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TWENTY-ONE YEARS OF AFFIRMATIVE ACTION: THE MATURATION OF THE ADMINISTRATIVE ENFORCEMENT PROCESS UNDER THE EXECUTIVE ORDER 11,246 AS AMENDED

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In administration as in architecture "form follows function,"[1] or at least it should. If we misperceive the function, the forms chosen are likely to be inept. To that extent, then, the substance of the law (in this case, Executive Orders 10,925[2] and 11,246[3]), including both articulated and implied obligations and remedies, ought to determine the form, the structure if you will, adopted for its administration. This is an odd way to begin a discussion on the maturation of the enforcement process of the executive order program on equal employment opportunity and affirmative action. I think, however, it is an appropriate beginning as this article is about the halting, almost stumbling, process by which we have progressed, from ill-thought-out, rudimentary approaches to enforcement of the program, to the current state of the art.

The fundamental premise, critical to the thesis of this article, is that the affirmative action obligation is a contractual undertaking imposed by the Executive Orders without concern for the guilt or innocence of the subject contractors and without concern for individual entitlement to the fruits of affirmative action efforts. Thus, an individ-

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1. "Form ever follows function." Louis Henry Sullivan, BARTLETT'S FAMILIAR QUOTATIONS 838a (1968).

2. 3 C.F.R. 448 (1961).

3. 3 C.F.R. 339 (1965).

ual complaint oriented process of enforcement completely misperceives the function which should have been the major emphasis of the administrative process. Our collective failure in 1961 to appreciate the overriding significance of the affirmative action element of Executive Order 10,925 led to an administrative model that over-emphasized the importance of the individual complaint process. The administrative structure, the rules and, ultimately, their reception by the courts all suffered because of this failure. It has taken almost 20 years for us to begin to recognize that the affirmative action thrust of Executive Order 10,925 and its successor orders is conceptually ill-suited for vindicating rights through a plaintiff-complaint process. It seems even more certain that the modern rules and regulations[4] are ill-designed for implementation of the affirmative action obligations at the behest of the affected classes.

This article argues that the rules and regulations which over the years have been developed to implement the executive order program have not adequately provided for vindication of individual rights by the affected classes nor for enforcement of the affirmative action obligations by the government at the affected classes' behest.

There are several primary reasons for these failures:

1. The individual complaint process, as designed in the rules and regulations, is ill-suited for compelling the imposition of the sanctions of debarment, cancellation, or black listing of contracts,
2. That process is also ill-suited to compel contractor compliance with affirmative action obligations, and
3. As designed, the process gives only limited rights, if any, to affected class members to initiate or affect the course of administrative adjudication, thus frustrating the vindication of rights solely or primarily individual in nature.

There is nothing inherently wrong with an administrative structure which the affected classes can manipulate on their own behalf either by explicit provision for such actions or an implied right.[5] However, the original rules and regulations and interpretations by the Attorney General,[6] contributed to eventual court determination that the President did not intend the affected classes to have an independent right of action.[7] They also contributed to the illusion that individuals could manipulate the administrative process on their own behalf.

This article will examine the early cases in the 1960's which

4. 41 C.F.R. § 60-1.1 through 60-741.54 (1981).
5. *See* discussion, *infra*, on right of action by implication in text accompanying notes 213-225.
6. The Attorney General's opinion is in 42 Op. Att'y. Gen. 97 (1961).
7. *See Farkas*, *Farmer*, and other cases discussed *infra* in text accompanying notes 31-50.

emerged as individuals sought judicial oversight of the executive order program. Aggrieved individuals first brought cases against government contractors under a third party beneficiary theory. While the early cases rejected the third party beneficiary theory, they strongly suggested that the proper avenue for relief lay in resort to existing administrative remedies provided by the rules and regulations. This rejection of the third party beneficiary theory had become conventional wisdom before the ascendency of right of action by implication.[8]

The pivotal case is *Hadnott v. Laird*,[9] since it first strongly suggested the real possibility of judicial review upon exhaustion of administrative remedies. At the same time, there were developments in administrative law also generally more favorable to judicial review, including more lenient rules on standing and a presumption of reviewability of final agency action.

The difficulty which the affected classes encountered in obtaining judicial relief was in contrast to the success of contractors in obtaining pre-enforcement judicial review of agency action under the Executive Orders. This article will suggest that these contractor-initiated cases reflected judicial efforts to accommodate the rights, obligations, and duties under the Executive Orders of affected classes, contractors, the government and the courts to generally accepted concepts of administrative law.

By 1970, evidence of the arrival of the administrative process at the threshold of administrative maturity came in the judicial acceptance of the *bona fides* of the Executive Order program in the form of approval of the use of affirmative action goals and timetables.

The "mark of maturity" of the administrative process arrived in the 1970's as courts applied traditional administrative principles to enforcement of Executive Order 11,246. The article seeks to avoid overstating the case for maturity of process because none of these principles has been specifically endorsed by the Supreme Court in cases involving the Executive Order. However, it suggests that selected cases provide persuasive if not compelling authority for the following:

1. The government is generally required to provide an opportunity for a hearing before imposing any sanctions;
2. Contractors are increasingly being required to exhaust administrative remedies before seeking pre-enforcement judicial reviews;
3. The right of affected class members to judicial review is available after exhaustion of administrative remedies, although difficulties re-

8. *Id.*
9. 463 F.2d 304 (D.C. Cir. 1972); *see also* Freeman v. Shultz, 468 F.2d 120 (D.C. Cir. 1972).

main in determining when final agency action has occurred and when affected class members are "parties aggrieved" entitled to seek review;

4. Government access to the courts for specific performance of the Executive Order's contractual obligations is available in appropriate circumstances, including actions for back pay to the affected class members;

5. Mandamus will lie at the behest of affected class members against the government for compliance with the Order and the rules and regulations where such actions are appropriate.

It is also suggested that in the recent past (1972-80) the government has evidenced a greater willingness to enforce the Order and a decreasing likelihood of being appeased by contractors. Continuation of enforcement would make it more likely that civil rights advocates would rely upon the administrative process, rather than seek an implied right of action against contractors or direct action against the government. However, if the current administration reverts to soft or non-enforcement of Executive Order 11,246, rejection of the administrative process is likely in favor of more creative tactics—yet to be devised.

While the affirmative action program has made major strides in the past two decades in providing employment opportunities to the affected classes, the courts thus far have not applied the lately popular "implied right of action theory" to efforts by affected class members to enforce Executive Order 11,246.[10]

The article will conclude that there is a gradual drift in the case law, and in agency rules and regulations, toward acceptance and application of recognized principles of administrative law to adjudication under the Executive Order. It will suggest that transfer of the Executive Order enforcement to the Equal Employment Opportunity Commission would encourage further maturity in the administrative enforcement process and facilitate orderly and equitable judicial oversight.

Brief Historical Background

When a more comprehensive history of this country's efforts to assure equality of employment opportunities is finally written, it is likely that the roots of modern affirmative action will be found not to have been the novel enunciation in Executive Order 10,925[11] issued by John F. Kennedy on March 16, 1961, but to have been tucked into the

10. *See* discussion, *infra*, of Cannon v. University of Chicago, Cort v. Ash and developments following them in text accompanying notes 213-225.

11. 3 C.F.R. 448 (1961).

policy of the initial order of Franklin D. Roosevelt issued on June 25, 1941.[12] The foregoing statement is a discovery for this writer despite the fact that my personal involvement with Executive Order 10,925 began in March of 1961 when I was assigned as a staff lawyer to the Task Force in the United States Department of Labor which was established to organize the new President's Committee on Equal Employment Opportunity.

President Roosevelt declared in the first Executive Order on Equal Opportunity that it was the "policy of the United States that there shall be no discrimination in the employment . . . because of race, creed, color, or national origin." He further declared it to be the duty of employers' and labor organizations "to provide for the *full and equitable* participation of all workers in defense industries without discrimination. . . ."[13] This admonition, or duty and obligation as the case may be, was extended to all contracting agencies of the federal government by Executive Order 9,346.[14] The President asserted that full manpower (human resources) utilization was the national goal in 1941, and exclusion of Blacks was a major barrier to the achievement of this goal. I suggest that the duty of "full and equitable participation" in employment could have been a basis for imposition of what we know today as affirmative action. However, the FDR program did not last long enough for creative interpretations to emerge. Moreover, as was also the case with Executive Order 10,925 in 1961, the problems in 1941 of rank discrimination were so rampant that there was neither time nor resources to deal with esoteric issues such as "full and equitable participation" and "affirmative action."

During the early days, 1961-65, the government's enforcement policy was one of persuasion. Except for the efforts of affected class plaintiffs,[15] there is no record of any formal attempts to enforce the Executive Order. In Title VII of the Civil Rights Act of 1964, there was express congressional recognition of Executive Order 10,925 and its successor Orders in the language of the Act. This congressional blessing of the President's efforts, along with subsequent appropriations by the Congress, provided legal authority for a bolder approach. When Lyndon Johnson became President, he issued Executive Order 11,246[16] which in addition to incorporating the substantive aspects of the Ken-

12. Executive Order, No. 8,802, 26 Fed. Reg. 6585, 3 C.F.R. 957 (1941).
13. *Id.*, Preamble ¶ 3 (emphasis added).
14. 8 Fed. Reg. 7183 (1943).
15. *See* text accompanying notes 21-74.
16. 3 C.F.R. 339 (1965).

nedy Orders, changed the organizational structure for the administration of the program. Powers previously lodged in the President's Committee were delegated to the Secretary of Labor. The Secretary subsequently delegated much of his authority to the Office of Contract Compliance which he established within the Department of Labor.[17]

Presidents Nixon, Ford, Carter and Reagan so far, have continued to operate under the substantive provisions of Executive Order 11,246,[18] as amended by Executive Order 11,375,[19] which in 1967 added "sex" to the affected classes. Carter's Reorganization Plan No. 1 of 1978, consolidated enforcement in the Department of Labor, rather than in contracting agencies.[20] This latter move probably has contributed to more orderly administrative process in the enforcement of this program, but this is an intuitive judgement not based upon data.

Suits to Enforce the Executive Order—The Early Days

In 1961, if a lawyer looked at the Rules and Regulations of the President's Committee[21] for an indication of the legal process available to vindicate the interests of a minority client, it was reasonable to conclude that an administrative procedure existed in which the plaintiff could participate and that such procedure *might* include judicial review.[22] Several provisions of the Rules dealt with general enforcement and a complaint procedure.[23] Not only were there instructions as to the filing of a complaint, but the investigation and processing of the complaint by the contracting agency was couched in mandatory language.[24] Although general rules of procedure under which one could actually conduct a hearing were not promulgated until later,[25] it was reasonable to conclude that the 1961 rules reflected an intent that the affected classes be able to activate the administrative process and influence its

17. *See* Jones, *The Transformation of Fair Employment Policies Practices*, Ch. 7, in FEDERAL POLICIES AND WORKER STATUS SINCE THE THIRTIES, IRRA (1976); Jones, *Federal Contract Compliance in Phase II—The Dawning of the Age of Enforcement of Equal Employment Obligations*, 4 GA. L. REV. 756 (1970).

18. 30 Fed. Reg. 12,319 (1965).

19. 32 Fed. Reg. 14,303 (1967).

20. 3 C.F.R. 321 (1978).

21. The published rules and regulations of the President's Committee were generally available by 1963. Government contract employment, rules and regulations of the President's Committee on Equal Employment, effective July 22, 1961, as amended on November 23, 1962, The Government Printing Office, (1963), Fed. Reg. Doc. 61-6955, July 21, 1961; as amended by Fed. Reg. Doc. 61-11838, Dec. 13, 1961, as amended Fed. Reg. Doc. 62-11703, Nov. 23, 1962.

22. There was also the possibility that final agency action would be committed to "unreviewable discretion." *See* Hadnott v. Laird, 463 F.2d 304 (D.C. Cir. 1972).

23. 41 C.F.R. §§ 60-1.21 through 60-1.23 (1961 rules).

24. 41 C.F.R. § 60-1.24 (1962 rules).

25. 41 C.F.R. § 60-30 (1980), first promulgated in 37 Fed. Reg. 20,536 (1972).

course. Few civil rights advocates would have dreamed that the government would be reluctant or unwilling to activate the enforcement process pursuant to an individual complaint.[26]

If, however, one looked at those rules with the assumption that the government would be reluctant to initiate enforcement, and therefore searched for explicit rights of the affected classes to manipulate the process, one would have found that the right to file a complaint is the only explicit right. The mandatory aspects of the complaint process are duties of the contracting agencies which can be interpreted as duties owed to the President's Committee and not to the protected classes.[27]

There are rights for non-governmental entities in the rules, but they are the rights of the contractors prior to the imposition of sanctions. In the Attorney General's opinion, regarding the validity of the Executive Order 10,925 there is no discussion of rights of the protected classes in an administrative process, only the rights of the contractors.[28] The misperceptions and omissions from the rules of those rights seemed to have been relatively harmless at that time. There were no attempts by civil rights advocates to force the government to conduct administrative hearings until much later.[29] In the early days, there were informal political pressures for enforcement, continuously, and there was constant criticism of the failure of the government to impose any sanctions. It would be a useful bit of research to find out why the first efforts by protected class members to enforce the Executive Order against contractors were made in the courts with few attempts to resort to the administrative process. I suspect lack of familiarity in 1961 with administrative procedure by other than the Washington lawyer may have been a factor. Civil rights advocates were most familiar with actions in the federal courts under the Constitution.[30]

In the first case on record, *Farmer v. Philadelphia Electric Company* in March of 1963,[31] the court dismissed the plaintiff's action

26. In the hearings on the first proposed rules and regulations of June 6 and 7, 1961, no substantial criticisms of the enforcement process were lodged.

27. *See e.g.*, Perkins v. Lukens, 310 U.S. 113 (1940).

28. *See* 42 Op. Att'y. Gen. 97 (1961) regarding the validity of requiring express contract provisions of Executive Order No. 10,925 in all contracts and the imposition of the sanctions made explicit for the first time in that order.

29. We do not really know if plaintiffs with lawyers would have attempted to process cases had the rules been clear but at least political flak from the Civil Rights advocates was not apparent until much later.

30. For example, William R. (Bob) Ming who brought the action in Todd v. Joint Apprentice Committee, 223 F. Supp. 12 (N.D. Ill. 1963), *vacated* 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965), was a long time civil rights lawyer.

