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In America, What You Do Is What You Are: The Equal Employment Opportunity Act of 1972

On March 8, 1972, the House of Representatives adopted and sent to the President the Conference Report on H.R. 1746, the Equal Employment Opportunity Act of 1972.¹ On March 24, shortly before the deadline for his active approval,² President Nixon signed the bill, enlarging the jurisdiction of the United States Equal Employment Opportunity Commission (EEOC) and granting the agency long sought enforcement powers.³

Enactment of the law closed a chapter in the continuing search for a remedy for employment discrimination, and ended a year-long debate in the Congress that had pitted civil rights groups and organized labor against organized business led by the United States Chamber of Commerce.⁴

This article will briefly examine the key provisions of the new law, discuss the problem of employment discrimination,⁵ and offer an example of how, in an atmosphere of conflicting employer-employee interests, civil rights remedies are shaped in political compromise.

Employment Discrimination: Background of the Problem

The provisions of the Equal Employment Opportunity Act of 1972⁶ represent the latest compromise in a long struggle between civil rights activists, favoring an aggressive attack on employment discrimination, and business groups concerned less with the problem and more with the possible disruption of their business activities.

During 1971, while the Congress was considering this legislation, the unemployment rate among white workers averaged 5.4 percent.⁷ Among blacks and other minority races, the unemployment rate was almost double—

1. H.R. REP. NO. 92-899, 92d Cong., 2d Sess. (1972). Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 (Mar. 24, 1972) [hereinafter cited as Pub. L. 92-261]. The House passed the Conference Report on Mar. 8, 1972 after two days of debate. 118 CONG. REC. H 1870-71 (daily ed. Mar. 8, 1972). The Senate had approved the measure two days before. 118 CONG. REC. 3464 (daily ed. Mar. 6, 1972).

2. U.S. CONST. art. I, § 7.

3. See 118 CONG. REC. D 321 (daily ed. Mar. 27, 1972).

4. For an account of the opposing sides and their positions, see Culhane, *Labor Report/Battle Over Enforcement Powers for EEOC Pits Business Against Labor, Civil Rights Groups*, THE NAT'L J., Vol. 3, no. 46, 2249-59 (Nov. 13, 1971) [hereinafter cited as Culhane].

5. The primary focus of this article will be employment discrimination on the basis of race.

6. Pub. L. 92-261.

7. DEP'T OF LABOR, MANPOWER REP. OF THE PRESIDENT 175 (Mar. 1972).

9.9 percent throughout most of 1971—and only slightly below the two-to-one unemployment ratio which had persisted for 20 years or more.⁸

High unemployment among blacks was not new. As one prominent commentator had put it several years before:

The fundamental, overwhelming fact is that *Negro unemployment*, with the exception of a few years during World War II and the Korean War, *has continued at disaster levels for 35 years.*⁹

The unemployment statistics for 1971 reflected only one facet of the economic discrimination visited by society on its minority citizens. Statistics on the level of minority employment in higher paying industries,¹⁰ median family income,¹¹ and job status¹² offered additional evidence that employment discrimination—and not merely lack of training and education—was denying minority citizens equal footing in the labor market.

The statistics of minority unemployment and income reflect, in part, the consequences of employment discrimination. The limits of the problem itself, however, are lines which the agencies and courts have only begun to draw. The borders between the permissible employment practice and the proscribed are poorly marked. Does chargeable employment discrimination require an evil intent, a *mens rea* on the part of the employer? At what point does an employer's aptitude test cease to be a legitimate personnel evaluation and become a discriminatory device? These are examples of the questions that agencies and courts are only beginning to answer.¹³

Although an adequate legal criterion of employment discrimination has yet to be established, there is now a consensus that the problem forms a breakable link in the chain of discrimination and poverty which encumbers millions of Americans. As Daniel Patrick Moynihan noted:

The principal measure of progress toward equality will be that of employment. It is the primary source of individual or group identi-

8. Unemployment was higher still during 1971 among blacks living in at least seven metropolitan areas: Houston, 10.3 per cent; Newark, 10.4 per cent; Pittsburgh, 11.7 per cent; Los Angeles-Long Beach, 13.7 per cent; San Francisco-Oakland, 13.8 per cent; Detroit, 13.9 per cent; and Cleveland, 16.1 per cent. DEP'T OF LABOR, MANPOWER REP. OF THE PRESIDENT (Mar. 1972) at 250.

9. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 20 (Mar. 1965) (emphasis in original). The commentator was sociologist Daniel Patrick Moynihan.

10. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, THE SOCIAL AND ECONOMIC STATUS OF NEGROES IN THE UNITED STATES, 1970 (July 1971) at 63.

11. *Id.* at 25.

12. *Id.* at 61.

13. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For a discussion of the failure of the courts and agencies to develop adequate legal criterion of employment discrimination, see A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW (1971) vii-9 [hereinafter cited as BLUMROSEN].

ty. In America what you do is what you are: to do nothing is to be nothing; to do little is to be little. The equations are implacable and blunt, and ruthlessly public.

For the Negro American it is already, and will continue to be, the master problem. It is the measure of white bona fides. It is the measure of Negro competence, and also of the competence of American society. Most importantly, the linkage between problems of employment and the range of social pathology that afflicts the Negro community is unmistakable. Employment not only controls the present for the Negro American but, in a most profound way, it is creating the future as well.¹⁴

It was the mounting evidence that employment discrimination lay at the core of the country's race problems that led forces within the 88th Congress to attempt to write stringent anti-discrimination provisions into Title VII of the landmark Civil Rights Act of 1964.¹⁵

The House, early in 1964, passed a bill creating a five-member Equal Employment Opportunity Commission with authority to investigate charges of employment discrimination, seek voluntary compliance, and failing that, to bring suits in U.S. district courts to compel compliance.¹⁶ In the Senate, the House bill ran into a record-breaking filibuster.¹⁷ The chief points of contention were Title II (public accommodations) and Title VII (fair employment).¹⁸ In the seventh week of Senate debate, May 11-16, 1964, the bill's managers announced a compromise designed to attract enough support to invoke cloture and pass the bill.¹⁹ Among the amendments proposed in the compromise was one stripping the proposed EEOC of authority to seek court enforcement and transferring to the Attorney General authority to bring suit—only when he had a "reasonable belief" that an employer was pursuing a "pattern and practice" of discrimination.²⁰

Thus, one of the prices paid for enactment of the Civil Rights Act of 1964 was the creation of an agency authorized to move against employment discrimination but stripped of any power to do so.

Title VII, however, as finally enacted by the 88th Congress was received by civil rights groups with great expectations.²¹ Aside from its enforce-

14. REP. OF THE NAT'L ADVISORY COMMISSION ON CIVIL DISORDERS 124 (1968).

15. 42 U.S.C. § 2000(e) (1970).

16. For a legislative history of the passage of Title VII of the Civil Rights Act of 1964 see Cong. Q. Almanac, Vol. XX 338-80 (1964) [hereinafter cited as CQ Almanac].

17. *Id.* at 361.

18. *Id.* at 360.

19. *Id.* at 361.

20. *Id.* at 364. This part of the 1964 compromise later became 42 U.S.C. § 2000(e)(7).

21. See, e.g. N.Y. Times, July 2, 1965 at 1, col. 3.

ment sections, now greatly weakened, it retained the original intent of its authors to move aggressively against employment discrimination. Section 703(a) framed a broad prohibition and left it to the newly created EEOC and the courts to fill in the blanks:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.²²

Section 705 created the EEOC, a five-member, bi-partisan commission with responsibilities confined to the investigation and conciliation of complaints and finding ways to achieve voluntary compliance with the objectives of Title VII.²³

The jurisdiction of the EEOC, when the law became fully effective, included a broad category of "persons"—individuals, labor unions, and employers—"engaged in an industry affecting commerce [who have] twenty-five or more employees for each working day in each of twenty or more calendar weeks. . ."²⁴ Upon finding that a charge of employment discrimination was supported by the evidence, the Commission was directed to eliminate ". . . any such unlawful employment practice by informal methods of conference, conciliation, and persuasion."²⁵

Title VII, in effect, was a declaration of national policy—a recognition of the worker's right to compete in the labor market, unfettered by considerations of race, color, religion, sex, or national origin. Title VII was never intended to be the only recourse of an individual aggrieved by employment discrimination.²⁶ Depending on his circumstance and the nature of his complaint, his remedies may include a welter of federal and state laws and regulations, administrative agencies, the National Labor Relations Board, the Office of Federal Contract Compliance, and private civil actions under the fifth and fourteenth amendments and the Civil Rights Act of 1866.²⁷

22. 42 U.S.C. § 2000(e)(2)(a) (1970).

23. 42 U.S.C. § 2000(e)(4) (1970).

24. 42 U.S.C. § 2000(e) (1970).

25. 42 U.S.C. § 2000(e)(5)(a) (1970).

