Time Limits for Federal Employees under Title VII: Jurisdictional Prerequisites or Statutes of Limitation

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In 1972, Congress waived federal sovereign immunity from suit by allowing federal employees to sue their employers for employment discrimination. After exhausting administrative remedies, the federal employee has thirty days to file suit in federal district court. This Note addresses the nature of this thirty-day time limit. The Fifth, Seventh, and Ninth Circuits hold that the time limit is a jurisdictional prerequisite to suit that absolutely bars untimely claims. The Second, Third, Tenth, Eleventh, and District of Columbia Circuits, on the other hand, hold that the time limit is like a statute of limitations, which may be equitably modified to allow courts to assume jurisdiction over untimely claims. The nature of the provision is of utmost importance to civil rights plaintiffs, who often proceed pro se and who may lose their causes of action through no fault of their own in a circuit adopting the 'jurisdictional' view. The Supreme Court has declined to resolve the conflict, but recently granted certiorari in a case that raises the issue. The issue also has not found a satisfactory resolution in academic circles. Those arguing that the time limit is a jurisdictional prerequisite to suit either fail to analyze congressional intent completely or misconceive the nature of jurisdictional

2. Id. § 2000e-16(c).
3. See infra notes 70-94 and accompanying text.
4. See infra notes 95-108 and accompanying text.
Those arguing for equitable modification fail to address the impact of federal sovereign immunity on interpretation of the time limit.¹⁰

This Note argues that courts can equitably modify the thirty-day time limit for federal employees to file employment discrimination suits in federal court. Part I discusses the structure of Title VII, which allows employees to sue for employment discrimination based on race, gender, color, religion or national origin. Part I also discusses the effect of federal sovereign immunity on construction of that statute, and the circuits’ analyses of the federal employees’ thirty-day time limit for filing employment discrimination suits. Part II argues that the conclusions of the jurisdictional circuits and commentators are incorrect, and suggests a more solid analysis supporting the equitable modification view. This analysis construes the time limit in light of its status as a condition in a statute waiving federal sovereign immunity, and concludes that Congress intended courts to equitably modify the time limit in appropriate circumstances.

I. TIME LIMITS IN TITLE VII AND SOVEREIGN IMMUNITY

A. TITLE VII AND THE EQUAL OPPORTUNITY ACT OF 1972

The Civil Rights Act of 1964 represents the most comprehensive civil rights legislation passed to remedy discrimination.¹¹ This section details the purposes and structure of Title VII of the Act, which gave private sector employees a private

9. Note, Equitable Tolling of Title VII Time Limits in Actions Against the Government, 74 CORNELL L. REV. 199, 217-20 (1988) [hereinafter Cornell Note] (arguing that § 2000e-16(c) is a jurisdictional prerequisite to suit, but that courts may accept jurisdiction over untimely claims if the plaintiff can show that the government engaged in affirmative misconduct); see infra note 115 (criticizing the Cornell Note’s analysis and conclusion).

10. E.g., Note, Equitable Modification of Time Limitations Under Title VII, 48 U. CHI. L. REV. 1016, 1018 (1981) [hereinafter Chicago Note] (arguing that all time limits in Title VII are statutes of limitation that may be equitably modified, but not discussing § 2000e-16(c) in particular and the impact of sovereign immunity on its construction); Note, Equitable Modification of Title VII Time Limitations to Promote the Statute’s Remedial Nature, 18 U.C. DAVIS L. REV. 749, 776-79 (1985) [hereinafter Davis Note] (arguing that all time limits in Title VII are statutes of limitation that may be equitably modified, and cursorily addressing federal time limits without discussion of the impact of sovereign immunity on their construction); see infra note 135 and accompanying text (criticizing the Chicago and Davis Notes’ analyses).

cause of action against their employers for employment discrimination; and the Equal Opportunity Act of 1972, which amended Title VII by waiving federal sovereign immunity to suit for employment discrimination claims by federal employees against their employers.12

1. Title VII: The Private Employee's Cause of Action for Employment Discrimination

In 1964, Congress passed Title VII of the Civil Rights Act, giving employees a private cause of action against their employers for employment discrimination.13 The Act prohibits discrimination in employment based on race, color, religion, sex, or national origin.14 As originally enacted, the Act applied only to private sector employers.15 The statute set up a two-step procedure for employees seeking a remedy for employment discrimination. First, the employee must exhaust remedies available within the Equal Employment Opportunity Commission (EEOC).16 After the employee has exhausted administrative remedies, the employee may file a civil suit in federal district court.17

14. 42 U.S.C. § 2000e-2 (1982). This prohibition includes refusals to hire individuals for employment, segregation, and other discriminatory practices with regard to employees. Id. § 2000e-2(a)-(c). For a thorough analysis of the scope and purpose of Title VII, which is beyond the scope of this Note, see B. SCHLEI & P. GROSSMAN, supra note 11, at vii-xiii (discussing history of Title VII's enactment); see also Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (noting Title VII's objectives).
16. 42 U.S.C. § 2000e-5(e) (1982). This section provides in part: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge . . . shall be served upon the person against whom such charge is made within ten days thereafter."
17. 42 U.S.C. § 2000e-5(f)(1) (1982). This section provides in part: If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . 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.

The statute grants employees the right to a trial de novo of the employment discrimination claim in federal district court. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973) (construing § 2000e-5(f)(1) to grant a trial de
The statute contains time limits that claimants must meet for each step in this procedure — initial filings with the EEOC\(^\text{18}\) and filings in federal district court.\(^\text{19}\) Section 2000e-5(e) requires that claimants file initial complaints with the EEOC within 180 days of the alleged discriminatory occurrence.\(^\text{20}\) If the EEOC dismisses or fails to act on the complaint, the employee has ninety days to file a civil suit against her employer in federal district court.\(^\text{21}\)

2. 1972 Amendments to Title VII: The Federal Employee's Cause of Action for Employment Discrimination

Because Title VII did not apply to federal employees,\(^\text{22}\) federal employees had no private cause of action against their employers for employment discrimination.\(^\text{23}\) Before the 1972 amendments, individual federal agencies handled discrimination charges "parochially."\(^\text{24}\) Each federal agency was responsible for investigating and judging itself.\(^\text{25}\)

\(^{19}\) Id. § 2000e-5(f)(1).
\(^{20}\) Id. § 2000e-5(e). Employees in states that have state or local bodies to investigate employment discrimination (so-called 'deferral states') must file charges with the EEOC within 300 days of the alleged occurrence, or within 30 days after receiving notice that the state or local body terminated the proceedings, whichever is earlier. Id. This filing allows the agency to determine the merits of the complaint and to seek conciliation between the employer and employee to encourage compliance with Title VII. Id. § 2000e-5(b). This section provides in part:

If the Commission determines after . . . investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge . . . . If the Commission determines after 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.

\(^{21}\) Id. § 2000e-5(f)(1). The EEOC has sole jurisdiction over the claim for 180 days. Id.
\(^{24}\) Brown, 425 U.S. at 825.
\(^{25}\) S. REP. No. 415, 92d Cong., 1st Sess. 14 [hereinafter SENATE REPORT]. Agencies could appoint outside hearing examiners, but the examiners had no authority to conduct independent investigations and could make only non-
In reaction to a general lack of confidence in the complaint procedure and a lack of access to the courts, Congress passed the Equal Employment Opportunity Act in 1972, amending the Civil Rights Act of 1964 and expanding its coverage. The 1972 Act included relief for federal employees with claims of employment discrimination. This relief served two binding recommendations to the agency. Id. The employee could appeal the agency decision only to the Board of Appeals and Review in the Civil Service Commission, which "rarely reverse[d] the agency decision." H.R. REP. NO. 238, 92d Cong., 1st Sess. 24, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2159 [hereinafter HOUSE REPORT]. The House Report noted that this system, "which permits the Civil Service Commission to sit in judgment over its own practices and procedures . . . creates a built-in conflict-of-interest" that "deny[es] employees adequate opportunity for impartial investigation and resolution of complaints." Id.

26. SENATE REPORT, supra note 25, at 14. Federal employees "indicated skepticism regarding the Commission's record in obtaining just resolutions of complaints and adequate remedies." Id. This skepticism "discouraged persons from filing complaints with the Commission for fear that it [would] only result in antagonizing their supervisors and impairing any hope of future advancement." HOUSE REPORT, supra note 25, at 24, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2159.

27. The Senate Report noted that "an aggrieved Federal employee d[id] not have access to the courts [because] [i]n many cases, the employee must overcome a U.S. Government defense of sovereign immunity." SENATE REPORT, supra note 25, at 16; accord HOUSE REPORT, supra note 25, at 25, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2160 (expressing "serious doubt that court review is available to the aggrieved Federal employee").


29. Congress sought to "correct . . . entrenched discrimination in the Federal service." Morton v. Mancari, 417 U.S. 535, 547 (1974); see Memorandum Accompanying Executive Order 11,478, 3 C.F.R. p. 803 (1966-70 Comp.) (stating that "[d]iscrimination of any kind based on factors not relevant to job performance must be eradicated completely from Federal employment"). Congress, therefore, sought to provide federal employees "the full rights available in the courts as are granted to individuals in the private sector under title VII." SENATE REPORT, supra note 25, at 16; accord HOUSE REPORT, supra note 25, at 23, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2158 (stating that "there can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector").