31. 215 F. Supp. 729 (E.D. Pa. 1963), *aff'd* 329 F.2d 3 (3rd Cir. 1964).

against a government contractor which alleged racial discrimination in violation of Executive Order 10,925. The court reasoned that if it considered the plaintiff's action as a breach of contract, it had no jurisdiction because of lack of diversity.[32] If, however, it considered the action as arising under the Executive Order, assuming the Executive Order had the force and effect of law, then there was no private right of action granted by that Order.[33] The court concluded that only administrative remedies were intended under the Order, and it rejected the private causes of action.[34]

On appeal to the Third Circuit, the court affirmed the decision below.[35] It held that, even assuming that the Executive Order and regulations had the force and effect of law, they did not provide a remedy to the plaintiff under third party beneficiary theory.[36] Noting that plaintiffs had not complied with the rules and procedures for filing complaints, the Third Circuit thought the case a proper one for application of the doctrine of "exhaustion of administrative remedies."[37] It declined to determine whether the federal court would have had jurisdiction to entertain the plaintiff's case if the plaintiff had exhausted these remedies.

In *Todd v. Joint Apprentice Committee*,[38] in October of 1963, the lawyers went to court on a combination of constitutional, federal statutory, and Executive Order grounds and sought direct action against the contractors under a third party beneficiary theory, among other claims.[39] The suit involved state, federal and private entities, including a union, a contractor and subcontractors subject to Executive Order 10,925. The court rejected the third party beneficiary theory,[40] but allowed the action and granted relief under the other provisions of law without substantial attention to whether there was a right of action for

32. *Id.* at 730-31.

33. *Id.* at 732. The court refers to the history of the Executive Orders and to Pasley, *The Non-Discrimination Clause in Government Contracts*, 43 VA. L. REV. 837 (1957). [Hereinafter cited as Pasley]. The Pasley article also referred to the 1953 Report to the President's Committee on Government Contract Compliance which considered alternative enforcement approaches including the third party beneficiary theory and a specific clause conferring a right of action upon affected classes. The Report recommended that such changes be rejected. 215 F. Supp. at 733, n. 10.

34. 215 F. Supp. at 733-34.

35. 329 F.2d 3 (3rd Cir. 1964).

36. *Id.* at 10.

37. *Id.*

38. 223 F. Supp. 12 (N.D. Ill. 1963), *vacated* 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

39. Claims were asserted under 42 U.S.C. § 1981, 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343, 1346, and 1361, and the 5th and 14th Amendments to the United States Constitution, as well as under Executive Order No. 10,925.

40. 223 F. Supp. at 16.

the plaintiffs under the Executive Order. On appeal, the Seventh Circuit vacated and remanded the case for dismissal as moot.[41]

There were several teams of lawyers involved in the case below, including a U.S. Attorney. It is an interesting period piece, a case of first impression, and it illustrates the rudimentary state of the art in 1963. It is of little significance today, except as a case involving the Executive Order in which plaintiffs obtained an injunction against continued discrimination by a union and an apprenticeship committee.

In *Farkas v. Texas Instrument, Inc.*[42] in 1967, the Fifth Circuit reviewed the dismissal for want of jurisdiction by a district court of an individual's complaint against a government contractor. The Court of Appeals disagreed with the court below regarding the lack of jurisdiction, but sustained the dismissal of the complaint.[43] Citing *Farmer v. Philadelphia Electric*,[44] it concluded that a private civil action was not a permissible method of enforcing Executive Order 10,925.[45] It went on to opine that were there an absence of any remedy save that which might be fashioned under the general jurisdiction of the federal courts, the inference would be strong that jurisdiction was intended to be invoked to give vitality to contractual assurances of nondiscrimination but that was not the case. The court held that the plaintiff could have taken his case to the President's Committee,[46] citing the complaint procedures of the then applicable rules and regulations.[47] In response to the plaintiff's allegation that he sought the remedy before the Committee and that relief was refused, the court said that in light of the Executive Order's emphasis upon administrative methods, that refusal was final.[48] The court cited for this proposition *Switchmen's Union of North America v. National Medical Board*.[49] (*Switchmen's* is, or was, the key case regarding action committed to unreviewable agency discretion.) The majority of the subsequent cases have held, virtually uniformly, that there is no private right of action under the Executive Order against a contractor.[50]

41. 332 F.2d 243 (7th Cir. 1964).
42. 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967).
43. *Id.* at 634.
44. 329 F.2d 3, 9 (3d Cir. 1964).
45. 375 F.2d at 632-33.
46. *Id.* at 633.
47. 41 C.F.R. §§ 60-1.20-e through 60-1.27 (1961).
48. 375 F.2d at 633.
49. 320 U.S. 297 (1943). For a further discussion of agency discretion, *see* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).
50. *See e.g.*, Cohen v. I.I.T., 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); Cap v. Lehigh University, 433 F. Supp. 1275 (E.D. Pa. 1977); Gorman v. University of Miami, 414 F. Supp. 1022 (S.D. Fla. 1976); Jackson v. University of Pittsburgh, 405 F. Supp. 607 (W.D. Pa.

In *Hadnott v. Laird*,[51] in 1972, the same argument was tried again. Plaintiffs sued the Secretary of Defense to enjoin the award of future contracts to eleven textile companies who allegedly were guilty of discrimination and to require the government to terminate the existing contracts until the discriminatory practices were eliminated. The district court dismissed the complaint on grounds of sovereign immunity and failure of the plaintiffs to exhaust administrative remedies.[52] The D.C. Circuit Court of Appeals sustained the dismissal on the failure to exhaust theory and declined to address the sovereign immunity issue. Both the trial judge and the majority (the decision was a two-to-one vote) described in detail the administrative process under Executive Order 11,246.[53] The Court of Appeals pointed out that nowhere in the record was there an assertion that any of the plaintiffs had filed a complaint seeking to invoke the administrative process.[54] The majority of the Court of Appeals refused to accept the plaintiff's claim that exhausting administrative remedies would have been futile. The court concluded that because plaintiffs had not tried the administrative remedies,[55] there was no administrative record to review and that the ad-

1975); Traylor v. Safeway Stores, Inc., 402 F. Supp. 871 (N.D. Cal. 1975); Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974); Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Pa. 1972), *remanded on other grounds*, 477 F.2d 1 (3d Cir. 1973); Bradford v. People's Natural Gas Company, 60 F.R.D. 432, 436 (W.D. Pa. 1973); Lewis v. FMC Corp., 11 Fair Empl. Prac. Cases (BNA) 31 (N.D. Cal. 1975). *See also* United States v. East Texas Motor Freight System, Inc., 564 F.2d 179 (5th Cir. 1977), for the proposition that a union, not being a contractor with the government, cannot be subject to an independent cause of action under the Executive Order.

51. 463 F.2d 304 (D.C. Cir. 1972).

52. 317 F. Supp. 379 (D.D.C. 1970).

53. 3 C.F.R. 339 (1965). This order was the successor to Executive Order No. 10,925, 3 C.F.R. 448 (1961).

54. 463 F.2d at 307.

55. The plaintiffs' explanation of why pursuing the administrative route would be futile was as follows in the court's language:

> 1) Principally plaintiffs claim that in the instances where the investigation has been made and completed, and corrective action taken pursuant to a new, specific affirmative action agreement, the companies are still in violation. If this is true, there is nothing to preclude the plaintiffs from filing another complaint making such factual assertions as they think can be established, and calling for a hearing on such complaint in which the plaintiffs and witnesses offered by them may be allowed to participate.
>
> 2) Plaintiffs further assert that neither Executive Order 11,246 nor the regulations provide an absolute right to the complainants or witnesses offered by them to participate in such hearings, but the regulations do provide that if there is a hearing the individual complainant may participate in the administrative hearing, if he can show he has an interest in the proceeding and may contribute materially to the proper disposition thereof. . . .
>
> 3) Plaintiffs further assert that in some (but not all) of the instances where revised contractual obligations have been put into effect following the compliance investigation triggered by the show-cause order, the new contracts have been refused to the plaintiffs on the grounds that these agreements are confidential. Whether this is true or not, we would assume that if a complaint were filed by the plaintiffs in regard to any one of these

ministrative process should be pursued in such cases.[56]

The majority of the court strongly and clearly suggested that plaintiffs could have obtained judicial review once there had been final agency action.[57] It stated:

> We cannot say with exactitude what will occur if plaintiffs go to the Office of Federal Contract Compliance and file a complaint in each of the eleven instances which they cited to the District Court and now cite to this court. But we are assured that one of several things will happen: (1) the Office of Federal Contract Compliance may actually reject the complaint on the ground that the matter has already been investigated, compliance assured, and the matter closed; (2) the OFCC may accept the complaint, reopen the investigation, but deny plaintiffs any role in such investigation by offering testimony or otherwise; or (3) the OFCC may reopen the investigation, conduct an open hearing, in which plaintiffs are allowed to participate. In either eventuality, the plaintiffs will have definite administrative action to which to point when they then come into the United States District Court for review under the provisions of the Administrative Procedure Act.[58]

Although *Hadnott* is a powerful argument that judicial review is available whenever the government process under the Executive Order comes to a final halt, it did not deal with the current practice of referral of individual complaints to EEOC.[59] Under the facts of *Hadnott*, there was no complaint to refer. If the present procedure had existed, since there were over 100 named plaintiffs in *Hadnott*, it would not have been a case appropriate for Office of Federal Contract Compliance (OFCC). The court also suggested that if the agency violated its own

companies in this situation the contract provisions would be a matter of relevant evidence at the hearing.

463 F.2d at 307-08 (footnotes omitted).

56. *Id.* at 308.

57. The plaintiffs' grievance might arise at any one of three stages: (1) Before any OFCC consideration or action with respect to plaintiffs' complaints; (2) During OFCC consideration or action; or (3) After OFCC consideration and action, in the form either of a finding of no discriminatory practices or acceptance by a company or companies of a compliance agreement, which plaintiffs find is insufficient or not being enforced. In any of these cases, complainants should at first attempt to make full use of the administrative remedies explicitly designed to provide the kind of relief which they seek here—elimination of discriminatory practices on the part of the companies. *Having once fully but unsuccessfully pursued the available administrative remedies, plaintiffs would have exhausted them and they would pose no bar to judicial consideration of the plaintiffs complaints.*

(Emphasis in the original) 463 F.2d at 308, n. 12.

58. 463 F.2d at 308-09 (footnote omitted). In response to the plaintiffs' complaint that they were not assured judicial review under the Administrative Procedure Act, the court cited Service v. Dulles, 354 U.S. 363 (1957), as having determined otherwise. 463 F.2d at 309, n.13. *But c.f.* Farkas v. Texas Instrument Co., *supra*, note 41 and text accompanying notes 41-50.

59. 46 Fed. Reg. 7435 (1981), revising 39 Fed. Reg. 35,855 (1975), revising 35 Fed. Reg. 18,461 (1970). Even if it had been operative when *Hadnott* was litigated, according to the Court of Appeals majority there would not have been a complaint for them to refer to EEOC.

rules, judicial review of agency action might be obtained at some point short of a debarment.[60] Chief District Judge Johnson wrote a dissent. He noted that the majority failed to respond to the plaintiffs' contention that the administrative remedies were ineffective and unavailing:

> For example, it is clear from a reading of the regulations that under either the Executive Order or Title VII, the plaintiffs could file complaints against the offending companies. This would not, however, guarantee plaintiffs the right to participate in the agency proceedings, although they may be permitted to do so. They have no control whatever over the investigation or prosecution of the action. They must file the complaint and then hope for the best.[61]

He also noted that past practice indicated that the federal defendants were unlikely to take the actions which the plaintiffs desired, namely to stop dealing with the discriminating companies until they were in compliance.[62] Judge Johnson correctly perceived that plaintiff, pre-*Hadnott*, could only file complaints and hope for the best. However, given the majority opinion, the plaintiffs post-*Hadnott* could seek judicial review of OFCC's dismissal of the complaint or seek review at any point when agency action is final.[63]

Under the majority view in *Hadnott*, if the agency started hearings and the plaintiffs were denied the right to participate, that denial would be subject to judicial review. Recognizing the problems of reviewing an action determined to be interlocutory, it would seem that after *Hadnott* in the District of Columbia prospects of success were good for obtaining an injunction to prohibit an agency from conducting a hearing without the plaintiffs' full participation. The court might conclude, however, that it would be too early to take such an action and delay considering the case until the proceeding had run its course. In a post-hearing judicial review on the merits, a court might conclude that the plaintiffs had been sufficiently damaged by the denial of participation

60. A citation to Service v. Dulles, 354 U.S. 363 (1957), and a long discussion in footnote 13, clearly suggested that the majority was inviting the parties to force the government to comply with its own rules and regulations. 463 F.2d at 309.

It obviously took a Herculean effort as well as considerable time on the part of the Legal Aid Society in Legal Aid Society v. Brennan, 608 F.2d 1319 (9th Cir. 1979), *cert denied sub. nom.* 100 S. Ct. 3010 (1980), discussed, *infra*, text accompanying notes 175-201, to get the facts and analyze and present them to the federal court. It is no wonder that representatives of minorities are distrustful of government officials who have operated these programs and therefore continue to seek rules and regulations which lawyers can manipulate in the interests of their clients. However, only the subsidized public interest law firms can pursue cases like Hadnott *supra*, note 9 and Legal Aid Society v. Brennan. Hopefully, the need for this type of case is past. But where government officials ignore their own regulations, the Administrative Procedures Act, 5 U.S.C. §§ 500-576 (1976), and the Mandamus statute support a cause of action and some relief.

61. 463 F.2d at 313.

62. *Id.*

63. *Id.*

in the hearing and vacate and remand for a proper hearing. Recognizing the uncertainty of these propositions, it seemed worth the effort of organized civil rights advocates to have pursued the avenues which the *Hadnott* majority suggested were open to them.

The more difficult problem plaintiffs found was inaction on the part of the agencies. The mandatory mediation and conciliation process lends itself to incremental offerings of change by the employers which, if accepted by the agency, tend to compromise the validity of the plaintiff's claim. Progress in the mediation and conciliation process could be made merely by agreeing to, say, desegregation of facilities such as showers, water fountains, time clocks, housing, etc. Any such small movement has resulted in the government continuing to deal with the offending contractors to the complete frustration of the civil rights advocates and of the affected classes. While *Hadnott* established the theoretical possibility of administrative relief and ultimate judicial review, in reality the affected class plaintiff had little possibility of success unless a government agency started formal proceedings against a contractor. The Labor Department had too little power over contracting agencies and did not have staff capability to litigate more than a handful of OFCCP cases.[64] The combined situation frustrated the efforts of advocates on behalf of the affected class to get meaningful relief under the Executive Order without intervention of some kind by the courts.

In the earlier periods the government had neither the will nor the confidence of success to seek specific enforcement of the contract. Even if the Labor Department could have been persuaded to refer such matters to the Justice Department, Labor could not require Justice to litigate and, besides, Justice was a rather conservative litigant during the early days. Moreover, the enforcement staff committed to these areas in the Department of Justice was minimal at best. As for the legal authority to support specific enforcement of the contract, the Department of Labor had neither the means nor the staff to do the necessary research to be persuasive. There was no law on point and memo writing on "analogous law" can be most time-consuming. If the reader of such a memo is looking for assurance of victory or excuses for inaction, preparation of such memos is likely to be a fruitless venture. By contrast, where there is the will to act, supporting arguments can be found.

