Missouri Law Review

Volume 43
Issue 3 *Summer 1978*

Article 3

Summer 1978

Executive Order No. 11,246: Presidential Power to Regulate Employment Discrimination

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COMMENTS

EXECUTIVE ORDER NO. 11,246: PRESIDENTIAL POWER TO REGULATE EMPLOYMENT DISCRIMINATION

I. INTRODUCTION

The eradication of employment discrimination is a goal of the highest priority in the United States today.[1] This policy is embodied in the congressional enactment of Title VII of the Civil Rights Act of 1964[2] and also is illustrated by numerous other laws prohibiting discrimination in employment.[3] The pervasiveness of federal legislation in the area overshadows the impact of the executive orders which deal with employment discrimination,[4] and diverts attention from the potential of these orders as effective weapons against employment discrimination.[5]

1. Franks v. Bowman Trans. Co., 424 U.S. 747, 763 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

2. 42 U.S.C. §§ 2000e to 2000e-16. (1970 & Supp. V 1975).

3. *See, e.g.,* Vocational Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified in scattered sections of 29 U.S.C.) (Supp. V 1975); Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970); Vietnam Era Veterans' Readjustment Assistance Act of 1972, Pub. L. No. 92-540, 86 Stat. 1097 (codified in scattered sections in 38 U.S.C.) (Supp. V 1975); Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107 (Supp. V 1975); Age Discrimination Act of 1967, 29 U.S.C. §§ 621-639 (1970 & Supp. 1975); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified in scattered sections of 18, 25, 28, and 42 U.S.C.) (1970 & Supp. V 1975); Civil Rights Act of 1870, 42 U.S.C. § 1981 (1970); State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, tit. I, 86 Stat. 919 (codified in scattered sections of 26, 31 U.S.C.) *as amended* 31 U.S.C. § 1264 (Supp. V 1975); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 5, 42 U.S.C.) (Supp. V 1975).

4. Exec. Order No. 11,141, 29 Fed. Reg. 2477 (1964) (proscribes age discrimination by federal contractors); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970) (proscribes discrimination based on race, color, religion, sex, and national origin, as amended); Exec. Order No. 11, 375, 32 Fed. Reg. 14,303 (1967) (amends Exec. Order No. 11,246 by substituting "religion" for "creed" and adding "sex" to the types of discrimination prohibited); Exec. Order No. 11,758, 39 Fed. Reg. 2075 (1974) (employment of veterans by federal contractors); Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969) (equal employment opportunity in federal employment); Exec. Order No. 11,830, 40 Fed. Reg. 2411 (1975) (employment of the handicapped); Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976) (also dealing with the handicapped); Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (1976) (requiring citizenship for federal employment). The orders are collected and reprinted in 1 EMPL. PRAC. GUIDE (CCH) ¶¶ 3675-3764.

5. At least one reason the Orders had only marginal impact after their issuance was the doubt that existed as to their meaning. *See* note 76 and accom-

The executive orders are significant weapons in the national effort to eliminate employment discrimination.[6] Part of their significance is derived from the substantive coverage of the orders, which may impose higher obligations on certain employers than those imposed by existing legislation. For example, Executive Order No. 11,246 expressly requires all employers to take "affirmative action" with respect to employment of minority group members,[7] while Title VII only authorizes a court to mandate affirmative action after a judicial finding that the employer intentionally and unlawfully discriminated.[8] Section 1981 of the Civil Rights Act of 1870 contains no affirmative action provision at all.[9]

The importance of the executive orders also may be derived from their jurisdictional coverage. In some instances, although the orders may impose substantive obligations on employers identical to those imposed by legislation, the coverage of the orders may extend to more, or different, employers. For example, Title VII, Executive Order No. 11,246, and section 1981 all require nondiscrimination in employment. However, Title VII applies only to employers with fifteen or more employees;[10] the Executive Order applies to employers who are federal contractors with $10,000 or more of federal business annually.[11] Section 1981 applies to all employers, but does not prohibit discrimination that is not racially based.[12]

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panying text *infra*. The lack of "teeth" in prior Orders and the lack of vigorous enforcement also may have contributed to misperceptions of the Orders' effectiveness. *See* notes 116-117 and accompanying text *infra*.

6. The significance of the Orders is apparent if one considers the sheer number of workers who may be affected by them. Because of the broad interpretation given the Orders and because of the enormity of federal procurement, few major employers can claim *not* to be a federal contractor or subcontractor. Some older estimates indicate that as many as 40% of America's workers are employed by contractors subject to the Orders. *See* 5 U.S. COMM'N. ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 at 230 (1975).

7. Exec. Order No. 11,246, § 202, 30 Fed. Reg. 12,319 (1975), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970). This affirmative action requirement is subject to many regulations and is currently a subject of considerable controversy. *See* text accompanying notes 76-101 *infra*.

8. 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

9. 42 U.S.C. § 1981 (1970).

10. 42 U.S.C. § 2000e(b) (Supp. V 1975).

11. 41 C.F.R. § 60-1.5 (1977).

12. Vazques v. Werner Continental, Inc., 15 Fair Empl. Prac. Cas. 72 (N.D. Ill. 1977) (rights protected by § 1981 are of a purely racial character and do not include a Mexican-American's claims of national origin discrimination); Marlowe v. General Motors Corp., 11 Empl. Prac. Dec. ¶ 10,779, 11 Fair Empl. Prac. Cas. 1357 (E.D. Mich. 1975) (Judaism is a religious and not a racial characteristic, and thus discrimination based thereon is not proscribed by § 1981); National Organization for Women v. Bank of California, 5 Empl. Prac. Dec. ¶ 8510, 6 Fair Empl. Prac. Cas. 26 (N.D. Cal. 1973) (sex discrimination claims by female employees not cognizable under § 1981); Marshall v. Plumbers Local 60, 343 F. Supp. 70, 5 Empl. Prac. Dec. ¶ 7977, 4 Fair Empl. Prac. Cas. 1224 (E.D. La. 1972) (national origin discrimination not proscribed by § 1981). *But see* Miranda v. Clothing

Although the various executive orders deal with several types of discrimination,[13] the eradication of *racial* discrimination has been of paramount importance both in the employment sector and in other areas of our society. Accordingly, the scope of this comment will be limited to a discussion of Executive Order No. 11,246,[14] which deals with racial discrimination by employers who are federal contractors within the meaning of that Order.[15] Part II *infra* will briefly examine the history and operation of the Executive Order and furnish the foundation for an exploration in Part III *infra* of fundamental constitutional issues raised in recent decisions regarding the Order.[16]

II. Development and Operation of Executive Order No. 11,246

A. *History of the Various Executive Orders*

Executive orders dealing with employment discrimination enjoy a long history in this country,[17] predating by many years the development of federal legislation on the same topic.[18] President Franklin D.

Workers Local 208, 8 Empl. Prac. Dec. ¶ 9601, 10 Fair Empl. Prac. Cas. 557 (D.N.J. 1974) (§ 1981 applies broadly to all minorities and is not confined to abstract anthropological classifications of races. *See generally* Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment,* 7 Harv. C.R.-C.L. L. Rev. 56 (1972).

13. *See* authorities cited note 4 *supra.*

14. 30 Fed. Reg. 12,319 (1965), *as amended,* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967), Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970).

15. The Executive Order delegates rulemaking authority to the Secretary of Labor, who has defined "federal contractors" pursuant to that grant of authority. *See* Exec. Order No. 11,246, § 201, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970). *See also* 41 C.F.R. § 60-1.2 (1977).

16. Several recent decisions have raised two issues concerning the Order. First, the authority of the Secretary of Labor's enforcement practices have been challenged directly and are likely to be challenged even more frequently in the future. *See, e.g.,* Uniroyal, Inc. v. Marshall, 14 Empl. Prac. Dec. ¶ 7672 (N.D. Ind. 1977). Second, recent changes in Title VII law have made previously unquestioned practices under the Executive Order quite controversial. For example, the recognition of bona fide seniority systems' immunity from Title VII challenges recently announced in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), raises the question whether they are also immune under the Executive Order. In the past their invalidity under Title VII had the practical effect of mooting the Executive Order issue. *See* text accompanying notes 173-190 *infra.*

17. *See generally* M. Sovern, Legal Restraints on Racial Discrimination in Employment 103-42 (1966); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U. Chi. L. Rev. 23 (1972); Contractors' Ass'n v. Secretary of Labor, 442 F.2d 159, 168-70, 3 Empl. Prac. Dec. ¶ 8180, at 6573-75, 3 Fair Empl. Prac. Cas. 395, 401-03 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

18. The Civil Rights Act of 1964, Pub. L. No. 88-352, § 716, 78 Stat. 241, 266, did not become effective until July 2, 1965. Although the Civil Rights Act of

Roosevelt issued the first executive order dealing with racial discrimination in 1941.[19] This order required all federal agencies to include in defense contracts clauses requiring that employers not discriminate against workers because of race, creed, color, or national origin.[20] The issuance of this order was a significant victory for civil rights groups and was obtained only after intense pressure had been exerted by those groups.[21]

The relatively limited scope of this first attempt to deal with employment discrimination was expanded by subsequent Executive Order No. 9001,[22] which eliminated the requirement of the prior Order that the nondiscrimination clause be physically incorporated in each contract. Instead, Executive Order No. 9001 allowed the clause to be incorporated by reference.[23] Executive Order No. 9346[24] later broadened the substantive coverage of prior orders by making them applicable to all government contractors instead of only to defense contractors. Both Executive Order No. 9001 and subsequent Executive Orders No. 9664[25] and No. 10,210[26] shifted the authority for contracting and enforcement among various federal agencies, but did not significantly alter the substantive provisions of the orders.

The next major change in the orders came after President Eisenhower took office.[27] In 1953, he issued Executive Order No.

1866, 42 U.S.C. § 1982 (1970), has been interpreted to extend to private employment situations, this did not occur until after the effective date of Title VII. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975). Notable exceptions to congressional inertia were some pieces of New Deal legislation which prohibited employment discrimination in relief programs. *See, e.g.,* Unemployment Relief Act of 1933, ch. 17, 48 Stat. 22.

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

20. The use of this contractual device was not unprecedented, as it has been used by Congress in other instances to achieve various other social policy objectives. *See* Note, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts,* 44 N.Y.U.L. REV. 590, 596 n.44 (1969) (federal statutes utilizing the contract device).

21. *Id.* at 590 n.1.

22. 6 Fed. Reg. 6787 (1941).

23. This is the practice under the Executive Order currently in force. *See* 49 C.F.R. § 60-1.4(d) (1977). However, the current regulations carry the principle of incorporation by reference a step farther and provide that,

> [by] operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

49 C.F.R. § 60-1.4(e) (1977).

24. 8 Fed. Reg. 7183 (1943).

25. 10 Fed. Reg. 1503 (1945).

26. 15 Fed. Reg. 1049 (1951).

27. *See* Birnbaum, *Equal Employment Opportunity and Executive Order 10,925,* 11 KAN. L. REV. 17 (1962); Pasley, *The Nondiscrimination Clause in Government Contracts,* 43 VA. L. REV. 837 (1957). *See also* M. SOVERN, *supra* note 17.

10,479[28] which delegated the authority to enforce the Order to the Government Contract Committee. For the first time, the body responsible for supervising compliance with the orders was empowered to receive complaints and to conduct educational and other activities to further the policies of the orders.[29] The Eisenhower Order also authorized the Committee to encourage nondiscrimination in areas outside the scope of government contracts.[30] While the scope of the Executive Order was thus facially broadened, this expansion proved largely ineffectual. The Contract Committee only had authority to make recommendations based on its various activities, and neither the Order nor the contract clauses mentioned possible sanctions for noncompliance.[31]

The most important changes in the coverage of the executive orders were made by President Kennedy in 1961, when he issued Executive Order No. 10,925.[32] Not only was enforcement greatly improved,[33] but the Kennedy Order augmented the provisions of the equal opportunity clause[34] required in government contracts by the prior orders. In addition to the promise not to discriminate, the Kennedy Order mandated a promise that the contractor would take "affirmative action" in its employment practices to insure nondiscrimination. The additional language stated:

> the contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, creed, color, or na-

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28. 18 Fed. Reg. 4899 (1953). The President later amended this Order with Executive Order No. 10,557, 19 Fed. Reg. 5655 (1954), strengthening the nondiscrimination clause.

29. Contractors' Ass'n v. Secretary of Labor, 442 F.2d 159, 170, 3 Empl. Prac. Dec. ¶ 8180 at 6574, 3 Fair Empl. Prac. Cas. 395, 402 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

30. *Id.*

31. Birnbaum, *supra* note 27.

32. 26 Fed. Reg. 1977 (1961). The subject of employment discrimination had been raised in the presidential campaign of 1960, as candidate Kennedy chided President Eisenhower about his failure to eliminate discrimination by federal contractors "with the stroke of a pen." Downs, *Equal Employment Opportunity: Opportunity for Whom?,* 21 LAB. L.J. 274, 275-76 (1970).

33. The Kennedy Committee enjoyed increased personnel and funding, and greater power within the government. These factors, combined with improved complaint-handling procedures, allowed the Kennedy Committee to handle many times the workload of the Eisenhower Committee with greater success. M. SOVERN, *supra* note 17, at 105-09.

34. The nondiscrimination clause of earlier Executive Orders has been designated the "equal opportunity clause" by the Secretary of Labor. 41 C.F.R. §§ 60-1.3, -1.4 (1977). The clause is reprinted in note 41 *infra.* The clause also contains various notice requirements which call for the posting of notices in the place of business and mailing notices to collective bargaining organizations. Exec. Order No. 11,246, § 202, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970).

> tional origin. Such action shall include, but shall not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other compensation; and selection for training, including apprenticeship.[35]

By virtue of this Order, President Kennedy retained the nondiscrimination principle articulated in earlier orders and increased its impact on federal contractors by imposing the additional burden of taking "affirmative action."

B. *Coverage of Executive Order No. 11,246*

The most recent major change was made in 1965 when President Lyndon Johnson promulgated Executive Order No. 11,246,[36] the Order currently in force. This Order retained the same nondiscrimination and affirmative action obligations imposed by prior orders, but extended their application to include more contractor activities. Executive Order No. 10,925 had only required obligations be fulfilled "in connection *with the performance of the work* under the contract."[37] However, Executive Order No. 11,246 enlarged this responsibility by mandating nondiscrimination and affirmative action *"during the performance* of the contract."[38] Executive Order No. 11,246 thus required a contractor to fulfill the obligations of the Order with respect to *all* of his operations; the prior Order required compliance only in those operations actually involved with the performance of a federal contract.[39]

Executive Order No. 11,246 is composed of three major parts. Part I, which has been superseded by subsequent executive orders,[40] originally dealt with nondiscrimination in federal employment. Part II deals with private contractors with the federal government, and requires the inclusion of the equal opportunity clause discussed above in these con-

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35. Exec. Order No. 10,925, § 301, 26 Fed. Reg. 1977 (1961) (emphasis added).

36. 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970).

37. Exec. Order No. 10,925, § 301, 26 Fed. Reg. 1977 (1961) (emphasis added).

38. Exec. Order No. 11,246, § 202, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970).

39. Obviously, this increases the efforts which a noncomplying contractor would need to make in order to comply. Previously, some contractors had been able to obtain technical compliance with the Order by merely shifting all of their currently employed minority workers to work on the federal contract instead of by hiring more minority workers as the Order intended.

40. Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967); Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969). Title VII has since been amended to apply to government employees. 42 U.S.C. § 2000e (Supp. V 1976).

tractors' agreements with the government.[41] Part III of the order requires the inclusion of a similar equal opportunity clause in federally assisted construction contracts.

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41. The equal employment opportunity clause contained in Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970) provides:

> During the performance of this contract, the contractor agrees as follows:
>
> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.
>
> (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.
>
> (3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
>
> (4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
>
> (5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
>
> (6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of Secretary of Labor, or as otherwise provided by law.