The principal purpose of the 1972 amendments was to provide the EEOC with meaningful enforcement powers not included in the 1964 Act. SENATE REPORT, supra note 25, at 4. The amendments also expanded the scope of cov-
purposes — to remedy the lack of impartiality in the Civil Service Commission's complaint procedure\(^\text{31}\) and to give federal employees access to the courts.\(^\text{32}\) Thus, Congress waived federal sovereign immunity to suit\(^\text{33}\) and gave federal employees a private cause of action against their employers.\(^\text{34}\)

The federal employee must follow a two-step procedure modeled after the private employees' cause of action. First, the employee must file charges with the EEOC within thirty days of the discriminatory occurrence.\(^\text{35}\) After exhausting adminis-
trative remedies, section 2000e-16(c) provides that federal employees aggrieved by the final disposition of their claims, or by the failure of the EEOC to take final action on their claims, may file a civil action in federal district court "within thirty days of receipt of notice of final [agency] action."36 This civil action is governed by the same provisions applicable to private sector employees.37

Because section 2000e-16(c) is part of a statute that waives federal sovereign immunity from suit, it is necessary to examine the Supreme Court's sovereign immunity jurisprudence and the rules of construction the Court uses to interpret statutes containing waivers of sovereign immunity.

B. THE DOCTRINE OF SOVEREIGN IMMUNITY: CONSTRUING TERMS AND CONDITIONS OF THE FEDERAL GOVERNMENT'S WAIVERS OF IMMUNITY TO SUIT

Because the federal government is cloaked in sovereign immunity, it cannot be sued without its consent.38 Only Congress

the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of...[its] effective date." 29 C.F.R. § 1613.214(a)(1)(i) (1989).

This time limit can be extended if "the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency." Id. § 1613.214(a)(4) (1989).

36. 42 U.S.C. § 2000e-16(c) (1982). This section reads in pertinent part:
Within thirty days of receipt of notice of final action taken by a department, agency, or unit...or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin...or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency or unit, as appropriate, shall be the defendant.

37. Id. § 2000e-16(d). This section provides that "the provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

38. United States v. Shaw, 309 U.S. 495, 500-01 (1940). The sovereign immunity doctrine is affirmed repeatedly in case law. E.g., Lehman v. Nakshian, 453 U.S. 156, 160-61 (1981) (noting that entities can sue the United States only according to the particular terms and conditions of federal consent statutes);
can waive the federal government's immunity from suit.\textsuperscript{39} Statutes that waive sovereign immunity to suit are called "consent statutes," and Congress may limit its consent to certain terms and conditions.\textsuperscript{40} Because of the underlying sovereign immu-

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Eastern Transp. Co. v. United States, 272 U.S. 675, 686 (1927) (stating that the sovereignty of the United States raises a presumption against its vulnerability to suit, and unless consent is clearly shown the courts should not enlarge its liability to suit beyond what the statutory language requires).

Sovereign immunity's theoretical basis in United States law, however, is unclear. See United States v. Lee, 106 U.S. 196, 208 (1882) (stating that the Supreme Court has never explained or justified the basis for sovereign immunity of the United States). The first case recognizing the doctrine was Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). Justice Marshall noted "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." \textit{Id.} at 411-12. The Supreme Court has referred to the doctrine as an inherent quality of statehood. Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1869). The Court stated that "[e]very government has an inherent right to protect itself against suits . . . . The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created." \textit{Id.} at 126; Lynch v. United States, 292 U.S. 571, 582 (1934) (stating that immunity from suit is an attribute of sovereignty). The Court also has called sovereign immunity a "familiar doctrine of the common law," \textit{The Siren}, 74 U.S. (7 Wall.) 152, 153-54 (1869), and a public policy or administrative necessity. \textit{E.g., Shaw}, 309 U.S. at 501 (stating that the reason for immunity is a blend of practical administrative necessity, political desirability, and governmental dignity and decorum); Kansas v. United States, 204 U.S. 331, 342 (1907) (stating that sovereignty of United States is based on public policy).

The Court also has criticized the sovereign immunity doctrine. \textit{See, e.g., Lee}, 106 U.S. at 204-09. In \textit{Lee}, the Court criticized the doctrine of sovereign immunity in a democratic state. \textit{Id.} at 208. Because the people rather than a monarch are sovereign in the United States, the Court reasoned that once a court of competent jurisdiction has established an individual's right to property, "there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." \textit{Id.} at 209. The Court noted that "[w]hile the exemption of the United States . . . from being subjected as defendants to ordinary actions in the courts has . . . been repeatedly asserted [by the Court], the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine." \textit{Id.} at 207.

39. United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 513 (1940) (stating that federal officials cannot waive federal sovereign immunity); The Siren, 74 U.S. at 154 (stating that "whoever institutes . . . proceedings [against the United States] must bring his case within the authority of some act of Congress").

40. \textit{See United States Fidelity}, 309 U.S. at 512 (holding that cross claims against the United States are justiciable only in those courts in which Congress consents to their consideration); \textit{Nichols}, 74 U.S. at 126 (holding that consent statute required written protest, signed by party, as condition precedent to suit for recovery of wrongfully collected taxes).

The United States even may withdraw its consent to be sued for contrac-
nity from suit, such terms and conditions of consent statutes define a court's jurisdiction to hear cases against the federal government.41

The Supreme Court construes statutes first to determine whether Congress has waived federal sovereign immunity to suit, and then to determine the scope of such a waiver.42 The Supreme Court usually labels its method of interpreting consent statutes "strict construction."43 This conclusory label is not very helpful in application, because the Court looks to different factors depending on the language of the statute and the particular term or condition to suit at issue. The Court's method of construing consent statutes has three tiers. First, the Court may look only to the express language of the consent statute to find whether Congress expressly has prohibited a

tual obligations once given. Lynch, 292 U.S. at 581. The Court stated that "[t]he contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will." Id. at 580-81 (quoting The Federalist, No. 81, at 446 (A. Hamilton) (Scott ed. 1894)).


42. When a consent statute contains a statute of limitation, the limitations provision "constitutes a condition on the waiver of sovereign immunity. Accordingly, although [the Court] should not construe such a time-bar provision unduly restrictively, [the Court] must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended.' " Block v. North Dakota, 461 U.S. 273, 287 (1983) (quoting United States v. Kubrick, 444 U.S. 111, 117-18 (1979)) (construing 12-year time limit in Quiet Title Act); see infra note 44 and accompanying text (setting out text of Quiet Title Act's time limitation). The Court has stated that words in a consent statute must "be 'interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.' " Crown Coat Front Co. v. United States, 386 U.S. 503, 517 (1967) (quoting Reading Co. v. Koons, 271 U.S. 58, 62 (1926)). The consent statute at issue provided that "every civil action against the United States shall be barred unless commenced within six years." Id. at 507 (emphasis added).

43. The Court construes such waivers of sovereign immunity "[a]gainst the background of complete immunity." United States v. Shaw, 369 U.S. 495, 502 (1940). The Court has found that "policy, no matter how compelling, is insufficient, standing alone, to waive . . . immunity." Library of Congress v. Shaw, 478 U.S. 310, 321 (1986) (requiring express congressional consent to the award of prejudgment interest separate from general waiver of immunity to suit). The Court was especially strict in this case because of the deeply rooted "no-interest" rule of sovereign immunity, which provides that interest cannot be collected on recoveries against the United States. Id. at 316-18; see also Boston Note, supra note 8, at 1177 (arguing that Supreme Court requires a "clear statement" in consent statute to manifest intent to be subject to particular term or condition of suit); Cornell Note, supra note 9, at 201 (same).
particular term or condition of suit. 44 Second, if a party argues

44. After the Court determines that a statute waives immunity from suit, it must determine the parameters of that waiver. The Court often refuses to imply terms into a consent statute and will look primarily to whether the plain language of a particular provision prohibits suit against the United States under certain conditions. See Library of Congress, 478 U.S. at 319 (stating that congressional silence does not permit a court to read provisions into the waiver of sovereign immunity); Eastern Transp. Co. v. United States, 272 U.S. 675, 686 (1927) (stating that the Court should not enlarge the sovereign's liability beyond what the statutory language requires); see also Lehman v. Nakshian, 483 U.S. 156, 160-61 (1981) (waiver of immunity in Age Discrimination in Employment Act does not include right to jury trial); Sherwood, 312 U.S. at 586 (waiver of immunity in Court of Claims does not include right to jury trial). Because consent statutes define the Court's jurisdiction to hear cases against the federal government, Sherwood, 312 U.S. at 587, the Court strictly construes the terms and conditions of such statutes in favor of the federal government. McMahon v. United States, 342 U.S. 25, 27 (1951); Sherwood, 312 U.S. at 590; Shaw, 309 U.S. at 502.

The Court often looks to emphatic language to determine whether Congress intended to prohibit suit if a particular term or condition were not met. Cases construing time limits in consent statutes are good examples of such express prohibitions of conditions to suit. The Court generally has not allowed for equitable modification of time limitations in consent statutes. But see Honda v. Clark, 386 U.S. 484, 500-01 (1967) (holding that time limit could be equitably tolled to resolve claims to seized alien property because the funds were not controlled by the United States treasury).

