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# Proposing a New Paradigm for EEOC Enforcement after 35 Years: Outsourcing Charge Processing by Mandatory Mediation

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## Articles

# Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing By Mandatory Mediation

Michael Z. Green\*

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## I. Introduction: Analyzing the EEOC at 35 In Search of New Enforcement Paradigms

The enforcement of federal employment discrimination laws by the Equal Employment Opportunity Commission (EEOC),<sup>1</sup> although generally accepted as adding some overall value,<sup>2</sup> has

1. The EEOC enforces the following federal laws: Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2 to 2000e-17 (2001); Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (2001); Equal Pay Act ("EPA"), 29 U.S.C. §§ 206-262 (2001); and Titles I and IV of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12212 (2001). Generally, these laws prohibit employment discrimination based on race, color, sex, religion, national origin, age, or disability. Furthermore, the statutes protect against retaliation for opposing job discrimination or for filing a charge or participating in proceedings under these laws. The EEOC has published a wealth of information about its past and present on its Internet site. See *EEOC 35th Anniversary*, at <http://www.eeoc.gov/35th> (last visited Nov. 10, 2001).

2. The EEOC publishes information in its annual report describing the total amount of money collected for victims of discrimination. The fiscal year 2000 report states that the EEOC collected \$293.2 million in 2000 for victims, including what the EEOC refers to as a record-breaking \$245.7 million in pre-litigation enforcement. See *EEOC Accomplishments Report for Fiscal Year 2000*, at <http://www.eeoc.gov/accomplishments-00.html>. (last modified Jan. 18, 2001). The amount of money collected in 2000 is still much less than fiscal year 1999, where the EEOC collected \$307.3 million. See Nancy Montwieler, *Commission's Case Inventory Keeps Dropping, But Monetary Benefits Were Lower Last Year*, 6 Daily Lab. Rep. (BNA) C-1 (Jan. 9, 2001). However, some commentators have provided persuasive data that laws passed by Congress prohibiting workplace discrimination have improved the economic conditions for African-Americans as a whole or at least created many more African-Americans who have reached middle class status. See Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 472-74 (1995); see also *Major Impact of Title VII is Cited as Seminar Marks 30-Year Anniversary*, 122 Daily Lab. Rep. (BNA) D-24 (June 28, 1994) (discussing findings of a study conducted by Rutgers Law Professor Alfred Blumrosen finding that Title VII has been "profoundly successful" in opening jobs to minorities that historically had been closed to them). Most information about the impact of Title VII does not separate the role of the EEOC in that impact. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 49 & n.181 (1996). Nevertheless, by using its enforcement authority, the EEOC is able to bring to bear resources to challenge class-based or systemic type discrimination. For instance, in 2000 the EEOC received dozens of complaints about threats to African-Americans and other members of minority groups involving the display of "nooses" in the workplace. See Sana Siwolop, *Nooses, Symbols of Race Hatred*, at *Center of Workplace Lawsuits*, N.Y. TIMES, July 10, 2000, at A1. Specifically, the EEOC has brought racial harassment lawsuits against twenty companies where nooses were allegedly involved. These suits stemmed from various EEOC regional offices all over the country, including offices in Charlotte, Chicago, Detroit, Miami, and San Francisco. *Id.* Because the EEOC only files a "few hundred lawsuits a year," *id.*, the fact that it has filed twenty noose-related lawsuits is significant. *Id.* This use of the EEOC's power to file suits also suggests that in egregious circumstances implicating systemic or national concerns, the EEOC's

never met the intended goal of becoming a key mechanism in eradicating discrimination in the workplace.<sup>3</sup> A key reason for the EEOC's enforcement failures traces back to the discriminatory beliefs<sup>4</sup> that clouded the initial passage of Title VII of the Civil Rights Act of 1964,<sup>5</sup> the statute that created the EEOC. The spineless compromises and last-minute deals, perpetuated by the

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enforcement mechanisms have a place in our society and can be helpful in tackling or eradicating discrimination in the workplace.

3. There are those, such as Professors Derrick Bell and Richard Delgado, who believe discrimination is so firmly rooted in our society that it can never be completely eradicated. See DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 97-100 (1992) (discussing Professor Bell's belief that racism in our society is too intrinsic and deep-seated for the courts or laws to eradicate it); Derrick A. Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (suggesting that civil rights leaders should abandon efforts to use the law and the legal system to remedy the effects of discrimination in our society and come to the "racial realism," or acknowledgment, that discrimination has survived and will continue to survive and cause frustration within the legal system); see also Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79, 84 (1991); Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?*, 80 GEO. L.J. 1879, 1881-82 (1992); Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 WIS. L. REV. 579, 584 (1989); Turner, *supra* note 2, at 375-77 (discussing the themes of permanent racism and the various commentators, including Professors Derrick Bell and Richard Delgado, who have consistently made that claim). Professor Ronald Turner has even reached the conclusion that "Title VII cannot reach or bring about the avowed and ever more distant statutory goal of ending the exclusion of African-Americans and other protected groups from the changing economic mainstream." *Id.* at 479-80. In contrast, Professor Cynthia Estlund has argued that labor and employment discrimination laws have successfully helped and can continue to help integrate the workplace, which has now become an important arena for racial discourse. See generally Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49 (1998).

4. See Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 4-5 (1977) (reviewing a lengthy document titled "The Minority Report," presented by a group of conservative congressmen expressing their opposition to the legislation during the debate over Title VII, expressing their beliefs that banning employment discrimination was a "radical" change, arguing to maintain the status quo, proclaiming "racial superiority by innuendo" and inciting fear of change which led conservative members of Congress to introduce an "array of amendments to modify or remove various portions of the bill under debate"); see also *Pre 1965: Events Leading to the Creation of the EEOC*, at [www.eeoc.gov/35th/pre1965](http://www.eeoc.gov/35th/pre1965) (last visited Nov. 10, 2001) (recognizing that the "most serious compromise" in getting Title VII passed was the compromise that "resulted in a bill that eliminated any real enforcement authority for EEOC"). Thus, the compromise leading to Title VII resulted from deals with Republicans and southern Democrats, who were vehemently opposed to passing civil rights legislation that would prohibit employment discrimination on the basis of race. See *infra* Part II.B.

5. 42 U.S.C. §§ 2000e-2 to 2000e-17 (2001).

longstanding divisions in the United States over slavery and race, may have ended a record-long congressional debate and led to passage of Title VII. However, those compromises also hampered any significant impact by the EEOC as an enforcement agency when it was given no power to enforce the law from the very beginning.<sup>6</sup>

From its inception, the EEOC recognized that its power to enforce its own investigative findings was virtually nonexistent. Since then, Congress and the EEOC leadership have attempted piecemeal efforts to reverse the initial failures and finally provide the EEOC with strong enforcement powers, but those actions have only led to a patchwork of hit-and-miss enforcement initiatives.<sup>7</sup> For example, Congress first responded to its initial failure to provide enforcement power to the EEOC by amending Title VII in 1972. Those amendments established that the EEOC had power to enforce its findings by filing a private court action on its own behalf. However, by starting the EEOC as a charge-handling agency, rather than an enforcement agency, the EEOC has been forced to

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6. After nearly twenty years of wrangling over several different bills to address employment discrimination, Congress passed the Civil Rights Act of 1964. See MICHAEL I. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 61 (1966). The debates surrounding the bill that became the Civil Rights Act of 1964 were the longest debates in the history of Congress, due to a Republican filibuster. *Id.* at 62 (noting that the filibuster “has been calculated at 534 hours, one minute, and thirty-seven seconds”); see Hill, *supra* note 4, at 2, 7 (noting that after being “[a]mended 105 times,” after being considered and debated by the “House Judiciary Committee twenty-two days, by the Rules Committee seven days, by the House six days, and by the Senate eighty-three days,” and with an “extended debate in the Senate [that] lasted 534 hours, one minute and thirty-seven seconds,” “testimony from 101 witnesses, a record comprising 2,649 pages, and innumerable compromises worked out in House and Senate committees, the Civil Rights Act was adopted on July 2, 1964” with the “most bitterly contested section of the Act [being] Title VII, covering employment”). See generally CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985) (describing background details of the debate leading to passage of Title VII).

7. An independent group recently conducted an examination of the EEOC’s mediation program. The report of that independent group provides an excellent review of the EEOC’s charge processing cycles over the last twenty years, starting in May 1977 with the reign of Chairwoman Eleanor Holmes Norton and ending in 2000 under the leadership of Chairwoman Ida Castro. The report also indicates that virtually every enforcement initiative has been hindered by a lack of funds, increasing responsibilities and overriding criticism that the charge processing backlog has become unmanageable. See E. Patrick McDermott et al., *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, at <http://www.eeoc.gov/mediate/report/> (Sept. 20, 2000) (click on link to Part IV.C).

focus on handling charges instead of pursuing enforcement initiatives. Meanwhile, its critics have highlighted this focus by constantly hammering the EEOC on how it handles charges. Also, because of the overall political nature of the agency and the more political nature of its funding, financial support by Congress has focused on tackling charge processing issues and limiting enforcement initiatives. So the initial compromise that stripped down the EEOC to an agency which merely receives charges, investigates them and attempts to conciliate them has limited any efforts to strengthen the EEOC's enforcement impact.

Thus, the bane of the EEOC's existence over time has become its backlog of charges. In 1995, when the charge backlog reached an all-time high of more than 100,000 charges, the EEOC received a tremendous amount of criticism as an agency where justice delayed became justice denied.<sup>8</sup> Some commentators even suggested that the EEOC should get out of the business of charge processing.<sup>9</sup> Most of these criticisms focused on the EEOC's handling of charges at a time when the EEOC's backlog reached staggering proportions. Given its current efforts to reduce the backlog and the inherent nature of the charge process as it relates to the EEOC's enforcement activities, it would be difficult—if not political suicide—to suggest that the EEOC completely abandon charge processing without establishing a viable alternative.<sup>10</sup>

Even before the staggering numbers in 1995, the EEOC battled to keep its backlog of charges manageable. It has vacillated

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8. Lamont E. Stallworth & Linda K. Stroh, *Who is Seeking to Use ADR? Why Do They Choose to Do So?*, 51 DISP. RESOL. J. 30, 30-31 (1996) (noting the tremendous hardships placed on claimants by the EEOC's backlog and discussing how justice may be denied due to the increasing backlog).

9. See, e.g., Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 219 (1995) (stating that "race discrimination in employment remains pervasive despite three decades of government effort" and asserting that the EEOC has been "constrained to focus on processing individual charges of discrimination" rather than being able to "concentrate on combating broader unlawful practices"); Selmi, *supra* note 2, at 57-64 (reviewing the overall ineffectiveness of the EEOC and suggesting that it should be disbanded or that its duties and functions be significantly altered). Other commentators have made serious criticisms of the EEOC. See generally Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 TEMPLE POL. & CIV. RTS L. REV. 1 (1997) (criticizing the EEOC's role in displacing or denying the pursuit of conflicts in the court system and thereby hindering enforcement); Ronald Turner, *A Look at Title VII's Regulatory Regime*, 16 W. NEW ENG. L. REV. 219 (1994) (arguing that Title VII has failed to meet its goals and aspirations due to its limited enforcement mechanisms); see also Stallworth & Stroh, *supra* note 8, at 31 (noting the tremendous hardships placed on claimants by the EEOC's backlog).

10. See *infra* Part V.

from periods of focusing on high quality investigation of every charge to limited investigation with a significant focus on reducing the backlog. This cyclical problem of balancing high quality investigation with reducing its backlog of charges has kept the EEOC from becoming a more powerful enforcement agency because the focus, funding and resources have not been dedicated to enforcement initiatives.

Over the last five years, the EEOC has focused on reducing the outrageous backlog that existed in 1995. It has made remarkable progress while attempting to focus on many enforcement initiatives. Although the EEOC has now significantly reduced its backlog,<sup>11</sup> Congress has stepped into the fray and tied the hands of the EEOC in its efforts to become a more consistent enforcement agency. By not providing adequate funding or by tying the funding to promises to limit its enforcement initiatives, Congress has stopped legitimate enforcement activity and even stymied important initiatives that were cutting the EEOC's backlog and allowing the EEOC to limit its focus on charge processing.

Congress repeatedly uses its funding decisions to stifle the EEOC from becoming a world class enforcement agency. With just enough financial support to barely operate, the EEOC will undoubtedly continue to be criticized for not spending more time investigating charges, despite limited resources and growing responsibilities.<sup>12</sup> Under these circumstances, charge processing will

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11. The EEOC reduced its backlog to an all-time low of 34,300 by the end of fiscal year 2000. See Montwieler, *supra* note 2. Nevertheless, the total amount of money collected by the EEOC for victims of discrimination decreased from the 1999 fiscal year. *Id.*

12. The federal courts have assumed that it is the EEOC's primary role to process charges to the point of effectively screening out meaningless cases from the court system. See Turner, *supra* note 2, at 467-68 (discussing efforts by the federal courts to limit Title VII cases and criticism by the Administrative Office of the United States Courts which called "for the EEOC to take a closer look at employment discrimination charges before issuing 'right-to-sue' letters to charging parties," because federal judges believed that "[i]f more careful administrative scrutiny [by the EEOC] were mandated, the number of EEO cases requiring federal court action might be reduced"). The National Employment Law Association, a major advocate for employee's rights, quickly responded to the federal court challenges to the EEOC by arguing that the EEOC should not be given additional responsibilities before allowing claims to be brought in court. *Id.* at 468. The reality is that the statutory scheme of Title VII calls for the federal courts to be the final arbiters of employment discrimination claims. If one assumes that the EEOC is to play a major role in screening out meaningless cases through its charge processing function, then the EEOC truly carries an enormous burden both politically and in terms of financial resources. If the EEOC is considered to be an agency that only enforces the law—much like the Justice Department—then the EEOC could focus on major enforcement initiatives.



remain the focus of the agency over any enforcement initiatives. Nevertheless, the EEOC continues to put a positive spin on its charge processing and enforcement efforts under these difficult circumstances. The EEOC issues a yearly report, the most recent of which indicating that it has reduced its backlog to longtime lows and that it is responsible for all-time highs in the amount of money that it has helped bring to victims of employment discrimination.<sup>13</sup>

After more than thirty-five years of existence and the quickly-approaching thirty year anniversary of the amendment that was intended to transform the EEOC from being a “toothless tiger” of an enforcement agency,<sup>14</sup> the EEOC must now adopt new paradigms for enforcement. Those new paradigms must concentrate on limiting or removing any ongoing focus on charge processing and switching the focus to long-term enforcement initiatives. To accomplish that objective, this Article proposes that the EEOC outsource<sup>15</sup> a significant portion of its charge processing responsibilities to private mediation, an informal process by which a neutral party works with the interested parties to craft a mutually agreeable resolution to their dispute.<sup>16</sup> Then the EEOC can start to

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13. See *EEOC Fiscal Year 2000 Accomplishments Report Shows Important Progress on Multiple Fronts*, at <http://www.eeoc.gov/press/1-18-01.html> (Jan. 18, 2001) (describing a seventeen-year low in charge processing backlog, record-high monetary benefits obtained through administrative channels, as well as other positive results from fiscal year 2000).

14. Throughout this Article, the EEOC is referred to as a “toothless tiger” of an agency. Alfred Blumrosen, one of the EEOC’s first officials, referred to the EEOC as such when it started in 1965. See ALFRED W. BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* 59 (1971).

15. The term “outsource” in this Article means attempting to transfer internal EEOC governmental work (charge processing) to external private sources (outside mediators) that will perform the work so that it does not need to be completed internally. Another term for this type of action is “privatization.” See Michael Glanzer, *Union Strategies in Privatizations: Shakespeare-Inspired Alternatives*, 64 ALB. L. REV. 437, 440-58 (2000) (discussing governmental decisions to outsource or privatize certain services to reduce overall costs and promote efficiency).

16. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 17-38 (1996) (describing various mediation techniques). Mediation has become the preferred option for resolving litigation disputes. See generally Lisa Brennan, *What Lawyers Like: Mediation*, NAT’L L.J., Nov. 15, 1999, at A1 (describing a 1999 survey of attorneys conducted by the American Arbitration Association and the National Law Journal finding that sixty-nine percent of litigators and eighty-eight percent of in-house counsel prefer using mediation to resolve disputes); see also John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOTIATION L. REV. 137, 171-76 (2000) (referring to study of outside counsel, in-house counsel and corporate executives demonstrating that all three groups think favorably of using mediation to resolve business disputes); Homer C. LaRue, *The Changing Workplace Environment in the New Millennium:*

shift the focus of its budgeted employees and its fixed expenses<sup>17</sup>

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*ADR is a Dominant Trend in the Workplace*, 2000 COLUM. BUS. L. REV. 453 (discussing the use of ADR including mediation as a tool to handle workplace disputes); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 834 (1998) (encouraging the general use of mediation for dispute resolution). *But see* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle For Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 775-81 (1999) (criticizing the increasing use of mediation when the choice to use mediation and the resulting settlement agreement were not based on informed consent). To avoid risks associated with a lack of informed consent, this Article proposes that employees and employers be required to participate in mediation only if the resolution is voluntary and based on informed consent. *See infra* Part V.C.