Construction contractors have been the target of a special enforcement effort by the Secretary, in the course of which highly controversial "hometown plans" have mandated complex and extremely detailed affirmative action efforts. Much has been written concerning this aspect of the Executive Order.[42] As Part III of the Order is beyond the scope of this comment, the reader is referred to these sources. The scope and application of Part II of the Order are of primary concern in this comment, although some of the discussion below may be equally relevant to Part III.

Enforcement authority for the obligations created by the Order is delegated primarily to the Secretary of Labor.[43] This authority allows the Secretary to exempt specific contracting agencies from the requirements of the Order if "special circumstances in the national interest so require."[44] He also may exempt broad classes of particular contracts, subcontracts, and purchase orders by rule or regulation.[45] The Secretary has exercised this authority by promulgating numerous regulations.[46]

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(7) The contractor will include the provisions or Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

42. *See, e.g.,* authorities collected in Comment, *supra* note 17, at 724 n.8.

43. Exec. Order No. 11,246, § 201, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970). The Secretary has in turn delegated his authority to the Director of the Office of Federal Contract Compliance Programs (OFCCP). The Director does not have the power to issue rules of a general nature. *See* 41 C.F.R. § 60-1.2 (1977). Each federal agency is directed to cooperate with the Director by supervising enforcement of the Order with respect to contractors under their control. Exec. Order No. 11,246, § 205, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970). 41 C.F.R. § 60-1.6 (1977).

44. Exec. Order No. 11,246, § 204, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970).

45. *Id.* This power applies to contracts for work which will be performed outside the United States with no recruitment of U.S. workers, to contracts for standard commercial supplies or raw materials, to contracts involving less than specified amounts of money or numbers of workers, or if subcontractors below a certain tier are involved. The Secretary also may exempt portions of an employer's activities that are separate from those related to the performance of the contract.

46. 41 C.F.R. §§ 60-1.1 to 60-741.54 (1977).

The regulations issued by the Secretary include definitions detailing the types and sizes of contractors subject to the Order. These definitions tend to be quite broad in scope. For example, an employer must hold a contract with the federal government before the Order may apply. In this context, "government contract" has been defined by the Secretary as "any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. . . ."[47] It should be noted that such contract need not be in writing.[48] The equal opportunity clause will be deemed a part of the contract regardless of whether it is incorporated therein.[49]

The definition of "government contract" cited above would include by its terms *all* government contracts, irrespective of whether the government was acting as a buyer or as a seller. However, this interpretation does not seem to comport with the statutory authority for the Executive Order. The most widely accepted source of authority for the President's Order is in the procurement statutes, which authorize the President to obtain goods and services for the government on the best terms available.[50] Courts have reasoned that by arbitrarily excluding available minority workers from the labor pool, contractors may indirectly increase procurement costs and delay contracts for the government. Hence, the President may properly intervene under his procurement authority to halt these practices among contractors. However strong this justification may be to sustain the validity of the Order as applied to

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47. 41 C.F.R. § 60-1.3 (1977).

48. 41 C.F.R. § 60-1.4(e) (1977). This regulation states that "[b]y operation of the Order, the equal opportunity clause shall be considered to be a part of every [nonexempt] contract and subcontract. . . ." It could be argued that this provision exceeds the authority of the Secretary because the Order nowhere directs that the EEO clause be considered as part of any contract. Rather, the Order's only directive is that contracting agencies *should* incorporate such a clause in every contract. *See* Exec. Order No. 11,246, § 202, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970). However, this argument has been rejected and the regulation upheld. United States v. Mississippi Power & Light Co., 553 F.2d 480, 14 Empl. Prac. Dec. ¶ 7603, 14 Fair Empl. Prac. Cas. 1730 (5th Cir. 1977); United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 465, 14 Empl. Prac. Dec. ¶ 7602, at 4967, 14 Fair Empl. Prac. Cas. 1734, 1739 (5th Cir. 1977) (recognizing that the "Order specifically authorized the issuance of implementing regulations by the Secretary of Labor, and . . . § 60-1.4(e), did nothing more than give teeth to the mandate of the Order").

49. 41 C.F.R. § 60-1.4(d) (1977) permits incorporation by reference. *See also* cases cited note 48 *supra.* United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 14 Empl. Prac. Dec. ¶ 7602, 14 Fair Empl. Prac. Cas. 1734 (5th Cir. 1977), involved some contracts which were written and some which were not. The court upheld application of the Order to the contractor even though none of the contracts contained the EEO clause or attempted to incorporate it by reference.

50. For discussion of the procurement power as the basis for the President's Executive Order see text accompanying notes 154-159 *infra.*

sellers *to* the government, it furnishes little justification for the application of the Order to purchasers *from* the government.[51]

The broad application of the "government contract" definition to both buyers and sellers was upheld in *Crown Central Petroleum Corp. v. Kleppe*.[52] The plaintiff-contractor in *Crown Central* argued that the Order and attendant definitions contemplated coverage of contracts and leases whereby goods and services were furnished *to* the government. The plaintiff was leasing off-shore oil land *from* the government and argued that the Secretary had exceeded his authority under the Order by issuing an overly broad definition of "government contract." Despite considerable support for the plaintiff's argument, the court upheld the regulation as a proper exercise of the Secretary's power. The Executive Order thus has tremendous scope, extending to contracts in which the government acts as a seller (or lessor) as well as a buyer (or lessee).

The obligations imposed by the Executive Order extend to subcontractors as well as contractors.[53] Subcontracts include:

> any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and employee):
> (1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or
> (2) Under which any portion of the contractor's obligations under any one or more contracts is performed, undertaken, or assumed.[54]

This provision enjoys the same broad interpretation as the "government contract" definition. For example, in a recent information notice to the heads of all federal agencies, the Secretary's Office of Federal Contract Compliance Programs (OFCCP) stated that reinsurers of the government's employees' insurance program were subcontractors within the meaning of the Order.[55]

The definitions of "contractor" and "subcontractor" are subject to several exceptions excluding certain contractors from coverage by the Order. For example, contractors holding contracts valued at less than $10,000 are not subject to the Order unless the total value of all such contracts aggregates or may reasonably be expected to aggregate to

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51. For discussion of the constitutional basis for the Order see text accompanying notes 151-172 *infra*.

52. 14 Empl. Prac. Dec. ¶ 7534, 14 Fair Empl. Prac. Cas. 49 (D. Md. 1976).

53. *See* clause 7, note 41 *supra*; 41 C.F.R. § 60-1.4(c) (1977).

54. 41 C.F.R. § 60-1.3 (1977).

55. Office of Federal Contract Compliance Programs, U.S. Dept. of Labor, Information Notice to Heads of All Agencies, No. 77-11 (Feb. 11, 1977), *reprinted in* 2 Empl. Prac. Guide (CCH) ¶ 5021.

$10,000 in any given year.[56] A similar provision applies to contracts for indefinite amounts of goods or services, such as supply or requirements contracts. The applicability of the Executive Order to such contracts is presumed, unless the purchaser "has reason to believe that the amount to be ordered in any year under such contract will not exceed $10,000."[57] Other exceptions apply to state and local government agencies,[58] to educational institutions which are religiously oriented,[59] to work performed on or near Indian reservations,[60] and to work performed outside the United States.[61]

C. *Obligations Imposed by the Order*

The Executive Order imposes many obligations on contractors subject to its terms. These obligations are created directly by provisions contained in the Order and also by regulations issued pursuant to the Secretary's authority under the Order. These requirements frequently demand higher standards of behavior than are required under existing legislation and entail much more than the legislatively-mandated obligation not to discriminate.

1. Cooperation

The Executive Order obligates the contractor to cooperate with the Secretary of Labor in his efforts to enforce the Order. Clause Five of the equal opportunity clause specifically requires the contractor to:

> furnish all information and reports required by [the Executive Order] and by the rules, regulations, and orders of the Secretary of Labor . . . and [to] permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.[62]

This cooperation requirement is further defined by the Order as requiring the contractor and certain subcontractors to file "compliance reports," which "contain such information as to the practices, policies,

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56. 41 C.F.R. § 60-1.5(a)(1) (1977). Government bills of lading are not included in this exception, nor are contracts with depositories of federal funds or issuers of savings bonds. *Id.*

57. 41 C.F.R. § 60-1.5(a)(2) (1977).

58. *Id.* § 60-1.5(a)(4).

59. *Id.* § 60-1.5(a)(5).

60. *Id.* § 60-1.5(a)(6). Although a contractor subject to the Order may follow a publicly-announced policy of preferring Indians with respect to employment opportunities near reservations, he may not prefer members of one tribe over another, nor may he discriminate on the basis of sex or religion. *Id.*

61. *Id.* § 60-1.5(a)(3).

62. Exec. Order No. 11,246, § 202, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2002e app., at 10,294 (1970); 41 C.F.R. § 60-1.4(a)(5) (1977).

programs, and employment statistics of the contractor ... as the Secretary of Labor may prescribe."[63]

The Secretary has used his rule-making authority to define the circumstances under which compliance reports are to be filed. These reports must be filed by prime contractors and also by their immediate subcontractors if they employ more than fifty employees and have a contract amounting to $50,000 or more.[64] The reports must be filed annually, or at such other intervals as the contracting agency or Director of the OFCCP may direct.

The cooperation requirement is extended by both the Order and the regulations to the unions and subcontractors with which a contractor deals.[65] For example, the Order provides that the contractor shall submit as part of his compliance report "a statement in writing, signed by an authorized officer ... of any labor union ... to the effect that its policies and practices do not discriminate."[66] Although the unions and subcontractors lack direct contractual privity with the government, the requirement that the contractor place the equal opportuntiy clause in his subcontracts minimizes the adverse impact that lack of privity could have on enforcement of the Order.

The failure to file the required reports can work substantial hardships on contractors. Such failures may result in the imposition of significant sanctions by the Director pursuant to the Order.[67] A failure to file a required report may result in some circumstances in the loss of the contract. This can occur when a compliance report is required as part of a bid for a contract.[68] In such a situation, the failure to submit a properly completed report with the bid may result in the bid being declared "nonresponsive" and thus ineligible to receive the contract.[69]

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63. Exec. Order No. 11,246, § 203(a), 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2002e app., at 10,294 (1970); 41 C.F.R. §§ 60-1.7, .20 (1977).

64. 41 C.F.R. § 60-1.7(a)(1) (1977). Only first-tier subcontractors (holders of contracts directly with a prime contractor) and work-site subcontractors who otherwise meet the criteria discussed *supra* must file compliance reports.

65. Exec. Order No. 11,246 §§ 203(c), 203(d), 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2002e app., at 10,294 (1970); 41 C.F.R. § 60-1.9 (1977).

66. *Id.*

67. 41 C.F.R. § 60-1.7(a)(4) (1977). *See* text accompanying notes 102-123 *infra.*

68. Exec. Order No. 11,246, § 203(b), 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2002e app., at 10,294 (1970).

69. Rossetti Contracting Co. v. Brennan, 508 F.2d 1039, 9 Empl. Prac. Dec. ¶ 9886, 9 Fair Empl. Prac. Cas. 174 (7th Cir. 1975); Northeast Constr. Co. v. Romney, 485 F.2d 752, 5 Empl. Prac. Dec. ¶ 8495, 5 Fair Empl. Prac. Cas. 746 (D.C. Cir. 1973); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907, 2 Empl. Prac. Dec. ¶ 10,046, 2 Fair Empl. Prac. Cas. 30 (1969), *cert. denied,* 396 U.S. 1004 (1970). *But see* Centric Corp. v. Barbarossa & Sons, Inc., 521 P.2d 874, 7 Empl. Prac. Dec. ¶ 9343, 8 Fair Empl. Prac. Cas. 259 (Wyo. 1974) (failure to include clause held an inconsequential defect because contractor bound by the affirmative action requirement regardless).

Courts have enforced agency refusals to permit subsequent correction of defective bids and have affirmed awards of contracts to higher bidders whose bids did comply with the requirements.[70]

2. Notice

A second major requirement imposed by the Order is what may be termed the "notice" requirement. As part of the equal opportunity clause contained in the Order, a contractor agrees to post and publish various types of notices. One such notice is supplied by the contracting agency and sets forth the terms of the equal opportunity clause.[71] These notices must be placed in conspicuous locations at the employer's place of business.

A second type of notice required by the Order is a statement by the employer in his solicitations for employees that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.[72] This requirement has been modified by regulation to make it less burdensome. Compliance with the solicitation notice requirements may be achieved if the employer either states "in clearly distinguishable type that he is an equal opportunity employer,"[73] includes in display or other advertising the appropriate insignia approved by the Director,[74] or uses a single advertisement which is grouped with other advertisements under a caption stating that all of the employers in the group will assure equal employment opportunity to qualified applicants.[75]

3. Affirmative Action

As discussed earlier, the Executive Order imposes an affirmative action requirement on federal contractors. The precise meaning of "affirmative action" was uncertain for many years after President Kennedy first used the term in Executive Order No. 10,925 because it was not defined in that Order. President Kennedy created the President's Committee on Equal Employment Opportuntiy and authorized it to promulgate rules to implement and enforce the Order, but the Committee also failed to define the obligations entailed in the concept of affirmative action. The absence of a workable definition for the affirmative action

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70. *See* cases cited note 69 *supra.*

71. Exec. Order No. 11,246, § 202, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2002e app., at 10,294 (1970). *See* note 41 *supra. See also* 41 C.F.R. § 60-1.42 (1977).

72. 41 C.F.R. § 60-1.41 (1977).

73. *Id.* § 60-1.41(d).

74. *Id.* § 60-1.41(b).

75. *Id.* § 60-1.41(c).

concept was criticized by commentators, who attributed the paucity of meaningful enforcement of the Order to the absence of such a definition.[76]

In the social context of the early 1960's, "affirmative action" could have meant obligations far less demanding than those currently associated with the term.[77] For example, the term might have meant only "policing" of an employer's practices to be certain that they did not inadvertently discriminate.[78] A different interpretation could have imposed a higher burden on the contractor by requiring the utilization of recruitment techniques designed to produce more minority applicants.[79] Various other definitions of affirmative action obligations were suggested to satisfy the new presidential requirement.[80] The number and variation of different proposed definitions ultimately prodded the issuance of regulations to define the term in 1968.[81]

The Secretary currently defines an affirmative action program as being "a set of specific and result-oriented procedures to which a con-

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76. *See* Note, *supra* note 20, at 606-07.

> The indefiniteness of affirmative action obligations is an invitation to casual and uncertain enforcement. Where affirmative action compliance programs containing specific steps have been agreed to at the time of contracting, strict sanctions for failure to perform are warranted.... [I]t may be both impractical and unfair to seek sanctions for a failure to take "affirmative action," the content of which is known or misunderstood at the time of contracting.

Id. at 601. One motivation behind the lack of vigorous enforcement must have been the Committee's lingering doubts that the Order and the regulations issued pursuant thereto would be judicially upheld. M. SOVERN, *supra* note 17, at 113-114.

77. For a discussion of the technical interpretation currently given to the term "affirmative action," see 5 U.S. COMM'N ON CIVIL RIGHTS, *supra* note 6, at 236-50.

78. Note, *supra* note 20, at 593. Such an interpretation finds support in the language of the Kennedy Order, which requires "affirmative action to ensure applicants ... and employees *are treated ... without regard to their race ....*" Exec. Order No. 10,925, § 301, 26 Fed. Reg. 1977 (1961) (emphasis added).

79. Note, *Fair Employment Policies and the Federal Contractor Program — Some Unanswered Questions,* 37 GEO. WASH. L. REV. 372, 382 (1968).

