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NOTES

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INTRODUCTION

In 1964, President Johnson signed into law the landmark Civil Rights Act of 1964.[1] In this massive legislation, Congress intended to address inequities such as the longstanding problem of employment discrimination.[2] To improve the dismal record of American employers,[3] Congress combined the tactics of persuasion and compulsion in an elaborate system that integrated administrative and judicial remedies.[4] On one hand, legislators created the Equal Employment Opportunity Commission (EEOC or Commission) to act as a conciliator and to seek voluntary compliance,[5] while on the other, Title VII provided a right to pursue claims in federal court to those individuals denied satisfaction at the administrative level.[6] The provisions that linked

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended principally at 42 U.S.C. §§ 2000a to 2000h-6 (1988)). "The bill passed the Senate on June 17, 1964, by a vote of 76 to 18. On July 2, 1964 . . . the House of Representatives passed the Senate version of the bill by a vote of 289 to 126. At seven o'clock that evening, President Johnson signed the Civil Rights Act of 1964 in the East Room of the White House." 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, 917 (1978) (footnotes omitted).

2. *See* Julius L. Chambers & Barry Goldstein, *Title VII: The Continuing Challenge of Establishing Fair Employment Practices,* 49 LAW & CONTEMP. PROBS., Autumn 1986, at 9, 11-12 ("The various forms of employment discrimination established after the Civil War created the patterns which existed when Title VII became effective nearly 100 years later.").

3. "In 1962, nonwhites made up 11 percent of the civilian labor force, but 22 percent of the unemployed. . . . Moreover, among Negroes who are employed, their jobs are largely concentrated among the semiskilled and unskilled occupations." H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 27 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2513, *and in* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, 2122, 2148 (1968) [hereinafter EEOC LEGISLATIVE HISTORY].

4. *See* Belton, *supra* note 1, at 907 ("Congress substituted three enforcement processes for cease and desist power: administrative enforcement by the EEOC, 'pattern or practice' civil litigation by the Attorney General, and private civil actions by aggrieved persons — the 'private attorney general.' ") (footnotes omitted).

5. "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (1988).

6. If a charge filed with the Commission pursuant to subsection (b) . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify

these disparate approaches included the requirement that an individual follow the EEOC's procedures for conciliation before filing a claim in court.[7] Section 706(e) of Title VII as enacted authorized an individual to bring an action against an employer only after the EEOC had failed to obtain voluntary compliance within a maximum of sixty days.[8] Because this right was contingent upon filing a proper charge with the EEOC, absent unusually sympathetic circumstances sufficient to toll the filing period,[9] failure to file a valid charge could result in denial of both administrative and judicial relief. Commentators have characterized this scheme as "an administrative obstacle course" which "plac[es] the EEOC at the courthouse door."[10]

As enacted in 1964, section 706(a) described the manner in which an individual initiated 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."[11] In keeping with the statute, the EEOC promulgated implementing regulations on July 1, 1965, which stated that a "charge shall be in writing and signed, and shall be sworn to before a notary public."[12] The EEOC also fleshed out its administrative processes by injecting a preliminary step into the filing procedure. According to the 1965 regulations, the Commission would receive information from any person, but the complainant would be assisted in filing a charge only where such information disclosed that the person was entitled to such help.[13]

Since the mid-1960s, the EEOC's enforcement power has expanded[14] as has the body of regulations governing its procedures. Under current regulations, the EEOC will consider a charge to have

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the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . .
42 U.S.C. § 2000e-5(f)(1) (1988).

7. "A person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964 may not maintain a suit for redress in federal district court until he has first unsuccessfully pursued certain avenues of potential administrative relief." Love v. Pullman Co., 404 U.S. 522, 523 (1972) (citation and footnote omitted).

8. The statute granted the EEOC 30 days to conciliate with a possible extension of up to 30 days. Civil Rights Act of 1964, § 706(e), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 3, at 1012-13.

9. *See infra* note 22 and accompanying text.

10. 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 11.2 (2d ed. 1988).

11. Civil Rights Act of 1964, § 706(a), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 3, at 1011. The oath requirement currently appears in § 706(b), 42 U.S.C. § 2000e-5(b) (1988).

12. 30 Fed. Reg. 8408 (1965) (previously codified at 29 C.F.R. § 1601.8; codified as amended at 29 C.F.R. § 1601.9 (1991)).

13. 30 Fed. Reg. 8408 (1965) (previously codified at 29 C.F.R. § 1601.5; currently codified at 29 C.F.R. § 1601.6(a) (1991)). For example, the alleged acts would have to be among those prohibited by one of the laws administered by the EEOC. *See infra* notes 138-39 and accompanying text.

14. Under the 1972 Equal Employment Opportunity Act, which amended Title VII, the

been filed "when 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."[15] Further, in the view of the EEOC, a "charge may be amended to cure technical defects or omissions, *including failure to verify the charge,*" and such amendments "will relate back to the date the charge was first received."[16]

Today the EEOC employs a two-step filing procedure embodied in a pair of forms: the Intake Questionnaire,[17] which solicits preliminary information, and the Charge of Discrimination,[18] which formally engages the EEOC's administrative machinery. In a typical claimant's situation, on the first visit to an EEOC office, the individual completes an intake questionnaire which requests her name and address, the reason for the alleged discriminatory action, a brief description of the action complained of, and the name, address, and size of the employer. On the basis of this submission, an EEOC official determines whether grounds exist for the filing of a formal charge. If appropriate, the EEOC drafts a charge and presents or sends it to the claimant for approval and signature under oath.[19]

In order for this second document to be considered a valid and timely charge, the complainant must sign it and file it with the EEOC within 180 days of the alleged discriminatory act.[20] In a so-called deferral state, where the complainant has instituted proceedings with a state or local agency with authority to enforce statutes comparable to Title VII, the limitation period is extended to 300 days to permit processing by the nonfederal agency.[21] Failure to meet these deadlines

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EEOC is authorized to file suits in federal court in situations where it is unable to secure an acceptable conciliation agreement. 42 U.S.C. § 2000e-5(f)(1) (1988).

15. 29 C.F.R. § 1601.12(b) (1991).

16. 29 C.F.R. § 1601.12(b) (1991) (emphasis added).

17. EEOC Form 283.

18. EEOC Form 5.

19. EEOC Form 5, the charge of discrimination, is considered to be verified under oath when it is sworn to or affirmed before a notary public or other authorized person or when the charging party signs the following statement which appears at the bottom of the form: "I declare under penalty of perjury that the foregoing is true and correct." Under 28 U.S.C. § 1746 (1988), "[w]herever, under any law of the United States . . . any matter is required . . . to be . . . proved by the sworn . . . oath . . . in writing . . . such matter may, with like force and effect, be . . . proved by the unsworn . . . statement, in writing" of the preceding declaration. 29 C.F.R. § 1601.3(a) (Supp. 1992); *see also* 28 U.S.C. § 1746(2) (1988); *see, e.g.*, EEOC v. World's Finest Chocolate, Inc., 701 F. Supp. 637, 639 (N.D. Ill. 1988) (holding that a signed but undated EEOC charge is valid because the "crucial aspect of the form . . . is that the person write his or her signature under penalty of perjury.").

20. 42 U.S.C. § 2000e-5(e)(1) (Supp. 1992).

21. 42 U.S.C. § 2000e-5(e)(1) (Supp. 1992). For an overview of the EEOC enforcement procedure, see SULLIVAN ET AL., *supra* note 10, at 424-26. To be designated as a deferral or "706 Agency,"

> the State or political subdivision [must have] a fair employment practice law which makes unlawful employment practices based upon race, color, religion, sex, national origin or disa-

may render a claim invalid for purposes of administrative relief and therefore judicial relief as well. Although the Supreme Court has held that timely filing of a charge is not a jurisdictional requirement but rather akin to a statute of limitations,[22] federal courts dismiss numerous claims when plaintiffs, failing to comply with this procedural requirement, offer explanations insufficient to toll the filing limitations period.

Not surprisingly, plaintiffs confronted by motions to dismiss their claims for failure to file a timely charge have tried to rely on their intake questionnaires which often *were* filed within the limitations period.[23] Such plaintiffs argue that the questionnaire should satisfy the filing requirement, with the subsequently filed charge of discrimination acting as an amendment which relates back under the EEOC's regulations.[24] The validity of this argument turns on the question of whether a timely intake questionnaire that is verified after the limitations period has run may satisfy the requirement to file a sworn charge within the statutory period, or whether the EEOC's regulations which permit subsequent verification exceed the authority granted by Title VII.

This Note argues that the EEOC's interpretation of Title VII as reflected in its regulations is consistent with underlying statutory intent and strikes an appropriate balance between the needs of employers and employees. Therefore, Congress should amend section 706(b) of Title VII of the Civil Rights Act of 1964 to provide that a charge must be verified prior to the commencement of an EEOC investigation but not necessarily within the statutory filing period. Part I examines the legislative history of Title VII and its integrated procedures for obtaining administrative and judicial relief. Part II critiques the various ways in which federal courts have attempted to resolve the conflict between the explicit oath requirement contained in the statute and the EEOC's implementing regulations which permit subsequent verification of a lesser submission. Part III argues that Congress should amend the statute to coincide with the courts' movement toward a more flexible standard. This Note concludes that the purposes of Title VII would best be served by amending the statute to permit subsequent verification of timely filed intake questionnaires.

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bility [and must have] established a State or local authority . . . that is empowered with respect to employment practices found to be unlawful, to do one of three things: To grant relief from the practice; to seek relief from the practice; or to institute criminal proceedings with respect to the practice.

29 C.F.R. §§ 1601.70(a)(1) & (2) (Supp. 1992). *See also* 42 U.S.C. § 2000e-5(c) (1988).

22. Zipes v. Trans World Airlines, 455 U.S. 385, 386 (1982) ("Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable tolling.").

23. *See infra* Part II.

24. *See supra* note 16 and accompanying text.

I. LEGISLATIVE AND REGULATORY HISTORY

This Part examines relevant portions of Title VII's legislative and regulatory history and finds that although Congress institutionalized a preference for conciliation, the prerequisites to filing suit were not intended to deter individuals from seeking judicial relief. In fact, a detailed examination of the legislative history reveals that securing the right of an individual to pursue a claim in court was critical to Title VII's enactment. Section I.A demonstrates that Title VII was preceded by federal employment discrimination programs which relied on persuasion rather than judicial enforcement. This section also documents the concerted effort made by supporters of Title VII to ensure an individual claimant's ability to seek judicial relief when denied satisfaction at the administrative level. Section I.B shows that Congress provided a private right of action as part of a compromise limiting the EEOC's role to that of a conciliator. Section I.C notes the lack of congressional attention paid to the oath requirement and the long existence of the EEOC's amendment policy and concludes that the verification requirement was perfunctory and subordinate to larger concerns. These legislative values and the goal of facilitating the processing of EEOC claims in a uniform and equitable manner provide a basis for evaluating the courts' varied interpretations of section 706(b).