Mediation is also gradually increasing as a preferred option for resolving employment discrimination disputes. *See* Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLINE L. REV. 261, 261-62 (1998) (encouraging use of mediation to resolve employment disputes especially if companies change their culture of conflict resolution); Johnathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 150-56, 168-69 (1999) (tracing the emergence of mediation as a method to resolve employment disputes and supporting the use of mediation in resolving sexual harassment claims); Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431 (1996) (describing the benefits of using mediation to resolve disability discrimination claims brought pursuant to the Americans with Disabilities Act); Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 597-604 (identifying the potential value of mediating Title VII claims); Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489, 2510-33 (1997) (advocating use of mediation in sexual harassment disputes). The EEOC's mediation program for employment discrimination disputes has been highly touted. *See* Nancy Montwieler, *EEOC's New Nationwide Mediation Plan Offers Option of Informal Settlements*, 29 DAILY LAB. REP. (BNA) C-1 (Feb. 12, 1999) (discussing the EEOC's efforts to increase the use of mediation to resolve charges and how the EEOC's mediation program operates). I have asserted that more empirical studies and critical analysis of mediation programs involving employment disputes must still be conducted. *See* Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration For Discrimination Claims*, 31 RUTGERS L.J. 399, 471 (2000) (asserting that scholars must shift from analyzing arbitration and focus on understanding "mediation's effect on resolving employment discrimination disputes"); *see also* Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1058-59 (1996) (criticizing the lack of scholarly discourse and critique of ADR with respect to a general imbalance in power for those who may not benefit from an informal dispute resolution option, especially those lacking power because of racial, gender or economic status). *But see* Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO STATE J. ON DISP. RESOL. 735 (2001) (criticizing the "call for more such [empirical] studies" and suggesting that "we should be skeptical of declarations that empirical studies 'prove' one side of the debate to be correct").

17. Apparently, "eighty-four percent of the [EEOC's] overall budget consists of fixed costs, such as staff salaries, benefits, and related expenses such as rent and

from charge processing to developing stronger enforcement initiatives, especially with tester programs<sup>18</sup> that will help tackle the systemic wage discrimination<sup>19</sup> barriers that exist in our country.

The goal of this Article is to promote critical thinking about the practical effects that mandatory and private mediation of EEOC charges will have in making the EEOC a stronger enforcement agency. Part II of this Article discusses the historical development of the EEOC and its lack of enforcement power. Part

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utilities." See *EEOC List of "Major Accomplishments" Cites Mediation, Small Business*, 13 DAILY LAB. REP. (BNA) A-3 (Jan. 19, 2001). The budget for the private mediation program proposed in this Article should be set for the next five years and not considered a part of the EEOC's budget. See *infra* Parts V.C and VI.

18. Testing usually involves sending a pair of similarly qualified individuals from different protected classes to apply for the same position, and then observing whether the minority or female applicant receives less favorable results than her white or male counterpart to "test" whether an entity is discriminating. A number of tester programs have been quite successful in exposing housing discrimination. Expansion of those programs to employment discrimination cases would be helpful. See *Urban Institute Researchers Urge Expansion of Testing to Unearth Bias*, 41 DAILY LAB. REP. (BNA) A-9 (Mar. 3, 1999). Historically, the EEOC has been supportive of the use of testers to ferret out discrimination and has offered funds to private organizations in Chicago, Illinois and Washington, D.C. to start tester programs. Also, the EEOC has issued a policy statement supporting the use of testers. See *EEOC Notice 915.002*, at <http://www.eeoc.gov/docs/testers.html> (May 22, 1996). The EEOC has a "longheld position that 'testers' have legal standing to file charges and litigate claims of employment discrimination." *EEOC Issues New Guidance on Legal Standing of "Testers,"* at <http://www.eeoc.gov/press/5-24-96a.html> (May 24, 1996). However, Congress has prevented the EEOC from pursuing any longstanding "tester" initiatives by limiting funding. See Deborah Billings, *Congressional Appropriators Moving to Bar EEOC Pursuit of Employment Tester Program*, 131 DAILY LAB. REP. (BNA) D-7 (July 9, 1998) (describing efforts by GOP appropriators to link any overall increase in funding for the EEOC to an order or agreement "not to pursue any policy which would use testers as a standard practice"). For several critical analyses of tester programs, see Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403 (1993); Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply To Professor Yelnosky*, 28 U. MICH. J.L. REFORM 1 (1994); Michael J. Yelnosky, *Salvaging the Opportunity: A Response to Professor Clark*, 28 U. MICH. J.L. REFORM 151 (1994).

19. Male workers consistently earn at least twenty-five percent more than similarly situated female workers. See Pam Ginsbach, *Household Income Rises for Fifth Year as Poverty Rate Falls to 20-Year Low*, 188 DAILY LAB. REP. (BNA) D-1 (Sept. 27, 2000) (noting that the gap in pay between women and men in 2000 increased to the point where women earned seventy-two cents for each dollar earned by males, a two percent drop from the all-time high of seventy-four cents for each dollar, which occurred in 1996). The EEOC has made it a priority to investigate pay equity issues for women and minorities. See *EEOC Focuses on Pay Equity at Meeting in Philadelphia*, at <http://www.eeoc.gov/press/4-15-99.html> (Apr. 15, 1999).

III addresses the significant accomplishment of amending Title VII to give the EEOC enforcement powers in 1972. Part IV examines how the EEOC has continued to be bogged down by the initial label of being a charge-handling agency and how that label has allowed critics to limit the EEOC's enforcement power. Part V of this Article proposes a simple amendment to EEOC procedures and the congressional approval of legislation that would provide for private mandatory mediation of EEOC charges.<sup>20</sup> In Part VI, the

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20. There are numerous critics of mandatory mediation programs, but most of their criticisms involve its application to domestic relations proceedings. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 441-46 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1547, 1549-51 (1991); Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 272-73 (1992); Craig McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1394-96 (1995); Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 721-31 (1993); cf. Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 46 (criticizing mandatory ADR because it creates an additional layer of transactions and costs for litigants). Results from programs not involving domestic relations appear to be less concerning. See Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 566 (1997) (reporting studies in small claims and common pleas courts contexts showing little support for claim that parties are pressured to accept unfair settlements in mandatory mediation). The mandatory mediation proposed in this Article would require that the parties meet pursuant to an order of the EEOC, and during that meeting would have a duty to try to reach a mutual agreement with the help of a neutral mediator. See *infra* Part V. Actual agreement, however, would not be required. *Id.* This is similar to the duty to bargain in good faith under the National Labor Relations Act. See 29 U.S.C. § 158 (2001); see also Nolan-Haley, *supra* note 16, at 803 (noting that "mandatory mediation programs generally ignore any requirements for consent and specify some form of good faith participation"); IND. R. ADR 2.1 (parties are required to mediate in good faith but are not required to settle). If the parties cannot reach an agreement, the charge would come back to the EEOC for further processing. I also view this type of arrangement as similar to a fact finding conference which frequently occurs under many state administrative regimes enforcing employment discrimination laws. See, e.g., FLA. ADMIN. CODE ANN. r. 60Y-5.003 (2001) (fact finding conference under the Florida Human Rights Act); ILL. ADMIN. CODE tit. 56, § 2520.440 (2001) (describing fact finding conferences under the Illinois Human Rights Act). For example, under the Illinois Department of Human Rights regulations, the agency "may convene a fact-finding conference for the purpose of obtaining evidence, identifying the issues in dispute, ascertaining the positions of the parties and exploring the possibility of a negotiated settlement." *Id.* § 2520.440(a). The parties are given ten days notice to appear at the conference. *Id.* Although attorneys may appear, it is solely up to the investigator to determine what witnesses are to be heard during the conference. *Id.* §§ 2520.440(b)-(c). Also, the Department may dismiss the charge, if the complainant fails to attend, or default the charge, if the respondent fails to attend, unless that party can show good cause

Article argues that congressional efforts to prevent certain EEOC initiatives—including private mandatory mediation—by reducing overall EEOC funding should be limited to actual amendments to Title VII. Congress should not use the annual budgeting process to hold certain EEOC enforcement initiatives hostage in exchange for money needed just to allow the agency to function. The Article concludes in Part VII that private mandatory mediation will assist the EEOC by creating a new paradigm for long-term enforcement initiatives.

## II. The Creation of the EEOC: Establishing a Toothless Tiger of an Agency

### A. *Efforts to Address Employment Discrimination Prior to Title VII*

President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law on July 2, 1964.<sup>21</sup> Title VII of that statute establishes that “it shall be unlawful for an employer to fail or refuse to hire, discharge, limit, segregate, classify, or otherwise discriminate against any individual, with respect to wages, privileges, and other terms of employment because of that individual’s race, color, religion, sex, or national origin.”<sup>22</sup> Title VII was not the first

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for the failure to attend the conference. *Id.* § 2520.440(d)(1). Florida has similar fact finding conference provisions under its Commission on Human Relations statute. *See* FLA. ADMIN. CODE ANN. r. 60Y-5.003 (2001). Many other state anti-discrimination laws provide administrative regimes requiring parties to attend a fact finding conference. *See, e.g.,* MINN. R. 5000.0510 (2001); N.Y. COMP. CODES R. & REGS. tit. 9, § 465.6 (2001); 40 TEX. ADMIN. CODE § 327.2(e)-(l) (West 2001). The EEOC did use fact finding conferences when former Chairwoman Eleanor Holmes Norton made them a primary focus based upon her experience with the conferences under New York’s anti-discrimination laws. *See* McDermott, *supra* note 7 (click on link to Part IV.C). When Clarence Thomas became Chair of the EEOC, he stopped requiring fact finding conferences and the EEOC has not reinstated the practice. *See id.* The fact finding conference and rapid charge processing program used by Chairwoman Norton is described in more detail in Section IV.

21. *See* Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2 to 2000e-17 (2001)). For a discussion of the events leading to the enactment of Title VII, see Sovern, *supra* note 6; Blumrosen, *supra* note 14. In 1965, Professor Blumrosen, as a result of his study of the New Jersey Division on Civil Rights, was asked to help establish the EEOC, and has been involved in the implementation of Title VII since that time. *See* William L. Robinson, Statements Favoring EEOC’s Use of Goals and Timetables Before House Labor Subcommittee on Employment Opportunities, in 50 DAILY LAB. REP. (BNA) F-1 (Mar. 14, 1986).

22. *See supra* note 21.

attempt by the federal government to address employment discrimination. Rather, Title VII represented the fulfillment of two prior decades of unsuccessful efforts to enact fair employment legislation as Congress considered and rejected more than 200 fair employment bills.<sup>23</sup>

Before Title VII, a number of presidential executive orders had established a policy against discrimination in employment by federal contractors. In 1941, President Franklin D. Roosevelt issued an executive order prohibiting employment discrimination by federal contractors. President Roosevelt issued the order at the urging of A. Philip Randolph and other African-American leaders who had organized a mass civil rights march on Washington, D.C. to protest the exclusion of African-American workers from jobs in the defense and other industries.<sup>24</sup> Issuance of this order quelled the efforts to organize that march.<sup>25</sup> Specifically, that order prohibited employment discrimination “against all workers in defense industries” on the basis of “race, creed, color, or national origin” and it created a five-person Fair Employment Practice Commission (FEPC) to “receive and investigate complaints of discrimination” and “to take appropriate steps” in obtaining compliance.<sup>26</sup> On May 27, 1943, President Roosevelt increased the jurisdiction of the FEPC to include all employers involved in production of war materials or support for such production regardless of whether they had contracts with the federal government.<sup>27</sup> Other executive orders addressing employment discrimination were subsequently issued before Title VII’s passage.<sup>28</sup>

The year after Title VII passed, President Johnson issued Executive Order 11246.<sup>29</sup> That order was intended to strengthen “prohibitions against discrimination in government employment and in employment by government contractors and subcontractors

23. See Govern, *supra* note 6, at 61 (stating that Title VII was finally passed “[a]fter over twenty years of deliberation on dozens of bills”).

24. HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM, VOLUME 1: RACE, WORK, AND THE LAW, 178-79 (1977); see also Govern, *supra* note 6, at 9.

25. Hill, *supra* note 24, at 178-79.

26. *Id.* at 179 (citing 3 C.F.R. § 957 (1941)).

27. *Id.* at 179.

28. *Id.* at 379-81 (citing executive orders by the Truman, Eisenhower, Kennedy, and Johnson Administrations).

29. *Id.* at 380.

and it required equality of job opportunity for federally assisted construction projects.”<sup>30</sup>

*B. The Legislative Attempts by Republicans and Southern Democrats to Block Title VII and the Compromises Leading to Its Passage*

Throughout its history, the United States has been unable to face issues of race head on and has relied on countless compromises that have only masked the problem.<sup>31</sup> As an example of this premise, Title VII, as originally envisioned by certain members of Congress, was not intended to achieve equality in the workplace.<sup>32</sup>

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30. *Id.*

31. Examples of these compromises can be found in this country's Constitution. See generally Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2000) (describing how slavery was an important aspect of the Constitutional Convention in 1787 and how the Three-Fifths clause, the protection of the African slave trade until at least 1808, and the Fugitive Slave Trade clause were obvious accommodations to the needs of the South that were not directly addressed until the Civil War, despite attempts to further compromise before then with the Missouri Compromise in 1820 and the Compromise of 1850). At the formation of the Constitution, the states essentially entered into a Constitutional compact to not address the eradication of slavery despite it being a concept that was inimical to the Declaration of Independence, upon which this country was founded. See generally Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 NW. U.L. REV. 785, 790-91 (1995) (explaining that many believed that the slavery compromise in the Constitution was part of a compact between the northern and the southern states). That Constitutional compromise only led to other compromises like the Missouri Compromise, which allowed slavery to go forward in Missouri as long as it did not go forward in certain states acquired as part of the Louisiana purchase. *Id.* at 792. Eventually, the compromises and the deals that placated the South could no longer last as the Civil War erupted. Today, quite possibly, the compromises involved in passing the Civil Rights Act of 1964 may no longer be acceptable. See Finkelman, *supra* at 266-67 (describing the long term effects of slavery in the United States, especially in how it shaped the Constitution, and how despite congressional efforts to make the Constitution color-blind, race still matters in our everyday life, as the government has been unable to eradicate race as a factor of injustice in our society). Those compromises, hopefully, will not lead to a modern-day race war over the struggle for equality. See generally CARL T. ROWAN, *THE COMING RACE WAR IN AMERICA* (1995) (claiming that growing racial tensions and injustices in our society, along with a lack of success within the legal system, may lead to a race war).

32. At the beginning of the legislative effort to pass Title VII and create the EEOC, South Carolina Senator Strom Thurmond, then a Democrat, admitted that the southerners who wanted to defeat the legislation had their “backs . . . to the wall,” but they were “not without weapons with which [they] [could] fight back” because southerners chaired twelve of the eighteen committees in the Senate and twelve of the twenty-one committees in the House. Whalen & Whalen, *supra* note 6, at 19. In other words, these southern members of Congress would use their power to prevent the legislation from passing. *Id.*

Rather, Title VII represented significant compromises aimed at placating the whims of the southern congressmen who controlled its passage.<sup>33</sup> Despite an August 1963 march on Washington, D.C. by civil rights leaders and their insistence that any civil rights bill passed by Congress must include a strong agency like the FEPC and other enforcement powers, President John F. Kennedy remained pessimistic about the chances of such strong legislation passing under the scrutiny of the Republicans and the southern Democrats in the Congress.<sup>34</sup> President Kennedy's concerns proved true; even after his tragic death, compromises offered to get the support of certain Republicans and southern Democrats led to a focus on private enforcement by individuals and the creation of a watered down government agency with no enforcement authority.<sup>35</sup>

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33. See Whalen & Whalen, *supra* note 6, at 22-23 (noting the maneuvering of President Kennedy to get a civil rights bill passed). President Kennedy rebuked efforts by African-American civil rights leader Roy Wilkins, executive secretary of the National Association for the Advancement of Colored People (NAACP), who demanded on behalf of the Leadership Council on Civil Rights that the bill which became Title VII must include a strong enforcement agency called the EEOC. *Id.* President Kennedy did not pursue a strong enforcement agency because he "attempted to placate" Wilbur Mills, the chairman of the Ways and Means committee, a southern Democrat from Arkansas. *Id.* Kennedy believed that his tax bill had priority over the civil rights bill and that if the civil rights bill continued on, Mills and the Ways and Means Committee would hinder enactment of Kennedy's tax bill. *Id.* (suggesting that Kennedy had even asked the Democrats to stall on the civil rights bill until his tax reform bill made it out of the Ways and Means Committee).

34. *Id.* The march on Washington involved the famous "I Have A Dream" speech by Martin Luther King. *Id.* at 26. President Kennedy met with ten of the civil rights leaders shortly after the speech, including Martin Luther King, A. Philip Randolph, Whitney Young (then executive director of the Urban League) and Roy Wilkins. *Id.* When pressed by these civil rights leaders to ensure that any civil rights bill would be strengthened by an agency and the Justice Department's authority to intervene, President Kennedy analyzed the votes that would be needed from each state for it to pass and surmised that the southern Democrats would not vote for it. *Id.* President Kennedy believed that there would need to be compromises made to get the number of Republican votes necessary to pass any civil rights legislation, regardless of the opposition from southern Democrats. *Id.* at 26, 39.