The Court, however, only has construed time limits that have contained emphatic language clearly manifesting congressional intent to bar untimely claims. For example, the Quiet Title Act provides that "[a]ny civil action . . . shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. § 2409a(f) (1988) (emphasis added). Other consent statutes contain similar emphatic prohibitions. The Federal Tort Claims Act provides that

[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1988) (emphasis added). In the Court of Claims, "[e]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a) (1988) (emphasis added). The Court has held these time limits expressly prohibit equitable modification. Such time limits, therefore, define the court's subject matter jurisdiction over the case against the government. If missed, the court is without authority to hear the case. United States v. Mottaz, 476 U.S. 834, 851 (1986) (construing time limit in Quiet Title Act); Kubrick, 444 U.S. at 117-18 (construing time limit in Federal Tort Claims Act); Kendall v. United States, 107 U.S. 123, 124 (1883) (construing time limits in Court of Claims); accord Block, 461 U.S. at 284 (1983) (construing time limit in Quiet Title Act). The Court has yet to construe a statute containing a time limit without the emphatic "shall be barred" language.

The Civil Service Reform Act provides that cases "must be filed within thirty days after the date the individual filing the case received notice of the judicially reviewable action." 5 U.S.C. § 7703(b)(2) (1988) (emphasis added).
that Congress has consented to an unusual condition to suit, the Court requires express consent to that unusual term. 45 Finally, the Court may find the language of the statute ambiguous and therefore look to the totality of the circumstances surrounding the statute's enactment to imply consent to a term or condition of suit. 46 Under the totality approach, the Court has looked beyond the statutory language of a provision to public policy. 47

One circuit has held that this provision constitutes a jurisdictional prerequisite to suit. King v. Dole, 782 F.2d 274, 276 (D.C. Cir.), cert. denied, 479 U.S. 856 (1986).


The no-interest rule provides an added gloss of strictness upon [the usual consent statute construction] rules. "[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute... to permit the recovery of interest suffice where the intent is not translated into affirmative statutory... terms." Id. at 318 (quoting United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947)). The Supreme Court also has refused to construe consent statutes as requiring the sovereign to pay attorneys fees. Ruckelshaus v. Sierra Club, 463 U.S. 650, 655 n.7 (1983) (stating that "[i]f Congress had intended the truly radical departure from American and English common law [rules of no attorneys fees]... it no doubt would have used explicit language to this effect").

46. In these cases, the Court has implied congressional consent to terms and conditions in consent statutes when emphatic language of express consent or prohibition was absent or ambiguous. One tool the Court has used to imply consent is to reverse the presumption that Congress must 'opt in' to a term of suit, and instead presuming that Congress must 'opt out.' E.g., United States v. Yellow Cab, 340 U.S. 543, 550-57 (1951).

The policy underlying the implied consent cases is that "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld [and the Court will not] add to its rigor by refinement of construction where consent has been announced." Id. at 554. The Court, in holding that the Federal Tort Claims Act allowed the United States to be sued for contribution or impleaded as a third party defendant, despite the lack of specific language in the consent statute, recognized "a clearly defined breadth of purpose for the bill as a whole and the general trend toward increasing the scope of the waiver by the United States," and stated that it would be inconsistent to whittle this consent down by refinements. Id. at 550.

Furthermore, the Court, rather than presuming Congress was immune from impleader absent clear intent to the contrary, presumed Congress was not immune from impleader "without a clearer statement of it than appears here." Id. at 552. Thus the Yellow Cab Court reversed the usual presumption that absent express consent to a particular term, such a term may not be implied in the statute. The Court in effect held that absent clear intent not to be subject to impleader, the Court would presume the consent statute included such a term. See also Becker Steel Co. v. Cummings, 296 U.S. 74, 80 (1935) (holding that only compelling language in a consent statute would be construed as withdrawing or curtailing the privilege of suit for violation of the United States' constitutional obligations).

47. The Davis, 77 U.S. (10 Wall.) 15, 19 (1870) (holding that when the
C. Construction of Section 2000e-16(c) as a Condition to Suit in a Consent Statute: The Circuit Split

The following section will discuss first the Supreme Court's case law construing Title VII's private sector time limits, and then the circuit courts' reasoning used to interpret section 2000e-16(c).

1. Construction of Time Limits in Title VII Private Sector Suits

Title VII contains two time limits for private employees, the 180-day time limit for filing an initial charge with the EEOC found in section 2000e-5(e), and the ninety-day time limit for filing in federal court found in section 2000e-5(f)(1). After enactment of Title VII, lower federal courts reached different conclusions regarding the nature of the two time limits. Some courts held that the time limits operated as jurisdictional prerequisites that bar claims of plaintiffs who

48. Chandler v. Roudebush, 425 U.S. 840, 848-61 (1976). In Chandler, the Court implied consent to a trial de novo under the 1972 amendments to Title VII. Id. at 848 (construing 42 U.S.C. § 2000e-16). Even though a presumption against de novo review of agency decisions exists, the Court did not cite the strict construction rule, but ascertained congressional intent by looking at the structure of Title VII and the 1972 amendments, and legislative history. Id. at 848-61.

49. Crown Coat Front Co. v. United States, 386 U.S. 503, 517 (1967) (stating that words in a consent statute must be interpreted in light of the general purposes of the statute). The Court therefore has stated that "waiver of sovereign immunity is accomplished not by a ritualistic formula; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." Franchise Tax Board v. United States Postal Serv., 487 U.S. 512, 521 (1984). The Court has construed most liberally waivers of immunity for administrative agencies that have been given the power to "sue and be sued." See id. at 520; Federal Hous. Admin. v. Burr, 309 U.S. 242, 245 (1940) (stating that waivers of immunity in cases of federal agencies should be liberally construed).

The Court also has ascertained congressional intent to waive immunity from suit broadly by looking at policies behind a series of statutes. Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 375, 389 (1939).


52. If a time limit defines a court's subject matter jurisdiction, failure to meet that time limit deprives the court of power to hear the case. Lack of sub-
miss either the section 2000e-5(e) initial charge deadline for filing with the EEOC or the section 2000e-5(f)(1) civil suit filing deadline. Other courts held that the time limits were in the nature of a statute of limitation, which a court may extend under the doctrines of equitable tolling, waiver, and estoppel. The Supreme Court settled these disputes in two cases, finding that both time limits may be equitably modified in appropriate circumstances.

Subject matter jurisdiction may be raised by the parties or the court sua sponte at any time during the proceedings. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1393, at 866-67 (West 1969 & Supp. 1987). It is impossible to waive or be estopped from asserting a subject matter jurisdiction defense. Id. at 863; Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

53. E.g., Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1233 (8th Cir. 1975) (holding that federal court only has jurisdiction if employment discrimination charge is timely filed with the EEOC); Moore v. Sunbeam Corp., 459 F.2d 811, 821-22 n.26 (7th Cir. 1972) (holding time limit for filing with EEOC in deferral states jurisdictional and therefore not subject to equitable tolling); see Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 n.6 (1982) (noting lower court split).

54. E.g., Cleveland v. Douglas Aircraft Co., 509 F.2d 1027, 1029-30 (9th Cir. 1975) (per curiam); Genovese v. Shell Oil Co., 488 F.2d 84, 85 (5th Cir. 1973) (per curiam); Archuleta v. Duffy's Inc., 471 F.2d 33, 34 (10th Cir. 1973); see Zipes, 455 U.S. at 393 n.6 (noting lower court split).

55. E.g., Carlile v. South Routt School Dist. RE 3-J, 652 F.2d 981, 985 (10th Cir. 1981) (holding time limit for initial filing of charge subject to equitable tolling); Leake v. University of Cincinnati, 605 F.2d 255, 259 (6th Cir. 1979) (holding that all Title VII time limits are statutes of limitation and equitable principles may be applied to extend them); Hart v. J.T. Baker Chem. Corp., 598 F.2d 829, 831 (3d Cir. 1979) (holding time limit for initial filing of charge subject to equitable modification such as tolling); Cottrell v. Newspaper Agency Corp., 590 F.2d 838, 838 (10th Cir. 1979) (holding that plaintiff had shown no grounds for equitably tolling the filing period with the court); Harris v. Walgreen's Distrib. Center, 456 F.2d 588, 592 (6th Cir. 1972) (holding that pending motion for appointment of counsel tolls time limit for filing in federal court); see Zipes, 455 U.S. at 393 n.6 (noting lower court split).