A. *The Fair Employment Practices Committees*

Prior to establishment of the EEOC in 1964, a series of presidentially created committees studied and made recommendations regarding the elimination of employment discrimination.[25] The initial impetus for the creation of the committees was a wartime labor shortage exacerbated by the refusal of employers to hire black workers.[26] The first Committee on Fair Employment Practices (FEPC), established in 1941 by executive order, was intended to "reaffirm[ ] [the] policy of full participation in the defense program by all persons, regardless of race, creed, color, or national origin."[27] President Franklin D. Roosevelt authorized the five-member Committee on Fair Employment Practices to "receive and investigate complaints of discrimination" and to "take appropriate steps to redress grievances."[28] His executive order also required the government to administer federal vocational training programs in a nondiscriminatory manner and to

25. Belton, *supra* note 1, at 908-11.

26. 90 CONG. REC. A3033-34 (1944) (statement of Rep. Dawson) ("The labor situation got so acute that the war industries and the war movement were being retarded. The President, in his judgment, in order to meet a war situation, in order to cure or seek to cure a glaring wrong, appointed this Committee.").

27. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

28. *Id.*

include in all government contracts a provision prohibiting employment discrimination. Over the course of its five-year existence, the size and precise mission of the FEPC changed slightly, but it never wielded any enforcement power.[29] Presidents Truman and Eisenhower continued these efforts in a more limited manner, creating by executive order committees to address problems of discrimination in government contracts.[30]

The Fair Employment Practices Committee of this era led to further efforts by the federal government to regulate discriminatory employment practices.[31] Members of both the House and Senate of every Congress from 1943 to 1963 introduced bills to establish permanent nondiscrimination committees with varying degrees of enforcement power.[32] The battle over a bill introduced by Representative McCon-

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29. A press release issued by the Southeastern Railroad Presidents' Conference illustrates the inability of the FEPC to obtain compliance: "Sixteen railroads and terminal companies today told the President's Committee on Fair Employment Practice, in a letter of response, that they cannot comply with the committee's directives . . . regarding the hiring and promoting of Negro railroad workers . . . ." 89 CONG. REC. A5454 (1943) (remarks of Rep. John E. Rankin). The frustration of members of Congress was evident in remarks by Rep. Marcantonio regarding the Southeastern Presidents' Conference's decision not to honor Executive Order 8802.

> Instead of complying with an order which is in keeping with the war effort, instead of cooperating by using all available manpower, irrespective of race, creed, color, or national origin, these railroad companies have seen fit to send to this Congress a message misrepresenting what has been done and at the same time attacking the fundamental principles of democracy, for which American men are fighting and dying all over the world.

89 CONG. REC. 10,656 (1943).. *See also* 90 CONG. REC. A3034 (1944) (statement of Rep. Dawson) ("Their only powers were those of persuasion."). *But see* 90 CONG. REC. 6803, 6806 (1944) (statement of Sen. Russell regarding a transportation strike in Philadelphia precipitated by the union's assertion that compliance with an FEPC order to hire blacks as streetcar and motorcoach operators violated its contract with the Philadelphia Transportation Company:

> They have asserted when before committees of Congress, and their sponsors have contended, that they had no power to enforce their directives, except that of an advisory nature. . . . When the F.E.P.C. press the button, they throw into action every agency of the Federal Government, from the War Manpower Commission to the armed might of the United States Army and the Navy.).

30. *See* 16 Fed. Reg. 12,303 (1951); 18 Fed. Reg. 4899 (1953); 26 Fed. Reg. 1977 (1961); *see also* Chambers & Goldstein, *supra* note 2, at 13 n.27. Ultimately, President Kennedy's Committee on Equal Employment Opportunity, which had a similar focus, gained enforcement powers including authority to publish the names of parties in noncompliance, recommend civil and criminal actions by the Department of Justice, terminate the contracts of noncomplying employers, and prohibit entering into additional contracts with violators unless the party could show that the discriminatory policies no longer existed. EEOC LEGISLATIVE HISTORY, *supra* note 3, at 4. The Committee also administered a vast program to encourage voluntary cooperation under the title "plan for progress." *Id.*

31. EEOC LEGISLATIVE HISTORY, *supra* note 3, at 7.

32. *See, e.g.*, H.R. 3096, H.R. 3994, 77th Cong., 1st Sess. (1941); H.R. 7412, 77th Cong., 2d Sess. (1942); H.R. 1732, 78th Cong., 1st Sess. (1943); S. 2048, 78th Cong., 2d Sess. (1944); H.R. 2232, 79th Cong., 1st Sess. (1945); S. 101, S. 459, 79th Cong., 1st Sess. (1945); H.R. 5216, 79th Cong., 2d Sess. (1946); H.R. 2824, 80th Cong., 1st Sess. (1947); S. 984, 80th Cong., 1st Sess. (1947); H.R. 4453, 81st Cong., 1st Sess. (1949); S. 174, S. 1728, 81st Cong., 1st Sess. (1949); H.R. 6841, 81st Cong., 2d Sess. (1950); H.R. 552, H.R. 2092, 82d Cong., 1st Sess. (1951); S. 551, 82d Cong., 1st Sess. (1951); S. 3368, 82d Cong., 2d Sess. (1952); H.R. 647, H.R. 1253, 83d Cong., 1st Sess. (1953); S. 1, S. 692, 83d Cong., 1st Sess. (1953); H.R. 3306, H.R. 3393, 84th Cong., 1st Sess. (1955); S. 899, 84th Cong. 1st Sess. (1955); H.R. 10,968, 84th Cong., 2d Sess. (1956); H.R. 144, H.R. 3615, 85th Cong., 1st Sess. (1957); S. 506, 85th Cong., 1st Sess. (1957); H.R. 354, H.R. 908,

nell in the 81st Congress (1950) — the only antidiscrimination bill of this type to pass either house during this period — illustrates the contentious nature of the enforcement issue. The McConnell bill would have established a permanent Fair Employment Practice Commission that relied solely on the dissemination of information, the provision of technical assistance, and voluntary conciliation to achieve its objective of eliminating "discrimination because of race, creed, or color in employment relations."[33] In adopting this measure, the House rejected a stronger FEPC bill authored by future Education and Labor Committee Chairman Adam Clayton Powell, Jr. The Powell bill made it an "unlawful employment practice . . . to refuse to hire, to discharge, or otherwise to discriminate" in the terms of employment on the basis of "race, color, religion, ancestry or national origin."[34] The Powell bill also established a five-member FEPC to provide technical assistance and conciliation services and to receive and investigate individual charges of discrimination. Upon a finding of an unfair employment practice, the Commission would have had the power to issue cease and desist orders and to seek enforcement by the federal appellate courts. The House, not yet ready to create an enforcement mechanism against discriminatory employers, substituted the McConnell version for the more stringent Powell measure by a vote of 222 to 178.[35]

In the Senate, neither the companion measure to the Powell bill, introduced by Senator McGrath, nor the House-passed version of the McConnell bill ever received consideration on the merits as the Senate failed to invoke cloture to end a filibuster of the FEPC bill.[36] In that setting, the question of enforcement power was among the most divisive issues. Some Senators viewed an antidiscrimination commission with authority to compel employers to abide by equal employment opportunity guidelines as un-American.[37] Following the Senate's failure

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86th Cong., 1st Sess. (1959); S. 1999, 86th Cong., 1st Sess. (1959); H.R. 104, 87th Cong., 1st Sess. (1961); S. 1258, S. 1819, 87th Cong., 1st Sess. (1961); H.R. 10,144, 87th Cong., 2d Sess. (1962); H.R. 405, H.R. 3139, 88th Cong., 1st Sess. (1963); S. 1937, 88th Cong., 2d Sess. (1963); H.R. 7152, 88th Cong., 2d Sess. (1964); *see also* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

33. H.R. 6841, 81st Cong., 2d Sess. § 2(b) (1950).

34. H.R. 4453, 81st Cong., 1st Sess. § 5(a)(1) (1949) (as reported by the Committee on Education and Labor on Aug. 2, 1949).

35. 96 CONG. REC. 2253 (1950).

36. "The FEPC defeat came in the form of failure to adopt a proposal to limit debate on a motion to call up the FEPC bill. The vote was 52 for and 32 against. Since 64 favorable votes were needed to invoke cloture, this means that FEPC is dead for this session." *Senate in Mourning*, WASH. STAR, May 21, 1950 (editorial), *reprinted in* 96 CONG. REC. A3949 (1950) (remarks of Sen. Richard B. Russell).

37. A radio debate between Sen. Humphrey, an FEPC supporter, and Sen. Holland, an opponent, was reprinted in the *Congressional Record* at the request of Sen. Eastland. In response to the question "Do you support and advocate a voluntary [FEPC]?", Senator Holland responded that "you can't ram this kind of thing in America down the throats of the great majority of the States . . . . [T]hose powers of compulsion are foreign to and incompatible with the American system of law." Senator Humphrey responded that the FEPC legislation "carries with it, as all

to invoke cloture, the *Washington Star,* in an editorial opposing a compulsory FEPC, noted that "[n]o other issue had been so shot through with partisan politics as this one . . . ."[38] A *New York Times* editorial, on the other hand, emphasized that "some form of compulsion is required. . . . [C]ommon sense . . . indicates that the enforcement agency should be able to fall back on legal sanctions if its efforts at persuasion fail. There is no tyrannical power here, unless Congress and the Federal courts be viewed as instruments of tyranny."[39] This early debate foreshadowed disagreements that continue today.

B. *Judicial Enforcement as a Compromise*

Congress carried the strategy of attacking employment discrimination through conciliation and persuasion into the language of Title VII in 1964. In order to secure passage of an equal opportunity bill and avoid a filibuster in the Senate, supporters were forced to compromise.[40] The House Judiciary Committee reported an omnibus civil rights bill that included a title which established an Equal Employment Opportunity Commission to receive, issue, and investigate charges of discrimination.[41] Although the Commission could bring civil actions against violators, this option was available only after the Commission had failed to eliminate the discriminatory practice by "informal methods of conference, conciliation and persuasion."[42] As part of the trend toward limiting what opponents viewed as the potentially unchecked power of the new administrative agency,[43] the House bill as reported adopted this scheme in lieu of the model reported by the House Education and Labor Committee, which would have provided the Commission direct enforcement power in the form of cease and desist orders.[44] The full Judiciary Committee also rejected a proposal

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effective American law does, penalties for that recalcitrant antisocial minority which will not abide by the decision of the majority." 96 CONG. REC. A3025, A3028 (1950).

