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JUDITH ASHTON*

Title VII of the Civil Rights Act of 1964\(^1\) was enacted for the purpose of securing equal employment opportunity to employees by eliminating employment practices that discriminate on the basis of race, color, religion, sex, or national origin.\(^2\) To achieve this goal, Congress established the Equal Employment Opportunity Commission (EEOC) and directed it to receive, investigate, and attempt to conciliate charges of discrimination made by individuals and groups.\(^3\) Primary responsibility for court enforcement,\(^4\) however, was given to private individuals who, if the EEOC can not conciliate their claims, can file civil actions against errant employers in the federal district courts.\(^5\) In 1972, Title VII was amended to allow the EEOC to seek court enforcement.\(^6\)

Given this statutory scheme that encourages informal persuasion as the initial method of securing full equal employment opportunities, the necessity of preserving the status quo while this statutory method is pursued becomes clear both from the point of view of an individual complainant and from that of the public. From the perspective of the individual complainant in a Title VII case, unless immediate preliminary relief is available pending EEOC's disposition of a case, final relief may well be of little value. For the employee who is fired, two or more years of unemployment while awaiting EEOC action may fully drain financial and personal resources. The damage to the employee's reputation may well be irreparable.

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4. Under the 1964 Act, the Attorney General was empowered to file actions on behalf of the United States when there was reason to believe that "a pattern or practice of resistance" to the rights secured by Title VII existed. 42 U.S.C. § 2000e-6(a) (1970), as amended, (Supp. II, 1972). In March of 1974, this power was transferred to the EEOC. 42 U.S.C. § 2000e-6(c) (Supp. II, 1972).
For the employee who is demoted, future opportunities may be irreversibly limited by events or simply by the passage of time. Moreover, from a public policy standpoint, to allow discrimination to continue pending long administrative procedures, especially in the form of firing an employee because of his or her race, color, religion, sex, or national origin, or because he or she has complained of discrimination, legitimizes and fosters such unlawful and invidious practices.\(^7\)

Regardless of its necessity, whether preliminary judicial relief is available to private plaintiffs to preserve the status quo pending EEOC action has not yet been firmly established. This article will examine the language of Title VII and the legislative history of that statute; it will analyze the rationale used in past cases in deciding whether preliminary relief is available. Based upon that statutory language, legislative history, and case law, it will offer a rationale for providing preliminary injunctive relief to Title VII plaintiffs in order to preserve the status quo pending EEOC’s final disposition of their charges.

**Statutory Scheme**

Although Title VII sets up an elaborate procedural maze through which an individual who seeks relief from an employer’s alleged discriminatory practices must pass, it makes no specific reference to the availability or unavailability of preliminary injunctive relief to private plaintiffs. Nevertheless, the statutory scheme does shed light upon the question.

The Title VII procedural maze rarely commences at the EEOC level. Generally, if the individual’s home state or locality has a law prohibiting the alleged discriminatory practice, the individual must file a charge there first.\(^8\) Sixty days after filing with the state or locality, but not less than 180 days after the alleged violation,\(^9\) the individual may file a charge under Title VII with the EEOC.\(^10\) At that time, the EEOC must investigate the charge and, if it finds

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10. During the first year after the effective date of the state or local law, defer to the state or locality is extended to 120 days. 42 U.S.C. § 2000e-5(c) (Supp. II, 1972). EEOC regulations do, however, allow the EEOC to receive the charge, defer it to the state or local agency, and begin acting on the charge without another filing when the deferral period has ended. 29 C.F.R. § 1601.12 (1975). The United States Supreme Court has countenanced this procedure. *Love v. Pullman Co.*, 404 U.S. 522 (1972).
"reasonable cause to believe that the charge is true," it must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." If the EEOC has not secured a conciliation agreement within 30 days after the charge has been filed, the EEOC may file an action in the appropriate United States District Court. If no action has been filed by the EEOC and no conciliation agreement has been entered into 180 days after the charge has been filed, the charging party may request a notice of right to sue. After receiving this so-called "Right to Sue Letter," the charging party then has 90 days in which to file an action in federal court.

The 1972 Amendments to Title VII also give the EEOC the power to seek preliminary injunctive relief pending its final disposition of a charge. This power may be utilized without compliance with the above-mentioned 30-day or 180-day time requirements for a civil action on the merits.

THE EEOC AND PRELIMINARY RELIEF

Since the 1972 Amendments granted the EEOC power to seek preliminary relief, the Commission has used its power sparingly at best; preliminary relief has been sought in only 21 cases. This

12. Id.
14. Id. The former § 2000e-5(e) gave the EEOC power to extend the 30-day EEOC deferral period to 60 days "upon a determination by the Commission that further efforts to secure voluntary compliance are warranted." By regulation, the EEOC extended that period to 60 days in every case. 29 C.F.R. § 1601.25(a) (1970). Again, it is highly unlikely that within 180 days after the filing of the charge the EEOC will have taken any action whatever, much less secured a conciliation agreement or filed an action. See text accompanying notes 18 through 30 infra.
   Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge.
18. This figure is as of March, 1976, 4 full years after power to seek preliminary injunctive relief was granted to the EEOC. Interview with Charles L. Thomas, Special Assistant to EEOC General Counsel Abner W. Sibal on August 18, 1976. See also Report by EEOC Chairman Lowell W. Perry to Senate Labor Committee on Commission's Current Status and Projected Improvements, BNA FAIR EMP. PRAC., SUMMARY OF LATEST DEVELOPMENTS, No. 279-
figure is nothing less than astounding, considering the enormous number of cases filed with the EEOC. By the end of fiscal 1975, EEOC had received over 280,000 charges. Nearly two-thirds of these were filed after the 1972 Amendments.19 In fiscal 1975 alone, 71,000 charges were filed; at the end of fiscal 1975, the Commission's then current inventory of charges totalled 106,700.20

Congress itself has mandated that the EEOC “not hesitate”21 to seek preliminary injunctive relief when it deems such relief necessary. Considering this mandate, the vast number of cases filed under Title VII, and the probability of harm to individuals and to the public interest if the status quo is not maintained,22 it is impossible that “prompt judicial action” has been required in only 21 of the nearly 200,000 cases filed since the 1972 Amendments. A more plausible explanation for EEOC’s failure to act centers on that organization’s inefficiency and inadequate staffing. The District Directors,23 vested with authority to determine whether preliminary injunctive relief is necessary,24 do not independently screen cases as they come in to determine whether such relief should be sought.25 It may take two years after a complaint is filed for the EEOC to even investigate it;26 the bulk of the EEOC’s caseload at the end of fiscal 1975, some 94,190 cases, has not been fully investigated.27

Even if a charging party requests that the EEOC seek relief, and persuades the District Director to make a determination that relief is necessary to carry out the purposes of Title VII, the EEOC has erected its own procedural maze through which the request must make its way. After the District Director makes an initial determination, the approval of four more persons or groups must be obtained. The District Director first forwards the case to the appropriate Regional Litigation Center. If the Regional Litigation Center

Part II 24 (October 30, 1975) [hereinafter cited as Report]. At the time the Report was made, 20 requests for preliminary injunctive relief had been filed by the EEOC.

20. Id. at 12, 13.
22. See note 7 supra and accompanying text.
23. The EEOC has 32 District Offices, each headed by a District Director. It is in the appropriate District Office that an individual files a charge.
25. See generally CCH 1976 EEOC COMPLIANCE MANUAL.
26. H.R. Rep. No. 238, 92d Cong., 1st Sess. 12 (1971). The Commission has now taken steps to shorten this time. The current goal is to “reduce the backlog to such a level that charging parties will, on the average, have to wait no longer than 12 months for resolution of their charges.” CCH 1976 EEOC COMPLIANCE MANUAL ¶ 321.
27. Report, supra note 18, at 12.
approves suit, it prepares the necessary papers and forwards them to the Litigation Services Branch. That Branch then makes a recommendation to the Associate General Counsel, Trial Division. The Associate General Counsel reviews the case and makes a recommendation to the Commission. Then, unless the majority of the EEOC Commissioners place a hold on the recommendation, the petition for preliminary relief may finally be filed by the Regional Litigation Center.28 Recognizing the EEOC’s enormous backlog of charges and the procedural requirements set out above, District Directors have not been making such requests except in the most egregious of circumstances when charging parties have been particularly vocal.