35. This Article is not suggesting that governmental enforcement is better than private enforcement; both mechanisms are valuable. See Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 961 (1978) (describing the role of private litigation in the enforcement of Title VII and arguing that scholars have underestimated the impact of private litigation on the enforcement of Title VII); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1384 (2000) (proposing that private enforcement of civil rights laws would be strengthened by allowing governmental agencies to deputize individuals or private organizations to pursue civil rights violations); Michael Selmi, *Public vs. Private Enforcement of*



Accordingly, the reason for the EEOC's lack of enforcement power was due solely to the compromise "frenzy" fostered by those vehemently opposed to eradicating employment discrimination.<sup>36</sup> Title VII was initially intended to be a statute with significant enforcement goals accomplished through a powerful administrative agency.<sup>37</sup> Specifically, last minute compromises on the congressional floor led to a significant amendment with respect to the creation of the EEOC. The bill, as it was originally reported out of the House Judiciary Committee, called for the creation of a federal agency, patterned after the National Labor Relations Board (NLRB), to deal with employment discrimination.<sup>38</sup> Under the House version of the bill, the EEOC was to have broad investigatory powers similar to the Federal Trade Commission, but the Senate limited this power and as a compromise, the House agreed.<sup>39</sup> Also, the EEOC was to be composed of an administrator and a five-member board and was to be empowered to issue cease and desist orders which would be factually conclusive if later reviewed by a court. However, because of the last-minute deals<sup>40</sup> that

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*Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1402-05 (1998) (analyzing the strengths and weaknesses of private versus public enforcement of civil rights laws and suggesting that reliance on government agency enforcement is fruitless).

36. See Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants*, 12 HOFSTRA LAB. L.J. 39, 40-41 (1994) (noting that "[o]ne pitfall of the compromise frenzy [leading up to Title VII's passage] was that the remedial section of the statute, originally written to provide for judicial relief incidental to central agency enforcement, was adopted without further conference or significant debate."). These changes to the enforcement principles behind Title VII were "last-minute compromises made on the floor of the chamber." *Id.* at 40.

37. Franke, *supra* note 36, at 40. The agency that eventually became the EEOC was initially expected to be based on the National Labor Relations Board (NLRB): an agency with cease and desist powers, the authority to hold hearings and issue enforceable orders and only limited judicial review of its decisions. *Id.* at 41-42; see also Rebecca Hanner White, *The EEOC, the Courts and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 58-59 (describing same).

38. See James E. Jones, Jr., *Some Reflections on Title VII of the Civil Rights Act of 1964 at Twenty*, 36 MERCER L. REV. 813, 820 (1985); see also White, *supra* note 37, at 59 (describing Senate action to remove prosecutorial authority from Title VII bill); Whalen & Whalen, *supra* note 6, at 37-38 (noting that the bill that came out of the House committee established the EEOC and empowered it to investigate charges of discrimination in firms with twenty-five or more employees and to issue judicially enforceable orders). At least one commentator has suggested that the decision to bring a "strong bill out of subcommittee" was part of a plan to "then trade away those sections most objectionable to the southern Democrats and conservative Republicans on the full committee" in order to get some form of civil rights legislation passed. Whalen & Whalen, *supra* note 6, at 37.

39. See Sovern, *supra* note 6, at 85.

40. Description of the attempts to defeat the Title VII legislation have reached

stripped the EEOC of its enforcement powers, the revised bill passed in the House with little debate or discussion despite the wholesale emasculation of the EEOC's enforcement powers.<sup>41</sup> It is believed that most of that EEOC power was compromised in order to avoid a Republican filibuster in the Senate.<sup>42</sup>

Concerns about enforcement mechanisms of Title VII became a prominent bargaining chip in getting the legislation passed. These concerns of mostly southern and Republican congressional members generally followed two threads: 1) beliefs that legitimate businesses and their practices would be trampled by a strong government agency with a mission to enforce anti-discrimination laws; and 2) direct opposition to any form of civil rights legislation.<sup>43</sup> Specifically, some senators feared that business and free enterprise would be harmed by having strong government regulation of the

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legendary proportions. Some have argued that southern opponents of the bill were so determined to defeat the legislation that they proposed a last minute amendment adding the word "sex" to the list of protected classes only one day before the House vote with the hope that this addition would seal the legislation's failure. See Leland Ware, *The Civil Rights Act of 1990: A Dream Deferred*, 10 ST. LOUIS U. PUB. L. REV. 1, 6 (1991) (describing legislative history of Title VII). Professor Ware also notes that a plurality of the U.S. Supreme Court, per Justice William J. Brennan in *Price Waterhouse v. Hopkins*, confirmed the understanding that "sex" was thrown into the statute at the last minute as an attempt to thwart the entire passage of Title VII. *Id.* (citing 490 U.S. 228, 244 n.9 (1989)). See also White, *supra* note 37, at 60 n.57 (noting that the inclusion of "sex" to Title VII was one of the "more celebrated of the amendments passed that day"). However, there are others who claim that the insertion of the term "sex" was part of a massive effort by feminist organizations that had failed in their attempt to get support for an equal rights amendment and saw the inclusion of "sex" in Title VII as a major victory. See generally Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997) (arguing that those who have consistently alleged that the word "sex" was thrown into Title VII as an afterthought or an attempt to prevent the entire bill from being passed are mistaken because it was part of a major effort by the feminist groups that helped secure its passage). In any event, the purported plan of adding "sex" at the last minute to defeat the legislation failed when the House passed Title VII, as amended and with "sex" included, the day after the amendment was offered.

41. Franke, *supra* note 36, at 40-42.

42. See Timothy Lionel Jenkins, *Study of Federal Effort to End Job Bias: A History, A Status Report, and A Prognosis*, 14 HOW. L.J. 259, 279 (1968); see generally Whalen & Whalen, *supra* note 6; Jones, *supra* note 38; see also *Pre 1965: Events Leading To The Creation of the EEOC*, at <http://www.eeoc.gov/35th/pre1965> (last visited Nov. 10, 2001).

43. See Whalen & Whalen, *supra* note 6, at 26, 37-39; Chambliss, *supra* note 9, at 4-9; Laurie M. Stegman, Note, *An Administrative Battle of the Forms: The EEOC's Intake Questionnaire and Charge of Discrimination*, 91 MICH. L. REV. 124, 128-34 (1992).

workplace that would “subject a great part of American industry to bureaucratic whims, prejudices and caprices.”<sup>44</sup> Another senator commented:

I predict this bill will never be enforced without turning our nation into a police state. . . . [T]his Commission will have virtually \$10 million a year to create a big brother bureaucracy to meddle in the affairs of virtually every business or industry . . . in the United States.<sup>45</sup>

By focusing on private enforcement instead of strong agency enforcement, the proponents of civil rights legislation won enough votes from northern Republicans to overcome staunch southern senate opposition.<sup>46</sup> Thus, the commitment to an agency with only power to seek informal conciliation rather than any strong enforcement was a key part of the compromise and believed by proponents of the legislation as a necessary component to Title VII's passage.

Of course, from the proponents' perspective, it was also a compromise that ended the longest filibuster in the history of Congress.<sup>47</sup> Proponents resolved the conflict over Title VII's enactment by pretending that the EEOC would be fine with just investigating charges and conciliating them without enforcing its findings. They accepted this compromise under the faulty premise that employers should not be forced into compliance by a powerful government agency and accepted the belief that it would be better to have the statute passed with a weak agency rather than not pass at all. As another congressman noted, the proponents for civil rights legislation recognized this result and they still went ahead with the weak regulatory scheme:

I must say, in all candor, that we have taken [T]itle VII and rewritten it, believing that the prime responsibility for action and enforcement is at the State and local level, recognizing that this is not the fast approach, recognizing that this is a concession—and I would be the last to say that it was not—and recognizing that in a sense we have weakened the bill.<sup>48</sup>

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44. Chambliss, *supra* note 9, at 5 (quoting Senator Tower from the legislative history).

45. *Id.* (quoting Senator Johnston from the legislative history).

46. *Id.* at 7.

47. *See id.* at 5 n.12; *see generally* Whalen & Whalen, *supra* note 6; Hill, *supra* note 4.

48. Chambliss, *supra* note 9, at 8 n.37 (quoting Senator Humphrey from the legislative history).

So it is true that a significant aspect of Title VII was that it created the EEOC to administer the law.<sup>49</sup> Unfortunately, it is generally understood that the most significant aspect of the decision to create the EEOC was the accompanying decision by Congress that it would not provide the EEOC with any enforcement authority.<sup>50</sup> Accordingly, the EEOC and many scholars recognized from the very beginning that it was a “toothless tiger”<sup>51</sup> of an agency.<sup>52</sup>

### III. The Equal Employment Act of 1972: Attempting to Provide the Tiger With Some Teeth

In 1971, Congress responded to the number of critics regarding the EEOC’s lack of enforcement power by conducting public hearings on proposed amendments to Title VII. From those hearings, Congress concluded that although the “EEOC has made an heroic attempt to reduce the incidence of employment discrimination in the nation . . . employment discrimination is even more

49. See generally 42 U.S.C. §§ 2000e-2 to 2000e-17 (2001).

50. This differed markedly from the NLRB and other state employment discrimination commissions that existed at the time of the EEOC’s creation. See Selmi, *supra* note 2, at 5 & n.14. Compared with the NLRB, which has administrative enforcement authority, the EEOC is a weak agency. See Jones, *supra* note 38, at 820; Blumrosen, *supra* note 14, at 57-58. Furthermore, some “pessimists” believed that Title VII’s emphasis on private litigation as a result of too many Democratic compromises in Congress was evidence of the defeat of the civil rights movement. See Jones, *supra* note 38, at 819-20 (identifying Professor James Jones as one of many who were “bitterly disappointed with the compromise that emerged from Congress”).

51. As mentioned *supra* note 14, the origin of the term “toothless tiger” is attributed to Professor Alfred Blumrosen, who was the first chief of conciliations for the EEOC. See Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 957 & n.177 (1993) (citing Alfred Blumrosen as the source of the “toothless tiger” moniker). Even the EEOC has referred to itself as a “toothless tiger” before Title VII was amended in 1972 to give it enforcement powers. See 1965-1971: A “Toothless Tiger” Helps Shape the Law and Educate the Public, at <http://www.eeoc.gov/35th/1965-71> (last visited Nov. 10, 2001).

52. When Title VII was passed in 1964, Columbia Law Professor Michael Sovern called the EEOC a “poor, feeble thing” that only has the “power to conciliate but not to compel.” See Sovern, *supra* note 6, at 205. A number of other critiques of Title VII have condemned its failure to provide the EEOC with enforcement powers when it began. See Hill, *supra* note 4, at 7, 51-52; Jones, *supra* note 38, at 819-20 & n.32 (describing the compromise involved with the bill that became Title VII and noting that the bill was believed to be “far short of that hoped for” because instead of creating an exclusive federal commission with cease and desist powers similar to those of the NLRB, it only granted the newly-created EEOC a right to investigate and conciliate but not the right to prosecute cases and seek enforcement; this was left up to individuals who brought lawsuits).

pervasive and tenacious than . . . Congress had assumed . . . [when] it passed the 1964 Act.”<sup>53</sup> Also, it became evident that widespread discrimination existed and little progress in eradicating employment discrimination had occurred since enactment of Title VII.<sup>54</sup> Congress awakened from its earlier slumber to recognize that “relying on conciliation and voluntary compliance was inadequate.”<sup>55</sup>

Accordingly, in 1972, Congress agreed to give the EEOC litigation authority to enforce its administrative findings by private lawsuit. But even with new legislation in 1972, Congress still failed to give the EEOC cease and desist power under the amendments to Title VII created by the Equal Employment Opportunity Act of 1972.<sup>56</sup> Nevertheless, these amendments were necessary to ensure

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53. *The 1970s: The “Toothless Tiger” Gets Its Teeth—A New Era of Enforcement*, at <http://www.eeoc.gov/35th/1970s> (last visited Nov. 10, 2001).

54. *Id.*

55. *Id.*

56. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified in pertinent part in title 42 of the United States Code). For the full text of the Act, see [http://www.eeoc.gov/35th/thelaw/eo\\_1972.html](http://www.eeoc.gov/35th/thelaw/eo_1972.html) (last visited Nov. 10, 2001). Although beyond the scope of this Article, it is important to point out that even the legislation intended to amend Title VII to address the EEOC’s lack of enforcement power was subject to another compromise. Conservative members of Congress joined with what might appear to be an unlikely partner—labor unions—in an effort to stop the legislation intended to provide the EEOC with broad enforcement authorities. See Hill, *supra* note 4, at 32-51 (discussing efforts by the AFL-CIO to block legislation authorizing cease and desist powers for the EEOC, unless all powers of the Office of Federal Contract Compliance (OFCC) were also transferred to the EEOC). The OFCC is now called the Office for Federal Contracts Compliance Programs (OFCCP). Under Executive Order 11246, the OFCC was regulating construction trade unions under the AFL-CIO that had federal construction contracts. The AFL-CIO did not like this agency’s powerful authority, especially because the agency had been challenging most of the discriminatory seniority provisions of the construction trade unions and threatening to use its authority to cancel those contracts. *Id.* at 38-42. Initially, in response to concerns about the EEOC and the OFCC being opponents of the unions, the AFL-CIO asked that any legislation giving the EEOC cease and desist power only be given in exchange for a limit on the private right of an individual to sue. *Id.* at 38-39. The AFL-CIO retreated from that position, but after several attempts and with the help of Mississippi Democrat William Colmer, they were able to prevent the EEOC from obtaining cease and desist authority. *Id.* at 46. Because Colmer was adamantly opposed to civil rights legislation and considered it “vicious” legislation, he used his authority as Chair of the House Rules Committee to keep the bill from getting outside of his committee. *Id.* at 46-47. Eventually, through a compromise brokered by the Nixon administration, an agreement was reached whereby the EEOC would have the right to file private lawsuits to enforce Title VII, but not the right to issue cease and desist orders. *Id.* at 49-51. The lead opponent in the Nixon administration to the EEOC having cease and desist powers was William Rehnquist, then head of the Office of Legal Counsel and now Chief Justice of the United States. See White, *supra* note 37, at 64-66. Without cease and desist authority, the EEOC has no power to issue an enforceable order against a party; it can only file a private

that employers would start to take the EEOC seriously.<sup>57</sup> The 1972 Act also expanded the EEOC's jurisdiction by reducing the number of employees needed to be covered by Title VII from twenty-five to fifteen employees, allowing the EEOC to sue employers, employment agencies and unions and creating coverage under Title VII for federal, state and local governments.<sup>58</sup> With this new-found enforcement power, one would expect that the EEOC would take the lead in enforcement of the statute. However, poor leadership, lack of funding, expanded responsibilities and coverage and a growing concentration on the backlog of charges became the main focus of the 1970s.<sup>59</sup>

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lawsuit to enforce the law and cause a *de novo* trial to be held in court—the only entity able to determine liability under Title VII. *Id.* at 66, 91.

57. See Earl D. Kraus, Note, *Arbitration Agreements Between Employers and Employees: The Sixth Circuit Says The EEOC is Not Bound*, 2000 J. DISP. RESOL. 187, 190.

58. See *supra* note 56.

59. See *The 1970s: The "Toothless Tiger" Gets Its Teeth—A New Era of Enforcement*, at <http://www.eeoc.gov/35th/1970s> (last visited Nov. 15, 2001); see also Hill, *supra* note 4, at 51-96 (criticizing the EEOC for not organizing to take advantage of its authority to litigate, for getting bogged down in handling the growing charge backlog, for not prioritizing any enforcement initiatives, for being burdened by mismanagement and inept leadership, and for losing out on the authority to issue cease and desist orders based upon general investigations of industries, as opposed to being confined to pursuing individual charges). Other sources explain the background for the 1972 Act. See H.R. REP. NO. 92-238, at 3 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2139 (“[T]he machinery created by the Civil Rights Act of 1964 [was] not adequate” because the “voluntary approach . . . failed to eliminate employment discrimination”). “In cases posing the most profound consequences, [employers had] more often than not shrugged off the [EEOC’s] entreaties and relied upon the unlikelihood of the parties suing them.” S. REP. NO. 92-415, at 4 (1971). The “failure to grant the EEOC meaningful enforcement powers [was] a major flaw in the operation of Title VII.” *Id.* The Sixth Circuit has recently held that EEOC enforcement actions vindicate the broader public interest in eradicating employment discrimination. See *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 468 (6th Cir. 1999) (finding that the EEOC may proceed against an employer even though the employee who filed the EEOC charge agreed to have her claims resolved by arbitration, because the EEOC was not a party to the arbitration agreement and the importance of the EEOC’s independent right to file suits on behalf of the public interest would be jeopardized if individuals could prevent suit, or the relief that the EEOC can obtain, by agreeing to arbitrate). The scope of the EEOC’s enforcement powers will be sorely tested in front of the Supreme Court very soon when the Court decides a case on whether the EEOC may still seek independent monetary awards when an individual plaintiff has agreed to arbitrate a statutory employment discrimination claim. See *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), cert. granted, 121 S. Ct. 1401 (2001).