38. *Senate in Mourning, supra* note 36.

39. *The FEPC Bill,* N.Y. TIMES, May 10, 1950 (editorial), *reprinted in* 96 CONG. REC. A5144-45 (1950) (remarks of Rep. Adam C. Powell, Jr.).

40. [W]e are in a parliamentary situation where we do not dare adopt any amendment which has not received the categorical approval of Representative McCulloch.

If we should do so, we might be forced to go to conference. If the House would not accept the Senate amendments, and if the bill went to conference — that is, if the House should let it go there, we would then be faced with the threat of a second filibuster.

110 CONG. REC. 7215 (1964) (statement of Sen. Clark), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 3, at 3010.

41. EEOC LEGISLATIVE HISTORY, *supra* note 3, at 9-10, 2011-13.

42. H.R. 7152, §§ 707(a) & (b), *reprinted in* H.R. REP. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 3, at 2001, 2012.

43. Vaas, *supra* note 32, at 450-51 (referring to the "fear that the EEOC would develop into an extensive octopus like the NLRB").

44. HOUSE COMM. ON THE JUDICIARY, ADDITIONAL VIEWS OF HONORABLE GEORGE MEADER, H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 3, at 2043, 2057; *see also* Vaas, *supra* note 32, at 435.

reported by one of its own subcommittees that would have vested enforcement authority in one half of a bifurcated EEOC.[45] As indicated by committee member McCulloch:

> A substantial number of committee members . . . preferred that the ultimate determination of discrimination rest with the Federal judiciary. Through this requirement . . . settlement of complaints w[ould] occur more rapidly and with greater frequency. In addition . . . the employer or labor union w[ould] have a fairer forum to establish innocence . . . .[46]

Thus, the process of compromise regarding Title VII in the House was a movement toward curtailing the authority of the EEOC to act unilaterally against discriminatory employers.[47] Although a Commission member was empowered to file a charge, and the Commission could investigate and evaluate the reasonableness of the allegations and seek conciliation, it would not have the power to adjudicate the complaint and implement a remedy. Instead, the federal courts were designated as the fairer, more appropriate arbiters on the sensitive question of employment discrimination.

In the Senate, the House-passed omnibus civil rights bill was the subject of extended procedural and substantive wrangling. Concurrent with the Senate's debate on the bill, a bipartisan cadre of its supporters worked with the Department of Justice and key House members to reach an acceptable compromise. These negotiations resulted in a pair of substitute amendments offered by Senators Mansfield and Dirksen.[48] Described as "the most basic and far-reaching of all the Senate amendments,"[49] the revisions in the enforcement provisions further restricted the EEOC's role in ensuring compliance with the antidiscrimination law. The amendment eliminated the EEOC's ability to obtain court enforcement except when there was a pattern or

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45. "The subcommittee bill called for procedures before the newly created [EEO] board, followed by judicial review by the district courts . . . . The full committee substitute calls for proceedings by the Commission in the U.S. district courts . . . ." HOUSE COMM. ON THE JUDICIARY, MINORITY REPORT UPON PROPOSED CIVIL RIGHTS ACT OF 1963, H.R. REP. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 3, at 2062, 2087.

46. HOUSE COMM. ON THE JUDICIARY, ADDITIONAL VIEWS OF HONORABLE WILLIAM M. MCCULLOCH ET AL., H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2 (1963), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 3, at 2122, 2150.

47. For a view that this process was less one of compromise and more an exercise of sheer political power, see HOUSE COMM. ON THE JUDICIARY, ADDITIONAL INDIVIDUAL VIEWS OF HONORABLE WILLIAM C. CRAMER ON H.R. 7152, H. REP. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 3, at 2114, 2117 ("No purpose would be here served by a recitation of how the 'compromise' was drafted or who participated in it. Although I was a member of the subcommittee that considered the matter for months, I was not invited to participate nor was I informed of its contents until 10:30 p.m. when a Justice Department messenger delivered my copy on the Monday before the Tuesday meeting.").

48. Amend. No. 656, 88th Cong., 2d Sess., 110 CONG. REC. 11,926 (1964); Amend. No. 1052, 88th Cong., 2d Sess., 110 CONG. REC. 13,310 (1964); *see also* Vaas, *supra* note 32, at 445-46.

49. Vaas, *supra* note 32, at 452.

practice of resistance by an employer. In cases of individualized discrimination, the agency could do no more than seek conciliation.[50]

As congressional compromise diminished the EEOC's ability to secure compliance from violators, there was a concomitant increase in the individual complainant's role in enforcement. To assuage the concerns of critics who feared an EEOC with little accountability, legislators virtually eliminated the Commission from the enforcement process. Still requiring some enforcement mechanism to gain support from members of Congress who favored a strong EEOC, the negotiators deposited the burden of enforcement squarely on the complainant.[51] As part of the deal, procedures to facilitate claimants' ability to enforce their rights were added to the Senate bill. The bill authorized courts to appoint an attorney to represent the party aggrieved, to permit commencement of the action " 'without payment of fees, costs, or security,' " and to grant the prevailing party a reasonable attorney's fee and costs.[52] In addition, the Senate struck the House requirement that an individual obtain permission from one Commissioner to proceed in court.

As one commentator has noted, "[t]he most significant feature of the Title VII enforcement scheme is that it lodges the formal power of adjudication exclusively in the courts, rather than giving quasi-judicial power to an administrative agency."[53] Furthermore, as part of the final compromise, in individual cases only the person aggrieved may utilize this judicial enforcement mechanism; no one may sue on that person's behalf. Certainly such a scheme was not the first choice of either the opponents of Title VII, who would have preferred a strictly

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50. A staff member of the Senate Judiciary Committee summarized the change in a memorandum:

> The Senate amendment struck out the power of the [EEOC] to enforce this title of the bill in court suits. . . . Its function now is limited to an attempt at voluntary conciliation of alleged unlawful practices . . . . Under the Senate amendment only an aggrieved person can bring suit against an employer unless there is a pattern or practice of resistance . . . . The Commission cannot institute suit at all.

110 CONG. REC. 14,331 (1964) *quoted in,* Vaas, *supra* note 32, at 452.

51. George Rutherglen, *Title VII Class Actions,* 47 U. CHI. L. REV. 688, 691 (1980).

> This allocation of enforcement powers among administrative proceedings, public actions, and private suits was the result of a series of compromises that steadily diluted the power of the EEOC to prosecute and decide cases, and steadily strengthened the power of private individuals to sue and of federal judges to adjudicate.

Id. at 692.

52. Vaas, *supra* note 32, at 453. These provisions were "part of the price which had to be paid to secure bipartisan agreement on striking out the power of the EEOC to enforce Title VII by court action." *Id.* at 454; *see* Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964,* 32 U. CHI. L. REV. 430, 433 (1965) ("The leadership compromise completed the attenuation of the Commission by divesting it of all enforcement power and denying it access to the courts, but in return every grievant was granted the opportunity to seek redress in the federal courts."). For a discussion of the anticipated impact of provision of attorney's fees, see R. Wayne Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies,* 7 B.C. INDUS. & COM. L. REV. 495, 501-06 (1966).

53. Walker, *supra* note 52, at 495 (footnotes omitted).

voluntary employment discrimination plan, or of the proponents, who might have opted for a strong EEOC with authority to adjudicate claims and issue cease and desist orders. Nevertheless, the individual's ability to press his or her claim in court was central to the reaching of a ceasefire in the 534-hour Senate battle over the bill[54] and ultimately to passage of the Civil Rights Act of 1964. As the linchpin in this elaborate compromise, preservation of complainants' access to court remains a central tenet of Title VII and must be borne in mind even as the statute is interpreted almost three decades later.

C. *"In Writing Under Oath"*

In contrast to the extensive legislative history documenting the evolution of the Title VII enforcement provisions, the information available regarding the impetus for the section 706(a) requirement that a charge of discrimination be submitted "in writing under oath"[55] is sparse. Fair Employment Practices legislation introduced prior to 1948 utilized language such as "[w]henever it is alleged,"[56] "[w]henever the committee has reason to believe,"[57] or "[w]henever it is charged"[58] to describe the manner in which enforcement proceedings would be initiated. In 1947, however, members of the 80th Congress introduced changes in the language in FEPC bills to require that a charge be filed under oath. First included in a bill introduced by Senator Ives of New York on March 27, 1947,[59] members of Congress carried this concept forward through the intervening sixteen years[60] and utilized it in Title VII as enacted.

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54. "After 534 hours, one minute and thirty-seven seconds, the Senate voted cloture." Chambers & Goldstein, *supra* note 2, at 12.

55. Civil Rights Act of 1964, § 706(a), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 3, at 1011 (codified as amended at 42 U.S.C. § 2000e-5(b) (1988)).

56. S. 101, 79th Cong., 1st Sess. § 10(b) (1945).

57. H.R. 1732, 78th Cong., 1st Sess. § 5.2 (1943).

58. S. 2048, 78th Cong., 2d Sess. § 10(b) (1944).

59. S. 984, 80th Cong., 1st Sess. § 7(a) (1947).

60. *See, e.g.*, H.R. 4453, 81st Cong., 1st Sess. § 7(b) (1949) ("[w]henever a sworn written charge has been filed"); S. 174, 81st Cong., 1st Sess. § 7(a) (1949) (same); S. 1728, 81st Cong., 1st Sess. § 7(b) (1949) (same); H.R. 552, 82d Cong., 1st Sess. § 7(b) (1951) (same); H.R. 2092, 82d Cong., 1st Sess. § 7(a) (1951) (same); S. 551, 82d Cong., 1st Sess. § 7(a) (1951) (same); S. 3368, 82d Cong., 2d Sess. § 7(b) (1952) (same); H.R. 647, 83d Cong., 1st Sess. § 7(b) (1953) (same); H.R. 1253, 83d Cong., 1st Sess. § 7(b) (1953) (same); S. 692, 83d Cong., 1st Sess. § 7(b) (1953) (same); H.R. 3306, 84th Cong., 1st Sess. § 7(a) (1955) (same); H.R. 3393, 84th Cong., 1st Sess. § 7(b) (1955) (same); S. 899, 84th Cong., 1st Sess. § 7(b) (1955) (same); H.R. 1096, 84th Cong., 2d Sess. § 7(b) (1956) (same); H.R. 144, 85th Cong., 1st Sess. § 7(b) (1957) (same); H.R. 3615, 85th Cong., 1st Sess. § 7(b) (1957) (same); S. 506, 85th Cong., 1st Sess. § 7(b) (1957) (same); H.R. 354, 86th Cong., 1st Sess. § 7(b) (1959) (same); H.R. 908, 86th Cong., 1st Sess. § 7(b) (1959) (same); S. 1999, 86th Cong., 1st Sess. § 7(b) (1959) (same); H.R. 104, 87th Cong., 1st Sess. § 7(b) (1961) (same); S. 1258, 87th Cong., 1st Sess. § 7(b) (1961) (same); S. 1819, 87th Cong., 1st Sess. § 7(b) (1961) (same); H.R. 10144, 87th Cong., 2d Sess. § 9(a) (1962) ("[w]henever it is charged in writing under oath"); H.R. 7152, 88th Cong., 1st Sess. § 707(a) (1963) (as reported with amendments by House Committee on the Judiciary) (same).