For these and whatever other reasons involved, and regardless of the congressional mandate that the EEOC not hesitate to seek relief, it is apparent from the EEOC’s past performance that it will not take primary responsibility for enforcing Title VII for individual complainants.29 The EEOC has recognized its inability to deal with the vast number of complaints filed with it, and instead of seeking new ways to redress individual complainants’ rights, has made a conscious decision to shift its focus away from individuals towards eliminating systematic discrimination through administrative regulation and so-called “pattern and practice” suits.30 In order to fully effectuate the purposes of the statute and to avoid probable irreparable harm, “prompt judicial action” in the form of preliminary injunctive relief will have to be requested in the future, as in the past, primarily by private individuals. How will the courts respond to such requests?

DREW v. LIBERTY MUTUAL INSURANCE CO. AND SUBSEQUENT CASES

The first court to squarely face the issue of the availability of interim injunctive relief pending EEOC action did so in a case involving quite unusual facts. Unfortunately, due primarily to the facts involved, its holding rests on principles of questionable precedential value.

The plaintiff in Drew v. Liberty Mutual Insurance Co.31 filed a sex discrimination charge against Liberty Mutual with the EEOC on

29. As of October of 1975, the EEOC had authorized only 695 actions. Only 124 of these had been settled at that time. Report, supra note 18, at 24.
31. 480 F.2d 69 (5th Cir. 1973).
April 6, 1972. She was fired the next day. Twelve days later, on April 19, 1972, she filed a complaint in district court requesting temporary relief ordering her reinstatement pending the EEOC's final disposition of her charge.\textsuperscript{32} Liberty Mutual moved to dismiss.\textsuperscript{33} At the initial hearing on May 4, the trial court expressed "strong doubt" as to whether an individual could maintain an action in light of the provisions of § 2000e-5(f)(2) granting the EEOC the right to seek preliminary relief.\textsuperscript{34} On May 12, 1972, the EEOC filed its own complaint under (f)(2) seeking the same relief plaintiff Drew sought.\textsuperscript{35} In that latter action the EEOC prevailed; Drew was ordered reinstated on May 30, 1972.\textsuperscript{36}

Plaintiff Drew had amended her individual complaint on May 23, 1972, alleging that the EEOC issued her a Right to Sue Letter on May 18, 1972.\textsuperscript{37} Nevertheless, the district court dismissed her complaint, holding that she had no statutory right to proceed under (f)(2), and that her Right to Sue Letter was of no effect as it was issued long before the expiration of 180 days after her complaint was filed with the EEOC, as is required by (f)(1).\textsuperscript{38} The court did not decide whether (f)(2) defines the exclusive procedure available in employment discrimination cases. Because the EEOC did take advantage of its (f)(2) powers, seeking relief for Drew, her independent action was held to be "superfluous."\textsuperscript{39}

Plaintiff Drew appealed. Although she had already been reinstated, she prevailed in her argument before the Court of Appeals for the Fifth Circuit that the case was not moot because she was ordered to pay costs in her individual action and because her attorney was not awarded counsel fees.\textsuperscript{40}

The court of appeals framed the issue in a way that allowed it to ignore many of the procedural and substantive issues involved and required only one logical conclusion. The court asked simply whether the 1972 Amendments, which gave the EEOC the right to

\begin{itemize}
  \item \textsuperscript{33} Presumably defendant's motion could have been based upon Federal Rules of Civil Procedure 12(b)(1), (6), and (7). The motion could also have contained a defense under Rule 19, for failure to join an indispensable party, the EEOC.
  \item \textsuperscript{34} 480 F.2d at 71.
  \item \textsuperscript{35} EEOC v. Liberty Mutual Insurance Co., 475 F.2d 579 (5th Cir. 1973).
  \item \textsuperscript{36} \textit{Id.}
  \item \textsuperscript{37} 5 FEP Cases at 781. The EEOC trial attorney in the case convinced the Atlanta District Director to issue the letter prior to the expiration of 180 days after filing with EEOC. With regard to the propriety of this action, see text accompanying notes 138 through 143 infra.
  \item \textsuperscript{38} \textit{Id.}
  \item \textsuperscript{39} \textit{Id. at 782.}
  \item \textsuperscript{40} 480 F.2d at 72.
\end{itemize}
proceed for temporary relief, made such a provision the exclusive means by which a person in Ms. Drew's position could be protected from irreparable harm. Refusing to hold that congressional silence destroyed what the court assumed was an existing right of action, it answered the question in the negative and reversed the trial court.

The initial analytical problem with the court's opinion is its assumption that Ms. Drew would have had a right to preliminary relief pending the EEOC's disposition prior to the 1972 Amendments. Its assumption is based, not upon any Title VII case, but entirely upon its application of the holding in *Sanders v. Dobbs House, Inc.* to the facts presented in *Drew*. *Sanders* was an action brought under 42 U.S.C. § 1981, which gives every person the right "as is enjoyed by white citizens," to make and enforce contracts. Although § 1981 does not prescribe a private remedy, the court in *Sanders* held that it had jurisdiction under the declaratory provisions of § 1981 and the general civil rights jurisdictional statute. Therefore, it could fashion an equitable remedy to vindicate the rights granted by § 1981.

The flaw in the analogy is that plaintiff Drew's situation was unlike the situation present in *Sanders*. Title VII, unlike § 1981, does create a private right of action and does give the federal court jurisdiction to grant broad remedies. But Title VII, again unlike § 1981, erects certain procedural requirements that must be met before the rights set out therein can be vindicated. The *Sanders* argument as used in *Drew* is, instead, more analogous to an argument in favor of direct access to the courts under Title VII without going through the procedural maze erected by Title VII (i.e., an argument that a court can take independent jurisdiction under the declaratory provisions of Title VII, as the court did in *Sanders*, without any reference to the EEOC, and, once it has jurisdiction, can fashion the appropriate remedy). While this analysis has much to commend it, no court accepted it prior to the 1972 Amendments and no court has accepted it since. In fact, the *Drew* court, in a footnote, concedes

41. 431 F.2d 1097 (5th Cir. 1970).
43. 431 F.2d 1097 (5th Cir. 1970).
44. Direct court access under Title VII has been urged by one law review commentator. Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 Harv. L. Rev. 834, 852-55 (1969) [hereinafter cited as *Discrimination in Employment*]. However, that commentator noted that direct access had been rejected at that time by both courts and commentators. The United States Supreme Court has now indicated that filing a charge with the EEOC is a jurisdictional prerequisite to suit. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). See also cases cited at 2 A. Larson, *Employment Discrimination* § 49.31 (1975) and *Developments in the
as much.\footnote{Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1202-04 (1971) [hereinafter cited as Developments].}

Nor can the \textit{Drew} court's decision be based in any way on plaintiff Drew's Right to Sue Letter, issued prior to the expiration of 180 days following the filing of her complaint with the EEOC. The court never mentioned Drew's Right to Sue Letter nor did it discuss whether a letter issued early is proper. The court simply ignored the letter and assumed that Drew's charge was still pending in the EEOC.\footnote{Counsel for Title VII plaintiffs should be alert to the possibility that the discriminatory conduct might be actionable under 42 U.S.C. §§ 1981, 1983, or under state law. In a § 1981 or § 1983 action, preliminary relief is available without the procedural encumbrances of Title VII. As to those plaintiffs to whom it applies, it is available in addition to, not in lieu of, Title VII. See, e.g., Waters v. Wisconsin Steel Works, Int'l Harvester Co., 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970); Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1971). Preliminary injunctive relief might also be more readily available under state law. See, e.g., MASS. GEN. LAWS ANN., ch. 151B § 9 (1975-76 Cum. Ann. Pocket Part).}

Aside from the vague argument referred to above, the \textit{Drew} court never actually faced the issue as to the basis for its jurisdiction. Because of the unusual procedural posture of the case, the court did not have to confront the issue because the injunction was actually granted to the EEOC. Since all of the elements required for injunctive relief were satisfied in \textit{EEOC v. Liberty Mutual Insurance Co.}, the \textit{Liberty Mutual} court clearly did have jurisdiction of the action under section (f)(2); hence, discussion of the jurisdictional basis was not crucial to the decision in \textit{Drew}.\footnote{\textit{For this reason, Drew's value as precedent is questionable.}} For this reason, \textit{Drew}'s value as precedent is questionable.

