of your intervention as set forth above until you wrote Purex with a carbon copy sent to the Chicago Litigation Center. You never informed me, William Robinson or Ron James of these matters. As you know, Mr. Robinson is the Associate General Counsel in charge of all OGC litigation matters and Mr. James is the OGC's Regional Attorney whose staff is prosecuting this case

. . . [Y]our personal intervention has at once lessened the opportunity for a successful resolution of this case; compromised the integrity of the Office of General Counsel's litigation process by giving the appearance that special treatment may be obtained by personal *ex parte* contact with you; and provided the unfortunate opportunity for the staff of the General Counsel to believe that hard fought efforts may be circumvented or rendered nugatory by negotiations which neither my staff nor I are aware of [Y]ou have begun a precedent which, if not stopped in its tracks, presents a clear and present danger of undermining public confidence in the impartial and even-handed Commission enforcement of Title VII. That is to say that if your personal intervention were to be tolerated, every one of the some 425 plus respondents against whom suit has been authorized could expect to receive the same personal attention of the Chairman. Failure to give such personal attention would involve the Chairman in personal selectivity which is always the hallmark of special treatment and its commitment to public misunderstanding.

On a final note, I believe it is appropriate to point out that I often receive requests from respondents for special or individualized treatment with respect to cases filed against them. Without exception, I have found it not only desirable but appropriate to inform the representatives of those respondents that they should deal with our regional attorneys or headquarters staff responsible for the prosecution of such cases. It is my honest belief that the fair and impartial enforcement of Title VII mandates nothing less.

tion, not tied to charge requirements, allowing the EEOC to devote its resources to a systematic attack against institutionalized patterns of discrimination.

This problem could be partly overcome without a change in the statute if the power of commissioners under section 706(a) to file charges were frequently exercised. Commissioner charges are potentially very important, since they can precipitate investigation and litigation by the EEOC in the absence of a charge from an aggrieved party. Individuals may not file complaints for a variety of reasons, including ignorance of Title VII and fear of reprisal, and the frequent and innovative use of commissioner charges could be valuable in circumventing these difficulties. According to the United States Commission on Civil Rights: "Used in combination with EEOC's enforcement powers under the 1972 amendments, the Commissioner Charge is a potentially powerful tool. It gives the agency full stature as an enforcement agency in that it can select its own targets for investigation. The Commissioners, however, have made only sporadic use of the Commissioner Charge."²⁸⁴ Unfortunately, there was no plan or strategy for the filing of Commissioner Charges as a supplementary approach to the charge process initiated by individuals.

J. Backlog of Charges

From its inception, the EEOC has been plagued by a constantly increasing accumulation of unresolved cases. The number of charges filed has increased in each year of the Commission's existence—from 8,854 in fiscal 1966²⁸⁵ to 77,000 in 1976.²⁸⁶ Between July 1965 and September 1975 more than 280,000 individual charges were filed.²⁸⁷ The Commission has not kept up with this pace, and at the end of the first fiscal year in June 1966 the backlog was 6,133 charges;²⁸⁸ in 1967, 8,512 charges;²⁸⁹ in 1968, 11,172

284. 1974 CIVIL RIGHTS COMM'N REP., *supra* note 243, at 547.

This last observation is confirmed by the data:

Fiscal Year	Commission Charges Filed	Fiscal Year	Commission Charges Filed
1965	3	1971	23
1966	30	1972	70
1967	127	1973	62
1968	154	1974	100
1969	76	1975	20
1970	94	1976	21

Source: Office of the Executive Director, EEOC.

285. 1 EEOC ANN. REP. 58 (1967).

286. Interview with Alvin Golub, *supra* note 279.

287. *Oversight Hearings on Federal Enforcement of Equal Opportunity Laws Before the Subcomm. on Equal Opportunities of the House Comm. on Educ. and Labor*, 94th Cong., 1st Sess. part 2 at 4 (1975) (statement of Lowell W. Perry).

288. 1 EEOC ANN. REP. 58 (1967).

289. 2 EEOC ANN. REP. 52 (1968).

charges²⁹⁰ and by June 1975 the backlog was 126,340 charges.²⁹¹ In 1976, after ten consecutive years of backlog increase, it was projected that the number would exceed 130,000.²⁹²

As a consequence of the huge backlog, serious delays in processing the charges occurred, and by 1974 the problem of time lag had assumed critical proportions.²⁹³ In November 1974, a report prepared by Booz, Allen & Hamilton, a private consulting company engaged by the EEOC to study its operations, concluded that the Commission takes an average of two and a half years to process a charge,²⁹⁴ and in the same year the United States Commission on Civil Rights found the average time required for the resolution of an EEOC charge, from receipt to final disposition, to be 32 months. "The process takes so long because of delays caused by EEOC's enormous backlog of charges."²⁹⁵

290. 3 EEOC ANN. REP. 33 (1969).

291. GAO REPORT, *supra* note 253, at 9.

292. Interview with Alvin Golub, *supra* note 279.

293. In 1976 the U.S. Court of Appeals for the Fifth Circuit took judicial notice of EEOC's backlog and its implications:

We noted in 1972 that "it takes the EEOC a minimum of eighteen months to two years to process a charge of discrimination." *Chromcraft Corp. v. EEOC*, (5th Cir. 1972) 465 F.2d 745, 747. The uncontradicted affidavit of plaintiffs' counsel, presented to the district court in support of a motion to modify order, attested to his experience that the length of time the New Orleans EEOC office (where this complaint would be heard) has taken to investigate and attempt reconciliation of discrimination charges was 1-½ to 5-½ years. The EEOC, in its amicus brief in this case, makes the following uncontested statement: "As of December, 1974, there were 2,195 charges pending in the Commission's New Orleans District Office, with 215 new charges filed each month. The average period of time elapsing between the filing of a charge until conciliation is attempted is 40.2 months."

Whatever the absolute judicial validity of the above sources of information, it seems beyond cavil that the effect of the stay order in this case was to put plaintiffs "effectively out of court," see *Bon Voyage*, 188 F. Supp. 434 (S.D.N.Y. 1960) for a protracted and indefinite period—at least eighteen months, and possibly much longer. For the purpose of expedition and certainty, the parties here would have been served just as well by a stay pending the arrival of Godot.

We do not overlook the fact that the district court, in conjunction with its stay order, "respectfully requested" the EEOC "to receive and to entertain the charges so filed, to investigate the same and to expedite its determination of this matter." We quote again from the amicus brief of the EEOC: "Although the Commission's New Orleans office implemented a procedure for expediting charges in December, 1974, it is not known how long it will take to process an "expedited" charge. Moreover, if investigation of charges filed in the course of Section 1981 suits is expedited, as the district court requested in this case, the anomalous result will be that such charges will take precedence over charges previously filed pursuant to regular Title VII procedures."

We agree that the expedition requested by the district court would lead to an anomalous result, and we find that the court's request does nothing to undermine our initial conclusion that the stay order placed plaintiffs effectively out of court. Nothing in the record indicates that there was any possibility, at the time the district court entered its order, that the EEOC proceedings could be initiated and brought to the conciliation stage in less than eighteen months.

Hines v. D'Artois, 531 F.2d 726, 731 (5th Cir. 1976).

294. Singer, *Employment Report/Forced Resignations Allow Revamping of EEOC*, 7 NAT'L J. 447, 448 (1975).

295. 1974 CIVIL RIGHTS COMM'N REP., *supra* note 243, at 529.

This deteriorating situation brought attacks from several quarters. For example, Representative William Clay of Missouri reported that a hundred complaints were pending against a company in St. Louis, "but nothing has been done about those complaints in five years."²⁹⁶ The *New York Times*, in a survey of the EEOC's operations, concluded that "because of the backup, employees—most of whom earn low wages—are forced to wait from two to seven years for rulings on whether their complaints are justified. By the time the Commission gets around to their complaints, many employees have left their jobs in discouragement."²⁹⁷

In April 1970 the EEOC initiated a new approach to the backlog problem.²⁹⁸ Under "Pre-Determination Settlement" procedures, the Commission's district directors are permitted to begin negotiations to resolve a charge while the investigation is still being conducted and before a determination has been made of whether there is reasonable cause to find a violation of Title VII.

The Pre-Determination Settlement approach has very limited value, since it is useful only when the charge before the Commission involves no dispute over the facts and no conflict between charging parties and respondents over issues and remedies. When there is one charging party, one issue without complexity, and one respondent, it is possible to use this procedure, but such cases are rare.

In fiscal years 1972 through 1975 the Commission "resolved" an increasing number of charges,²⁹⁹ but approximately half of all the charges reported "resolved" were in fact so designated for "administrative" purposes, that is, with no known benefit to charging parties. In fiscal year 1975 the number of "administrative closures" was 55 percent of all "resolved" cases,³⁰⁰ and in 1976 it was 46 percent.³⁰¹ In each year a very large proportion of all cases reported "resolved" were in fact dismissed for a variety of

296. Holsendolph, *supra* note 277, at 51, col. 4; 52, col. 7.

297. *Id.* at 52, col. 7.

298. 5 EEOC ANN. REP. 33-34 (1970).

299. According to a 1976 report by the U.S. General Accounting Office on the effectiveness of the EEOC, the Commission "resolved" 98,135 charges from July 1, 1972 to March 31, 1975.

Data analysis shows; however, that only 11 percent of these resolutions were considered by EEOC to be successful negotiated settlements. In another 11 percent of the cases, EEOC found reasonable cause to believe that discrimination had occurred but was unable to negotiate a successful settlement of the charges Approximately 16 percent of EEOC's reported charge resolutions were no-cause findings. The remaining 61 percent were closed administratively

GAO REPORT, *supra* note 253, at 11.

300. Source: Office of the Executive Director, EEOC.

301. *Id.*

reasons, including findings of no jurisdiction; there was no action against discrimination and the EEOC achieved nothing.³⁰²

Under section 706(c) of Title VII the EEOC is required to defer charges to local and state fair employment practices agencies, which are allowed sixty days to resolve each charge before the EEOC establishes its jurisdiction. Through mid-1977, the EEOC was still deferring complaints to fifty-seven state and local agencies.³⁰³

Analysis of the operations of these agencies reveals that, on the whole, they have not helped eliminate the backlog of unresolved Title VII charges. According to the United States Commission on Civil Rights:

In theory, the deferral of charges is an important means of reducing the backlog. In practice, however, it has done little to alleviate EEOC's caseload. During fiscal year 1974 EEOC deferred 32,173 charges to State and local agencies but only approximately 7,000 of these charges were processed by the agencies. In most cases, the agencies simply waived jurisdiction over the cases to the EEOC.