#### IV. The Reality of Being Considered a Charge Processor Instead of an Enforcer: Focusing on the Tiger's Intake While Not Allowing Its Teeth to be Exposed

As enacted in 1964, Section 706(a) of Title VII provides the process by which an employee may initiate an employment discrimination action with the EEOC: "Whenever it is charged in writing under oath by a person claiming to be aggrieved . . . that an employer . . . has engaged in an unlawful employment practice, the Commission shall . . . make an investigation of such charge."<sup>60</sup> The initial EEOC regulations stated that the charge "shall be in writing . . . and shall be sworn to by a notary public."<sup>61</sup>

With expansion of the EEOC's enforcement power in the 1970s,<sup>62</sup> the scope of the EEOC's charge handling functions also expanded. The charge process can be quite complex. The EEOC considers a charge to have been properly filed if "the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of."<sup>63</sup> The EEOC uses two forms to assist in accomplishing its charge processing function, an Intake Questionnaire and the Charge of Discrimination.<sup>64</sup> The Intake Questionnaire solicits informal information and the Charge of Discrimination provides the formal information to invoke the EEOC's processing of the charge.<sup>65</sup> The Intake Questionnaire can sometimes meet the timely filing requirements with the EEOC even if the Charge has not been signed under oath before the statute of limitations expires.<sup>66</sup> As more timely charges get filed,

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60. Pub. L. No. 88-352, § 706, 78 Stat. 241, 259 (1964) (codified as amended at 42 U.S.C. § 2000e-5(b) (2001)).

61. Stegman, *supra* note 43, at 125 (citing prior regulation at 29 C.F.R. § 1601.9 (1991)).

62. *See generally* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified in pertinent part in title 42 of the United States Code). The 1972 Act gave the EEOC the authority to file lawsuits in federal court to enforce its findings when it was unsuccessful in obtaining a conciliation agreement. *See id.*

63. 29 C.F.R. § 1601.12(b) (2001). The validity of 29 C.F.R. § 1601.12(b), which also provides that a Title VII "charge may be amended to cure technical defects or omissions, including the failure to verify the charge" will be examined by the Supreme Court during the 2001 term. *See Edelman v. Lynchburg College*, 228 F.3d 503 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 2547 (2001).

64. Stegman, *supra* note 43, at 126.

65. *Id.*

66. *Id.* at 144-46; *see also* Roy L. Brooks, *A Roadmap Through Title VII's Procedural and Remedial Labyrinth*, 24 Sw. U. L. REV. 511, 512-13 (1995) (noting some courts have found that an intake questionnaire may constitute a charge).

the more resources must be employed to handle and investigate the charges. Without adequate resources and focus, a backlog is created.

As a response to its growing backlog in 1995, the EEOC implemented a new charge-prioritizing process. Under this priority charge system, each charge is placed into one of three tracks ranked in order of importance, where:

[t]rack "A" will contain cases where there is reasonable cause that a violation occurred, "C" cases will be those that do not contain reasonable cause to think that a violation occurred or where further investigation is not likely to yield a material violation, and "B" is a temporary condition for those requiring more investigation to determine if they belong on Track A or C.<sup>67</sup>

In June 1998, approximately three years after adopting this new process, the EEOC announced that it had cut the backlog nearly in half by reducing it to 58,000 cases.<sup>68</sup> One commentator has referred to this new charge prioritizing process as a "'triage' procedure . . . classifying cases as 'A,' 'B,' or 'C' priorities depending on merit and importance, and tossing out many charges after the briefest of investigations[.]"<sup>69</sup> This triage procedure assumes that an "intensive initial intelligence gathering 'conversation'" occurs.<sup>70</sup> Relying on this initial conversation to quickly dismiss "C" cases is a weakness in this triage procedure because everything hinges on how well that single initial conversation goes.<sup>71</sup> By

67. See *EEOC: New Charge-Processing System Means More Action at Local Level, Official Says*, 92 DAILY LAB. REP. (BNA) D-9 (May 12, 1995).

68. See Nancy Montwieler, *EEOC Reduces Pending Inventory By Half—to 58,000 cases—in Three Years*, 157 DAILY LAB. REP. (BNA) A-1 (Aug. 14, 1998); *EEOC Statistics on Charge Receipts and Resolutions*, 157 DAILY LAB. REP. (BNA) E-6 (Aug. 14, 1998).

69. Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 8 (1998).

70. See *supra* note 67, at D-9.

71. See St. Antoine, *supra* note 69, at 8 (noting that the EEOC is "no salvation" for the employee with a "minimal case," as the backlog of charges is being reduced by using the "briefest of investigations"). This suggests that the speed with which the EEOC has reduced its backlog parallels the speed with which victims of discrimination have lost any meaningful investigation of their charges unless it is clear that discrimination has occurred.

EEOC guidance further explains the handling of "C" charges:

A charge may be placed in Category C and dismissed when an office has sufficient information from which to conclude that it is not likely that further investigation will result in a cause finding.

An office will have sufficient information when it has conducted an



labeling them as “C” charges, quite possibly, the triage procedure merely shifts a large number of the charges out of the system without any investigation.<sup>72</sup> Nevertheless, because the system has worked so well at reducing the backlog, a large number of charges are being expeditiously dismissed at the administrative level.

Discussions about the figures surrounding the EEOC’s tremendous backlog and limited enforcement actions<sup>73</sup> have remained a source of debate throughout the EEOC’s existence. In

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investigation appropriate to the particular charge, factoring in resource considerations, and has assured that the [Charging Party] has been provided a fair opportunity to present his or her case.

See *Priority Charge Handling Task Force Litigation Task Force Report*, at <http://www.eeoc.gov/task/pch-lit.html> (Mar. 1998) (Sec. VI, under “Dismissals at Intake”). Given the large number of cases that are dismissed, and general difficulties regarding proof, it is likely that a large number of the “C” cases involve unconscious discrimination, which requires a creative approach. Professor Ann McGinley has provided one of the most recent and detailed explanations of how unconscious discrimination may occur and why it should be a factor in addressing discrimination in the workplace. See generally Ann C. McGinley, *Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415 (2000); see also Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003 (1997); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329-30 (1987) (describing how discrimination laws fail to deal with the realities of unconscious racism); Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299, 1299-1304 (1995) (asserting that the failure of civil rights laws is related to the reluctance to expand the definition of discrimination to include an objective standard that would address unconscious use of stereotypes). Professor Lamont Stallworth has argued that “C” charges should be mediated rather than just dismissed because they could involve unconscious discrimination. See Lamont E. Stallworth et al., *Discrimination in the Workplace: How Mediation Can Help*, 56 DISP. RESOL. J. 35, 37-43 (2001). Also, Professor Yelnosky has noted that the existence of unconscious discrimination may make the EEOC process and the litigation process unrealistic options for plaintiffs. Yelnosky, *supra* note 16, at 589-92.

72. See St. Antoine, *supra* note 69, at 8.

73. In 1995, the EEOC backlog of charges had reached an all-time high of over 100,000. Because of increasing responsibility to process charges for new anti-discrimination statutes, and the failure of Congress to provide additional resources, the EEOC backlog reached 111,345 by third quarter 1995; the EEOC then implemented its priority charge handling procedure. At the end of its fiscal year on September 30, 1999, the EEOC claimed that the priority charge handling procedure had slashed its backlog down to 40,000—a twenty-three percent decrease from the previous year. See Nancy Montwieler, *EEOC Reaped Record Benefits, Continued Culling Inventory Last Year*, 20 DAILY LAB. REP. (BNA) C-1, (Jan. 31, 2000). The EEOC also claimed that it had received an all-time high of \$307.3 million in benefits for victims of discrimination in 1999. See *id.* A large portion of that amount was attributed to the EEOC’s new voluntary mediation program which caused victims of discrimination to receive up to \$58 million. See *id.*

an independent analysis of the EEOC's mediation program, the researchers describe how former EEOC Chairwoman Eleanor Holmes Norton, starting in May 1977, developed a rapid charge processing program; that program reduced the backlog while allowing the EEOC's limited resources to focus on enforcement objectives related to systemic and class-based discrimination.<sup>74</sup> Ms. Norton's background with New York's discrimination commission led her to implement a fact-finding conference to get to the root of the matter even before the EEOC began serious investigation.<sup>75</sup> These fact-finding conferences, along with the overall rapid charge processing program, fostered quick settlements without any recognition of fault and with significant reduction of the charge backlog.<sup>76</sup>

When Clarence Thomas became the Chair of the EEOC in 1982, a General Accounting Office (GAO) report criticized the rapid charge processing program as fostering a system where culpability did not matter, cases with merit were being settled too quickly and too cheaply, and cases without merit were being settled for too much money.<sup>77</sup> So Thomas disbanded the rapid charge processing program and focused the EEOC's efforts on investigating every individual charge and relying less on the high-profile cases for enforcement. Under this policy, every individual charge was investigated fully with either a finding of "reasonable cause" or "no reasonable cause."<sup>78</sup> Again, the backlog of charges increased and less enforcement activity occurred.

When Evan J. Kemp, Jr. replaced Thomas as EEOC Chair in 1990, the EEOC took on more responsibility with the Americans With Disabilities Act. Kemp kept the same policy as Thomas of doing full investigations for every charge, and the charge backlog soared to nearly 100,000 in 1994 when Gilbert Cassellas became the Chair.<sup>79</sup>

Similar to the regime of former Chairwoman Norton, former Chairman Cassellas implemented a special charge procedure. This

74. See E. Patrick McDermott et al., *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, at <http://www.eeoc.gov/mediate/report> (Sept. 20, 2000) (click on link to Part IV.C).

75. See *id.*

76. See *id.*

77. See *id.*

78. *Id.*; see also Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 542-44 (1987) (discussing the "rapid charge processing" program of Chairwoman Norton, the critical GAO report and the response of Chairman Thomas).

79. See *supra* note 74.

charge handling priority system, as discussed earlier, has focused on reducing the backlog. When Ida Castro became the head of the EEOC in 1998, she took the lead from Cassellas and implemented additional programs to greatly assist in the reduction of the backlog.<sup>80</sup> Thus, the handling of charges and the resulting backlog has become a key focus area for the EEOC at least since 1977. By starting the agency off as a charge processing agency that investigates charges without having the authority to enforce its findings, Congress established an agency with no real strength. Even when the agency was later provided with enforcement tools in 1972, it had already been stigmatized with the burden of determining its success by the number and scope of charges it processed rather than the number and scope of enforcement initiatives it had completed. Thus, an agency charged with major enforcement responsibility is constantly looking at its handling of charges. Although the EEOC enforcement mechanisms may have some teeth after the 1972 Act amendments allowing private lawsuits for enforcement, Congress, the EEOC and all of its stakeholders are paying too much attention to its charge processing to put any real power behind its enforcement bite.

## V. Outsourcing Charge Processing to Private and Mandatory Mediation: A New Paradigm to Unleash the Tiger

### A. *The Development of the EEOC's Private Mediation Program*

The EEOC has explained its mediation program as follows:

Mediation is a form of Alternative Dispute Resolution offered by EEOC early in the process to facilitate resolution without lengthy investigations or litigation. The decision to mediate is completely voluntary for the charging party and the employer, and the mediation process is strictly confidential at every stage. During a mediation session, a neutral third party facilitator helps the opposing sides to reach a negotiated resolution of workplace disputes. Unlike an arbitrator or judge, the mediator does not resolve the charge or impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution that results in a win-win outcome for everyone involved.<sup>81</sup>

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80. *Id.*

81. *EEOC Launches Major Expansion of its Mediation Program*, at <http://www.eeoc.gov/press/2-11-99.html> (Feb. 11, 1999).

The EEOC's mediation program started as a pilot program conducted in four field offices in 1991.<sup>82</sup> With the success of that program, the EEOC established a taskforce to review further use of the program.<sup>83</sup> In 1994, that taskforce found that mediation was an appropriate tool in resolving employment discrimination claims, and it recommended the development of an expanded Alternative Dispute Resolution (ADR) program.<sup>84</sup>

In 1995, the EEOC adopted a policy statement on ADR establishing the requirement of certain core principles for implementation of an expanded ADR program.<sup>85</sup> In October 1996, Congress re-enacted the Administrative Dispute Resolution Act,<sup>86</sup> which authorized the expansion of the mediation program, while district offices used pro bono services to add to their roster of

82. *See History of EEOC Mediation Program*, at <http://www.eeoc.gov/mediate/history.html> (last modified Feb. 11, 1999).

83. *See id.*

84. *See id.* The EEOC based its decision on the recommendations of the task force and the leadership from Commissioners who led the task force. *See Commission Votes to Incorporate Alternative Dispute Resolution into its Charge Processing System; Defers Decisions on State and Local Agencies*, at <http://www.eeoc.gov/press/4-28-95a.html> (Apr. 28, 1995). At that time, EEOC Commissioner Paul Steven Miller stated his belief that ADR would assist in charge processing because it would "facilitate early resolution where agreement was possible" and it "frees up our resources for use in identifying, investigating, and litigating more complex cases of employment discrimination." *Id.* Likewise, then-Commissioner R. Gaull Silberman stated that she believed that by making ADR a part of the EEOC's "charge processing system," it would help "better serve our constituents" and the EEOC's "law enforcement mission." *Id.*

85. *See Committee Adopts Policy on Alternative Dispute Resolution as a First Step in Implementing Agency ADR Program*, at <http://www.eeoc.gov/press/7-17-95.html> (July 17, 2001). That policy establishes three core principles for implementation:

- *Furthering the Commission's Mission:* ADR programs implemented by the Commission must further EEOC's dual mission of both vigorously enforcing the anti-discrimination laws within the agency's statutory mandate and resolving employment discrimination disputes.
- *Fairness:* An ADR program must be fair to all participants involved by being voluntary, neutral, confidential, and enforceable. Commission ADR processes will rely on a neutral third party to facilitate resolution of disputes; maintain confidentiality at every step of the process; and contain settlements that are enforceable by the EEOC.
- *Flexibility:* An ADR program must be flexible enough to respond to the wide-range of employment discrimination disputes that fall under the laws enforced by EEOC, as well as to meet a wide range of program needs.

*Id.*

86. Pub. L. No. 104-320, 110 Stat. 3870 (1996) (codified at 5 U.S.C. §§ 571-84 (2001)).

mediators.<sup>87</sup> In fiscal year 1999, after receiving “\$13 million specifically allocated for the expansion of the EEOC’s mediation program,” EEOC offices began using internal mediators employed directly by the EEOC, external mediators hired on a contract basis, and pro bono or volunteer mediators to conduct the mediation sessions.<sup>88</sup>

The EEOC finally launched its voluntary mediation program in February 1999 and it became functional at every district office nationwide in April 1999.<sup>89</sup> When the EEOC first proposed expansion of its mediation program, EEOC Vice-Chairman Paul Igasaki stated that the EEOC did not look at mediation as a “backlog reduction tool.”<sup>90</sup> However, after obtaining congressional support for the program by the passage of the Administrative Dispute Resolution Act of 1996,<sup>91</sup> the mediation program has become a boon in the EEOC’s efforts to reduce its backlog and has received overwhelming support from all stakeholders.<sup>92</sup>

According to a report dated September 20, 2000 and entitled *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*,<sup>93</sup> participants in the mediation program

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87. See *supra* note 82.

88. *Id.*

89. See generally Nancy Montwieler, *EEOC’s New Nationwide Mediation Plan Offers Option of Informal Settlements*, 29 DAILY LAB. REP. (BNA) C-1 (Feb. 12, 1999).

90. Kevin P. McGowan, *Federal Agencies Seek Strategic Ways to Enforce EEO Laws With Limited Funds*, 151 DAILY LAB. REP. (BNA) D-11 (Aug. 6, 1996).

91. See *supra* note 86.

92. See *EEOC List of “Major Accomplishments” Cites Mediation, Small Business*, 13 DAILY LAB. REP. (BNA) A-3 (Jan. 19, 2001) (describing how the success of the mediation program allowed the EEOC to obtain \$108.4 million through mediation, how sixty-five percent of the cases sent to mediation were successfully resolved, how the time to process charges was reduced, and how the EEOC cut its charge inventory); see also Harkavy, *supra* note 16, at 155 (noting that the EEOC’s pilot mediation program led not only to a major reduction in charges due to a fifty-two percent settlement rate, but it also caused a major reduction in the time that it took to resolve a charge, with mediation taking an average time of sixty-seven days—compared with non-mediated resolution taking an average time of 300 days). Harkavy has also provided information suggesting that mediation decreases the number of hearings in other workplace disputes involving administrative processes. Harkavy, *supra* note 16, at 153 (concluding that mediation reduced the number of worker’s compensation administrative hearings in North Carolina by forty percent).