\footnote{\textit{45. It must be remembered that this is not an action brought by Ms. Drew for a final adjudication of her right to be protected against the alleged discriminatory conduct of the defendant. That matter is being considered by the Commission in the usual course. She normally would not be permitted to file a suit on the merits unless the Commission had been unable for a period of 180 days to effect reconciliation.} 480 F.2d at 73 n.5.}

\footnote{\textit{46. The court stated: "The 180-day provision, of course, does not apply here, because the action brought by Ms. Drew is merely one to seek temporary relief pending the action of the Commission." Id. The court may have recognized that if its decision had been based in any way on the Right to Sue Letter, its decision may not have been to grant relief pending \textit{EEOC action}, as it is questionable whether the EEOC has the right to proceed at all after a Right to Sue Letter has issued. At least one court has asserted that once the letter issues, the EEOC can no longer take any action. \textit{EEOC v. Pacific Press Publishing Ass'n}, 535 F.2d 1182 (9th Cir. 1976). \textit{Contra}, \textit{EEOC v. Cleveland Mills Co.}, 502 F.2d 153 (4th Cir. 1974). See also Case Comment, 6 TEXAS TECH L. REV. 1163 (1975).} 47. The court specifically held: [I]n the limited class of cases, such as the present, in which irreparable injury is shown and likelihood of ultimate success has been established (here this has been determined by the trial court), the individual employee may bring her own suit to maintain the status quo pending the action of the Commission on the basic charge of discrimination.}
Regardless of Drew’s shaky underpinnings, many courts that have granted relief in cases subsequent to Drew based their holdings specifically on an acceptance or rejection of the Drew court’s analysis. The courts at this time are almost evenly divided on the issue of the availability of preliminary relief.48

Those courts that have refused to find a jurisdictional basis to grant relief have based their holdings on one or more of several arguments. First, a number of courts have criticized the concept of “partial” jurisdiction utilized in Drew, stating that since they do not have jurisdiction over the underlying cause of action, they cannot provide preliminary injunctive relief.49 Second, some courts have stated that the 180-day period is a “statutorily required cooling off and conciliation period” which should be judicially enforced.50

48 F.2d at 72. If applied to the usual case, this would require the court to hear the injunction request itself prior to deciding whether it has jurisdiction. The appropriateness of such an approach is questionable. The court either has jurisdiction or it does not, regardless of the strength of plaintiff’s case on the substantive issues.

In the end Liberty Mutual was ordered to pay costs in the EEOC action and in the Drew action as well. It must have been small comfort that plaintiff’s counsel fees had to be paid only once. Section 2000e-5(k) allows an award of attorney fees to the prevailing party as part of costs, but excepts the EEOC from this award.

49. Relief held to be available: Hochstadt v. Worcester Foundation, 11 FEP Cases 1426 (D. Mass.), aff’d, No. 76-1019, (1st Cir. Sept. 23, 1976) (here, the court denied defendants’ motion to dismiss, but also denied the injunction request as plaintiff did not show she was likely to prevail on the merits); Westerlund v. Fireman’s Fund Insurance Co., Civil No. C-75-1639-OJC (N.D. Cal., October 2, 1975); Lewis v. FMC Corp., 11 FEP Cases 31 (N.D. Cal. 1975); Everett v. Scott Lad Foods, Civil No. 75-406C(3) (E.D. Mo. July 2, 1975); Baxter v. Sharpe, 10 FEP Cases 1159 (W.D.N.C. 1975); Hyland v. Kenner Products Co., 10 FEP Cases 367 (S.D. Ohio 1974); Bauman v. Union Oil Co., 400 F. Supp. 1021 (N.D. Cal. 1973) (dicta). See Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974); Ingram v. First Wisconsin National Bank, 10 FEP Cases 870 (N.D. Ala. 1974); Commonwealth v. Operating Engineers, Local 542, 347 F. Supp. 268 (E.D. Pa. 1972). In these cases preliminary injunctive relief was held to be available, but it is not clear from the courts’ opinions in Faro and Ingram whether the 180-day waiting period had passed and Right to Sue Letters had issued. In Operating Engineers, Title VII was held to be one of five alternate grounds for granting a preliminary injunction. The opinion in that case does not state whether any filing with the EEOC had been made at all. See also Parks v. Dunlop, 517 F.2d 785 (5th Cir. 1975); Parks v. Brennan, 389 F. Supp. 790 (N.D. Ga. 1974) and Donald v. Ray, 377 F. Supp. 986 (E.D. Tenn. 1974), involving public employees for whom there is no (f)(2) remedy.


Third, others rely upon the comprehensive nature of the Title VII Amendments to sustain a finding that only the EEOC can seek preliminary relief. Fourth, *Drew* has been held to be factually distinguishable from subsequent cases because plaintiff Drew had an unchallenged Right to Sue Letter, because plaintiff Drew alleged a violation of the retaliation provisions of Title VII rather than the other discrimination provisions, or because there was no existing employment relationship between the parties.

Notwithstanding the doubtful validity of the *Drew* court’s reasoning, it is urged that the courts that have refused to find a jurisdictional basis to grant relief have misconstrued Title VII. There is a sound and persuasive rationale, consistent with Title VII and the congressional purposes in enacting it, for granting preliminary relief in all types of Title VII cases pending the EEOC’s disposition of the charges. That rationale cannot, however, be based simply upon the desirability of providing remedies to vindicate rights, as was apparently the case in *Drew*. Rather, it must be based upon the generally recognized power of the federal courts to grant interim relief in aid of administrative processes and the absence of language in Title VII itself indicating that Congress intended to take away that power in Title VII cases.

**Federal Courts’ Jurisdiction to Grant Interim Relief Pending Action by Administrative Agencies**

The courts that have refused to accept jurisdiction in Title VII

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54. Townsend v. The Exxon Company, Civil No. 76-1961-M 5 (D. Mass. Sept. 2, 1976); Jerome v. Viviano Food Co., Inc., 489 F.2d 965, 968 (6th Cir. 1974). However, whether there is an existing employment relationship between the parties has nothing to do with the court’s jurisdiction. This fact is relevant only as it relates to whether the plaintiff has shown he or she is going to be irreparably harmed pendente lite and whether it is appropriate for the court at the preliminary injunction stage to grant “affirmative” relief, rather than to just preserve the status quo ante.

55. For a complete discussion of this general subject from which the historical basis set
preliminary injunction requests are undoubtedly correct when they state that the federal district courts cannot simply grant injunctions where there is no underlying cause of action over which the courts have jurisdiction. But it is an entirely different matter to decide whether a federal court has the power to grant interim injunctive relief pending an administrative agency's disposition of a case when that court is directed by statute to make the final decision in the case.

It has long been settled that federal district courts may issue injunctions in pending cases and stays pending appeals to preserve the status quo, and that the courts of appeals and the United States Supreme Court also have the power to stay district court orders pending appeal. The Federal Rules of Civil Procedure specifically recognize this power. This power had earlier been held to be one of the inherent powers of congressionally created courts; it was confirmed by statute as early as 1789. The so-called All Writs Act, first enacted as section 14 of the Judiciary Act of 1789, empowers all congressionally created courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In 1942, in the case of Scripps-Howard Radio, Inc. v. FCC, the United States Supreme Court held that the courts of appeals, empowered by statute to review the decisions of the Federal Communications Commission, have the authority to stay administrative orders pending court review. This power, according to the Court, is "as old as the judicial system of the nation;" it is based upon the courts' "traditional equipment for the administration of justice," codified as early as "the very first Judiciary Act."

