Equality has long been expounded to be one of the bedrocks that the United States was built upon. Since the country's founding we have continually sought to craft a more equal society for all, where people are judged for who they are and not how they look or how they were born. There have been problems and hurdles along the way in the march towards greater inclusion and equality. The aspiration toward equality has been enshrined in law, together with institutions been empowered to secure equality for all.

One such organization is the Equal Employment Opportunity Commission ("EEOC"), which protects employees and potential employees from discrimination by their employers and potential employers. When individuals believe they have suffered discrimination they can report the offender to the EEOC with the hope that a thorough investigation will be conducted and, if discriminatory practices are found, disciplinary measures will be enacted to dissuade similar actions in the future.

While few would call into question the morality or the overarching legality of such pursuits, safeguards must be in place to ensure that an investigation does not lower itself to the level of a witch hunt. One such safeguard is a clear indication of when the investigation ends so that the individuals and entities being investigated are not forever subjected to the perceived whims of the EEOC. Unfortunately, this very safeguard is missing for many Americans, and millions more are left guessing as to whether the investigation ends or if it continues into perpetuity. This uncertainty is the result of an as yet unaddressed circuit split, the result of which is an unequal standard being applied based on jurisdiction or the persuasive ability of the litigator.

This note will review the existing statutory law, case law by circuit, regulatory law, and policy arguments regarding when the EEOC's investigation terminates. This survey will demonstrate that the EEOC's
investigatory power should be limited to ensure uniformity and consistency across jurisdictions.

II. AUTHORITY AND INVESTIGATORY PROCESS OF THE EEOC

The EEOC was initially created under Title VII of the Civil Rights Act of 1964.\(^2\) It was tasked with preventing discrimination in employment practices "because of race, color, religion, sex, or national origin."\(^3\) The EEOC had to make a determination for each charge filed, and issue a notice of the right to sue within a maximum of 60 days.\(^4\) The EEOC could only refer cases of discrimination to the Attorney General and had no enforcement capacity itself.\(^5\) Congress rectified these weaknesses in 1972 with the \textit{Equal Employment Opportunity Act of 1972}.\(^6\) The right to sue notice was extended to one-hundred eighty days and the EEOC gained its own enforcement procedures, meaning it no longer had to rely on the Attorney General or the Department of Justice for many of its charges/cases.\(^7\) These changes have helped to make the EEOC into the agency a more effective route for justice.

The typical process that the EEOC follows when it receives a charge of discrimination is dictated in Title 42, Chapter 26, Subchapter VI of the United States Code. When individuals believe they have been victims of discrimination, they file a charge with the EEOC within one-hundred eighty days after the event.\(^8\) Upon receiving the complaint, the EEOC notifies the accused party within ten days of the charge being filed and it begins its investigation.\(^9\) During this investigatory period, the EEOC has "access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices."\(^10\) Using this broad authority, it is to determine the reasonableness of the charge within one-hundred twenty days from it being filed, so long as it is practicable.\(^11\) If the EEOC determines that the charge is valid, it will pursue "informal methods of conference, conciliation, and persuasion" to prevent further discrimination from

\(^3\) \textit{Id.} § 703(a)(1)-(2).
\(^4\) \textit{Id.} § 706(e).
\(^5\) \textit{Id.} § 705(g)(6).
\(^7\) \textit{Id.} at section 4, § 706.
\(^8\) 42 U.S.C.A. § 2000e-5(e)(1) (West 2018) (The amount of time changes if the individual first files their claim with the relevant state or local agency).
If the EEOC and the party against whom the charge was filed are unable to reach a reconciliation agreement, the EEOC can file a civil charge against the party if it believes it is an efficient use of resources to effectuate its mandate. If a determination has been made and the EEOC has dismissed the charge, or if it has failed to institute a civil action within one-hundred eighty days, the EEOC issues the charging party with a notice of the right to sue. If the individual chooses to pursue civil litigation on their own the litigation must be commenced within ninety days from receipt of the notice.

III. DIVISION

When two great ideals of society are in conflict, it may be nigh impossible to rationally decide between the two. The two great ideals locked in conflict here are the desire for equality and the desire for privacy. If we truly desire for the EEOC to uphold the ideals of equality, then an employer has no right to privacy. Every decision that the employer makes should be examined to ensure that it has not been influenced by a prejudicial motive. The results of any action must be considered to ensure it will not cause the disenfranchisement of any group or protected class. Only by doing this can we truly hope to ensure equality for everyone in the workforce.