There is evidence that some State agencies are not anxious to prosecute deferred EEOC charges. The Illinois Human Relations Commission, for example, routinely waives jurisdiction over deferred charges unless the charging party also personally files the charges with them. The California agency employs the same procedure. In both instances, the agencies cited their own workloads as the justification for this practice.³⁰⁴

Despite their sorry record, these agencies receive substantial financial assistance from the EEOC. In fiscal year 1973 state and local agencies

302.

Fiscal Year	New Charges Received	Total Charges Resolved (Includes Deferral Agencies)
1966	8,854	6,347
1967	9,688	5,134
1968	10,095	6,720
1969	12,148	6,342
1970	14,234	5,967
1971	22,920	11,497
1972	32,840	10,802
1973	48,899	20,187
1974	56,953	37,726
1975	71,023	62,128
1976	77,000	55,437

The category "Total Charges Resolved" includes charges from the accumulated backlog of previous years. Data supplied by the Office of the Executive Director, EEOC.

303. *Id.* For a list of these agencies, see note 230 *supra*.

304. 1974 CIVIL RIGHTS COMM'N REPORT, *supra* note 243, at 562.

received \$1.7 million from the Commission; in 1974, \$2.5 million; in 1975, \$3.5 million; and in 1976 the President requested \$8 million.³⁰⁵ A few of the deferral agencies have been of some limited value in helping to reduce EEOC's backlog. The Pennsylvania Human Relations Commission, for example, though inadequate in many respects, has used funds from the EEOC to employ attorneys trained by the Commission and to initiate pattern-centered litigation against a variety of large employers in Pennsylvania. There is reason to believe that such litigation would not have taken place without EEOC support, financial and otherwise.³⁰⁶ But the Pennsylvania experience is far from typical. Most local and state commissions have not engaged in programs of litigation, and the EEOC has failed to make the deferral mechanism function properly by imposing standards and monitoring operations. However, given EEOC's own internal weakness, it is unrealistic to expect any other condition.³⁰⁷

The inadequate performance of most of these agencies, together with their lack of accountability to the EEOC, became so evident that, according to Alvin Golub, Deputy Executive Director of the Commission, "In 1976, because of the uneven performance and capabilities of the various agencies, EEOC found it necessary to begin a major effort to evaluate the functioning of all state and local agencies to which we defer charges."³⁰⁸

Given the continuing increase in new charges, it is unlikely that the EEOC will be able to reduce its backlog significantly unless there are drastic changes in its structure and operations.

K. Operational Deficiencies

The EEOC began operations with both an inadequate budget and administrative difficulties. During the first year of operation it received \$3,250,000.³⁰⁹ For fiscal year 1967 the budget was increased to \$5,240,000.³¹⁰ During the next decade appropriations for the Commission were significantly increased.³¹¹ In the course of public hearings held in May

305. *Id.* at 563.

306. Interview with Harriet Hendler, Director of Enforcement, Pennsylvania Human Relations Comm'n, Philadelphia, Pa. (June 10, 1976).

307. A study released in 1977, made by the Center for National Policy Review, *State Agencies and their Role in Federal Civil Rights Enforcement*, concluded that the practice of deferring charges of job discrimination from EEOC to state and local fair employment practice commissions is a failure. According to the study, EEOC is guilty of "an increasing abdication of federal civil rights responsibility," while the state and local agencies are "in a state close to administrative and procedural chaos." Fair Employment Practices—Summary No. 317 (BNA), Apr. 14, 1977 at 2, 5.

308. Interview with Alvin Golub, *supra* note 279.

309. 1 EEOC ANN. REP. 57 (1967).

310. 2 EEOC ANN. REP. 51 (1968).

311. On January 25, 1972, the Washington Post reported (p. A9) that the EEOC had requested a "major increase" from \$21.7 million to \$29.5 million:

If that request is approved, the agency's budget will have nearly doubled in three years; the actual expenditures for the EEOC were \$15.7 million in fiscal 1971.

1976 on the operations of EEOC, Representative Hawkins of California, Chairman of the House Subcommittee on Equal Opportunities, pointed out that the agency had received an \$8.5 million increase in its annual budget over the previous year, together with an increase of 200 in its staff authorization level.³¹² The Commission's proposed budget for 1977 requested a total of \$70,100,000, a net increase of \$5,441,000 over the adjusted 1976 budget of \$64,659,000.³¹³ Despite the increased budget and an expanded staff—2,421 at the end of fiscal year 1975 and 2,584 in fiscal 1976³¹⁴—the EEOC continued to suffer from acute internal problems, including inadequate leadership, inexperienced management, and chronic staff vacancies.

These problems have been endemic to the EEOC from its inception. Although the Civil Rights Act of 1964 was enacted into law on July 2, 1964, enforcement of Title VII was postponed until one year later.³¹⁵ The justification given for this delay was that an interim period was necessary to establish the EEOC, to organize and staff the new agency, and to formulate procedures. In addition, the Act required:

The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in a fair and effective administration of this title when all of its provisions become effective.³¹⁶

Most of the increase would go for additional staff to try to cut the huge backlog of complaints.

Past increases in staff have not done so. Two factors help explain this, according to government officials: first, whenever the EEOC opens a new office, it stimulates more complaints; second, whenever an award is made in a neighborhood, more complaints come in.

The EEOC requested a budget of about \$46.5 million for fiscal year 1973; instead, Congress appropriated \$32 million. 8 EEOC ANN. REP. 33 (1975).

Funding of such magnitude may seem impressive, but given its statutory responsibilities, the approved annual budgets for the EEOC have been insufficient. The Commission stated in its budget request for fiscal year 1971 that

Since the beginning of the Commission in fiscal year 1965, budget and staff resources have proven inadequate to deal with the inflow of complaints from citizens under Title VII As a result, the enforcement backlog of investigations and conciliations and decisions to be written has grown steadily Sufficient resources have not been available for improving the processing and analysis of statistical data collected through the Commission's annual surveys of employers, unions and apprenticeship programs The results of these programs provide decision-making data for action programs at the Federal, State, and local levels to eliminate employment discrimination.

Hearings on EEOC and Related Agencies' Appropriations Before a Subcommittee of the House Comm. on Appropriations, 91st Cong., 2d Sess. 581. For a detailed analysis of EEOC budget and expenditures, see *Hearings Before a Subcommittee on Appropriations, House of Representatives*, 94th Cong., 2d Sess. 466-524 (1976).

312. Holsendolph, *supra* note 277, at 51.

313. EEOC, 1977 Budget, Submitted to the Congress of the United States, February 1976, p.3.

314. Interview with Alvin Golub, *supra* note 279.

315. Act § 716(a), 42 U.S.C. § 2000e-15(a), reprinted in 42 U.S.C.A. ch. 21 at 280.

316. Act § 716(c), 42 U.S.C. § 2000e-15(c) (1970).

President Johnson appointed a chairman and members of the Commission just one month before the EEOC was to become operational, although section 716(b) permitted establishment of the agency eleven months earlier; and the conference required by the statute to prepare the nation for compliance with the Act did not take place until after the effective date of Title VII.

When the agency finally got under way, such failures of leadership continued. The lack of continuity at executive levels has been especially conspicuous. The United States Commission on Civil Rights noted that during its first five years

. . . the EEOC has been directed by four chairmen, not one of whom has served as long as 2 years. Moreover, a hiatus of five months occurred between the resignation of the first chairman and the qualification of his successor. Thus there has been a lack of continuity in Commission leadership during its 5-year existence, particularly since the rapid succession of chairmen has been paralleled by an equally rapid turnover of high-level staff.³¹⁷

During the same five-year period, EEOC had six Executive Directors, seven Directors of the Office of Compliance, and six General Counsels.³¹⁸ In its first eleven years, EEOC had six Chairmen, five Acting Chairmen, and a total of sixteen Commissioners.³¹⁹ It has also had ten General Counsels or

317. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT at 88 (1971).

318. *Id.*

319. EEOC Commissioners and Terms Served

Commissioner	Served from	To
Franklin D. Roosevelt, Jr. (Chairman)	June 1, 1965	(resigned) May 11, 1966
Samuel C. Jackson	June 1, 1965	July 1, 1968
Luther Holcomb	June 1, 1965	July 1, 1975
Aileen Hernandez	June 1, 1965	(resigned) November 10, 1966
Richard Graham	June 29, 1965	July 1, 1966
Stephen N. Shulman (Chairman)	September 21, 1966	July 1, 1967
Vicente Ximenes	June 11, 1967	July 1, 1971
Clifford L. Alexander 1969; (Chairman)	August 4, 1967	Resigned as Chairman May 1, resigned as Commissioner August 17, 1969
Elizabeth Kuck	March 15, 1968	July 1, 1970
William H. Brown III (Chairman)	Appointed Commissioner October 29, 1968; appointed Chairman May 6, 1969	July 1, 1973
Colston A. Lewis	August 14, 1970	—
Ethel B. Walsh	January 1, 1971	—
Raymond Telles	October 18, 1971	(resigned) October 1, 1976
John H. Powell, Jr. (Chairman)	January 3, 1973	Resigned as Chairman March 19, 1975; resigned as Commissioner April 30, 1975

Acting General Counsels and eleven Executive Directors or Acting General Directors.

Since the statute makes the chairman responsible for the administrative operations of the Commission,³²⁰ the lack of continuity in that office has been especially damaging. Agency officials such as the executive director and other staff executives report directly to the chairman. The responsibilities of the other commissioners are vague, and these commissioners have significantly less authority over EEOC operations than the chairman.³²¹

Commissioners do not have specific day-to-day responsibilities and have been left to define their roles for themselves. Because of the informal nature of this process there is extreme variation in the functioning of individual commissioners. Unless a commissioner, on his or her own initiative, develops an area of expertise and continuing responsibility, he or she has little to do but approve staff recommendations to litigate specific cases and vote on policy matters. Few commissioners have proposed and actively participated in the making of agency policy. Some just make speeches, issue statements and generally engage in a variety of public relations activities that have little substance. Others are concerned with operational matters, such as bookkeeping and accounting procedures, and the awarding of contracts to private companies for goods and services. Very few have been interested in the interpretation of Title VII by the courts and the implications of legal decisions on the agency's administration of the law. On balance, the lack of definition of the role of commissioners and the wide latitude permitted each individual appointed as such have been significant factors in the failure of EEOC to function as an effective agency.