80. Note, *supra* note 20, at 593-94.

81. 41 C.F.R. § 60-1.20 (1968). This initial effort to define the affirmative action concept was criticized as being an incomplete attempt at definition; although the rules "defin[ed] ultimate goals, [they failed] to describe the nature of the 'specific steps' which the contractor should take." Note, *supra* note 20, at 601. Consequently, "lacking either guidance or models, neither contractor nor compliance officer had any clear idea what an acceptable affirmative action plan should contain. As a result different agencies—and even different officers within the same agency—rejected and approved plans on quite unpredictable lines." Downs, *supra* note 32, at 278. Further, some officers equated "affirmative action" with "more" and rejected plans by contractors who merely repeated earlier affirmative action commitments in new plans. An Ohio compliance office reportedly went so far as to require the use of racially-based quotas in a plan. *Id.*

tractor commits himself to apply every good faith effort."[82] A written affirmative action program must be submitted by contractors employing fifty or more persons and having either a single contract valued at $50,000 or government bills of lading which may reasonably be expected to total that much in a year.[83] The failure to observe the Secretary's regulations regarding such plans is considered an act of noncompliance with the Executive Order[84] and will subject a contractor to possible sanctions.

The requirement of a written affirmative action plan is a significant one for a contractor to meet. Such plans are the subject of a large number of complicated regulations which impose a substantial administrative burden on employers.[85] One major component of such a plan is the development of a "utilization analysis."[86] A utilization analysis is composed of a "work force analysis,"[87] which is a "listing of each job title as appears in applicable collective bargaining agreements or payroll records ... ranked from the lowest paid to the highest paid within each department or other similar organizational unit ...."[88] For each job title, the total numbers of incumbent employees must be given and broken down by sex and minority group status.

The second major component of a "utilization analysis" consists of the employer's application of various factors to his work force analysis to determine whether he has "underutilized" minorities or women. "Underutilization" is defined as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability."[89] The factors which determine underutilization are the population of minorities and women in the areas surrounding the employer's business, along with other indicia of minority availability.[90] When

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82. 41 C.F.R. § 60-2.10 (1977).
83. *Id.* § 60-2.1(a). Depositories of government funds in any amount or any financial institution issuing and paying savings bonds or notes also must develop written affirmative action plans.
84. *Id.* § 60-2.2(a), .2(b).
85. *Id.* §§ 60-2.10 to .32.
86. *Id.* § 60-2.11.
87. *Id.* § 60-2.11(a).
88. *Id.*
89. *Id.* § 60-2.11(b).
90. *Id.* § 60-2.11(b)(1). That section provides:

> In determining whether minorities are being underutilized in any job group the contractor will consider at least all of the following factors:
> i. the minority population of the labor area surrounding the facility;
> ii. the size of the minority unemployment force in the labor area surrounding the facility;
> iii. the percentage of minority work force as compared with the total work force in the immediate labor area;
> iv. the general availability of minorities having requisite skills in the immediate labor area;

applied to the work force analysis, the utilization factors are supposed to enable an employer (and the OFCCP) to recognize deficiencies in his affirmative action policies.

The second major ingredient in an affirmative action plan is the establishment of "goals and timetables."[91] These serve as employment targets for eliminating underutilization of minorities and are to be "reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."[92] The goals and timetables are designed to remedy each specific instance of underutilization disclosed by the utilization analysis. The use of the goals and timetables is not intended to be "rigid and inflexible"[93] and thus "reverse discrimination" should not occur against any qualified applicant or employee.[94] However, as a practical matter reverse discrimination may still result because of the administrative burden entailed by the failure to meet goals and timetables. Each such failure must be explained by the employer to a bureaucrat who may be less than sympathetic. The failure to adhere to an affirmative action program may also be construed as noncompliance with the Order and subject the employer to sanctions.[95] In addition, a contractor's failure to establish a goal to remedy a specific underutilization will require him to analyze specifically all of the utilization factors and to detail reasons for the failure to set the goal.[96] Hence, it may be the path of least resistance for an employer to treat his "goals" as though they were quotas to avoid expense and inconvenience.

The third major ingredient in an affirmative action program consists of its implementation. Proper implementation of an affirmative action program requires that an employer disseminate the program both internally and externally.[97] The employer also should appoint one of

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v. the availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;
vi. the availability of promotable and transferable minorities within the contractor's organization;
vii. the existence of training institutions capable of training minorities in the requisite skills; and
viii. the degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

91. *Id.* § 60-2.12.
92. *Id.* § 60-2.12(e).
93. *Id.*
94. "The purpose of a contractor's establishment and use of goals is to insure that he meets his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin." *Id.* § 60-2.30. The constitutionality of affirmative action plans will be examined briefly in text accompanying notes 225-252 *infra.*
95. *Id.* § 60-2.2.
96. *Id.* § 60-2.12(k).
97. *Id.* § 60-2.21.

his executives to serve as director or manager of his equal opportunity programs.[98] Finally, the employer should develop an internal audit and reporting system to enable accurate monitoring of his affirmative action efforts.[99] Specifically, the OFCCP regulations suggest that employers should require formal reports from unit managers on a scheduled basis, and that the report results should be reviewed at all levels of management.[100] The OFCCP additionally suggests that the contractor support various community action groups in order to improve his minority recruitment.[101]

D. *Sanctions for Noncompliance with the Executive Order*

Both the Executive Order and the regulations issued thereunder specify certain sanctions which may be imposed against noncomplying contractors. Noncompliance may be found if the contractor breaches any of the contractual requirements of the equal employment opportunity clause.[102] Subpart D of the Order entitled "Sanctions and Penalties" enumerates these sanctions in section 209(a). By virtue of this section, the Secretary of Labor may:

1. Publish the names of noncomplying contractors;
2. Recommend to the Department of Justice that criminal proceedings be brought against the contractor for furnishing false information;
3. Recommend to the Department of Justice that proceedings be brought to enforce the Order;
4. Recommend to the EEOC that enforcement proceedings be brought by the EEOC under Title VII;
5. Cancel, terminate, or suspend the contracts of noncomplying contractors;
6. Provide that all federal agencies refrain from further contracting with the noncomplying contractor.

The first sanction mentioned is the publication of the names of noncomplying contractors. The Director currently publishes a list of contractors who have been declared ineligible to receive federal contracts.[103]

The second and third sanctions contained in the Order provide that the Secretary may recommend that enforcement proceedings under the Order be brought by the Department of Justice. The Attorney General then could bring a criminal action against a contractor for furnishing false information to the government.[104] Civil proceedings also could be

98. *Id.* § 60-2.22.
99. *Id.* § 60-2.25.
100. *Id.* § 60-2.25(b).
101. *Id.* § 60-2.24(e), 60-2.26.
102. *Id.* § 60-1.26(a).
103. *Id.* § 60-1.30.
104. 42 U.S.C. § 1001 (1970) provides:
Whoever, in any matter within the jurisdiction of any department or

brought to enforce the contractual obligations assumed by the contractor under the equal employment opportunity clause. Presumably, these proceedings would seek to enjoin violations of the Order.[105] For example, injunctive relief could be sought to restrain labor organizations from interfering with a contractor's efforts to comply with the Order.[106] Although the Order appears to require efforts at conciliation and mediation as a precondition of referral of a violation to the Attorney General,[107] the Secretary takes the position that there are no procedural prerequisites to such referrals.[108]

The third sanction, referral to the Equal Employment Opportunity Commission, can result in an investigation and the commencement of judicial action against the contractor, with the full range of Title VII remedies available to redress the effects of the discrimination.

The first three sanctions underscore the apparent inability of the Secretary to *directly* redress discrimination under the Order. While regulations provide for various proceedings before the OFCCP,[109] the failure to comply with any orders issued by the Secretary may result merely in the cancellation of the employer's contract or in his debarment from further contracting, which are the last two sanctions listed.[110] To be

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agency of the United States knowingly and wilfully falsifies, conceals or covers up by any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

105. 41 C.F.R. § 60-1.26(e)(1) (1977).

106. United States v. Operating Engineers, Local 701, 13 Empl. Prac. Dec. ¶ 11,608, 14 Fair Empl. Prac. Cas. 1400 (D. Ore. 1977); United States v. Local 189, United Papermakers & Paperworkers, 301 F. Supp. 906, 2 Empl. Prac. Dec. ¶ 10,047, 1 Fair Empl. Prac. Cas. 820 (E.D. La.), *aff'd,* 416 F.2d 980, 2 Empl. Prac. Dec. ¶ 10,092, 1 Fair Empl. Prac. Cas. 875 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970); United States v. Local 189, United Papermakers & Paperworkers, 282 F. Supp. 39, 2 Empl. Prac. Dec. ¶ 10,032, 9 Fair Empl. Prac. Cas. 1178 (E.D. La. 1968); Exec. Order No. 11,246, § 207(a), 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2002e app., at 10,294 (1970). *But cf.* United States v. Building & Const. Trades Council, 271 F. Supp. 447, 2 Empl. Prac. Dec. ¶ 10,184, 1 Fair Empl. Prac. Cas. 897 (E.D. Mo. 1966) (unincorporated association of builders not subject to suit).

107. Exec. Order No. 11,246, §§ 205, 209(b), 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970).

108. "There are no procedural prerequisites to a referral to the Department of Justice by the Director, and such referrals may be accomplished *without proceeding through the conciliation procedures in this chapter. . . .*" 41 C.F.R. § 60-1.26(a)(2) (1977) (emphasis added). *See also* United States v. New Orleans Pub. Serv. Inc., 553 F.2d 459, 473, 14 Empl. Prac. Dec. ¶ 7602, at 4972, 14 Fair Empl. Prac. Cas. 1734, 1746 (5th Cir. 1977) (upheld the regulation in 41 C.F.R. § 60-1.26 (1977)).

109. 41 C.F.R. § 60-1.26 (1977).

110. *Id.* § 60-1.26(d); Exec. Order No. 11,246, §§ 209(a)(5), 209(a)(6), 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970).

sure, the cancellation of a profitable contract or the debarment of a contractor heavily dependent upon federal business may be a substantial sanction. However, the imposition of such sanctions does not directly address the acts of discrimination which have occurred. Absent judicial action undertaken by other federal authorities, the OFCCP and the Secretary must be content with the Order's cancellation and debarment remedies.

As noted above, the cancellation and debarment remedies are potentially effective sanctions because of the adverse impact which they may have on a contractor. Because of this, both the Order and the regulations issued thereunder require that an opportunity for a hearing be afforded a contractor before he may be debarred.[111] The issuance of a "show cause" notice is normally the first step in these enforcement proceedings.[112] This notice informs the contractor that enforcement under the Order is being contemplated, and gives him the opportunity to show cause why enforcement proceedings should not be instituted.[113] If the matter cannot then be settled through mediation and conciliation, the Secretary's rules provide that an administrative hearing may be held.[114] The hearing rules are modeled generally after the Federal Rules of Civil Procedure, with parallel discovery provisions.[115]

Despite the effectiveness of the debarment and cancellation remedies, these sanctions have been applied only infrequently. Although over 2,000 show cause notices were issued from 1972 to 1974,[116] only nine companies were debarred in the first ten years of the Order's operation (through February, 1974).[117] These debarments had a minimal impact because most of the employers were relatively small; three of the nine had been reinstated by early 1975.[118] The lack of wholesale debarments may be explained in part by the emphasis placed by the

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111. 41 C.F.R. § 60-1.26(a)(2) (1977); Exec. Order No. 11,246, § 208(b), 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970). It is important to note that *debarment* is different from a declaration of *nonresponsibility*. The latter applies only to one contract and is evidence of a temporary ineligibility to receive a contract. The former is a declaration of indefinite ineligibility and requires a hearing before imposition. Commercial Envelope Mfg. Co. v. Dunlop, 10 Empl. Prac. Dec. ¶ 10,252, at 5051, 11 Fair Empl. Prac. Cas. 117, 119 (S.D.N.Y. 1975). Apparently, a contractor may be declared nonresponsible only twice before enforcement proceedings must be begun against him. 41 C.F.R. § 60-2.2(b) (1977). *See generally* Comment, *Due Process in the Debarment and Suspension of Government Contractors*, 27 HASTINGS L. REV. 793 (1976).

112. 41 C.F.R. §§ 60-1.28, -2.2(c) (1977).

113. *Id.* § 60-1.28.

114. *Id.* §§ 60-1.26(a)-.26(d).

115. *Id.* §§ 60-30.1 to .30.

116. Castillo v. Usery, 13 Empl. Prac. Dec. ¶ 11,559 at 7015, 14 Fair Empl. Prac. Cas. 1240, 1247 (N.D. Cal. 1976).

117. 5 U.S. COMM'N ON CIVIL RIGHTS, *supra* note 6, at 298-99.

118. *Id.*

OFCCP on voluntary compliance through "persuasion and conciliation."[119] Indeed, many agencies do not send out "show cause" notices until all hope of settling the dispute with the contractor has disappeared.[120] Additionally, the hesitation of the OFCCP to pursue debarments and otherwise vigorously enforce the Order may be explained by its reluctance to have its authority challenged. Even among its proponents, the OFCCP was considered to be at least arguably vulnerable to judicial invalidation in its early years.[121]

In addition to the six sanctions enumerated in the Order, the OFCCP also claims to be able to assess and impose back pay awards to specifically redress acts of discrimination by contractors.[122] It is significant to note that while some commentators believe such a sanction would be highly effective,[123] the Executive Order fails to list back pay awards among the sanctions it provides. The authority of the OFCCP to award back pay will be discussed in part III B, *infra.* It suffices for present purposes to note that back pay is at least potentially available as a sanction under the Order.

E. *Existence of a Private Cause of Action Under Executive Order No. 11,246*

Although several commentators[124] and numerous plaintiffs[125] have argued that the Executive Order should enable private plaintiffs to bring suit directly against employers for acts of discrimination, the courts have

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119. 41 C.F.R. § 60-1.20(b) (1977).

120. 5 U.S. COMM'N ON CIVIL RIGHTS, *supra* note 6, at 296-97.

121. M. SOVERN, *supra* note 17, at 113-14.

122. The current regulations refer to the availability of back pay in several places. *See, e.g.,* 41 C.F.R. §§ 60-1.26(a)(2), .26(e)(1), .26(f), -2.1(b) (1977). The Executive Order nowhere mentions the availability of back pay.

123. Moroze, *Back Pay Awards: A Remedy Under Executive Order 11246,* 22 BUFFALO L. REV. 439 (1973); 5 U.S. COMM'N ON CIVIL RIGHTS, *supra* note 6, at 242-44.

124. Comment, *Equal Employment Opportunities and Government Contracting: Three Theories for Obtaining Judicial Review of Executive Order Number 11,246 Determinations,* 1972 WIS. L. REV. 133; Note, *supra* note 20.

125. With the existence of Title VII and the judicial revitalization of § 1981, it could be asked why plaintiffs would wish to rely upon a less certain cause of action under the Executive Order. The answer is that reliance on the Executive Order is often a matter of last resort, at least in the more recent cases. Such cases usually involve employees of governmental bodies which only recently became subject to Title VII under the amendments in the 1972 Equal Employment Opportunity Act. Many courts have refused to apply those amendments retroactively, so the Executive Order furnishes a last resort to those claimants. In older cases, plaintiffs may not have been able to rely upon the revitalized § 1981, or they may have been victims of discrimination not prohibited by that act, *e.g.,* sex discrimination. Finally, plaintiffs may have had no other federal right to rely upon if they were discriminated against prior to the effective date of Title VII, or if they failed to comply with its procedural prerequisites.

uniformly denied the existence of such a private right of action.[126] At least four different rationales have been offered by the courts in their refusal to allow a private right of action.