It has also been held that the courts of appeals need not have

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56. See note 49 supra. See also C. Wright, Federal Courts § 7 (1971) ("The federal courts . . . cannot be courts of general jurisdiction. They are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress.")


58. See Jaffe, supra note 55, at 656-59, especially cases cited at nn. 14, 16, 17, 19.


60. 28 U.S.C. § 1651(a) (1970). It has been held that this power includes the power to issue an injunction. Stell v. Savannah-Chatham County Bd. of Ed., 318 F.2d 425 (5th Cir. 1963); United States v. Western Pa. Sand & Gravel Ass'n, 114 F. Supp. 158 (W.D. Pa. 1953).

61. 316 U.S. 4 (1942).

62. Id. at 17.

63. Id. at 9-10.

64. Id. at 10 n.4.
present jurisdiction over a cause of action to issue writs in aid of their appellate jurisdiction over district court cases. The reasoning behind this principle is sound. First, the All Writs Act referred to above does not specifically limit that power to cases in which the court has present jurisdiction. Second, the power must be exercisable as incidental to the court's ultimate jurisdiction because, as was asserted by a unanimous Court in the case of Roche v. Evaporated Milk Association: "Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal." This reasoning has been extended to cover administrative agency rulings. In the case of FTC v. Dean Foods, Co., the Federal Trade Commission asked the Court of Appeals for the Seventh Circuit to enjoin a merger until the Commission could determine the legality of the merger under the antitrust laws. The United States Supreme Court held that the court of appeals had jurisdiction over the request because jurisdiction under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." Furthermore, even though the Commission had not been given express statutory authority to request preliminary relief, this power was held to be "incidental" to those functions Congress did give the Commission. "Without standing to secure injunctive relief, and thereby safeguard its ability to order an effective divestiture of acquired properties," said the Court, "the Commission's efforts would be frustrated." Jurisdiction was thus upheld not only to protect the potential jurisdiction of the court of appeals but also to protect the primary jurisdiction of the federal agency.

Although the action in Dean Foods was brought by the Federal Trade Commission and not by a private party, there appears to be

65. JAFFE, supra note 55, at 659 and cases cited at nn. 27 and 28 therein. The cases of La Buy v. Howes Leather Co., 352 U.S. 249 (1947), Ex parte United States, 287 U.S. 241 (1932), and McClellan v. Carnegie, 217 U.S. 268 (1910) all involved the issuance of writs of mandamus by either the United States Supreme Court or a court of appeals requiring a district court (or a district court judge sitting as a judge of the court of appeals in McClellan) to take certain action. In each case the court issuing the writ did not have present jurisdiction over the cause of action; in each case, the Court held that issuance was proper in aid of the court's potential appellate jurisdiction under the All Writs Act as then in force.
66. 319 U.S. 21 (1943).
67. Id. at 25.
69. Id.
70. 384 U.S. at 603.
71. Id. at 606.
72. Id. at n.5.
no reason, absent specific statutory exclusion, for a different result when the request is made by a private party, assuming the plaintiff meets all the requirements for injunctive relief.\textsuperscript{73} This principle was specifically upheld by the United States Supreme Court in the case of \textit{Sampson v. Murray},\textsuperscript{74} although ultimate relief in that case was denied.\textsuperscript{75}

The jurisdiction of the federal courts in these cases was not "partial" jurisdiction.\textsuperscript{76} The courts in \textit{Scripps-Howard, Dean Foods, Roche,} and \textit{Sampson} had potential jurisdiction over an underlying cause of action and had the power to make the final decision in each of these cases, just as the federal district courts asked to grant preliminary injunctive relief will have over Title VII cases. In fact, in a Title VII case, the argument should be even stronger. In such a case, the federal district court does not merely have power to review the agency's decision; it is empowered to hear the case de novo on its merits. The only power the court lacks is present power to make that decision on the merits. Only as to the final decision must the court await the exercise by the agency of its primary jurisdiction.\textsuperscript{77}

\textbf{TITLE VII DOES NOT DIVEST THE FEDERAL COURTS OF JURISDICTION TO PROVIDE PRELIMINARY INJUNCTIVE RELIEF PENDING EEOC'S DISPOSITION OF A CHARGE}

Although the federal district courts do generally have jurisdiction to grant interim relief pending action by federal agencies, if the

\textsuperscript{73} Indeed, Professor Jaffe argues that when relief is sought by a private party the case for recognizing the power to preserve the status quo is stronger. \textsc{Jaffe, supra} note 55, at 677. Caution should be used, however, in taking this argument too far when the administrative agency also has the authority to seek relief.

\textsuperscript{74} 415 U.S. 61 (1974). One court in a Title VII case did properly use this analysis. \textsc{See Hyland v. Kenner Products Co., 10 FEP Cases 367, 377 (S.D. Ohio 1974).}

\textsuperscript{75} 415 U.S. 61 (1974). In \textit{Sampson}, the majority paid lip service to the principles of the All Writs Act "as a preservative of jurisdiction," and countenanced its use in \textit{Dean Foods} where, if injunctive relief were not available, the practical disappearance of one entity by merger would render the Commission helpless to take any action if it found the proposed merger violated the antitrust laws. However, when the \textit{Dean} rule was applied to a woman who alleged she was fired from her government job unlawfully, the majority agreed that her deprivation of income for an indefinite period of time and the damage to her reputation from a wrongful discharge did not constitute irreparable harm. The majority did not recognize that \textit{...} employees may lack substantial savings, and a loss of income for more than a few weeks' time might seriously impair their ability to provide themselves with the essentials of life. \textit{Id.} at 101 (Marshall, J., dissenting). It is hoped that this case will be limited to its specific facts. However, counsel for Title VII plaintiffs should be aware of \textit{Sampson} and the possibility that a strong irreparable harm showing might be required. \textsc{See, e.g., Morgan v. Fletcher, 518 F.2d 236 (5th Cir. 1975) and note 144 infra.}

\textsuperscript{76} \textsc{See note 49 supra.}

\textsuperscript{77} \textsc{Developments, supra note 44, at 1257.}
applicable statute precludes relief, this overriding consideration must lead the court to conclude that Congress has divested it of jurisdiction.78

Prior to the 1972 Amendments, Title VII contained no express exclusion of preliminary relief to private parties. The argument has been made, however, and accepted by some courts, that such an exclusion can be implied by the language of (f)(1) (180-day deferral provision) and the post-1972 (f)(2) (EEOC granted power to seek preliminary relief).79 These provisions will be discussed separately.

Section (f)(1)

Section (f)(1) provides, in pertinent part:

If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify 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. . . . 80

The pre-1972 statute was similar except that, as has been stated, the deferral period to the EEOC was only 30 days.81

There were no cases under the pre-1972 statute directly holding that preliminary relief was either available or not available prior to the expiration of the EEOC deferral period. In Bowe v. Colgate Palmolive Co.,82 a class action in which only one class member had filed with the EEOC and obtained a Right to Sue Letter, one district court did hold that: "It would be unrealistic to require an em-

78. Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658, 667-69 (1963). See also FTC v. Dean Foods Co., 384 U.S. 597, 608 (1966) ("In the absence of explicit direction from Congress we have no basis to say that an agency charged with protecting the public interest cannot request that a court of appeals, having jurisdiction to review administrative orders, exercise its express authority under the All Writs Act to issue temporary injunctions as may be necessary to protect its own jurisdiction"); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 11 (1942). ("These controlling considerations [that irreparable damage could occur while litigation is pending] compel the assumption that Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review.").