64. *In re Bethlehem Steel Co.*, (OFCC Docket No. 102-68), alone took five years. More than half the strike force of the Department of Labor lawyers was committed to that case at some time during that period.

The Executive Order itself is a prime example.[65]

The pre-*Hadnott* plaintiffs also suffered from the informality of the process. Rarely were complaints denied; they just did not get a formal response. If the agency acted upon the complaint and initiated a process of some sort, it often took into consideration many things not of specific benefit to the plaintiffs and of which plaintiffs were not advised. The negotiations went on sporadically, and there was rarely any formal indication that agency action was final. How could one get judicial review under such circumstances? It would only be in those rare cases in which formal proceedings were triggered by the plaintiff's complaint that the *Hadnott* court's suggestions could have been meaningful in any practical sense. Under the *Hadnott* theory, one would have been able to seek review of a dismissal of a complaint; however, in practice, that happened only when the Executive Order was clearly inapplicable. In cases where jurisdiction under the Executive Order attached, the complaint more likely went into a file and waited its turn for some type of consideration, minimal or otherwise.

It is interesting to note that the *Hadnott* court ignored *Farmer* and *Farkas*. In its refusal to entertain the plaintiffs' case, it emphasized the availability of administrative remedies and subsequent judicial review. *Farkas*, on the other hand, dismissed the plaintiff's complaint for failure to state a cause of action upon which relief could be granted. To the plaintiff's allegation that he had exhausted available remedies, the *Farkas* court concluded that agency action refusing him relief was final and unreviewable. *Hadnott* strongly suggests the contrary.[66] Are there plausible explanations for these seeming variances between the Courts of Appeals? I think there are. The trend in administrative law between 1967 (*Farkas*) and 1970 (*Hadnott*) shifted in favor of judicial review in the manner suggested by the *Hadnott* court. The law of standing had undergone rapid change starting with *Hardin v. Kentucky Utilities Co.*[67] in 1968. The most significant developments were the 1970 cases, *Association of Data Processing Service Organizations, Inc. v. Camp*[68] and *Barlow v. Collins*.[69] These cases established that plaintiffs have stand-

65. *See* subsequent cases like United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977); United States v. Mississippi Power & Light Co., 553 F.2d 480 (5th Cir. 1977); and United States v. Duquesne Light Co., 423 F. Supp. 507 (W.D. Pa. 1976), discussed in text accompanying notes 161-63 *infra*.

66. *See* 463 F.2d 304, at 308-09, notes 12 and 13 and accompanying text.

67. 390 U.S. 1 (1968). *Hardin* permitted standing to protect certain competitive interests; *see also* Flast v. Cohen, 392 U.S. 83 (1968).

68. 397 U.S. 150 (1970).

69. 397 U.S. 159 (1970).

ing if they are arguably within the zone of interests to be protected by the statute and have suffered injury in fact. Perhaps as significant as the standing cases were the views expressed by the Supreme Court in *Abbott Laboratories v. Gardner*[70] that only upon a showing of clear and convincing evidence of contrary legislative intent should the courts restrict access to judicial review. Although that case involved a pre-enforcement challenge to a rule, it clearly foreshadowed the presumption of reviewability of all final agency action. The 1970 standing cases continued that trend particularly when participation in the administrative process was available to a "party in interest."[71]

The loss in *Hadnott* actually amounted to a victory of sorts. The *dicta* should have had greater impact on plaintiffs' access to judicial review of administrative action under the Executive Order in view of the fact that it was the thinking of the District of Columbia Circuit Court of Appeals, which presides over the seat of government. However, little use was made of it by civil rights advocates. One reason seems obvious. The problem was to get the government agency to institute enforcement hearings. It was not clear from the *dicta* in *Hadnott* that one could get the court to force the government to start the process, although it can be read to invite judicial review of inaction.[72] However, *Farkas* was to the contrary; prosecutorial discretion provided powerful arguments against the conclusion that the government's refusal to go forward at the behest of the plaintiff would be reviewable by the courts.[73]

Another possible explanation for the failure to pursue the suggestion of judicial review was the limited resources of civil rights advocates.[74] The government's program emphasis shifted to the construction industry, or at least its efforts in that industry caught the public attention. Thus, civil rights advocates had to respond to that shift or risk being left out of the only game in town.[75]

70. 387 U.S. 136 (1967).

71. *See also* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), where the second lowest bidder who lost out on a contract had standing to challenge the inappropriate grant of the contract to another.

72. 463 F.2d at 308-09, n. 12.

73. *See e.g.*, Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965).

74. The possibility of attorney's fees for work done in the administrative process in civil rights cases arose much later in New York Gaslight Club, Inc. v. Carey, 100 S. Ct. 2024 (1980). It is not clear whether such fees are available for going through the administrative process under the Executive Order. *See* note 218, *infra*.

75. I do not suggest that these were the only activities. I suggest that the attention they received from the executive, Congress, and the courts and the attacks by contractors and unions, dictated participation by civil rights groups, even if only on an amicus basis. The limited re-

Pre-Enforcement Judicial Review of Agency Action Under the Executive Order

The first case on record in which a contractor sued the government under the Executive Order program occurred quite late (1968) in the post-1961 period. That should come as no surprise since the government's first efforts were devoted to what has been referred to as the "Jawbone Phase," and contractors had little need to resort to the courts.[76] It was only when the government indicated it would act contrary to contractors' interests that cases started to arise. The first such case was *Crown Zellerbach Corporation v. Wirtz*.[77]

As might be expected, efforts by contractors to obtain pre-enforcement review by federal courts of agency action under the Executive Order met with early success. In the *Crown Zellerbach* case, the Secretary of Labor was enjoined from debarring a contractor by direct or indirect means (formal debarment, temporary suspension or otherwise) without first affording the contractor an opportunity for a hearing. In anticipation that contracting agencies would be ordered to withhold any new business from the company without first clearing the new contract with the Department of Labor, Crown Zellerbach successfully sought the assistance of the court. OFCC and Crown Zellerbach were deadlocked over the continuation of a seniority system which locked in incumbent Blacks. All attempts to modify that system had been rejected by the union representing the company's employees. The court's order left the Department of Labor with no alternative but to retreat or to institute enforcement hearings prior to the institution of sanctions. The company, after its victory, capitulated. The union announced its intent to strike, whereupon the government successfully sought injunctive relief in a district court in New Orleans,[78] and the *Crown Zellerbach* case became relatively unimportant.

None of the problems which affected class plaintiffs had encountered in seeking court assistance arose in the *Crown Zellerbach* case. Contractors, being in privity of contract with the government (under ordinary procurement law), had long enjoyed the right to seek court assistance.[79] Whether they had to exhaust administrative remedies

sources which were at their disposal probably dictated that other activities be reduced to accommodate these initiatives.

76. *See* Jones, *Federal Contract Compliance in Phase II—The Dawning of the Age of Enforcement of Equal Employment Obligations*, 4 GA. L. REV. 756 (1970).

77. 281 F. Supp. 337 (D.D.C. 1968).

78. United States v. Local 189, United Papermakers & Paperworkers, 301 F. Supp. 906 (E.D. La.), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

79. *See e.g.*, Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961);

would also be determined by procurement law principles. If one concludes, as Judge Sirica did in *Crown Zellerbach*, that the threatened action amounted to a cancellation, termination, or debarment, or other sanction against the contractor, it is easy to justify injunctive relief. The government was failing to comply with its own rules and the Executive Order. If one concludes, however, that an order not to enter into new contracts with a contractor who seems to be defaulting on existing contracts until the issue of default is determined is not a sanction, then an injunction that required the government to throw good money after bad would seem contrary to good business sense. After all, the contractors do not have an unlimited right to do business with the government.[80]

Rather than appeal the case, however, the government counterattacked. In *United States v. Local 189, United Papermakers and Paperworkers*,[81] and *Crown Zellerbach Corp.*[82], the government sought an injunction against the union's interference with the company's contractual obligations under Executive Order 11,246 as well as an action under Title VII of the Civil Rights Act of 1964.[83] This case came to be a celebrated seniority case, but it also was the first successful effort of the government to establish the enforceability of the Executive Order and as such contributed to confidence in the viability of administrative enforcement.

During the year after the *Crown Zellerbach v. Wirtz* decision, the first ever notices of proposed debarment through the administrative process were issued.[84] Of the first seven instances in which the Labor Department issued notices of proposed debarment, three of the cases

Gonzalas v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); Gantt and Panzer, *The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts*, 25 GEO. WASH. L. REV. 175 (1956); Miller, *Administrative Discretion in the Award of Federal Contracts*, 53 MICH. L. REV. 781 (1955); Note, *The Blacklisted Contractor and the Question of Standing to Sue*, 56 NW. U. L. REV. 811 (1962); Note, *Notice and Hearing in Government Exclusionary Action*, 110 U. PA. L. REV. 1009 (1962).

80. Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 370-71 (D.C. Cir. 1961). This article is not an essay on the government procurement process, and these "nice issues" are beyond the scope of this discussion.

81. 290 F.2d 368.

82. 282 F. Supp. 39 (E.D. La. 1968).

83. *See also* 301 F.Supp. 906 (E.D. La. 1969), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

84. *See* Federal Civil Rights Enforcement Effort, 1970 U.S. Civil Rights Commission Report, 163-165, n. 220, and 214-216 (Government Printing Office); *see also* In re Allen Bradley Co., OFCC Docket No. 101-68; In re Bethlehem Steel Co., OFCC Docket No. 102-68; In re Timken Roller Bearing Co., OFCC Docket No. 100-68, File, U.S. Department of Labor, OFCCP. Debarment notices also went to: B & P Motor Express, Pullman Standard, Inc., Hennis Freight Lines, and Bemis Co.

went to hearing. The first involved the Allen Bradley Co. in Milwaukee, Wisconsin. As an indication of the state of the art of administrative enforcement at that time, before the *Allen Bradley* case could proceed to hearing, the Department of Labor had to write rules and regulations under which one could conduct a trial.[85] 41 C.F.R. § 60-1.26 of the rules and regulations, in effect at the time these cases were noticed for trial, only provided certain minimal procedural due process rights. Although new sets of rules and regulations were issued by the Labor Department to become effective July 1, 1968, they provided no better procedures for trial than those which they replaced.[86] In the first few cases, rules of practice were issued with each notice of debarment. Some parties complained during the hearings about the lack of published rules of procedure, but with little effect.

The early ad hoc rules of practice made use of hearing panels and, despite reservations raised by the legal staff, utilized labor arbitrators as panel members. Given the emphasis in the conventional wisdom (and by 1964 in Title VII itself) on mediation and conciliation, the earlier enforcement process tended to reflect the more informal attitudes of grievance arbitration than the formalities of the administrative process or formal litigation.

It now seems surprising that a program could exist from 1961 to 1972[87] without uniform, published procedures governing trial practice. That the program survived without this is probably due to the limited use made of the enforcement hearing process and, perhaps, because the ad hoc rules were reasonably adequate. Finally, in 1977, the rules of practice were published[88] and are now codified in 41 C.F.R. § 60-30. With the promulgation of uniform rules of practice in 1972[89] and in the current rules,[90] the full panoply of rules of practice, recognizable as such by lawyers familiar with the administrative law and practice,[91] has

85. 33 Fed. Reg. 10,479 (1968). The notice of *In Re Allen Bradley Co.*, stated that the hearing would be conducted "in accordance with rules of procedure which are available at Room 4136, 14th and Constitution Avenue, Washington, D.C. . . ."

86. *See* 33 Fed. Reg. 7804 (1968).

87. 37 Fed. Reg. 20,536, (1972), revised in 43 Fed. Reg. 49,240 (1978).

88. Federal Civil Rights Enforcement Effort, 1977, 67-76, 42 Fed. Reg. 3452 (1977). (The rules in 43 Fed. Reg. 49,240 were published pursuant to President Carter's consolidation plan to clarify the results of consolidation. The changes made from 42 Fed. Reg. 3462 were not "significant or major.")

89. 37 Fed. Reg. 20,536 (1972).

90. 43 Fed. Reg. 49,240 (Oct. 20, 1978), 41 C.F.R. § 60-30.

91. PART 60-30—RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS TO ENFORCE EQUAL OPPORTUNITY UNDER EXECUTIVE ORDER 11,246

General Provisions

Sec.
60-30.1 Applicability of rules.
60-30.2 Waiver, modification.

been provided. It should be noted that the informal panels have been replaced by administrative law judges and panels are not used.

While these new rules do not specifically provide for judicial review, it is clear that the process is similar to a multitude of other administrative processes whereby the authorizing statutes provide for judicial review. It is also clear that records made pursuant to these rules follow familiar patterns which will facilitate court review in accordance with normal standards of review of administrative agency action.

AUTHORITY: Secs. 201, 205, 208, 209, 301, 302(b) and 303(a) of the Executive Order 11,246, as amended, 30 Fed. Reg. 12,319; 32 Fed. Reg. 14,303; sec. 60-1.26 of this chapter (41 C.F.R. § 60-1), as amended by E.O. 12,086.

SOURCE: 43 Fed. Reg. 49,259, Oct. 20, 1978, unless otherwise noted.

Recall, if you will, the discussion in *Hadnott v. Laird*[92] of the justification for requiring exhaustion of administrative procedures in Executive Order cases. The *Hadnott* court seemed to assume that standard administrative practice and concepts of administrative law would govern both the process within the agencies as well as the conduct of the court. It should be noted that in 1970 when *Hadnott* was decided, the full impact of cases like *Barlow v. Collins*,[93] *Data Processing Service Organizations, Inc. v. Camp*,[94] and *Abbott Laboratories v. Gardner*[95] had not been felt within the various executive agencies of the federal government.[96]

The Exhaustion Requirement for Judicial Review—Application of a Sound Policy or Pursuit of a Non-existing Remedy?

Early on, the courts agreed that they had jurisdiction of cases arising under the Executive Order even where they found the plaintiffs had no cause of action.[97]

The District of Columbia Court of Appeals had a second opportunity to express itself regarding the Executive Order program in the 1972 case of *Freeman v. Shultz*.[98] In *Freeman*, nineteen employees brought a class action against the Secretary of Labor seeking to enjoin federal contracts to Grumman Aerospace Corporation for alleged racial discrimination. They also sought a declaration that the continuing contracts violated Executive Order 11,246, Title VII of the Civil Rights Act

92. *See* text accompanying notes 21-64, *supra*.
93. 397 U.S. 159 (1970).
94. 397 U.S. 150 (1970).
95. 387 U.S. 136 (1967).
96. It was clear to administrative lawyers that the new presumption of reviewability and the new standing rule would have significant impact on those administrative agencies which were established by statute. However, it was not apparent that the legion of activities established by Executive Order or by agencies would also come under court scrutiny in due time. The Executive branch did not fully appreciate that the new trend toward reviewability would require it to pay more attention to administrative rules. Whether the Administrative Procedure Act itself provided jurisdiction for judicial review and what the limits of administrative discretion were were issues very much in a state of flux during the late 60's and early 70's.