The source of the oath requirement appears to have been the New York state FEPC law with which Senator Ives had been strongly associated as a member of the New York State Assembly and upon which he had modeled his Senate legislation.[61] The New York "Law Against Discrimination," which was enacted in 1945, created a state agency "with power to eliminate and prevent discrimination in employment because of race, creed, color or national origin."[62] Under the New York law, "[a]ny person claiming to be aggrieved by an alleged unlawful employment practice may . . . make, sign and file with the commission a verified complaint in writing."[63] The adoption of the oath from the New York law was likely in response to objections by opponents of a fair employment bill in the 79th Congress that authorized a Fair Employment Practice Commission to act "[w]henever it is *alleged* that any person has engaged in any such unfair employment practice."[64] During a filibuster of that bill, Senator Olin Johnston of South Carolina, after quoting this section of the bill, commented: "Senators will notice the word 'alleged.' When newspapers start to say something about me down home which they might not be able to prove, they just start by saying, 'It is alleged that Olin Johnston did so and so.' . . . It is easy to allege something."[65] In the following Congress, when the Committee on Labor and Public Welfare reported Senator Ives' bill, the report stated:

> Critics of earlier legislation prohibiting discrimination in employment laid much stress on the alleged procedural weaknesses of those bills. S. 984 seeks to provide every possible protection for those coming under its jurisdiction. . . .
>
> . . . [I]t sets up safeguards against irresponsible complaints by limiting the period within which complaints may be filed [and] by requiring that a sworn written charge be filed . . . .[66]

From these sparse legislative clues, it appears that Senator Ives included the oath requirement to preclude opponents from raising the specter of frivolous claims. Because Senator Johnston did not offer any evidence that the complaint process had been misused under existing state FEPC laws, it is uncertain whether this objection was raised out of genuine concern or as a simple political diversion. It is similarly unclear whether legislators considered the oath requirement an essential aspect of the Commission's administrative procedures or

61. "The FEPC law in New York is better known as the Ives-Quinn law, bearing the name of that fine Republican gentleman, Irvin Ives, who was since elected junior United States Senator from the State of New York . . . ." 94 CONG. REC. 9532 (1948) (statement of Rep. Multer).

62. Law Against Discrimination, ch. 118, § 125, 1945 N.Y. Laws 457, 458.

63. Law Against Discrimination, ch. 118, § 132, 1945 N.Y. Laws 457, 461.

64. S. 101, 79th Cong., 1st Sess. § 10(b) (1945) (emphasis added).

65. 92 CONG. REC. 395 (1946).

66. S. REP. NO. 951, 80th Cong., 2d Sess. 11-12 (1948).

instead viewed it as an expedient and seemingly harmless way of quashing one of the many criticisms produced by FEPC opponents.

The inclusion of a requirement that a charge be filed under oath was carried over from this early legislation to most subsequent FEPC legislation. Although commentators have noted that "[s]eldom has similar legislation been debated with greater consciousness of the need for 'legislative history,' or with greater care in the making thereof, to guide the courts in interpreting and applying the law,"[67] nothing in the congressional debates over Title VII indicates the significance of the oath requirement.

On July 29, 1966, the EEOC first promulgated regulations that some courts[68] perceive as conflicting with the oath requirement contained in the language of the Title VII statute.[69] The relevant regulations permit submission of timely unsworn complaints provided that claimants subsequently verify them. "The purpose of this amendment [to the Title VII regulations] is to describe more clearly the present Commission policy with respect to the filing and amendment of charges . . . ."[70] Evidently, the EEOC had consistently accepted subsequently verified unsworn complaints as valid charges since the enactment of Title VII. This regulation has been operative since promulgated and Congress has never required the EEOC to conform to the apparent statutory requirement that charges be filed in writing under oath.

Examination of relevant parts of Title VII's lengthy legislative history reveals a movement from efforts to encourage voluntary compliance with nondiscrimination laws to a system which mandates equal employment opportunity. At the same time, the Act's enforcement procedures shifted away from a soon-to-be-established administrative agency and into the hands of the judiciary. In the end, Congress created an agency obligated to protect the right to a discrimination-free workplace but wholly lacking the power necessary to effectuate this policy. This system could function only if the drafters expected dissatisfied complainants — private litigants — to shoulder much of the burden of enforcing Title VII.[71]

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67. Vaas, *supra* note 32, at 444. Because the House-passed bill, H.R. 7152, was not referred to a Senate Committee, there was no Senate report or opportunity to clarify troubling provisions; therefore legislative history created during floor debate was particularly important in expressing the Senate's intent regarding the bill.

68. *See infra* section II.A.

69. 31 Fed. Reg. 10,269 (1966).

70. *Id.*

71. Note, *Protection from Employer Retaliation: A Suggested Analysis for Section 704(a)*, 65 VA. L. REV. 1155, 1155 n.2 and accompanying text (1979) ("Title VII places major responsibility for enforcing compliance with its policies, through either formal or informal conciliation, on the individual complainant.").

II. JUDICIAL INTERPRETATION OF THE OATH REQUIREMENT

With varying degrees of success, the federal courts have grappled with the problem of reconciling the language of Title VII and the EEOC's regulations. This Part describes and critiques the three approaches that the federal courts have taken in interpreting the section 706(b) oath requirement when that interpretation is determinative of whether an individual may pursue her claim in court.[72] Section II.A discusses those courts that have given no weight to the EEOC's regulations and have instead strictly enforced the statutory oath requirement. Section II.B examines the increasing number of courts that emphasize the remedial nature of Title VII by treating an intake questionnaire as a valid charge for the purposes of fulfilling the filing limitations period. Section II.C analyzes a final group of courts that view an intake questionnaire as sufficient to meet the timely filing requirement if the EEOC treats the questionnaire in the manner it would a valid charge. Section II.D concludes that the second group of decisions, which has adopted the "Remedial Approach,"[73] best serves the goals of Title VII.

A. *No Oath, No Charge*

The Fourth Circuit and some district courts of Massachusetts, Virginia, and Illinois have held that section 706(b)'s requirement that charges be filed in writing under oath "is cast in mandatory terms"[74] and therefore an unsworn intake questionnaire is insufficient to satisfy the filing limitations period. While offering differing rationales for their unwillingness to examine the language of the statute more than superficially, each court applied the provision in a mechanical fashion without regard to important underlying goals of Title VII. In *EEOC v. Appalachian Power Co.*,[75] an EEOC Commissioner filed a charge without obtaining verification.[76] The district court dismissed the case on the ground that the unsworn charge was invalid and thus the

72. *See* 4 Empl. Discrimination Coordinator (Research Inst. Am.), ¶ 46,245 (Apr. 16, 1991) (describing the split among courts on treatment of subsequently verified intake questionnaires).

73. *See infra* section II.B.

74. EEOC v. Appalachian Power Co., 568 F.2d 354, 355 (4th Cir. 1978).

75. 568 F.2d 354 (4th Cir. 1978).

76. Although this case involved a charge filed by a Commissioner rather than one filed by a private plaintiff, the reasoning is relevant because the 1972 amendments to Title VII extended the oath requirement to the Commission. Prior to the 1972 amendments, the statute authorized a Commissioner to file a charge of discrimination only when "he has reasonable cause to believe a violation of this title has occurred." Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259 (amended 1972). The 1972 amendments eliminated this distinction between Commission charges and private charges. As interpreted by the Supreme Court in EEOC v. Shell Oil Co., 466 U.S. 54, 76 (1984), "[t]he only plausible explanation for that change is that Congress wished to place a Commissioner on the same footing as an aggrieved private party: neither was held to any prescribed level of objectively verifiable suspicion at the outset of the enforcement procedure."

EEOC and the court lacked jurisdiction.[77] Rejecting an examination of legislative history, the district court stated "the language [of the statute] is plain and unambiguous," and indicated that "to dilute the oath requirement and hold it only directory . . . would be tantamount to ignoring the congressional language."[78] The Fourth Circuit affirmed the dismissal.[79]

By truncating its analysis at this point, the *Appalachian Power* court ignored an emerging body of law holding that Title VII should be liberally interpreted to effectuate an underlying policy of nondiscrimination. As stated by the Fifth Circuit:

> Title VII of the Civil Rights Act provides a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics.[80]

Subsequent to *Appalachian Power,* the Supreme Court repeatedly emphasized that Title VII should be construed broadly to carry out congressional intent to eradicate employment discrimination.[81] Rather than seeking to interpret the statutory language to effectuate congressional goals[82] or relying on the EEOC's regulations, the *Appalachian*

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77. EEOC v. Appalachian Power Co., 13 Fair Empl. Prac. Cas. (BNA) 1294, 1295-96 (W.D. Va. 1976). This case occurred prior to the Supreme Court's decision in Zipes v. Trans World Airlines, 455 U.S. 385 (1982), which established that the filing of a valid, timely charge is not a jurisdictional requirement but instead operates like a statute of limitations which is subject to equitable tolling. 455 U.S. 385, 393 (1982). The reasoning of the court remains relevant because post-*Zipes* courts have applied it in dismissing cases (though not on jurisdictional grounds).

78. *Appalachian Power Co.,* 13 Fair Empl. Prac. Cas. (BNA) at 1295.