The most obvious and frequently mentioned rationale for denying the existence of a private right of action under the Executive Order is the failure of the Order to provide expressly for such a right.[127] As the Order is quite specific in many of its provisions, it seems improbable that the creation of a private right of action by implication was intended.[128] In following this reasoning, one court observed that the

> history of the [Executive] Orders, the rules and regulations made pursuant to them, and the actual practice in the enforcement of the nondiscrimination provisions are all strong persuasive evidence, it seems to us, that court action as a rem-

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126. Weise v. Syracuse Univ., 522 F.2d 397, 10 Empl. Prac. Dec. ¶ 10,294, 10 Fair Empl. Prac. Cas. 1331 (2d Cir. 1975); Cohen v. Illinois Inst. of Technology, 524 F.2d 818, 10 Empl. Prac. Dec. ¶ 10,465, 11 Fair Empl. Prac. Cas. 659 (7th Cir. 1975), *cert. denied,* 425 U.S. 943 (1976); Farkas v. Texas Inst., Inc., 375 F.2d 629, 1 Empl. Prac. Dec. ¶ 9777, 1 Fair Empl. Prac. Cas. 890 (5th Cir.), *cert. denied,* 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 1 Empl. Prac. Dec. ¶ 9689, 1 Fair Empl. Prac. Cas. 36 (3d Cir. 1964); Zubero v. Memorex, Inc., 12 Fair Empl. Prac. Cas. 604 (N.D. Cal. 1976); Lewis v. FMC Corp., 11 Fair Empl. Prac. Cas. 31 (N.D. Cal. 1975); Traylor v. Safeway Stores, Inc., 402 F. Supp. 871, 11 Empl. Prac. Dec. ¶ 10,711, 14 Fair Empl. Prac. Cas.1762 (N.D. Cal. 1975); Rackin v. University of Pennsylvania, 386 F. Supp. 992, 9 Empl. Prac. Dec. ¶ 10,137, 10 Fair Empl. Prac. Cas. 1318 (E.D. Pa. 1974); Baer v. Standard Oil Co., 12 Fair Empl. Prac. Cas. 383 (N.D. Cal. 1973); Bradford v. Peoples Natural Gas Co., 60 F.R.D. 432, 7 Empl. Prac. Dec. ¶ 9120, 6 Fair Empl. Prac. Cas. 1336 (W.D. Pa. 1973); Braden v. University of Pittsburgh, 343 F. Supp. 836, 4 Empl. Prac. Dec. ¶ 7936, 4 Fair Empl. Prac. Cas. 923 (W.D. Pa. 1972), *vacated on other grounds,* 477 F.2d 1, 5 Empl. Prac. Dec. ¶ 8557, 5 Fair Empl. Prac. Cas. 908 (3d Cir. 1973). *See also* Annot., 31 A.L.R. Fed. 108 (1977).

127. There are doubts that such a remedy could constitutionally exist even *had* the President specifically provided for it. *Cf.* Traylor v. Safeway Stores, Inc., 402 F. Supp. 871, 877 n.12, 11 Empl. Prac. Dec. at 6968 n.12, 14 Fair Empl. Prac. Cas. at 1767 n.12 (N.D. Cal. 1975) (noting by way of dicta that the President's authority to create a private cause of action is questionable).

128. *See, e.g.,* Braden v. University of Pittsburgh, 343 F. Supp. 836, 4 Empl. Prac. Dec. ¶ 7936, 4 Fair Empl. Prac. Cas. 923 (W.D. Pa. 1972), *vacated on other grounds,* 477 F.2d 1, 5 Empl. Prac. Dec. ¶ 8557, 5 Fair Empl. Prac. Cas. 908 (3d Cir. 1973). The *Braden* court observed:

> A careful reading of Executive Order No. 11246 ... discloses no provisions which suggest or create any right in an individual .... Rather, the Order provides for the enforcement of its terms by the [OFCCP] .... From the language of the Order it thus appears that private action against alleged non-complying contractors was not contemplated, although the Order does not preclude individuals [from seeking relief] in *valid* actions brought under other federal or state laws ....

Id. at 840, 4 Empl. Prac. Dec. at 6477, 4 Fair Empl. Prac. Cas. at 926 (emphasis in original).

> edy was to be used only as a last resort, and that *the threat of a private civil action to deter contractors from failing to comply with the provisions was not contemplated by the Orders.*[129]

Several other courts have analyzed the provisions of the Order at length, using the same approach to determine that private enforcement of the Order was not intended.[130]

A second rationale offered by courts for denying a private right of action under the Executive Order is based on a type of preemption argument. The preemption doctrine is usually applied to resolve state-federal conflicts[131] or local-state conflicts,[132] and results in the invalidation of state or local legislation if federal or state legislation, respectively, is found to have preempted the legislative area. The preemption doctrine was raised in this manner in the context of the Executive Order prior to the passage of the Civil Rights Act of 1964. In a state civil rights prosecution, a defendant airline asserted that federal preemption invalidated the state civil rights law because the President had issued the Executive Order.[133] The Supreme Court dismissed the argument, stating, "It is impossible for us to believe that the Executive intended for its Orders to regulate air carrier discrimination among employees so pervasively as to preempt state legislation intended to accomplish the same purpose."[134]

This traditional approach to preemption has been improperly applied by courts in other Executive Order cases to deny the existence of

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129. Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 9, 1 Empl. Prac. Dec. ¶ 9689 at 354, 1 Fair Empl. Prac. Cas. 36, 40 (emphasis added). Although the *Farmer* decision actually rested on a finding that administrative remedies had not been exhausted, the decision has been cited and followed by many other courts as supporting the quoted proposition.

130. Farkas v. Texas Instr. Inc., 375 F.2d 629, 1 Empl. Prac. Dec. ¶ 9777, 1 Fair Empl. Prac. Cas. 890 (5th Cir.), *cert. denied,* 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 1 Empl. Prac. Dec. ¶ 9689, 1 Fair Empl. Prac. Cas. 36 (3d Cir. 1964); Zubero v. Memorex, Inc., 12 Fair Empl. Prac. Cas. 604 (N.D. Cal. 1976); Bradford v. Peoples Natural Gas Co., 60 F.R.D. 432, 7 Empl. Prac. Dec. ¶ 9120, 6 Fair Empl. Prac. Cas. 1336 (W.D. Pa. 1973); Braden v. University of Pittsburgh, 343 F. Supp. 836, 4 Empl. Prac. Dec. ¶ 7936, 4 Fair Empl. Prac. Cas. 923 (W.D. Pa. 1972), *vacated on other grounds,* 477 F.2d 1, 5 Empl. Prac. Dec. ¶ 8557, 5 Fair Empl. Prac. Cas. 908 (3d Cir. 1973).

131. *See, e.g.,* Castle v. Hayes Freight Lines, 348 U.S. 61 (1954); Hines v. Davidowitz, 312 U.S. 52 (1941). *See also* Hirsch, *Toward a New View of Federal Preemption,* 1972 U. ILL. L.F. 515 (1972).

132. *See, e.g.,* United Tavern Owners v. School Dist. of Philadelphia, 41 Pa. 274, 272 A.2d 868 (1971); Galvan v. Superior Court, 70 Cal. 2d 851, 452 P.2d 930 (1969).

133. Colorado Anti-Discrimination Comm'n. v. Continental Air Lines, 372 U.S. 714 (1963).

134. *Id.* at 725. *But cf.* 41 C.F.R. § 60-2.31 (1977) (which provides for federal preemption of state laws).

a private right of action. The preemption argument was raised in *Bradford v. Peoples Natural Gas Co.*,[135] in which the court stated:

> The thrust of the order is to prescribe administrative remedies as the exclusive mode of enforcement. . . . Extensive provisions establish specific procedures for enforcement, including the holding of hearings, and issuance of publicity and recommendations to the Department of Justice and other agencies for the institution of proceedings. *These specific provisions concerning sanctions and penalties seem to indicate 'occupation of the field' to the exclusion of private lawsuits as a mode of enforcement.*[136]

Although this preemption argument is initially persuasive, it is a misapplication of the concept. The traditional application of the preemption doctrine assumes preemption of a subordinate entity by a superior entity. On closer analysis, *Bradford* only states that the executive has preempted *itself* because only one entity—the executive—is involved in the court's analysis. Thus, the purported application of preemption principles in *Bradford* seems to be only an alternative means of stating the conclusion that the language of the Order indicates the President did not intend private enforcement of the Order.

The availability of private remedies under various federal statutes has furnished some courts with a third rationale for denying private actions under the Order. The fact that aggrieved individuals may bring suit under Title VII or section 1981 has encouraged some courts to deny that right under the Order. For example, the court in *Lewis v. FMC Corp.*[137] stated:

> In light of the absence of authority [to bring suit under the Order] *and the full remedies available to plaintiff should he prevail on his claims under Title VII and § 1981,* this court declines to hold that the executive order creates a private cause of action.[138]

Of course, the plaintiff in *Lewis* was within the jurisdictional limitations of Title VII and section 1981 and thus could bring an action under those statutes. However, some plaintiffs may wish to sue small (or otherwise Title VII exempt) employers or prosecute non-racially-based discrimination claims. These plaintiffs are not as fortunate as the *Lewis* plaintiff, and have unsuccessfully sought to rely only on the Order for relief. The *Lewis* rationale is thus not a persuasive argument for denying a private remedy under the Order.

A fourth rationale for denying the existence of a private right of action under the Executive Order is derived from the principle of *ubi*

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135. 60 F.R.D. 432, 7 Empl. Prac. Dec. ¶ 9120, 6 Fair Empl. Prac. Cas. 1336 (W.D. Pa. 1973).

136. *Id.* at 436, 7 Empl. Prac. Dec. at 6700, 6 Fair Empl. Prac. Cas. at 1338 (emphasis added).

137. 11 Fair Empl. Prac. Cas. 31 (N.D. Cal. 1975).

138. *Id.* at 34 (emphasis added).

jus, ibi remedium ("for every right there is a remedy"). In the past, courts often have been willing to use this principle to imply private causes of action based on federal statutes which did not expressly provide for such actions.[139] Four principles are typically applied to determine whether implication of the private right of action is permissible. The court in *Traylor v. Safeway Stores*[140] stated these elements as follows:

1) plaintiff must be a member of the class for whose especial benefit the statute was enacted
2) the court deciding the question must take account of any indication of legislative intent, explicit or implicit, regarding existence of a private right of action
3) the implication of such a right of action is consistent with the achievement of the underlying purpose of the statute
4) the cause of action should not be in an area of basic concern to the states, so that the implication of a right based solely on federal law would be inappropriate.

The *Traylor* court held that a private right of action could *not* be implied under the Order, and based its decision on an analysis of the third principle. The court held that implicit in that principle is the further requirement that the private right of action "not disrupt the administrative scheme established by statute, or, as in this case, executive order and related regulations."[141] The court found that the Order established a "plethora of administrative procedures and remedies," and that the existence of private actions would complicate and destroy the delicate administrative processes involved.[142] The court also noted the potential burden that could be placed upon federal courts if a private remedy were allowed. It thus declined to imply a private right of action under the Order.

The case law establishing the nonexistence of a private right of action under the Order is confused by *Lewis v. Western Air Lines.*[143] The *Western Air Lines* case is often cited for the proposition that a private cause of action *does* exist under the Executive Order. However, a close reading of the case should indicate that the case actually illustrates the availability of a different remedy, the writ of mandamus.

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139. Cort v. Ash, 422 U.S. 66 (1975); Securities Investors Protection Corp. v. Barbour, 421 U.S. 412 (1975). *See* Traylor v. Safeway Stores, 402 F. Supp. 871, 875-77, 11 Empl. Prac. Dec. ¶ 10,711 at 6966-67, 14 Fair Empl. Prac. Cas. 1762, 1765-66 (N.D. Cal. 1975). *See also* Comment, *supra* note 124, at 142-46; Note, *supra* note 20, at 602-03.

140. 402 F. Supp. 871, 11 Empl. Prac. Dec. ¶ 10,711, 14 Fair Empl. Prac. Cas. 1762 (N.D. Cal. 1975).

141. *Id.* at 875, 11 Empl. Prac. Dec. at 6966, 14 Fair Empl. Prac. Cas. at 1765.

142. *Id.*

143. 379 F. Supp. 684, 8 Empl. Prac. Dec. ¶ 9609, 8 Fair Empl. Prac. Cas. 373 (N.D. Cal. 1974).

F. *Availability of Mandamus to Enforce the Order*

The plaintiff in *Western Air Lines* sought an injunction to compel the Secretary of Labor and other federal officials to enforce the provisions of the Executive Order against Western. Western was joined in the count seeking injunctive relief against the federal officials. Confusion has resulted from the case because the court refused to dismiss Western from the action. This has been widely interpreted as allowing a private right of action under the Order against contractors who violate its provisions.[144] However, this conclusion overlooks the fact that the only relief sought under the Executive Order portion of the complaint *was injunctive relief directed against the Secretary.* The court noted: "The only relief Plaintiffs seek directly under the executive order is an injunction compelling the Secretary of Labor [and other federal authorities] to comply with their mandate under the Executive Order and the Regulations."[145] The court refused to dismiss the contractor from that portion of the suit because it felt that Western was a proper party to the action as its interests were integrally involved and would be substantially affected by the relief sought under the Order.

Western Air Lines thus illustrates that private individuals may seek injunctive relief against federal officials to compel them to enforce the obligations imposed by the Order. This is now an established principle under the Order; it should not be confused with the existence of a private cause of action for discrimination. *Legal Aid Society v. Brennan*[146] further illustrates this principle. In *Legal Aid Society* the plaintiffs sought a writ of mandamus to compel the Secretary and various federal officials to properly apply the affirmative action mandate imposed by the Order and regulations. The plaintiffs contended that the officials were not following the Order and were approving contractors' affirmative action plans which did not conform to the regulations that the Secretary had issued. The federal officials argued that because their duties were discretionary mandamus was an improper remedy. The court found that the Secretary's regulations defining affirmative action plans were sufficiently specific to remove any administrative discretion from the officials. Therefore, their duties were ministerial in nature, and mandamus was a proper remedy.[147] Other cases also have held that the failure of the Sec-

144. *See, e.g.,* Annot., 31 A.L.R. Fed. 108 (1977); Traylor v. Safeway Stores, 402 F. Supp. 871, 11 Empl. Prac. Dec. ¶ 10,711, 14 Fair Empl. Prac. Cas. 1762 (N.D. Cal. 1975).

145. 379 F. Supp. at 689, 8 Empl. Prac. Dec. at 5617, 8 Fair Empl. Prac. Cas. at 376.

146. 381 F. Supp. 125, 129, 8 Empl. Prac. Dec. ¶ 9483 at 5181, 8 Fair Empl. Prac. Cas. 178, 181-82 (N.D. Cal. 1974).

147. As noted earlier, the affirmative action mandate was not always as precisely articulated by the regulations as it currently is. A mandamus action brought to enforce such rules was thus subject to the defense that enforcement

retary to properly interpret and apply the Order's sanctions is actionable in mandamus,[148] provided that the plaintiff has exhausted the administrative remedies within the Department of Labor before mandamus is sought.[149]

III. Validity of Executive Order No. 11,246

The preceding discussion of the Executive Order suggests at least three areas in which the validity of the Executive Order may be challenged.[150] These areas include: (1) the scope of the Executive Order vis à vis Title VII, (2) the availability of backpay and other individual relief under the Order, and (3) the validity of the Order's affirmative action mandate as it has been interpreted by the Secretary. Integral to an understanding of these issues is a discussion of the constitutional and statutory authority of the President to issue the Order.

A. *Validity of the Order as Originally Interpreted*

The limitations on presidential power is not a subject which has been frequently litigated. The most widely recognized case dealing with this topic arose out of President Truman's efforts to seize the steel mills during a period of labor unrest in 1952. To avert what he perceived as an imminent threat to national security, the President issued an Executive Order directing the Secretary of Commerce to seize and operate steel mills threatened by a nationwide steelworkers' strike. In *Youngstown Sheet & Tube Co. v. Sawyer*[151] a divided court held that the President did not have the authority to seize the mills.