26. An attempt was made in the 92d Congress to make the EEOC the exclusive remedy for employment discrimination. See note 46 *infra* and accompanying text.

27. For a survey of employment discrimination remedies see BLUMROSEN, *supra* note 13, at 408-16.

The EEOC, as originally conceived, was to assist aggrieved individuals in achieving the equal employment opportunity proclaimed by Title VII. Yet, the EEOC which emerged in the Civil Rights Act of 1964²⁸ was poorly equipped to do so. In the words of one expert, writing in 1966, it was "a poor, enfeebled thing . . . [with] the power to conciliate but not to compel."²⁹

Later evaluations confirmed the inadequacy of "informal methods" to resolve job discrimination complaints against employers through " . . . conference, conciliation, and persuasion."³⁰

The power to go after the more pernicious "pattern and practice" forms of employment discrimination was placed in the hands of the Attorney General, a power which was exercised 69 times between 1964 and 1971.³¹

Title VII, in effect, created the proverbial "right without a remedy." The failure of its provisions was reported in the testimony of EEOC Chairman William H. Brown, III before the Senate Subcommittee on Labor and Public Welfare, October 4, 1971:

Since its inception in 1965, the Commission has received 81,004 charges. This number, though large when considered by itself, becomes even more significant when we consider the fact that each year the number of charges filed with the Commission continues to increase. For example . . . in FY 1971, 22,920 charges were filed; and our current estimate is that during the current fiscal year more than 32,000 charges will be filed. . . .³² Of the 81,004 charges that I mentioned, we were only able to achieve a totally or even partially satisfactory conciliation in less than half of these cases. This means that in a significant number of cases, the aggrieved individual was not able to achieve any satisfactory settlement through the EEOC and was forced either to give up his or her claim, or, if they had the necessary funds and time, to pursue the case through the Federal courts.³³

In addition, the EEOC faced a growing backlog of work—amounting to 32,000 cases as of June 30, 1971³⁴—with processing sometimes requiring 18 to 24 months.³⁵

The Commission's difficulties stemmed not only from the filibuster of

28. 42 U.S.C. § 2000(e) (1970).

29. M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION* 25 (1966).

30. See, e.g., R. NATHAN, *JOBS & CIVIL RIGHTS* (1969). See also, U.S. COMM'N ON CIVIL RIGHTS, *FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT* 263-306 (1970).

31. *Hearings on S. 2515, S. 2617, and H.R. 1746 Before the Subcomm. on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 1st Sess., at 126 (1971) [hereinafter cited as *Senate Hearings*].

32. *Id.* at 53.

33. *Id.*

34. *Id.* at 55.

35. *Id.* at 170.

1964, which had stripped it of enforcement powers, but also from the naive view of employment discrimination prevalent in the early 1960's. In 1964, employment discrimination was thought to be a rather simple problem, fairly easily solved. By 1971, it was clear that employment discrimination was a difficult problem raising fundamental questions about American society.

It was obviously a problem beyond the capacity of the EEOC to remedy. By 1971, an introductory passage of the Annual Report of the EEOC possessed the cadence and mood, if not the tense, of an epitaph: "Born in compromise and limited by budgetary restrictions, the Equal Employment Opportunity Commission exercises its few powers to their fullest in attacking discrimination."³⁶

Action in the 92d Congress

When the 92d Congress convened on January 22, 1971, the question was no longer whether to grant the EEOC enforcement powers; the question had become *what kind*.³⁷ An answer was not long in coming: Congressman Augustus F. Hawkins (D. Cal.) and 16 of his colleagues, including every black member of the House, chose the first day of the Congress to introduce a bill entitled the Equal Employment Opportunities Enforcement Act.³⁸ Section 706(h) of their bill proposed to empower the Commission, after all efforts to conciliate had failed, to:

. . . issue and cause to be served on the respondent . . . an order requiring the respondent to cease and desist from such unlawful employment practice and to take such affirmative action, including reinstatement or hiring of employees, with or without backpay . . . as will effectuate the policies of this title.³⁹

The Commission's cease and desist orders were to be enforced by the United States courts of appeal.⁴⁰

The Hawkins bill, in addition to providing cease and desist powers, proposed to enlarge the jurisdiction of the EEOC to include employees of state and local governments, public and private educational institutions, and labor unions and business organizations with as few as eight members or employees.⁴¹ It also proposed to consolidate Federal equal employment programs within the EEOC, including the Civil Service Commission (CSC), the Office of Federal Contract Compliance (OFCC), and the authority of

36. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, 5TH ANNUAL REP. 1 (1971).