79. See notes 50 and 51 supra.
81. See note 14 supra.
ployee whose rights are threatened with irreparable harm to exhaust his remedies before the EEOC prior to seeking injunctive relief from the Court. On appeal, the Court of Appeals for the Fifth Circuit reached the same result, but on much more narrow grounds. The court reasoned that the purposes of filing with the EEOC, to give notice to the charged party and to give the EEOC the opportunity to determine the adequacy of the charge and to seek voluntary compliance, were properly effectuated by one class member filing a charge.

In *Rios v. Enterprise Association Steamfitters*, three plaintiffs who complied with the EEOC filing requirements were granted preliminary injunctive relief. A fourth plaintiff, Rutledge, filed with the EEOC and then brought suit before he was entitled to receive a Right to Sue Letter. Denying an injunction, the court stated:

And even if the complete bypassing of the EEOC may be allowable, it does not follow that a plaintiff may invoke the help of that agency and then short-circuit its efforts by premature resort to the federal court.

Regardless of this language, *Rios* is not really persuasive precedent for a holding that preliminary relief prior to the issuance of a Right to Sue Letter is not available. The court’s decision was bolstered by the fact that plaintiff Rutledge filed his complaint with the EEOC after the expiration of the time allowed for filing by the statute. Moreover, the court also found that Rutledge was quite unlikely to succeed on the merits of his claim.

The few other pre-1972 cases that involved procedural aspects of the availability of preliminary injunctive relief were cases in which the plaintiffs had complied with EEOC procedures and had received prior Right to Sue Letters. Thus, whether (f)(1) precludes an indi-

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83. *Id.* at 338.
84. 416 F.2d at 720.
86. *Id.* at 204.
87. *Id.*
88. *See*, e.g., *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970) and *Rios v. Enterprise Ass’n Steamfitters*, 326 F. Supp. 198 (S.D. N.Y. 1971). *See also* *Murry v. American Standard, Inc.*, 488 F.2d 529 (5th Cir. 1973). These cases are not applicable to the issue discussed herein because in all three cases preliminary relief was granted by a court that had present jurisdiction over the underlying cause of action and the jurisdiction to grant relief was incidental to that present jurisdiction.

However, the *Culpepper* court did rely not only upon its inherent power to grant preliminary relief in pending cases, but also upon the language of 42 U.S.C. § 2000e-5(g), which provides, in pertinent part: "If the court finds that the respondent has intentionally engaged in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice." If this reliance is proper,
Individual from seeking court relief prior to the expiration of the 180-day EEOC deferral period cannot be determined based upon pre-1972 precedent. Resolution must depend upon the purposes Congress sought to achieve by including that deferral period.

The congressional scheme designed to eradicate discrimination is based upon a belief that seeking voluntary compliance with the statute is an effective method to secure that goal. To a certain extent, Congress has even indicated in (f)(1) that this method is the preferred method, at least for a period of time. But Congress has also recognized that in many cases voluntary compliance may not be readily obtainable, and has indicated that at the end of the 180-day EEOC deferral period, strict court enforcement is to be preferred over the informal methods of eradicating discrimination. It appears at first blush that Congress has clearly demarcated separate areas of responsibility for the EEOC and the courts, and the separate time periods within which each can act. Those responsibilities and time periods, however, are far from clear cut; there has been much litigation on this issue, and not solely regarding the availability of preliminary injunctions. One offshoot of this litiga-

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it might also provide a basis for jurisdiction in actions for preliminary relief pending the EEOC’s disposition of a charge. But the reliance on 5(g) is misplaced. It is not the court’s duty, at the preliminary injunction stage, to make a “find[ing] that the respondent has intentionally engaged in an unlawful employment practice.” Traditionally, at this stage, the court asks only whether it is likely that the complainant will prevail on the merits.

The Culpepper court attempted to bolster its statutory argument by referring to § 2000e-5(h), which provides that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 “shall not apply with respect to civil actions brought by private persons.” The court stated that this provision makes it clear that preliminary injunctive relief is available, because if 5(h) referred only to permanent injunctive relief, it would be superfluous because 5(g), the power referred to above, explicitly grants permanent relief. This argument is not persuasive. If Congress has intended to include a statutory provision dealing with preliminary injunctive relief, it would have done so. It is more probable that the Norris-LaGuardia language was inserted to make it clear that the provisions of that Act would not supersede the express 5(g) provision.

Thus, a specific statutory basis for preliminary relief cannot be persuasively argued. In fact, not even the Fifth Circuit, the court that decided Culpepper and Murry, has attempted to extend this argument to preliminary injunction requests made pending the EEOC’s disposition of a charge.

One further case should be noted. Sims v. Sheet Metal Workers, Local 65, 3 FEP Cases 712 (N.D. Ohio 1971), was before the district court on a motion for a preliminary injunction and also a motion by certain defendants to dismiss because no EEOC charge had been filed or Right to Sue Letter issued as to charges against those defendants. The motion to dismiss was granted, the court holding: “[T]his Court adopts the view that a right to sue notice is a prerequisite to filing suit in the instant case.” It is not clear from the opinion whether only the case on the merits was dismissed for this reason or whether this holding encompassed the preliminary injunction request. It is arguable that it did not encompass the preliminary injunction request, because, after the above statement, the court discussed plaintiffs’ showing with respect to the preliminary injunction as to those dismissed defendants, and found it lacking.
tion has been a clarification of the purpose of the (f)(1) deferral period, a clarification which sheds light on whether allowing preliminary injunctive relief to private individuals would contravene Congress' intent in enacting (f)(1).

One much litigated issue has been whether an actual attempt at conciliation by the EEOC is required before an individual can seek court enforcement. It is now clear that if the plaintiff has filed with the EEOC and has waited 180 days, he or she may seek court enforcement of Title VII regardless of the existence of any attempt at conciliation or even a reasonable cause finding. The basis for this result is that Title VII plaintiffs need not postpone court action because of EEOC inaction if the EEOC has been given an "opportunity to persuade."90

In the numerous cases deciding whether a Right to Sue Letter is required before an individual can bring a court action seeking final relief on the merits of the case, the EEOC's opportunity to act has again been cited as the reason for the 180-day EEOC deferral requirement.91 For example, in Stebbins v. Nationwide Mutual Insurance Co.,92 the court stated:

[W]e agree with the District Judge that the plaintiff could not bypass the federal agency and apply directly to the courts for relief. Congress established comprehensive and detailed procedures to afford the Equal Employment Opportunity Commission the opportunity to attempt by administrative action to conciliate and mediate unlawful employment practices with a view to obtaining voluntary compliance. The plaintiff must therefore seek his administrative remedies before instituting court action against the alleged discriminator.93

In class action suits the same reasoning has applied. If at least one class member has filed with the EEOC and has a proper Right to Sue Letter, it has been held that court action is proper. The theory

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91. See note 44 supra.

92. 382 F.2d 267 (4th Cir. 1967).

93. Id. at 268. See also Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136, 1139 (5th Cir. 1971) ("[T]he EEOC was intended to, and does, play an important role in the legislative scheme. Potential litigants are absolutely required to take a step which affords them at least an opportunity to reach a more amicable conciliation out of court.").
has been that because one class member has filed with the EEOC, the EEOC has notice of the grievances common to the class and the concomitant opportunity to perform its duties in connection therewith. The policy thus formulated was stated succinctly in the case of EEOC v. Cleveland Mills Co.:

The 180 day period serves its apparent purpose when it limits the time before which a private action may not be filed and thus avoids potential interference with the Commission in the performance of its primary duties of conciliation and enforcement. There is no evidence whatever to indicate that the 180-day deferral period was ever intended to be a "cooling off" period in which employers would be free from judicial or EEOC sanctions. The purpose was clearly to allow the EEOC a time to employ its facilities, if possible, to act on a charging party's complaint. It cannot be said that allowing an action for preliminary relief preserving the status quo pending the EEOC's disposition will in any way contravene that purpose. The EEOC will in all respects retain its primary jurisdiction to attempt conciliation regardless of the court action. In fact, in most instances in which preliminary relief is granted, the granting of the relief will give the EEOC a better opportunity to perform its function. In cases where plaintiffs show the probability of irreparable harm absent preservation of the status quo, preliminary relief will give the EEOC the opportunity to act where, without such relief, the EEOC's later attempted action would be futile. Thus, court action would in no way short-circuit the EEOC's powers, but, rather, would allow those powers to be utilized to their fullest extent in eradicating discrimination as Congress intended.