The concurring opinion of Mr. Justice Jackson has been accepted as the most instructive of the opinions in *Youngstown.* In an extended passage Justice Jackson defined three situations in which the President may act:[152]

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these

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of the rules required the exercise of broad administrative discretion. Fortunately, the regulations are now sufficiently clear to prevent this. Note, *supra* note 20, at 606-07.

148. Castillo v. Usery, 13 Empl. Prac. Dec. ¶ 11,559, 14 Fair Empl. Prac. Cas. 1240 (N.D. Cal. 1976).

149. Freeman v. Shultz, 468 F.2d 120, 5 Empl. Prac. Dec. ¶ 7957, 4 Fair Empl. Prac. Cas. 1245 (D.C. Cir. 1972); Hadnott v. Laird, 463 F.2d 304, 4 Empl. Prac. Dec. ¶ 7678, 4 Fair Empl. Prac. Cas. 374 (D.C. Cir. 1972).

150. For an interesting examination of some other possible areas of conflict, see Note, *supra* note 79.

151. 343 U.S. 579 (1952).

152. *Id.* at 635-38.

> only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .
> 2. When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on [*sic*] independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
> 3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Under this analysis the President's power will be at its strongest when he acts pursuant to congressional authorization (the first category) and at its weakest when he acts against the will of Congress (the third category). In determining the validity of any particular provision of the Order, three major issues must be confronted:

> (1) whether the President has the power (either inherently via the Constitution or delegated to him by Congress) to order the action;
> (2) whether he in fact exercised that power in the Order;
> (3) whether his Order runs counter to valid legislation.

Paragraphs (1) and (2) of Mr. Justice Jackson's analytic framework address the first of these issues; the third paragraph addresses the last issue. The second issue is simply a question of whether the President used the authority he possessed, and the extent to which he delegated that authority.[153]

1. The Procurement Power as a Source of Authority for the Executive Order

Courts have traditionally upheld the Order as being a valid exercise of presidential power. The court in *Contractors' Association v. Secretary of*

153. *See* United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 465, 14 Empl. Prac. Dec. ¶ 7602 at 4967, 14 Fair Empl. Prac. Cas. 1734, 1739 (5th Cir. 1977).

Labor[154] applied Justice Jackson's analysis to the Order in what has become the leading case on the issue. The plaintiffs were construction contractors who were adversely affected by the stringent affirmative action requirements of the "Philadelphia Plan." They challenged the Order as an invalid exercise of the power of social legislation and contended that the President lacked both statutory and constitutional authority to issue the Order and its attendant affirmative action obligations.

The *Contractors'* court reviewed the long history of the Executive Orders issued since 1941 and concluded that the nondiscrimination and affirmative action obligations were supported by congressional authorization and hence were both valid exercises of presidential power. The court found the congressional authorization for the Order in the various War Powers Acts and Defense Production Acts which were enacted through 1950.[155] Stronger statutory support was found for Executive Orders 10,925 and 11,246 in the broad grant of procurement authority given to the President under Titles 40 and 41 of the United States Code,[156] which contain statutes relating to government procurement.

The strongest grant of Congressional authority to the President relating to procurement is contained in 40 U.S.C. section 486(a), which states:

> The President may prescribe such policies and directives, not inconsistent with the provisions of this act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder.

On the basis of this authority, the *Contractors'* court concluded that the Executive Order was valid because it was in the interest of the United States in its procurement procedures to see that its suppliers did not indirectly increase costs and delay programs by discriminatorily excluding available minority workmen from the labor pool.[157] The *Contractors'* court thus concluded that the Executive Order was validly issued because the President was acting pursuant to an express or implied authorization from Congress. His actions fell within Justice Jackson's first category and therefore were proper. Many other courts have upheld the Order on the same basis.[158] It is unlikely that this rationale can be challenged successfully despite its obvious weaknesses.

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154. 442 F.2d 159, 3 Empl. Prac. Dec. ¶ 8180, 3 Fair Empl. Prac. Cas. 395 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

155. *Id.* at 169, 3 Empl. Prac. Dec. at 6574, 3 Fair Empl. Prac. Cas. at 402.

156. The Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 486(a) (1970), is the major source of the President's procurement authority.

157. 442 F.2d at 170, 3 Empl. Prac. Dec. at 6574, 3 Fair Empl. Prac. Cas. at 403.

158. *See, e.g.,* United States v. East Tex. Motor Freight Sys., Inc., 564 F.2d 179, 15 Empl. Prac. Dec. ¶ 7961, 16 Fair Empl. Prac. Cas. 163 (5th Cir. 1977); United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 14 Empl. Prac. Dec.

The argument that the procurement power is sufficient congressional authorization is subject to criticism on at least two levels. First, there is the argument that Congress was considering nothing like the current Executive Order when it authorized the President to provide economical procurement procedures. Rather, Congress only intended to authorize the President to minimize internal bureaucratic inefficiencies which plagued government procurement at the time the procurement acts were enacted.[159] The second level of criticism assumes that if the procurement power did constitutionally authorize presidential action outside the federal bureaucracy, any executive incursion into the private sector thus authorized would still presumably be subject to *some* limitations. It could be argued that the additional costs incurred by contractors in their efforts to comply with the Order far outweigh the more speculative savings supposedly achieved by enlarging the number of available workers. Such an argument could be advanced in view of the tremendous expense employers incur in implementing and maintaining the affirmative action plans and information systems necessary to comply with the OFCCP's regulations. The argument would be that the Order thus has the effect of increasing rather than decreasing procurement costs and is therefore beyond the scope of the President's procurement authority.

2. Other Sources of Authority for the Order

Several other theories to support the validity of the Executive Order have been advanced by commentators, although these theories are not as important to the Order because they generally have not been accepted by the courts. One such theory is that the government may not constitutionally contract with employers who discriminate on the basis of race, because such behavior would be "state action" which would make the government guilty of the discrimination. The Order is thus valid because it prevents this unlawful action from occurring.[160] This theory finds *constitutional* support for issuance of the Order, independent of any congressional authorization. Even though this argument would render the

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¶ 7602, 14 Fair Empl. Prac. Cas. 1734 (5th Cir. 1977); United States v. Mississippi Power & Light Co., 553 F.2d 480, 14 Empl. Prac. Dec. ¶ 7603, 14 Fair Empl. Prac. Cas. 1730 (5th Cir. 1977); Farkas v. Texas Instr., Inc., 375 F.2d 629, 1 Empl. Prac. Dec. ¶ 9777, 1 Fair Empl. Prac. Cas. 890 (3d Cir.), *cert. denied,* 389 U.S. 977 (1967); United States v. Duquesne Power & Light Co., 423 F. Supp. 507, 12 Empl. Prac. Dec. ¶ 11,261, 13 Fair Empl. Prac. Cas. 1608 (W.D. Pa. 1976).

159. Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process,* 1974 WIS. L. REV. 301, 310-12 (1974); Comment, *supra* note 17.

160. *See* Comment, *supra* note 124; Nash, *Affirmative Action Under Executive Order* 11,246, 46 N.Y.U.L. REV. 225, 229 (1971).

Order much less susceptible to judicial or legislative invalidation, the argument is vulnerable because of its requirement of a broad interpretation of state action.[161]

A second theory supporting the Executive Order may be found by implying congressional authorization for the Order from the congressional consideration of Title VII. For example, it is generally concluded from the passage of Title VII and the references to the Executive Order therein that Congress did not intend to alter the practices then current under the Order.[162] Proponents of the Order have made a similar argument with respect to the congressional deliberation over the Equal Employment Opportunity Act of 1972.[163] During the debates on this act, several amendments were proposed which would have reduced or eliminated the authority of the OFCCP to enforce the Order.[164] These amendments were primarily an attack on the "hometown plans" and their affirmative action requirements, but their defeat has been widely interpreted by some as representing a congressional ratification of the Executive Order.[165] Although this argument may have some initial appeal, one should be cautious in inferring congressional authorization from legislative inaction, especially when seeking to validate far-reaching executive action. Mr. Justice Frankfurter articulated this concept best in *Youngstown:*

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specificallly address itself to a problem, as Congress did to that of a seizure, to find secreted in the interstices of legislation the very grant of power which Congress con-

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161. After the retreats which have been made from the highwater "state action" case of *Shelley v. Kraemer,* 334 U.S. 1 (1948), it is at least arguable that sufficient state action would not be found in merely doing business with a contractor that discriminates. Even if such action would be found, the affirmative action mandate could be improper because it indirectly requires remedies for discrimination far in excess of those which courts have imposed directly. *See* Comment, *supra* note 17, at 727-28 n.24. *But see* Ethridge v. Rhodes, 268 F. Supp. 83, 1 Fair Empl. Prac. Cas. 185 (E.D. Ohio 1967).

162. 42 U.S.C. § 2000e-8(d) (1970) refers to the Order and contains an exception for records reporting under Title VII for employers who comply with the Order. The language was deleted in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 6, 86 Stat. 107 (codified at 42 U.S.C. § 2000e-8(d) (Supp. V 1975)).

163. Pub. L. No. 92-261, 86 Stat. 107 (codified at 42 U.S.C. (1970 & Supp. V 1975)).

164. Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 238, 15 Empl. Prac. Dec. ¶ 7935 at 6680, 16 Fair Empl. Prac. Cas. 1, 19 (5th Cir. 1977) (Wisdom, J., dissenting); Comment, *supra* note 17, at 737-39.

165. Authorities cited note 164 *supra.*

> sciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.[166]

Because of the difficulty inherent in accurately inferring the fact and the extent of congressional authorization from legislative inaction, courts should not uphold the validity of the Order solely upon this argument.

A third argument in support of the Executive Order is based on *Perkins v. Lukens Steel Co.*[167] *Perkins* involved the use of a contract clause which Congress had statutorily required in government contracts. The clause bound employers to pay the minimum wage for their locality, as determined by the Secretary of Labor. The plaintiffs had challenged the Secretary's determination of the wage for their locality, but the Supreme Court held the parties lacked standing to raise that issue. Support for the Executive Order is found in language to the effect that "the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."[168] Although this language seems generally supportive of the Order, the case probably should not be considered to be reliable authority for the Order.[169] As it was used in the opinion, the term "Government" referred to Congress and not to the President. The power of the President to fix contract terms was not before the Court in *Perkins*. As a proposition of constitutional law, the Executive should not be allowed to unilaterally determine national social policy objectives and to implement them through contract terms and the procurement process.[170] Instead, the principles in

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166. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring). The parallels between *Youngstown* and the Executive Order situation are striking. In both situations Congress had enacted legislation in the particular areas in which the President had acted, in both cases Congress considered the scope of executive authority, and in both cases the President acted without a specific grant of authority to support his action. Of course, in *Youngstown* the added factor was present that Congress had considered and specifically rejected a provision which allowed seizure of property by the President.

167. 310 U.S. 113 (1940).

168. *Id.* at 127.

169. *See* Comment, *supra* note 17, at 731-32; Pasley, *The Non-discrimination Clause in Government Contracts*, 43 VA. L. REV. 837, 857-62 (1957).

170. Morgan, *supra* note 159.

> Valuable as clauses furthering nonprocurement objectives can be, however, there are compelling reasons to keep their use within well-defined bounds. First, while national goals clauses are by definition uses for "good" ends, there is not necessarily a consensus on what nonprocurement objectives ought to be pursued. It is easy to say, for example, that nondiscrimination is an important goal; nevertheless, the debate can be intense on whether affirmative action to remedy past

Youngstown should control executive action and require independent constitutional or legislative authorization to validate such action.

A final basis for the Order is based upon the President's obligation to faithfully execute the laws.[171] This argument is somewhat circular, as it seeks to justify executive action in the employment discrimination area because the President would be enforcing the "law" of nondiscrimination. The argument overlooks the fact that it is the President's "law" he would be seeking to enforce, not a Congressional enactment. "The duty of the President to see that the laws be fully executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."[172] The argument that the duty to execute the laws supports the Executive Order should thus be rejected.

3. Congressional Limitations on Executive Power— The Relationship Between Title VII and the Executive Order

Mr. Justice Jackson's analysis of executive authority in *Youngstown* requires an examination of existing law to determine whether any congressional legislation is contradictory to or inconsistent with the Executive Order. If such a statute is found, the Executive Order would be invalid under the *Youngstown* principles, at least to the extent that it conflicted with the paramount congressional enactment. The court in *Contractors' Association v. Secretary of Labor*[173] followed this analysis. After it had concluded that the President had the authority to issue the Order, the *Contractors'* court proceeded to the limitation issue to determine whether any federal statutes were inconsistent with the Order. The most obvious source of such a statute would be the limitations contained

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> discrimination itself constitutes improper discrimination. Moreover, the same rationale used to sustain the equal opportunity clause was used for many years to justify imposition of a loyalty oath on employees of federal contractors. Such a use of the contract power should be sufficient to warn us that what is in the public interest is not always self-evident.

Id. at 304.

171. The proposition is advanced and rejected in Speck, *Enforcement of Nondiscrimination Requirements for Government Contract Work*, 63 COLUM. L. REV. 243, 246-47 (1963). This argument is based on U.S. CONST. art. II, § 2.

172. Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.

Id. at 587.

173. 442 F.2d 159, 3 Empl. Prac. Dec. ¶ 8180, 3 Fair Empl. Prac. Cas. 395 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

within Title VII. Thus an issue of major importance addressed in *Contractors'* is the relationship of the Executive Order vis à vis Title VII.

The plaintiffs in *Contractors'* argued that the Executive Order conflicted with several provisions of Title VII. First, it was argued that the Order conflicted with section 703(j) of Title VII.[174] This section provides:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual because of the race . . . of such individual or to any group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed . . . in comparison with the total number of percentage of persons of such race . . . in the available work force in any community . . . or other area.

Because it proscribes preferential treatment based on race, the *Contractors'* plaintiffs urged that the section is directly contradictory to the affirmative action requirements of the Executive Order. However, the court held that section 703(j) did not affect the Executive Order and concluded without discussion that "[s]ection 703(j) is a limitation only upon Title VII, not upon any other remedies, state or federal."[175] The *Contractors'* decision has been subject to criticism for its failure to articulate the reasoning behind this conclusion.[176]

The plaintiffs also argued that the affirmative action mandate of the Order was invalid because it interfered with bona fide seniority systems under section 703(h) of Title VII. That provision states:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . .[177]

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174. 42 U.S.C. § 2000e-2(j) (1970).

175. 442 F.2d at 172, 3 Empl. Prac. Dec. at 6576, 3 Fair Empl. Prac. Cas. at 404.

176. The Third Circuit in Contractors' Assn. dealt with the conflict between Title and Executive Order 11246 briefly and seemed to accept the mandate of the Order by fiat more than by reason or constitutional imperative . . . . If the President had the power to overrule an Act of Congress that should be set forth in the Constitution. Until required by the Fourth Circuit, the Supreme Court, Congress, or constitutional amendment so to hold, this Court will not rule that Executive Orders supersede a congressional mandate.

Cramer v. Virginia Comm'w. Univ., 415 F. Supp. 673, 680, 12 Empl. Prac. Dec. ¶ 10,968 at 4551, 12 Fair Empl. Prac. Cas. 1397, 1403 (E.D. Va. 1976). Commentators likewise have criticized the *Contractors'* case as being "less than candid in explaining its rationale," Morgan, *supra* note 159 at 312, and as "too facile" in its treatment of the constitutional issues. Comment, *supra* note 17 at 732.

177. 42 U.S.C. § 2000e-2(h) (1970).