56. In contrast to time limits that define a court's subject matter jurisdiction, failure to meet a statute of limitation is an affirmative defense that a party can waive if not asserted at the appropriate time, or be estopped from asserting. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1394, at 889 n.79 (West 1969 & Supp. 1987). The doctrine of equitable modification applies when a claimant receives inadequate notice of her right to sue, when a claimant's motion to proceed in forma pauperis or for appointment of counsel is pending in the federal district court, when the court has led the claimant to believe that she has done everything required of her, or when the claimant's employer has lulled the plaintiff into inaction by affirmative misconduct. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (per curiam). Tolling of a time limit in a federal statute is appropriate when "congressional purpose is effectuated by tolling the statute of limitation in given circumstances." Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 321 (1965).
The Court determined that the section 2000e-5(e) 180-day private employee time limit for filing an initial charge with the EEOC was not a jurisdictional prerequisite to suit in Zipes v. Trans World Airlines. Thus, courts may hear untimely claims in certain circumstances. The Court first noted that section 2000e-5(f)(3), the Title VII provision granting jurisdiction to federal district courts, does not explicitly condition jurisdiction on timely filing or make reference to the section 2000e-5(e) 180-day filing requirement. Rather, the filing requirements are in an entirely different provision unrelated to the grant of jurisdiction. The Court reasoned that because the filing time limit and the grant of jurisdiction were placed in separate sections of the statute, it was unlikely that Congress intended to limit the federal courts' jurisdiction in cases of untimely initial filings. The Court then examined the remedial purpose of Title VII and determined that a technical jurisdictional reading of the time limit would be inappropriate in a statutory scheme in which most plaintiffs are laypersons who initiate the process unassisted by lawyers.

The Court construed the section 2000e-5(f)(1) ninety-day private employee time limit for filing in federal court after an adverse agency action in Baldwin County Welcome Center v. Brown. Although the Court held that the plaintiff in this case did not merit equitable extension of the section 2000e-5(f)(1) time limit, the Court did note instances in which equitable tolling is appropriate.

57. Zipes, 455 U.S. at 393 (holding the § 2000e-5(e) time limit for filing initial charge with EEOC not a jurisdictional prerequisite to suit); Baldwin County Welcome Center, 466 U.S. at 151 (holding the § 2000e-5(f)(1) 90-day time limit for filing civil suit subject to equitable tolling in appropriate cases).
58. 455 U.S. 385 (1982).
59. 42 U.S.C. § 2000e-5(f)(3) provides that “[e]ach United States district court . . . shall have jurisdiction of actions brought under this subchapter.”
60. Zipes, 455 U.S. at 393-94.
61. Id. (citing 42 U.S.C. § 2000e-5(e) (1970)).
62. Id. at 393-94.
63. Id. at 397 (quoting Love v. Pullman Co., 404 U.S. 522, 527 (1972)). Zipes was a class action alleging that the defendant airline unlawfully grounded flight attendants who became new mothers while allowing new fathers to continue to fly. Id. at 388. In Zipes, the Court allowed equitable modification of the initial filing time limit by holding that not all class members need file timely charges with the EEOC in order to qualify for relief in the subsequent civil suit. See id. at 393.
64. 466 U.S. 147 (1984).
65. Id. at 151-52.
table tolling of section 2000e-5(f)(1) would be appropriate.66

2. Construction of Time Limits in Title VII Public Sector Suits

*Zipes* and *Baldwin County* resolved the uncertainty as to time limits in the Civil Rights Act of 1964, and thus clarified these provisions for private sector employees. The Supreme Court, however, has not clarified the time limits for federal employees found in the 1972 amendments to Title VII.67

The circuit courts are split in interpreting section 2000e-16(c), the thirty-day time limit for federal employees to file in district court. Three circuits hold that the section 2000e-16(c) time limit is a jurisdictional prerequisite to suit that bars untimely claims.68 Six circuits hold that the section 2000e-16(c) time limit is a statute of limitations that may be equitably modified.69

66. *Id.* at 151; see *supra* note 55 for a list of appropriate circumstances for equitable tolling.

67. The Court may resolve this issue when it decides *Irwin v. Veterans Admin.*, 874 F.2d 1092 (5th Cir. 1989), *cert. granted*, 110 S. Ct. 1109 (1990).

68. These are the Fifth, Seventh, and Ninth Circuits. See *infra* notes 70-94 and accompanying text for a discussion of the reasoning of these circuits. The First Circuit has not resolved the question. See *Rys v. United States Postal Serv.*, 886 F.2d 443, 446-47 (1st Cir. 1989) (holding summary judgment of pro se plaintiff's action appropriate whether the § 2000e-16(c) time limit is jurisdictional prerequisite or statute of limitation because the First Circuit only allows equitable modification of time limits when the defendant "actively misled" the plaintiff).

69. If the First Circuit eventually becomes an equitable modification circuit, it may be a harsh one. Rys argued that the EEOC's right-to-sue letter was so ambiguous as to actually mislead him into suing the wrong defendant, the United States Postal Service and three local department heads, instead of the Postmaster General. *Id.* The letter instructed Rys to "name the appropriate official agency or department head as the defendant." *Id.* at 446. Rys argued that this instruction could be read in the disjunctive, allowing him to name either the agency itself or its head. *Id.* at 446-47. The court rejected this argument because the letter also "clearly and unequivocally" defined department as "the overall national organization ... not the local administrative department where you might work." *Id.* at 447 (emphasis in original). This definition, however, doesn't really respond to Rys's disjunctive argument, because he did in fact name the national agency. *Id.* The court further noted that "[i]f he relied upon and been misled by the EEOC letter, he would have named only the [United States Postal Service]. His inclusion of local department heads — in direct contravention to the EEOC's missive — belies his alleged reliance upon its instructions." *Id.* (emphasis in original).

69. These are the Second, Third, Eighth, Tenth, Eleventh, and District of Columbia Circuits. See *infra* notes 95-108 and accompanying text for a discussion of the reasoning of these circuits.
a. The Jurisdictional Circuits: Untimely Filing is an Absolute Bar to Suit

The Fifth, Seventh, and Ninth Circuits adhere to a jurisdictional reading of section 2000e-16(c). This reading bars untimely filed claims regardless of the reasons for the delay.

The Fifth and Seventh Circuits originally construed section 2000e-16(c) as a jurisdictional prerequisite to suit merely by extending the reasoning of pre-Zipes private sector cases to the federal sector. The courts found no reason for different interpretations of the private and federal sector time limits. Even after the Supreme Court decided in Zipes that the private sector time limits were statutes of limitation these circuits reaffirmed the jurisdictional nature of section 2000e-16(c).

These circuits have relied on the strict construction rule, finding that the section 2000e-16(c) time limit is a term in the sovereign's consent to be sued that must be strictly construed in favor of the government. In Sims v. Heckler, the Seventh Circuit first used the sovereign immunity rationale to differentiate between private and federal sector time limits, construing the EEOC regulatory time limit for initial filings as jurisdic-

70. Irwin, 874 F.2d at 1093; Brown v. Department of Army, 854 F.2d 77, 78 (5th Cir. 1988); Bell v. Veterans Admin. Hosp., 826 F.2d 357, 360 (5th Cir. 1987).
71. Harris v. Brock, 835 F.2d 1190, 1194 (7th Cir. 1987); Gaballah v. Johnson, 629 F.2d 1191, 1199 n.11 (7th Cir. 1980).
72. Johnston v. Horne, 875 F.2d 1415, 1419 (9th Cir. 1989); Cooper v. United States Postal Serv., 740 F.2d 77, 78 (5th Cir. 1988); Bell v. Veterans Admin. Hosp., 826 F.2d 357, 360 (5th Cir. 1987); Mahroom v. Hook, 563 F.2d 1369, 1374 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978).
73. See, e.g., Harris, 835 F.2d at 1194.
74. Gaballah v. Johnson, 629 F.2d 1191, 1199 n.11 (7th Cir. 1980) (stating that the § 2000e-16 30-day time limit is a jurisdictional prerequisite and may be raised sua sponte by the court) (citing In re Consolidated Pretrial Proceedings in the Airline Cases, 552 F.2d 1142, 1151-52 (7th Cir. 1977) (construing time limit in private employer cases); Eastland v. Tennessee Valley Authority, 553 F.2d 364, 368 (5th Cir.) (citing Genovese v. Shell Oil Co., 488 F.2d 84, 85 (5th Cir. 1973) (per curiam) (construing time limit in private employer cases), cert. denied, 434 U.S. 985 (1977).
75. Gaballah, 629 F.2d at 1199 n.11; Eastland, 553 F.2d at 368.
76. Williams v. United States Postal Serv., 873 F.2d 1069, 1074 (7th Cir. 1989). In Antoine v. United States Postal Serv., 781 F.2d 433, 439 n.6 (5th Cir. 1986), the Fifth Circuit in dicta questioned the validity of its Eastland holding because it relied on private sector cases that Zipes overruled. The court, however, definitively reaffirmed the Eastland holding in later cases. Brown v. Department of Army, 854 F.2d 77, 78 (5th Cir. 1988); Bell v. Veterans Admin. Hosp., 826 F.2d 357, 360 (5th Cir. 1987).
77. Brown, 854 F.2d at 78; Harris, 835 F.2d at 1194.
78. 725 F.2d 1143 (7th Cir. 1984).
tional. In holding the regulatory time limit a jurisdictional prerequisite, the court reasoned that the Zipes holding should not extend to federal employees because these time limits constituted terms of Congress' consent to be sued, and as such, must be strictly construed in favor of the government. The Seventh Circuit then extended the reasoning of Sims to the section 2000e-16(c) time limit.