However, if every decision were scrutinized and there could be no expectation of privacy, then innovation would likely be stymied. Every action and decision would become a long-drawn-out process that is subject to analysis of countless attorneys and experts to ensure that a non-prejudicial motive and result will occur. This would have a devastating effect on businesses, employment, and the larger economy.

To prevent either scenario from occurring, a middle ground must be found that allows the EEOC to investigate a claim of discrimination while also allowing a business to retain its privacy and independence. Currently, there are two divergent views on how to answer this question which relate to the length of the investigation of the EEOC.

The first view is that the EEOC has broad investigatory power until it issues a notice of the right to sue. At this point its investigatory power terminates in regards to that charge. Only if another charge is filed will it regain its investigatory authority.

The second view is that the EEOC has broad investigatory power until it voluntarily terminates or litigates the investigation. The issuance of a notice of the right to sue is simply a statutory requirement and has no bearing or impact on the EEOC’s authority, nor does any litigation that

12. Id.
13. Id. § 2000e-5(f).
comes about as a result of the notice. The EEOC can only lose its investigatory power if it voluntarily ceases the investigation or if it decides to litigate it itself.

A thorough examination of both points of view is below. After the survey of statutory law, case law, regulatory law, and policy reasoning behind both sides the final section will find that the EEOC’s investigatory power terminates with the issuance of a notice to sue.

A. “Absolute Power Corrupts Absolutely”

The Fifth Circuit Court of Appeals was the first to rule that the EEOC’s investigation period had a definitive end in *EEOC v. Hearst.* This is still the preeminent case for the limitation side of the debate because of the thorough analysis of the legislative history. When the ruling in *Hearst* is supplemented with the rulings and rational of the District Court of the Eastern District of Virginia, the Eleventh Circuit Court of Appeals, and the D.C. Circuit a substantial argument on the side limiting the investigatory period is formed.

1. Fifth Circuit

The Houston Chronicle, a division of the Hearst Corporation, had two EEOC charges filed against it by its employees. The EEOC began investigating. As a part of its investigation, the EEOC requested the personnel files of the employees, “copies of any internal investigation documents, a list of employees in the Advertising Department, and permission to conduct an on-site investigation and to review certain other records.” Hearst only turned over the personnel files and refused the other requests. The EEOC issued administrative subpoenas to acquire the requested information, along with additional information that it had determined was necessary. After learning that Hearst was not going to comply with the subpoenas, the EEOC filed suit to compel Hearst to comply with the

17. *Id.* at 463.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Hearst Corp.*, 103 F.3d at 463-64.
subpoenas. During this time the employees who had filled the charges with the EEOC had also instituted a civil action against Hearst and were issued notices of their right to sue by the EEOC. \(24\) Hearst argued that since the EEOC had issued right to sue notices to the employees, it had terminated its investigation and thus the EEOC's subpoena power had expired. \(25\)

The Fifth Circuit determined that an EEOC's involvement was broken into four distinct and separate stages, "filing and notice of charge, investigation, conference and conciliation, and finally, enforcement." \(26\) The different stages correspond with the different roles and powers that the EEOC has during the entire process, namely, as the "administrator, investigator, mediator, and finally, enforcer." \(27\) Each stage proceeds in order and only occurs after the termination of the prior stage. \(28\) While the EEOC has broad investigatory powers during the investigation stage these powers terminate once the case proceeds to the conference and conciliation stage of the proceedings. \(29\) The EEOC had allowed the case to advance to the enforcement stage when it granted the charging employees with right to sue notices. \(30\) Even if this was not sufficient to move the case from the investigation stage, the employees had begun their own enforcement through a civil action against Hearst. \(31\) Considering the case had advanced past the investigatory stage and to the enforcement stage, the EEOC had lost its investigatory powers. \(32\) Therefore, the administrative subpoenas issued by the EEOC were null and void. \(33\) Since the existing charge could not be used to continue the investigation after notices to right to sue and private litigation had begun, the Court found in favor for the Hearst Corporation. \(34\)

\(23\). [Id. at 464.]
\(24\). [Id. at 463.]
\(25\). [Id. at 464.]
\(26\). [Id. at 468 (citing Occidental Life Ins. Co. of Cal. v. Equal Emp't Opportunity Comm'n, 432 U.S. 355, 359 (1977))].
\(27\). [Id. at 469.]
\(28\). [Hearst Corp., 103 F.3d at 468-69.]
\(29\). [Id. at 469.]
\(30\). [Id.]
\(31\). [Id.]
\(32\). [Id. at 469-70.]
\(33\). [Id.]
\(34\). [Hearst Corp., 103 F.3d at 470.]
2. Fourth Circuit: Eastern District of Virginia