Throughout its history a high rate of staff turnover has seriously impaired the functioning of the EEOC, and the Commission "continue[s] to be plagued by personnel problems which hamper its efforts to fulfill its mission. As of May 1973, nearly 25 percent (440) of its authorized positions were vacant. EEOC's vacancy problem was worsened by the fact that many of the vacancies were in crucial areas."³²² As of June 30, 1976, there were 167 vacancies in the authorized staff level of the Commission.³²³ While there was a decrease in the percentage of vacancies, it should be noted that a large proportion of the unfilled positions were in the Office of the General Counsel (75 vacancies)³²⁴ and that other vital staff positions had

Lowell W. Perry (Chairman)	May 27, 1975	(resigned) May 15, 1976
Daniel Leach	April 1, 1976	—

As of May 1, 1977 there were two vacancies on the Commission, including that of chairman.

Source: Office of the Executive Director, EEOC.

320. Act § 705(a), 42 U.S.C. § 2000e-4(a) (1970).

321. 1974 CIVIL RIGHTS COMM'N REPORT, *supra* note 243, at 529.

322. *Id.* at 499-500.

323. Interview with Alvin Golub, *supra* note 279.

324. *Id.*

remained vacant over a long period. In many instances the operations of the EEOC require persons with highly specialized skills, and there is reason to believe that the civil service system has been unable to supply enough personnel with suitable qualifications. This places heavy burdens on the small number of long-term staff members who are devoted and highly competent. Finally, in the appointment of commissioners, political and other non-job-related considerations have often been decisive to the great detriment of the agency.³²⁵

Beginning in 1974, the problems of the EEOC became increasingly serious and subject to public exposure.³²⁶ At the request of the Senate Committee on Labor and Public Welfare, the General Accounting Office investigated the functioning of EEOC and prepared a report "detailing the apparent failure of its administration."³²⁷

325. The major public example of direct interference by the White House in the work of the EEOC occurred in 1969, when the Nixon Administration removed Clifford L. Alexander, Jr., as chairman of the Commission after Senator Dirksen threatened during a Senate committee hearing to have the President oust Alexander. The EEOC, in response to many complaints, had investigated employment practices in the aerospace, banking, motion picture, and television and radio industries in Southern California, and invited several major corporations and labor unions to testify at a public hearing and respond to criticism of their alleged discriminatory employment policies. Among the companies asked to participate in three days of EEOC hearings in Los Angeles were McDonnell-Douglas, Lockheed Aircraft, Warner Brothers, Twentieth Century-Fox, Bank of America, Security Pacific National Bank, and the CBS, NBC, and ABC television networks. Representatives of the International Association of Machinists, and the International Alliance of Theatrical and Stage Employees, both AFL-CIO affiliates, were also asked to appear. (*Hearings Before the U.S. Equal Employment Opportunities Commission on Utilization of Minority and Women Workers in Certain Major Industries*, March 12-14, 1969, Los Angeles, California, Government Printing Office, pp.iii, iv.) Two weeks later, during hearings of the Senate Subcommittee on Administrative Practice and Procedure, Senator Dirksen made many references to the EEOC's Los Angeles hearings and was extremely critical of the Commission's activities. On March 27, 1969, in the course of a heated exchange with Alexander, Dirksen said that "either this punitive harrassment is going to stop, . . . or I am going to the highest authority in this Government and get somebody fired." (*Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 22 (1969-1970)). The day after the Senate Republican leader's threat, the White House announced that Alexander would be replaced by a Republican, and on April 9, 1969, Alexander resigned as EEOC Chairman, effective May 1. Reed, *Job-Rights Chief Quits in Dispute on Nixon's Goals*, N.Y. Times, April 10, 1969, at 1. According to Alexander, Dirksen's attack and the subsequent action of the Nixon Administration, although directly provoked by the EEOC hearings in Los Angeles, were the results of a growing hostility to the work of the Commission by many major corporations and business interests with extensive political influence. Interview with Clifford L. Alexander, Jr., Washington, D.C. (May 5, 1970).

326. Senators Williams and Javits charged the Commission with unsatisfactory performance in compliance and litigation functions, inadequate data collection systems, and poor utilization of and coordination with other agencies. According to the Senators, "The apparent poor quality of investigations has been noted frequently. Some conciliators indicate that they must often re-investigate cases to obtain remedial information. The Justice Department reports that their investigators must often re-investigate cases referred to them by the Commission because the original investigations are inadequate. Part of the high rejection rate of the cases referred to litigation centers is also attributable to the poor quality of investigations." The Senators also asserted that "many charges and cases are simply and irresponsibly lost," and "of 75 charges and cases studied in two district offices, 23 % could not be located." Finally, they noted that the litigation centers fail to fulfill their goals for initiating cases. Letter from Senators Harrison A. Williams, Jr. and Jacob K. Javits to John H. Powell, Jr., EEOC Chairman, at 2 (Sept. 1974).

327. *Nomination Hearing Before the Senate Comm. on Labor and Public Welfare*, 94th Congress, 1st Sess. 2 (1975) (Statement of Senator Harrison A. Williams).

The House Subcommittee on Equal Opportunities held three days of public hearings beginning September 17, 1974, "to assess the extent and the nature of the backlog in the processing of complaints by EEOC, the means by which the backlog might be reduced, and the readiness of the Commission to meet any further responsibilities."³²⁸ In the course of these hearings, EEOC General Counsel William A. Carey, acknowledged an 80 to 90 percent litigation rejection rate³²⁹ and EEOC Commissioner Colston A. Lewis was sharply critical of Commission Chairman John H. Powell, Jr.³³⁰

Later the *Washington Post* and other newspapers reported that Chairman Powell had been "secretly" censured by a vote of the EEOC commissioners on February 11, 1975, because he had "exceeded his authority" and engaged in "intimidation of personnel."³³¹ An internal memorandum from the EEOC's general counsel charged that Powell had refused to "follow the policies established by majority vote," had hidden "the true and accurate financial condition of the Commission" from the other commissioners, and had contributed to the demoralization of the entire agency.³³² Senator Williams stated that the EEOC's "administrative problems have been compounded with financial mismanagement which led the Commission to report a deficiency of \$1 million, a most debilitating matter."³³³

A study of the EEOC's operations made by a private consulting company, stated:

Commission public meetings often include episodes of acrimonious, sometimes personal, dispute among some commissioners. Protracted and rancorous discussions of the role of the chairman and commissioners and exhaustive arguments about the nature and authenticity of prior commission actions are not infrequent The finding can easily be reported that agency staff are dismayed and disheartened by the display of this kind of behavior on the part of the leadership.³³⁴

After pressure from many quarters,³³⁵ Chairman Powell resigned on

328. News release from the office of Representative Augustus F. Hawkins, Chairman, Subcommittee on Equal Opportunities, Hearings on Equal Employment Opportunity Commission Announced (Sept. 4, 1974).

329. Fair Employment Practices—Summary (BNA), No. 251, Oct. 3, 1974, at 3. After attempts at conciliation have failed, cases are sent by EEOC district offices to one of the five regional litigation centers. The centers either reject the case or recommend to the Commission that a lawsuit be filed. The "rejection rate" also includes those cases which the General Counsel believes are not suitable for litigation.

330. *Id.*

331. Anderson and Whitten, *EEOC Chairman Secretly Censured*, Wash. Post, February 25, 1975, at B11, col. 4. See also Singer, *Employment Report, EEOC Censures Chairman, White House Probes Leadership*, 7 NAT'L J. 315-16 (1975).

332. Memorandum to John H. Powell, Jr., Chairman, from William A. Carey, General Counsel; subject: The Commission's Public Image, February 19, 1975. Copy in author's files.

333. Nomination Hearings, *supra* note 327 at 9.

334. Holsendolph, *Job Panel Head Urged to Resign*, N.Y. Times, March 16, 1975, at 37, col. 1.

335. *Id.* See also Wall St. J., March 18, 1975, at 17, col. 1.

An editorial entitled "A Crisis of Leadership at EEOC," in the Wash. Post of March 4, 1975, at

March 19, 1975, in response to President Ford's request that he do so.³³⁶ The Commission's General Counsel, William A. Carey, resigned at the same time.³³⁷ The two resignations, together with an existing vacancy on the Commission and another commissioner's term due to expire in June, left the EEOC without leadership.

On May 27, 1975, President Ford appointed Lowell W. Perry to replace Powell as chairman of the EEOC. Perry came to the Commission after twelve years as a Chrysler Corporation executive; his "major handicap [was] his lack of a civil rights record."³³⁸ At the same time Abner W. Sibal, a former Republican congressman from Connecticut, was appointed general counsel, the second most important position in the EEOC. On September 22, 1975, soon after Perry defended the record of the EEOC before the House Labor Subcommittee on Equal Opportunities,³³⁹ Arthur S. Flemming, Chairman of the United States Commission on Civil Rights, contended in his testimony before the same subcommittee that federal agencies responsible for the elimination of employment discrimination have "a deplorable record of enforcing antidiscrimination statutes and executive orders."³⁴⁰ Flemming specifically charged that the EEOC had been unable to reduce its case backlog, had failed to issue right-to-sue notices unless requested, had filed only one pattern or practice suit to date, and that the agency was seriously understaffed.³⁴¹

Although Perry had assured the House Subcommittee that the functioning of the EEOC would be improved and that its difficulties would be overcome,³⁴² the problems that had first come to public notice during Pow-

A14, col. 1 stated:

EEOC is now carrying a backlog of cases that exceeds 100,000. The Senate Committee charged with its oversight felt compelled last year to write to Chairman Powell in alarm over the manner in which the agency was handling its caseload and the lack of efficiency it showed in disposing of those cases. One of the more disturbing aspects of the oversight committee's findings was the fact that in the face of this backlog, 20 percent of EEOC's openings for investigators and conciliators were unfilled

The condition of the EEOC's caseload is nearly a scandal. The morale of the staff of the agency has sunk to the point of being nearly nonexistent. The necessary good working relationship among the commissioners has disgracefully deteriorated, and Mr. Powell's image as the government's leading official for job market desegregation is appalling. It is for those reasons—all serious in our view—that we think this is a matter meriting the attention of Mr. Ford.