Despite the circuit's consistent jurisdictional holdings however, the court apparently has allowed equitable tolling of the section 2000e-16(c) time limit in one case. The Seventh

79. Id. at 1145. The court construed 29 C.F.R. § 1613.214 (1976), the EEOC-promulgated time limit for filing initial complaints with the agency after a discriminatory occurrence. Id. at 1144-46. The Seventh Circuit recently overruled Sims, noting that all other circuits addressing the issue had found the regulatory time limit non-jurisdictional. Rennie v. Garrett, 896 F.2d 1057, 1059-60 (7th Cir. 1990) (citations omitted).

80. Sims, 725 F.2d at 1145-46. The court noted the EEOC's regulation had "the force and effect of law." Id. at 1146.

81. Williams v. United States Postal Serv., 873 F.2d 1069, 1074 (7th Cir. 1989); Harris, 835 F.2d at 1194. But see Paulk v. Department of Air Force, 830 F.2d 79, 81-83 (7th Cir. 1987) (holding § 2000e-16(c) jurisdictional, but allowing for equitable tolling while the plaintiff's motion to proceed in forma pauperis was pending in the district court).

82. Williams, 873 F.2d at 1074; Harris, 835 F.2d at 1193; Gaballah, 629 F.2d 1191, 1199 n.11 (7th Cir. 1980).

83. Paulk, 830 F.2d at 81-83. In Paulk, the court restated that § 2000e-16(c) is jurisdictional, but allowed for tolling of the time period while plaintiff's motion to proceed in forma pauperis was pending. Id. at 83. The court later distinguished Paulk as a case in which "although [the Paulk court] recog-
Circuit has overruled the *Sims* jurisdictional holding on the regulatory time limit, but has not yet reevaluated the nature of section 2000e-16(c) in light of that ruling.

The Fifth Circuit has relied on a sovereign immunity rationale to interpret section 2000e-16(c) as a jurisdictional prerequisite in only one case. In *Brown v. Department of Army*, the court cited the Seventh Circuit’s sovereign immunity discussion in *Sims*. The court thus held that because section 2000e-16(c) is a term in a consent statute, courts are without jurisdiction to hear untimely claims. The Fifth Circuit still adheres to this holding, but has noted the severity of the

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84. Rennie v. Garrett, 896 F.2d 1057, 1062 (7th Cir. 1990).
86. *Id.* at 78 n.1 (citing *Sims v. Heckler*, 725 F.2d 1143, 1146 (7th Cir. 1984)).
87. *Id.* at 78.
88. Irwin v. Veterans Admin., 874 F.2d 1092, 1093 (5th Cir. 1989), cert. granted, 110 S. Ct. 1109 (1990). In *Irwin*, notice of the EEOC’s final decision and right-to-sue letter were delivered to plaintiff’s attorney’s office on March 23, 1987. 874 F.2d at 1093. Irwin learned of the delivery on April 7, and filed suit in federal court on May 6, 1987. *Id.* The court held that receipt of the right-to-sue letter by Irwin’s attorney’s office constituted “constructive notice” and thus began the § 2000e-16(c) 30-day time limit. *Id.* at 1095. Irwin’s claim therefore was barred. *Id.*

The Supreme Court granted certiorari in *Irwin* to address two issues. First, “[i]s [the] 30-day period for filing suit for federal employees pursuant to 42 U.S.C. § 2000e-16 [an] absolute jurisdictional requirement, or, as in [the] case of non-federal employment discrimination cases, in [the] nature of [a] statute of limitations subject to equitable tolling?” *Irwin*, 58 U.S.L.W. 3326 (Feb. 20, 1990) (editor’s comments). Second, the Court will decide whether “receipt other than actual receipt by claimant or claimant’s attorney of notice of final action issued by EEOC [is] sufficient for initiating [the] running of [the] 30-day filing period requirement” of § 2000e-16(c). *Id.* The Court thus could answer the constructive notice question negatively and avoid reaching
jurisdictional rule, and has expressed a desire to reconsider precedent disallowing equitable modification of section 2000e-16(c).

The Ninth Circuit originally held the section 2000e-5(f)(1) time limit in private employer suits a jurisdictional prerequisite to suit in Cleveland v. Douglas Aircraft Company. Before Zipes, the court originally cited to Cleveland in holding that

the nature of § 2000e-16(c), because Irwin did file within 30 days of actual notice of her right to sue. Irwin, 874 F.2d at 1093. This interpretation of “notice” would be consistent with the Court's summary action in Hernandez, in which it avoided the jurisdictional issue and focused instead on the interpretation of “filing.” Hernandez v. Rice, 110 S. Ct. 1314, 1314 (1990); see infra note 90 (discussing Hernandez).

89. Bell v. Veterans Admin. Hosp., 826 F.2d 357, 360 (5th Cir. 1987). The court stated “we are not unsympathetic to Bell’s request for equitable relief, and we certainly understand his frustrations as a pro se plaintiff in dealing with complex procedural requirements that may seem unnecessarily burdensome.” Id. In Bell, the plaintiff failed to name the head of the Veterans' Administration as a defendant and instead named only the Administration itself. Id. at 359. The clerk of court stamped the plaintiff’s timely complaint “received” and assured Bell that the office would serve the necessary party. Id. The complaint was not actually stamped “filed” until after Bell’s motions for appointment of counsel and to proceed in forma pauperis were heard — 47 days after the § 2000e-16(c) 30-day time limit began. Id. The court refused to allow Bell to amend his complaint to name the Veterans Administrator as defendant because the Administrator had no notice of the suit within the 30-day time limit, as required by FED. R. CIV. P. 15(c). Id. at 360.

90. Hernandez v. Aldridge, 866 F.2d 800, 803 (5th Cir. 1989), vacated, Hernandez v. Rice, 110 S. Ct. 1314 (1990). The court of appeals felt bound by precedent not to equitably extend the filing time limit. Id. at 801. The plaintiff filed his complaint with the district court clerk, who marked it “received” but did not actually file it until 40 days after the plaintiff’s time limit began to run. Id. The court noted that “[i]n Bell, the clerk of court stamped the plaintiff’s timely complaint ‘received’ and assured Bell that the office would serve the necessary party.” Id. The court refused to allow Bell to amend his complaint to name the Veterans Administrator as defendant because the Administrator had no notice of the suit within the 30-day time limit, as required by FED. R. CIV. P. 15(c). Id. at 360.

91. 509 F.2d 1027 (9th Cir. 1975) (per curiam).

the section 2000e-16(c) time limit was jurisdictional. Even though Cleveland is no longer good law after Zipes, the circuit has never independently analyzed the nature of the federal time limit. To avoid the harsh results of the jurisdictional rule, the Ninth Circuit has construed other requirements of section 2000e-16 more liberally.

b. The Equitable Modification Circuits: Untimely Claims May Be Heard in Appropriate Circumstances

The circuits allowing equitable modification of section 2000e-16(c) fall into two categories. Some circuits allow equitable modification of section 2000e-16(c) by extending the rationales of Zipes, Baldwin County and other private sector cases to the federal employee context. One court addresses and refutes the sovereign immunity arguments of the jurisdictional circuits and implies consent into section 2000e-16(c) for equitable modification.

The Third, Tenth and Eleventh Circuits assume juris-

93. Johnston v. Horne, 875 F.2d 1415, 1419 (9th Cir. 1989); Cooper v. United States Postal Serv., 740 F.2d 714, 716 (9th Cir. 1984) (citing Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082, 1083 (9th Cir. 1983), cert. denied, 471 U.S. 1022 (1985)); Rice, 720 F.2d at 1083 (citing Mahroom, 563 F.2d at 1374); Cooper v. Bell, 628 F.2d 1208, 1213 (9th Cir. 1980) (citing Mahroom, 563 F.2d at 1374).

In Johnston, the plaintiff failed to name the Secretary of the Navy as defendant as required by § 2000e-16(c), but instead named the commander of the shipyard where he worked. Id. at 1419. The court denied his rule 15(c) motion to amend to correct the defendant. Id.

94. Rice, 720 F.2d at 1085. The court held that § 2000e-16(c) is jurisdictional, but allowed an untimely plaintiff to go forward anyway. Id. The plaintiff filed his right-to-sue letter together with a motion for appointment of counsel within the 30-day limit. Id. The court circumvented its jurisdictional holding by also holding that the documents filed were sufficiently similar to a complaint to satisfy the statutory filing requirements, reasoning that “[t]he intention to institute an action is plainly present when a pro se plaintiff requests counsel specifically to prosecute an action.” Id. The court further held that although the plaintiff named the wrong defendant on the motion form, the correct defendant had sufficient notice because he was named in the appended right-to-sue letter. Id.


96. Martinez v. Orr, 738 F.2d 1107, 1109-10 (10th Cir. 1984).

97. Washington v. Ball, 890 F.2d 415, 415 (11th Cir. 1989); Ross v. United States Postal Serv., 814 F.2d 616, 616-17 (11th Cir. 1987); Milam v. United States Postal Serv., 674 F.2d 860, 862 (11th Cir. 1982).