37. See, e.g., *Senate Hearings* 167.

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

39. *Id.* at § 2.

40. *Id.*

41. *Id.*

the Attorney General to bring suits against persons engaging in a "pattern or practice" of discrimination.⁴²

The Hawkins bill suggested one solution to the problem of what to do about the EEOC. Another answer, more palatable to employers, was introduced a short time later. On March 25, 1971, Congressman John N. Erlenborn (R.-Ill.) introduced H.R. 6760⁴³ which lacked provisions to enlarge the jurisdiction of the EEOC but which would authorize the Commission, after all else had failed to ". . . bring a civil action against the respondent named in the charge . . ." ⁴⁴

The Hawkins and Erlenborn proposals collided on the House floor on September 15, 1971. The next day, by a margin of six votes, the House adopted the Erlenborn court authority approach.⁴⁵

Two provisions of the Erlenborn substitute adopted by the House had attracted relatively little attention during the debate.⁴⁶ Section 706(d) offered the following language:

. . . a charge filed hereunder shall be the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of an employer, employment agency, or labor organization.⁴⁷

Another section of the bill, while not as explicit, would have barred class actions in employment discrimination suits filed under the law.⁴⁸

By making the EEOC an individual's exclusive remedy for employment discrimination the House-passed bill would have barred all other avenues to relief, including job bias actions before the NLRB and civil actions brought under the Civil Rights Act of 1866 and the thirteenth and fourteenth amendments. By eliminating class actions, the bill would have required separate civil actions for each individual aggrieved under the law. Combined, the two provisions would have had a devastating impact on the workload and effectiveness of the EEOC. Father Theodore Hesburgh, Chairman of the United States Commission on Civil Rights, summed up the frustration of civil rights groups three weeks later in testimony before the Senate Subcommittee on Labor:

[W]e wholeheartedly oppose the bill passed by the House on Sep-

42. *Id.*

43. H.R. 6760, 92d Cong., 1st Sess. (1971). Rep. Erlenborn later reintroduced his bill slightly amended, H.R. 9247, 92d Cong., 1st Sess. (1971).

44. H.R. 9247, 92d Cong., 1st Sess., § 2 (1971).

45. 118 CONG. REC. H 8539 (daily ed. Sept. 16, 1971).

46. *See*, for one of the few examples, the remarks of Rep. Bob Eckhardt (D.-Tex.) 118 CONG. REC. H 8477 (daily ed. Sept. 15, 1971). Mr. Eckhardt took the floor, he explained, ". . . to disclose some real bears in the thicket of H.R. 9247, the Erlenborn amendment."

47. H.R. 9247, 92d Cong., 1st Sess., § 3 (1971).

48. *Id.* *See also*, *Senate Hearings* 47.

tember 16. It is totally unacceptable. It is worse, I think, than the weak law we already have. It is worse because it promises substance and gives little.⁴⁹

Instead of the House bill, Father Hesburgh and civil rights leaders favored S. 2515,⁵⁰ a bill identical to the cease and desist approach originally proposed by Congressman Hawkins and his colleagues in the House. On October 28, 1971, the Senate Committee on Labor and Public Welfare reported S. 2515 to the Senate floor, along with the bill passed by the House.⁵¹ S. 2515 did not make the EEOC the exclusive remedy for employment discrimination, and left the right to bring class actions undisturbed.

As had happened with Title VII in 1964, however, S. 2515 ran into a filibuster by its opponents in the Senate. During its five-week debate, the Senate twice rejected amendments seeking to substitute a court enforcement approach for the cease and desist language contained in S. 2515.⁵² On February 8, however, sponsors of S. 2515 agreed to drop cease and desist enforcement provisions in order to break the filibuster and pass a bill.⁵³ On February 22, 1972, the Senate passed the compromise bill,⁵⁴ and one week later, House and Senate conferees agreed to the final version of the law, giving the EEOC power to bring civil actions and retaining the aggrieved individual's right to pursue other remedies and the right to bring class action suits.⁵⁵

Once again, employment opportunity legislation had reached its final form in a process of political compromise.

Public Law 92-261

The Equal Employment Opportunity Act of 1972,⁵⁶ as it finally emerged in the 92d Congress, represents a partially successful attempt to overhaul the EEOC through amendments to Title VII of the Civil Rights Act of 1964.⁵⁷ Its authors sought to strengthen the Commission by granting the agency enforcement powers, by consolidating under its authority Federal anti-employment discrimination activities and by extending its coverage to more employees, including those of local and state governments.