For other examples of critical comment on the EEOC, see J. Maslow, *Is Title VII Sinking?* JURIS DOCTOR, Sept. 1974 at 28-36, and Singer, *Employment Report, Internal Problems Hamper EEOC Anti-bias Efforts*, 6 NAT'L J. 1226-36 (1974).

336. Holsendolph, *Two Quit Panel on Job Rights After Dissension on Leadership*, N.Y. Times, March 20, 1975, at 12, col. 1. See also Singer, *Employment Report, Forced Resignations Allow Revamping of EEOC*, NAT'L J., March 22, 1975, at 447-48.

337. *Id.*

338. *Business Week*, June 23, 1975, at 113.

339. Oversight Hearings, *supra* note 287, at 2-8.

340. Fair Employment Practices—Summary, No. 277, Oct. 2, 1975, at 1.

341. *Id.*

342. Oversight Hearings, *supra* note 287, at 2-8.

ell's brief tenure persisted. Perry ordered a confidential audit of all thirty-two EEOC district offices soon after he took office. These audits were intended for internal use only, but Washington newspapers obtained copies of three of them. On April 21, 1976, the *Washington Star* reported, "The FBI, Senate and House Subcommittees, and the General Accounting Office have either documented or are looking into fiscal irresponsibility, mismanagement, possible employee wrongdoing and alleged fraud in the Equal Employment Opportunity Commission."³⁴³

The audits contained allegations of "chaos" in the agency's accounting system, illegal use of federal property for private purposes, and failure to submit contracts for competitive bidding.³⁴⁴ A summary of the reports released later revealed that three EEOC district offices were accused of trying to induce complainants to accept less favorable settlements than the law required; staff members in fifteen offices were accused of disposing of the complaint backlog by dismissing charges or closing cases without processing them as required; and that in some instances files were destroyed or altered in ways that deprived complainants of their rights under the law.³⁴⁵

The Senate Committee on Labor and Public Welfare, in announcing its continuing oversight study of the EEOC, stated that the investigation "appears to confirm the disheartening conclusions that this afflicted agency, over its more than ten-year history, has had meager impact on employment discrimination, which continues to pervade many employment practices in this country."³⁴⁶ According to Senators Williams and Javits, "The high expectations with which the Civil Rights Act established the Commission in 1964 have not been fulfilled. Such empty promises underlie the distrust of many citizens with government. The Commission's supporters in the Congress cannot countenance such a disappointment."³⁴⁷ The House Labor Subcommittee on Equal Opportunities turned over the audits of the EEOC district offices to the Department of Justice because they contained allegations of possible violations of federal criminal laws.³⁴⁸

Perry, the sixth chairman of the EEOC, resigned May 15, 1976, after serving just eleven months,³⁴⁹ and returned to a management position at the Chrysler Corporation. Representative Hawkins, stated at the time of Perry's departure from the Commission that the backlog of cases had increased to 120,000.³⁵⁰ As the House Subcommittee began its hearings on the internal

343. Oppenheimer, *FBI Probes Fraud in Equal Job Agency*, Wash. Star, April 21, 1976, at 1.

344. *Id.* Questions relating to the accounting system and competitive bidding were not part of the thirty-two reports. The U.S. Government Accounting Office had been working with the EEOC on these problems before the thirty-two investigations were begun.

345. Holsendolph, *Job Rights Panel Target at Inquiry*, N.Y. Times, May 13, 1976, at 13, col.

1.

346. 92 LAB. REL. REP. (BNA) 29-30 (NEWS & BACKGROUND INFO. May 10, 1976).

347. *Id.* at 30.

348. 92 LAB. REL. REP. (BNA) 68 (NEWS & BACKGROUND INFO. May 24, 1976).

349. 91 LAB. REL. REP. (BNA) 301 (NEWS & BACKGROUND INFO., April 19, 1976).

350. Scott, *Hill Blamed in Part for EEOC Backlog*, Wash. Post, May 13, 1976, at 1.

functioning of EEOC, Hawkins pointedly argued that “. . . Congress’s failure to provide the Commission with cease-and-desist authority has contributed substantially to the agency’s inability to provide redress.”³⁵¹ Hawkins said that aggrieved parties must wait from two to seven years for the processing of their complaints³⁵² and that EEOC’s production had declined during the previous year despite an increase of 200 staff positions and a budget increase (of \$8.5 million) to \$63 million.³⁵³ An analysis of the audits made by the subcommittee staff revealed that fourteen audits were critical of the operations of state and local fair employment practice commissions.³⁵⁴ Hawkins was also critical of EEOC district offices: “This subcommittee has found no uniformity in the operation of the District Offices.” He stated that each office functions “as it pleases with no direction from above.”³⁵⁵

351. 92 LAB. REL. REP. 275-76.

352. Judge Myron H. Bright of the Court of Appeals for the Eighth Circuit noted that one of the consequences of the backlog and the failure of EEOC to resolve charges was a growing tendency on the part of federal judges to reduce the effect of Title VII by restrictive jurisdictional interpretations. Gest, *Court Overload May Influence Judges To Dismiss Some Cases On Hiring Bias*, St. Louis Post-Dispatch, Nov. 14, 1976, at 16A col. 1. The General Accounting Office reported that “On the average, charging parties have had to wait about two years for their complaints to be resolved; in some instances charges have been pending in EEOC’s backlog for periods ranging up to 7 years An EEOC analysis of a sample of 48,164 fiscal year 1975 charge resolutions showed that on a national basis it took an average of 22 months to resolve an individual charge: this included 17 months for nondeferred charges and 26 months for charges that are initially referred to State or local agencies. This analysis also showed a wide variance in processing times among field locations: several district offices averaged more than 3 years per charge, while others averaged between 14 and 16 months per charge. More recently, EEOC estimated that the average time required to process a charge had increased to about 25 months on a national basis due to an increase in the size of its charge backlog.” GAO Report, *supra* note 253, at 7, 9.

353. Scott, *supra* note 350.

354. *Id.*

355. 92 LAB. REL. REP. (BNA) 67 (NEWS & BACKGROUND INFO., May 24, 1976). The basic rights of charging parties under the statute were often jeopardized by the incompetent and irresponsible actions of EEOC District Offices. An example is illustrated by the following letter, to Charles A. Dixon, EEOC District Director in Memphis, dated October 4, 1976, from Barry L. Goldstein, Associate Counsel, NAACP Legal Defense and Educational Fund, regarding Charge No. TME 3-1675, NAACP Legal Defense and Educational Fund v. Southern Railway Systems, which is here quoted in its entirety.

I have just received a determination finding “no cause” in the above-referenced charge, a copy of which is enclosed for your convenience; please note the correct address of LDF’s Washington office.

(1) Although the Determination states (but does not detail, describe, etc.) that the “entire” record was examined, we are not aware of what “investigation” took place as required by Section 706(b) of Title VII. Thus, we would like to inspect and copy the entire investigative file, see *Kessler & Co. v. EEOC*, 472 F.2d 1147 (5th Cir. 1973) (en banc.) cert. denied 5 EPD para. 8659 (1973). It is essential that we review the entire record which contains as the Determination states “all relevant evidence” before we make the most informed decision possible concerning the pursuit of judicial remedy. Since the “Determination” does not give even one reason or any facts in support of the “no cause” finding it is especially essential that we inspect and copy the file as soon as possible. Please let me know as soon as possible when we may inspect and copy the file.

(2) The Determination states:

“This Determination concludes the Commission’s processing of the subject charge. Should the aggrieved party wish to pursue this matter further, he may do so by filing a

Disclosure that the FBI, the Justice Department, and the General Accounting Office were investigating the EEOC, together with hearings by congressional committees on allegations of mismanagement and corruption, led to speculation that Congress would move to restructure the agency and that other corrective action would be taken. But as of May 1977 the EEOC continued to operate as before, without a chairman, crippled by other vacancies on the Commission and its staff, and plagued by grave internal problems such as the crucial lack of continuing competent leadership.

V

CONCLUSION

In the first seven years of its existence the EEOC, whose legislative mandate was to eliminate employment discrimination, had no enforcement powers. The Commission could only attempt to conciliate complaints and to refer cases involving a pattern or practice of discrimination to the Attorney General for possible litigation.³⁵⁶ These limitations eliminated the threat to employers and labor unions of the Commission's intervening on behalf of private plaintiffs initiating lawsuits under Title VII.

In the absence of enforcement powers, the EEOC could process charges of discrimination filed by aggrieved workers,³⁵⁷ make investigations³⁵⁸ and technical studies,³⁵⁹ and conduct educational programs.³⁶⁰ The Commission, however, was able to influence the body of law that defined job discrimination through filing *amicus curiae* briefs in private party litigation.

private action in Federal District Court within 90 days of his receipt of the Notice of Right to Sue. A Notice of Right to Sue will be issued to the aggrieved party upon his/her request."

It is my understanding that in a number of cases concerning the "two letter problem" the United States District Court for the Western District of Tennessee has ruled that where the EEOC concludes its processing of the charge, e.g., by a determination of no cause, that the 90-day time-period begins to run from that date and *not* from the issuance of a Notice of Right to Sue, regardless of what the EEOC states in the Determination letter. See e.g., *Mungun v. Choctaw*, *Delk v. Kellogg*, *Henderson v. East-Tex Packaging Co.*, and *Pope v. Schlitz*. (Footnotes omitted.) If my understanding of the law in the Western District of Tennessee is correct, then the statement which you made in the Determination is incorrect. Thus, charging parties who rely on your statement may be forever barred from filing suit. Would you please inform me what is your interpretation of the law in the Western District of Tennessee which justifies the statement made in the Determination.

(3) There is no description of any investigation or facts upon which the conclusion of "no cause" is based. This appears to contravene Section 40 of the EEOC Compliance Manual. We would like to know pursuant to the EEOC manual the basis for the Determination.

Since we must soon make a decision as to how we should proceed, an immediate response to paragraphs 1-3, *supra*, would be appreciated.