79. EEOC v. Appalachian Power Co., 568 F.2d 354, 355 (4th Cir. 1978).

80. Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970), *quoted in* Douglas A. Schaaf, *Title VII — Timely Filing Requirement in Deferral States Is Satisfied When the Initial Complaint Is Received by the EEOC Within the 300-Day Limitation of 706(e),* 55 NOTRE DAME LAW. 396, 405 n.44 (1980); *see also* Love v. Pullman Co., 404 U.S. 522 (1972); Chambers & Goldstein, *supra* note 2, at 14 n.36 and accompanying text ("In short, the courts treated Title VII as a broad remedial statute designed to change fundamentally the patterns of employment discrimination which had become ossified in the labor market."). *But cf.* Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 150 (1984) (holding that there is "no satisfactory basis for giving Title VII actions a special status under the [Federal] Rules of Civil Procedure").

81. *See, e.g.,* Zipes v. Trans World Airlines, 455 U.S. 385, 398 (1982) ("[W]e honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer."); Mohasco Corp. v. Silver, 447 U.S. 807, 818 (1980) ("It is unquestionably true that the 1964 statute was enacted to implement the congressional policy against discriminatory employment practices, and that that basic policy must inform construction of this remedial legislation.") (footnote omitted).

82. In Love v. Pullman, 404 U.S. 522 (1972), the Supreme Court approved an EEOC procedure whereby after receiving a written charge, the EEOC orally referred it to a state agency, "and then formally filed once the state agency indicated that it would decline to take action," without the benefit of an additional written charge. 404 U.S. at 525. The Court, in an effort to provide broad coverage, reasoned that nothing in the statutory language precluded the interpretation advanced by the plaintiff: "Nothing in [Title VII] suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself, nor is there any requirement that the complaint to the state agency be made in writing rather than by oral referral." 404 U.S. at 525. The same reasoning could have been applied in

Power court enforced the statute in a formalistic manner.

Turning a similarly deaf ear to the Supreme Court's statements that Title VII be liberally construed, the district court of Massachusetts, in *Hamel v. Prudential Insurance Co.*,[83] rejected the plaintiff's argument that a timely filed intake questionnaire was adequate to preserve her right to file in court, stating that "[a]ny suggestion that th[e] distinction [between an unsworn intake questionnaire and a charge filed under oath] is formalistic tends to ignore the significance of a perjury conviction."[84] By use of the inflammatory term *perjury,* the court shifted the focus of Title VII from protecting employees from discrimination to protecting employers from employees and employees from themselves. The court ignored longstanding EEOC regulations that provide for verification of a charge subsequent to its filing, thus reducing the risk of perjury while preserving the victim's cause of action. After rejecting several other arguments,[85] the *Hamel* court granted defendant's motion for summary judgment. Sensitive to the disproportionately severe consequences of its rigid interpretation of Title VII, the court defensively commented that "[q]uestions of 'technicality' go to enactment, not interpretation."[86] This finger-pointing, however, did little to mask the fact that the court declined to follow the Supreme Court's lead in interpreting Title VII in light of its underlying goals. Instead, the court seemed to indicate it would interpret the statute literally until Congress made explicit its apparent intent that the oath requirement, like the rest of Title VII, be liberally construed.

The District Court for the Northern District of Illinois has taken a similarly rigid approach. In a series of cases with influence outside the Seventh Circuit,[87] most notably *Proffit v. Keycom Electronic Publish-*

Appalachian Power because § 706(b) does not indicate when in the filing process a charge must be verified.

83. 640 F. Supp. 103 (D. Mass. 1986).

84. *Hamel,* 640 F. Supp. at 105.

85. The court rejected the plaintiff's claim that the filing period should be equitably tolled due to administrative error and delay by the EEOC in sending her the charge. Noting that the plaintiff was represented by counsel and that she had waited seven months before completing an intake questionnaire, the court determined that tolling would be inappropriate, though it might have been proper if plaintiff had proceeded pro se. 640 F. Supp. at 105. The court also found that even if the intake questionnaire were deemed a charge, the claim would not have been timely due to the failure to file with the Massachusetts Commission Against Discrimination, a prerequisite for obtaining the 300-day federal filing period. 640 F. Supp. at 105-07.

86. 640 F. Supp. at 107.

87. *See, e.g.,* Sparkman v. Combined Intl., 690 F. Supp. 723 (N.D. Ill. 1988); Proffit v. Keycom Elec. Publishing, 625 F. Supp. 400 (N.D. Ill. 1985); Austin v. Russell County Sch. Bd., Fair Empl. Prac. Cas. (BNA) 1749, 1750 (W.D. Va. 1990) (citing *Sparkman* in support of the statement that "a signed intake questionnaire is not a writing under oath"); Graf v. K-Mart Corp., 50 Fair Empl. Prac. Cas. (BNA) 1370, 1373 n.5 (W.D. Pa. 1989) (citing *Proffit* for the proposition that "an intake questionnaire is not the same as an EEOC charge"); Buffington v. General Time Corp., 677 F. Supp. 1186, 1193 (M.D. Ga. 1988) (relying on *Proffit* for the proposition that a "[q]uestionnaire does not constitute a sufficient 'charge' "); Hamel v. Prudential Ins.

ing[88] and *Sparkman v. Combined International,*[89] several judges of the district court for the Northern District of Illinois have explicitly rejected the EEOC's regulations permitting subsequent verification of a timely intake questionnaire, finding that they exceed the authority of the underlying statute.[90] Faced with a situation in which the individual employee plaintiff filed a claim ten days after the statute had run, even though the EEOC had sent her the charge for signature more than two months earlier, the *Proffit* court stated that if the plaintiff had acted promptly, it might have been more inclined to "stretch the meaning of a 'charge' to include an Intake Questionnaire."[91] In *Sparkman,* EEOC employees wrongly led the plaintiff to believe her questionnaire was sufficient to initiate formal proceedings. The court, while noting the harsh result of its decision, seemed to agree with the *Proffit* court that the Title VII statute "gives [the] EEOC the power to prescribe [only] the *informational content* and *form* of the sworn charge,"[92] stating that " 'implementing regulations or administrative procedures cannot override their authorizing statute.' "[93] Thus, the regulations permitting amendment were unenforceable and a subsequently filed sworn charge was ineffective to rescue her claim.

The application of the *Proffit* reasoning to the *Sparkman* facts demonstrates one shortcoming of this formalistic interpretation of the section 706(b) oath provision. *Proffit,* while establishing a rule that the EEOC's regulations are unenforceable, implied that on different facts it might react more sympathetically. The *Sparkman* court, faced with such sympathetic facts, strictly applied the *Proffit* ruling and declined to address the merits of the claim. Neither case accounts for the remedial intent of Title VII or acknowledges the deference arguably due the EEOC's regulations.[94] Although the Seventh Circuit re-

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Co., 640 F. Supp. 103, 105 (D. Mass. 1986). The *Hamel* court approved of the statement in *Proffit* that Casavantes v. California State Univ., Sacramento, 732 F.2d 1441 (9th Cir. 1984), *see infra* notes 115-18 and accompanying text, is "unpersuasive and another hard case making bad law."

88. 625 F. Supp. 400 (N.D. Ill. 1985).

89. 690 F. Supp. 723 (N.D. Ill. 1988).

90. *See* Mason v. Harris Trust & Sav. Bank, 46 Fair. Empl. Prac. Cas. (BNA) 1310, 1312 (N.D. Ill. 1987) ("[E]ven if the EEOC considered the Intake Questionnaire to be a charge, the EEOC has no authority to dispense with the statutorily mandated oath."); *Sparkman,* 690 F. Supp. at 724) ("[I]rrespective of EEOC's administrative view of the intake questionnaire, it does not satisfy the controlling statutory definition.") (quoting *Proffit,* 625 F. Supp. at 403); *Proffit,* 625 F. Supp. at 403 ("First, of course, there is the fundamental principle that implementing regulations or administrative procedures cannot override their authorizing statute."); *see also* Ferch v. Syncor Intl. Corp., 56 Fair Empl. Prac. Cas. (BNA) 876 (N.D. Ill. 1990).

91. *Proffit,* 625 F. Supp. at 405.

92. *Proffit,* 625 F. Supp. at 403.

93. *Sparkman,* 690 F. Supp. at 724 (quoting *Proffit,* 625 F. Supp. at 403).

94. *See* EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) ("[I]t is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one . . . . Rather, the EEOC's interpretation of ambiguous language need

cently rejected the position taken by its district courts,[95] whether this rejection will diminish the attractiveness of their reasoning to courts outside the Seventh Circuit that previously had adopted the Northern District of Illinois' position[96] remains to be seen.

A more flexible interpretation of the oath requirement need not undermine congressional concern for protecting employers from frivolous or untimely claims. For instance, the District Court for the Western District of Virginia granted defendant's motion for summary judgment in *Austin v. Russell County School Board.*[97] The plaintiff in *Austin* failed to file a timely charge even though the EEOC repeatedly informed her that her intake questionnaire and correspondence were insufficient to initiate proceedings against her former employer. Although the EEOC sent the plaintiff a confidential affidavit which would have functioned as her sworn statement, she never returned it.[98] Further, the court's opinion suggests that she never submitted any type of sworn document.[99] In refusing to treat the signed questionnaire as a formal charge, the court cited *Appalachian Power, Hamel,* and *Sparkman,* and stated that it declined to "encourage such blatant disregard for the law as exercised by the plaintiff."[100] Finding further that the plaintiff's employer did not mislead her as to the cause of her discharge, the court rejected her claim that the filing period should be tolled. A policy permitting subsequent verification, as allowed by the EEOC's regulations, would not save a claimant in this situation. Title VII clearly demands that a claimant ultimately swear to a charge and on these facts the court's expressed concern is valid. The strict rule it applied, however, may be misused if a clearer policy or rule is not articulated.

These courts, categorized as the "No Oath, No Charge" group, fail to accommodate the dominant view that Title VII be liberally construed in favor of alleged victims of employment discrimination.[101] Both the Supreme Court and its observers have arrived at the conclu-

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only be reasonable to be entitled to deference."); *see also* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Udall v. Tallman, 380 U.S. 1, 16 (1965).

95. The district court decisions hold that the statute requires that a complaint be in writing and under oath or affirmation before it can be considered a charge for purposes of Title VII. Therefore, those courts have held that the EEOC is exceeding the authority of the statute in allowing a written statement to constitute a charge for purposes of the time bar before the statement is verified by oath or affirmation. . . . We . . . hold that an intake questionnaire which is later verified *may be* sufficient to constitute a charge in some circumstances.

Philbin v. General Elec. Capital Auto Lease, Inc., 929 F.2d 321, 323 (7th Cir. 1991) (emphasis added). *Philbin* is discussed at greater length in section II.C. *See infra* notes 128-30 and accompanying text.