98. Neither do these courts address any potential differences between § 2000e-5(e), governing initial filing with the EEOC, and § 2000e-16(c), governing subsequent filing in federal district court. See, e.g., Sousa v. NLRB, 817 F.2d 10, 11 (2d Cir. 1987) (per curiam) (rejecting constructive notice doctrine and tolling the § 2000e-16 time period until plaintiff actually received his right-
diction over untimely complaints when equity requires. These circuits generally cite Zipes and merely extend the Zipes holding allowing equitable modification of section 2000e-5(e), the time limit for filing with the EEOC, to section 2000e-16(c) by analogy. These circuits do not analyze the sovereign immunity problem, but rather find no reason to construe section 2000e-16(c) differently from the private sector time limits. The Second Circuit has allowed equitable tolling of section 2000e-16(c) by extending private sector cases construing section 2000e-5(f)(1), the time limit for filing suit after exhausting administrative remedies, to the federal employee context.9

The District of Columbia Circuit analyzed and refuted the sovereign immunity arguments in Mondy v. Secretary of the Army, and determined that section 2000e-16(c) may be equitably modified. The court noted that emphatic language is one sign of congressional intent that a time limit is jurisdictional. Section 2000e-16(c) contains no such language. The court also found significant that the provisions of section 2000e-5(f)-(k), which govern private actions against private sector employers, are incorporated by reference in section 2000e-16(c) to govern private actions against federal employers. Because the Supreme Court held these provisions subject to equitable modification in Baldwin County and Zipes, the court

100. 845 F.2d 1051, 1055-57 (D.C. Cir. 1988).
101. Id. at 1055-57. The court noted that equitable tolling of claims against the government is by no means automatic, because the government enjoys sovereign immunity and waiver of such immunity must be strictly construed. Id. at 1055.
102. Id. at 1055; see supra note 44 for examples of statutes with emphatic language.
103. Mondy, 845 F.2d at 1056.
108. Mondy, 845 F.2d at 1057. The Mondy court found this cross reference suggestive of a parallel intent for the two provisions. 845 F.2d at 1056. The
found section 2000e-16(c) subject to equitable modification.\textsuperscript{109}

\textbf{II. CONSTRUCTION OF 2000e-16(c) AS A TERM IN A CONSENT STATUTE: JURISDICTIONAL PREREQUISITE OR STATUTE OF LIMITATION?}

A thorough analysis of section 2000e-16(c) reveals congressional intent to allow equitable modification.\textsuperscript{110} Circuit courts and commentators from both camps either engage in minimal analysis of the sovereign immunity doctrine and its applicable rules of construction, or extend analyses used in private sector cases to the federal sector without any analysis of sovereign immunity.\textsuperscript{111} Because of flaws in this reasoning, and because of the importance of a correct construction of section 2000e-16(c) to both the federal government\textsuperscript{112} and the federal employee plaintiff,\textsuperscript{113} this section first critiques the circuit courts' analyses, and then proposes a more complete analysis of the time limit.

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\textsuperscript{109} See infra notes 148-81 and accompanying text.

\textsuperscript{110} See infra notes 116-47 and accompanying text.

\textsuperscript{111} The federal government has an interest in maintaining its inherent sovereign immunity and in ensuring that consent statutes are not construed to waive immunity more broadly than intended. The federal courts have an interest in maintaining their institutional competence by not overstepping the bounds of the jurisdiction granted them. If jurisdiction has been granted, the courts have an interest in hearing the claims of plaintiffs and remedying discrimination in meritorious cases.

\textsuperscript{112} The plaintiff has an interest in knowing the nature of § 2000e-16(c) to prepare a suit and to avoid harsh results from procedural errors by loss of his cause of action in federal court.

\textsuperscript{113} See infra notes 116-30 and accompanying text.
A. CRITICISMS OF THE CURRENT CIRCUIT COURTS’ ANALYSES OF SECTION 2000E-16(c)

1. Criticisms of the Jurisdictional Circuits’ Analyses

Labelling the section 2000e-16(c) time limit as a jurisdictional prerequisite to suit absolutely bars the claims of untimely plaintiffs. The jurisdictional circuits fall into two analytical categories. Some circuits apply the rule of strict construction because section 2000e-16(c) is a term in a consent statute. Other circuits extend pre-Zipes case law from the private sector to construe section 2000e-16(c), which applies to the public sector. Both approaches are flawed. The jurisdictional courts and commentators, therefore, not only reach the wrong conclusion about section 2000e-16(c) in particular, some also confuse the nature of jurisdictional bars in general.

a. The “Strict Construction” Circuits

The Fifth and Seventh Circuits have applied a strict construction rule to construe section 2000e-16(c) because it constitutes a term in the sovereign’s consent to be sued. These

114. See infra notes 131-47 and accompanying text.
115. In addition, one commentator calls the time limit “jurisdictional,” but argues for estopping the government from asserting this defense in cases when it engages in “affirmative misconduct.” Cornell Note, supra note 10, at 217-20. This commentator seeks the best of both theories, but ignores the fact that a jurisdictional labelling of the section 2000e-16(c) time limit restricts the federal district court’s subject matter jurisdiction, and therefore the court is institutionally incompetent to hear untimely filed claims. The theory is flawed, therefore, because no amount of equity, even “affirmative government misconduct,” can overcome such a subject matter jurisdiction barrier. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (stating that subject matter jurisdiction can never be created by estoppel); see supra notes 51, 54 (discussing difference between statutes of limitation and jurisdictional time limits). Thus, the Cornell Note’s conclusion is similar to the Seventh Circuit’s reasoning in Paulk v. Department of Air Force, 830 F.2d 79, 81, 83 (7th Cir. 1987), in which the court labeled the time limit “jurisdictional” but allowed for equitable tolling.
116. Brown v. Department of Army, 854 F.2d 77, 78 (5th Cir. 1988); Harris v. Brock, 835 F.2d 1190, 1193 (7th Cir. 1987). One commentator also agrees with these strict construction circuits. Boston Note, supra note 8, at 1183-85 (arguing that Supreme Court’s sovereign immunity jurisprudence requires a “clear statement” of consent to a particular term or condition to suit and that such a statement is absent in § 2000e-16(c)). This writer’s analysis fails to acknowledge that the Supreme Court does not in fact require a “clear statement” of congressional intent and is willing to investigate the totality of circumstances surrounding the statute’s enactment in order to ascertain congressional intent.
117. Brown, 854 F.2d at 78; Harris, 835 F.2d at 1193.
circuits, however, merely cite the "strict construction" rule as a label, and do not analyze the Supreme Court's sovereign immunity case law to see how to apply the rule. The Seventh Circuit, for example, cites to the general rule of strict construction of consent statutes, and then concludes that because section 2000e-16(c) is a condition to suit against the sovereign, these time limits define a district court's subject matter jurisdiction.

The Fifth Circuit also misapplies the Supreme Court's sovereign immunity rules of construction. The court has stated merely that the section 2000e-16(c) time limit "is a jurisdictional requirement and this statute must be strictly construed." Again, this statement oversimplifies the proper rules of construction to apply to consent statutes. It does not follow that the time limit must be a jurisdictional prerequisite to suit simply because section 2000e-16(c) is a consent statute. Strict construction applies only to consent statutes with clear language. Only when emphatic language prohibits equitable modification of a time limit in a consent statute should a court refuse to imply consent to such a term. Such language is absent in section 2000e-16(c). Thus, to ascertain congressional intent, courts cannot rely on the strict construction rule but

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118. Harris, 835 F.2d at 1193. The court "recognized that because the United States is generally immune from suit, the terms under which it consents to be sued define a court's jurisdiction to entertain the suit." Id. Therefore, "[c]ourts must strictly construe any conditions attached to the government's waiver of sovereign immunity." Id.

119. Id. (citing Sims v. Heckler, 725 F.2d 1143, 1145-46 (7th Cir. 1984)). From this language, it appears that the court believes that any time limit in a consent statute must be a jurisdictional prerequisite to suit. This is not the rule. The Supreme Court has refused to construe time limits in consent statutes "unduly restrictively," Block v. North Dakota, 461 U.S. 273, 287 (1983), thus leaving open the possibility of equitable modification in appropriate statutes. Furthermore, the Seventh Circuit ignores the Supreme Court's sovereign immunity jurisprudence, which applies the strict construction rule only when statutory language is emphatically clear. See supra note 44 and accompanying text. Because the language of section 2000e-16(c) is not emphatically clear, the court should look to other sources evidencing congressional intent as to the nature of section 2000e-16(c), such as legislative history and statutory purpose. See supra notes 46-49 and accompanying text.

120. Brown, 854 F.2d at 78.

121. Id. (citing United States v. Sherwood, 312 U.S. 584, 590 (1941)).

122. See supra note 44 and accompanying text.

123. Id.


125. 509 F.2d 1027 (9th Cir. 1975). Cleveland was a pre-Zipes case that construed private sector time limits in Title VII as jurisdictional prerequisites to suit. Id. at 1030.
must look beyond statutory language to the totality of circumstances surrounding the statute's enactment.

b. The Ninth Circuit's Analysis

All the Ninth Circuit's section 2000e-16(c) cases rely directly or indirectly on Cleveland v. Douglas Aircraft Company. After Zipes, Cleveland no longer represents good law. The Ninth Circuit has never reevaluated its jurisdictional holding on section 2000e-16(c) since Zipes overruled Cleveland. If the court based its initial extension of Cleveland to section 2000e-16(c) on similarities between the private and federal sector time limits, then it should allow equitable modification of section 2000e-16(c) now that private sector time limits can be extended. The Ninth Circuit at least should address the continuing validity of Cleveland, and should interpret section 2000e-16(c) using the Supreme Court's rules of construction for consent statutes.