The court dismissed this contention with a single sentence: "Just as with § 703(j), however, § 703(h) is a limitation only upon Title VII, not upon any other remedies."[178]

The court's failure to articulate the reasoning behind its conclusions exposes the decision to substantial criticism.[179] By its very terms, section 703(h) can be distinguished from section 703(j). Section 703(h) is a broad validating provision, which states that maintenance of a bona fide seniority system "shall not be an unlawful employment practice," anything in Title VII to the contrary notwithstanding. The purpose of Congress in enacting this provision clearly was to protect the validity of seniority systems which did not intentionally discriminate.[180] On the other hand, section 703(j) expressly confines its own effect to Title VII by stating that "[n]othing *in this subchapter*" shall require preferential treatment. In adopting this language and rejecting amendments which would have altered its meaning, Congress indicated an intent to restrict the effect of section 703(j) to Title VII.[181] It is submitted that both the language of section 703(h) and the congressional intent behind its enactment indicate that it should apply as a limitation to the Executive Order.

The significance of the failure of the Third Circuit to analyze fully the implications of its holding in *Contractors'* is apparent in the wake of the recent decision of the Supreme Court in *Teamsters v. United States.*[182] In *Teamsters* the Supreme Court held that bona fide seniority systems are protected from attack under Title VII by section 703(h), and that a seniority system does not lose its bona fides merely because it perpetuates the effects of past discrimination which occurred prior to the effective date of Title VII. This decision had the effect of overruling numerous circuit court decisions that seniority systems which per-

178. 442 F.2d at 172, 3 Empl. Prac. Dec. at 6576, 3 Fair Empl. Prac. Cas. at 404.

179. *See* authorities cited noted 176 *supra.*

180. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 348-55 (1977) (legislative history of Title VII). *See also* 110 CONG. REC. 1518, 2227, 5423, 6564, 7207, 7213, 9113, 11,848, 12,723, 12,818, 14,220, 14,331 (1964).

181. During the floor debates which occurred during the consideration of Title VII, Senator Ervin proposed several amendments to the bill. One amendment which was defeated would have expanded the prohibition of § 703(h) by proscribing *any* preferential treatment, expressly including within that proscription affirmative action pursuant to the Executive Order. The defeat of this amendment has been interpreted as indicating Congressional intent to confine the effects of § 703(j) to Title VII. *See* Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 238, 15 Empl. Prac. Dec. ¶ 7935 at 6680, 16 Fair Empl. Prac. Cas. 1, 19 (5th Cir. 1977); Comment, *supra* note 17, at 737-39.

182. 431 U.S. 324 (1977).

petuated the effects of past discrimination could not be bona fide and were thus unprotected by section 703(h).[183]

The *Teamsters* decision may not have directly affected the holding in *Contractors'* because *Teamsters* did not involve Executive Order No. 11,246. However, *Teamsters* could lead courts applying *Contractors'* principles to anomalous results because the holding in *Contractors'* was that section 703(h) is a limitation only upon Title VII and not upon the Executive Order. For example, following the *Contractors'* rationale, seniority systems which are perfectly lawful under Title VII because of section 703(h) and *Teamsters* may nevertheless be held invalid under the Executive Order because section 703(h) does not limit the Order. The Executive Order contains no provision of its own paralleling section 703(h) which would protect bona fide seniority systems and thus require a different conclusion. This surprising result has been urged by the government in several recent cases.[184] Because of the congressional intent to protect bona fide seniority systems evident in section 703(h),[185] this illogical result should be avoided. Section 703(h) should be recognized as a limitation on the nondiscrimination provisions of both Title VII and the Executive Order. Otherwise, the President's action in issuing the Order would be in conflict with valid legislation and thus within Justice Jackson's forbidden third category.[186]

Many of the troublesome issues raised in *Teamsters* concerning the vitality of the *Contractors'* decision and the interplay between the Executive Order and Title VII were addressed recently in *Weber v. Kaiser Aluminum & Chemical Corp.*[187] The plaintiff in *Weber* challenged the use of training practices (preferring minorities over nonminorities) which the employer had included in a collective bargaining agreement in an effort to comply with OFCCP directives under the Executive Order. The dis-

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183. *See* cases cited in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 378-79 nn. 2 & 3 (1977) (Marshall, J., dissenting).

184. United States v. East Texas Motor Freight Sys., Inc., 564 F.2d 179, 15 Empl. Prac. Dec. ¶ 7961, 16 Fair Empl. Prac. Cas. 163 (5th Cir. 1977); United States v. Lee Way Motor Freight, Inc., 15 Empl. Prac. Dec. ¶ 7884, 15 Fair Empl. Prac. Cas. 1385 (W.D. Okla. 1977); United States v. Trucking Employers, Inc., Civil Action No. 74-453 (D.D.C., Apr. 5, 1976) (motion for protective order denied). *Cf.* Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 15 Empl. Prac. Dec. ¶ 7935, 16 Fair Empl. Prac. Cas. 1 (5th Cir. 1977) (government made argument that the Order imposes obligations greater than and inconsistent with those of Title VII).

185. *See* authorities cited note 180 *supra.*

186. United States v. East Texas Motor Freight Sys., Inc., 564 F.2d 179, 15 Empl. Prac. Dec. ¶ 7961, 16 Fair Empl. Prac. Cas. 163 (5th Cir. 1977); Weber v. Kaiser Alum & Chem. Corp., 563 F.2d 216, 15 Empl. Prac. Dec. ¶ 7935, 16 Fair Empl. Prac. Cas. 1 (5th Cir. 1977).

187. 563 F.2d 216, 15 Empl. Prac. Dec. ¶ 7935, 16 Fair Empl. Prac. Cas. 1 (5th Cir. 1977).

trict court accepted the plaintiff's argument that the preferential practices were prohibited by Title VII and enjoined the practices.[188] The employer and the union appealed, contending that the preferential practices were required by the Executive Order and therefore valid. Had the *Weber* court applied the *Contractors'* rationale and construed Title VII as not affecting the Order, the employer and the union in *Weber* should have prevailed. However, the Fifth Circuit affirmed the judgment of the lower court and held that the preferential practices were unlawful. To reach this result, the court concluded that the specific language contained in section 703(d) of Title VII[189] was inconsistent with the affirmative action requirements of the Executive Order, and that this Title VII provision operated as a limitation on the Order under *Youngstown* principles. The *Weber* court thus failed to observe the artificial barrier erected in *Contractors'* between Title VII and the Executive Order.

The *Weber* and *Contractors'* courts perceived the *Youngstown* issues identically, with both courts accepting the concept that congressional legislation could limit the effect of the Executive Order. However, the *Weber* court refused to interpret the effect of Title VII as narrowly as the *Contractors'* court and instead construed Title VII as a limitation on the Order. The *Contractors'* rationale is thus seriously challenged by the *Weber* decision.

Contractors' was distinguished in *Weber* because it involved a finding of past discrimination by the employers; *Weber* involved no such finding. The questionable validity of this distinction undermines the *Weber* court's effort to avoid inconsistency with the *Contractors'* decision. First, the *Contractors'* decision seems to be based on an interpretation of Title VII, not on a finding of past discrimination. In fact, a finding of past discrimination was deemed legally irrelevant in *Contractors'*.[190] Further, application

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188. Weber v. Kaiser Alum. & Chem. Corp., 415 F. Supp. 761, 12 Empl. Prac. Dec. ¶ 11,115, 12 Fair Empl. Prac. Cas. 1615 (E.D. La. 1976).

189. 42 U.S.C. § 2000e-2(d) (1970). The section deals with access to training programs, and provides:

> It shall be an unlawful employment practice for any employer . . . controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

The broad nondiscrimination provision contained in § 703(a) was rejected by the *Contractors'* court as a limitation on the Order, although it had been successfully urged by the *Weber* plaintiffs in the district court. However, the Fifth Circuit based its decision in *Weber* on the more directly applicable provision in § 703(d), a provision not addressed in *Contractors'*. This may be another means of distinguishing *Contractors'* from *Weber*, albeit a highly technical one.

190. 442 F.2d at 175, 3 Empl. Prac. Dec. at 6578, 3 Fair Empl. Prac. Cas. at 406.

of such a distinction could lead to paradoxical results in future cases. Executive action would be prohibited in the case of employers who had not discriminated in the past (as in *Weber*), because Title VII would operate as a limitation on the Order under *Youngstown*. On the other hand, Title VII would not operate as a limitation in the case of employers who had discriminated in the past, thus allowing Executive action. The application of the fluctuating standard under *Youngstown* principles would not only be unworkable, but also utterly unsupported by the language of Title VII. Either Title VII operates as an expression of congressional intent, or it does not; it is difficult to understand how the legal effect of a federal statute under *Youngstown* can be made to hinge upon factual determinations regarding the status of the employer. Instead of wrestling with such cumbersome and illogical concepts in an effort to rationalize the relationship of Title VII and the Order, courts should reject the *Contractors'* rationale and accept the better reasoned and more workable standards enunciated in *Weber*. The effect of Title VII on the Order would thus be uniform and in accord with congressional intent and the *Youngstown* rationale.

B. *Constitutional Problems With the Executive Order— Availability of Individual Relief*

Quite apart from the question whether Executive Order No. 11,246 may invalidate seniority systems which are lawful under Title VII is the issue whether the Order also may *provide relief to the alleged victims* of that discrimination. Assuming *arguendo* that the maintenance of given seniority systems is an unlawful act of discrimination under the Executive Order (but not under Title VII), there remains the issue of what remedies are available under the Order to redress that violation. Title VII provides specific remedies, *e.g.*, back pay and seniority awards, for violations of its provisions. The Executive Order similarly contains a provision authorizing various sanctions and penalties. Because the recovery of back pay and seniority relief is not specifically authorized in the Order, the question is whether the President impliedly authorized the recovery of these forms of individual relief. The discussion below is addressed to an analysis of the availability of a back pay recovery, but the same analysis may be applied to seniority relief, and has been so applied in at least one circuit.[191]

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191. The seniority issue was raised in United States v. East Texas Motor Freight Sys., Inc., 564 F.2d 179, 15 Empl. Prac. Dec. ¶ 7961, 16 Fair Empl. Prac. Cas. 163 (5th Cir. 1977). The court held that seniority relief could not be recovered for individuals pursuant to the Executive Order because nothing contained in the Order suggested such relief was available. Even if such relief could be sought, the court concluded that the Order could not be construed so as to invalidate seniority systems which were lawful under Title VII and *Teamsters*.

1. Presidential Authorization for the Recovery of Back Pay Under the Executive Order

The self-proclaimed ability of the OFCCP to obtain back pay awards pursuant to the Order and the recent judicial approval of that claim infuse substantial constitutional issues into the administration of the Order. The development of the OFCCP's position that it could award back pay originated in the early 1970's.[192] The creation of definite policies for back pay recovery evolved slowly, and the OFCCP was criticized for the lack of firm guidelines.[193] Proposed guidelines were finally published early in 1975,[194] and the period for comment on these guidelines was extended once.[195] No further rule-making activity occurred in the area until late in 1976, when another notice of proposed rule-making appeared.[196] The availability of back pay relief was mentioned in several rules contained in the notice,[197] and these rules were ultimately adopted in January, 1977.[198] Although the OFCCP claimed as early as 1975 that the policy regarding back pay had been in effect for several years,[199] it is significant to note that no back pay recoveries had been imposed on contractors by the OFCCP up to 1974.[200]

The authority of the Secretary to allow recovery of back pay has been assumed by many,[201] even though the the Executive Order itself nowhere mentions the availability of such a sanction. One commentator[202] has suggested that authority to award back pay may be inferred from the language in section 202 of the Order, which allows imposition of sanctions and remedies "as provided in Executive Order 11,246 . . . or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law."[203] It is difficult to accept the argument that this language impliedly represents presidential authorization for recovery of back pay pursuant to the Order because the provision dealing with sanctions and penalties authorized by the Order is rather detailed and

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192. 5 U.S. COMM'N ON CIVIL RIGHTS, *supra* note 6, at 242 n.729.
193. *Id.* at 243-44.
194. 40 Fed. Reg. 13,311 (1975).
195. 40 Fed. Reg. 23,127 (1975).
196. 41 Fed. Reg. 40,340 (1976).
197. *See* note 122 *supra.*
198. 42 Fed. Reg. 3454 (1977), *codified* in 41 C.F.R. §§ 60-1.1 to .32 (1977).
199. 42 Fed. Reg. 3465 (1977); 40 Fed. Reg. 13,311 (1975).
200. 5 U.S. COMM'N ON CIVIL RIGHTS, *supra* note 6, at 242. Evidently, the Secretary claims that such recoveries *had* been made. *Id.* at 242, n.728.
201. *Id.* at 242. The Secretary's regulations cite no legal authority for the availability of back pay awards other than *U.S. v. Duquesne Light Co.,* discussed *infra.*
202. Moroze, *supra* note 123, at 439.
203. This language is drawn from clause 6 of the equal opportunity clause to be included in government contracts. *See* note 41 *supra.*

specific.[204] It is unlikely that the President would have failed to mention a sanction or remedy as significant as back pay awards and left that matter instead for implication from general language. Considering the ease with which an Executive Order may be issued, it is even more difficult to accept this argument, especially in view of the number of Executive Orders issued since 1965 which deal with employment discrimination.[205]

Another argument in support of the availability of back pay is based on the ability of courts to imply remedies into federal statutes to further statutory objectives.[206] Proponents of the back pay sanction would argue that this principle should be applied to the Order, allowing the implication of a back pay remedy to further the purposes of the Order and encourage compliance therewith. One obvious flaw in this argument is the fact that the Executive Order *is not a statute.* Even though the Order has been accorded the force and effect of law,[207] it should not be treated and interpreted as if it were a statute.[208] Courts may attribute broad remedial purposes to Congress as part of the legislative intent which would aid interpretation of Title VII. However, both the limited power of the President to act in a quasi-legislative capacity as well as the delegation-of-power issues involved in the Executive Order suggest that expansive reading of the Order is inappropriate.

A second weakness in the implication-of-remedies argument is that the national policy of eradicating employment discrimination is attributed to the Order; implication of the back pay sanction is urged because it furthers that objective.[209] This argument overlooks the fact that the only judicially legitimized purpose for the Order is the furtherance of federal procurement objectives.[210] The eradication of employment

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204. *See* Exec. Order No. 11,246, § 209, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970); text accompanying notes 102-123 *supra.*

205. Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (1976); Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976); Exec. Order No. 11,830, 40 Fed. Reg. 2411 (1975); Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969); Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967); Exec. Order No. 11,758, 39 Fed. Reg. 2075 (1974).

206. Moroze, *supra* note 123 at 448-54.

207. *See, e.g.,* cases cited note 158 *supra. See also* Cramer v. Virginia Comm'w. Univ., 415 F. Supp. 673, 12 Empl. Prac. Dec. ¶ 10,968, 12 Fair Empl. Prac. Cas. 1397 (E.D. Va. 1976).

208. EEOC v. American Tel. & Tel. Co., 506 F.2d 735, 8 Empl. Prac. Dec. ¶ 9854, 9 Fair Empl. Prac. Cas. 53 (3rd Cir. 1974).

> While it is true that we have held that the regulations issued under Executive Order 11,246 have the force and effect of law [citation omitted], it is quite a different thing to say that the Executive Order and regulations are themselves statutes. This we cannot do.

Id. at 740, 8 Empl. Prac. Dec. at 6548, 9 Fair Empl. Prac. Cas. at 56.

209. Moroze, *supra* note 123, at 444-49.

210. *See* text accompanying notes 154-159 *supra.*

discrimination is obviously a national policy, but Congress has not specifically authorized the President to further that objective by creating remedies in that area.[211]

Finally, the implication-of-remedies argument implicitly assumes that the President did not authorize the back pay remedy, but that such a remedy would be useful to enforcement of the Order and therefore should be implied by the Order. This raises questions of delegation of authority and of the constitutional propriety of judicial expansion of the scope of a Presidential directive beyond its admitted terms. In view of the ease with which the President could do this himself, the delicate constitutional issues involved, and the refusal of courts to similarly imply a private cause of action under the Order,[212] the argument in favor of implying a back pay remedy should be rejected.