96. See cases cited *supra* note 87.

97. 53 Fair Empl. Prac. Cas. (BNA) 1749 (W.D. Va. 1990).

98. *Austin,* 53 Fair Empl. Prac. Cas. at 1749.

99. 53 Fair Empl. Prac. Cas. at 1750.

100. 53 Fair Empl. Prac. Cas. at 1750.

101. *See supra* notes 80-81 and accompanying text.

sion that Title VII is to be interpreted in a flexible manner to facilitate the congressional goal of "assur[ing] equality of employment opportunities" and "eliminat[ing] . . . discriminatory practices and devices."[102] This underlying belief has led the courts to opt repeatedly for a less technical interpretation of the statute's intricate filing procedures. The Supreme Court noted in *Love v. Pullman Co.*[103] that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[104] In light of these firm statements that Title VII is "a remedial statute to be liberally construed in favor of the victims of discrimination,"[105] an interpretation that would bar a claim because it was signed but unverified at the time of filing is too exacting. The filing procedure should comply with the intent of the Act[106] rather than serve only the letter of the law. Furthermore, an interpretation that unduly inhibits the ability of complainants to pursue their claims in court undermines the private enforcement component of Title VII, which was essential to the compromise that ultimately led to its enactment.[107]

B. *The Remedial Approach*

In stark contrast to the approach taken by the courts discussed in section II.A, a second group of courts represented by the Fifth,[108] Sixth,[109] Ninth, and Tenth Circuits has relied on the underlying remedial intent of Title VII by permitting plaintiffs who filed timely intake questionnaires to pursue their claims in court despite verification subsequent to the expiration of the filing limitations period. In an early case, *Weeks v. Southern Bell Telephone & Telegraph Co.*,[110] the Fifth Circuit noted:

> "The legislative history is silent on the requisites of the charge. . . . It is in keeping with the purpose of the Act to keep the procedures for initiating action simple. . . . All that is required is that it give sufficient information to enable EEOC to see what the grievance is all about."[111]

The court reasoned further that the purpose of the procedural require-

102. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

103. 404 U.S. 522 (1972).

104. *Love*, 404 U.S. at 527.

105. Mahroom v. Hook, 563 F.2d 1369, 1375 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978).

106. *See Love*, 404 U.S. at 525 (1972) (holding that the filing procedure followed fully complied with the *intent* of the Act).

107. *See supra* section I.B.

108. The Fifth Circuit subsequently shifted its reasoning from relying exclusively on the remedial intent of Title VII to an approach that also considers the EEOC's treatment of the unverified charge. *See infra* notes 131-32 and accompanying text.

109. *See infra* note 112 and accompanying text.

110. 408 F.2d 228 (5th Cir. 1969).

111. *Weeks*, 408 F.2d at 231 (quoting Jenkins v. United Gas Corp., 400 F.2d 28, 30 n.3 (5th Cir. 1968)).

ments is to protect employers from frivolous charges and that such protection is provided because "unsworn charges are not served upon respondents and . . . the investigation does not commence until a sworn charge is served."[112] The *Weeks* court recognized the importance of keeping procedures for initiating action simple in a setting in which complainants typically will proceed pro se.[113] The court also recognized Congress' competing interests in facilitating resolution of employment discrimination claims and protecting employers from unfounded claims.[114]

In *Casavantes v. California State University, Sacramento,*[115] the Ninth Circuit relied heavily on the proposition that " '[t]he Equal Employment Opportunity Act is a remedial statute.' "[116] It concluded that the plaintiff's intake questionnaire filed 248 days after the alleged discriminatory act, "in the context of both the amendment procedures and the liberality to be ascribed to the procedural requirements, is sufficient to constitute a charge."[117] The court noted further that the completed intake questionnaire provided sufficient information to meet the requirements of the EEOC's regulations which allow for subsequent amendment and verification. Acknowledging the need to balance the interests of employers with those of the claimants, the court stated that "[t]he charge intake process is principally designed to facilitate the processing of valid charges while screening out invalid charges at the earliest possible time."[118]

To achieve both goals identified by the *Casavantes* court, the largest reasonable number of charges should be permitted to reach the investigation stage because it is the earliest point at which the validity of most claims may be assessed. Requiring an oath significantly earlier than the investigation stage prematurely narrows the complaint intake funnel and needlessly screens out valid claims.

The Tenth Circuit, in *Peterson v. City of Wichita,*[119] relied heavily on EEOC implementing regulations that permit amendment of a charge "to cure technical defects or omissions, including failure to verify the charge."[120] The court stated that "the EEOC's interpretation

112. 408 F.2d at 231. The Sixth Circuit employed similar reasoning in Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 357 (6th Cir. 1969). The court concluded that congressional intent that verification of charges prevent harassment of employers by reckless charges may be served by requiring verification prior to EEOC action, but after the statutory filing period has run. *See also* EEOC v. Dillard Dept. Stores, Inc., 768 F. Supp. 1247, 1252 (W.D. Tenn. 1991).

113. 408 F.2d at 231.

114. 408 F.2d at 231.

115. 732 F.2d 1441 (9th Cir. 1984).

116. *Casavantes,* 732 F.2d at 1442 (quoting Mahroom v. Hook, 563 F.2d 1369, 1375 (9th Cir. 1977), *cert. denied,* 436 U.S. 904 (1978)).

117. 732 F.2d at 1443.

118. 732 F.2d at 1442.

119. 888 F.2d 1307 (10th Cir. 1989).

120. 29 C.F.R. § 1601.12(b) (1988), *cited in Peterson,* 888 F.2d at 1308.

of Title VII is entitled to deference if it is reasonable."[121] Ultimately, like the *Casavantes* court, the Tenth Circuit concluded that "the regulation does not frustrate the purpose of the verification requirement, which is to protect an employer from frivolous claims, because the EEOC does not proceed to investigate a charge until it is verified."[122]

This Remedial Approach, adopted by a number of circuits,[123] pays appropriate deference to the well-recognized congressional intent to eradicate employment discrimination. As Justice O'Connor has instructed, deference to the EEOC's interpretation of its authorizing statute is proper when "technical issue[s] of agency procedure" arise.[124] In addition, unlike the No Oath, No Charge group, this position seeks to strike a balance between the goal of affording broad relief under Title VII and the competing need to protect employers from unnecessary, frivolous claims. Congress should strengthen this position further by amending the statute to coincide explicitly with the EEOC's regulations.

C. *The EEOC Watchers*

The final group of courts, which includes the Fifth[125] and Seventh Circuit Courts of Appeals and some district courts of Pennsylvania and Georgia, finds the EEOC's treatment of an individual intake questionnaire determinative of whether it later may be viewed as a charge for purposes of meeting the filing limitation period. Only where the EEOC treats an intake questionnaire as it would an actual charge will these courts accord it this status. These courts, some of which claim to follow the Remedial Approach,[126] in fact reason that the EEOC's acceptance of an intake questionnaire as a charge waives the requirement that a formal timely charge be submitted.[127] Among the factors courts have considered in determining the status of a filing is whether or not the EEOC assigned a charge number to the case upon receipt of the intake questionnaire or notified the employer that a charge had been filed against it.

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121. 888 F.2d at 1309.

122. 888 F.2d at 1309.

123. *See supra* text accompanying notes 108-09.

124. EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 125 (1988) (O'Connor, J., concurring in part and concurring in the judgment).

125. *See supra* note 108.

126. *E.g.*, Price v. Southwestern Bell Tel. Co., 687 F.2d 74, 78-79 (5th Cir. 1982) (stating that "[c]onsistent with the remedial purposes underlying Title VII, we construe employment discrimination charges with the 'utmost liberality,' " but finding also that the EEOC's treating the unverified complaint as a charge "is relevant"); *see infra* text accompanying note 132.

127. *E.g.*, Choate v. Caterpillar Tractor Co., 402 F.2d 357, 360 (7th Cir. 1968) ("If the Commission undertakes to process a charge which is not 'under oath' we perceive no reason why the district court should not treat the omission of the oath as a permissive waiver by the Commission.").

In *Philbin v. General Electric Capital Auto Lease, Inc.*,[128] the Seventh Circuit invoked the reasoning of the Remedial Approach to conclude that a subsequently verified intake questionnaire may *in some situations* be considered a valid charge.[129] In determining that the *Philbin* case was one of those situations, the court found that "the Intake Questionnaire was treated as a charge by Philbin and the EEOC. . . . The EEOC accepted the questionnaire and note and assigned a charge number to the claim. . . . [T]he EEOC then notified Philbin's employer that a charge had been filed against it."[130]

Similarly, in *Price v. Southwestern Bell Telephone Co.*,[131] the Fifth Circuit stated:

> The fact that the Commission, at least at the initial stage of the proceedings, considered the circumstances surrounding the receipt of Price's complaint sufficient to initiate the administrative process [including issuing an official notice of charge to Bell], is relevant to the determination whether the interview [with an Equal Opportunity Specialist] and completion of Form 283 [Intake Questionnaire] constitutes a 'charge' within the meaning of the statute . . . ."[132]

In each of these cases, the EEOC's treatment of the intake questionnaire was essential to the court's conclusion that the questionnaire could fulfill the charge requirement.

Applying a similar rule to reach a different outcome, the District Court for the Eastern District of Pennsylvania, in *Berger v. Institute of Pennsylvania Hospital*,[133] relied on the fact that the EEOC did not notify the plaintiff's employer that a charge had been filed against it upon receipt of the timely but unverified intake questionnaire, but instead waited until the plaintiff filed an untimely sworn charge to send notice to the employer.[134] The *Berger* court distinguished *Price* on the basis that "the EEOC used [the information submitted by Price] to send an official notice of charge to the employer/defendant."[135]

Examining the EEOC's view of an intake questionnaire in a different light, in *Buffington v. General Time Corp.*,[136] the District Court for the Middle District of Georgia relied on the distinction the EEOC has drawn between an intake questionnaire and a charge of discrimination in determining that a timely questionnaire could not satisfy the filing

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128. 929 F.2d 321 (7th Cir. 1991).

129. *Philbin*, 929 F.2d at 323.

130. 929 F.2d at 324.

131. 687 F.2d 74 (5th Cir. 1982).

132. *Price*, 687 F.2d at 78-79; *see also* EEOC v. Calumet Photographic, Inc., 687 F. Supp. 1249, 1252 (N.D. Ill. 1988) ("where the EEOC considers a private party's filing to be a charge, the filing *is* a charge which tolls the statute").

133. No. 88-6650, 1989 U.S. Dist. LEXIS 4956 (E.D. Pa. May 8, 1989).

134. *Berger*, 1989 U.S. Dist. LEXIS 4956, at *2.