The Eastern District of Virginia adopted the logic in *Hearst* in *EEOC v Federal Home Loan Mortgage Corporation*. The EEOC investigated the Federal Home Loan Mortgage Corporation ("Freddie Mac") after charges of racial discrimination were filed against it by a former employee. During the course of its investigation, the EEOC requested an unredacted version of an internal "Diversity Assessment" which Freddie Mac refused to produce even after the EEOC issued an administrative subpoena for it. Before a court could issue a ruling regarding the issue of enforcing the subpoena, the EEOC issued a determination letter, a notice of the right to sue, and the employee filed a claim against Freddie Mac. Only then was the subpoena once again brought to the attention of the court.

The District Court chose to adopt the reasoning proffered by the Fifth Circuit in *Hearst*. The EEOC had chosen of its own volition to move from the investigatory stage and into the conciliation stage. If the EEOC still desires the document, nothing prevents it from joining in the lawsuit filed by the employee or filing its own suit and request the documents through the litigation process. Permitting the EEOC to retain its investigatory powers after it has transitioned to a subsequent phase would undo Congress' attempt to separate the charge into distinct phases. Thus, the subpoena was denied by the Court for the Eastern District of Virginia.

While there has been no ruling by the Fourth Circuit Court of Appeals, the fact that this decision has been adopted by one of its districts and has remained unchallenged for over a decade indicates satisfaction by the circuit as a whole.

3. Eleventh Circuit

The Eleventh Circuit Court of Appeals expressed a clear desire to adopt a similar hard line ending to the investigation in *Crawford v. City of Fairburn*, when it stated that "An EEOC investigation ... ends when the EEOC either dismisses the charge or issues a letter of determination that

36. Id. at 770.
37. Id. at 770-71.
38. Id. at 771-72.
39. Id. at 772.
40. Id. at 773.
42. Id. at 774.
43. Id.
44. Id.
states its final findings about the charge." Officer Crawford had been tasked with an internal investigation of two complaints of sexual harassment in the police department, the first of which had also come to the attention of EEOC. The EEOC had concluded its investigation into the first complaint and had issue a letter of determination. Crawford continued his investigation regarding the second complaint for several weeks, but he was terminated shortly after reporting on his findings. Crawford asserted that this was a result of his investigation and that he was protected under Title VII against discrimination stemming from any assistance he provided to the EEOC’s investigation. The Court ruled that this protection ended when the investigation terminated. Its decision was based on the language of U.S.C. 42 §2000e-5(b) which states that “if the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” The distinction between the investigation and the conciliation is sufficient to show that the two are separate stages and protection under the investigation stage does not apply to subsequent stages.

While this decision has since been vacated because the appeal was reconsidered, it is still relevant because it shows that the Eleventh Circuit Court of Appeals is in favor of a strict ending to the EEOC’s investigatory period. It is likely that the Eleventh Circuit Court of Appeals will adopt this standard the next time it is presented with this issue again. When that happens, the Eleventh Circuit might have an even earlier termination than the Fifth Circuit because the investigatory period would end upon the issuance of the letter of determination, which occurs prior to the notice of the right to sue.

4. D.C. Circuit

While the District of Columbia Circuit Court of Appeals has yet to issue a ruling directly on the subpoena power of the EEOC after a notice of the right to sue, it has issued another ruling regarding the EEOC in which it has

45. Crawford v. City of Fairburn, 479 F.3d 774, 777 (11th Cir. 2007) (vacated by Crawford v. City of Fairburn, 482 F.3d 1305 (11th Cir. 2007).
46. Id. at 775-76.
47. Id. at 775.
48. Id. at 776.
49. Id. at 777.
50. Id. at 777-78.
51. Crawford, 479 at 778 (citing 42 U.S.C. § 2000e-5(b)).
52. Id. at 778 (discussing 42 U.S.C. § 2000e-5(b)).
53. Crawford v. City of Fairburn, 482 F.3d 1305, 1306 (11th Cir. 2007).
expressed its view regarding the EEOC’s investigatory powers, giving an indication on how it will rule if faced with the subpoena issue. In Martini v. Federal National Mortgage Association the Court confronted the issue of whether the EEOC could grant an early right to sue notice before the required one-hundred eighty day period from the date of the charge had expired. An employee filed a sexual discrimination charge against her employer, the Federal National Mortgage Association with EEOC. The EEOC provided a right to sue notice “twenty-one days” after the charge was filed, at the request of the employee who subsequently filed a civil lawsuit against the Federal National Mortgage Association “101 days after filing the EEOC charge.” Although the early notice to sue was objected to during the trial the court allowed the case to proceed, resulting in an order against the Federal National Mortgage Association. The issue of the early right to sue notice emerged again on appeal.