The jurisdictional circuits recognize the hardship a jurisdictional construction of section 2000e-16(c) poses to Title VII plaintiffs, who usually proceed pro se. If these circuits would abandon the jurisdictional construction of section 2000e-16(c), they could effectuate Congress' intent without confusing other areas of Title VII, because the aggregate effect of the circumstances underlying enactment of section 2000e-16(c) manifest an intent to allow equitable modification.

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126. See supra notes 92-93 and accompanying text.

127. The court simply stated that "[t]his thirty-day time period is jurisdictional" and cited to Cleveland without analysis. Mahroom, 563 F.2d at 1374.


129. The jurisdictional circuits, therefore, in a seemingly subconscious desire to effectuate congressional intent to allow equitable extension of § 2000e-16(c), resort to strained construction of other terms in the statute, or inconsistent statements of the jurisdictional rule. See Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082, 1085 (9th Cir. 1983) (construing filing of right-to-sue letter with motion for appointment of counsel as a complaint); Paulk v. Department of Air Force, 831 F.2d 79, 83 (7th Cir. 1987) (holding that § 2000e-16(c) is "jurisdictional" but allowing for equitable tolling of time limit anyway).

130. See infra notes 148-81 and accompanying text.

131. Sousa v. NLRB, 817 F.2d 10, 11 (2d Cir. 1987) (per curiam).
2. Criticisms of the EquitableModification Circuits’ Analyses

a. The Zipes Extension Circuits

The Second,\textsuperscript{132} Third,\textsuperscript{133} Tenth,\textsuperscript{134} and Eleventh\textsuperscript{135} Circuits merely extend the holdings in \textit{Zipes} or other private sector cases, allowing equitable modification of the section 2000e-5(e) time limit. Two commentators also argue for equitable modification of section 2000e-16(c) based on extension of private sector time limit decisions.\textsuperscript{136} This analysis ignores the fact that section 2000e-16(c) is a term in the United States’ waiver of sovereign immunity to suit, and therefore should not be interpreted in the same manner as statutes governing private suits. Although these courts and commentators reach the correct conclusion, their weak analyses make them less persuasive and further confuse the application of Title VII to federal employees.

Another problem with this analysis is that the time limit construed in \textit{Zipes} served a different purpose than does section 2000e-16(c). The \textit{Zipes} Court construed section 2000e-5(e), which governs filing of initial charges with the EEOC.\textsuperscript{137} Because section 2000e-16(c) governs subsequent filing in federal court, congressional intent as to the nature of the two time limits may differ.\textsuperscript{138}

The rationale behind the \textit{Zipes} holding, therefore, may be inapplicable to the federal employee context. Equitable modification

\begin{itemize}
  \item \textsuperscript{132} Hornsby v. United States Postal Serv., 787 F.2d 87, 89 (3d Cir. 1986).
  \item \textsuperscript{133} Martinez v. Orr, 738 F.2d 1107, 1109-10 (10th Cir. 1984).
  \item \textsuperscript{134} Ross v. United States Postal Serv., 814 F.2d 616, 616-17 (11th Cir. 1987); Milam v. United States Postal Serv., 674 F.2d 860, 862 (11th Cir. 1982).
  \item \textsuperscript{135} Chicago Note, \textit{supra} note 10, at 1018. The Chicago Note is a pre-\textit{Zipes} analysis arguing that all time limits in Title VII can be equitably modified. The author, however, never addresses those time limits applicable to federal employees, and therefore never considers the impact of sovereign immunity. Rather, the author concludes that “equitable modification should be allowed under Title VII . . . in the absence of any evidence that Congress meant to preclude it.” \textit{Id.}; accord Davis Note, \textit{supra} note 10, at 776-79. The Davis Note does analyze federal employee time limits separately, but addresses the sovereign immunity issue only briefly in footnotes. \textit{Id.} at 768 n.78, 769 n.109. The author merely concludes that the same policy reasons for allowing equitable modification in the private sector, “sympathy for the inexperienced plaintiff and preventing employer prejudice,” should also apply in the federal sector. \textit{Id.} at 779.
  \item \textsuperscript{136} Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982).
  \item \textsuperscript{137} The purposes underlying \S 2000e-5(e) are beyond the scope of this Note, but if the equitable extension circuits are going to rely on the \textit{Zipes} rationale, they should address this difference.
  \item \textsuperscript{138} See \textit{infra} notes 148-81 and accompanying text.
\end{itemize}
cation circuits must recognize that section 2000e-16(c) is a term in a consent statute, and address and refute the sovereign immunity arguments of the jurisdictional circuits. Because no emphatic language bars equitable modification of section 2000e-16(c), the courts can use the totality of circumstances approach to construction.  

b. The District of Columbia Circuit's Analysis

Of the equitable modification circuits, the District of Columbia Circuit's analysis in *Mondy v. Secretary of the Army,* is the most defensible construction of section 2000e-16(c). The *Mondy* court recognized the difference between public sector and private sector time limits, and the role of sovereign immunity.  

The *Mondy* court examined two factors in the totality of circumstances approach. First, the court noted that section 2000e-16(c) contains no emphatic or 'jurisdictional' type language. The court found the absence of such language suggested that Congress did not intend the time limit to be jurisdictional. Next, the court stressed that the context of section 2000e-16(c) in the statutory scheme suggests it may be equitably modified. The court noted the *Zipes* Court had stressed that the grant of jurisdiction is in a provision separate from that governing time limits, suggesting that the time limits are not jurisdictional.  

The *Mondy* court's analysis could be strengthened in two ways. First, courts should acknowledge expressly that the "strict construction" rule is inapplicable to section 2000e-16(c), because no express language prohibits equitable modification. Courts, therefore, can ascertain congressional intent using the totality of circumstances approach. Once courts establish that the totality approach supplies the rule of construction, they may determine congressional intent from all available

139. 845 F.2d 1051 (D.C. Cir. 1988).
140. *Id.* at 1055.
141. *Id.* at 1056-57.
142. *Id.* at 1056.
144. *Id.* at 1054, 1056.
145. *Id.* The jurisdictional provisions, § 2000e-5(f)-(k), govern both private and federal employees.
146. *Id.* at 1056.
147. See supra notes 46-49 and accompanying text.
148. See supra note 44 and accompanying text.
sources. Courts could bolster the Mondy reasoning by analyzing legislative history and the purposes of the statute. By analyzing all factors, courts can illuminate how a jurisdictional reading of section 2000e-16(c) would frustrate congressional intent by subjecting plaintiffs to unintended hardships that often result in loss of their cause of action in federal court.

B. A PROPOSED ANALYSIS OF SECTION 2000E-16(c)

Because section 2000e-16(c) is a condition of the sovereign's consent to be sued, courts must apply different rules of construction than they apply to statutes governing purely private rights. These rules of construction must be gleaned from the Supreme Court's sovereign immunity case law. This case law establishes three steps to construction of terms in consent statutes.

1. The Three Tier Approach to Construction of Consent Statutes

First, the court should scrutinize the statutory language to see if Congress has expressly prohibited equitable modification of the time limit.149 Such express prohibitions take the form of mandatory language "forever barring" claims after a specified time period.150 Scrutiny of the language of section 2000e-16(c) reveals no such express prohibition of equitable modification; the statute requires merely that suits must be brought in federal court "within thirty days" of receipt of notice of the agency's final action.151

Next, the court must determine whether the particular term that a plaintiff argues should be read into the statute constitutes an especially extraordinary condition of suit.152 If the term is extraordinary, as are awards of prejudgment interest153 or attorney's fees,154 then the consent statute must contain express and unequivocal consent to the term.155

Equitable modification of time limits is not such an extraordinary condition of suit. The Supreme Court has stated

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149. See id. for examples of statutes with such express prohibitions.
150. 42 U.S.C. § 2000e-16(c) (1982); see supra note 36 for text of § 2000e-16(c).
151. See supra note 45 and accompanying text.
154. See supra note 45 and accompanying text.
that time limits in consent statutes must not be construed "un-
duly restrictively," implying that equitable modification would be allowed in an appropriate case. Thus, section 2000e-16(c) need not contain express consent to equitable modification of its time limit. When express consent is absent, the Court has used a totality approach to ascertain congressional intent.