49. *Senate Hearings* 198.

50. S. 2515, 92d Cong., 1st Sess. (1971).

51. H.R. 1746, 92d Cong., 1st Sess. (1971) *as amended*.

52. For an account of the Senate debate, see *Senate Passes Equal Jobs Bill After Ending Filibuster*, CONG. Q., Vol. XXX, No. 9 (Feb. 26, 1972) at 454.

53. Wash. Post, Feb. 9, 1972 at 1, col. 4.

54. 118 CONG. REC. S 2302 (daily ed. Feb. 22, 1972).

55. Wash. Post, April 1, 1972 at 1, col. 8.

56. Pub. L. 92-261.

57. 42 U.S.C. § 2000(e) (1970).

Section 706, as amended by the new law, establishes the enforcement powers of the EEOC and represents the most significant change in Title VII.⁵⁸ The Commission is empowered "to prevent any person from engaging in any unlawful employment practice . . ." ⁵⁹ as originally defined by Title VII.⁶⁰

Section 706(b) retains, with minor changes, the existing procedures by which a charge of employment discrimination is filed with the EEOC; notice is given the respondent, an investigation is conducted, and, if reasonable cause is found to believe a charge is true, the Commission is directed "to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."⁶¹

Sections 706(c), (d) and (e), as amended, set forth deferral procedures to be followed by the EEOC in cases where local and state employment discrimination laws exist.⁶² The procedures are virtually identical to the provisions originally contained in Title VII and approved by the Supreme Court in *Love v. Pullman Co.*⁶³

Section 706(f), as amended, established the new enforcement procedures available to the EEOC when it has been unable to achieve voluntary compliance.⁶⁴ If the respondent is not a government or governmental agency and if the Commission has been unable to secure a conciliation agreement after 30 days of trying, the Commission is authorized to bring a civil action against the violator in an appropriate U.S. district court.

If the respondent is a government or governmental agency, the Commission is directed to refer the case to the Attorney General of the United States, who is authorized to bring civil actions against state and local governments and their agencies.⁶⁵

The authority granted the Attorney General to bring civil actions against state and local governments will be the sole remaining role to be played by the Department of Justice in Federal job discrimination suits when the new law becomes fully effective. Under Section 707, as amended, the power to bring "pattern and practice" suits is to be transferred in 1974 from the Department of Justice to the EEOC.⁶⁶

The new power of the EEOC to bring civil actions in the United States

58. Pub. L. 92-261 § 4.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. 404 U.S. 522 (1972).

64. Pub. L. 92-261 § 4.

65. *Id.*

66. *Id.* at § 5.

district courts represents a victory—possibly Pyrrhic—for business groups who had successfully opposed efforts to equip the Commission with authority to issue “cease and desist” orders patterned after the National Labor Relations Board.⁶⁷ Fearing an EEOC empowered to issue cease and desist orders, and sensing that some form of legislation to strengthen the Commission was inevitable in the 92d Congress, employer interests advanced what they considered the lesser evil—court enforcement. Some commentators⁶⁸ take a contrary view, believing that the courts will prove to be the more aggressive agencies of relief and that the business groups, through misjudgment, may have equipped the EEOC with the more effective weapon.

Section 701(a), as amended, redefines “person” to include state and local governments, governmental agencies, and political subdivisions.⁶⁹ The effect is to bring an estimated 10.1 million employees of state and local governments within the jurisdiction of the EEOC.⁷⁰

Section 702 now eliminates the previous exemption for employees of educational institutions.⁷¹ The effect is to bring an estimated 4.3 million⁷² employees of public and private educational institutions within the jurisdiction of the EEOC for complaints founded on discrimination because of race, color, sex, or national origin, but not religion.⁷³

Section 701(j) now defines “religion” to include all aspects of religious observance in order to require employers to make reasonable accommodations for employee religious practices.⁷⁴ The purpose of the section is to authorize the Commission to formulate guidelines on religious discrimination such as those challenged in *Dewey v. Reynolds Metals Co.*⁷⁵

Section 701(b), as amended, redefines “employer” to include labor unions and business organizations employing 15 or more employees instead of the previous minimum of 25 employees.⁷⁶ The effect is to extend EEOC coverage to employers of 15 or more individuals after March, 1973.

Section 706 (g) authorizes the U.S. district courts, upon finding that a

67. 29 U.S.C. § 160 (1970).