93. This report can be found on the EEOC’s website at <http://www.eeoc.gov/mediate/report> (Sept. 20, 2000). A full description of the report’s research methodology can be found by clicking on the link to Part V from that site.

expressed a high degree of satisfaction with the process and expressed their willingness to participate in it again if they ever become a party to a charge.<sup>94</sup> Specifically, the report also stated that “nine out of ten participants . . . indicated that they would be willing to participate in EEOC’s mediation program again . . . regardless of the outcome of their mediation session.”<sup>95</sup> The main problem that hindered further success of this program was the fact that only thirty-one percent of employers accepted mediation when a charge of discrimination was filed against them.<sup>96</sup> EEOC Chairwoman Castro hoped that the results of this independent survey would send a message to employers that the EEOC’s mediation program is “fair, neutral, and makes good business sense [because it] resolv[es] charge filings expeditiously, effectively, and efficiently.”<sup>97</sup>

Dr. E. Patrick McDermott was the primary researcher for the independent study of the EEOC’s mediation program. He noted that “[i]n all my years of experience in the field of employment law, I have never come across a program that enjoys such a high level of participant satisfaction as the EEOC mediation program.”<sup>98</sup> The EEOC’s mediation program report analyzed mediation sessions conducted between March and July 2000 and issued the following findings:

- The participants expressed strong satisfaction with EEOC’s ability to communicate information regarding its mediation program prior to the actual mediation and also after the mediator’s introduction at the session;
- The vast majority of participants agreed that their mediation was scheduled promptly;
- An overwhelming majority of the participants believed they had a full opportunity to present their views;
- The participants expressed high satisfaction with the role and conduct of the mediators indicating that the mediators understood and helped to clarify their needs, and also assisted them in developing options for resolving the dispute;

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94. See *EEOC Mediation Program Scores High Marks in Major Survey of Participants*, at <http://www.eeoc.gov/press/9-26-00.html> (Sept. 26, 2000).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

- The high level of satisfaction for the mediators' performance was true for both EEOC staff mediators and for contract mediators;
- The overall level of satisfaction with the program remained high regardless of such factors as the size of the employer, basis or issue alleged in the underlying charge, or whether the parties were represented during the session.<sup>99</sup>

Thus, it is essentially undisputed that the EEOC's mediation program was a rousing success.<sup>100</sup>

*B. A Proposal to Make EEOC Mediation Mandatory and Private: Getting Employers to Participate*

With the only real negative aspect of the EEOC's current mediation program being the fact that approximately two-thirds of the employers have not participated,<sup>101</sup> this Article proposes that mediation should become a mandatory and private procedure. A mandatory program will get more employer participation. A private mandatory process eliminates employers' mistrust because EEOC employees are not involved in the process.

Under the current EEOC mediation program, after the EEOC conducts its initial intelligence gathering conversation to identify the charge as either an "A", "B", or "C" charge, it then dismisses

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99. *Id.* The detailed results from the Mediation Program Survey can be found by linking to Part VI from this site: <http://www.eeoc.gov/mediate/report> (Sept. 20, 2000). See also *EEOC List of Major Accomplishments Cites Mediation, Small Business*, 13 DAILY LAB. REP. (BNA) A-3 (Jan. 19, 2001).

100. See Michael R. Triplett, *EEOC: Study Shows High Satisfaction Levels With EEOC's Voluntary Mediation Program*, 189 DAILY LAB. REP. (BNA) A-6 (Sept. 28, 2000) (describing how nine out of ten participants would be willing to participate in mediation again if they became involved in an EEOC charge, and describing an overall high satisfaction rate among the participants).

101. See Susan J. McGolrick, *EEOC: Agency Needs More Employers in Mediation, Full Funding of Program, Chairwoman Says*, 99 DAILY LAB. REP. (BNA) A-8 (May 22, 2000) (discussing comments of Chairwoman Castro that the mediation program needs more employer participation as only thirty-five percent had participated in 1999). Castro noted that ninety-five percent of the employers that participated appeared satisfied by the mediation program. *Id.* Castro also noted that Congress level-funded the mediation program; in other words, it provided the same amount for fiscal year 2001 as it did for fiscal year 2000. *Id.* This does not account for the cost-of-living increases that the EEOC must provide to its employees. *Id.* The EEOC uses its mediation program for "B" charges that require more investigation. *Id.* Castro's comments and concerns about the 35 percent employer participation rate in 1999 proved noteworthy as the employer participation rate dropped to 31 percent in 2000. Compare *id.* with *supra* note 94.

“C” charges, sends “B” charges to mediation if both parties agree and continues to process “A” charges.<sup>102</sup> Professor Lamont Stallworth has asserted that some “C” charges may involve subtle or unconscious forms of discrimination that may be effectively addressed through mediation.<sup>103</sup> While that may be true, for purposes of this Article’s proposal, the EEOC would make that call from its initial assessment of a charge and its determination of whether it was an “A”, “B”, or “C” charge. Under the congressional amendment proposed by this Article, the EEOC could send “C” charges to mediation or it could dismiss them for no cause and issue a right-to-sue letter. To provide flexibility, the EEOC will have the authority to mandate that all “B” charges be sent to mediation and it will be within the discretion of the EEOC as to whether it sends certain “A” or “C” charges to mediation. To ensure the sanctity and trust of the system, all charges that are referred to mandatory mediation should be sent to private mediation—not mediation with EEOC employees who may be perceived as biased. Concerns about such bias may explain the reasons why only 31 percent of employers have participated in the mediation program.<sup>104</sup>

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102. See Nancy Montwieler, *EEOC’s New Nationwide Mediation Plan Offers Option of Informal Settlements*, 29 DAILY LAB. REP. (BNA) C-1 (Feb. 12, 1999).

103. See Stallworth et al., *supra* note 71.

104. See Montwieler, *supra* note 102, at C-1 (discussing comments from the President of the Society for Human Resource Management expressing the view that employers are concerned that by participating in the EEOC’s mediation program, they are “going to be forced to accept a settlement” and that the biggest hurdle is to ensure that the program is “impartial” by using “outside mediators as much as possible”); see also Hodges, *supra* note 16, at 488-89 (beginning a general discussion on the strengths and weaknesses of using private outside mediators for EEOC disability-related claims and how using private mediators might encourage the use of mediation by employers who are likely to be “wary of revealing information to the very agency responsible for investigating statutory violations” and asserting that the “use of agency mediators might result in lower participation rates”). As mentioned earlier, the employers’ perception of the EEOC has historically been one of an adversary relationship where, as long ago as the administration of Chairwoman Norton, employers believed that the EEOC was forcing financial settlements for charges that had no merit. See Silver, *supra* note 78, at 542, 563-65 (describing complaints about rapid charge processing program as coercing EEOC settlements for charges having no merit). Although mediation proceedings are generally confidential, employers with fears of bias by the EEOC will likely believe that once EEOC employees are involved, any matters discussed in mediation will be fodder for later use by the EEOC if a settlement is not reached. See Symposium, *Civil Rights Law in Transition: The Forty-Fifth Anniversary of the New York City Commission on Human Rights Welcoming Remarks*, 27 FORDHAM URB. L.J. 1105, 1121-22 (2000) (describing the differences between in-house EEOC mediators and private, outside volunteer mediators regarding the additional level of structure necessary to maintain confidentiality



In order to mandate private mediation, Congress must enact legislation. This Article proposes the following language for such legislation:

The EEOC is authorized to require that parties participate in mediation. The EEOC may choose whatever charges it believes will be best suited for resolution through mediation. Mediators will be provided to the parties via a panel of private mediators who will be trained and certified by the EEOC. Mediators will be paid \$800 per mediation. The payments will come from the U.S. treasury and all funding for payments of the mediators will be made separate and apart from any general funding decisions about the EEOC's budget. Congress must provide money for the mediation program as long as this legislation exists and it must prioritize funds for this program on an annual basis consistent with the number of charges submitted to mediation on an annual basis. All parties must be notified of their rights under the mediation program. Failure to appear at a mediation session absent good cause may warrant dismissal of the charge for the complainant and a default for the respondent. Parties are expected to participate in mediation in good faith but they are not expected to reach an agreement. Any mechanisms that engender force or compulsion to settle without voluntary and informed consent are expressly prohibited. The EEOC must approve all settlements reached through mediation before they can become final. All information submitted in mediation is considered confidential and may not be used in any legal proceedings. Mediators may not give testimony in any proceedings regarding information learned in mediation and may not perform any task in violation of the Uniform Mediation Act.

Congress is already considering legislation that would require private mediation for disputes involving federal contractors under the National Employment Dispute Resolution Act (NEDRA)<sup>105</sup>

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when mediators are EEOC employees). There may be no absolute guarantee that communications made during mediation proceedings remain privileged and confidential despite any guarantees by statute or in writing. See Lynn Rambo, *Impeaching Lying Parties With Their Statements During Negotiation: Demystifying the Public Policy Rationale Behind Evidence Rule 408 and the Mediation-Privilege Statutes*, 75 WASH. L. REV. 1037, 1093-94 (2000) (arguing that statements constituting prior inconsistent statements, when made during mediation proceedings, should be allowed as proper impeachment at trial despite guarantees of confidentiality and the existence of mediation privilege laws).

105. H.R. 4593, 106th Cong. (2000). A full copy of the text of NEDRA may be found in the Appendix at the end of this Article. NEDRA requires the EEOC to provide mediation for federal employees. *Id.* § 3. Also, section 3 of NEDRA

and may also review legislation being drafted to provide uniform mediation standards.<sup>106</sup> A simple amendment to that proposed legislation would add the provisions above requiring separate funding for private mediation and mandating its use for all EEOC charges as chosen by the EEOC. By making it mandatory at the discretion of the EEOC, all parties would have a good faith obligation to meet and attempt mediation for charges that the EEOC selected. Any resolution of a charge through mediation would still have to be voluntary and with informed consent.<sup>107</sup>

This process would satisfy all the stakeholders. If the EEOC's mediation program becomes private and mandatory, then most of the EEOC's ongoing concerns about charge processing would be handled through the private mediation process. In some respects this may model the rapid charge processing system that former Chairwoman Norton championed during her reign.<sup>108</sup> However,

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would amend Title VII by requiring those federal contractors having contracts of \$200,000 or more and 200 or more employees to establish internal dispute resolution programs or systems that would, among other things, provide workplace disputants with the opportunity to resolve discrimination and other workplace disputes internally before a charge is filed with the EEOC. *Id.* The federal contractors are responsible for payment of the mediator's fees and expenses. *Id.* The key component of NEDRA that is important to the author of this Article is that it mandates or directs participation in mediation. NEDRA is one-sided in that regard; a federal contractor-employer must participate, even though an employee does not have to participate unless he or she agrees to do so. Although NEDRA requires mediation for all charges, this Article proposes that mediation be mandatory for all charges that the EEOC chooses to send to mediation. A full explanation of the purposes and expectations of NEDRA is beyond the scope of this Article. The authors of NEDRA have provided an excellent analysis of NEDRA and an explanation of why it should be adopted. *See Stallworth et al., supra* note 71.

106. On August 16, 2001, members of the American Bar Association's Section on Dispute Resolution and the National Conference of Commissioners on Uniform Laws completed work on the Uniform Mediation Act. I have included language at the end of my proposal to provide consistency with that law. The Uniform Mediation Act can be found at the following Internet site: <http://www.pon.harvard.edu/guests/uma> (last modified Oct. 5, 2001).

107. *See generally* Nolan-Haley, *supra* note 16 (expressing concerns about the lack of informed consent in mediation). The EEOC would have final approval of any settlement to ensure consent is voluntary and informed. Because of this proposed discretion, the EEOC could also decide that some "B" cases involving repeat offenders may have to be treated as "A" cases requiring full investigation and conciliation. In addition, it is possible that certain "A" cases could be well-suited for mediation.

108. *See* Silver, *supra* note 78, at 542, 563-65 (describing how the Office of Civil Rights in the Department of Education undertook a mediation program with the hope that it would reduce its backlog of complaints, just as the "rapid charge processing" program worked for the EEOC in reducing its backlog during the administration of Chairwoman Eleanor Holmes Norton).

instead of EEOC employees pushing settlements on parties and getting charges dismissed solely for backlog reasons, mediation is designed to have an outside party assist the parties in crafting a mutual resolution. Even if mediation is unsuccessful, the process is worthwhile. If the parties fail to reach a settlement through mediation, the EEOC could still decide to process the charge and take the case or it could just dismiss it without any further investigation.

Although the courts may expect the EEOC to prevent frivolous suits, Congress designed Title VII to be a private individual enforcement statute. It is the courts, not the EEOC, that must ferret out meaningless claims should they reach the courts. By requiring mandatory and private mediation, a significant portion of the charge processing function and its backlog is outsourced or transferred out of the hands of the EEOC and into the private mediation process.<sup>109</sup> This allows the EEOC to focus its limited resources and funding on enforcement initiatives tackling systemic and class-based problems that may have a more meaningful effect over time.

### C. Addressing Process Dangers of Mandatory Mediation

A number of commentators have analyzed mandatory mediation outside of the employment dispute context.<sup>110</sup> Professor

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109. Even the EEOC has recognized that its mediation program helps reduce its charge backlog. See *EEOC List of "Major Accomplishments" Cites Mediation, Small Business*, 13 DAILY LAB. REP. (BNA) A-3 (Jan. 19, 2001) (describing how sixty-five percent of the cases sent to mediation were successfully resolved).

110. See generally John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813 (1999) (discussing the overall advantages of various mandatory mediation court programs for general civil disputes not including small claims or domestic relations cases); Susan C. Kuhn, Comment, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L.J. 733 (1984) (discussing mandatory mediation statute for child custody disputes in California); John G. Mebane, III, Comment, *An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts*, 71 N.C. L. REV. 1857 (1993) (discussing mandatory mediation statute for civil actions in North Carolina); Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855 (1985) (criticizing the use of court-ordered mediation for domestic violence cases); David S. Winston, Note, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water. . ."*, 11 OHIO ST. J. ON DISP. RESOL. 187 (1996) (proposing that legislatures move past the ambiguous "good faith" or "meaningful participation" standards in mandatory mediation and move to a stronger objective test for assessing participation). See also Gary Smith, *Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not*, 36 OSGOOD

Michael Yelnosky has recently recognized that power imbalances can occur in employment disputes and great care should be taken when shifting disputes into private resolution forums.<sup>111</sup> These questions about imbalance of power have fostered the general critique of mediation and informal dispute resolution as a mechanism to protect the “haves”<sup>112</sup> and disadvantage the “have-nots”<sup>113</sup> in the dispute. Specific disadvantaged segments of society that may be harmed under this theory include people of color,<sup>114</sup>

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HALL L.J. 847 (1998) (criticizing mandatory mediation in Canada).

111. See Yelnosky, *supra* note 16, at 606-08.

112. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974). Professor Menkel-Meadow has recently highlighted this issue as it relates to the use of mediation and other forms of ADR. See generally Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

113. There are some critics of mediation and other forms of ADR who believe that these processes are part of a general plan to prevent certain rights from being vindicated in public forums where greater concerns may be addressed. See, e.g., Owen M. Fiss, Commentary, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (analyzing adjudication in terms of public values that are threatened by settlement and ADR processes); Isabelle R. Gunning, *Diversity Issues In Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 61-62 (discussing “rights” theories); Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 255, 302-03 (1987) (asserting that certain public interests must be protected when implementing private ADR programs); Ralph Nader, *The Corporate Drive to Restrict Their Victims’ Rights*, 22 GONZ. L. REV. 15, 20-21 & n.211 (1986) (describing the value of litigation options, including the jury system, as a deterrent to future wrongdoing, and as a public communication vehicle to expose a wrongdoer). But see Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1095, 1104 (1990) (proposing the adoption of mandatory mediation programs). Some commentators are known for their views challenging a rush to use ADR versus the courts. See generally Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995). A critical review of how issues of culture affect any proposed dispute resolution system should also be explored. See generally PAT K. CHEW, CONFLICT AND CULTURE READER (2001) (suggesting that any understanding of conflict resolution must consider cultural aspects); see also Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & LAW 269 (1996) (describing need for broad-based recognition of cultural differences in mediation, beyond typical areas of race and gender, to assist effective mediation across those cultures).

114. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360-61, 1375-99 (arguing that the adversarial process in litigation promotes efforts to fight prejudice, and that by allowing informal mechanisms, people of color eventually feel compelled to accede to the stronger parties whose prejudiced beliefs cloud their positions).

women,<sup>115</sup> the poor,<sup>116</sup> or a combination of these groups.<sup>117</sup> Some empirical analysis does suggest that these power imbalance concerns should not be neglected.<sup>118</sup> Any program that supplements

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115. See, e.g., Grillo, *supra* note 20, at 1549 (arguing that mediation "can be destructive to many women" because of the imbalance of power); see generally Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375 (1999) (stating concerns that mediation limits access to the court system for poor women in divorce proceedings).

116. See generally Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 N.D. L. REV. 269 (1994) (describing issues with respect to use of ADR for the poor).