356. Act § 705(g)(6), 42 U.S.C. § 2000e-4(g)(6) (1970).

357. Act § 706, 42 U.S.C. § 2000e-5 (1970).

358. Act § 709, 42 U.S.C. § 2000e-8 (1970).

359. Act § 705(f)(5), 42 U.S.C. § 2000e-4(f)(5) (1970).

360. Act § 705(h), 42 U.S.C. § 2000e-4(h) (1970).

tion and by making EEOC decisions available to the public. By 1972 the Commission had made public ninety-eight of the more than a thousand formal decisions it had issued based on findings of reasonable cause.³⁶¹ By 1973 some 400 EEOC decisions made from June 20, 1968, to January 19, 1973, were available.³⁶²

The EEOC also issued guidelines on discrimination based on sex,³⁶³ national origin,³⁶⁴ religion,³⁶⁵ and testing and personnel procedures.³⁶⁶ Although not binding, they were given deference by the courts. These guidelines, together with Commission decisions, were to have an impact on the development of employment discrimination law. But the burden of enforcing Title VII fell upon aggrieved workers who filed charges with the Commission and initiated many lawsuits.

During the period from 1965 to early 1972, through litigation in the federal courts, the private civil rights bar, not the government, was responsible for the major advances made under Title VII. As conciliation failed³⁶⁷ and it became evident that the nature of employment discrimination was such that other, more direct measures were necessary, Congress in 1972 adopted amendments empowering the EEOC to initiate lawsuits in federal district courts against private parties to remedy violations of Title VII.³⁶⁸

On March 24, 1972, the EEOC was empowered to litigate to achieve compliance with Title VII.³⁶⁹ The Commission also acquired concurrent power with the Department of Justice to initiate pattern or practice suits, and on March 24, 1974, the EEOC assumed all functions previously performed by the Attorney General in regard to such litigation.³⁷⁰

The 1972 Amendments provided a statutory basis for the transformation of the EEOC into a law-enforcement agency. This could have been accomplished by a creative and systematic program of litigation against the major discriminators in every sector of the economy, but such a develop-

361. 3 Fair Empl. Prac. Cas. (BNA) 1257 (1972).

362. 1973 EEOC Decisions (CCH).

363. 29 C.F.R. § 1604 (1976).

364. 29 C.F.R. § 1606 (1976).

365. 29 C.F.R. § 1605 (1976).

366. 29 C.F.R. § 1607 (1976).

367. "The employer realizes that any attack on its policies by the EEOC presents largely an ineffectual threat. To comply with the Commission's interpretation of a problem, and to accord the appropriate relief, is a purely voluntary matter with the respondent, with no direct legal sanctions available to EEOC. This absolute discretion available to respondents has not proven conducive to the success of Title VII objectives. In cases posing the most profound consequences, respondents have frequently ignored the EEOC's findings, preferring rather to chance the unlikelihood that the complainant will pursue his claim further through the costly and time-consuming process of court enforcement. The social consequences have been extreme. The failure of the voluntary conciliation approach is reflected in the present EEOC workload statistics. . . ."

S. LAB. COMM. LEGISLATIVE HISTORY, *supra* note 189, at 414.

368. Act § 706(f), 42 U.S.C. § 2000e-5(f) (1970 & Supp. V 1975).

369. Act § 706, 42 U.S.C. § 2000e-5 (1970 & Supp. V 1975).

370. Act § 707(c),(e), 42 U.S.C. § 2000e-6(c),(e) (1970 & Supp. V 1975).

ment would have required the reorganization of the Commission for emphasis on litigation rather than on conciliation. Unfortunately, this was not done. Instead "[t]he general counsel's office was merely superimposed on the existing administrative structure. As a result . . . it has not really been integrated with the agency and there has been little effective coordination with the rest of the Commission. The standards and procedures used before the 1972 Amendment . . . have not proved adequate to support the litigation effort. . . ."³⁷¹

In addition to its failure to restructure the agency after the 1972 Amendments went into effect, the EEOC failed to establish a new policy; indeed, it continued to operate on the assumption that it was not necessary to develop any new approaches and that policy-making was not a basic responsibility of the Commission. As a result, it did not establish programs and priorities based on the newly acquired litigation powers. The absence of a strategy was especially obvious in the new areas of jurisdiction, such as state and local governments, colleges and universities, and employment in elementary schools.

Although the EEOC had acknowledged that conciliation was ineffective and that enforcement powers were necessary,³⁷² it remained committed to the conciliation process and did not turn to litigation as the major means of obtaining compliance with Title VII. Furthermore, conciliation was not coordinated with the power to sue; it was not viewed by the agency as an integral part of the process of case selection and preparation for the filing of lawsuits.

That the EEOC failed to utilize valuable new powers granted by Congress in the 1972 Amendments is made abundantly clear by the litigation record. As of September 15, 1976, the Commission had filed only three pattern or practice lawsuits under section 707 of the amended act.³⁷³ This dismal record is made even more significant by the fact that as of July 1, 1976, seventy-seven Commissioner Charges filed under section 707(e), involving 425 respondents, had been pending for various periods without action by the Office of the General Counsel.³⁷⁴

The authority to initiate lawsuits under section 707 is potentially the most important power the EEOC acquired under the 1972 Amendments. Individual case-by-case litigation is inadequate to eliminate unlawful discriminatory systems, and even class action suits may be limited to a com-

371. Singer, *Employment Report/Internal Problems Hamper EEOC Anti-Bias Efforts*, 6 NAT'L J. 1226, 1234 (1974).

372. In 1972 the EEOC noted that "[t]he growing recognition that exclusive reliance on voluntary methods of negotiation, persuasion, and conciliation to resolve complaints of employment discrimination was misplaced and ineffective. Viable procedures which would insure, and not merely encourage, compliance with Title VII would have to be developed in order to assure effective enforcement of prohibitions against employment discrimination." 7 EEOC ANN. REP. 4 (1973).

373. Source: Office of the General Counsel, EEOC.

374. *Id.*

paratively small percentage of the workers employed by major multi-plant corporations. The many judicial opinions that define the nature of employment discrimination clearly indicate the need for an attack on patterns of discrimination.³⁷⁵ Through the use of Commissioner Charges such an attack could be given priority; the agency could select major discriminators in each industry and region and, without waiting for charges from individual workers, initiate innovative litigation attacking discriminatory employment systems of large enterprises. This approach, however, requires a comprehensive litigation strategy with internal coordination throughout the agency. This strategy, essential to realize the purposes of Title VII, has not been developed.

Four years after the EEOC was given the authority to file pattern or practice lawsuits under section 707, it was evident that the agency had not only failed to use this power but, according to the United States Commission on Civil Rights, did so as a matter of policy:

It was the policy of that Office [General Counsel], for example, not to file pattern or practice lawsuits under Section 707(e) of the Act. This policy was of crucial importance in terms of reducing the scope of relief available to affected classes and requiring the agency to undertake conciliation as a pre-condition to suit. The General Counsel's policy of bringing actions exclusively under Section 706 was communicated orally in meetings to the field staff. It was never, however, transmitted in writing, except that on the occasions when complaints were sent from the litigation centers to headquarters for review, the words "Section 707" were crossed out and the words "Section 706" substituted with no further comment. The demotion of several senior staff attorneys for violating the unwritten policy and filing suits under Section 707(e) resulted in a considerable amount of bad publicity for EEOC. This incident may well have been avoided had the policy been issued in written form as had been other less crucial policies, such as matters involving public speaking engagements by staff members.³⁷⁶

Although the EEOC has as a matter of policy refrained from using its section 707 power, and preferred to proceed under section 706, even here its litigation record is limited. From March 24, 1972, to April 15, 1976, the Commission filed a total of 571 lawsuits under section 706.³⁷⁷

375. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *U.S. v. Jacksonville Terminal*, 451 F.2d 418 (5th Cir. 1971), *cert. den.* 406 U.S. 906 (1972).

376. 1974 CIVIL RIGHTS COMM'N REPORT, *supra* note 243, at 503.

377. In 1972 the Commission filed four lawsuits under section 706 of the amended Act; in 1973, 109; in 1974, 85; in 1975, 169; and to April 15, 1976, 204. Source: Office of the General Counsel, EEOC. The Department of Justice, with exclusive authority to file lawsuits against state and local government agencies under section 706(f) of the amended Act, rarely litigated to enforce Title VII in the public sector. From 1972 to July 1975 the Justice Department filed only twenty-three employment anti-discrimination lawsuits against agencies of state and local government, in contrast with the more than one hundred lawsuits filed by private parties during the same period where a revenue sharing involvement existed. *Civil Rights Under General Revenue Sharing*, National Science Foundation Grant Number APR 75-13993, Center for National Policy Review, Washington, D.C., July 1975, at 50-51. From July 1975 to October 1976, eighteen additional public employment discrimina-

In contrast to its innovative activity as an advocate of Title VII during the period when it was without enforcement power, the EEOC, after the adoption of the 1972 Amendments, failed to perform the leadership role required of such a federal agency. It did not develop policy on many fundamental problems within its jurisdiction: It failed to issue guidelines on affirmative action requirements under Title VII and on the crucial question of seniority practices, although the disparate impact of dismissal and furlough upon minorities working under "last-hired-first-fired" labor agreements became a major public controversy. The Commission left these important matters to the Equal Employment Opportunity Coordinating Council and waited for the courts to decide. This abdication of responsibility by the EEOC contrasts with its forthright action in 1970 when it issued the guidelines on testing and employee selection³⁷⁸ to which the Supreme Court deferred in *Griggs*.³⁷⁹ The EEOC also failed to take a stand on the important matter of the relationship of criminal convictions to denial of employment. Here, as on other vital subjects, the Commission did not issue guidelines and did not litigate, although it had the power to do so, but instead deferred to the courts or other agencies to decide questions that were clearly related to the interpretation and enforcement of Title VII.³⁸⁰

Furthermore, the EEOC did not expand its National Programs Division, the one internal effort by the agency to realize the litigation potential of the 1972 Amendments. At the end of 1976, the National Programs Division staff was as limited as its budget, and it was still working on the original few cases it had begun three and a half years earlier. The failure to expand the approach embodied in the work of the National Programs Division was part of the larger failure to interpret, apply, and expand Title VII to a variety of issues and to select as targets major employers and labor unions. In short, by failing to utilize its powers to litigate actively, the EEOC had failed to enforce the law and to extend Title VII to all aspects of industrial relations.