Certainly since 1977 we expect no problem with judicial review of OFCCP action. Califano v. Sanders, 430 U.S. 99 (1977), makes it clear, if it were not clear before, that the Administrative Procedure Act, while not providing an independent basis for subject matter jurisdiction, reflected congressional intent that judicial review should be widely available. 430 U.S. at 104. Moreover, the 1976 amendments to 28 U.S.C. § 1331 (the federal question jurisdiction) which eliminated the requirement for any specific monetary amount in an action brought against the United States, an agency, officer or employee thereof, conferred jurisdiction on federal courts to review agency action. The new OFCC rules clearly evidence an administrative intent that judicial review was anticipated.
97. *See Farkas* and *Farmer*, discussed in text accompanying notes 38 and 42, *supra*.
98. 468 F.2d 120 (D.C. Cir. 1972).

of 1964,[99] and the due process clause of the Constitution. The district court dismissed the action on the grounds of sovereign immunity and failure of the plaintiffs to exhaust the administrative remedies.[100] The court of appeals declined to decide the sovereign immunity issue, which was the grounds for the district court's dismissal, but affirmed on the ground of failure to exhaust administrative remedies.[101]

In *Freeman*, unlike in *Hadnott*, the plaintiffs had lodged an informal complaint with the Office of Federal Contract Compliance. In partial response thereto, a compliance review of the company's equal employment opportunity obligations had been conducted. Moreover, the Defense Supply Agency, which was the compliance agency under the existing procedures, had determined that the company was not in compliance with the requirements of Executive Order 11,246. Negotiations between the company and the Office of Compliance of the Defense Supply Agency eventually resulted in an agreement to correct deficiencies in the company's employment practices and to file an acceptable affirmative action plan. After this was done, the company was found to be in compliance with the Executive Order.[102] The court noted that after the agreement the plaintiffs never formally or informally complained regarding the company's discriminatory practices but rather filed a suit directly in federal court. The court went on to opine that the case was controlled by *Hadnott v. Laird*.[103] The plaintiffs attempted to distinguish this case on the ground that they had informally complained and pursued administrative remedies which turned out to be inadequate. Since the remedies did not deal with the problem raised in the complaint, the plaintiffs contended that further resort to the administrative process should not be required before they could go to the federal courts. The court of appeals did not find this distinction persuasive.[104]

It did note, however, that it was not necessary for a complaint to be filed for a compliance review to be done. The general reviews which the government might conduct were not limited or directed toward investigating the grievances of any particular group of persons. This did not limit OFCC's formal complaint process in any particular fashion. The court recognized that a specific investigation to address individual

99. 42 U.S.C. §§ 1971-1974e (1964).
100. 317 F. Supp. 376 (D.D.C. 1970).
101. 468 F.2d at 124.
102.. 468 F.2d at 121.
103. *Id.* at 122.
104. 468 F.2d at 122.

complaints was different from the general review which the government had conducted in this case.[105] In requiring the individuals to exhaust the administrative process despite the fact that their informal efforts had triggered or contributed to a compliance review, the court was making a clear distinction between the general compliance process and the individual complaint resolution process, which is now codified in the memorandum of agreement between OFCCP and EEOC.[106]

Plaintiffs could have instigated an investigation of their grievances, but they chose not to do so. Since the general investigation that was conducted was not specifically directed at the evils alleged by the specific plaintiffs, the company was not directly confronted with their charge until the lawsuit had been filed and had no opportunity to explain or respond to those allegations. The court declared it both fundamentally illogical and unfair to contend that there had been a complete investigation of an accusation, when the accused has not been afforded an opportunity to hear and answer the charges.[107] It postulated three fundamental reasons why a formal complaint is needed in a case such as this:

> First, a complaint is needed to focus the attention of the agency. The obligation of the Office of Compliance is to see that the company fulfills its equal employment duties in all of its operations. It cannot be expected to address itself to alleged discriminatory practices on the basis of informal comments and allegations. Secondly, a formal complaint is necessary to tell the accused company what is allegedly wrong. Without this the accused cannot be expected to answer the allegations, and thereby completely illuminate the matter. Finally, a formal complaint is needed so that a record can be created regarding the specific allegations and in order to establish conclusively what, if anything, was done to remedy them. Even if a formal charge is made and the Office of Compliance does nothing, that is a matter of record which can be corrected by judicial action.[108]

In its final preachment the court urged the parties to utilize the administrative procedure provided under the Executive Order as well as the processes of Title VII of the Civil Rights Act of 1964.[109]

In addition to foreshadowing the separation of compliance reviews and individual complaints, the D.C. Circuit Court, in *Freeman v. Shultz*, made it clear that if the government does nothing in response to a formal complaint, its non-action would be subject to judicial review.

105. *Id.*
106. Memo of agreement re: referral to EEOC, 39 Fed. Reg. 35,855 (1975).
107. 468 F.2d at 123.
108. *Id.* at 123-24.
109. 468 F.2d at 124.

It is also noteworthy that both *Hadnott* and *Freeman* involved substantial numbers of individuals,[110] each of whom represented a potential OFCCP complaint. Under current practices, cases such as these involving substantial numbers of individuals should be retained by OFCCP for processing. Systemic complaints should trigger the OFCCP enforcement process leading to corrections or sanctions. As a practical matter, the first thing that would occur would be an investigation, and, normally, the procedure which would follow would be not unlike that in *Freeman v. Shultz* where an agreement was reached and no formal hearing held.[111] Is the court suggesting that had these parties filed a formal piece of paper and had this case then gone exactly the same way, that it would then be ripe for judicial review? What then would be before the court? Obviously the same thing that the plaintiffs were attacking, namely the adequacy of the agreement which the Government accepted.

The distinction which the court draws between the compliance review process and response to an individual complaint in *Freeman v. Shultz* was accidental. In fact, the practice in the early days, which is now codified in the OFCCP Rules and Regulations, required the affected class issues to be resolved before any conciliation agreement was reached with the company. Under that practice, no matter what triggered the compliance review, violations were to be adjusted before agreements were reached. At the very least, provisions or agreements to correct violations were extracted in order to continue the contracting. The problem then was that federal agencies, which had the primary responsibility for enforcement of the Executive Order, very often accepted "soft" settlements and refused to respond to OFCC's demands for more adequate and complete relief before reaching agreement. It is this problem which the plaintiffs in both *Hadnott* and *Freeman* unsuccessfully sought to attack.

If we take the court's opinion at face value, had the employees filed a formal complaint and had the process gone exactly as it went in *Freeman*, they would have been in a position to insist that the court grant judicial review. It is the quality of the settlement which the government had accepted which would have been before the court for review. It is not clear from this case that the court would, in 1972, have reviewed that judgment. The D.C. Court discussed resort to the ad-

110. *Hadnott* had a hundred and fifteen named plaintiffs in the beginning and *Freeman* had nineteen.

111. Memo of agreement re: referral to EEOC, 39 Fed. Reg. 35,855 (1975).

ministrative process but did not address the statement in *Farkas* that if the process were resorted to, had been fully exhausted, and the government had made certain judgments in accepting settlements, then those judgments would be unreviewable.

This was probably the critical point for civil rights advocates from public interest law firms. It is one thing to fashion individual relief for specific individuals, whether they be 19 or 115 strong; it is another thing to order the government to require the company to clean up its act completely or face debarment. It is judicial oversight over this systemic process through the initiative of the civil rights advocates that was the critical issue in *Hadnott* and *Freeman*. It may still be the issue which separates those advocates who accept the deferral of individual complaints to EEOC and those who would require the use of the administrative enforcement process of the Executive Order. What they have yet to get the courts to focus on is, can the representatives of the affected classes hold the government accountable for the quality of the settlements it is accepting, or the decisions it makes to prosecute or not to prosecute, when the ultimate relief is complete eradication of discrimination as perceived by the affected class representatives or the imposition of the sanctions of cancellation, termination or debarment? We will discuss *Legal Aid Society v. Brennan*,[112] but that case does not provide us with an answer to this more narrow issue, namely, what about the review of the settlement "compromise"?

On the issue of whether the parties will ultimately be able to attack the agreement between the two agencies that individual cases be deferred to EEOC and class complaints be retained by OFCCP, *Hadnott* has language which will certainly be pertinent to any such challenge. The court said:

> Our conclusion that plaintiffs should not be permitted to initiate an original court action, demanding the remedy of government contract termination with all companies found racially discriminating in employment practices, with the remedy derived directly from the due process clause, is reinforced by the existence of still another remedy to vindicate their rights unresorted to by plaintiffs. Recognizing that Title VII of the Civil Rights Act of 1964 is not an exclusive remedy, and that the action is brought directly against the offending company rather than against government officials as plaintiffs have done here, still, if plaintiffs are interested in securing equal employment opportunities with private companies instead of litigating with government officials, this is precisely the purpose for which Title VII was

112. 608 F.2d 1319 (9th Cir. 1979) *cert. denied sub. nom.* 100 S. Ct. 3010 (1980).

designed.[113]

One can infer that the court would favor referral of individual complaints to EEOC rather than forcing OFCCP to process them. Perhaps that conclusion really expresses a bias against the theory of the case brought in *Hadnott*. The court may have thought that it was an attempt to base action too broadly on the due process clause of the fifth amendment. However that may be, the decision expresses a preference for resort to the existing statute and to judicial review of administrative actions rather than to direct suits against the government.

It would seem that if a challenge to the OFCC agreement to defer informal cases to EEOC were made in the District of Columbia, both *Freeman v. Shultz* and *Hadnott v. Laird* could be relied on as support for the agreement. It seems unlikely that the court would rule as impermissible the government's attempt to allocate the resources of two agencies with overlapping authority. This is particularly so in view of the general acceptance of prosecutorial discretion. The deferral agreement raises two important policy questions. As a policy matter, why should OFCC not be required to prosecute individual complaints while at the same time being allowed substantial, if not complete, discretion in accepting settlements of valid discrimination claims? It is easy to defend the reasonableness of the EEOC/OFCC deferral agreement as an allocation of resources for economic efficiency, but what about its effectiveness if compliance with the Executive Order is the goal?

Obviously some civil rights advocates would prefer that every opportunity for enforcement of the Executive Order be pursued by the government, but that is not a realistic expectation. If each complaint were pursued, it is unlikely that the courts would sustain the imposition of sanctions of debarment, cancellation or termination of a government contract for one, or a few, violations of individual rights. Given most of the history of Executive Order enforcement during which the imposition of sanctions for violation of individual rights was rare indeed, it is not likely that the courts would require such sanctions, even though they might permit them in appropriate cases.

Public interest law firms and other such institutional civil rights lawyers are—understandably—dissatisfied with any deferral policy in which all individual complaints go to EEOC as it limits their opportunity to force the government to act. Such a policy gives them less control over OFCC's allocation of its enforcement resources. It also gives the agency wider enforcement latitude without the possibility of judi-

113. 463 F.2d at 311 (footnotes omitted).

cial oversight. Public interest actions are still viable under a deferral policy, certainly in those cases in which the government's misfeasance is systemic such as in *Legal Aid Society v. Brennan*,[114] discussed here later. Even informal agency decisions should be reviewable by the courts for rationality.[115]

EVIDENCE OF THE ARRIVAL AT THE THRESHOLD OF ADMINISTRATIVE MATURITY

In this section I will attempt to illustrate through selected cases that the administrative process under the Executive Order has finally arrived at the threshold of what I refer to as "maturity of the administrative process." I say threshold because we still have a few years to go before we can make a final judgment. However, we are now in a position where we have a full set of rules and regulations and case law upon which to build. By the end of the 80's, enforcement of the Executive Order could be as orderly and predictable as the processes of the National Labor Relations Board. If that analogy holds, we should also see a continuation and perhaps even an increase in settlements without resort to the formal administrative process. This might lead the civil rights advocates to complain that we have come full circle, since the early experience under the Executive Order was all settlement and no enforcement. Obviously that is not the ideal mature administrative process. It may well be that for that reason we will still see efforts to retain an outside check in the hands of representatives of the affected classes.

Pre-enforcement challenges to a program occur most frequently during its early stages before its validity has been authoritatively established. Once the legitimacy of the fundamental elements of a program have sufficient court endorsement, attacks tend to focus on its administrative regularity. In this context, *Contractors Association of Eastern Pennsylvania v. The Secretary of Labor*,[116] decided in 1970, will probably go down in history as the most significant case of the modern Exec-

114. 608 F.2d 1319 (9th Cir. 1979).

115. The APA requires courts to set aside agency action that are arbitrary, capricious, or an abuse of discretion. 5 USC § 706(2)(A) (1976). The Supreme Court has said this requires a searching and careful inquiry by the reviewing court. Thus, the informal administrative record must be subject to judicial oversight. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc., 435 U.S. 519, 549 (1978). *See also* Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L. REV. 38, at 62-64 (1975).

116. 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3rd Cir. 1971).

utive Order era.[117] There are a multitude of reasons for this assessment: first, the case established the validity, not only of Executive Order 11,246, but of the affirmative action concept which prior to this case had little content and no clear definition; second, it encouraged the government to devise and ultimately to issue Order Number 4,[118] which applied affirmative action obligations to most contractors subject to the Executive Order rather than merely to construction contractors.[119] These two factors enabled the government to shift its emphasis to attempts to monitor overall compliance and to focus on underutilization of minorities without being limited to cases of specific acts of discrimination against individuals.[120] The numerical goals and timetables requirements gave the government a management tool whereby the contractor's performance of the undertaking to assure affirmative action could be measured and evaluated. This more objective measurement of progress, or lack thereof, was perceived as increasing the likelihood of hearings leading to the imposition of sanctions because it facilitated proof of non-performance of affirmative action. With the affirmative action concept validated by a court of appeals opinion, the Department of Labor was more confident that the general affirmative action requirements would also be sustained. Challenges to the goals and timetables concept have continued largely without success. The Supreme Court so far has refused to review any of the contractor cases in which the validity of the Executive Order had been challenged and upheld.[121]

Probably the most interesting issue of administrative law involved

117. *Id.* The author confesses some bias regarding this judgment because of personal involvement in development of the Philadelphia plan and the devising of the legal theory in support thereof.

118. Eventually codified in 41 C.F.R. § 60-2 (1972).

119. For discussions of the Philadelphia Plan, *see e.g.*, Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, [Hereinafter Bugaboo]; Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power* [Hereinafter Philadelphia Plan], 39 U. CHI. L. REV. 723 (1972).

120. *See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 65-74 (1972), discussing the three types of employment discrimination and definitions. *See* Bugaboo, note 117, *supra*.