2. The *Duquesne* Decision

The OFCCP policy regarding the recovery of back pay pursuant to the Order received recent judicial approval in *United States v. Duquesne Light Co.*[213] In *Duquesne* the Department of Justice brought suit to enforce the obligations of the Executive Order and sought injunctive relief against the defendant Duquesne Light Co. The Justice Department also sought back pay awards for individuals who suffered from Duquesne's alleged acts of discrimination. The court held that such relief was recoverable pursuant to the Order. Because of the significance of its conclusion, the reasoning in *Duquesne* bears analysis.

There are at least two major weaknesses in the decision reached by the *Duquesne* court. First of all, assuming, as the court eventually decided, that the Executive Order could constitutionally mandate the recovery of back pay, it does not follow that such a recovery should automatically be allowed. Before allowing recovery, the court would have to find that the President in fact decided to provide for such a remedy in his Order. In addressing this critical issue, the Duquesne court observed:

> Nowhere in the Executive Order or its accompanying regulations is a back-pay order specifically mentioned. This should not, however, be interpreted, by negative implication, as a statement of an intention to exclude a back-pay order as a sanction available to remedy violations of the Executive Order.[214]

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211. Not even *implied* congressional authorization for the back pay policy may be found because consideration by Congress of the 1972 amendments to Title VII antedated the instigation of the back pay policy.

212. *See* text accompanying notes 124-142 *supra* (refusal to imply a private cause of action). By analogy, the process of strictly construing the Order's provisions used in those cases could be applied to the back pay issue.

213. 423 F. Supp. 507, 12 Empl. Prac. Dec. ¶ 11,261, 13 Fair Empl. Prac. Cas. 1608 (W.D. Pa. 1976).

214. *Id.* at 509, 12 Empl. Prac. Dec. at 5862, 13 Fair Empl. Prac. Cas. at 1610.

In so concluding, the court fundamentally misunderstood the purpose for its analysis. The question to be answered should not have been whether back pay had been excluded, which incorrectly assumes that such a sanction is available unless specifically restricted, but rather whether the President affirmatively *authorized* such a sanction in the first place. Such a remedy could exist under the Order only if the President impliedly or expressly authorized it, and thus the court's analysis whether the Order *excludes* back pay addresses the wrong question.

Although there is no doubt that the Order contains no express authorization for back pay awards, the *Duquesne* court concluded that the President *impliedly* authorized the back pay remedy by virtue of section 209(a)(2) of the Order. That section states that the Secretary of Labor may:

> Recommend to the Department of Justice that, in cases in which there is a substantial . . . violation . . . of the contractual provisions set forth . . . in this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limits of applicable law, of organizations, individuals, or groups who prevent directly or indirectly . . . compliance with the provisions of this Order.

The *Duquesne* court reasoned that the reference to "appropriate proceedings" empowered the government to invoke the equitable powers of the court and to seek restitution and whatever other relief it wished, subject only to congressional limitation. It is difficult to accept the conclusion that this language, taken as a whole, authorizes an award of back pay as a means of enforcing the contractor's contractual obligations with the government. First of all, the phrase "appropriate proceedings" is modified in the same sentence by a phrase which requires such proceedings to be brought "to enforce the contractual provisions of the Order." It is a familiar principle of construction that words should be read together to determine their intended meaning. If this is done, restitution should not be available under the Order because it is generally not a remedy used to enforce the provisions of a contract, but instead is usually invoked only when contractual provisions are *unenforceable.*[215]

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215. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 222-29 (1973). Professor Dobbs recognized the dual aspects of restitution, *i.e.,* the substantive and the remedial. The substantive aspect views restitution as a form of action, such as tort or contract, while the remedial aspect views restitution as a type of remedy. Either view is inapplicable to a restitutionary remedy under the Executive Order. Substantively, restitution requires the "unjust enrichment" of one party by another under circumstances in which it would not be equitable for the benefit to be retained without compensation. The presence of the fully enforceable government contract militates heavily against such a finding. As a remedy, restitution is inapplicable because it involves restoration of the value of the unjust enrichment to the party who conferred it. However, the government is fully compensated for its contractual exchange by the goods which it receives in return. The back pay assertedly due in no way reflects the value of a benefit conferred

Further, the Order nowhere authorizes the pursuit of restitutionary relief for third parties; rather, it only authorizes the government to enforce the provisions of its contract. Such relief presumably would be limited by principles of contract law to damages or injunctive relief.[216]

A second problem with the existence of a restitutionary remedy under the government's contract is that such a remedy presupposes that the alleged victims of discrimination were deprived of some right or entitlement under the contract. However, courts have uniformly denied these individuals any private rights whatsoever under the Order, holding they have no status as third party beneficiaries of the government's contract.[217] Thus the use of the restitutionary theory would place the government in the unusual position of seeking to enforce, on behalf of third parties, rights which do not exist.

A third problem with the restitutionary theory is the rule which may limit the remedies available to the promisee of a third party beneficiary contract (assuming the Order contract attains that status). The promisee of a third party beneficiary contract enforcing such a contract on behalf of the beneficiary may be limited to the remedy of specific performance and may not be able to recover damages.[218] The *Duquesne* court

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by the government, but rather reflects the value of a benefit conferred by the workers. The courts have already held they have no individual rights under the Order. *See* text accompanying notes 124-142 *supra.*

216. *See generally* D. DOBBS, *supra* note 215, at 786-95. The usual measure of restitutionary relief is the value of the benefit conferred. Back pay is a measure of a benefit conferred by the workers, not by the government. *See* note 215 *supra.* These workers have no individual rights under the Order, and such rights, even if they existed, presumably would be limited by the general rule that an employer's liability under an employment contract is usually limited to the contract. D. DOBBS, *supra,* at 927. This would forclose any restitutionary relief based on the government's arguments that the value of the benefit conferred was actually greater than what the workers were paid (the underpayment being due to race discrimination).

217. *See* text accompanying notes 124-142 *supra.*

218. 4 A. CORBIN, CONTRACTS § 812 (1951). Some jurisdictions deny the promisee the right to bring an action for damages to enforce the contract, especially where the promisee's damages would be purely nominal. In such a case, the promisee would need to seek specific performance. This issue was raised by the defendant in *Duquesne* and rejected by the court. The principle would seem applicable, however, because the government sustains no damage by virtue of a breach of the equal opportunity clause in the contract and thus would be entitled only to nominal damages for such a breach. *But see* 4 A. CORBIN *supra* note 218, at 243, where it is noted that some jurisdictions allow recovery of the beneficiary's damages by the promisee acting in the capacity of a trustee. Of course, the application of this principle to cases under the Order could run afoul of the cases denying third-party beneficiary status to employees of government contractors. Such employees would not seem to have any claim to damages under the contract, regardless of the capacity in which the government sought to recover.

acknowledged the difficulties which this principle created for the government's restitution argument but failed to address the issue, noting:

> Were this an ordinary contract action the Court would be constrained to delve more deeply into the issues of contract law presented by [Duquesne]. But while this action is ostensibly brought in contract, it is in actuality an attempt to enforce a statutorily-authorized program. . . . The remedies available to enforce such a measure should not be limited to those discernable by reference to ordinary principles of contract law.[219]

The result-orientation evident in the use of contract principles to justify the implementation of the Order while ignoring the limitations imposed by such principles is a classic example of bootstrapping. The contractual device is used as a means of getting the proverbial foot in the door, but once this is done the natural limitations inherent in the contract mechanism are ignored. Absent further elucidation from the President or Congress, it is submitted that the courts should observe the limitations and conceptual formalities which the contractual method of enforcing the Order places upon actions brought thereunder.

3. Constitutionality of Presidential Authorization of Back Pay Relief

The issue whether the President could allow back pay recoveries pursuant to his Order perhaps could be articulated: Has the President the constitutional authority to create a civil cause of action by Executive Order, allowing the government to recover money damages for victims of acts of employment discrimination? The *Duquesne* court concluded that the President could constitutionally mandate the recovery of back pay and observed: "Here, where the question is the authority of the executive to enact a program, it is enough for the Court to say that neither the language nor the policy of the statute is contradicted by a suit for restitutionary relief."[220] Again, an expansive view of executive power is used by the court to uphold the validity of the back pay sanction. The justification traditionally applied to uphold the Executive Order is the Order's relationship to the procurement power. The nondiscrimination and affirmative action principles were found to have the effect of furthering an efficient and economical procurement system. This same justification was recognized and applied by the *Duquesne* court to justify back pay recovery; the court reasoned such a sanction would provide "an incentive to eliminate discriminatory employment practices."[221] No other reported case has been found which directly ad-

219. 423 F. Supp. at 510 n.5, 12 Empl. Prac. Dec. at 5863 n.5, 13 Fair Empl. Prac. Cas. at 1610 n.5.
220. *Id.* at 509, 12 Empl. Prac. Dec. at 5861, 13 Fair Empl. Prac. Cas. at 1609.
221. *Id.*

dresses this issue, although one decision has recognized the inherent constitutional problems.[222]

There are several problems inherent in justifying the award of back pay through its relationship to effective procurement policies. First, such a remedy is not an "incentive" in the sense characterized by the *Duquesne* court. A tax credit could be characterized as an incentive, but a back pay award is more closely akin to a fine or a sanction, as has been implicitly recognized by the OFCCP.[223] The issue to which the court should have addressed itself is whether the President has the power to authorize relief which is not already provided by existing law.

Regardless of whether back pay is characterized as a remedy or a sanction, a further weakness in the *Duquesne* reasoning is the application of the wrong test to determine its recoverability. The court justified the recovery of back pay because imposition of that remedy would encourage compliance with the Order, which in turn would further federal procurement objectives. This reasoning is questionable because the relationship between the imposition of back pay and procurement objectives is far more attenuated than the relationship between nondiscrimination (or affirmative action) and procurement objectives. Even if the

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222. Traylor v. Safeway Stores, Inc., 402 F. Supp. 871, 874 n.6., 877 n.12, 11 Empl. Prac. Dec. ¶ 10,711 at 6967 n.6, 6968 n.12, 14 Fair Empl. Prac. Cas. 1762, 1764 n.6., 1767 n.12 (N.D. Cal. 1975). *Cf.* United States v. East Texas Motor Freight Sys., Inc., 564 F.2d 179, 15 Empl. Prac. Dec. ¶ 7961, 16 Fair Empl. Prac. Cas. 163 (5th Cir. 1977) (Prohibitions of Executive Order may not run counter to Title VII).

223. Significantly, the OFCCP recently changed the title of its hearing rules from "Hearing Rules for Sanction Proceedings" to "Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11,246." 42 Fed. Reg. 3457 (1977). Further, the supposed source of authority within the Order for the availability of back pay lies in a section entitled "Sanctions and Penalties." Exec. Order No. 11,246, §§ 209-212, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970). Of course, the OFCCP may wish to avoid the argument that back pay is an illegal and unauthorized penalty by taking the position that back pay is *remedial* in nature and not punitive. *See* 42 Fed. Reg. 3456 (1977) ("[Individual relief] is an affirmative step which is required to eliminate discrimination or the effects of discrimination at the subject establishment. It is remedial rather than punitive."). This position would be similar to that taken by the courts regarding back pay awards under Title VII. *See* Ablemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Different problems emerge from this argument. One flaw is based upon the *Contractors'* line of cases which find authority for the Order in the procurement power. This power authorizes the President to effectuate economical procurement but provides no authority to the President to provide remedial relief to victims of employment discrimination. A second flaw, previously discussed, is that the President selected no language to suggest that he intended such relief to be available pursuant to his Order. On the contrary, all enumerated sanctions deal with punitive action to be taken against the contractor, rather than remedial action to be taken on behalf of third parties.

relationship were not so tenuous, in the case of nondiscrimination, a *policy* is being justified by its rational relationship to lower procurement costs. In the case of back pay, a *means of enforcing* a policy is being justified by its relationship to the procurement objective. This result-oriented justification could be used with equal efficacy to validate penal sanctions. Clearly, the wrong test is being applied to determine the validity of the back pay remedy. The availability of sanctions and remedies must be determined by reference to independent bases of executive authority using *Youngstown* principles, not by reference to the ultimate objective to be achieved. If these principles are applied, courts should conclude that back pay is not available under the Order because the President had no authority to create a private civil remedy for employment discrimination. The Congress has already done this in section 1981, the Equal Pay Act,[224] and Title VII. It is clear the President has no inherent legislative power in the civil rights area, and it is probably equally clear that Congress has not delegated any such authority to the President.

C. *Validity of the Affirmative Action Requirement*

The subject of affirmative action is currently a topic of intense controversy in the United States, with popular interest stirred by the widely reported cases of *DeFunis v. Odegaard*[225] and *Regents of the University of California v. Bakke.*[226] In both *DeFunis* and *Bakke,* white students challenged the constitutionality of affirmative action measures which allegedly admitted less qualified minority students to law and medical schools. In each case, the rejected white applicant claimed the affirmative action measures unconstitutionally discriminated against his application. The interest in the problem posed by these cases has generated increasing amounts of litigation challenging affirmative action as illegal or unconstitutional "reverse discrimination." Although it is clear that nonminority plaintiffs have standing under Title VII and section 1981 to challenge "reverse discrimination," the circumstances under which they may prevail are less clear.[227] This comment will not attempt to delve deeply into the validity of affirmative action because of the complexity of the issues involved and because the subject has already received exhaus-

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224. 29 U.S.C. § 206(d) (1970).

225. 416 U.S. 312 (1974). *See* DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

226. 46 U.S.L.W. 4896 (1978).

227. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), *noted in* Moeller, *Civil Rights—Reverse Discrimination—Title VII and Section 1981,* 42 Mo. L. Rev. 100 (1977). *McDonald* held that white plaintiffs did state a cause of action under Title VII and § 1981. Previously, some courts had held these statutes protected only minorities. However, the Court in *McDonald* expressly excluded from its decision the question whether whites could successfully challenge affirmative action programs. *Id.* at 281 n.8.

tive treatment by commentators. Further, the value of such a discussion could be short-lived due to the as yet incomplete interpretation of the Supreme Court's decision in *Bakke*.[228] Instead, a brief discussion of prior case law will be used to examine recent and possible future developments affecting the affirmative action requirement of the Executive Order.

A distinction must be made between "affirmative action" and "preferential remedies." The two terms are not synonymous.[229] For example, employers may make special efforts to recruit more minority employees by advertising job vacancies in newspapers having a large minority readership. Such a recruiting device is an example of affirmative action. On the other hand, an absolute hiring quota for minorities would be an example of both affirmative action and a preferential remedy. Nonpreferential forms of affirmative action resembling expanded recruitment advertising have not been the target of major litigation. Instead, nonminority plaintiffs have challenged the use of procedures which grant preferential treatment to certain minorities in hiring,[230] training,[231] promotion[232] or layoffs.[233]

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228. The reliance by the Court on Title VI makes the constitutional impact of *Bakke* unclear. 46 U.S.L.W. 4896 (1978).

229. "Affirmative action" and "preferential remedies" are distinguishable concepts; the latter is subsumed by the former. "Affirmative action," in a general sense, includes a number of remedies for employment discrimination, such as governmental agency prods to get employers to make good faith efforts to hire or promote more minorities or women. Only the last cited remedy, *i.e.*, preferential hirings and promotions, positively *requires* an employer to give *preference* to qualified minority persons or women (usually over white males) when hiring, promoting, or retaining employees in certain designated job positions. Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination,* 74 MICH. L. REV. 1, 2 (1975).

230. Cramer v. Virginia Comm'w Univ., 415 F. Supp. 673 (E.D. Va. 1976) (white professor allegedly denied position because of hiring preference for women).