Section (f)(2)

Section (f)(2) provides that "if the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act" it may bring an

95. 502 F.2d 153 (4th Cir. 1974).
96. Id. at 156.
97. Of course, the shoe will now be on the other foot. EEOC delays will now be detrimental to the employer, rather than the employee. This is as it should be, as the charging party will have already made a strong showing in court that he or she is likely to prevail on the merits. It may also encourage conciliation. See Developments, supra note 55, at 1258.
action for temporary relief. It is arguable that the provision relating to a “preliminary investigation” and a finding that “prompt judicial action is necessary” indicates a desire on the part of Congress to keep the courts free from complaints for preliminary relief that have not already been screened by the EEOC.

Employers might also argue that the preliminary investigation requirement is a requirement whose purpose is to protect them from what might be baseless temporary injunction requests.

Both of these arguments must be put in their proper perspectives. First, the overriding purposes of the 1972 Amendments were to achieve the goal of effectively eliminating discrimination by employers and to expand the power of the EEOC. Second, the legislative history demonstrates that this power under (f)(2) was to be liberally used. The Congressional Record contains the following analysis of (f)(2) as enacted:

> The importance of preliminary relief in actions involving violations of Title VII is central to ensuring that persons aggrieved under this title are adequately protected and that the provisions of this Act are being followed. Where violations become apparent and prompt judicial action is necessary to insure these provisions, the Commission or the Attorney General, as the case may be, should not hesitate to invoke the provisions of this subsection.

The analysis also provides that “[s]uch actions are to be assigned for hearing at the earliest possible date and expedited in every way.” This language is inconsistent with the contention that the purpose of the investigation language is to ensure that this tool will be used sparingly to protect the courts or employers from spurious litigation. Employers’ interests are adequately protected by the traditional requirement that the plaintiff must show that he or she is likely to prevail on the merits before a court will grant preliminary injunctive relief. With respect to the judiciary, it suffices to say that

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100. The only real debate in Congress concerned which means would best achieve the goal of eliminating discrimination; the goal itself was never questioned. See Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 GEO. WASH. L. REV. 824 (1972). See also H.R. REP. No. 238, 92nd Cong., 1st Sess. 1 (1971).
102. Id.
protection of individual rights granted under federal statutes, however burdensome to the courts' already enormous caseloads, is an integral part of their functions. Based on the legislative history, it is more probable that the language of (f)(2) directing preliminary investigation was not included to protect employers or the courts from what might later prove to be baseless suits, but simply to protect the EEOC from the requirement of requesting relief in cases it believes do not warrant it.103

One court has stated that the very existence of (f)(2) makes the remedy it provides “available” and that the “availability” of this so-called “administrative remedy” necessarily precludes the right of an individual to seek relief.104 This argument is no more persuasive than the argument that the investigation language in (f)(2) precludes individual relief. In the first place, merely because a remedy exists on the statute books does not render it available. Considering the EEOC’s backlog and past track record,105 it cannot be that the EEOC request for relief is in any way “available.”106 If it were available, the individual would not be in court on his or her own.107

Furthermore, because (f)(2) exists, it does not inexorably follow that it is an exclusive remedy. There is no doctrine that precludes granting of more than one remedy to a complainant. In fact, Title VII itself accords both administrative and judicial avenues of recourse to charging parties. Moreover, an individual’s right to judicial recourse in other Title VII areas has never been predicated in any way on favorable EEOC action. If the EEOC finds there are “insufficient grounds for the Government to file a complaint,” the legislative history indicates that the individual “should not be forced to abandon the claim.”108 Even if the EEOC finds no reason-

103. It is also probable that the “preliminary investigation” direction was used to clarify that the EEOC could seek preliminary injunctive relief before it did the in-depth investigation required by § 2000e-5(b) that would lead to a reasonable cause finding.
105. See text accompanying notes 18 through 30 supra.
106. The Nottelson court appears to confuse this situation with the entirely separate situation in which equitable relief has been held not to be appropriate if a plaintiff has an adequate remedy at law.
107. The invocation of the doctrine of exhaustion of administrative remedies is also misplaced here. The very reason for the injunction to preserve the status quo is so that administrative remedies can be exhausted at a later date. The injunction is issued in aid of the administrative processes, not in lieu of those processes. Furthermore, it is arguable that there is no available administrative remedy here since the EEOC cannot issue status quo orders. For an overview of the exhaustion doctrine see K. Davis, Administrative Law Text 356-71 (1959); Jaffe, supra note 55, at 424-58.
able cause to credit the allegations made by a charging party, that party retains the right to file an independent lawsuit.\footnote{109} There is no doubt that the Congress, in enacting the 1972 Amendments, hoped that, in contrast to pre-1972 practice, the EEOC would not only perform its task of obtaining compliance informally but would also aggressively seek court enforcement. Presumably, this was the purpose of extending the EEOC deferral period from an unrealistic 30 days to 180 days.\footnote{110} The analysis agreed to by the House and Senate Conference Committee provides: "It is hoped that recourse to the private lawsuit will be the exception and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate."\footnote{111} Notwithstanding this hope, there was also a certain pessimism, presumably based on the EEOC's past performance.\footnote{112} This pessimism led the Conference Committee to state emphatically: "As the individual's rights to redress are paramount under the provisions of Title VII, it is necessary that all avenues be left open for quick and effective relief."\footnote{113} This was a reiteration by the Conference Committee of what was said in the House Report on the bill sent to the floor: "The primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available."\footnote{114}

This history clearly indicates a desire on the part of Congress to strengthen enforcement of Title VII, not to weaken it. The essential concern was not to foreclose any potential rights of individual complainants.

\footnote{110} See note 14 supra.
\footnote{111} 118 Cong. Rec. S 3462 (daily ed. March 6, 1972) ("section-by-section" analysis agreed to by the Conference Committee of the House and Senate on February 29, 1972); 118 Cong. Rec. H 1962 (daily ed. March 8, 1972) ("section-by-section" analysis). It is questionable whether this reasoning was realistic in light of Congress' knowledge of the EEOC's past inability to perform when it had only conciliatory functions. With such a background one wonders why Congress concluded it could properly perform conciliatory functions and seek court enforcement.
\footnote{112} See text accompanying notes 18 through 30 supra.
\footnote{113} 118 Cong. Rec. S 3462 (daily ed. March 6, 1972) ("section-by-section" analysis agreed to by the Conference Committee of the House and Senate on February 29, 1972); 118 Cong. Rec. H 1962 (daily ed. March 8, 1972) ("section-by-section" analysis). The bill that reached the floor of the House and Senate gave the EEOC the power to issue judicially enforceable cease and desist orders. Even in drafting this bill, giving the EEOC the power to act as a "quasi-judicial agency with authority to obtain enforcement orders," the individual right of action was retained because of the concern for prompt action to vindicate Title VII complainants' rights. H.R. Rep. No. 238, 92nd Cong., 1st Sess. 2, 13 (1971).
\footnote{114} H.R. Rep. No. 238, 92nd Cong., 1st Sess. 13 (1971). One commentator has asserted that the very creation of an administrative agency indicates a desire to expedite individuals' complaints. Note, 49 Colum. L. Rev. 1124, 1126 (1949).
In conclusion, in determining whether a court has power to grant interim relief pending the termination of the administrative process, according to Professor Jaffe:

We start with the proposition that presumptively a court of equity has the power to maintain the status quo where necessary to effectuate the purposes of a statute. If the party seeking relief will suffer irreparable injury of a sort which it is the purpose of the statute to avoid, there is a prima facie case for relief pendente lite. It should require fairly clear statutory language to find a purpose to exclude the judicial power traditionally available for such protection.115

The United States Supreme Court supports the view that clear statutory language must be present in order to divest the federal courts of their traditional jurisdiction. In Dean Foods, the Court held that a federal court with prospective jurisdiction over a cause of action has jurisdiction to issue a preliminary injunction “[i]n the absence of an explicit direction from Congress.”116 There is certainly no such explicit direction in the 1972 Amendments.