135. *Berger*, 1989 U.S. Dist. LEXIS 4956, at *4.

136. 677 F. Supp. 1186 (M.D. Ga. 1988).

requirement.[137] The court cited an EEOC regulation[138] that states that the EEOC shall receive information from any person, but "[w]here the information discloses that a person is *entitled to file a charge with the Commission,* the appropriate officer shall render assistance in the filing of a charge,"[139] as evidence that the EEOC viewed the questionnaire and the charge as distinct in both purpose and form.

While providing a more flexible standard in keeping with the intent of the statute, the approach of the "EEOC Watchers" provides little certainty and creates opportunities for uneven enforcement. The decision of an individual Intake Equal Opportunity Specialist to assign a charge number or notify an employer upon receipt of an intake questionnaire, rather than to place the questionnaire in an appropriate suspension file or await submission of a formal charge, should not determine whether a claimant receives a hearing on the merits. By adopting the views of the EEOC on a claim-by-claim basis, the courts defer to the individual judgment of hundreds of EEOC employees across the nation. Variations in procedure and exercise of reasonable discretion are unavoidable in a decentralized agency[140] which handles the enormous volume of complaints received by the EEOC. The problem is caused not so much by the EEOC's handling of complaints but by the inordinate significance the courts lodge in the actions of Commission personnel. Finally, a court's use of one EEOC regulation to deny enforcement of another is an equally haphazard way of resolving claims.

D. *Summary*

Currently, the courts utilize three overlapping approaches to determine whether a timely filed intake questionnaire may satisfy the statutory requirement that a charge of discrimination be filed under oath. Although none of these methods is flawless, the failure of the No Oath, No Charge group to accommodate the strong judicial statement that Title VII be liberally construed is an unacceptable distortion of the statute's underlying policy. The EEOC Watchers, whose reasoning seems constrained only by the whims of EEOC personnel, create a system that provides for infinite flexibility but little predictability or uniformity in enforcement. The Remedial Approach, although it might not adequately address the possible conflict between the language of the Title VII statute and the EEOC's regulations, offers the

137. *Buffington,* 677 F.Supp. at 1193.

138. 29 C.F.R. § 1601.6 (1991).

139. 677 F. Supp. at 1193 (finding a distinction between an EEOC questionnaire and an EEOC charge based on their different functions).

140. For a description of the structure of the agency, see 4 Empl. Discrimination Coordinator (Research Inst. Am.) ¶ 46,104 (Mar. 17, 1992) ("The EEOC has three types of field offices: district, area, and local. There are currently 22 district offices, 18 area offices, and 9 local offices, each of which is headed by its own Director.").

best method of attaining the congressional goals of providing wide relief from employment discrimination, facilitating private enforcement of worthy claims, and furnishing employers some level of protection from frivolous claims.

III. A Proposed Solution

In light of the shortcomings of two of the three existing treatments of the oath issue by the courts, this Part proposes that Congress amend Title VII to reflect the position of the Remedial Approach group,[141] thus eliminating the apparent conflict between the statutory language, the EEOC's regulations, and the emerging consensus position of the circuits.[142] Among the three approaches discussed, the courts that construe Title VII liberally to provide victims of alleged discrimination access to the courts come closest to effectuating congressional intent. This interpretation offers other advantages as well. Section III.A argues that with the enormous backlog of complaints that has developed at the EEOC, private enforcement is often a claimant's only hope for prompt resolution of a discriminatory situation and thus should be facilitated. Section III.B notes that under existing law, when charges are filed with the EEOC under the Age Discrimination in Employment Act, a law with intent similar to Title VII, they are not required by statute to be verified at any point in the administrative process. Section III.C proposes the text of the amendment and explains its effects. This Part concludes that the Remedial Approach balances the interests of Title VII claimants and their employers in an equitable manner. The statute should require that a charge be verified prior to the initiation of an EEOC investigation but not necessarily prior to the expiration of the filing limitations period.

A. *The Need for the Private Attorney General*

Almost from its inception the EEOC has labored under a burden which far exceeds its expertise and resources. In its first year of operation, the agency received more than four times as many complaints as anticipated.[143] Between 1969 and 1975 the number of charges filed mushroomed from just over 12,000 to more than 71,000 annually.[144] More recently, the EEOC is widely reported as receiving 100,000 charges of discrimination every year.[145]

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141. *See supra* section II.B.

142. *See* Sullivan et al., *supra* note 10, § 11.3, at 431; 2 Arthur B. Larson, Employment Discrimination § 48.11(b)(1) (1990 & Supp. 1991).

143. Belton, *supra* note 1, at 921 (stating that EEOC expected 2000 charges but received 8854).

144. *Id.*

145. Bruce D. Butterfield, *Shunning Old Paths to Equality at Work; Affirmative Action Under Fire,* Boston Globe, Oct. 20, 1991, at 1 (Business section); *Anti-Bias Agencies Turn Deaf Ear to Complaints,* Newsday, Oct. 22, 1988, at 18 (Viewpoints section).

The result of this overwhelming workload has been an immense backlog of pending charges. The EEOC's Combined Annual Report for FY 1986-1988 stated that at the end of fiscal year 1988 the agency's pending inventory stood at 53,780 charges.[146] Reportedly as high as 126,000 in 1976,[147] this accumulation of charges has affected the Commission's ability to provide complainants relief in at least two ways. First, the EEOC is supposed to process charges within 180 days of receipt[148] but seldom is able to achieve this goal. Although reported at 185 days in 1984,[149] by 1991 average processing time had climbed to 284 days — more than nine months.[150] The inability to provide reasonably prompt relief leaves those complainants who prefer to await completion of EEOC efforts to resolve a claim before suing in an uncomfortable limbo. Also, in some extreme cases, where the EEOC moves so slowly that the equitable doctrine of laches will apply when a complainant finally does sue, this choice can foreclose opportunities for relief altogether.[151] Further, the agency's backlog has been a convenient and obvious target for EEOC critics.[152] As a result,

146. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 1986-1988 COMBINED ANNUAL REPORT 7 (1990). Pending inventory is the current workload that exists in addition to charges received during the fiscal year. For example, in fiscal year 1987 the EEOC had responsibility for processing 62,074 newly received charges but resolved only 53,482 charges. The remainder became part of the pending inventory. In fiscal year 1988, the EEOC resolved 11,896 more charges than it was required to process that year, thus the pending inventory declined slightly. Despite this gain, the pending inventory is still equal to approximately 90% of the workload which the EEOC is required to process each year. *See id.*

147. Richard I. Lehr, *EEOC Case-Handling Procedures: Problems and Solutions,* 34 ALA. L. REV. 241, 246 (1983).

148. EEOC is granted exclusive jurisdiction over the charge for 180 days. After expiration of 180 days from the time of filing, the charging party may request a notice of right to sue, regardless of whether the agency has completed processing of the claim. 42 U.S.C. § 2000e-5(f) (1988); 29 C.F.R. § 1601.28(a)(1) (1991).

149. *ABA Panel Discusses Preparation of EEO Cases, Trial Strategies, Burdens of Proof in Discrimination Cases,* Daily Lab. Rep. (BNA) No. 132, at A6 (July 10, 1985).

150. Butterfield, *supra* note 145. *But see From Platform Plank to Landmark Law, Title VII History Recounted at 25-Year Mark,* Daily Lab. Rep. (BNA) No. 93, at C1, C3 (May 16, 1989) (quoting R. Gaull Silberman, vice chairman of the EEOC, that she expects the Commission soon to reach its goal of six months processing time).

151. *See* Cleveland Newspaper Guild v. Plain Dealer Publishing Co., 839 F.2d 1147 (6th Cir. 1988) (rehearing en banc). In this case, due to the EEOC's backlog, it took 10 years for the agency to undertake and complete an investigation, make a finding of reasonable cause, and unsuccessfully seek conciliation. When the plaintiff finally sued, the court affirmed a grant of summary judgment to the defendant, holding that laches may apply in a Title VII suit and that here, the EEOC's delay failed to justify the plaintiff's inaction.

152. *GAO Says EEOC, State Agencies Not Fully Investigating Charges,* 26 Govt. Empl. Rel. Rep. (BNA) No. 1287, at 1538 (Oct. 31, 1988) (discussing a General Accounting Office report which found that the EEOC failed to reduce its massive backlog of cases); *Employment, Women's Groups Urge Congress to Monitor Enforcement of Anti-Discrimination Laws,* Daily Lab. Rep. (BNA) No. 206, at A16, A17 (Oct. 24, 1991) (quoting Judith Lichtman, president of Women's Legal Defense Fund, that EEOC has been plagued by a large backlog and slow response time); Allen Greenberg, *NAACP Sees Rising Job Discrimination Against Minorities,* UPI, Jan. 12, 1988, *available in* LEXIS, Nexis library, UPI file (quoting NAACP attorney James Foster that EEOC investigators are overwhelmed by a backlog of complaints).

EEOC officials have felt compelled to restructure the charge processing system to maximize case closings, arguably at the expense of more thorough but time consuming investigations.[153] This emphasis on improving the numbers makes the backlog figure an unreliable indicator of the quality of service provided to complainants.

Demands for investigations of alleged employment discrimination have consistently overwhelmed the EEOC. As a result, private litigants historically have shouldered much of the burden of developing employment discrimination case law.[154] In recognition of this trend, the EEOC has developed programs to expedite claimants' litigation efforts, including "activities to develop and train a private Title VII bar."[155] These activities range from educational seminars to maintenance of a panel of attorneys by each EEOC district office "to review case files and provide legal assistance . . . to charging parties" considering suits in federal court.[156] However, this is not enough to ensure appropriate attention to each claim. Given the EEOC's mixed motives[157] for reducing its backlog, elimination of these accumulated charges would provide inadequate assurance that complainants were receiving fair consideration of their claims. In this context, Congress should amend the statute to facilitate the ability of victims of discrimination to pursue their claims in court rather than permit the courts to rely on an overly technical interpretation of Title VII to dismiss claims.

B. *Filing Procedures Under the Age Discrimination in Employment Act*

Congress enacted the Age Discrimination in Employment Act (ADEA)[158] and Title VII in response to similar problems. ADEA was passed three years after Title VII to prohibit discrimination in employment on the basis of age. The EEOC assumed responsibility for en-

153. Greenberg, *supra* note 152 (reporting that due to the EEOC's backlog, a "purported quota requir[es] EEOC investigators to dispose of at least 85 cases a year"); *ABA Panel, supra* note 149 (reporting that the EEOC "came under pressure from both management and civil rights groups for placing so much emphasis on RCP," the Rapid Charge Processing system); Lee May, *Jobs Panel Failed to Properly Investigate Large Number of Bias Cases, Report Says*, L.A. TIMES, Oct. 11, 1988, at C17 (quoting a GAO report that there existed "a perception by investigative staff that EEOC was more interested in reducing the large charge inventory than in performing full investigations").