121. *See e.g.*, Detroit Police Officers Association v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 50 U.S.L.W. 3931 (June 15, 1981); EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); EEOC v. International Union of Elevator Constructors, Local Union No. 5, 538 F.2d 1012 (3d Cir. 1976); Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) and cases cited therein. *But see* Minnick v. California Dept. of Corrections, 20 Empl. Prac. Dec. (CCH) ¶ 30,233 (Cal. Ct. App. 1979), *cert. granted*, 100 S. Ct. 3055 (1980) *dismissed* 101 S. Ct. 2211 (1981); *Cf.* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978); United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

in the revised Philadelphia Plan[122] is the conceptual nature of the plan. The plaintiffs sought without success to challenge its validity because of an alleged procedural irregularity. They claimed, among other things, that the plan constituted general rule making and, having been issued by an Assistant Secretary of Labor, was in violation of Executive Order 11,246, which reserved general rule making for the Secretary of Labor.[123] The circuit court of appeals brushed this argument aside concluding that the plan was not a general rule but was based upon findings as to available construction manpower in a specific labor market.[124] The "rule or order" issued under the APA did not preoccupy the court at all.[125]

The Mark of Maturity

While one or two or three swallows do not make a spring, the two *Uniroyal, Inc. v. Marshall*[126] cases and *St. Regis Paper Company v. Marshall*[127] are significant harbingers that spring may not be far off. With increasing authority sustaining the validity of the Executive Or-

122. *See, e.g.*, Bugaboo and Philadelphia Plan, note 117 *supra*.

123. *See* Executive Order No. 11,246, 3 C.F.R. 339, § 401 (1965).

124. Contractors Association of Eastern Pa. v. Sec. of Labor, 442 F.2d 159, 176 (3rd Cir. 1971).

125. It is also worth noting that the process which proceeded issuance of this revised plan was not adjudication. The Administrative Procedure Act definition of a rule is broad enough to encompass the Philadelphia Plan. The order embodying the plan was certainly an agency action of particular applicability and future effect designed to implement the Executive Order; thus, the APA definition of an order could be applicable. But if so, then the process for the formulation of an order is by definition "adjudication". The due process requirements for adjudication, as well as the standards of judicial review, are different from the requirements for the promulgation of a rule. In the Philadelphia Plan case the court seemed to have treated the plan as a rule. In any event, it could be subject to judicial review. *See e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); *see also* NAACP v. FPC, 425 U.S. 662 (1976).

5 U.S.C. § 551 (4):

> "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

5 U.S.C. § 551 (6):

> "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than rule making but including licensing;

5 U.S.C. § 551 (7):

> "adjudication" means agency process for the formulation of an order.

5 U.S.C. § 551 (4), (6), (7) (1976 & Sup. IV. 1980).

126. 579 F.2d 1060 (7th Cir. 1978). This is Uniroyal 1. Uniroyal 2 is at 20 Empl. Prac. Dec. ¶ 30,109, ¶ 30,108, ¶ 30,109 (CCH) (D.D.C. and D.C. Cir. 1979). *See also* Firestone v. Marshall, 24 Fair Empl. Practices Cases 1694, 23 Fair Empl. Practices Cases 215, 526 (BNA) (E.D. Tex. 1980).

127. 591 F.2d 612 (10th Cir.), *cert. denied*, 442 U.S. 826, *reh'g denied*, 444 U.S. 974 (1979).

der, contractors turned to litigation to challenge the administration of the program. The resulting cases are revealing the contours of the administrative law of the Executive Order program and provide further evidence of what I have labeled the maturation of the administrative enforcement process.

In the first *Uniroyal, Inc. v. Marshall*,[128] the company sought to challenge the validity of OFCC's pre-hearing discovery rules and administrative subpoenas[129] on the ground that the rules were not specifically authorized by the Administrative Procedure Act,[130] Executive Order 11,246, or the Federal Property and Administrative Services Act.[131] The company also alleged that the government's attempt to terminate its contracts for non-compliance with the rules deprived it of property rights protected by the fifth amendment to the Constitution.

When this case arose in January 1976, the Department of Interior was the compliance agency. It had conducted an onsight review of one of the company's plants and found a number of deficiencies. The deficiencies included failure to supply complete and accurate data to investigators, failure to identify areas where women and minorities were under-utilized, failure to set goals and timetables for an affirmative action program, and assignment of women and minorities to lower paying jobs. The Interior Department issued a 30-day notice to show cause why proceedings leading to sanctions should not be instituted. Negotiations for settlement failed and the government issued a formal complaint which commenced the administrative process. The case was set for hearing before an administrative law judge.

During the pre-hearing discovery phase, Uniroyal was uncooperative; its refusal to comply with orders of the administrative law judge prompted the government's motion to compel discovery. The government moved to terminate its contracts and debar the company from future contracts for its failure to engage in discovery. The hearing was expanded to consider whether Uniroyal's refusal to engage in pre-hearing discovery was violative of the Executive Order and grounds for sanctions. Uniroyal sued in the federal district court seeking to bar enforcement of the rules, to enjoin any administrative hearing, and to bar the government from imposing any sanctions for its non-compliance with the pre-hearing discovery rules. It sought a declaratory judgment that the said rule was an unconstitutional exercise of government

128. 579 F.2d 1060 (7th Cir. 1978).
129. 41 C.F.R. §§ 60-30.1, 60-30.9 through 60-30.11, and 60-30.17 (1980).
130. 5 U.S.C. §§ 500-576 (1976).
131. 40 U.S.C. § 486 (1976).

authority. Ultimately the district court granted the government's motion for summary judgment on grounds of no showing of irreparable harm and of failure to exhaust administrative procedures. It stated that the case met none of the requirements for pre-enforcement review of agency action and was not ripe for judicial review. Moreover, the court held that the rules were valid contract terms neither in conflict with nor in excess of the Executive Order's authority. On appeal, the Seventh Circuit denied Uniroyal's motion for an injunction against proceeding with the administrative hearing.[132] The court of appeals affirmed the court below on the "failure to exhaust" theory without deciding on the validity of the rules. It found that Uniroyal's case did not come within the exceptions to the exhaustion requirement.[133] The administrative hearing on the merits was concluded and a final order was issued on June 28, 1979.[134]

In the second *Uniroyal, Inc. v. Marshall*,[135] the company got a temporary restraining order in the District Court of the District of Columbia on July 2, 1979, barring any action by the government in the matter of *Department of Labor v. Uniroyal* until approved by the court. On July 20, the court sustained the Department of Labor, holding that Executive Order 11,246 and the implementing regulations under challenge were valid and that Uniroyal was properly debarred from present and future contracts for violation of the discovery regulations. The authority to impose sanctions under the Executive Order extended not only to the substantive nondiscrimination provisions, but also to discovery and inspection orders.[136] The Court of Appeals for the District of Columbia denied the company's requests for an injunction pending appeal of the district court's decision.[137] Subsequently, Uniroyal and the Department of Labor reached an agreement on the matters in dispute, and the appeal was dismissed without opinion based on the joint stipulation of the parties.[138]

St. Regis Paper Co. v. Marshall[139] is another case which I believe portends increasing maturity in administrative law under Executive Order 11,246. In a compliance review, the government found that the St. Regis Company had deviated from its affirmative action plan in the

132. 579 F.2d at 1064.
133. *Id.* at 1065.
134. In the Matter of Department of Labor and Uniroyal, No. OFCCP 1977-1.
135. 482 F. Supp. 364 (D.D.C. 1979).
136. *Id.* at 367.
137. Uniroyal v. Marshall, 20 Empl. Prac. Dec. ¶ 30,109 (BNA) (D.C. Cir. 1979).
138. 22 Empl. Prac. Dec. ¶ 30,889 (BNA) (1980).
139. 591 F.2d 612 (10th Cir. 1979).

employment of women. A notice to show cause under the rules was issued and the parties proceeded to negotiations on corrective measures. The company's proposals were rejected by the government. When the company brought an action in the district court, it was dismissed for failure to exhaust administrative procedures. The company appealed, arguing that its action was excepted from the exhaustion requirement on one or more of the following grounds:

1. The complaint raises important questions of law involving statutory interpretation and the constitutionality of regulations, which are within the expertise of courts rather than agencies.

2. Review by the agency would be expensive and fruitless, since the agency is not likely to void its own regulations.

3. Agency rules constitute "final agency action" subject to pre-enforcement court review under the Administrative Procedure Act.

4. Plaintiff is prejudiced by the administrative delay in that it is subject to further show cause notices at its other facilities and is subject to *de facto* debarment nationally by virtue of the Libby show cause notice.

5. If plaintiff loses at the administrative level it will likely be permanently debarred with no assurance of being granted a stay pending court review.[140]

Citing *Abbot Laboratories v. Gardner*,[141] the Tenth Circuit rejected the plaintiff's arguments, noting that agency action must not only be final to be properly reviewable, but also that the controversy must be ripe.[142] It also cited *Toilet Goods Association v. Gardner*,[143] for the proposition that agency review of challenged regulations is desirable, even where pure questions of law are concerned, in order to provide the court with the agency's considered views and to preserve the opportunity for the agency to correct an ill-conceived regulation and moot the issue without judicial interference.[144] The court opined that "[t]he desirability of full agency consideration is particularly great where, as here, the plaintiff's challenge is to the regulation as applied to a specific set of facts, as well as on its face, so that ultimate judicial review, if necessary, will be facilitated by a complete administrative record."[145]

140. 591 F.2d at 614.
141. 387 U.S. 136, 149 (1967).
142. 591 F.2d at 615.
143. 387 U.S. 158 (1967).
144. 591 F.2d at 614.
145. *Id.*

The Supreme Court denied certiorari.[146]

In *Illinois Tool Works, Inc. v. Marshall*,[147] a contractor challenged an OFCCP rule which, in effect, permitted debarment until disputed matters were resolved.[148] Contractors so affected could be determined non-responsible bidders or designated non-awardable. With such a cloud upon them, another regulation disabled them from bidding on future contracts. In this case, the company's name also appeared on a list which was published and circulated.

The Seventh Circuit held that, before the hearing on the merits at which a contractor may be found guilty of noncompliance with the order, the government may not take any action which debars, or has the effect of debarring, that contractor from government contracts. This decision was grounded on the determination that the rule permitting such action violated the Executive Order.[149] No issue of exhaustion of remedies was raised. The court also held that Section 209 of Executive Order 11,246 permitted publication of a contractor's name as not being in compliance only when the government made such a finding after an opportunity for a hearing.[150] The court found valid a government regulation which provided that a contractor is not in compliance as long as he has an unremedied "affected class" problem but held that a hearing is required to determine whether such a problem exists.[151] It further held that Section 209 of the Executive Order permitted publication of the names of non-complying contractors only after hearings on the merits.[152]

In every case in which government sanctions have been imposed without a hearing and have been challenged, the government has lost. The government has, as *Illinois Tool* reports, discontinued all practices which have been successfully attacked as *de facto* debarments without prior hearings. The proposed rules of OFCCP will eliminate the problem.[153]

146. 444 U.S. 828, *reh'g. denied*, 444 U.S. 974 (1979).

147. 601 F.2d 943 (7th Cir. 1979).

148. 41 C.F.R. § 60-2.2(b) (1976) authorized a government contracting officer, before a hearing, to declare a contractor non-responsible and ineligible for government contracts if the officer is informed through sources within any government agency that the contractor has "substantially deviated from an approved affirmative action program." 601 F.2d at 947.

149. 601 F.2d at 948, 41 C.F.R. § 60-2(b) (1976) and ASPR § 12-801(1).

150. 601 F.2d at 948.

151. *Id.* (Executive Order No. 11,246, § 101, protects persons from discrimination on the basis of race, creed, color, national origin, and sex. Sex was added as a classification in Executive Order No. 11,375, issued October 13, 1965). *See* note 4, *supra*, citing 41 C.F.R. § 60-2.1(b) on affected class relief.

152. 601 F.2d at 948.

153. *See* 44 Fed. Reg. 77,006 (1979); codified in 41 C.F.R. § 60-1.30 (1981).

Instructive on a number of different issues are *United States v. New Orleans Public Service, Inc. (NOPSI)*[154] and *United States v. Mississippi Power & Light Co.*[155] In the scheme of this article, however, the most significant issue is the view of the Court of Appeals of the Fifth Circuit that under the circumstances of these cases, and recognizing jurisdiction in the district court to grant the government the injunctive relief requested, these disputes can best be dealt with by requiring the government to institute its own administrative process.

These cases arose in 1974 when the government sued to require two public utilities to comply with the Executive Order and the Rules and Regulations. The public utilities contended that they were not subject to the Executive Order for a variety of reasons. The central theory was that there was no consensual basis to their relationship with the Government since they were required to provide the services by law. Moreover, they did not have contracts which included the Executive Order and affirmative action requirements. At issue in the cases also was the effect of the OFCCP rules which incorporated the Executive Order by operation of the Order and the incorporation of the obligations by reference. (The more comprehensive opinion is in the *New Orleans Public Service* case).

The district court issued far-ranging findings and conclusions before granting the government's request for relief. The court found that: (1) the Executive Order 11,246 has the force and effect of law; (2) Executive Order 11,246 requires that specific Executive Order language be placed in each nonexempt government contract; (3) the Executive Order authorizes the Secretary of Labor to adopt the rules and regulations he deems necessary to effectuate the purposes of the order; (4) the regulations require that Executive Order language be included in each nonexempt government contract whether or not such language is physically incorporated in the contract or agreed upon by the parties; (5) contractors subject to the Executive Order are also subject to all the rules and regulations issued thereunder that are not in conflict with it; (6) the rules and regulations in question are not in conflict with the order; (7) NOPSI is a nonexempt government contractor; and (8) NOPSI has violated the Executive Order and the rules and regulations.

On appeal, the Fifth Circuit affirmed, one judge dissenting on a

154. 553 F.2d 459 (5th Cir. 1977), *modified*, 436 U.S. 942 (1978).
155. 553 F.2d 480 (5th Cir. 1977), *modified*, 436 U.S. 942 (1978).

narrow issue.[156] The Executive Order program is reviewed in the majority opinion and various authorities for its validity discussed and endorsed. Old and new arguments attacking the program are dismissed. Thus, this case contributes greatly to the *bona fides* of the Executive Order program and adds impetus to an increasing judicial acceptance of the Executive Order and its administrative structure.