The EEOC has a “mandatory and unqualified” duty to investigate a charge filed with it. Since the filing of an early notice to sue normally “terminates EEOC investigation of the charge,” certain charges may not be properly investigated. This goes against Congress’ explicit intent in establishing the EEOC. The intent was to have the majority of charges handled through the EEOC conciliatory process or through a lawsuit led by the EEOC, rather than through private lawsuits. This reasoning and the legislative history, led the Court to rule that the EEOC cannot issue early notices of the right to sue, thereby vacating the judgment against the Federal National Mortgage Association.

The importance and the distinctness that the Court placed on the investigatory period indicates that it would likely be favorable towards a line of logic similar to the one the Fifth Circuit chose to adopt in Hearst. Since the D.C. Circuit Court of Appeals placed such emphasis on a thorough investigation during the Congressionally allotted one-hundred eighty day period prior to the issuance of a notice of the right to sue, it is likely that they will view the termination of the investigation with a similar finality.

55. Id. at 1338-39.
56. Id. at 1339.
57. Id. at 1339-40.
58. Id. at 1340.
59. Id. at 1346.
60. Martini, 178 F.3d at 1346.
61. Id.
62. Id. at 1347-48.
63. Id.
5. Statutory Interpretation

The statutory language emphasizes the investigatory period as a crucial step in the EEOC's process regarding claims of discrimination in the workplace. Only after an investigation shall the commission dismiss the charge or "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." This language places the investigation as a crucial unique step in the process that must take place before any further action can be undertaken. "The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." It must also be noted that a notice of the right to sue can only be issued to the aggrieved party if the charge (1) "is dismissed by the Commission"; (2) if the commission has not filed a civil action "within one hundred and [sic] eighty days from the filing of such a charge"; or (3) "the Commission has not entered into a conciliation agreement to which the person aggrieved is a party." When these two sections are read together it becomes apparent that a right to sue letter should only be issued after the EEOC has completed its investigation of the charges. Since the EEOC cannot delay the issuance of the notice it must then complete its investigation prior to its issuance. Therefore, its investigative powers should terminate with, if not prior to, the issuance of the notice to sue.

While the Fifth Circuit Court of Appeals has offered the most in depth and detailed analysis of why the EEOC's subpoena power terminates after the issuance of a notice of the right to sue, it is by no means the only court to have adopted this view or that has expressed a significant preference towards this point of view. There is statutory evidence to indicate that this interpretation is accurate. These factors coalesce into a powerful argument as to why the EEOC's investigatory power terminates with the issuance of a notice to sue.

B. Unlimited Power

Multiple courts have given the EEOC a significant degree of latitude in its investigatory power even after a notice of the right to sue has been issued. This point of view was originally championed by the Ninth Circuit Court of Appeals, but it has since been adopted by other courts and is reinforced by other case law and regulations.

64. 42 U.S.C. § 2000e-5(b) (West 2018).
65. Id.
1. Ninth Circuit

An employee for the Federal Express Corporation ("FedEx") filed a discrimination charge with the EEOC alleging that a skills test given to FedEx employees to determine eligibility for promotion "had a statistically significant adverse impact on African American and Latino employees" and that he had personally been discriminated against in other ways because of his race. After the one-hundred eighty days had passed, the EEOC issued a notice of right to sue but continued to investigate the claim. While the employee joined a larger action against FedEx, the EEOC continued to investigate the claim and issued a subpoena for information. FedEx refused to comply with this subpoena and had to be taken to Court by the EEOC which resulted in the district court enforcing the subpoena. FedEx appealed.

The Ninth Circuit Court of Appeals considered the issue of whether the EEOC could issue a subpoena after it had previously issued a notice of right to sue. The EEOC's own regulations dictate that when it "issues a right-to-sue notice, it terminates its processing of the charge, but not always." The EEOC is empowered to continue investigating the charge if it believes it is necessary. This occurs when it is necessary to "Effectuate the Purposes of Title VII/ADA." The EEOC's own interpretive regulations and codes grant it the right and ability to continue an investigation after a notice of right to sue has been issued. The various stages in the process are not separate. Instead the entire process is an "'integrated' procedure 'that enables the Commission to detect and remedy instances of discrimination.'" While there might be separate stages, moving from one stage to the next does not terminate the preceding stage and the investigation can continue during the entire process.