231. Weber v. Kaiser Alum. & Chem. Co., 563 F.2d 216, 15 Empl. Prac. Dec. ¶ 7935, 16 Fair Empl. Prac. Cas. 10 (5th Cir. 1977); Haber v. Klassen, 10 Empl. Prac. Dec. ¶ 10,387, 10 Fair Empl. Prac. Cas. 1446 (N.D. Ohio 1975) (court denied white worker's challenge of an allegedly discriminatory refusal of a transfer request), *rev'd,* 540 F.2d 220, 12 Empl. Prac. Dec. ¶ 11,089, 13 Fair Empl. Prac. Cas. 450 (6th Cir. 1976) (reversed on authority of McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)).

232. Germann v. Kipp, 429 F. Supp. 1323, 14 Empl. Prac. Dec. ¶ 7504, 14 Fair Empl. Prac. Cas. 1197 (W.D. Mo. 1977) (challenge of affirmative action plan which allegedly restricted the opportunity of white firefighters to advance within the Kansas City, Missouri, fire department).

233. Watkins v. United Steel Workers, Local 2369, 516 F.2d 41, 10 Empl. Prac. Dec. ¶ 10,319, 10 Fair Empl. Prac. Cas. 1297 (5th Cir. 1975); Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248, 5 Empl. Prac. Dec. ¶ 8458, 5 Fair Empl. Prac. Cas. 362 (N.D. Cal. 1972) (white administrators selected for lay-offs before minority administrators with less seniority).

The validity of practices which accord different treatment to individuals based on racial criteria has been determined traditionally by the application of "strict scrutiny" by the courts.[234] Racial classifications are seen as inherently "suspect," "invidious," and "stigmatizing." In order to sustain such a classification, a court would have to find that it was necessary to an overriding state interest.[235] As an exception to this general rule, courts traditionally have affirmed the constitutionality of preferential remedies whenever such remedies have been imposed "to remedy the effects of past discrimination."[236]

It has also been urged that preferential remedies are valid in the absence of prior discrimination. This use of preferential remedies finds support in various constitutional arguments, including the thesis that the use of race as a basis for discrimination *in favor* of a minority group is not a "suspect" racial classification,[237] and that such discrimination is "benign" and therefore not invidious or stigmatizing.[238] For these reasons, it is argued, the less rigid "rational basis" test should be applied to sustain the constitutionality of preferential remedies.[239] By using a rational basis test, a racial classification would only need to be found rationally related to a permissible state objective, a much easier test to satisfy than "strict scrutiny." The ultimate constitutionality of preferential treatment in the absence of past discrimination could have been re-

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234. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).

235. *See* historical discussion in Bakke v. Regents of the Univ. of Cal., 18 Cal. 3rd 34, 553 P.2d 1152 (1976).

236. Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 15 Empl. Prac. Dec. ¶ 7935, 16 Fair Empl. Prac. Cas. 1 (5th Cir. 1977); Chance v. Board of Examiners, 534 F.2d 993, 11 Empl. Prac. Dec. ¶ 10,663, 11 Fair Empl. Prac. Cas. 1450, *modified on rehearing,* 534 F.2d 1007, 12 Empl. Prac. Dec. ¶ 11,091, 13 Fair Empl. Prac. Cas. 150 (2nd Cir. 1976), *cert. denied,* 431 U.S. 965 (1977); EEOC v. Detroit Edison Co., 515 F.2d 301, 9 Empl. Prac. Dec. ¶ 9,997, 10 Fair Empl. Prac. Cas. 239, 1063 (6th Cir. 1975), *vacated on other grounds,* 431 U.S. 951 (1977) (remanded for reconsideration in light of International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)); Rios v. Enterprise Ass'n Steamfitters, Local 638, 501 F.2d 622, 8 Empl. Prac. Dec. ¶ 9,488, 8 Fair Empl. Prac. Cas. 293 (2d Cir. 1974); Castro v. Beecher, 459 F.2d 725, 4 Empl. Prac. Dec. ¶ 7,783, 4 Fair Empl. Prac. Cas. 700, 1223 (1st Cir. 1972).

237. Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723, 726-27 (1974). *But see* Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions,* 75 COLUM. L. REV. 559, 572-75 (1975).

238. Edwards & Zaretsky, *supra* note 229, at 14. *But see* DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) (argument that minorities *are* stigmatized by the thought that they "couldn't make it" without preferential treatment). *See also* DeFunis v. Odegaard, 82 Wash. 2d 11, 32, 507 P.2d 1169, 1182 (1973) (the court noted that "the minority admission policy is certainly not benign with respect to non-minority students who are displaced by it").

239. Edwards & Zaretsky, *supra* note 229, at 14. *Contra,* Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152 (1976) (California Supreme Court

solved by the Supreme Court in *DeFunis v. Odegaard* if the Court had reached the merits of that case. The Court did not fully decide these issues in *Bakke,* relying mainly upon the Title VI issues.[240] Because no ruling of the Supreme Court has directly confronted and sustained preferential remedies in the absence of prior discrimination, the only authority for preferential remedies is that noted earlier, which would sustain such remedies if imposed to remedy the effects of past discrimination.[241]

The limitations of the "past discrimination" rationale as a firm basis for preferential remedies are obvious. Such a rationale does not speak to the validity of affirmative action plans which are *not* imposed to remedy the effects of past discrimination. This issue is particularly relevent in the context of the Executive Order, because a judicial finding of past discrimination by a government contractor is not a prerequisite to the contractor's obligation to implement and adhere to such a plan. *Any* federal contractor with the requisite $50,000 of annual federal business and fifty employees is subject to the written affirmative action plan requirement.[242] As noted earlier, such a plan necessarily contains "goals and timetables" for minority hiring. As in the *Weber* case, such plans may become de facto, if not de jure, discriminatory. It would seem that the imposition of such a plan in the absence of a history of prior discrimination would be beyond the scope of the "past discrimination" rationale, and the plan thus would unlawfully discriminate against nonminority workers.

This situation is illustrated in *Weber v. Kaiser Aluminum & Chemical Corp.*[243] The *Weber* plaintiff challenged the use of preferential training practices instituted by an employer pursuant to an affirmative action program required by the Executive Order. The district court did not find a history of prior discrimination by the employer and held that the

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rejected the argument that rational basis test should be applied and instead applied strict scrutiny), *aff'd in part,* 46 U.S.L.W. 4896 (1978); Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537 (1976) (court specifically rejected rational basis test and applied level of scrutiny higher than that required by rational basis test, but lower than that required by "suspect" classifications.

240. *See* note 228 *supra.*

241. *But cf.* United Jewish Org. v. Carey, 430 U.S. 144 (1977) (use of racial criteria allowed in drawing voting district lines). This case is distinguishable from the typical preferential remedies case because nobody was disenfranchised. However, in the employment context a preferential remedy operates to allocate a limited number of opportunities among a greater number of applicants. If race were used as the deciding criteria, this would pose an entirely different question than that resolved in *United Jewish Organizations.*

242. *See* text accompanying note 83 *supra.*

243. 563 F.2d 216, 15 Empl. Prac. Dec. ¶ 7935, 16 Fair Empl. Prac. Cas. 1 (5th Cir. 1977).

preferential practices within the affirmative action plan were thus invalid.[244] The Fifth Circuit agreed, holding that "[i]n the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as a *preference* prohibited by Title VII § 703(a) and (d)."[245] Similarly, other courts have invalidated preferential practices which were not imposed to remedy past discrimination.[246]

A second issue raised by the "past discrimination" rationale to justify preferential remedies concerns the *scope* of activities which a court will examine for evidence of past discrimination. For example, a test which looked for past discrimination within all of American society, within an entire industry, or within a geographical region could have the effect of validating virtually *any* affirmative action program, irrespective of whether a *particular* employer had itself discriminated in the past. Both *Bakke* and *DeFunis* posed the preferential remedies question in this context, because there was no evidence of prior discrimination by the defendant in either case. On the other hand, a test which looked only to a given employer's practices would have the effect of invalidating preferential practices absent a showing of prior discrimination by the *particular employer* involved.

Although the argument has been made that courts should look to past *societal* discrimination to justify preferential remedies,[247] most courts implicitly look only to the practices of the employer involved.[248] The

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244. Weber v. Kaiser Alum. & Chem. Corp., 415 F. Supp. 761, 12 Empl. Prac. Dec. ¶ 11,115, 12 Fair Empl. Prac. Cas. 1615 (E.D. La. 1976).

245. 563 F.2d at 224, 15 Empl. Prac. Dec. at 6671, 16 Fair Empl. Prac. Cas. at 7 (emphasis in original).

246. Chance v. Board of Examiners, 534 F.2d 993, 11 Empl. Prac. Dec. ¶ 10,663, 11 Fair Empl. Prac. Cas. 1450, *modified on rehearing,* 534 F.2d 1007, 12 Empl. Prac. Dec. ¶ 11,091, 13 Fair Empl. Prac. Cas. 150 (2nd Cir. 1976), *cert. denied,* 431 U.S. 965 (1977); Patterson v. American Tobacco Co., 535 F.2d 257, 11 Empl. Prac. ¶ 10,728, 12 Fair Empl. Prac. Cas. 314 (4th Cir.), *cert. denied* 429 U.S. 920 (1976); Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972); Bakke v. Regents of Univ. of Cal., 18 Cal.3d 34, 553 P.2d 1152 (1976), *aff'd in part,* 46 U.S.L.W. 4896 (1978); Cramer v. Virginia Comm'w Univ., 415 F. Supp. 673, 12 Empl. Prac. Dec. ¶ 10,968, Fair Empl. Prac. Cas. 1397 (E.D. Va. 1976); Watkins v. United Steel Workers, Local 2369, 516 F.2d 41, 10 Empl. Prac. Dec.¶ 10,319, 10 Fair Empl. Prac. Cas. 1297 (5th Cir. 1975).

247. *See, e.g.,* Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 15 Empl. Prac. Dec. ¶ 7935, 16 Fair Empl. Prac. Cas. 1 (5th Cir. 1977) (Wisdom, J., dissenting); Bakke v. Regents of Univ. of Cal., 18 Cal.3d 34, 553 P.2d 1152 (1976) (Trobriner, J., dissenting) (Justice Trobriner argued that the preferential admission program invalidated by the majority had been instituted to remedy "the continuing effect of past discrimination in the country" and thus was valid. *Id.* at 75, 553 P.2d at 1172).

248. *See* cases cited in note 246 *supra. See also* OFCCP regulations which implicitly suggest reference only to the particular employer's activities. 41 C.F.R. Part 60 (1977); 42 Fed. Reg. 3456 (1977) ("[Individual relief] is an affirmative step which is required to eliminate discrimination *at the subject establishment.*"

Weber court directly confronted this issue and adopted the more restrictive standard of looking to the particular employer's practices. The court held that "unless a preference is enacted to restore employees to their rightful places within a *particular employment scheme* it is strictly forbidden by Title VII."[249] The *Weber* court seemed to view the "particular employment scheme" principle as a necessary adjunct to the concept of "make-whole" relief espoused in recent Supreme Court decisions.[250] By use of awards of back pay, seniority, and other equitable relief, make-whole relief is used to place victims of employment discrimination in the position which they would have occupied were it not for unlawful discrimination. As applied by the Supreme Court in employment discrimination cases, the make-whole concept requires an identifiable victim of discrimination in order to justify an award of back pay or seniority relief.[251] Conceptually, identification of the victim of discrimination serves as a type of causation requirement which operates to define the injury and to limit employer liability in much the same fashion as proximate causation in a tort action. This identification requirement would be weakened if courts looked to redress discrimination caused by society rather than by an identifiable employer. The make-whole concept thus at least indirectly supports the use of the "particular employment scheme" standard to justify the relief afforded victims of discrimination by preferential remedies.

A third issue raised by the "past discrimination" rationale concerns the *source* of the preferential remedies. Because courts traditionally have imposed preferential remedies as a form of equitable relief, it has been argued that plans voluntarily assumed (as opposed to judicially imposed) by an employer would be invalid. The district court so held in *Weber,* although the Fifth Circuit felt it was not necessary to reach the issue in view of its holding. It is submitted that requiring the judicial imposition of preferential remedies in order to find such a scheme valid is probably an unduly restrictive application of the "past discrimination" rationale. Preferential remedies should be valid whenever they remedy the effects of past discrimination within a particular employment scheme, irrespective of whether the remedies are judicially imposed or voluntarily assumed. Despite the desirability of allowing an employer to voluntarily assume preferential remedies, as a practical matter such a principle may

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(Emphasis added)). *But see* Germann v. Kipp, 429 F. Supp. 1323, 14 Empl. Prac. Dec. ¶ 7504, 14 Fair Empl. Prac. Cas. 1197 (W.D. Mo. 1977).

249. 563 F.2d at 225, 15 Empl. Prac. Dec. at 6671, 16 Fair Empl. Prac. Cas. at 8.

250. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

251. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

be difficult to follow. For example, the voluntary imposition of an affirmative action plan in the context of the Executive Order may place the contractor in an uncomfortable position. If he has no affirmative action plan, he may be in violation of the Order and subject to debarment and the other sanctions discussed, perhaps including back pay liability. On the other hand, if he does have an affirmative action plan, he is faced with potential Title VII or section 1981 liability (including back pay) to adversely affected nonminority employees for "reverse discrimination." Of course, the employer may defend the reverse discrimination action by showing that the preferential remedies were justifiably imposed to remedy the effects of past discrimination within his particular employment scheme. However, this would supply potentially valuable admissions and collateral estoppel arguments to *minority* claimants who also could pursue remedies under Title VII and Section 1981 for past discrimination. Although an employer understandably would not wish to defend and lose a discrimination case to obtain a court-ordered preferential remedy, at least a judicially-imposed preferential remedy could provide a limited measure of protection for the remedy without requiring damaging admissions of the employer.[252]

IV. Conclusion

This comment has attempted to outline the scope of the Executive Order and its attendant regulations. In the course of this study, several constitutional issues have been encountered which have implications far beyond the Executive Order. The specific issues concerned the substantive proscriptions of the Order as well as the types of sanctions and remedies it may provide. In the broader context, the resolution of these issues poses profound separation of powers questions which require definition of the proper roles of the President and the Congress in the employment discrimination area.

Solving the separation of powers problem presented by the Executive Order will not be an easy task for the courts. Proponents of the Order point to the improvements in minority employment that the Order can produce. However, the mere fact that laudable social objectives are furthered by the Order should not be enough to sustain its validity.[253] Courts should look to the *Youngstown* principles for independent constitutional or statutory authority giving the President power to issue the Order. Courts also should examine federal statutes with which Congress may have limited that power.

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252. *Cf.* Germann v. Kipp, 429 F. Supp. 1323, 14 Empl. Prac. Dec. ¶ 7504, 14 Fair Empl. Prac. Cas. 1197 (W.D. Mo. 1977) (A judicially imposed plan contained in a consent decree may be upheld against later challenge by whites even absent evidence of prior discrimination).

253. *See* note 170 *supra.*

The fact that Congress has legislatively defined the eradication of discrimination as an important national policy does not suggest abandonment of the dictates of *Youngstown*. Congressional identification of national policy should not automatically authorize executive efforts to further that policy, absent a congressional delegation of authority to the President. On the contrary, Congress has prescribed the means by which it wished to further the eradication of employment discrimination. Any inference of authorization for presidential action would thus be unwarranted. Congress is the body entrusted with the power to legislate, and the fact that presidential action complements congressional action should not be sufficient in itself to justify presidential legislation.

The need for *Youngstown* principles to justify presidential action is illustrated by the Executive Order itself. As a matter of policy, support for the eradication of employment discrimination as a proper and desirable national objective is almost universal. However, whether "affirmative action," as defined by the Secretary, should be the means utilized to achieve that objective will provoke strong and well-reasoned arguments from both sides. It is precisely this type of policy choice which should be committed for resolution to the Congress instead of to the President or an administrator. Because the Congress is the body vested by the Constitution with the power to legislate, it is altogether proper that the Congress be looked to for authorization if the President wishes to use that power. This is perhaps most important in areas of intense controversy, as in the area of employment discrimination.

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