Instead, the Commission was obsessed with reducing its backlog without regard to consequences for charging parties. In August 1976 the Com-

tion suits were filed, including five actions initiated by the Justice Department because of failure of public agencies to provide the data as required in the EEO-4 Forms issued by the EEOC. (Information supplied by Center for National Policy Review, Washington, D.C.)

378. 29 C.F.R. § 1607 (1975).

379. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

380. The Civil Service Commission and the Civil Division of the Department of Justice have taken positions on Title VII litigation involving federal employees which are often in conflict with the arguments of the Civil Rights Division of the Justice Department. According to a memorandum jointly prepared by the Washington Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund, Inc., "The Civil Service Commission, the Civil Division [of the Department of Justice] and various agency defendants have shown remarkable ingenuity in creating obstacles to the enforcement of Title VII against federal defendants. . . ." (Memorandum to Kelly Green, Department of Justice Transition Team, from Roderic Boggs, Executive Director, Washington Lawyers' Committee for Civil Rights Under Law, re Justice Department Civil Division and Civil Service Commission Positions on Title VII Rights of Federal Employees, January 5, 1977). The memorandum identifies many specific examples of conflict and inconsistency in the arguments of respective government agencies in cases where the federal government was a defendant.

mission adopted an approach described as the "Thirty Day Turn-Around Process."³⁸¹ This policy called for accelerated procedures to reduce the case backlog drastically and rapidly. The new, expedited process was to be applied to all individual charges filed before 1974, and EEOC field personnel were directed to settle immediately if a respondent had made a "reasonable (but not "full relief") offer" or to send a "final opportunity" letter to both charging parties and respondents who had resisted conciliation.³⁸² EEOC field staff were directed to "rigidly limit investigations" and were criticized as being "prone to find manifold issues."³⁸³ Investigators were specifically instructed to refrain from developing class actions based upon individual charges and to be willing to act upon an investigation which is "minimally sufficient."³⁸⁴ The danger that the vital interests of charging parties were being violated or ignored alarmed many, including EEOC personnel, who complained that the new plan was "forcing employees to violate civil rights laws by treating discrimination cases too hastily."³⁸⁵ According to a member of the EEOC field staff, "In the Chicago district alone, there are 700 outstanding pre-1974 charges. This means that each Chicago investigator must complete 48 charges within one and one-half months. Under these conditions, 'minimum evidence' investigations will be tantamount to no investigation."³⁸⁶ From August 20 to September 13, 1976, the EEOC Chicago District Office, using expedited procedures, found no cause in 87 percent of the pre-1974 charges under investigation.³⁸⁷

These procedures restricted the EEOC's investigation by excluding in almost all cases on-site investigations or examination of like or related issues, and interviews with the charging party, witnesses, or company personnel. Moreover, the Commission staff was required to discourage complainants from insisting upon full relief; the charging party was not informed of the new procedures and the need to send any additional evidence to or to request a meeting with an investigator prior to a determination. The procedures provided for a determination to be made on the basis of an abbreviated examination of the charges, which inevitably resulted in a sharp increase of "no cause" findings.

381. *EEOC's Adoption of Accelerated Procedures*, 93 LAB. REL. REP. 1 (Sept. 6, 1976).

382. *Id.* at 6.

383. *Id.*

384. *Id.* at 5.

385. Wall St. J., Sept. 21, 1976, at 1, col. 5 (Pacific Coast Ed.).

386. Letter from David Hashimoto, Field Staff, Chicago District Office, EEOC, to Herbert Hill (Aug. 13, 1975).

It is significant that the memorandum directing the use of expedited procedures cites the Dallas and New Orleans EEOC offices as examples of the desirable processing of charges. However, the Dallas and New Orleans offices had the lowest percentages of cause determinations of any regional and district offices, respectively, within the entire Commission. 93 LAB. REL. REP. 4-5 (Sept. 6, 1976).

387. Interview with Robert Masur, Staff Attorney, Legal Assistance Foundation of Chicago (Aug. 13, 1976).

Civil rights organizations protested this approach³⁸⁸ and a lawsuit challenging the legality of the accelerated procedures was filed on September 27, 1976, in the federal district court in San Francisco. In *Hall v. EEOC*³⁸⁹ two black males and civil rights organizations argued that a charging party has a legal right under Title VII to an adequate investigation and full conciliation efforts by the EEOC. Plaintiffs argued that as a result of the new procedures, pre-1974 charging parties were denied this right and that the EEOC's refusal to investigate and conciliate these charges adequately violated the Commission's own regulations and the due process rights of the plaintiffs as guaranteed them by the Fifth Amendment. It was further alleged that the procedures themselves constituted "Rule Making" as defined by the Administrative Procedure Act and as such were void in that they were promulgated without notice or opportunity for comments by the public. In *Hall*, the court was asked to declare EEOC's new procedures invalid and to enjoin their future use as well as to order the Commission to investigate and conciliate fully all charges filed with it.

As a result of this lawsuit and related protests by civil rights organizations, the EEOC decided to discontinue the Thirty Day Turn-Around Project. However, it was reported to be considering the possibility of incor-

388. One example was the meeting of representatives of the NAACP Legal Defense and Educational Fund, the Employment Law Center of San Francisco, the Mexican-American Legal Defense and Educational Fund and other groups with Ethel Bent Walsh, EEOC Vice Chairman, in Washington on September 20, 1976. The purpose of this meeting was to register a strong protest against the EEOC's New Accelerated Procedures for processing pre-1974 charges. On September 30, 1976, the NAACP Legal Defense Fund, in a letter to the Commission, again protested the new procedures. Among the several reasons given for its objections, the LDF stated that:

[A] finding of 'no cause' has direct consequences; the EEOC does not attempt conciliation nor will it institute litigation. However, there are additional indirect but harsh adverse effects.

a. The findings of the EEOC are admissible as evidence in some courts, see, e.g., *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972).

b. Many private attorneys have relied upon the determination of the EEOC in deciding whether to advise a CP [charging party] to pursue his judicial remedy and whether to represent a CP.

Accordingly, the 'no cause' finding acts as an obstacle to a CP's attaining private representation and to prevailing in court. The sample 'no cause' letter does not indicate that the determination was made under the accelerated procedures which are substantially different than the investigation and review normally undertaken in the past. . . . At least, if this was done lawyers reviewing the case of a CP would understand that a 'no cause' finding should no longer be given the credence with which they formerly afforded it. . . .

In commenting on the instructions to proceed with "minimally adequate evidence," the LDF stated:

As many courts have observed, proof of discrimination in employment 'is seldom direct' and considerable review of 'patterns, practices, and general policies' is necessary to determine if there is discrimination. . . . Limited investigations will result in substantial reductions in 'cause' determinations simply because of a failure to discover evidence pertinent to discrimination.

Letter from Barry L. Goldstein, Associate Counsel, NAACP Legal Defense and Educational Fund, Inc., to Ethel Bent Walsh, Vice Chairman, EEOC (Sept. 30, 1976).

389. No. C-76-2090 RFP (N.D. Cal., 1976).

porating "elements" of the rejected plan into its regular procedures.³⁹⁰ From August 16 to September 30, the EEOC processed approximately twelve thousand pre-1974 charges³⁹¹ and remained under pressure from Congress to reduce its huge backlog rapidly.

In addition to *Hall v. EEOC*,³⁹² the Commission was a defendant in other litigation. Among the most important of these cases was *Stewart v. EEOC*,³⁹³ brought by named plaintiffs and a coalition of civil rights organizations in Chicago. In this case data were presented showing that charges filed with the EEOC's Chicago District Office are rarely investigated in less than two years and that reasonable cause determinations take even longer. In response to this deplorable condition, the plaintiffs in *Stewart* argued that Title VII requires that a reasonable cause determination be made ". . . within 120 days 'so far as practicable,' but in all cases 'as promptly as possible.'" Plaintiffs argued that section 706(a) of the amended Act, while flexible, imposes mandatory requirements of timely investigations upon the EEOC. They also contended that the long delays in processing charges violated the Administrative Procedure Act which requires agency action "within a reasonable time." And finally, it was argued that the delays violate the due process rights of charging parties, for the longer the charge remains uninvestigated, the more difficult it is to prove.³⁹⁴

In describing the significance of *Stewart v. EEOC*, the attorney for the plaintiffs wrote:

For most persons, Title VII and the EEOC are the only realistic means available to vindicate rights guaranteed by law. Private litigation pursuant to 42 U.S.C. Section 1981 requires money and access to lawyers and courts. Much the same can be said for litigation under Title VII, and as a general rule, persons discriminated against have neither money nor access. . . . If employment discrimination is to be eradicated in the United States, a properly functioning EEOC offers the best hope. Unfortunately, however, the EEOC is a disaster area. As a result of the long delays, charges become unprovable, persons move and cannot be located or become disillusioned. . . . In the end, not only does the EEOC have little or no impact on employment discrimination, but our citizens' respect for and willingness to comply with the laws of the land are seriously eroded.³⁹⁵

For the EEOC the major objective had become reduction of its complaint accumulation rather than the elimination of patterns of job discrimination. By 1976 the agency had become a backlog reduction mechanism rather

390. Fair Employment Practices—Summary No. 305 (BNA) (Oct. 28, 1976), at 1.

391. Source: Office of the Executive Director, EEOC.

392. *Hall*, *supra* note 389.

393. No. 75-C-4069, (N.D. Ill. 1976).

394. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, *id.*

395. Letter from Robert Masur, Staff Attorney, Legal Assistance Foundation of Chicago to Herbert Hill (Nov. 8, 1976).

than an enforcer of the law.³⁹⁶ This left black workers, women, and other minorities without an operative anti-discrimination agency in the work place.³⁹⁷

The litigation power was given to EEOC, in part, to make the conciliation process function effectively.³⁹⁸ But the Commission did not integrate and use litigation and conciliation as components of a unified strategy to enforce Title VII. That no such strategy existed thirteen years after the adoption of the Act was further confirmed by the absence of an administrative procedure within the EEOC that differentiated individual job disputes from institutional discrimination, two categories of problems that require fundamentally different approaches.