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68. Id.
69. Id. at 845.
70. Id. at 846.
71. Id.
72. Id. at 848.
74. Id.
76. Id. at 850.
77. Id. at 851.
78. Id. at 851 (citing Equal Emp’t Opportunity Comm’n v. Shell Oil Co., 466 U.S. 54, 62 (1984)).
The EEOC does not act as a proxy for the employee that filed the initial charge, rather it acts for the broad public interest. If the EEOC had to cease its investigation and its entire process every time the charging party reconciled with the employer, it would fail to carry out its public mandate. The EEOC goes beyond simply advocating for one individual, but advocates for society as a whole as well in an effort to reduce and ultimately eliminate discriminatory employment practices.

The court concluded that the EEOC retains its investigatory powers after a notice of right to sue has been issued and even after a civil lawsuit has commenced. The Court ruled against FedEx and affirmed the lower court’s ruling that it had to comply with the subpoena.

2. Seventh Circuit

While the Ninth Circuit Court of Appeals was the first circuit to rule that the EEOC’s investigatory power did not end with the issuance of a notice to sue it, it was not the last. The Seventh Circuit Court of Appeals has recently issued a similar ruling in *EEOC v. Union Pacific Railroad Company*. Two African American employees of the Union Pacific Railroad Company (“Union Pacific”) applied to take a skills test in order to receive a promotion. They were denied the opportunity to take the test and had their employment terminated shortly thereafter. After their termination, both employees filed charges with the EEOC alleging racial discrimination. The course of the EEOC’s investigation took long enough that it issued the former employees with notices of right to sue which they subsequently used to file a civil claim against Union Pacific. This litigation ultimately resulted in summary judgement for Union Pacific because of a lack of evidence produced by the former employees. However, while the litigation was underway, the EEOC continued its investigation and issued a subpoena for information. Union Pacific petitioned to have it revoked. The District court rejected Union Pacific’s “arguments that the EEOC lost its investigatory authority either (1) after the issuance of a right to sue

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80. *Id.* (citing *Equal Emp’t Opportunity Comm’n v. Goodyear Aerospace Corp.* 813 F2d 1539, at 1542 (9th Cir. 1987)).
81. *Id.* at 852.
82. *Id.*
84. *Id.* at 845.
85. *Id.*
86. *Id.*
87. *Id.* at 846.
88. *Id.*
89. *Union Pac. R.R. Co.*, 867 F.3d at 846.
90. *Id.*
notice to Jones and Burks or (2) when the district court granted judgment in favor of Union Pacific."\textsuperscript{91} Union Pacific appealed both of these rulings.\textsuperscript{92}

Once a claim is properly filed with the EEOC there is no explicit nor implicit limit to the EEOC investigatory authority.\textsuperscript{93} This includes the one-hundred eighty day period before the notice of the right to sue can be issued.\textsuperscript{94} An argument that it should be limited because the EEOC has alternative avenues to pursue an investigation is also insufficient to limit its investigatory power.\textsuperscript{95} While it is true that the EEOC can file a commissioner's charge, in essence bringing its own charge against a party, this could result in an untimely charge.\textsuperscript{96} Alternatively, if the EEOC decided to join in an existing lawsuit of a charging party, it would be subject to the Federal Rules of Civil Procedure which are a significant constraint on the EEOC's traditional investigatory power.\textsuperscript{97} Since textual support for either of these actions is absent, there is no compelling reason that the EEOC's authority should be limited in such a way.\textsuperscript{98} Therefore, the issuance of a notice of a right to sue does not terminate the investigatory authority of the EEOC.\textsuperscript{99}

Union Pacific also urged, unsuccessfully, that once a court has ruled on the merits of the charge, the EEOC loses its investigatory authority.\textsuperscript{100} The EEOC retains control over the investigation and any enforcement efforts relating to it.\textsuperscript{101} Furthermore, if a ruling on the merits regarding an individual claim were sufficient to terminate the EEOC's investigation then it would lead to a respondent settling just to prevent an investigation of a larger case that might be in the public interest.\textsuperscript{102} The EEOC's mandate goes beyond any singular individual and extends to the entirety of the public.\textsuperscript{103} The public would be unfulfilled if the actions of one person were allowed to determine the results for the general public.\textsuperscript{104} For these reasons, a determination on the merits in a charging party's civil case has no impact on the investigatory authority of the EEOC.\textsuperscript{105}