154. Belton, *supra* note 1, at 924.

155. 4 Empl. Discrimination Coordinator (Research Inst. Am.) ¶ 46,110 (Mar. 17, 1992).

156. *Id.*

157. Although the EEOC may wish to reduce its backlog to be more responsive to complainants, it also has incentive to do so to quiet the agency's critics. Depending upon the method used to achieve this goal, efforts to reduce the backlog could have a negative impact on the quality of claims processing.

158. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (1988)).

forcement of ADEA on July 1, 1979.[159] Title VII and ADEA are presumed to have comparable remedial intent and because the EEOC assumed direct responsibility for ADEA, they are similarly administered and enforced. Further, the courts often construe ADEA in a manner similar to Title VII.[160] Both statutes are triggered by the filing of a charge with the EEOC within 180 days of the alleged discriminatory act, and complainants under each statute must wait a prescribed period while the EEOC seeks conciliation before pursuing their claims in federal court.[161] Given these parallels, one would expect the related statutory language on the filing of charges to be similar as well.

Despite the similarities in underlying intent and administrative procedures, however, Title VII and ADEA have different statutory requirements for filing a charge. While Title VII demands that a charge be filed in writing under oath, ADEA is silent on the details of an age discrimination claim. The regulations promulgated by the EEOC fill this gap by requiring that, at a minimum, an ADEA charge "be in writing," "name the prospective respondent," and "generally allege the discriminatory act(s). Charges received in person or by telephone [are to] be reduced to writing."[162] This skeletal information may be augmented under the same liberal amendment policy that governs Title VII charges.[163] Thus, because EEOC regulations allow the additional statutory requirement for verification under Title VII to be fulfilled through the amendment process, the EEOC handles the intake of charges filed under ADEA and Title VII virtually identically.[164]

The differences between the two statutes continue to narrow. Until recently, ADEA, unlike Title VII, provided a two-year statute of limitations within which claimants had to file in court.[165] The Civil Rights Act of 1991,[166] however, deleted this ADEA provision,[167] and

159. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1366 (1988), *and in* 92 Stat. 3781 (1978).

160. *See* Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) (White and Stevens, JJ., concurring) (Blackmun and Marshall, JJ., dissenting) (relying on Title VII legislative history to interpret ADEA); Astoria Fed. Sav. & Loan Assn. v. Solimino, No. 89-1895, 111 S. Ct. 2166, 2170 (1991) (describing Title VII as a "closely parallel context" to ADEA); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 395 n.11 (1982) (stating that ADEA "was modeled after Title VII"); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (stating that "ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace").

161. *Compare* 42 U.S.C. § 2000e-5(e) and § 2000e-5(f)(1) (1988) *with* 29 U.S.C. § 626(d) (1988).

162. 29 C.F.R. § 1626.6 (1991).

163. 29 C.F.R. § 1626.8(c) (1991).

164. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 764 n.11 (1979) (acknowledging that ADEA complaints will be processed under the same system as Title VII complaints).

165. 29 U.S.C. § 626(e)(1) (1988) (making applicable 29 U.S.C. § 255 (1988)).

166. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

167. Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (1991).

inserted new language that mimics that of Title VII.[168] Under the revised Act, like a Title VII complainant, an individual filing under ADEA would have ninety days from the time the EEOC notified him or her of the termination of its proceedings — rather than two years from the time of the alleged discriminatory act — to sue in federal court.[169] As the administrative procedures for processing claims under Title VII and ADEA move closer together, the remaining statutory differences become increasingly anomalous. It is apparent from the EEOC's procedures that the practical effects of verifying a charge at the time of filing are minimal in light of the agency's liberal amendment practices. Moreover, the EEOC receives and processes many charges under ADEA, a statute which does not require verification and which is substantially similar to Title VII, without significant ill effects. Therefore, an amendment permitting a more flexible verification policy for charges filed under Title VII would not be overly burdensome.

C. *An Amendment to Section 706(b)*

Section 706(b) should be amended to read in relevant part:

> Charges shall be in writing [under oath or affirmation] and shall contain such information and be in such form as the Commission requires. . . . *Any individual filing a complaint shall verify such complaint by oath or affirmation prior to the initiation of an EEOC investigation.* If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action.[170]

An amendment to section 706(b) specifying that charges must be verified prior to the initiation of an EEOC investigation would cause little if any disruption of the existing relationship between the EEOC, complainants, and their employers. The agency already operates under a system that permits amendment of charges. Title VII requires that the EEOC notify employers of complaints filed against them within ten days of the EEOC's receipt of a charge.[171] Notice to employers enables them to retain all employment records which may be

168. Pub. L. No. 102-166, § 115, 105 Stat 1071, 1079 (1991) ("29 U.S.C. § 626(e) is amended . . . by adding at the end, the following: If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice."). For comparison to Title VII, see 42 U.S.C. § 2000e-5(f)(1) (1988).

169. Pub. L. No. 102-166, § 115, 105 Stat 1071, 1079 (1991).

170. Text which would be deleted by the proposed amendment is enclosed in brackets. New language appears in italics.

171. 42 U.S.C. § 2000e-5(b) (1988).

relevant to the discrimination claim.[172] Such records not only facilitate the EEOC's investigation but also may assist an employer in preparing a defense.[173] According to the Enforcement Manager of the EEOC's Detroit District Office, the EEOC typically does not notify employers that a complaint has been filed against them until the complainant verifies the charge.[174] However, if it appears likely that a complainant will be unable to file a sworn charge before the statutory period runs, notice will be sent to an employer on the basis of the intake questionnaire.[175] This notice does not describe the nature of the allegations contained in the unverified intake questionnaire, but informs the employer that a claim has been filed against her.[176] Once the complaint is verified, an employer receives an amended notice providing the date and place of the allegations and detailing the statutory basis for the claim.[177] Only at this point may an EEOC investigator proceed to request from the employer any relevant documents or records.[178]

In light of recent regulatory changes in record keeping requirements, any additional burden on employers from the proposed amendment would be minimal. Effective August 26, 1991, the EEOC extended the mandatory retention period for all voluntarily created employment records from six months to one year.[179] The EEOC explained that the six-month requirement "was promulgated before Title VII was amended in 1972 to change the time limit for filing a charge from 90 days to 180 days."[180] In light of the extended filing period, six

172. The EEOC's recordkeeping requirements are minimal. Each employer covered by Title VII with 100 or more employers must submit annually and keep on hand Standard Form 100, the Employer Information Report EEO-1, which classifies the workforce by sex and race. The EEOC "reserves the right to impose [additional] recordkeeping requirements upon . . . employers . . . when in its judgment, such records . . . are further required to accomplish the purposes of title VII." 29 C.F.R. § 1602.12 (1991). Title VII grants such authority to the EEOC explicitly. 42 U.S.C. § 2000e-8(c) (1988). If employers voluntarily create additional employment records, the EEOC requires that they be kept for one year after their creation or the personnel action they concern. 56 Fed. Reg. 35753, 35755 (1991) (amending 29 C.F.R. § 1602.14 (1991)); *see infra* notes 179-84 and accompanying text.

173. *See* EEOC v. Shell Oil Co., 466 U.S. 54, 74-75 (1984) (stating that the reason that Congress added the 10-day notice requirement in 1972 "seems to have been to provide employers fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation by the EEOC"). The Court in *Shell* found that notice of a charge must contain information sufficient to enable the employer to determine which records he or she must retain for EEOC examination during the investigation stage. *Shell,* 466 U.S. at 78.

174. Telephone Interview with Earl L. Benson, Enforcement Manager, EEOC Detroit District Office (Nov. 15, 1991 and Jan. 28, 1992).

175. *Id.*

176. *Id.*

177. *Id.* The second notice relates back to the date of the first notice in the same way that the amended (verified) charge relates back to the date of the intake questionnaire.

178. *Id.*

179. 56 Fed. Reg. 35,753 (1991).

180. *Id.* at 35,754.

months was no longer sufficient to ensure that employers "necessarily will have retained" records relevant to a charge.[181] The Commission stated further that the "retention of the records for the period of one year will increase only minimally, if at all, the employer's cost of maintaining the records."[182] This new requirement will decrease the likelihood that employers receiving a general notice of a discrimination complaint will inadvertently dispose of employment records which may prove helpful to them or to the EEOC.[183] Once the EEOC notifies an employer of the content of a charge, all relevant records must be retained until final disposition of the charge.[184]

Congress should amend Title VII to require only that verification occur prior to the initiation of an EEOC investigation. Conforming the statutory language to the EEOC's current practice as described above would affect only those complainants who relied on the amendment procedure to verify their claims and subsequently chose to pursue their claims in court. For these complainants who are dissatisfied with the EEOC's findings or for whom the EEOC is unable to obtain relief by conciliation, the amendment would ensure that courts that have refused to honor the EEOC's longstanding regulations permitting amendment could no longer decline to examine the merits of a claim on those grounds. Bringing these courts into conformity with the majority of the circuits would further the intent of Title VII and facilitate uniformity in the resolution of employment discrimination claims.

CONCLUSION

The existing morass of statutes, regulations and common law that determines the ability of Title VII claimants to pursue their claims in court is filled with inconsistencies. In order to facilitate uniform treatment of Title VII claims in a manner that complies with the underlying intent of the statute, Congress should amend the requirement that a charge be filed under oath to mandate instead that it be verified prior to initiation of an EEOC investigation. This approach honors the remedial intent of the Civil Rights Act of 1964. It also safeguards the right of private enforcement, which was necessary to secure passage of the original legislation and continues to be necessary due to the

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181. *Id.*

182. *Id.*

> The Commission estimates that the changes . . . increasing the title VII records retention period from six months to one year will result in an increased recordkeeping burden on employers of approximately 9,000 burden hours annually. . . . The Commission believes that this increase in burden hours is *de minimis* and that the modifications will not have a significant impact on a substantial number of small employers.

Id.

183. If necessary, the EEOC could extend further the retention period to provide additional protection for employers who are concerned that they may prematurely dispose of relevant records.

184. 29 C.F.R. § 1602.14(a) (1991).

EEOC's excessive workload. Moreover, the proposed amendment shows appropriate deference to the EEOC's interpretation of its authorizing statute and provides adequate protection for employers from frivolous claims.