Assuming arguendo that it is necessary to examine the congressional intent in enacting Title VII to determine whether Congress intended that the federal courts grant preliminary relief, the examination should be undertaken with caution:

The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under §402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts.117

Here, a look at the legislative history clarifies that neither (f)(1) nor (f)(2) were intended to divest the courts of their traditional powers. The (f)(1) deferral period is present so that the EEOC will have the opportunity to seek voluntary compliance with the provisions of Title VII. Preliminary injunctive relief pending such EEOC action can only aid the EEOC in performance of its compliance functions. The fact that the EEOC may, under (f)(2), seek relief, does not necessarily mean that an individual cannot. The remedy is not explicitly made exclusive. Moreover, it was added for the

115. JAFFE, supra note 55, at 685.
116. 384 U.S. at 608.
117. 316 U.S. at 11.
purpose of broadening the EEOC’s powers so that individuals could be better protected from discrimination. To conclude that (f)(2) denies an individual the right to seek preliminary relief directly contravenes the congressional purposes in enacting the 1972 Amendments. The clear implication of the legislative history is that artificial obstacles ought not to be placed in the way of Title VII complainants as they attempt to enforce their rights.

As a practical matter, if the overworked and understaffed EEOC is going to function at all in the future, individual enforcement of Title VII will have to be encouraged. There is no reason why a private individual who has adequate representation should divert the EEOC’s feeble resources from its other tasks.

Congress intended to emphasize the ends to be gained by effective enforcement of Title VII, that is, to promptly and fully eradicate long standing discrimination and to allow all appropriate means to obtain that goal. This being so, it must be said that the statutory direction is to retain the power of the federal courts to grant interim injunctive relief pending the EEOC's disposition of individual charges, not to divest those courts of that general power.

MISCELLANEOUS CONSIDERATIONS AND SUGGESTED COURSES OF ACTION

Based upon the foregoing analysis, preliminary injunctive relief should be made readily available to plaintiffs pending the EEOC’s disposition of their charges. However, attorneys for prospective Title VII plaintiffs still have a number of problems to solve and tactical decisions to make. The following is a discussion of the major procedural issues.

Is Filing With EEOC Necessary Before Seeking Preliminary Relief?

With few exceptions, a Title VII plaintiff will be denied preliminary relief if he or she has not filed a charge with the EEOC. It is well-settled that in order to obtain court relief on the merits, a plaintiff must show that the Commission has not been completely bypassed. In each and every case in which preliminary relief has been granted, a charge had been filed with the EEOC. The very

118. Professor Blumrosen makes a strong argument that "massive prompt implementation of the law" can take place only if private plaintiffs aggressively pursue individual complaints and the EEOC is free to combat systematic discrimination. Blumrosen, supra note 30, at 53.

119. The EEOC made this argument in its memorandum filed as amicus curiae in opposition to the defendants' motion to dismiss in Hochstadt v. Worcester Foundation, 11 FEP Cases 1426 (D. Mass.), aff'd, No. 76-1019 (1st Cir., Sept. 23, 1976).

120. See note 44 supra.
rationale for granting relief urged herein is based upon a pending agency claim.

Counsel should be aware, however, that there are certain recognized exceptions to this rule. The exceptions are available where it can be shown that the lack of a filing does not affect the EEOC's "opportunity to act." First, in a class action, only one class member need file with the EEOC and receive a Right to Sue Letter. Second, when filing with the EEOC would be "futile," it has not been required. For example, where the EEOC has had an opportunity to deal with the same issue involving many of the same parties and has not done so, filing has been considered unnecessary. Also, where a male has sued for sex discrimination and a female employee's claim against the same employer was decided in the EEOC adversely to the male's position, filing was not required. Third, where preliminary injunctive relief is sought because of a violation of § 2000e-3(a) (retaliation against an employee for opposing unlawful employment practices), and a charge of discrimination on the basis of race, color, religion, sex, or national origin has been filed, an additional filing has not been strictly required. The 180-day EEOC deferral requirement has not been applied in this situation when an action has been filed for permanent relief because of an EEOC regulation which allows amendments to relate back to the initial filing and because the EEOC always has notice and the "opportunity to act" as to retaliation. When it investigates any change it always investigates possible retaliation. On the same theory, a filing relating to retaliation has not been required before proceeding for preliminary injunctive relief.

121. See text accompanying notes 89 through 97 supra.
122. See note 94 supra.
125. That section provides, in pertinent part:
   It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title.
128. Hyland v. Kenner Products Co., 10 FEP Cases 367 (S.D. Ohio 1976). However, as filing itself does not usually create insurmountable problems, it would be advisable to file the retaliation charge with the EEOC. It appears that this was done in Drew. The district court opinion indicates that two charges were filed with the EEOC, presumably the sex charge and a retaliation charge. 5 FEP Cases at 780.
What About State Deferral?

Prior to the decision in Love v. Pullman Co., the EEOC would entertain a charge prior to the expiration of the mandatory period of deferral to state and local equal employment commissions. The EEOC regulations allowed the EEOC to receive the charge, defer it to the appropriate agency, and, at the end of the deferral period, begin its statutory functions without subsequent filing. Love approved this procedure.

The existence of the 60 or 120-day deferral period should not delay a filing for preliminary injunctive relief. A prospective plaintiff can file with the EEOC and let the Commission defer the complaint. The argument is hardly persuasive that interim relief would not be in aid of the EEOC's jurisdiction simply because its action is suspended for a short period of state deferral.

There are, however, states whose statutes allow charging parties to request that the state agency waive its jurisdiction over the complaint. The use of this option might strengthen a plaintiff's position that the injunction is actually in aid of the EEOC's jurisdiction. However, there are negative aspects in utilizing this mechanism. First, the possibility of action against employers by both state and federal agencies strengthens an employee's bargaining power with the employer. Plaintiffs may understandably not wish to surrender this power. Second, it is arguable that requesting that a state waive jurisdiction constitutes a failure to proceed under the state statute and, hence, prevents the federal court from taking jurisdiction over a complaint.

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130. See note 10 supra.
131. The situation in the EEOC's requests for relief is analogous. There, by regulation, the EEOC may seek (f)(2) relief during the state deferral period. 29 C.F.R. § 1601.12(d) (1975).
Any person claiming to be aggrieved by a practice made unlawful under this chapter . . . may, at the expiration of ninety days after the filing of a complaint with the Commission, or sooner if a Commissioner so points in writing, bring a civil action for damages or injunctive relief . . . . The petitioner shall notify the Commission of the filing of the action, and any complaint before the Commission shall then be dismissed without prejudice, and the petitioner shall be barred from subsequently bringing a complaint on the same matter before the Commission.
133. See, e.g., EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1968). A few Title VII plaintiffs have attempted to circumvent the 180-day EEOC deferral period completely by filing with the EEOC and immediately asking that their charges be dismissed. Because (f)(1) allows the issuance of a Right to Sue Letter upon dismissal of a charge, in at least one case,
The fact that a preliminary injunction request is made during the state deferral period should not be a ground for a federal court to deny relief; the existence of state remedies should not mandate disallowance of a request to preserve the status quo pending administrative agency action. The same principles, namely, that relief is in aid of the EEOC administrative process and of the court's prospective jurisdiction, and that no statutory exclusion is present, should apply. Plaintiffs in states that allow waiver should not be required to give up their state remedies to obtain interim relief. Plaintiffs in other states with state or local equal employment agencies should not have to defer action for 60 to 120 days before seeking relief.