\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 849.
\textsuperscript{94} Id. at 849-850.
\textsuperscript{95} Union Pac. R.R. Co., 867 F.3d at 850.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 850-51.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 851.
\textsuperscript{101} Union Pac. R.R. Co., 867 F.3d 867 at 851 (the court cites 42 U.S.C. § 2000e-5(b) and 29 C.F.R. §§ 1601.21 and 1601.19).
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
Since neither of Union Pacific’s assertions held merit, the Court determined that the EEOC retained its investigatory power despite issuing a notice of the right to sue and despite a court having ruled on the merits in a case that resulted from a notice of the right to sue.106

This decision has placed the Seventh Circuit firmly within the expansive investigatory power of the EEOC camp. This is the broadest ruling to date since it also determines how courts should handle a situation where a decision on the merits has already been made regarding an individual case. Since this is a relatively new ruling it is unclear if other courts will adopt the secondary line of logic regarding judgments.

3. United States Supreme Court

It must be determined if the charging party or the EEOC has control and authority over a filed charge. The Supreme Court considered this question in EEOC v. Waffle House, Inc. and ruled that the EEOC has control over a charge.107 An employee suffered a seizure shortly after beginning work at Waffle House and was subsequently fired.108 He filed a charge with the EEOC which determined that the event violated the American’s with Disabilities Act (“ADA”) and subsequently filed an enforcement action with the court.109 Waffle House asserted that the EEOC had no authority because of an arbitration agreement between its employees and itself which prevented the EEOC from intervening.110 The district court ruled in the EEOC’s favor because it found insufficient evidence that such an arbitration provision existed in the contract.111 On appeal, the Court determined that there was an arbitration provision, but determined that it could not prevent the EEOC’s enforcement action.112 Still, the Court did bar “victim-specific relief.”113 The EEOC appealed to the Supreme Court.114

The Supreme Court examined the statutory construction of Title VII and was unable to find any language that limited the function or statutory powers of the EEOC if an arbitration agreement existed between the charging party and the employer.115 “Once a charge is filed … the EEOC is in command of the process” and retains “exclusive jurisdiction over the

106. Id. at 845.
108. Id. at 283.
109. Id. at 283. (It is important to note that the EEOC’s enforcement power for the ADA is the same as its power under Title VII).
110. Id. at 284.
111. Id.
112. Id. (Discussing lower court ruling).
114. Id. at 285.
115. Id. at 288.
claim for 180 days." Therefore, it is the exclusive decision of the EEOC if it wishes to seek relief on a societal level or for a specific victim. The Supreme Court ruled that the EEOC retained exclusive jurisdiction and could therefore seek whatever enforcement it wanted under Title VII, and by effect, the ADA.

The Supreme Court's determination that the EEOC retains its authority independent of any action or decision by the charging party is important because it means that nothing the charging party independently does can end the investigative process or divest the EEOC of its authority. Specifically, if the charging party brings a lawsuit after it is issued with a right to sue, that does not divest the EEOC of its authority. This means that it retains its investigatory powers until such a time that the EEOC itself acts.

4. Regulatory Interpretation

Similar to many agencies, the EEOC has a catalogue of its own internal regulations that it is has developed to accomplish the task that has been appointed to it by Congress. While a notice of a right to sue will typically terminate the investigation of the EEOC, this is not always the case. The EEOC retains discretionary authority to continuing processing a charge if "it would effectuate the purpose of title VII." The EEOC's own regulations show that it retains control of the charge and reserves the right to continue its own independent processing of the charge, which can include continuing the investigation. The EEOC retains a similar right in regards to its determination and dismissal of a charge which it can reconsider if it believes it is necessary.

These regulations demonstrate the EEOC's desire to retain control over a case even after it might traditionally be perceived to have ended. Neither the of issuing a right to sue nor the actions of a charging party are sufficient to divest the EEOC of this authority. The retention of this authority allows it to ensure that it can effectively insure the civil rights of protected classes under Title VII.

The Ninth Circuit was the first circuit to propose that the investigation did not terminate with the issuance of the notice of the right to sue, and subsequent case law supports that the EEOC's investigatory period does not end with the issuance of a notice of the right to sue.

116. Id. at 291.
117. Id. at 291-92.
118. Id. at 297-98.
120. Id.
121. 29 C.F.R. § 1601.19(b) (2018); 29 C.F.R. § 1601. 21(d) (2018).
III. ANALYSIS

Does the investigatory power of the EEOC end when it issues the notice of the right to sue, or does it only end when the EEOC either terminates the investigation or files a complaint with the court itself? The short answer is that the EEOC's investigatory authority terminates when it issues a notice of the right to sue.

This conclusion was reached upon the consideration of three factors: first, the statutory language of the act itself; second, the existing case law; and third, the policy implications of either interpretation.