117. See, e.g., Rebecca E. Zietlow, *Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111, 1114-21 (1996) (asserting that low-income women, particularly those of color, do not fair well in informal processes); see also Stephen Meili and Tamara Packard, *Alternative Dispute Resolution in a New Health Care System; Will It Work for Everyone?*, 10 OHIO ST. J. ON DISP. RESOL. 23, 30-35 (1994) (describing problems with ADR for women, minorities and the poor). But see Beryl Blaustone, *The Conflicts of Diversity, Justice, and Peace in the Theories of Dispute Resolution*, 25 U. TOL. L. REV. 253, 261 n.17 (1994) (pointing out that the argument of Delgado is not supported empirically); Gunning, *supra* note 113, at 86-93 (noting that concerns about the use of mediation for powerless and disadvantaged members of society can be rectified by assuring that the mediator is trained regarding equality and intervenes to protect the disadvantaged party); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767, 770 (1996) (stating that before their efforts, there were no empirical studies showing how a disputant's ethnicity or gender compares in court cases versus mediation cases); Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 467-68 (1991) (asserting that Professor Grillo's account of mediation only refers to those few bad cases and ignores good mediation experiences). Nevertheless, both Blaustone and LaFree & Rack recognize that the existence of bias and bargaining power can play a factor in mediation, and both argue that a mediator must take those factors into account. Blaustone, *supra*, at 261 n.17; LaFree & Rack, *supra*, at 788-94.

118. See LaFree & Rack, *supra* note 117, at 788-94 (describing findings concluding that female and male claimants of color received less in mediation than similarly situated white claimants in litigation based upon the actual percentages of the amounts obtained). The results of this study did not show a process difference when results for women in mediation versus adjudication are compared. *Id.* at 791-93; see also Blaustone, *supra* note 117, at 261 n.17 (describing a study conducted by Professor Michele Hermann that found claimants of color received less money from mediation than in the courts, even though they were more satisfied with the mediation process, and also finding that women did not experience any monetary difference between mediation and the courts but women were much less satisfied with mediation versus the courts). In another recent analysis of this empirical data, process differences for parties of different races or parties with little power are highlighted as a major concern. See generally Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metro Court Study*, 20 HAMLINE J. PUB. L. & POL'Y 211 (1999) (describing data from prior study and analyzing the negative effects in bargaining differences for ethnic minorities, women, and those with limited bargaining power in mediation conducted on interest-based facilitative principles).

the duties of the EEOC should be sensitive to ensure that the parties the EEOC is intended to protect are not harmed by an imbalance of power.<sup>119</sup> However, this form of mandatory mediation, unlike mandatory arbitration,<sup>120</sup> is limited by the fact that any agreements reached pursuant to mediation must be voluntary.<sup>121</sup> Empirical study has also shown that the use of mandatory mediation substantially increases the overall participation in a mediation program.<sup>122</sup> Because lack of participation was the only drawback in an exceptionally well received EEOC mediation program, the risks of mandatory participation are outweighed by the purported benefits.

Also, despite concerns about mandatory participation in mediation, empirical study has shown that parties to a mandatory mediation are just as satisfied and reach settlement at the same rate as parties to a voluntary mediation proceeding.<sup>123</sup> While acknowledging concerns about the use of mandatory mediation, the Society for Professionals in Dispute Resolution (SPIDR) developed its own provisions to handle concerns about unfairness in mandatory

119. See Yelnosky *supra* note 16, at 607-08 (recognizing that any "vision of Title VII enforcement incorporating widespread use of mediation should try to account for the power imbalance problem").

120. Unlike mediation, arbitration is usually binding on the parties. By mandating it, that system forces the parties to accept the result, rather than forcing only participation in the process. See generally Green, *supra* note 16 (describing the strengths and weaknesses of mandatory arbitration involving large or small employers and their individual employees); Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135 (2000) (describing mandatory arbitration concerns with respect to situations involving a business and employees represented by a union); see also Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 19-26 (1999) (describing the EEOC's policy against mandatory arbitration).

121. See Winston, *supra* note 110, at 188-89 (acknowledging that mandatory mediation may be an "oxymoron" because the process is still voluntary with respect to the decision to accept or decline a settlement proposal developed in mediation).

122. See Rogers & McEwen, *supra* note 16, at 848.

123. *Id.* at 850; see also Wissler, *supra* note 20, at 566 (finding from empirical analysis of small claims and common pleas court cases that mandatory versus voluntary mediation has little difference in terms of case outcome and participant evaluation). The empirical research of Roselle Wissler also demonstrates that there is little difference in outcome between mandatory versus voluntary mediation based upon the race or sex of the litigants. Wissler, *supra* note 20, at 566, 576-77. Although there are some differences about this empirical study that may not translate to employment discrimination cases where race or sex is directly at issue, it is still another helpful source. See *id.* at 603 (acknowledging that the study may not readily apply to other mandatory mediation disputes or procedures).

mediation proceedings.<sup>124</sup> Unless the process is mandatory, the reality is that only a small percentage of charges will be mediated.<sup>125</sup> Thus, increasing participation in the EEOC's mediation program by making it mandatory will benefit all the stakeholders.<sup>126</sup>

Professor Isabelle R. Gunning has analyzed the various forms of bias and prejudice affecting the mediation processes.<sup>127</sup> One of the concerns about the imbalance of power is that the employer will be represented by counsel when the weaker party, the employee, will not have legal representation.<sup>128</sup> However, in mediation, the use of lawyers may not necessarily add value to the process.<sup>129</sup> As

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124. See *Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts*, 46 ARB. J. 38-44 (1991) (this publication is available from the Association for Conflict Resolution, SPIDR's successor organization at <http://www.acresolution.org>); see also McCrory, *supra* note 110, at 824, 833 (describing SPIDR standards). The SPIDR standards focus on making sure that the mediators determine which practice or technique is appropriate for the individual parties, including the "nature of the dispute, the type of process available or used, the structure of the dispute resolution services—e.g. formal or informal, time-pressed or leisurely, etc.—and the social and cultural setting." McCrory, *supra* note 110, at 837 n.93 (citation omitted).

125. See McCrory, *supra* note 110, at 815 n.11 (discussing the Ohio and Georgia mandatory mediation court programs and recognizing that those programs had to be mandatory because only a small percentage would volunteer to mediate).

126. See Gourlay & Soderquist, *supra* note 16, at 264-66 (describing benefits of mediation for employers and employees).

127. See Gunning, *supra* note 113, at 65-68. However, Professor Gunning also demonstrates quite persuasively that assumptions about the balance of power in mediation may not be problematic at all, or they can be overcome through exacting detail, analysis, and intervention by a skilled and well-trained mediator. See *id.* at 86-93. Professor Gunning also suggests that another way to address issues of race, sex, and sexual orientation may be to match those parties with mediators who have similar backgrounds. See *id.* at 88-90; see also Fred D. Butler, *When Should Race, Culture, or Gender be a Factor When Considering a Mediator?*, 26 S.F. ATT'Y 33, 33-34 (2000) (suggesting that mediators should be selected based upon race, gender, and an understanding of those concepts to better address the interests of the parties involved in the dispute); McCrory, *supra* note 110, at 840-42 (discussing the need for available mediators of diverse races, sexes, and ethnic backgrounds).

128. See Nolan-Haley, *supra* note 16, at 777-78 (describing the assumption that participants understand what they are doing when they agree to settle a dispute through mediation, but in reality the parties do not truly understand what is occurring or what they have consented to in mediation, especially when not represented by counsel).

129. See Carrie Menkel-Meadow, *The Transformation of Disputes By Lawyers: What the Dispute Paradigm Does Not Tell Us*, 1985 J. DISP. RESOL. 25, 31 (explaining that, in the process of transforming a grievant's story to make it amenable to conventional management procedures, a lawyer may narrow the nature of the dispute); see also Reginald Alleyne, *Delawyerizing Labor Arbitration*, 50 OHIO ST. L.J. 53 (1989) (complaining about the effect of more lawyers being involved in labor arbitration as having a negative effect on that form of alternative dispute resolution); Leonard L. Riskin, *Mediation and Lawyers*, 43

Professor Gunning has also eloquently expressed, the concerns of the powerless and disadvantaged members of society can be addressed in mediation by making sure that the mediator has the skills and abilities to adequately assess those situations and respond accordingly.<sup>130</sup>

To address specific concerns about process dangers, the role of the mediator becomes paramount. Mediators may play various roles and take various approaches depending upon the circumstances.<sup>131</sup> In an "evaluative" mediation approach, the mediator focuses on the parties' legal dispute by analyzing the constraints of the law involved and assessing the relative strengths of each side's legal position to assist the parties in reaching a resolution.<sup>132</sup> Another approach<sup>133</sup> consists of "facilitative" mediation in which the mediator addresses any problem that the parties raise and focuses on their individual interests without assessing any legal positions of the parties.<sup>134</sup> Some commentators have challenged whether mediators should use evaluative mediation because it tends to destroy the neutrality of the mediator if he or she must inform one side about the legal aspects of the dispute.<sup>135</sup> The EEOC

OHIO ST. L.J. 29, 45 (1982) ("Lawyers are trained to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules, [and] to focus on acts more than persons."); Nolan-Haley, *supra* note 16, at 831 n.264 (discussing mixed findings regarding the benefit of lawyers in mediation).

130. See Gunning, *supra* note 113, at 86-93; see also Harkavy, *supra* note 16, at 167-68 (arguing that mediators should also be skilled in the employment discrimination field); McCrory, *supra* note 110, at 830 n.65 (discussing the advantage of mediators learning different styles of mediation and selecting from a "spectrum of techniques" that a mediator might use depending upon the individual situation).

131. See generally Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41 (arguing that mediators in legal disputes often change styles many times throughout the process and it is necessary to do so when mediating legal disputes); see also Riskin, *supra* note 16, at 35-36, 40-41 (describing various mediation styles).

132. See Yelnosky, *supra* note 16, at 601.

133. There are also other forms of mediation approaches, styles, and models including "transformative," "shuttle diplomacy," and "dealmaking." Nolan-Haley, *supra* note 16, at 814 n.189 (mentioning various mediation models and citing articles describing their application).

134. See Yelnosky, *supra* note 16, at 601; see also Riskin, *supra* note 16, at 27.

135. See, e.g., Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 28-31 (asserting that it is inappropriate for a mediator to use the evaluative approach because it detracts from the neutrality of the mediator); Gunning, *supra* note 113, at 81-83 (describing Bush's arguments that evaluative mediation has a harmful effect on the mediator's neutrality). *But see* Harkavy, *supra* note 16, at 167-68 (criticizing a purely facilitative mediation approach for mediating employment discrimination cases). Also, concerns about



mediation program tends to suggest a facilitative approach.<sup>136</sup> However, mediators of employment discrimination disputes need to be trained to use evaluative approaches in those instances where it is clear that an imbalance of power may be an issue.<sup>137</sup> Probably the most appropriate approach is to ensure that the results from mediation are voluntary and not an effort by the mediator to “cajole or bamboozle parties into consent.”<sup>138</sup>

Accordingly, while the academics debate the merits of evaluative versus facilitative approaches to mediation,<sup>139</sup> the mediator should focus on an assessment of which approach is more

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the unlicensed practice of law and other ethical issues beyond the scope of this Article may be raised during an “evaluative” mediation proceeding. See Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 156-57 (1999).

136. See Yelnosky, *supra* note 16, at 601-02 (describing the initial pilot program of the EEOC which referred to an “interest-based” mediation to resolve EEOC disputes, and referring to various mediation settlements under that program including creative resolutions outside available legal remedies, where employers agreed to alter work rules or make disciplinary changes).

137. See Gunning, *supra* note 113, at 80-86 (arguing that imbalances of power in mediation can be alleviated by training mediators to use evaluative mediation and to intervene to protect the interests of those parties).

138. Nolan-Haley, *supra* note 16, at 778; see also Robert A. Baruch Bush, *What Do We Need a Mediator For? “Value-Added” for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 8, 36 (1996) (discussing failed mediation negotiations that occur when settlement is reached at undue cost or on sub-optimal terms).

139. See, e.g., James J. Alfani, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997); Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989); John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 106-08; Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN’S L.J. 272, 273-74 (1992); Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 713 (1997); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 856-79 (1997); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669 (1997); Barbara A. Phillips, *Mediation: Did We Get It Wrong?*, 33 WILLAMETTE L. REV. 649, 701 (1997); Leonard L. Riskin, *Mediation Quandaries*, 24 FLA. ST. U. L. REV. 1007 (1997); James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer-Mediator*, 38 S. TEX. L. REV. 769, 795 (1997); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985 (1997); Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155 (1998); Donald T. Weckstein, *In Praise of Party Empowerment—and of Mediator Activism*, 33 WILLAMETTE L. REV. 501 (1997).

appropriate in each mediation setting.<sup>140</sup> Professor Nolan-Haley has expressed serious doubts about whether mandatory mediation can ever involve the level of informed consent that she believes is necessary.<sup>141</sup> However, even she acknowledges that it might work if there is a heightened level of protection involved in the process.<sup>142</sup> Given the benefits of making EEOC mediation mandatory, any concerns about neutrality must give way to protecting the interests of all the parties regarding their informed and voluntary resolution of the dispute through mediation.<sup>143</sup>

Furthermore, analysis of the EEOC's mediation program demonstrates that the participants were clearly informed about their rights and that they knew what could occur even in instances where the parties did not actually reach an agreement.<sup>144</sup> Also, because the EEOC's current mediation program shows that not all cases settle, even when participation is voluntary, it may support the position that the EEOC's mediation program fosters only voluntary settlements.<sup>145</sup> The mediators must determine that process dangers or any other reasons have not led to a settlement that is truly involuntary or one that is based upon uninformed consent.<sup>146</sup> The EEOC still plays a role. If the EEOC believes a

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140. See Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997) (contending that it is not whether facilitative is a better approach than evaluative or vice versa but which approach is more appropriate under the circumstances or even if a mixture of the approaches may be appropriate depending on the needs of the disputants in that situation); Nolan-Haley, *supra* note 16, at 824, 827 (arguing same and suggesting the use of a sliding scale for disclosure in terms of the context of the specific dispute).

141. Nolan-Haley, *supra* note 16, at 829.

142. *Id.*

143. *Id.*

144. See E. Patrick McDermott et al., *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, at <http://www.eeoc.gov/mediate/report> (Sept. 20, 2000) (click on link to Part IV.C).

145. Yelnosky, *supra* note 16, at 602 (raising the same argument).

146. See McCrory, *supra* note 110, at 831 (suggesting a flexible approach to handling disputes in mandatory mediation, and that the application of styles to be used will be determined by the needs of the participants). SPIDR suggested that mandatory mediation may be acceptable as long as the mediation process takes specific aims to ensure that power and education differences do not force a settlement that is not the intent of the parties. See *id.* at 833. SPIDR referred to this as ensuring that the participants are "quality" participants who understand the ramifications of the mandatory mediation process. See *id.* Other factors in the quality aspects of the mediation program involve the skill and diversity of the mediators. See *id.* at 836 (listing several necessary items for a quality mediation panel, including diversity of gender, race, ethnicity, mediation style, subject matter familiarity, size, and experience).

settlement obtained through mediation was coerced, it can proceed to process the charge as usual.

Another concern about an EEOC mandatory mediation program is that it may cause a perverse disincentive for employers to not create their own internal programs if they know that the EEOC will cause mediation to occur anyway, especially if there is no charge for the mediator's fee.<sup>147</sup> But, if the NEDRA is adopted, certain employers (federal contractors with \$200,000 contracts and 200 employees) will have a duty to establish a private mediation program anyway. Furthermore, employers are not prohibited from having their own internal mediation policies and programs despite this Article's proposal.

An internal program could provide separate benefits to an employer. Unlike the EEOC mediation program proposed herein, the employers in an internal program could choose their own mediator rather than have the mediator assigned to them under the EEOC's program. Finally, by allowing the EEOC discretion to choose which charges are sent to mandatory mediation, the EEOC can prevent specific offenders from repeatedly using the government-sponsored mediation rather than adopting their own internal mediation programs.

## VI. Making Mediation Private to Remove the Political Manipulation of the EEOC's Funding for the Program: Dealing With Not So Subtle Efforts to Muzzle the Tiger

### A. *Congressional Meddling with the EEOC's Programs*

Efforts by Congress to use its power in the appointment and funding process to stymie the EEOC are well known.<sup>148</sup> In 1998,

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147. However, studies have shown that even charging a modest fee for voluntary mediation may make the program "inaccessible to low income" complainants. See Thomas Kochan et al., *An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233, 245, 277 (2000) (describing wealth bias problems associated with Massachusetts Commission Against Discrimination mediation program which required a payment of a fee and legal representation). SPIDR agreed that the wealth of the participants should not matter in an agency-run program. See Peter S. Adler et al., *Guidelines for Voluntary Mediation Programs Instituted by Agencies Charged with Enforcing Workplace Rights*, at <http://acresolution.org> (Apr. 21, 1998) (click on "Learning Center," then on "Guidelines," then on article's title).