Finally, in the absence of language expressly prohibiting equitable modification of section 2000e-16(c), the court must look at the totality of circumstances underlying the statute’s enactment to ascertain whether equitably modifying the time limit is consistent with congressional intent. Factors to consider in this totality approach are the absence of emphatic language, the context of section 2000e-16(c) in the statutory scheme, the statute's legislative history, and the underlying statutory purpose.157

2. Construction of Section 2000e-16(c) Under the Totality of the Circumstances Approach

Analysis of the totality of the circumstances reveals that Congress intended federal employees to receive the same rights and access to the federal courts as private employees with employment discrimination claims. Private employees have the right to equitable modification of Title VII time limits in appropriate circumstances.158 The courts also should allow equitable modification of section 2000e-16(c), therefore, in appropriate circumstances. The following analysis demonstrates that equitable modification is consistent with congressional intent as expressed in the legislative history and the broad remedial purposes of Title VII and the Equal Employment Act of 1972.

a. The Language of Section 2000e-16(c)

The presence of especially emphatic language in a time limitation can be determinative of congressional intent to disal-
low equitable modification. It follows that the absence of such language, while not dispositive, is one factor suggesting an intent to allow equitable modification of section 2000e-16(c).

Section 2000e-16(c) does not contain express language prohibiting equitable modification. In fact, like section 2000e-(f)(1), section 2000e-16(c) merely requires that suit be filed "within" a certain number of days; the Court has held the section 2000e-5(f)(1) time limit subject to equitable tolling. When language of express consent to or prohibition of equitable modification is absent or ambiguous, courts may look elsewhere to ascertain congressional intent.

b. The Context of Section 2000e-16(c) in the Statutory Scheme of Title VII

Several aspects Title VII's structure suggest an intent to allow equitable modification. First, the provision granting jurisdiction to the federal courts over Title VII actions does not expressly require timely filing, and is not limited by any reference to the section 2000e-16(c) time limitation. Congress did not condition federal jurisdiction on timely filing of complaints.

Second, section 2000e-16 incorporates by reference the provisions governing filing of suits against private sector employers. In Zipes and Baldwin County, the Supreme Court held that these provisions may be equitably modified. The Court interpreted this incorporation by reference of the procedures governing private sector employees to provide federal employees with the same right to a trial de novo in federal court as is granted to other employees. The District of Columbia Circuit has used this incorporation by reference to grant federal employees the same right to equitable modification of Title VII time limits as is granted to private sector employees in sections


160. Baldwin County, 466 U.S. at 151.

161. See supra notes 46-49 and accompanying text.


163. 42 U.S.C. § 2000e-16(d) (1982). This section provides that "[t]he provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder." Id.

164. Zipes, 455 U.S. at 393; see Baldwin County, 466 U.S. at 151.


166. Mondy v. Secretary of the Army, 845 F.2d 1051, 1056 (D.C. Cir. 1988).
2000e-5(e) and 2000e-5(f)(1).\textsuperscript{167}

c. Legislative History of the Equal Employment Act of 1972

The legislative history of the Equal Employment Act of 1972 manifests Congress' intent to allow equitable extension of section 2000e-16(c). The Senate Report noted that not only did federal employees lack sufficient impartial remedies at an agency level, they had no access to the courts to seek relief, primarily because the employees could not overcome the federal government's sovereign immunity defense.\textsuperscript{168}

The Senate Report states that section 2000e-16(c) is designed to provide federal employees with "the full rights available in the courts as are granted to individuals in the private sector under title VII."\textsuperscript{169} The Supreme Court has cited the Senate Report language in holding that the 1972 Act grants federal employees the same right to a trial de novo as private employees.\textsuperscript{170} Because private employees under Title VII have the right in federal court to equitable modification of their time limitations,\textsuperscript{171} an analogous intent exists for allowing equitable modification of section 2000e-16(c).

By enacting section 2000e-16, therefore, Congress sought not only to provide regularized agency review of employment discrimination complaints, but also to provide access to the courts for federal employees without the need to overcome a sovereign immunity defense. This legislative history suggests

\textsuperscript{167} Senate Report, supra note 25, at 16; accord House Report, supra note 25, at 23, reprinted in 1972 U.S. Code Cong. & Admin. News 2158 (stating that there can exist no justification for anything but a vigorous effort to accord federal employees the same rights as private employees).

\textsuperscript{168} Senate Report, supra note 25, at 16.

\textsuperscript{169} Chandler v. Roudebush, 425 U.S. 840, 841 (1976). The dissent in Library of Congress v. Shaw, 478 U.S. 310 (1986), cited the same language to argue that Congress also consented to awards of prejudgment interest to federal employees. Id. at 325 (Brennan, J., dissenting). The dissent stated: [t]he legislative history of the 1972 amendments thus demonstrates that Congress intended that federal employees enjoy the same rights and remedies in the courts as private litigants. It therefore follows that Congress intended that in situations where private sector Title VII litigants may recover prejudgment interest on their attorney's fees awards, so may federal employees.

Id. (footnote omitted). See supra note 43 for a discussion of the majority view in Library of Congress.

\textsuperscript{170} Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982); see Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (per curiam).

\textsuperscript{171} Peyton v. Rowe, 391 U.S. 54, 65 (1968).
d. *The Purpose of Title VII and the 1972 Amendments*

Allowing equitable modification serves the purposes of section 2000e-16. Remedial statutes are to be construed broadly.\(^{172}\) The Court has construed Title VII as a broad remedial statute,\(^{173}\) and therefore has rejected technical readings of the statute because individuals, rather than trained lawyers, initiate the process and often proceed pro se in the subsequent civil suit.\(^{174}\)

The broad remedial purpose of Title VII to provide access to the federal courts suggests an intent to allow equitable modification, especially in light of the hardships pro se plaintiffs suffer from a strict jurisdictional reading of section 2000e-16(c). A pro se plaintiff has thirty days to overcome a variety of procedural traps. First, if she is in a circuit that applies the doctrine of constructive notice, the section 2000e-16(c) thirty-day time limit may begin to run before the plaintiff actually receives notice of her right to sue.\(^{175}\)

Next, the employee must determine who to name as a defendant based on "delphic" language\(^ {176}\) in section 2000e-16(c).\(^ {177}\) If the plaintiff names the wrong defendant she probably will be unable to amend her complaint pursuant to rule 15(c) unless she can serve her complaint and then amend it within the time limit.\(^ {178}\)

The plaintiff also might forfeit her day in court if she exercises her right to file motions for appointment of counsel and to proceed in forma pauperis.\(^ {179}\) A jurisdictional reading of sec-

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173. *Id.*
174. *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1093 (5th Cir. 1989) (holding that receipt of plaintiff's right-to-sue letter by her attorney's office constituted constructive notice sufficient to begin the § 2000e-16(c) time period), *cert. granted*, 110 S. Ct. 1109 (1990).
176. For text of § 2000e-16(c), see *supra* note 36.
177. *Williams v. United States Postal Serv.*, 873 F.2d 1069, 1074 n.6 (7th Cir. 1989) (holding that plaintiff could not amend complaint to correct defendant after 30-day period expired); *Bell v. Veterans Admin. Hosp.*, 826 F.2d 357, 359 (5th Cir. 1987) (same); see *Schiafone v. Fortune*, 477 U.S. 21, 29 (1986).
179. *E.g.*, *Bell*, 826 F.2d at 359. To avoid this inequitable result, the jurisdictional circuits have resorted to strained legal analysis. In *Paulk v. Department of Air Force*, 830 F.2d 79, 80-82 (7th Cir. 1987), the court allowed tolling during a pending motion to proceed in forma pauperis, stating that § 2000e-16(c) is ju-
tion 2000e-16(c) does not allow tolling of the thirty-day period while these motions are pending in the federal court. Finally, pro se plaintiffs may effect service of process on the federal defendant incorrectly or incompletely because of ignorance or misunderstanding of complex procedural requirements. If the correct defendant does not have notice of the suit within thirty days, the suit will be dismissed.

In light of the congressional purpose in enacting a broad remedial statute to provide access to the courts, it is unlikely that Congress intended to trap pro se plaintiffs in procedural snares. Allowing equitable modification of section 2000e-16(c) furthers that statute’s purpose to provide access to the federal courts for federal employees with employment discrimination claims. The totality of circumstances surrounding the enactment of section 2000e-16(c), therefore, suggests congressional intent to allow equitable modification of its thirty-day time limit.

This analysis takes into account the jurisdictional circuits’ concern for sovereign immunity by completely analyzing congressional intent. It also provides a rationale for concluding that section 2000e-16(c) may be equitably modified without relying solely on the rationale of Zipes, a private sector case.

CONCLUSION

In 1972, Congress waived federal sovereign immunity to allow federal employees to sue for employment discrimination. As a condition to suit, Congress included a thirty-day time limit for employees to file suit in federal district court after exhausting administrative remedies. The circuit courts have disagreed over the nature of this time limit, some interpreting it as a jurisdictional prerequisite to suit and others construing it as a statute of limitations that may be equitably modified.

Using the totality of circumstances approach reveals that Congress intended to allow equitable modification of the section 2000e-16(c) thirty-day time limit for federal employees to
file suit in federal court. The statute does not contain emphatic language manifesting a jurisdictional intent. The legislative history indicates a two-fold purpose: to provide federal employees with access to the courts without facing a sovereign immunity defense, and to provide federal employees with the same rights in court as are granted to private employees — whose filing time limits may be equitably modified. Given the broad remedial purpose of Title VII, it is unlikely that Congress intended for pro se plaintiffs to lose their access to the courts because of failure to comply in thirty days with complex procedural requirements. Courts, therefore, should allow section 2000e-16(c) to be equitably modified in appropriate circumstances.

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