A. Statutory Analysis

The Commission is broadly empowered with the authority to "have access to... any evidence of any person being investigated or proceeded against that relates to unlawful employment practices."\(^{122}\) To ensure that this authority is followed, the EEOC is empowered with the ability to subpoena witnesses and evidence for the purpose of its investigation.\(^{123}\) If a subpoena is not obeyed the EEOC is further permitted to bring a case in court to have the court order the production of such evidence or testimony with the possibility of being punished for contempt of court if the order continues to be refused.\(^{124}\) These are broad powers that can bring not only the force of an administrative agency but also the courts to bear upon anyone that attempts to hide evidence of their wrongdoing. It is widely accepted that the EEOC has these powers during its investigation of a charge. This extensive power is the core of the problem. Because the power is so vast it seems natural that Congress created some limit to this power to prevent its abuse, which Congress did.

The investigation is one of the key functions of the EEOC and it makes sense that it would be granted with such broad power to carry out its purpose of eliminating discrimination. However, the investigation is also tied into the rest of the EEOC process. Only after an investigation will the commission make a determination to either dismiss the charge, or choose to pursue it itself.\(^{125}\) Any further action taken by the EEOC is only done after the investigation.

The investigation itself is limited to "one hundred and [sic] twenty days" which is clear evidence that Congress intended to have a clear ending.\(^{126}\) While, the same sentence does provide some flexibility "so far

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124. Id. §161(2).
126. Id.
as practicable” in reference to the length of the investigation, this
allowance is not an unlimited amount of time.\textsuperscript{127} This view is reinforced by
the “one hundred and [sic] eighty day[]” period from the date of the charge
until the EEOC must either bring a charge or issue a notice of the right to
sue.\textsuperscript{128} Congress thereby limits the time for both the EEOC to complete its
investigation and its reconciliation process, if necessary. The reason for
these limits is to ensure that the process has some finality as does any
adjudication in Article I or Article III courts. The common argument that
the limited time period is only included so that aggrieved individuals could
seek reprieve in court is incorrect and lacks a statutory basis. The argument
is further weakened by the fact that the EEOC has the right “to intervene
in such civil action upon certification that the case is of general public
importance,” thus allowing the Commission to continue rooting out
discriminatory employment practices.\textsuperscript{129}

The statutes pertaining to the EEOC show a strong inclination towards
limiting the duration of the investigatory powers of the EEOC. While the
first element of the three-element analysis has supported this position,
this alone is insufficient to validate the conclusion. An examination of the
existing case law that has been created since the formation of the EEOC
must now occur.

\subsection*{B. Case Law Analysis}

Restricting the time limit of the EEOC’s investigation would fit nicely
into existing case law. The Supreme Court has stated that “Congress [has]
established an integrated, multistep enforcement procedure.”\textsuperscript{130} The
Ninth Circuit seemed to equate “integrated” with “concurrent” in its
decision in \textit{Federal Express}.\textsuperscript{131} This is mistaken since “integrate” means “to
form into a more complete, harmonious, or coordinated entity often by
the addition or arrangement of parts or elements.”\textsuperscript{132} Therefore, the
sentence can more appropriately be interpreted as simply being a
reference to the fact that all of the steps in the EEOC’s process are part of
its larger framework on how it handles a complaint.

\begin{thebibliography}{9}
\bibitem{127} Id.
\bibitem{128} § 2000-e(f)(1).
\bibitem{129} Id.
(This is the same argument made by the \textit{Hearst Court} discussed above).
\bibitem{131} \textit{Equal Emp’t Opportunity Comm’n v. Fed. Express Corp.}, 558 F.3d 842, 851-52 (9th Cir.
2009).
\bibitem{132} \textit{Integrate}, \textit{WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED}
(1964).
\end{thebibliography}
The Supreme Court's decision in *Waffle House* held that an individual filing a charge cannot terminate the EEOC's investigatory power.\(^{133}\) This is correct, but, it is also inconsequential. "[T]he EEOC [is] the master of its own case."\(^{134}\) The Supreme Court explains that this means that only the EEOC can decide how to proceed once a charge has been filed during the initial one-hundred eighty days from when the charge is made.\(^{135}\) If the EEOC declines to file a claim during this period, then it must issue a notice of the right to sue.\(^{136}\) This notice of the right to sue is a deliberate action by the EEOC which causes the case to move past the investigation stage. The fact that it is required to give this notice by statute makes no difference since the Supreme Court made no distinction between voluntary actions of the EEOC and actions that it is compelled to undertake by statute.