While agreeing that the district court had both jurisdiction and power to direct compliance by injunction, the court of appeals concluded that the program would best be served by the government resorting to its own administrative procedures.[157] In effect, the government is being required to exhaust the administrative process. This exercise of equitable discretion by the Fifth Circuit rests in part on the fact that the company's recalcitrance in both *NOPSI* and *Mississippi Power & Light* was due in part to a dispute over coverage. The court alluded to its expectation of good faith compliance with the administrative process on the part of the companies as a basis for its decision to remand the matter to that process.[158]

Both of these cases went to the Supreme Court. One issue involved was whether unlimited access to the company's premises, as well as to its books and records, was in violation of the fifth amendment of the Constitution. After the Supreme Court decided *Marshall v. Barlows, Inc.*,[159] an occupational health and safety case in which it concluded that warrantless searches violated the fifth amendment, *NOPSI* and *Mississippi Power & Light* were vacated and remanded for reconsideration in the light of *Barlows*.[160] The court of appeals vacated and remanded the cases to the district courts.[161] The district courts reaffirmed the earlier decisions and concluded that *Barlows* did not render invalid Executive Order 11,246, as amended, or the rules and regulations issued thereunder.[162]

If these cases, as well as *Uniroyal* discussed earlier, are widely followed in the future, and in my opinion they will be, the attention of the parties who are interested in the administration of the Executive Order

156. 553 F.2d 459 (5th Cir. 1977), *modified*, 436 U.S. 942 (1978).
157. *Id.* at 472.
158. *Id.* at 475.
159. 436 U.S. 307 (1978).
160. 436 U.S. 942 (1978).
161. 577 F.2d 1030 (5th Cir. 1978).
162. 480 F. Supp. 705 (E.D. La. 1979); 21 Fair Empl. Practices Cases 445 (D.C. La. 1979), 25 Fair Empl. Practices Cases 250 (5th Cir. 1981), *cert. denied*, 454 U.S. 892 (1981). *See also* U.S. v. Mississippi Power & Light, 20 Fair Empl. Practices Cases 47 (S.D. Miss. 1979) to the same effect, 25 Fair Empl. Practices Cases 250 (5th Cir. 1981), *cert. denied*, 454 U.S. 892 (1981). *See also* National Bank of Commerce of San Antonio v. Marshall, 628 F.2d 474 (5th Cir. 1980).

program will be further focused on the administrative process, with judicial review once agency action is final and ripe. If successful, OFCCP decisions may replace court cases as the primary source to which lawyers resort when considering action under the Executive Order.

We now have rather strong endorsements of the exhaustion requirement from the Court of Appeals in the District of Columbia, the Fifth Circuit, the Tenth Circuit, the Third Circuit, and the Seventh Circuit,[163] which is definitely a significant amount of authority. Additionally, it seems that the present Supreme Court is concerned with efficiency in the administration of justice. The federal judicial system has been so overloaded that additional federal judgeships were recently created. For these reasons, it is highly likely that the requirement of exhaustion of the administrative process would meet with great favor in the Supreme Court, unless the Executive Order itself were disfavored.

In *United States v. Duquesne Light Company*,[164] a district court refused to dismiss the government's complaint which sought an award of back pay from the company for persons discriminated against in employment on the basis of race and sex. It ruled that there was statutory and constitutional authority for the executive to seek restitution from government contractors allegedly guilty of employment discrimination.[165] Additionally, the court concluded that the rules and regulations and the Executive Order allowed the government to enforce its provisions through an action directly in the federal court for back pay.[166] The court also suggested that there was no necessity for the government to pursue the administrative process before it could resort to the courts under the rules and the Order.

Timken Company v. Vaughn[167] is a case which illustrates how enforcement of the Executive Order through the administrative process ought to work once it has reached full maturity. The administrative

163. In the District of Columbia, Hadnott v. Laird, 463 F.2d 304 (D.C. Cir. 1972); Uniroyal v. Marshall, 482 F. Supp. 364 (D.D.C. 1979); in the Third Circuit, Farmer v. Philadelphia Electric, 329 F.2d 3 (3d Cir. 1963); in the Fifth Circuit, United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977); United States v. Mississippi Power & Light Co., 553 F.2d 480 (5th Cir. 1977); in the Ninth Circuit, Legal Aid Society of Alameda County v. Brennan, 608 F.2d 1319 (9th Cir. 1979); and in the Tenth Circuit, St. Regis Paper Co. v. Marshall, 591 F.2d 612 (10th Cir. 1979). *See also*, Harris Trust & Savings Bank v. Marshall, 20 Fair Empl. Prac. Cases 558 (N.D. Ill. 1979); Commercial Envelope Mfg. Co. v. Dunlop, 11 Fair Empl. Prac. Cases 117 (S.D. N.Y. 1975).

164. 423 F. Supp. 507 (W.D. Pa. 1976).

165. *Id.* at 509.

166. *Id. See also* United States v. Lee way Motor Freight, Inc., 20 Fair Empl. Practices Cases 1345 (10th Cir. 1979) regarding the backpay issue under Executive Order No. 11,246.

167. 413 F. Supp. 1183 (N.D. Ohio 1976).

regularity in *Timken* is attributable, at least in part, to the sophistication of counsel. In this case, which arose in 1973 before the consolidation of enforcement in the Department of Labor, Timken initiated an action in the federal district court to review the final decision and order of the Supply Agency of the Department of Defense (hereinafter DSA) debarring Timken from eligibility for contracts with the United States or contractors doing business with the United States. The company sought a declaratory judgement and injunctive relief pursuant to the Administrative Procedure Act.

The background of the case reveals that the DSA did a compliance review of Timken's Bucyrus facility and a review of the company's affirmative action plan for that plant in September of 1973. The agency found the proposed affirmative action plan unacceptable, although virtually the identical plan had been accepted the previous year. The specific issue involved a controversy over the appropriate labor market (a 16 mile area around the plant as contrasted with a 25 mile area). The affirmative action goals and timetable in the rejected plan were based upon the minority population and availability in the work force in the 16 mile radius. If the area were that within the approximately 25 mile radius from the plant, as the government contended, it would have included the city of Mansfield, Ohio, which had a substantial minority population. Thus, the goals and timetables would have been higher. Timken's limitation of its labor market area resulted in an affirmative action plan allegedly in violation of Executive Order 11,246. On December 27, 1973, DSA issued a show cause letter to Timken, which is the preliminary step leading to a complaint. The parties were not able to resolve the problem in negotiation and on June 10, 1974, the government agency issued a notice of proposed cancellation, termination or debarment. On June 28, 1974, Timken responded by denying the violation, asserting several affirmative defenses and requesting a hearing. On September 12, 1974, counsel for both parties then appeared before an administrative law judge for a pre-hearing conference in which procedure and timetables for the prosecution of the matter were generally established. With the issues framed by the "complaint" and the "answer," the matter was heard on November 25 and 26, 1974, with stipulations, testimony of witnesses, introduction of exhibits, cross-examination, arguments, briefs and so forth. The administrative law judge found that Timken applied a 16 mile radius without regard to race, but that the radius used as a hiring restriction was arbitrary and that the affirmative action plan should have been based upon the 25 mile radius which included the city of Mansfield. The administrative

law judge held that the lesser area was inherently discriminatory and in violation of the Executive Order.[168]

The administrative law judge's proposed findings and conclusions were adopted by the appropriate executive in the Department of Defense and approved by the Director of the Office of Federal Contract Compliance as required by the then existing regulations. Timken then petitioned the district court for judicial review.

The company contended before the district court that the decision and order were arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence. The court concluded that the decision and order were unquestionably a final decision subject to judicial review under the Administrative Procedure Act.[169] It held that the standard of review in these cases as set forth in Section 706 of the Administrative Procedure Act and as stated by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*[170] is as follows: "In all cases agency action must be set aside if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the action failed to meet statutory, procedural, or constitutional requirements."[171] The court went on to declare that in addition to requiring agency action to pass muster under the aforementioned standard, "the fact of a complete administrative record also requires application of the substantial evidence standard."[172] It found that substantial evidence did not support the conclusion that the 25 mile radius was the proper labor market area.[173] It reversed and vacated the decision and order debarring Timken and entered judgment for the company. The government did not appeal the case.

On the purely technical issue of what is a proper labor market area surrounding a given facility, this case may or may not have been correctly decided. But as an exercise in judicial review of an administrative action, the judge's decision was soundly based and the *process* and the *principles of judicial review*[174] which he followed are those which

168. *Id.* at 1188.

169. 413 F. Supp. at 1188-89. The court cited Commercial Envelope Mfg. Co. v. Dunlop, 10 EPD ¶ 10,252 (S.D.N.Y. 1975); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Scanwell Laboratories, Inc. v. Schaffer, 424 F.2d 859 (D.C. Cir. 1970).

170. 401 U.S. 402 (1971).

171. 413 F. Supp. at 1189, citing 401 U.S. at 413, 414.

172. 413 F. Supp. at 1189. The court referred to Camp v. Pitts, 411 U.S. 138 (1973), as authority for requiring substantial evidence on the record as a whole as the standard of review.

173. 413 F. Supp. at 1192.

174. That is, the judge reviewed and gave deference to the administrative law judge's decision, applied the "arbitrary, capricious, and abuse of discretion" standard and the "substantial evidence" rule, and knew where the burden of proof lay.

should be encouraged and widely adopted. Unfortunately, the case has not received the notoriety for administrative practice purposes which it deserves. It is mostly known as a defeat of an affirmative action enforcement attempt. Hopefully in the near term it will receive more attention, and a following as more Executive Order cases are subject to judicial review.

Lawyers for both sides in this case had substantial experience, both with the writing and rewriting of the rules and regulations, and in the administrative enforcement process as advocates for the government. They not only understood the process, but also accepted it and had confidence in its efficacy. I do not think it is wishful thinking to project that given a comparable degree of acceptability and increased experience and competence on the part of the emerging Executive Order practicing bar, the orderliness of the administrative process as illustrated by the *Timken* case would be the norm. Moreover, if the maturation process continues, even *Timken* should be the exception. If the NLRB's experience can be generalized, the overwhelming majority of the cases should never go past the administrative law judge stage.

The only unqualified[175] success by representatives of the affected classes in obtaining judicial review and a victory on the merits came in *Legal Aid Society v. Brennan*.[176] It provided a dimension previously missing from opinions considered in this paper. The decision is only part of the original case, the balance of which was pending in the court below.[177] It is unacceptable as a matter of program administration that five years after the district court decision we have only a partial resolution of the matter on appeal, a matter which under a mature system should have been resolved within the administrative process. The government has yet to come to terms with the rights of protected individuals to seek assistance of the courts, particularly when the government fails to act, or, as in this case, acts improperly.

One aspect of the case is supportive of my contention that there is

175. Legal Aid Society v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974) was the decision below. In Lewis v. Western Airlines, Inc., 379 F. Supp. 684 (N.D. Cal. 1974), plaintiffs won a qualified victory at least in resisting a motion to dismiss for failure to state a cause of action. The victory is qualified in that the court noted that to maintain the causes of action against the contractor the plaintiffs would have to show, as they had pleaded, that they had exhausted administrative remedies which were reasonably available. The case was a suit against several employees of the federal government and Western Airlines regarding non-compliance with the Executive Order and may not add anything beyond a procedural device to keep a defendant contractor in a case where the main object is a suit against the government for mandamus.

176. 608 F.2d 1319 (9th Cir. 1979), *cert. denied sub. nom.* Chamber of Commerce of U.S. v. Legal Aid Society, 100 S. Ct. 3010 (1980).

177. 608 F.2d at 1327.

a creeping acceptance of the administrative process as the appropriate forum for resolution of issues arising under the Executive Order program. Both the appellants (contractors) whose affirmative action plans form the basis of the district court's order, and the federal appellee[178] invoke, among other things, the exhaustion of remedies doctrine as a basis for reversing the court below. Interestingly, the appellants asserted that appeal of an affirmative action plan is not subject to judicial review, at least not at the behest of the representatives of the affected classes.[179]

In *Legal Aid Society*,[180] several Black residents of Alameda County, California, and the Legal Aid Society which represented them brought an action against federal officials responsible for enforcing the Executive Order, alleging that they had failed to carry out their duty to insure that food processing contractors were maintaining adequate affirmative action programs. The district court granted partial summary judgment and injunctive relief.[181] The plaintiffs had two claims in their main case. First, they charged that the officials of the United States Department of Agriculture, which under the then existing rule was the compliance agency for the companies, failed to review affirmative action program of the majority of federal contractors within their compliance jurisdiction.[182] Second, the plaintiffs alleged that where compliance reviews were undertaken, the Department of Agriculture regularly approved programs that did not comply with Revised Order Number 4.[183] In discovery proceedings relating to the second claim, the plaintiffs had obtained affirmative action programs of twenty-nine contractors in the Alameda County area that had been reviewed and approved by the Department of Agriculture between 1972 and 1973. Plaintiffs analyzed them, documented their deficiencies, and requested the court to restrain the officials from approving non-complying programs and to require them to rescind approval of deficient plans and

178. Federal officials filed and then withdrew a notice of appeal and appeared in the court of appeals in support of the judgment below. *See* 608 F.2d at 1327.

179. No doubt they would contest the proposition of unreviewability if they were the ones seeking review of the affirmative action plan such as was the case in Timken v. Vaughan, 413 F. Supp. 1183 (N.D. Ohio 1976). *See* 608 F.2d at 1332 nn. 22-23 discussing and distinguishing *Farkas*, *Farmer*, *Gnotta v. U.S.*, 415 F.2d 1271 (8th Cir. 1969), and at 1337 n. 33 discussing and distinguishing *Hadnott v. Laird*, and *Freeman v. Shultz*.

180. Legal Aid Society of Alameda County v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974).

181. *Id.* at 140.

182. The main defendants were the Secretary of Labor, the Director of OFCC, the Secretary of United States Department of Agriculture (U.S.D.A.), and the Chief of the Contract Compliance Division of the Department of U.S.D.A.'s Office of Equal Opportunity. That portion of the case was still pending below in 1979 when the court of appeals decided the instant action.

183. *See* 41 C.F.R. §§ 60-1.40, 60-2.10 through 60-2.13 (1980).

initiate enforcement proceedings against the companies submitting those plans. The district court granted the plaintiffs' motions, concluding that the affirmative action requirements mandated by the rules and regulations were absent from the plans approved by the officials. It declared ten specific programs to be in violation of the regulations and therefore illegally approved. The court ordered the officials to cease approving programs that did not comply, to rescind approval of the ten non-complying programs, to issue show cause notices to those contractors submitting them, and to seek sanctions against any contractor that did not develop and implement a complying program.[184]

The appellants in the case at the court of appeals level, who included four of the ten contractors whose plans were specifically declared unacceptable as well as the Chamber of Commerce, were not parties to the proceedings below. After partial summary judgment was granted, they sought to intervene for the purpose of reopening the proceedings. The district court denied their motion but permitted intervention for purposes of appeal.

On appeal they presented five issues:

1. They contended that approval of the affirmative action plans by a compliance agency is not subject to judicial review or remedies, at least not at the behest of these appellees.

2. They contended that judicial review, if available, was premature because appellees had not exhausted administrative remedies.

3. They argued that they were entitled to participate in the proceedings below, and that entry of summary judgement without their presence deprived them of due process.

4. They contended that in finding the affirmative action programs inadequate and in formulating the decree, the district court relied upon standards that were erroneous in substance and not lawfully promulgated.