148. These efforts are not limited to attempts to stifle the EEOC. Pennsylvania Republican Congressman William F. Goodling, who sat on House Education and Workplace Committee for twenty-six years and functioned as its chair from 1994

Congress even stalled the appointment of EEOC Commissioners, threatening to bring the EEOC to a standstill as it became dangerously close to not having enough Commissioners for a quorum.<sup>149</sup> Many observers believed that the failure to confirm Commissioners was “linked . . . to the GOP’s perception that the Commission is overly sympathetic to plaintiffs” and that belief was recently confirmed by an attorney representing corporations when he acknowledged that due to “political indifference” and the fact that the “EEOC has been so underfunded and so understaffed for such a long time that you can’t fault them for the [backlog] situation anymore.”<sup>150</sup>

A recent study presented to the United Nations applauds the efforts of the EEOC in reducing its backlog, hiring new employees and improving technology while also pointing to the fact that “[i]nadequate enforcement of existing anti-discrimination laws due to underfunding of federal and state civil rights agencies is among a host of reasons cited for the ‘subtle’ forms of discrimination against minority individuals and groups that exist in American society.”<sup>151</sup> Assistant Attorney General Bill Lann Lee acknowledged that

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until recently retiring, expressed the view that Congress should restrain agencies from developing policies and regulations that prevent employers from competing in the twenty-first century because they have a chilling effect on the growth of the economy. *See In Parting, Goodling Urges Regulatory Caution, Amending Outdated Labor Laws*, 248 Daily Lab. Rep. (BNA) C-1 (Dec. 27, 2000). Goodling specifically mentioned Republican attempts to prevent the Occupational Safety and Health Administration (OSHA) and the Office of Federal Contract Compliance Programs (OFCCP) from issuing regulations. *Id.*; *see also Ergonomics Restriction in Labor-HHS Bill Could Be Off the Table Hastert Aide Says*, 238 Daily Lab. Rep. (BNA) A-11 (Dec. 11, 2000) (discussing Republican attempts to prevent OSHA from issuing ergonomics regulations by tying the funding of the Department of Labor to a prohibition, thus preventing the issuance of the ergonomics final rule, and attempts by Republican majority whip Tom Delay to limit funding for the Departments of Labor, Health and Human Services, and Education to last year’s levels). The NLRB is also a target of congressional meddling through the use of funding decisions. *See, e.g., NLRB: Board Officials Grilled On Budget At Senate Appropriations Hearing*, 25 Daily Lab. Rep. (BNA) D-3 (Feb. 7, 1996) (discussing efforts to limit appropriations to the NLRB and Union official complaints that the Senate’s budget cuts for the NLRB were merely aimed at retaliation for having tried to accomplish its enforcement mission through its increased use of injunctions and the need to appease business that the NLRB will be unable to continue that practice).

149. Darryl Van Duch, *Paralysis for EEOC Feared*, NAT’L L.J. at A1 (Aug. 24, 1998).

150. *Id.*

151. *See Race Discrimination: Report to U.N. Panel Lauds Recent Changes at EEOC for Improved Attacks on Race Bias*, 185 Daily Lab. Rep. (BNA) A-8 (Sept. 22, 2000). A full copy of the report may be found at the U.S. State Department website: <http://www.state.gov> (visited Feb. 15, 2001).

budget increases in 1999 had led to major improvements at the EEOC. In 1999, instead of its customary "flatlined" budgets, the Clinton administration and Congress agreed to improve the funding for the EEOC and the Civil Rights Division of the Department of Justice.<sup>152</sup>

As a prelude to how pernicious congressional meddling in the affairs of the EEOC has become and despite the overwhelming success of the EEOC's mediation program, congressional budget cuts forced the EEOC to terminate the use of private mediators in 2000.<sup>153</sup> Thus, similar to the charge processing backlog, the EEOC has become encumbered with delays in scheduling mediation sessions.<sup>154</sup> Because of the \$13 million that the EEOC received in 1999 to get the program going, the EEOC was able to assemble a cadre of about 100 in-house mediators at its twenty-four District offices, along with a significant pool of outside mediators who were hired on a contract basis.<sup>155</sup> However, Congress did not approve funding for mandatory cost-of-living increases for 2000. The EEOC was forced to absorb costs of approximately \$8 million and the contract mediators were the first to be let go as a result of the lack of funding.<sup>156</sup> Although Chairwoman Castro believes that the EEOC mediation program is one of the "shining stars" in the EEOC's list of accomplishments, she has asked "contract mediators, usually paid \$800 per mediation, to offer some of their services on a pro bono basis."<sup>157</sup> Thus, continued congressional

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152. *Id.*

153. Julie Harders, *Too Good to Last? Budget Cuts Force the EEOC to Terminate Contract Mediators From its New, Highly Touted Program*, A.B.A. J. 30 (Apr. 2000); see also Fawn Johnson, *EEOC: Castro Says FY 2000 Budget Means Loss of Mediation Program's External Contractors*, 38 Daily Lab. Rep. (BNA) A-10 (Feb. 25, 2000) (discussing that \$800 per mediation by private mediators would not be funded in 2000 as the EEOC reached out to organizations to provide pro bono mediation services); Fawn Johnson, *EEOC: House Subcommittee Approves Increase of \$10 Million in EEOC's FY 2001 Budget*, 111 Daily Lab. Rep. (BNA) A-10 (Jun. 8, 200) (noting comments of Chairwoman Castro that budget approved by Congress was only an increase of \$10 million instead of the requested \$29 million, that this shortfall would place the EEOC at "critical mass" given that cost of living increases, by themselves, would increase the EEOC's budget by \$11 million, which would require the EEOC to abandon staffing for its mediation program).

154. Harders, *supra* note 153, at 30.

155. *Id.*

156. *Id.* GOP members of Congress may argue that the Democratic-led EEOC could have made cuts in other parts of their programs rather than cutting the private mediation program. However, the result of not providing enough funding for the EEOC to make annual cost of living increases for its employees led to the private mediation program being virtually disbanded.

157. *Id.*; see *EEOC's Mediation Program Going Strong Despite Budget Shortfall, Coordinators Say*, 59 Daily Lab. Rep. (BNA) B-1 (Mar. 27, 2000) (noting

meddling in the affairs of the EEOC has resulted in a hindrance to the one program that both sides of the aisle and all the stakeholders believe is worthwhile, the mediation program.

As with most analysis of government enforcement agencies, the more “compelling” reasons for lax enforcement probably have to do with “money and politics” and the “shifting sands of political will.”<sup>158</sup> A Republican-led Congress presents a number of opportunities to have the EEOC’s mediation and enforcement efforts stopped by budget cutting, especially under its currently Democratic-led Commissioners. If Congress truly supports mediation, it should provide for an ongoing use of mediation to resolve employment discrimination disputes under the jurisdiction of the EEOC regardless of the political parties of the EEOC Commissioners or those in control of Congress.

In order to prevent private mandatory mediation from being subjected to cyclical administrative budget fights, the funding for this program should be separate from the EEOC’s general funding. Near the end of 1998, Congress increased the budget of the EEOC by \$37 million dollars for fiscal year 1999.<sup>159</sup> This increase was partially intended to establish an ongoing program to mediate EEOC charges. Because \$9 million of the 1999 budget was used to get the private mediation program going and an \$8 million dollar shortfall in budget year 2000 caused its abandonment, the author recommends that Congress allocate \$10 million dollars annually to this program for the next five years and keep its funding separate from any decisions about the EEOC’s general funding. Both sides of the aisle are supportive of using mediation to resolve Title VII disputes and should put the money where it should be, in the mediation program.<sup>160</sup> Government funding of this private

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the problem in funding that led to dismissal of private mediators who constituted about fifty percent of the initial mediation program and how pro bono mediators were keeping the program afloat). It is unreasonable to assume that pro bono mediators will keep the program going long-term. If it is necessary to make mediation mandatory to get more employer participation, then it is also necessary to provide private mediators that will address employers’ concerns about impartiality.

158. See Gilles, *supra* note 35, at 1409-10 (explaining why the Department of Justice has brought only a few cases challenging police corruption over five years); see also Menkel-Meadow, *supra* note 112, at 30 (noting that those wanting to use the legal system for social reform have neglected the impact of politics).

159. Harkavy, *supra* note 16, at 155 & n.178 (citing Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998)).

160. Although the amount of money required may be subject to control by Congress, it should not be part of the fights that Congress gets into with

mediation will cut costs overall and provide a powerful dispute resolution tool that is apolitical and not based upon the wealth of the parties involved.<sup>161</sup>

*B. Separately Funded, Private Mediation as a Response to the Meddling*

With the history of Congress's use of its funding whims as a control on the EEOC in mind, this Article has proposed the use of private mediators with separate and ongoing funding that is not linked to the EEOC's funding. Professor John P. McCrory has recently posed that there are several options in selecting mediators for a mandatory mediation program.<sup>162</sup> Applying those same factors, Congress could pursue the following options for the EEOC's mandatory mediation program: 1) use EEOC employees; 2) refer the disputes to community mediation centers; 3) use volunteer mediation panels; 4) use mediation panels of private practitioners who work for a fixed fee; or 5) use private practitioners selected and paid by the parties.<sup>163</sup> This Article proposes that Congress should fund the program by using private practitioners who work for a fixed fee paid through a congressional program. The only real concern is getting Congress to fund the program.<sup>164</sup> SPIDR has also suggested that any mandatory

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government agencies like the EEOC.

161. See Fiss, *supra* note 113, at 1076-77 (arguing that ADR creates a second class system of justice where the wealth of the parties dictates the type of justice involved because the rich do not have to settle for anything less than the court system); see also Jerrold S. Auerbach, *Justice Without Law?* 144 (New York: Oxford University Press, 1983) (arguing that alternative dispute resolution creates a two-tier system of justice with ADR being used by the poor and the weak with weaker procedures and protections than the court system which the rich still may pursue).

162. See McCrory *supra* note 110, at 850-53 & nn.2-7 (referring to a mandatory mediation program for courts and listing the following categories: 1. court employees; 2. community mediation centers; 3. volunteer mediation panels; 4. mediation panels of private practitioners who charge a fixed fee; 5. private practitioners selected and paid by the parties).

163. *Id.*

164. There are various problems with the other options. Those problems include fears that EEOC mediators will try to force settlements and not keep the mediation confidential, fears that volunteers and community mediators will not present enough mediators who are familiar with employment discrimination law or willing to do mediation without some compensation, and concerns that if the parties choose the mediators, the repeat player employers will select the same mediators all the time which undermines the overall competence of the mediators in the program. See McCrory *supra* note 110, at 842-43, 851-53 & nn.111-13, 134-44 (analyzing the strengths and weaknesses of each option as to how the mediators should be determined and paid).

mediation program should be funded similar to actual trial litigation.<sup>165</sup> The theory is that government should not mandate a program and then force the participants to pay fees for it.<sup>166</sup> If Congress is unwilling to fund the program without requiring that the parties pay some user fee, it should still allow those parties who cannot afford to pay the fee to participate in the mediation program.<sup>167</sup>

At first glance, one might assume that it is unrealistic to propose that Congress would devote funds to a private mediation program as a supplement to government enforcement. However, Congress has used private services when it had concerns about agency failures in other contexts.<sup>168</sup> Likewise, the decision to supplement EEOC enforcement by private mediation would likely be supported by both sides of the aisle, which generally agree about the positives of mediation. Thus, by having a statutory mandate to provide separate funding for the mediation program at say \$10 million dollars for the next five years, Congress could allow the program to function without major meddling. Then, if certain members of Congress don't like what the EEOC is doing with its enforcement initiatives, they can't just use the annual budgeting process to cut back on the tremendously successful private and mandatory mediation program. If Congress wanted to change the program, it would have to do so by some new enactment. To ensure the integrity of the program, Congress could let the provisions for funding the private mandatory mediation program

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165. See McCrory, *supra* note 110, at 827.

166. *Id.*

167. *Id.* at 826-29 & n.59 (discussing the concerns including the politics involved with inadequate funding of mandatory mediation programs and legislative actions necessary to remedy these concerns). Efforts should be made to start the program without any fees to the participants if it is going to be mandatory. Although there is evidence that parties will still pay reasonable user fees without complaint if the quality of the mediation services offered is very high. *Id.* at 829.

168. See, e.g., Laveta Casdorff, Comment, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 510-14 (1999) (claiming that Congress incorporated private citizen-suit provisions into environmental statutes to cure problems, including the lack of effective agency oversight by any of the three branches of government and the fear of "agency capture," wherein agency employees become less motivated over time to make decisions and that can adversely affect the regulated community's interests); Robert B. June, Note, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. REP. 761, 764 (1994) (stating that "Congress first established the citizen suit in the 1970 amendments to the Clean Air Act, in response to a perceived governmental failure to enforce the statute").



sunset so that after five years, the program would automatically terminate absent congressional action to reauthorize the program.<sup>169</sup>

## VII. Conclusion: Using Private Mandatory Mediation to Establish a New Enforcement Paradigm

The fault for the problems with the EEOC's lack of enforcement and problems with handling of charges lies at the feet of Congress not the EEOC. The legislative development of Title VII, through its original enactment and subsequent amendments, has been characterized by compromise positions that have had a significant detrimental impact on enforcement of Title VII. Accordingly, congressional one-upmanship and partisan politics has plagued the EEOC from the very beginning with the passage of a faulty compromise that made the EEOC a toothless tiger.

This compromise has taken its toll. To allow some form of a civil rights bill to pass, liberal members of Congress and the President permitted conservative Republicans and southern Democrats to wiggle out of the initial efforts to make the EEOC a strong enforcement agency. This compromise has, at least, provided a mechanism for addressing employment discrimination under law that did not exist before Title VII. However, that compromise has distorted the focus of the EEOC, permitting critics who did not want the EEOC to be a strong enforcement agency to now complain that the EEOC is not doing enough to process charges. Those critics support cutting money and resources from the agency and preventing any long-term focus on systemic enforcement programs. As proposed by this Article, Congress can

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169. Congress has used such sunset provisions before. In 1990, Congress passed the Administrative Dispute Resolution Act which encouraged federal agencies to use informal procedures as an alternative to formal adjudication. That statute contained a sunset provision requiring it to lapse in six years and Congress then granted permanent reauthorization in 1996. See Administrative Dispute Resolution Act (ADRA) of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (authorizing and promoting the use of ADR by federal government agencies and codified in scattered sections of U.S.C.), as amended, by ADRA of 1996, 5 U.S.C. § 571 et seq. (2000); see also Peter R. Steenland, Jr. & Peter A. Appel, *The Ongoing Role of Alternative Dispute Resolution in Federal Government Litigation*, 27 U. TOL. L. REV. 805, 806, 806 nn.66-72 (1996) (discussing how Congress permanently reauthorized the ADRA in 1996 after the sunset provisions of the 1990 Act had passed and suggesting that the continued use of ADR by government agencies has positive effects in saving time and valuable resources of the agencies). Likewise, Congress could create a five-year sunset on the mandatory private mediation program that would create an investment of \$10 million a year for five years. At the end of the five-year sunset, Congress could address the issue again through a permanent reauthorization, an additional sunset period or through cancellation.

correct the initial compromise and long-term neglect of the EEOC's enforcement powers by allocating the funds to an ongoing private and mandatory mediation program.

By attempting to expose the effects of the faulty compromise and proposing private mandatory mediation as a viable alternative, one hopes that the EEOC can get out of the business of charge processing on a regular basis. This would allow the EEOC to become the agency that civil rights leaders hoped it would be during the legislative efforts to pass Title VII.

One remaining problem is that ever since it granted the EEOC enforcement power, Congress has used its funding and consent powers to still make the agency toothless. Even now the tremendous efforts made to improve charge processing and enforcement are up for political challenge as the George W. Bush administration chooses two new commissioners, including a chair, and a vice-chair.<sup>170</sup> It may be unrealistic to ever expect that the EEOC will be a powerful tool in eradicating discrimination in the workplace because of ongoing political maneuvering. Without the ability to set long-term policy consistently, it is likely that the executive,<sup>171</sup>

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170. See Nancy Montwieler, *EEOC: Commission's Future Remains Unclear With Three Democrats at Leadership Helm*, 9 Daily Lab. Rep. (BNA) C-1 (Jan. 12, 2001). All three of the current Commissioners are Democrats and President Bush will be able to appoint only two more Commissioners through July 2002, when the first Commissioner's term expires. *Id.* At the time of preparing this Article, President Bush had not selected a Commissioner. Since that time and before the Article went to the publisher, President Bush has selected a new Chair, Cari Dominguez. See Reed Abelson, *Anti-Bias Agency Is Short of Will and Cash*, N.Y. TIMES, July 1, 2001, Sec. 3, at 1 (describing President Bush's nomination of Cari Dominguez as the new EEOC Chair and the overall ineffectiveness of the EEOC due to government bureaucracy, politics and lack of funding). After Ms. Dominguez's appointment, Ida Castro resigned as a Commissioner. As this Article goes to press, President Bush has not made a decision about Ms. Castro's replacement, but he is now in a position to appoint three commissioners, including Ms. Dominguez, to establish his overall control over the EEOC and his general mark on the administration of the agency. See Nancy Montwieler, *Ex-EEOC Chairwoman Expresses Concern Over Agency Direction in Bush Administration*, 163 Daily Lab. Rep. (BNA) B-1 (Aug. 23, 2001) (describing comments of former Chair Ida Castro as to her concern that the Republican administration may cut the EEOC budget and back-off on important programs necessary for the EEOC to function properly). The initial spin about the EEOC under its new Chair, Commissioner Dominguez, has already started. See Patrick McGeehan, *U.S. Sues Morgan Stanley, Charging Sex Bias in a Firing*, N.Y. TIMES, Sept. 11, 2001, at C1 (describing lawsuit by the EEOC in what new Chair Dominguez called the first action to contend with a major Wall Street firm that did not treat female professionals fairly and noting that "the suit signaled that Bush administration officials would enforce antidiscrimination laws for even the highest-paid workers").