68. See generally BLUMROSEN 1-14. See also, Wall Street Journal, Sept. 15, 1971, at 12, col. 4.

69. Pub. L. 92-261 § 2.

70. Culhane 2249.

71. Pub. L. 92-261 § 3.

72. Culhane 2249.

73. Pub. L. 92-261 § 3.

74. *Id.* at § 2.

75. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971), *aff'g* by an equally divided court 429 F.2d 324 (6th Cir. 1970). In an action by an employee alleging religious discrimination the court held a company work rule requiring employees to work on Sundays to be a Title VII violation.

76. Pub. L. 92-261 § 2.

respondent has engaged in an unlawful employment practice, to grant injunctions and order appropriate affirmative relief, including reinstatement or hiring, with or without back pay limited to that accruing not more than two years prior to the filing of the original charge with the EEOC.⁷⁷

Summary

Behind the language and provisions of the Equal Employment Opportunity Act of 1972, lies a recurring problem of legal process: whether words, paper and ink, can be translated into social policy, social action, and tangible social progress.

Throughout the debate over what form of enforcement powers to give the EEOC, both sides addressed themselves to the same question: which will be the fairer, faster remedy? Their answer to the question, however, rested entirely upon whether their perspective was that of employer or employee.

The employee interests who favored the "cease and desist" approach cited the more than 30 states and local employment opportunity agencies empowered to issue cease and desist orders.⁷⁸ On the federal level, they argued, the NLRB, the FDA, the SEC, the FCC, and the FTC all possess cease and desist authority, why not the EEOC.⁷⁹ Fundamental due process would be guaranteed under the Administrative Procedure Act⁸⁰ and by the provisions in the bill for review by the United States courts of appeal. Furthermore, the mere existence of the power to issue cease and desist orders would improve the probability of achieving a satisfactory resolution of disputes in the early stages of conciliation. The present and projected workload of the United States district courts, it was contended, militated against the Congress adding employment discrimination cases to the backlog of the judiciary.⁸¹

The employer interests who advocated authorizing the EEOC to bring civil actions contended that the courtroom was the logical forum for the adjudication of civil rights. A court could fashion immediate, injunctive relief, they argued, while under the cease and desist approach, the EEOC would have to seek enforcement of its orders in the United States courts of appeal. The median time interval from issue to trial for non-jury trials in the United States district courts during 1970 was only 10 months, contrasted

77. *Id.* at § 4.

78. *See, e.g.*, 118 CONG. REC. H 8460 (daily ed. Sept. 15, 1971) (remarks of Rep. Perkins).

79. *Id.*

80. 5 U.S.C. § 551 (1970).

81. *See, e.g.*, *Senate Hearings* 233-35.

with much longer delays in administrative proceedings, they argued.⁸² Moreover, in the courts a more consistent body of law governing the field of employment discrimination could be developed than would be possible under the administrative approach.⁸³ The SEC, the FDA, the ICC and other federal agencies possessing cease and desist authority are essentially regulatory agencies, handling cases that are substantively different from the disputes brought before the EEOC.

To the Congress fell the final task of weighing the arguments and redrawing the line between the interests of the employing and the employed. Despite the victory of employers in the matter of enforcement powers, the larger victory still belongs to civil rights activists who favored a strengthened, more effective EEOC. Notwithstanding the similar political compromises which resulted in the passage of Title VII, in 1964, and the amendments, in 1972, the same consequences of failure need not follow.

The notion that an administrative agency, empowered to issue cease and desist orders patterned after those of the NLRB, can offer an effective remedy to a difficult social problem is unwarranted by the history of such agencies, on both state and local levels.⁸⁴ If employment opportunity agencies in 30 states possess cease and desist authority, why does it remain such a pervasive, persistent problem? Administrative agencies are far more susceptible to changes in political climate than are courts, whose commitment to civil rights, particularly employment opportunity, has been largely unwavering.

In addition, the new authority of the EEOC to bring lawsuits in the U.S. district courts will assist the Commission in achieving voluntary compliance in the majority of its cases through conciliation. The prospect of litigation with a Federal agency would seem to make earnest conciliators out of all but the most recalcitrant employers.

The legal machinery which emerged in the Equal Employment Opportunity Act of 1972—although gerrybuilt in the politics of legislative compromise—can become, in the hands of able and aggressive administrators, an effective means to realize equal opportunity in the labor market. Politics, it is said, is the art of the possible. In this case, what was possible could prove more artful than anyone foresaw.

Richard R. Rivers

82. *Id.* at 169-75.

83. *Id.*

84. *See generally* BLUMROSEN 1-14.