The Seventh Circuit postulated that the existence of alternative means for the EEOC to pursue its investigation was insufficient to allow the termination of the EEOC's investigatory authority because the subsequent investigations would be subject to various limitations.\(^{137}\) While this assertion may or may not be true, it is not a valid reason to permit the EEOC's expansive investigatory power to continue unabated. The fact that an alternative form of investigation might be more cumbersome is actually a motivator for the EEOC to complete its investigation in an expeditious manner. The Seventh Circuit fails to recall the Supreme Court's instructions that federal courts have a right to provide relief if there is an "inordinate EEOC delay in filing an action."\(^{138}\) If the investigation and conciliatory period take too long, the EEOC still might be prevented from pursuing legal action.

The question must be also asked as to why the EEOC is permitted to join in the lawsuit of an individual if Congress intended for it to retain its broad investigatory power.\(^{139}\) It is doubtful that this was designed as a way for the EEOC to push the burden of investigating and bringing a case to trial onto an aggrieved individual. Instead, it is more likely that Congress gave the EEOC the ability to intervene in a private civil trial as a way for the EEOC to stay involved in a case and attempt to continue to reduce discriminatory employment practices even after it has lost its investigatory authority and its exclusive control of the charge.

135. *Id.* at 291-92.
The existing case law given by the Supreme Court supports a limited duration to the EEOC's investigatory authority. While there will certainly be conflict with the exiting law in some circuits the decisions of the Supreme Court that are most often cited to bolster the argument against a limited duration are not of as much assistance as they first appear. Since existing precedent allows for limitation, it is yet another hurdle cleared indicating that this is the correct conclusion.

C. Policy Considerations

While it is tempting to simply allow the EEOC's investigation to continue perpetually and to allow its investigatory power to go unchecked in order to achieve the goal of eliminating discriminatory employment practices, this would not have the desired result. Allowing the investigation to continue perpetually simply allows more and more charges to accumulate which reduces the likelihood that important charges will ever even be considered. The EEOC is a small agency employing only 1,968 employees. Yet, it is tasked with ensuring that the nearly one-hundred fifty-seven million employees across the United States are treated fairly. This is a monumental task at best and an impossible task at worst. If the EEOC is tasked with both handling new charges in addition to continuing to process prior charges, the agency will soon become overwhelmed. It is hard to argue that the charges it receives in one year alone would not overwhelm it since over eighty-thousand were filed in 2017 alone. In order to prevent the EEOC from losing its effectiveness it must have clear lines for when part of its role terminates.

If we examine the alternative where the EEOC's investigation terminates after one-hundred eighty days and the issuance of the notice of a right to sue, the EEOC's workload becomes more manageable. The clear line will force the EEOC to prioritize the most important cases to ensure that the public is receiving the largest benefit from its actions. It will not accrue such a backlog of tasks because it will have to continually process them and focus on the most important. This will also allow the recipient of a charge to know when they won't be subject to the EEOC's investigation. While there is the risk that too many valid charges could be ignored and never properly investigated, Congress could authorize the EEOC to hire more personnel to fill the need.

It is also more appropriate for Congress to rectify this issue than the courts. It is not the role of the judicial branch to cover Congress' shortcomings in allocating personnel. Instead of allowing Congress to fix the problem, courts such as the Seventh and Ninth Courts of Appeals have provided a stopgap by allowing the EEOC to continue an investigation into perpetuity. Eventually, this temporary solution will be insufficient to handle the backlog of charges.

IV. CONCLUSION

The Equal Employment Opportunity Commission is charged with protecting the millions of workers across the United States from discrimination. To do this it has been granted a wide, but not limitless, latitude regarding its investigatory authority. The EEOC’s extensive investigatory power can normally only be brought to bear during the initial one-hundred eighty day period after a charge is filed. There are multiple and compelling statutory, precedential, and policy reasons why this is true. The investigatory period should terminate upon the right to sue which should be adopted by Courts at large.

Were all Courts to adopt this interpretation, then there would not be nearly as much confusion as to how long the investigatory process lasts. The uncertainty of an investigation’s duration based on where an entity is located would disappear. It would encourage the EEOC to work more efficiently and to prioritize the most important charges to focus on. It would signal to the employer when it could return to regular operations as opposed to wondering if it would continue to be compelled to turn over information to the EEOC for years to come. It might even compel Congress to allocate more resources and most importantly personnel to the EEOC. For all of the aforesaid reasons the Equal Employment Opportunity Commission’s investigatory power should terminate after the initial one-hundred eighty days from the filing of the charge.