Failure to develop an independent and creative EEOC was in large part a consequence of the failure of national administrations—both Republican and Democratic—to give a high priority to civil rights enforcement and the work of the Commission. With a few exceptions, those appointed to the Commission lacked professional competence and commitment. The result was an agency increasingly characterized by timidity and bureaucratic inefficiency. That the EEOC failed to perform a leadership role within the government by functioning as a forceful advocate of Title VII, and that it failed to fulfill its responsibilities in implementing the law, is not surprising. Indeed, it might be concluded that the government prevented the emergence of an effective EEOC by repeatedly filling Commission vacancies and major staff positions with people who were not civil rights advocates and who were least likely to perceive the possibilities of using the law to eliminate discriminatory systems and to advance social change.

396. During the "Thirty Day Turn-Around Project" EEOC pressured its District Offices to "administratively close" as many pre-1974 charges as possible. In practice this frequently meant that a charge would be dismissed if the complainant could not be reached after one telephone call. An investigation made by the House Labor Subcommittee on Equal Opportunities of the Thirty Day Turn-Around Project concluded that EEOC offices in Boston, Chicago, Detroit, San Francisco, and Washington, D.C., made only one attempt to contact charging parties before closing cases, and this attempt usually consisted of a telephone call. *Report by Staff of House Labor Subcommittee on Equal Opportunities on Investigation of EEOC's Thirty Day Turn-Around Project*, Daily Labor Report, No. 33, (BNA) February 16, 1977, at D1-5. The report also found that the agency's system of reporting figures to headquarters is "inefficient and inaccurate." *Id.* In addition, the data fail to distinguish between class actions, predetermination settlements, and individual complaints, the report says. For example, a conciliation agreement resolving eight charges would be listed as eight separate resolutions. The dramatic increase in resolutions of charges announced by the agency may be the result of errors in statistical data, the report asserts. It also claims that numerous charges listed as resolved during the project were actually resolved prior to August 1974. The agency is also held responsible for a "total vacuum" in training personnel and the failure to establish at the beginning of the project an internal monitoring procedure. *Id.*

397. The U.S. General Accounting Office concluded: "In the aggregate, our analyses suggest that EEOC has had little impact on alleviating problems of systemic employment discrimination. Comparisons of nationwide employment statistics, as well as analysis of data for employers under conciliation agreements, show little change over the years in the employment status of minorities and women." GAO REPORT, *supra* note 253, at 38-39.

398. See S. LAB. COMM., LEGISLATIVE HISTORY 414.

The EEOC failed as an enforcement mechanism in the five years after Title VII was amended because it was denied adequate leadership and because it was not transformed into an organization whose basic emphasis was upon litigation against systemic patterns of discrimination. The conclusion is inescapable: the EEOC's failure to utilize the litigation powers granted by Congress in 1972, in conjunction with its operating problems, had resulted in the failure of the administrative process to realize the potential of the law. Enforcement of Title VII continued to depend upon private litigants, with all the limitations that this condition implies.

Although restricted by inadequate resources, the private civil rights bar, not EEOC or the Department of Justice, was responsible for the major advances under Title VII.³⁹⁹ The civil rights bar responded to the opportunity provided by the enactment of Title VII and it performed a decisive role in the development of the law. Innovative litigation subjected the employment practices of major businesses and labor unions to judicial scrutiny and new forms of relief evolved with far-reaching consequences. However, the very success of Title VII litigation provoked a growing opposition to the law and a stiffening of resistance to its requirements.

The AFL-CIO, one of the major lobbying groups which supported the original Act in 1964, became increasingly hostile to the law as many of their largest and most important affiliates were repeatedly involved as defendants in costly and protracted litigation under Title VII. Organized labor found, to its great chagrin, that instead of a federal version of the ineffective state fair employment practice statutes, Title VII was being interpreted and enforced by the judiciary. It was the courts that were ordering extensive changes in job practices codified in collective bargaining agreements held to be in violation of the law. The retreat of the labor federation was sharply expressed in its *amicus curiae* brief in *United Airlines, Inc. v. Evans*,⁴⁰⁰ where according to one veteran labor attorney,

399. In recent years, the most striking contribution of the legal process to the enrichment of democracy has been the rise of social advocacy. Prefigured in the work of Brandeis half a century ago, pursued with specialized vigor by the NAACP lawyers, sustained by a wide variety of public-interest advocates, and brought to institutional fruition by the Legal Assistance Program of the OEO, the use of litigation to affect public policy on behalf of the socially disadvantaged has become a lively aspect of the American legal order. Social advocacy draws heavily upon the common-law tradition. It projects a view of law as problematic and of advocacy as the imaginative and critical use of legal resources. Social advocacy works within the framework of the legal process, for it entails the representation of group interests through an appeal to norms that have some color of authority. It uses forums that can be held responsible to those norms. Hence, the characteristic locale of social advocacy is the court or the administrative agency, rather than the legislature. The appeal is to legal entitlement, not to political will. And yet, paradoxically, politics is made an engine of justice.

Selznick, *The Ethos of American Law*, in 2 CRITICAL CHOICES FOR AMERICANS, THE AMERICANS: 1976, 230-31 (I. Kristol, P. Weaver eds. 1976).

400. Brief *amicus curiae* of the AFL-CIO, *United Airlines, Inc., v. Evans*, 534 F.2d 1247 (7th Cir.), cert. granted, 45 U.S.L.W. 3329 (U.S. Nov. 2, 1976) (No. 76-333). (The AFL-CIO failed to file this brief within the prescribed time period, and therefore it was not accepted by the Court.)

[t]he AFL-CIO went out of its way—in a case where it was not necessary—to attack one of the most effective remedies the courts have developed in Title VII litigation, to restore blacks and women to the place they would have held had it not been for discriminatory hiring and promotion practices.⁴⁰¹

In its brief in *Evans*, a case involving job discrimination based on sex, the AFL-CIO attacked the validity of the line of decisions in seniority cases beginning with *Quarles v. Philip Morris, Inc.*,⁴⁰² and again demonstrated that its primary commitment was to the white male worker. Mary Jean Tully, President of the National Organization for Women/Legal Defense and Education Fund, stated that “the brief *amicus curiae* of the AFL-CIO in *Evans* is not only an attack on women workers and blacks locked into segregated seniority structures, it is also a repudiation of the fundamental premises of Title VII.”⁴⁰³

By 1976, employers and unions were attacking the basic remedies required to achieve job equality and the retreat from the goals of Title VII and of the Civil Rights Act of 1964 was noted in many quarters. According to an article in *Fortune* magazine, “. . . those who wrote and pushed through the legislation have reason to feel uneasiness about it now.”⁴⁰⁴

As a result of these developments and the general regression on civil rights issues,⁴⁰⁵ advocates of equality in job opportunity sought to protect Title VII from the forces that would restrict or void the forms of relief developed under the statute and to preserve the body of law that developed from it.⁴⁰⁶ Equally important was the effort to seek correction of deficiencies in the enforcement mechanism of the law.

VI

RECOMMENDATIONS

A basic administrative reorganization of agency structure and operations is necessary to realize the potential of Title VII and the federal executive orders prohibiting employment discrimination and to eliminate the fragmentation, conflict, and bureaucratization that has long characterized government activity in this area. Instead of the old administrative morass

401. Interview with Ruth Weyand, Associate General Counsel, Int. Union of Electrical, Radio and Machine Workers, AFL-CIO, in Washington, D.C. (March 3, 1977).

402. 279 F. Supp. 505 (E. D. Va. 1968).

403. Interview with Mary Jean Tully, President of the Nat. Org. for Women/Legal Defense and Educ. Fund, New York, New York (March 8, 1977).

404. Dorothy Rabinowitz, *The Bias in the Government's Anti-Bias Agency*, *FORTUNE* 138 (Dec. 1976).

405. See Hill, *Affirmative Action and the Quest for Job Equality*, 6 *REV. BLACK POLITICAL ECON.* 263-78 (1976).

406. See, e.g., Brief *amicus curiae* of the NAACP Legal Defense and Educational Fund, in *United Airlines, Inc. v. Evans*, 534 F.2d 1247 (7th Cir.), cert. granted, 42 U.S.L.W. 3329 (U.S. Nov. 2, 1976) (No. 76-333).

with many ineffective agencies, one strong enforcement agency is needed to bring into a coherent unity all governmental powers to eliminate job discrimination. The experience of the past suggests the need for a central commission to enforce Title VII and the executive orders and to coordinate directly the efforts of each federal agency as it implements the law in its specific jurisdiction.⁴⁰⁷

But any attempt at reorganization must deal not only with the mismanagement of EEOC but also with the basic inadequacy in the statutory enforcement scheme. Thirteen years after the passage of Title VII it is necessary to recognize the futility of attempting to attack patterns of systemic discrimination through the individual charge process. A basic distinction must be made between institutional discrimination and complaints arising from individual job disputes. While EEOC has the obligation to process every charge, it is essential that the agency have separate procedures for the resolution of individual complaints and the elimination of systemic job discrimination which requires a different approach and the highest priority.

The fallacy of basing EEOC's ability to attack institutional discrimination on the individual charge procedure lies in the fact that victims of discriminatory patterns rarely file complaints about such discrimination and that few of the complaints which individuals do file involve systemic structures of discrimination. It is evident that the two kinds of problems must be approached separately. This conclusion is to be found in virtually every major study of the relationship between institutional discrimination and the limitations of the individual complaint process.⁴⁰⁸

407. See Hill, *The National Labor Relations Act and the Emergence of Civil Rights Law: A New Priority in Federal Labor Policy*, 2 HARV. C.R.-C.L. L. REV. 299-360 (1976).

408. For example, during 1961-1962 the Joint Center for Urban Studies of Harvard University and the Massachusetts Institute of Technology conducted a comprehensive study of the Massachusetts Commission Against Discrimination and concluded that "The pattern of complaints did not correspond to the structure of discrimination. By and large, the complaints did not attack the major bastions of discrimination." L. MAYHEW, *LAW AND EQUAL OPPORTUNITY: A STUDY OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION* (1968). In 1961, the Harvard Law Review in an extensive analysis of state fair employment practice laws concluded that "It is generally agreed that neither the type nor the number of complaints initiated by private parties is an accurate barometer of actual discrimination." Note, *The Rights to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 531 (1961). The Harvard study concluded that as a result, most state agencies suffered from acute schizophrenia, unable to decide whether they were an "independent force created to combat discrimination" or rather simply a forum "to adjudicate disputes between aggrieved complainants and respondents." (*Id.* at 531.) Not surprisingly, it was recommended that state agencies be established to "take coercive action . . . systematically" on an "industry-wide basis" independent of individual charges. *Id.* at 589.