171. Because the President can appoint the chair and vice-chair of the EEOC,

legislative and even the judicial branch will intervene to limit the power of the EEOC.

However, at least one program, mediation, appears to be a tool that all the stakeholders and political pundits have enthusiastically endorsed for the long-term.<sup>172</sup> Therefore, Congress should expressly require the use of mediation under Title VII by passing legislation, possibly by an amendment to the pending NEDRA, that would mandate the use of private mediation to resolve EEOC charges. By mandating mediation, employers will participate at a much higher rate. By making it private, the perception that the “plaintiff-oriented” EEOC and its employee mediators will use mediation to force settlements will become a dead issue.<sup>173</sup>

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those officials apparently can depart from policies that were established by prior EEOC regulations. See *Statements Favoring EEOC's Use of Goals and Timetables Before House Labor Subcommittee on Employment Opportunities*, 50 Daily Lab. Rep. (BNA) F-1 (Mar. 14, 1986) (describing objections to actions of EEOC General Counsel's refusal to use affirmative action goals and timetables in establishing remedies for Title VII violations despite their longstanding use because then-Chairman Clarence Thomas and the then-Acting General Counsel for the EEOC, Johnny Butler, along with then-Attorney General William Bradford Reynolds, had views opposing affirmative action).

172. See Montwieler, *supra* note 170, at C-1 (noting the comments of the former Republican Commissioner, Reginald Jones, that mediation of EEOC disputes is a common theme with bipartisan support). Former EEOC Commissioner Jones has always been a big proponent of ADR and has led Republican support of it since he first joined the EEOC. See *EEOC: Newest Commissioner Jones Says EEOC Should Make Dispute Resolution Happen*, 178 Daily Lab. Rep. (BNA) C-1 (Sept. 13, 1996) (discussing then-Commissioner Jones's statement that the EEOC must “zealously” pursue ADR to ensure that parties resolve their disputes without litigation and without having to give up any protection provided by general litigation).

173. See Harders, *supra* note 153, at 30 (noting comments of EEOC contract mediator, John L. Quinn, that “the elimination of contract attorneys [as mediators] will cause the agency to backslide in terms of the willingness of defendants to participate in mediation” because “[t]he EEOC is perceived as being more plaintiff-oriented.”). In response to a question about why private mediators should be employed instead of EEOC mediators, Professor Lamont Stallworth, one of the contributors to NEDRA, stated: “the EEOC is wrong to use its own employees as volunteer mediators . . . [e]mployers [also] err when they use internal staff to mediate disputes. The perception of fairness is as important as fairness itself, . . . and the mediator has to be neutral in fact and in the parties' perceptions.” *Alternative Dispute Resolution: Arbitrator/Mediator Urges Legislation to Encourage Job Dispute Resolution Mediation*, 110 Daily Lab. Rep. (BNA) A-4 (June 9, 1998); see also Fawn W. Johnson, *Top Ten Things Not to Say at a Mediation*, 59 Daily Lab. Rep. (BNA) B-2 (Mar. 27, 2000) (noting that two of the major concerns for employers about mediation are being forced to put some money on the table and the need for a “firewall to keep mediation matters confidential” especially after the parties do not agree to a settlement via mediation).

Under this Article's proposal, the EEOC will be charged with developing, training and monitoring a list of outside, experienced and diverse private mediators who will work with the parties to resolve their EEOC charges.<sup>174</sup> All parties to cases that the EEOC decides to refer to mediation will be required to participate. These private mediation sessions will become the main charge processing vehicle instead of the charge prioritizing triage procedures currently being used by the EEOC.<sup>175</sup> By establishing funding separate from the EEOC's annual funding, the private mandatory mediation program may operate without being a whipsaw for political maneuvers. If Congress will solidify the long-term investment and financial support for the use of mediation, the EEOC can then shift to some of the other major enforcement initiatives<sup>176</sup> that have been neglected in the past.<sup>177</sup> Congress may still choose to prevent the EEOC from proceeding with those enforcement objectives for its

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174. See Johnson, *supra* note 173, at B-2 (describing the EEOC's mediation program out of its San Francisco district office that used solely contract mediators with backgrounds in employment law and where the EEOC held frequent roundtables to communicate the EEOC's expectations and where it also held mock mediations to help employers understand how it works with private mediators).

175. Federal courts may still not like that "C" charges are dismissed immediately and "B" charges may still come directly to court after a dismissal, but that is the regime Congress intended with private claimants having the right to file in court to enforce their claims. Over the last decade, the number of employment discrimination cases in federal court tripled. See *Employment Bias Cases in Federal Court Almost Tripled in Previous Decade*, DOJ Says, 13 Daily Lab. Rep. (BNA) A-1 (Jan. 20, 2000) (discussing a U.S. Dept. of Justice study finding that although the number of federal employment discrimination cases had tripled from 8,413 in 1990 to 23,735 in 1998, the percentage of cases that were disposed of by trial declined from nine percent to five percent, and the percentage of all cases filed that ended in a verdict for the plaintiff fell from two percent to 1.6 percent).

176. See Silver, *supra* note 78, at 522 (noting the value of using mediation to "free scarce agency resources for the eradication of systemic discrimination"). Those initiatives that the EEOC could pursue include developing tester initiatives, preparing class action/pattern and practice cases and dealing with systemic wage disparities. These are all programs the EEOC has endorsed at one time. See, e.g., *Latest Developments*, Fair Empl. Prac. (BNA), at 5 (May 22, 1995) (statements of then EEOC Chair, Gilbert Cassellas, about the need for funding to focus on "classwide and pattern and practice cases"); EEOC Issues New Guidance on Legal Standing of Testers, at <http://www.eeoc.gov/press/5-24-96a.html> (visited Feb. 15, 2001); EEOC Focuses on Pay Equity at Meeting in Philadelphia, (Apr. 15, 1999) at <http://www.eeoc.gov/presss/4-15-99.html> (visited Feb. 15, 2001).

177. Donald G. Aplin, *Federal Employees: Congress Asks EEOC About Delays, Backlog Reliability of Data Regarding Federal Workers*, 64 Daily Lab. Rep. (BNA) A-5 (April 3, 2000) (noting during congressional review of EEOC's handling of federal employees' backlog of charges that Post Office and Air Force representatives testified that mediation had helped focus their resources on its mission goals rather than being forced to put resources and energy into the formal EEO process).

own political reasons. But, at least, the use of mandatory mediation will create a paradigmatic shift in how the EEOC manages its enforcement activities.

## APPENDIX: NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

United States Library of Congress

HR 4593

Introduced in House

June 7, 2000

H. R. 4593,

To amend title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Vocational Rehabilitation Act of 1973, and the Civil Rights Act of 1991, to require the Equal Employment Opportunity Commission to mediate employee claims arising under such Acts, and for other purposes.

### IN THE HOUSE OF REPRESENTATIVES

June 7, 2000

Mrs. CLAYTON introduced the following bill which was referred to the Committee on Education and the Workforce

#### A BILL

To amend title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Vocational Rehabilitation Act of 1973, and the Civil Rights Act of 1991, to require the Equal Employment Opportunity Commission to mediate employee claims arising under such Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

#### SECTION 1. SHORT TITLE.

This Act may be cited as the 'National Employment Dispute Resolution Act of 2000 (NEDRA).

#### SEC. 2. FINDINGS.

The Congress finds the following:

- (1) The prohibitive costs and emotional toll of litigation as well as the growing backlog of employment civil rights claims and lawsuits has impeded the protection and enforcement of workplace civil rights.
- (2) Mediation is an economical, participatory, and expeditious alternative to traditional, less cooperative methods of resolving employment disputes.

- (3) Mediation enables disputants to craft creative solutions and settlements, surpassing the reach of traditional remedies, thereby possibly protecting the continuity of the employment relationship.
- (4) As we enter the new millennium, a national program of directed or required participation in mediation where any settlement is voluntary mandated mediation for certain employment and contract disputes, will help fulfill the goal of equal opportunity in work and business places of the United States.
- (5) Overt and subtle discrimination still exists in our society and in the workplace.
- (6) Overt and subtle forms of discrimination cause substantial measurable economic and non-economic costs to employers and the American workforce, create a barrier to fully realizing equal opportunity in the workplace, and are contrary to public policy promoting equal opportunity in the workplace.

(b) **PURPOSES**—The purposes of this Act are—

- (1) to establish a fair and effective alternative means by which employees and covered employers may have an increased likelihood of resolving both alleged overt and subtle forms or acts of discrimination without the necessity of the employee taking some form of legal action against the employer,
- (2) in accordance with the various public policies encouraging the use of mediation, to make mediation available at an early stage of an employment dispute, thus—
  - (A) possibly reducing economic and noneconomic costs,
  - (B) preserving the employment relationship and decreasing acrimony, and
  - (C) decreasing the filing of a number of formal discrimination complaints, charges, and lawsuits and further burdening our public justice system, and
- (3) to provide that the participation in mediation shall not preclude either the employee-disputant or covered employer-disputant from having access to the public justice system.

**SEC. 3. AMENDMENTS TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.**

(a) **FEDERAL EMPLOYEES**—Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) is amended—

(1) in section 706(a) ((42 U.S.C.A. 2000e-5)) by inserting after the 7th sentence the following:

‘Regardless of whether the Commission makes an investigation under this subsection, the Commission shall provide counseling services regarding, and endeavor to responsibly address and resolve, claims of unlawful discrimination using certified contract mediators.’, and

(2) in section 711(a) ((42 U.S.C.A. 2000e-10)) by adding at the end the following:

‘Every employer, employment agency, and labor organization shall provide to each employee and each member, individually, a copy of the materials required by this section to be so posted.’.

(a) **OFFICE OF FEDERAL CONTRACT COMPLIANCE**—Section 718 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-17) is amended—

(1) by inserting ‘(a)’ after ‘SEC. 718’, and

(2) by adding at the end the following:

(b) The Office of Federal Contract Compliance shall endeavor to responsibly address and resolve any alleged discrimination using mediation with respect to which this section applies.

(c) An employer who establishes, implements an approved internal conflict management program or system providing the use of a certified mediator participates in mediation under this section shall be given preferred status in contract bidding for additional and for maintaining current Federal Government contracts.

(d) An employer who is a party to a Government contract or the agency of the United States shall assume the costs of mediation under this section, including the fees of the mediator and any travel and lodging expenses of the employee, if such travel exceeds 25 miles, one way. Any settlement shall include, among other things, any appropriate and reasonable attorney fees.

(e) Retaliation by an employer who is a party to a Government contract or the agency of the United States, or the destruction of evidence, shall result in the imposition of appropriate civil or criminal sanctions. The participation in mediation shall be at the



option of the employee. The participation in mediation shall not preclude the employee's access to any State, local, or Federal EEO enforcement agency or any State or Federal court.

(f) The Office of Federal Contract Compliance shall have authority over employers who are parties to Government contracts that fail to comply with this section. Failure to comply shall result in the loss of a current Government contract and disqualification from consideration for future Government contracts.

(g) No resolution by the disputants may contravene the provisions of a valid collective bargaining agreement between an employer who is a part to a Government contract and a labor union or certified bargaining representative. Any voluntary settlement outcome and agreement may not be in conflict with the collective bargaining agreement.'.

#### SEC. 4. AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.) is amended—

(1) in section 7(e) ((29 U.S.C.A. 626)) by inserting after the 2d sentence the following:

'The Commission shall provide counseling services regarding, and endeavor to responsibly address and resolve, claims of unlawful discrimination using certified contract mediators.', and

(2) in section 8 ((29 U.S.C.A. 627)) by adding at the end the following:

'Every employer, employment agency, and labor organization shall provide to each employee and each member, individually, a copy of the materials required by this section to be so posted.'.

#### SEC. 5. AMENDMENT TO AMERICANS WITH DISABILITIES ACT OF 1990.

Section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)) is amended by adding at the end the following:

'The Commission shall provide counseling services regarding, and endeavor to responsibly address and resolve, claims of unlawful discrimination using certified contract mediators.'.

## SEC. 6. MEDIATION.

### (a) DEFINITIONS—For purposes of this section:

(1) The term ‘employer’ means any Federal agency (including Federal courts) or business enterprise receiving Federal funds of \$200,000 or greater or having 20 or more employees.

(2) The term ‘mediator’ means any neutral, third-party, including an attorney and a nonattorney, who is trained in the mediation process and has a demonstrable working knowledge in relevant EEO and employment law, including a third party who is—

(A) appointed or approved by a competent court, the Equal Employment Opportunity Commission, a certified mediation center, or a university, or

(B) jointly chosen by the disputants.

(3) The term ‘trained mediation professional’ means a person who—

(A) has participated in employment mediation training of 40 or more hours, or

(B) has co-mediated with or been supervised by another trained certified mediation professional for at least three employment or contract dispute cases of no fewer than 15 hours.

(4) The term ‘certified mediation center’ includes any private or public entity that is qualified to facilitate the employment or contract mediation process and provide training on employment and contract dispute resolution, including, but not limited to, the American Arbitration Association, the American Bar Association, the Center for Employment Dispute Resolution, CPR Conflict Institute, JAMS/Endispute, United States Arbitration and Mediation, Inc., Institute on Conflict Resolution at Cornell University, and the Society of Professionals in Dispute Resolution.

### (b) REQUIREMENTS—

(1) All employers shall—

(A) establish an internal dispute resolution program or system that provides, as a voluntary option, employee-disputant access to external third-party certified mediators,

(B) participate in mediation if the employee has exhausted the internal dispute resolution program or system and has formally requested mediation without the filing of a charge or lawsuit, and

(C) participate in mediation if the claimant has filed a

charge or lawsuit and the claimant formally requests mediation.

(2) While the mediation settlement outcome would be voluntary, the employer shall participate in mediation where the employee-disputant has expressed a desire to mediate.

(3) Under all circumstances, the employee-disputant is entitled to legal representation.

(4) Employers shall inform employee-disputants of the mediation alternative and their respective rights thereof, and the employee-disputant would have 30 days in which to decide whether to participate in mediation.

(5) When an employee-disputant voluntarily agrees to participate in the mediation process, any applicable statute of limitations shall be tolled, and the private tolling agreement shall be enforceable in any court of competent jurisdiction.

(6) The employee and employer disputants shall not have more than 90 days within which to resolve the dispute.

(7) Should mediation prove unsuccessful, the employer shall again inform the employee-disputant of their rights, in writing including the right to pursue the matter under any applicable State, county, local ordinance, or Federal statutes.

(8) Consistent with section 705 of the Civil Rights Act of 1964 ((42 U.S.C.A. 2000e-4)), the Equal Employment Opportunity Commission, and any State or local authority involved in proceedings described in section 706 ((42 U.S.C.A. 2000e-5)), shall offer technical assistance to any unrepresented or self-represented party, provided that a formal complaint has been filed with the Commission or such authority. Such assistance shall include, but not be limited to—

(A) pre-mediation counseling,

(B) assistance in understanding the status of relevant case law,

(C) assistance in what would be the appropriate remedy if the instant claim were to be found to have merit, and

(D) assistance in drafting any post-mediation

settlement agreement or resolution.

(9) Submission of a claim for mediation shall not preclude either the claimant or respondent from seeking other appropriate relief on that claim, except that neither party shall seek other relief until the mediation process has concluded.

(10) Any settlement as a result of the mediation process shall be strictly voluntary and remain confidential except for research and evaluation purposes.

(11) In every case, the privacy, privilege, and confidentiality of all parties to the dispute shall be preserved, including complaint intake personnel and mediation consultations.

(c) **ATTORNEY'S OBLIGATION TO ADVISE CLIENTS OF MEDIATION**—For the purposes of this Act and all of the other related statutes, attorneys and consultants are legally obliged to advise their clients of the existence of the mediation alternative and their obligations under the Act to participate in mediation in 'good faith'.

(d) **JUDICIAL ENFORCEMENT**—Either party to a mediation agreement to bring an action of enforcement in a Federal district court of competent jurisdiction, however any matter discussed or material presented during mediation shall not be used in any subsequent local, State, or Federal administrative or court proceeding. The confidential provisions of any internal conflict management program or system or agreement to mediation shall be immune from attack by any third party. 1999 Cong. H.R. 4593.

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