What Documentation Should Be Sought From EEOC Prior to Filing a Complaint? Should an “Early” Letter Be Requested?

If counsel determines that there is time, certainly the EEOC should be requested to act under (f)(2). A presentation to the federal court is demonstrably more persuasive with EEOC backing. The EEOC's Counsel Manual indicates that requests involving retaliation for resorting to the EEOC and imminent layoff of employees will be considered most favorably. The time it will take to get a determination from the District Director will, of course, depend on the particular Director. Once he or she has made a decision, EEOC regulations indicate that the subsequent decision-making process should take no more than 6 days. This does not, however, include preparing the necessary papers and actually filing the action.

If the EEOC cannot act, counsel should request that the EEOC enter the case on an amicus curiae basis. In fiscal 1975 alone, the EEOC participated as amicus in 84 cases. Counsel should also seriously consider requesting an affidavit from the District Director that the Commission cannot seek preliminary relief on the individual's behalf because of its workload, understaffing, etc. Although, under the analysis urged herein, the EEOC's ability or inability to

the EEOC did dismiss the charge and did give the charging party a Right to Sue Letter. In that case, Scott v. Southern California Gas Co., 7 FEP Cases 1030 (C.D. Cal. 1973), the court found it had jurisdiction over the request for an injunction because, according to the court, plaintiff had exhausted his Title VII remedies. This holding is questionable; it appears that the plaintiff became exhausted before he had exhausted his Title VII remedies. The method of requesting dismissal should not be relied on by counsel for Title VII complainants. They may find that because the EEOC has not been given the required opportunity to act; their court actions as well as their charges will be rightly dismissed.

134. CCH 1976 EEOC GENERAL COUNSEL MANUAL ¶ 10,050.
135. Id. at ¶¶ 10,050-58.
Preliminary Relief Under Title VII

act should not in any way affect an individual's right to preliminary relief, such an affidavit is an extra precaution and could prove persuasive.\textsuperscript{137}

Should an "early" letter be sought? At least three EEOC District Offices have been issuing Right to Sue Letters prior to the expiration of the 180-day EEOC deferral period.\textsuperscript{138} If an individual requests such a letter, those offices have granted the request and sent along with it a statement that the EEOC has a backlog of cases and cannot investigate the complaint within the 180-day period. Although the statute appears unambiguous that 180 days must pass before a Right to Sue Letter can issue, at least two district courts have held that the language of (f)(1), providing that the individual has such a right "if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action," is open to judicial construction, and, consequently, have held such early letters to be proper.\textsuperscript{139} In the case of Berg v. Richmond Unified School District\textsuperscript{140} the Court of Appeals for the Ninth Circuit approved this procedure.

Although this flies in the face of an explicit, contrary EEOC regulation,\textsuperscript{141} it is settled in these districts, pending possible United States Supreme Court review in Berg, that such "early" letters are proper. In such areas, if counsel deems it tactically desirable to abandon the EEOC altogether, this may be an appropriate course of action.\textsuperscript{142}

\textsuperscript{137} These affidavits or letters were presented to the court in Hochstadt v. Worcester Foundation, 11 FEP Cases 1426 (D. Mass.), aff'd, No. 76-1019 (1st Cir., Sept. 23, 1976) and Lewis v. FMC Corp., 11 FEP Cases 31 (N.D. Cal. 1975), cases in which the courts did accept jurisdiction.

\textsuperscript{138} Those district offices are Atlanta, San Francisco, and St. Louis.


In Howard, for example, the court asserted that the words "within one hundred and eighty days" "connote some measure of flexibility, at least up to the one hundred and eightieth day." 10 FEP Cases at 159.

\textsuperscript{140} 528 F.2d 1208 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3459 (U.S. Jan. 28, 1976).

\textsuperscript{141} 29 C.F.R. § 1601.25b(c) (1975) states: At any time after the expiration of one hundred and eighty (180) days from the date of the filing of a charge or upon dismissal of the charge at any stage of the proceedings an aggrieved person may demand in writing that a notice issue pursuant to § 1601.25, and the Commission shall promptly issue a notice, and provide copies thereof and copies of the charge to all parties.

\textsuperscript{142} Preliminary injunctive relief in such an action would be readily available based upon the cases and doctrine set out in note 88 supra.
In other areas, even if the District Director can be persuaded, through "conference, conciliation, and persuasion" or otherwise, to issue such a letter, its acceptance in the courts is unlikely. The propriety of such a letter is highly questionable, based upon traditional notions of statutory interpretation and, more importantly, upon the directly contrary regulation promulgated by the EEOC itself. The recipient of such a letter may in the end have the letter and nothing else except an enormous legal bill and wasted time in litigation.

The Injunction Hearing Itself

The substantive issues relating to the injunction hearing itself are beyond the scope of this article. Counsel should be aware, however, that he or she is entitled to access to the EEOC's files in order to prepare the case. Most often the file will contain the charge and little else concerning the client's specific case at this stage. However, counsel is entitled to the employer's EEO-1s (Employer Information Reports) and other files involving the same employer that the EEOC deems "relevant or material." This information may be helpful in establishing the client's likelihood of success on the merits.

143. Early in 1976 the EEOC did draft a new regulation allowing for the issuance of Right to Sue Letters prior to the expiration of the 180-day EEOC deferral period. This regulation was never promulgated, presumably because of the direct conflict with the statute.

144. With regard to the substantive elements, the plaintiff will have to show a likelihood of success on the merits and, to a greater or lesser degree, that there is a probability of irreparable harm if the injunction is not granted. As to this latter requirement, some courts have required a full showing while others have assumed the presence of irreparable harm once the plaintiff has shown a Title VII violation. Compare, e.g., United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969); Murry v. American Standard, 488 F.2d 529 (5th Cir. 1973); Culpepper v. Reynolds Metal Co., 421 F.2d 888 (5th Cir. 1970) with Baxter v. Sharpe, 10 FEP Cases 1159 (D.N.C. 1975); Hyland v. Kenner Products Co., 10 FEP Cases 367 (S.D. Ohio 1974); Held v. Missouri Pacific R.R. Co., 373 F. Supp. 997 (S.D. Tex. 1974). For some courts, the time period of the injunction granted has been linked to the showing of irreparable harm made. See, e.g., Hyland v. Kenner Products Co., 10 FEP Cases 367 (S.D. Ohio 1974). In that case the plaintiff could not show irreparable harm and for that reason the court limited the injunction to the 180-day EEOC deferral period. Although the result in the case was, it is urged, incorrect, the court's reasoning is probably correct: because the injunction is in aid of the administrative process, irreparable harm to the individual need not be shown. But this reasoning is no less valid after the 180-day deferral period while the case is still pending in the EEOC. Therefore, under the analysis used herein, as long as the injunction is granted pending an EEOC disposition, the injunction should stand as long as the case is pending in the EEOC.


146. Id. at ¶ 1789.
CONCLUSION

The EEOC simply does not have the manpower to deal with the vast number of individual complaints filed with it. Thus, if the goals of Title VII are to be reached under the statutory scheme promulgated by Congress, private individuals must have prompt and full access to the federal courts. It is particularly critical in many Title VII cases that court access be available for preliminary injunction requests pending the EEOC’s disposition of the individual charge. Without such relief, it is probable that the individual who ultimately prevails in court or before the EEOC will already have been irreparably harmed by the delay and, therefore, the ultimately favorable decision will be meaningless.

The federal courts do have the power to grant preliminary relief in such cases based upon the general power given them to grant relief in aid of the administrative process and to preserve their potential jurisdiction. Title VII itself and the legislative history also clearly indicate that individual plaintiffs should be armed with the fullest court access possible.

It is hoped that in this second decade after the enactment of Title VII, unlike the first, full court access will be made readily available to all who seek it.