5. Finally, they argued that the decree imposing hiring and promotion quotas was in violation of the Constitution and Title VII of the Civil Rights Act of 1964.[185]

The federal appellees argued that the appellants lacked the requisite interest to maintain the appeal.[186] The court gave short shrift to the government's argument that the appellants were not properly before

184. 381 F. Supp. at 140.

185. 608 F.2d at 1327.

186. The Labor Department appears here in support of the judgment. The Legal Aid Society was its antagonist in the action below. Both joined in the court of appeals action against the appellants who were not involved in the action below.

the court on appeal. It also rejected appellants' argument that they were denied due process by not being able to force the matter to a rehearing, concluding that their participation on appeal rendered harmless any defect in the prior proceeding.[187]

The Court of Appeals for the Ninth Circuit thus added its weight to that of other jurisdictions regarding the validity of the Executive Order. It notes that while disclosure of information regulations may not be sufficiently rooted in authority from Congress to have the force and effect of law, there can be no doubt that the essential features of the affirmative action program reflected in Revised Order Number 4 issued under the Executive Order[188] were effectively ratified by Congress in adopting the Equal Employment Opportunity Act of 1972.[189]

The court also asserted that administrative action is subject to judicial review unless it is clear that such review is not available. Noting that nothing in the order precluded judicial review, and indeed the order appeared to anticipate such review by preserving remedies otherwise provided by law, the court expressed doubt that an Executive Order could of its own force preclude such review.[190] The court concluded that although the Executive Order and the implementing regulations placed heavy reliance upon administrative expertise and discretion, not all compliance review action was committed to the discretion of the agency.[191] It discussed the regulations with regard to affirmative action and isolated those matters which by the language of the order were mandatory. It then concluded that judicial review was available to insure that compliance officials perform their nondiscretionary duty to refrain from approving plans that do not contain elements mandated by the regulations.[192] It asserted that the remedies available under the APA may be invoked against officials who violate this duty. Moreover, mandamus was also appropriate.[193]

Legal Aid Society v. Brennan did not take a contrary view to that taken by cases already discussed regarding the necessity of exhaustion of the administrative process. Rather, this court harmonized its approach with the earlier decisions. It noted that appellees sought neither recognition of a supplemental private enforcement mechanism nor

187. 608 F.2d at 1329.
188. Revised Order 4, 41 C.F.R. § 60-2 (1971).
189. 5 U.S.C. §§ 5108 *et seq.* (1976), 42 U.S.C. §§ 2000e-1 through 2000e-17 (1976). *See* 608 F.2d at 1329-30, particularly n. 14.
190. *See* 608 F.2d at 1330, n. 15.
191. 608 F.2d at 1330.
192. *Id.* at 1331.
193. *Id.*

damages for specific acts of discrimination against them. Rather, they were asking the court to review the government's own enforcement effort against standards established by the Executive Order and the regulations.[194] It noted that the reluctance of courts to imply separate private enforcement rights from statutory regulations which provided explicitly only for government enforcement procedures and penalties was not applicable to actions such as the one before it.[195] It then stated:

> If the cases on which appellants rely correctly deny the right to initiate a private suit against a discriminating employer under Executive Order 11,246, judicial oversight of enforcement efforts of government officials through such a suit as this becomes doubly important; without it, no remedy would be available against compliance agencies that ignore the specific requirements of the Executive Order and regulations.[196]

With regard to the exhaustion of administrative remedy claim, the court declared that there was no administrative remedy to be exhausted.[197] It observed that the complaint was directed against the ultimate cause of appellees' injury, *i.e.*, the systematic approval by government officials of affirmative action programs that did not contain the provisions required by the rules.[198] The appellees sought a declaration of standards by which the adequacy of affirmative action plans must be judged and of duties of compliance officials in implementing those standards. The administrative procedures to which appellants pointed were not designed for processing cases of this sort nor for providing relief of this scope. Consequently, there was no administrative remedy to exhaust.[199]

Moreover, even if the complaint procedure were applicable to appellees' private claims, the court would not reverse for failure to exhaust in this case. The court noted that as applied here the requirement that administrative remedies be exhausted was a judicially created doctrine to be employed in the manner that best serves the competing interest of the court, the agency and the aggrieved individuals in the circumstances of a particular case. It was not legislatively mandated as a prerequisite for judicial intervention. The private appellees did not deliberately flout the administrative process, such as could be claimed in *Freeman v. Shultz* and *Hadnott v. Laird*, but rather they submitted

194. *Id.*
195. *Id.* at 1332.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 1336.

their grievances to the agency by informal means before filing suit. The agency ruled against them on the merits, and after litigation was commenced, the lower court required the private appellees to present their claims to compliance officials for a second time. This was to no avail. The agency officials were afforded an opportunity to correct their errors, to make their expertise available, and to develop an administrative record for review. They declined to do so.[200]

The fascinating aspect of the case is that the order of the court below directing the agency to institute proceedings to deny contracts to the non-complying contractors seems undisturbed by the Court of Appeals. One wonders if this will form a basis for assertions that representatives of the affected class may sue the Department of Labor to require it to initiate debarment proceedings rather than to refer their complaints to EEOC pursuant to the Memorandum of Understanding.[201]

In *Reynolds Metals Company v. Rumsfeld*,[202] plaintiffs challenged, among other things, the Memorandum of Understanding between OFCC and EEOC regarding the referral by OFCC of individual complaints to the EEOC for processing. It was argued that the memorandum improperly delegated the responsibility for processing OFCC complaints to the EEOC. The plaintiff asserted that the regulations implementing the Executive Order directed the Compliance Office and compliance agencies to promptly investigate and resolve all complaints about discrimination filed with them against a government contractor.[203]

The Fourth Circuit rejected this argument, distinguishing the functions by noting that the Compliance Office under the Executive Order monitors government contractors to determine whether they are meeting their commitments as equal opportunity employers.[204] A priority was given to the eradication of systemic discrimination rather

200. *See* 608 F.2d at 1337-38, and text accompanying notes 33, 34, and 35. Throughout this opinion, acceptance of the administrative process under the Executive Order was manifested by this court. The additional contribution it made was to delineate a type of case where exhaustion will not be required while elucidating and affirming the situation under the Executive Order where prior resort to the administrative process was proper. The opinion is a powerful affirmation of the validity of the order and the rules and regulations and a particularly lucid discussion of the affirmative action requirement in the face of a "reverse discrimination" claim. 608 F.2d at 1342-44. This decision came after Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and United Steelworkers of America v. Weber, 443 U.S. 193 (1979), were decided by the Supreme Court.

201. 46 Fed. Reg. 7435 (1981).

202. 564 F.2d 663 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978).

203. *See* 41 C.F.R. §§ 60-1.21, 60-1.24, 60-1.26 (1980).

204. 564 F.2d at 668.

than to the investigation and resolution of complaints about isolated instances of discrimination. The duty of the Compliance Office and compliance agencies to receive and promptly process complaints had to be considered in that context. The complaints which OFCC processes are those dealing with systemic violations of the company's contractual obligations to comply with the Executive Order rather than those dealing with the violations of rights afforded individual employees under Title VII. The court described the Executive Order sanctions and asserted that they are regarded by the Compliance Office as inappropriate remedies for cases of isolated discrimination against a single employee. The court found the allocation of functions between OFCC and EEOC to be consistent with the Executive Order and the pertinent regulations.[205] Consequently, transmission of the individual complaints to the Commission was not an unlawful delegation of authority. The plaintiffs also challenged the memorandum as not being issued in accordance with the rulemaking procedure of the APA.[206] This was rejected.

More significant for the question of access to judicial review may be the issue of the consistency of deferral of individual complaints. This question points to a potential conflict with the Ninth Circuit's willingness to mandate initiation of the administrative process to impose sanctions in *Legal Aid Society v. Brennan*.[207] It should be noted that affirmative action plan defects are clearly systemic defects, and the *Reynolds* situation would not necessarily yield the same results if *Brennan* were applied, even in the Ninth Circuit. It is possible under *Brennan* to permit a right of action against deferral of systemic complaints to EEOC as a violation of the Memorandum and deny one against deferral of individual complaints. The current rule of the Department of Labor evidences no general intent to defer the systemic complaints[208] but seems to permit it.

As a practical matter, what may be more significant regarding the likelihood of future challenges to the deferral of cases by OFCCP to EEOC for processing may be the relevance of 42 U.S.C. § 1988[209] to

205. *Id.* at 669. *Accord* Emerson Electric Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979), and McDonnell Douglas Corp. v. Marshall, 465 F. Supp. 22 (E.D. Mo. 1978).

206. *See* 5 U.S.C. §§ 552(a)(1) and 553 (1970).

207. *See* Legal Aid Society of Alameda County v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974).

208. For the memorandum of understanding at issue in *Reynolds*, *see* 39 Fed. Reg. 35,855 (1975). An earlier version was in 35 Fed. Reg. 18,461 (1970). The current memorandum is in 46 Fed. Reg. 7435 (1981).

209. Civil Rights Attorney's Awards Fees Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988).

such actions. Congress amended Section 1988 to provide for jurisdiction in the federal courts to allow the prevailing party reasonable attorney's fees as part of the cost of suing. Just recently, the United States Supreme Court, in *New York Gaslight Club, Inc. v. Carey*,[210] confirmed the view that Section 706(f) and Section 706(k) of Title VII of the Civil Right Act of 1964, as amended, authorized federal courts to allow attorney's fees for work done in state administrative and judicial proceedings to which the complaint was referred pursuant to the provisions of Title VII. The Court noted with favor cases involving federal employees in which fee awards have been upheld for work in federal administrative proceedings that must be exhausted as a condition to filing an action in the federal court.[211] It also approved awards of fees to public interest group lawyers.[212]

However, the laws which will support attorney's fees are listed in 42 U.S.C. § 1988, and the Executive Order is not included.[213] In order to obtain attorney's fees for suing the government in cases such as *Legal Aid Society*, affected class advocates will have to be rather ingenious. On the face of the aforementioned statute, it does not seem that a cause of action under the Executive Order would support attorney's fees as part of costs. Lawyers in general practice, as distinguished from public interest lawyers, are likely to take the more practical route of pursuing OFCCP deferral of individual complaints or of complaints involving more than one individual to EEOC. *New York Gaslight Club, Inc.* directs the financial traffic toward Title VII administrative hearings and court actions, not toward Executive Order 11,246. Moreover, cases which involve large numbers of individual employees which can be converted into class actions under Title VII have even more lucrative possibilities for the private lawyer. This would be frustrated if OFCCP preempted the action.

Even winning a right of action by implication under the Executive Order would not, without more, seem to qualify under the language of

210. New York Gas Light Club, Inc. v. Carey, 100 S. Ct. 2024 (1980).

211. *Id.* at 2030, n. 2, citing Brown v. Bathke, 588 F.2d 634, 638 (8th Cir. 1978); Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977); Foster v. Boorstin, 561 F.2d 340 (D.C. Cir. 1977); Johnson v. United States, 554 F.2d 632 (4th Cir. 1977).

212. 100 S. Ct. at 2034, n.9, citing Reynolds v. Coomey, 567 F.2d 1166 (1st Cir. 1978); Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976). The plaintiff in *Carey* was represented by counsel employed by the NAACP Special Contribution Fund, *See* 100 S.Ct. at 2027, n. 1.

213. 42 U.S.C. § 1988 as amended Pub. L. 94-559, § 2, 90 Stat. 2641 (1976), provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986, of this title, Title IX of Public Law 92-318, or in any civil action or proceeding by or on behalf of the United States to enforce. . . . the Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

the Civil Rights Attorney's Fee Act. It would be necessary to persuade the court that enforcement actions under the Executive Order program were also intended to be compensated, if not under 42 U.S.C. § 1988, then under Title VII of the Civil Rights Act of 1964, and that such results were within the spirit if not the letter of *New York Gaslight Club, Inc.* Actions involving the enforcement of affirmative action plans might have a stronger chance since they are specifically referred to in Section 718 of Title VII.[214] Such an interpretation would require the court to make a generous stretch of the law, and it is doubtful that this Supreme Court would be willing to do so.[215]

An Implied Right of Action Under Executive Order 11,246

There is a chance that if *Farmer v. Philadelphia Electric* and *Farkas v. Texas Instruments* were litigated in 1980, they would permit affected class plaintiffs to sue contractors directly. Further, it seems possible that those cases could come out the other way and *Hadnott v. Laird* and *Freeman v. Shultz* remain unchanged. My theory regarding *Farkas* and *Farmer* is not to suggest that the third party beneficiary theories rejected there would be approved under the current view of the law, but rather that there is a chance that if those cases came along now, the court would imply a right of action and permit the lawsuits to go forward under the Executive Order against the contractor to enforce the obligation.

214. 42 U.S.C. § 200e-17 (1981).

215. An argument can be made that Executive Order 11,246, as amended, is *now* an integral part of Title VII of the Civil Rights Act of 1964, as amended, and as such should *not* be considered *merely* an act of the President. If successful, Title VII attorneys' fees provisions would be applicable. The Seventh Circuit recently reversed a district court's ruling that fees for time spent seeking debarment under the Executive Order were not compensable despite the employer's admission that it would not have settled the Title VII case had it not been debarred. Chrapliwy v. Uniroyal, Inc., 28 Fair Empl. Practices Cases 19 (7th Cir. 1982).

In 46 Fed. Reg. 50,376, the Department of Labor reissued and made effective December 29, 1981, its regulation implementing the Equal Access to Justice Act (P.L. 96-481, 94 Stat. 2327, 5 U.S.C. 504). The rules had previously been issued on October 9, 1981 and revoked October 13, 1981. These rules provide for attorneys' fees when an eligible party prevails over an agency in an adversarial adjudication. Adversarial adjudications include proceedings of the Office of Federal Contract Compliance Programs, Employment Standards Administration, hearings prior to the denial, withholding, termination or suspension of a government contract or any portion of a contract under Title VII of the Civil Rights Act of 1964 as amended and 41 C.F.R. Part 60-30.

To be eligible for an award of attorneys' fees and other expenses under the Act, the applicant must be a "party" as that term is defined in 5 U.S.C. 551(3), to an adversary adjudication for which it seeks an award; the applicant must prevail; and must meet all the conditions of eligibility set out in the Department's rules.

While it is possible under these rules for a representative of the affected class in an OFCC proceeding to be included, it is far from clear at this point that they are covered. Even more uncertain, if covered, is when they would be considered to have "prevailed over an agency."

In *Cannon v. The University of Chicago*,[216] the Supreme Court made it clear that Title IX[217] provided a private right of action for the affected classes and permitted the plaintiff to sue the University of Chicago for an alleged violation of the ban against sex discrimination contained in Title IX. In the process, the Court also indicated that there is a private right of action under Title VI of the Civil Rights Act of 1964.