Shortly after the passage of Title VII, the author reviewed the record of twenty years of state agencies and found that "only a very small fraction of all individuals who are the victims of discrimination file complaints." This study concluded that fundamental changes must be made in antidiscrimination efforts, and called for "Affirmative action based upon pattern centered approaches instead of the individual complaint procedure." Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22, 24 (1964).

In another study, Professor Louis Jaffe, one of the major authorities on administrative law, wrote:

Since individual complaints of discriminatory treatment are inadequate to identify employers or labor unions responsible for institutional discrimination, the EEOC should, as an important component of a thorough investigation, identify pattern or practice violations through the examination of regularly reported statistical data available to the government.

[State agencies] should seek out important discrimination and make well-planned, imaginative, forceful efforts to eliminate or ameliorate it on a plant-wide, organization-wide, even industry-wide basis. It is no longer adequate for them to proceed wholly, or even principally, on the basis of complaints filed by private parties

[T]he quality of complaints received by the commissions has been disappointingly low [T]he number is small compared with unlawful discrimination and, more importantly, . . . the complaints continue to come before the commissions in haphazard and fragmentary patterns [A] systematic, comprehensive pattern [approach] is a vital reform

[Concentration on individual charges involves] dissipation of commission resources on unrelated, relatively insignificant, less tractable aspects of discrimination. [It] seems plainly inadequate—an indefensible frittering away of the commissions' resources and potentialities, like trying to drain a swamp with a teaspoon.

Jaffe & Girard, *Some General Observations on Administration of State Fair Employment Practice Laws*, 14 BUFFALO L. REV. 114, 115 (1964).

In 1965, three other studies concluded that individual complaints are usually unrelated to institutional discrimination. Professor J.P. Witherspoon, writing in the Yale Law Journal, stated: ". . . it is universally agreed that the number of complaints filed each year represents only a small percentage of the total number of discriminatory transactions." Witherspoon, *Civil Rights Policy in the federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1171, 1185 (1965). Even more significant was Professor Witherspoon's conclusion that the "complaint pattern in employment cases . . . is inversely related to the actual incidence of discrimination." *Id.* at 1190-91. Consequently, he concluded that agency action based on individual charges would not have a significant impact on employment discrimination. *Id.* at 1191-92.

Professor Alfred W. Blumrosen also found that individual complaints do not reflect the actual patterns of discrimination. Blumrosen, *Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study*, 19 RUTGERS L. REV. 189 (1965). Stanford Law Review's 1965 study of the California Fair Employment Practice Commission reached exactly the same conclusion. *Note, the California FEPC: Stepchild of the State Agencies*, 18 STAN. L. REV. 187-212 (1965). Michael Sovern's book, *Legal Restraints on Racial Discrimination in Employment*, which reviewed the consequences of state equal employment laws, concluded that very few individuals filed complaints challenging institutional discrimination and that "a high price is paid" if individual complaints are used as the basis for the government's efforts to eliminate discrimination. M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966).

Following the "long hot summer" of 1967, when Detroit, Cleveland and Newark experienced violent civil disorders, a Select Commission on Civil Disorder was established by order of Governor Richard Hughes of New Jersey and charged to examine the causes of the Newark riots and to make recommendations to prevent such occurrences in the future. Continued discrimination in employment was found to be a major contributing factor in causing the riots. The Commission concluded that the "greatest weakness" of civil rights enforcement agencies was their virtually complete reliance on an investigation process tied to single, individual charges of discrimination. GOVERNOR'S SELECT COMM'N ON CIVIL DISORDER, REPORT ACTION, 73-74 (1968). The Governor's Commission recommended that civil rights agencies be "aggressive" in attacking institutional barriers to equal employment rather than processing individual claims. *Id.* at 74, 77.

In 1970 the University of Michigan's Survey Research Center conducted a nationwide study of labor conditions and the workers' own perception of their conditions and found that widespread institutional discrimination went unreported, and indeed unperceived, by almost every victim of such discrimination. The study recommended against using individual complaints as the vehicle to eliminate discrimination. UNIV. OF MICH. SURVEY RESEARCH CENTER, *SURVEY OF WORKING CONDITIONS*, 280-81, 420-21 (1971).

A second conclusion is that institutional discrimination can be attacked and eliminated without reference to charges filed by private parties. For example, the entire investigation and litigation against the Bell System⁴⁰⁹ was successfully conducted without reference to a single individual charge. Furthermore, private class action lawsuits under Title VII are predicated on the theory that a lone administrative charge filed by one person satisfies the statutorily created jurisdictional prerequisite to an attack on the defendant's discriminatory employment system. However, private class action litigation proceeds essentially without reference to individual charges after jurisdictional requirements have been fulfilled. It should also be noted that the pattern or practice litigation authority of the Department of Justice was entirely independent of the individual charge process in the original Act.⁴¹⁰

The EEOC must develop an enforcement strategy with priorities, and that strategy must recognize the difference between the elimination of institutional discrimination and the resolution of private job disputes based on claims of discrimination. In retrospect, it is now clear that Title VII as originally enacted did exactly that. On the one hand, the Attorney General was given responsibility for elimination of institutional discrimination through pattern or practice litigation; and such litigation authority was wholly independent of the existence of a charge and completely separate from any administrative procedures. On the other hand, EEOC was given responsibility for resolving individual disputes through voluntary conciliation efforts. Individuals were also given independent access to the federal courts.

Unfortunately, this statutory scheme failed because the Attorney General rarely used his power to bring pattern or practice suits and institutional discrimination continued unabated. While the Justice Department failed to attack patterns of discrimination, EEOC failed to fulfill its mandate to resolve individual charges.

It is not surprising that the 1972 Amendments resulted in an administratively impossible situation in which it became even more difficult to chal-

Another study based on the results of the Michigan Survey found widespread sex discrimination in salaries, yet 93% of the significantly underpaid women reported that they had never been discriminated against. Moreover, there was no objective support for the few complaints of sex discrimination. Institutional discrimination was "unrelated to perceived discrimination." Levitin, Quinn, & Staines, *Sex Discrimination Against the American Working Woman*, 15 AM. BEHAV. SCIENTIST, 237, 249 (1971).

In 1971, the Harvard Law Review published an analysis of the first seven years of Title VII and concluded that "The individual complaint mechanism is an inadequate vehicle for eliminating job discrimination." *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1228-29, 1232 (1971). A study made for the U.S. Commission on Civil Rights by the Brookings Institution also concluded that the federal antidiscrimination effort would not succeed unless it could discard the "complaint orientation typical of most State and local fair employment practice agencies." R. NATHAN, *JOBS AND CIVIL RIGHTS* 256 (1969).

409. *EEOC v. Am. Tel. & Tel. Co.*, EMPL. PRAC. GUIDE (CCH) ¶ 1860 (E.D. Pa. Jan. 18, 1973).

410. Act § 707(a), 42 U.S.C. § 2000e-6(a) (1970).

allenge institutional discrimination. First, and most importantly, pattern or practice litigation authority did not survive intact. When the authority rested with the Attorney General, it could have been used swiftly without any administrative encumbrances. When the litigation authority was transferred to EEOC, it was superimposed upon the agency's existing administrative charge processing structure. Before a pattern or practice suit could be brought, a charge now had to wind its way through the entire administrative process.

Not only was the authority to litigate pattern or practice violations crippled by the 1972 Amendments, but EEOC was given an entirely new litigation responsibility—the authority to litigate individual charges, an authority which could also be exercised only after all administrative prerequisites were exhausted. The EEOC thus had two intertwined enforcement responsibilities: eliminating institutional discrimination and resolving individual disputes. Both responsibilities were tied by the statute to the agency's cumbersome administrative process. To complicate matters, the new litigation potential in individual cases raised a false hope that individual charges could be used to eliminate systemic discrimination. The EEOC was required simultaneously to eliminate institutional discrimination through the complaint process and also to resolve individual disputes. It has failed to do either. As a matter of hindsight, it now appears clear that a prime reason for EEOC's failure was its attempt to use the individual complaint procedure as the basis for eliminating institutional discrimination.

It is evident that the 1972 Amendments to Title VII, with all their good intentions, created an inherently contradictory situation for EEOC. But the structural defects of the law have been obscured by the serious operational defects of the agency. These problems have been so severe that they have been the focus of extensive public criticism of the Commission.⁴¹¹ The validity of the complaints of gross mismanagement created the demand for a quick but superficial repair of the agency and ignored fundamental problems. Critics who emphasize the need for strong leadership, a new role for Commissioners, formal training, and greater professionalism among the staff imply that improvements in these areas are all that is needed. This view is often expressed by those who think anything and everything can be patched up by bureaucratic fixing in the name of administrative efficiency. However, this approach is clearly inadequate. It is, of course, tempting to believe that the promise of Title VII can be realized without returning to Congress for what might be a difficult battle. But, the current enforcement structure ignores the basic lessons of decades of scholarly study and state agency experience as well as twelve years of operations under Title VII.

Effective enforcement of Title VII's mandate requires the separation of efforts to resolve individual complaints from efforts to eliminate institutional

411. For a typical example see editorial, *The Equal Employment Mess*, N. Y. Times, Feb. 12, 1977, at 20, col. 1.

discrimination. As long as the agency's pattern or practice litigation authority is tied to the administrative charge process, it cannot fulfill its primary mission: the elimination of patterns of employment discrimination.

Authority to eliminate institutional discrimination must not only be separated from individual charge resolution responsibility, but it must also be freed from an exhaustive administrative process as the condition for initiating *de novo* litigation in federal district courts. On the other hand, if administrative prerequisites are considered appropriate, then the agency should be given the authority to issue enforceable cease-and-desist orders.

The structure imposed by the 1972 Amendments hopelessly confused EEOC's responsibility to eliminate institutional discrimination with an obligation to resolve individual disputes. Improvements in the operation of the agency are of course needed, but only a major legislative change in the enforcement scheme of Title VII can transform the Commission into an effective instrument for the elimination of institutional discrimination.