Why is there then no implied right of action under Executive Order 11,246 in light of this recent upsurge in the number of cases finding a cause of action by implication?[218] I suggest a practical answer—it is no longer needed. The principles of *Cort v. Ash*,[219] however, could fit the Executive Order program. The Supreme Court set forth its test in *Cort v. Ash* for determining whether there should be a right of action by implication. The four factors considered are as follows: 1) whether the plaintiff is one of the class for whose special benefit the statute was enacted; 2) whether there is any indication of legislative (executive) intent either to create a federal right in favor of the plaintiff or to deny one; 3) whether implication of such a right is consistent with the legislative (in this case executive) scheme; and 4) whether the cause of action is one traditionally relegated to state law.[220]

In *Cannon*, the Supreme Court applied the *Cort v. Ash* standards and concluded that there was an implied right of action. Thus, the individual could sue the University of Chicago (the recipient of the federal assistance) directly. An argument can be made that if the Executive Order is treated as a law and the principles which emerge from *Cannon* are applied, consistency would dictate that a private right of action be found under the Executive Order.

One barrier to such a conclusion would be the Court's reading in *Cannon* of the "legislative history," or in this case the "Executive Order history." There is evidence that consideration was given to explicitly permitting a private right of action under the Executive Order in 1953 in a report to the Eisenhower administration.[221] The report recommended against amending the Executive Order to provide a private right of action. Nothing was ever done to change what was then the

216. 441 U.S. 677 (1979).

217. 42 U.S.C. §§ 2000h-1 through 2000h-6 (1976).

218. *See* Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378 (1978), and Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429 (1976).

219. 422 U.S. 66 (1975).

220. *Id.* at 78.

221. *See* Pasley, *The Non-Discrimination Clause and Government Contracts*, note 33, *supra*.

practice and it is conceivable that the Supreme Court might give weight to this as "legislative history."

Any other convincing rationale to exclude the Executive Order from the principles of *Cannon* comes hard. The 1953 considerations seem a bit thin as evidence of executive intent although this could be buttressed by the fact that courts have clearly articulated since 1967 that no private right of action was intended under the President's Executive Orders. All Presidents and the Congress have had clear notice of the courts' interpretations. Presidents have changed the Executive Order a number of times, and the Congress has by its actions ratified the Presidents' changes. The Supreme Court could conclude that this is sufficient to deny an implied right of action. Additionally, Justice Rehnquist's concurring opinion in *Cannon* has warned us that in the future the Supreme Court is going to be extremely reluctant to imply a cause of action absent specific legislative intent.[222] A further distinction between *Cannon* and the Executive Order is that in *Cannon* the Court found support for a private right of action in the inclusion of Titles IX and VI in the Civil Rights Attorneys' Fee Act of 1976. No Executive Orders are specified in that Act.

On the other hand, Title VI and Title IX cover grants; Executive Order 11,246 covers contracts, which are often grants in contract form. Title VI excludes employment (see Section 604) unless the purpose of the grant relates to employment. Many entities such as universities are covered by Title VI, Title IX and Executive Order 11,246. The private attorney general concept[223] is an integral part of civil rights law. Title VII itself is heavily dependent upon the actions of a private counsel for the affected classes. The case law for denying the private right of action against a contractor under Executive Order 11,246 is not so strong where individual rights are concerned. As our analysis has made clear so far, the administrative process is cumbersome at best for the vindication of private rights. However, under the practice of deferring individual complaints to EEOC, permitting individuals to sue contractors

222. *See* concurring opinion of Rehnquist and Stewart in Cannon v. Univ. of Chicago, 441 U.S. at 717. Since Executive Order 11,246 pre-dates *Cannon* it should be governed by the pre-*Cannon* principles of Cort v. Ash. The modern law of implied rights of action began in 1964 with J.I. Case Co. v. Borak, 377 U.S. 416 (1964). This was contemporaneous with the beginning of enforcement efforts under the executive order but the early cases did not seek to use the implied right of action theory. The Court now seems to be hostile to further extensions, unless Congress or the executive clearly indicates positive intent. *See* Note, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 279-288 (1980).

223. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).

directly under the Executive Order would not be at odds with the Executive Order administrative scheme nor would it affect its efficiency.

I do not suggest that because these principles could be fitted to the Executive Order that they should be. In fact, I might urge the contrary. I do not believe that further proliferation of equal employment laws is in the best interest of the affected classes. There is marginal utility at best in permitting private suits against contractors that cannot be achieved now under Title VII or other laws. The exception may be suits for seniority relief not available under Title VII's qualified immunity.[224] If it is finally determined that the Executive Order will not support seniority relief in excess of that available under Title VII, then little is lost if no private right of action under the Executive Order exists.[225] I think it totally unrealistic to expect the courts to impose debarment or other systemic sanctions in private suits where there is no resort to the administrative process, and the trend is clearly toward judicial review of that process. What then is missing? What is still missing is the confidence in the affected class communities that the government *will* enforce the Executive Order. That lack of confidence has always been the problem, but I fear it cannot be resolved by arcane legal theories. It can only be assured by political power.

Perhaps further consolidation of the equal employment functions at the federal level would contribute to a solution. An agency whose sole function is equal employment and whose major constituency is the affected classes would be more prone to enforce vigorously EEO obligations than would a multiplicity of agencies with a multiplicity of missions and constituencies.

Minorities are certainly entitled to be suspicious of the reliability of the executive branch of the federal government in respect to this program. Although presidents since Roosevelt have had a mechanism of some sort in place to deal with discrimination, few if any have enforced them with vigor. The Carter administration instituted the most actions for sanctions against contractors for employment discrimination but that fact may be due as much to the culmination of the maturity of the administration process as to the will to enforce. The Reagan administration has been marked by great uncertainty with threats of retreats coming from an assortment of voices within the administration, and certain significant retreats in the proposed rules of the Office of

224. *See* National Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

225. *See* U.S. v. Trucking Management, 662 F.2d 36 (D.C. Cir. 1981); United States v. East Texas Motor Freight System, Inc., 564 F.2d 179 (5th Cir. 1977).

Federal Contract Compliance Programs.[226] If the continued existence of the President's program is at risk, why should one suggest resort to the administrative process as the more desirable course for affected classes?

First, because of the prediction of increased reluctance on the part of the courts to take matters on pre-enforcement judicial review, despite the suggestion in *Legal Aid Society v. Brennan*,[227] and because, in my opinion, *Brennan* is limited authority for pre-enforcement judicial review.

Second, a liberal reading of *Hadnott v. Laird*,[228] and cases following its reasoning, that plaintiffs' resort to OFCCP can result in judicial oversight of agency's action at any point at which any such action is final and therefore ripe for review. It is my opinion that the administrative process has started to come of age and that the other cases discussed in this paper which emphasize administrative procedure represent the most authoritative sentiment in the courts although the Supreme Court's contribution has been largely negative in denials of review.

Third, affected class representatives should not forget the lessons of their own past with regard to the viability of the administrative route. In *National Association for the Advancement of Colored People v. Federal Power Commission*,[229] the NAACP, and several other organizations representing Blacks, Spanish-speaking Americans and females, petitioned the Federal Power Commission for the issuance of a rule requiring equal employment opportunity and nondiscrimination in the employment practices of companies which the Federal Power Commission regulates. Upon refusal to initiate the rule-making process by the Commission, the plaintiffs sought judicial review and took the matter to the Supreme Court. While they were defeated on the substantive issue, the procedural victory is potentially more important in the long run. The case clearly stands for the proposition that civil rights advocates should be able to challenge agency rule-making within the confines of judicial review of administrative process. Clearly, public interest law firms can have greater impact in monitoring agency rules than in attempting to push individual complaint cases, either through the administrative process or through pre-enforcement judicial review.

226. 47 Fed. Reg. 17,770 (1982); see particularly proposal to restrict or eliminate back pay for affirmative action cases, reduction in coverage, etc.

227. *Supra*, n. 173.

228. 463 F.2d 304 (D.C. Cir. 1972).

229. 425 U.S. 662 (1976).

Finally, I opt for primary resort to the administrative process for vindication of individual rights because I expect the executive order program to remain in effect. The proposition that the President with a "stroke of the executive pen" can eliminate the Executive Order program prohibiting employment discrimination is politically impracticable and legally suspect.

Nullification of Affirmative Action With the Stroke of the Executive Pen?

Professor James S. Blumstein of the Vanderbilt University School of Law, in discussing the Firestone Tire and Rubber Company's challenge to the validity of the Affirmative Action Program under Executive Order 11,246, asserted that "Each President has the Constitutional duty to determine the proper balance of power between the legislative and Executive Branches. Since the Affirmative Action Program is completely a product of executive action, the new administration is in a position to annul the program with a stroke of the executive pen. Then it would be up to Congress to take the initiative, if it chose, to establish such Affirmative Action policies."[230]

The aforementioned statement suffers from a multiplicity of shortcomings. With regard to the balance between the legislative and executive branch it is the Court which draws the lines. While the Affirmative Action Program originally involved the act of the President alone,[231] subsequent to the Kennedy order, beginning with Title VII of the Civil Rights Act of 1964, the Affirmative Action Program became a product of executive and legislative action. In subsequent Congressional ratifications of the budgets of the Department of Labor, after extensive debates over the Affirmative Action Program, it is clear that Congress, with specific knowledge, has continued those activities until the present day. Moreover, when Title VII of the Civil Rights Act was revised in 1972, whatever imperfections might have infected the original Affirmative Action of the Executive were cured by substantive action of Congress. Not only did Congress reject crippling amendments to the President's existing program, but Congress also enacted positive law which gives Affirmative Action obligations statutory status.[232] In pass-

230. *Wall Street Journal*, November 28, 1980, at 10, column 4.

231. President Kennedy issued Executive Order 10,925 which first clearly contained the Affirmative Action obligation. Note 2, *supra*.

232. Section 718 of the Civil Rights Act of Title VII as amended in 1972:

SPECIAL PROVISION WITH RESPECT TO DENIAL,
TERMINATION AND SUSPENSION OF GOVERNMENT CONTRACTS

ing the Vocational Rehabilitation Act of 1973[233] and the Veterans Readjustment Act of 1974[234] Congress provided for affirmative action, albeit limited, for three new classes and affixed their administration to the existing structures in the Labor Department. This is clear Congressional *reliance* on the continuation of the program which it had previously approved.

If that were not enough justification, in 1978 President Carter substantially reorganized these civil rights efforts and submitted to Congress, in Reorganization Plan No. 1,[235] a total overhaul of the program. It provided for phased adjustments in the entire civil rights endeavor and consolidated the affirmative action activity in the Department of Labor rather than in the contracting agencies which under successive Executive Orders had primary responsibility for enforcing the contractual obligations since 1961.

We make occasional reference to the truism that Presidential Executive Orders, validly issued, have the force and effect of law, and remain in place like acts of the Congress until changed by the President. However, no more delicate area of government exists than the Constitutional limits to the President's power to execute as it may collide with the power of Congress to legislate and determine what there is for the President to act upon.

Mr. Justice Jackson, concurring in *Youngstown Sheet & Tube Company v. Sawyer*,[236] noted:

> A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. . . . A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive

Sec. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of Title 5, section 554, and the following pertinent sections: *Provided*, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: *Provided further*, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

233. Pub. L. No. 93-112 §§ 501-04, 87 Stat. 390-94 (1973).
234. 38 U.S.C. 2012 and 2014.212 (1976). 3 C.F.R. 321 (Jan. 1, 1979).
235. 3 C.F.R. 321 (1978).
236. 343 U.S. 579 (1952).

> because of the judicial practice of dealing with the largest questions in the most narrow way.[237]

He also noted that Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.[238] Jackson postulated three categories of Presidential power. In dividing, simplistically by his own admission, those powers into three categories, he noted that 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 the second category, Justice Jackson noted that when the President acts in absence of either 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 quiesence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility.

He asserted the President is at his lowest ebb in the third category when his act is incompatible with the express or implied will of Congress and in that circumstance he can rely only on his own constitutional powers minus any constitutional powers of Congress over the matter.[239]

I suggest that a review of the history of the Presidents' Executive Orders *as they relate to employment discrimination* put them in an almost unique category. As Justice Rehnquist, in *Dames and Moore v. Regan*,[240] noted:

> Although we have in the past and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful . . . that 'The great ordinances of the Constitution do not establish and divide fields of black and white.' . . . and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeon-holes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.[241]

It seems to me a program which has been in existence since 1941, albeit pursuant to the original initiative of a president, is hardly a candidate for presidential cancellation with a stroke of the pen. The presi-

237. 343 U.S. at 634, 635.
238. *Id.* at 635.
239. *Id.* at 635-38.
240. 101 S. Ct. 2972 (1981).
241. 101 S. Ct. at 2981-82.

dents and the congresses over four decades have indeed constructed a three-legged stool which demonstrates the "interdependent nature of the tripartite structure established by the Constitution."[242] Clearly, it is within presidential authority to initiate programs which would lead to elimination of his involvement in private employment discrimination, and Congress may choose to handle the entire problem differently.[243] However, given the past interdependence and reliance by the Congress on the continued existence of the executive order initiative, at the very least, the President would be advised to act with the concurrence of Congress.

The Executive Reorganization Act[244] would have been the ideal vehicle for proposed changes in the executive order program on employment discrimination. President Carter used it in 1978. However, Congress has not revived, as yet, the presidential reorganization authority which expired in 1981.[245] Under the circumstances, as a practical, rather than legal or constitutional matter, the President may be limited to more traditional legislative approaches to changes in this area of law, or to seeking revitalization of the reorganization authority. The risks of attempting a "stroke of the pen" approach to employment discrimination seem to involve potential costs which far outweigh any benefits to the presidency.[246]

The Final Maturity

The final maturity in administrative enforcement of Executive Order 11,246 would be hastened if the President or the Congress reorganized the Civil Rights functions so that there is an orderly administration of the equal employment field. The President, in Reorganization Plan Number 1 of 1978, took some steps in the direction toward consolidation. His message suggested that further consolida-

242. *See* Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Powers*, 39 U. CHI. L. REV. 723, 758 (1972).

243. An argument can be made that the Congress can not *prohibit* the President from acting to insure that the federal government does not aid and abet private discrimination. The Constitution, in Article II, enjoins the President to take care that the Constitution and laws of the United States are faithfully executed. Discrimination is prohibited by the thirteenth, fourteenth, fifteenth, and fifth amendments to the Constitution. Arguably the President has the independent, constitutional responsibility to insure that the executive branch does not contribute to private discrimination.

244. 5 U.S.C. 901-912 (1966).

245. 5 U.S.C. 905(b), (1980).

246. *See* Broff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1 (1982) for an excellent discussion of presidential powers and judicial review, and *Symposium on Cost-Benefit Analysis and Agency Decision Making: An Analysis of Executive Order No. 12,291*, 23 ARIZ. L. REV. 4 (1981) which discusses a host of relevant issues.

tion would be instituted if the 1978 efforts demonstrated that this would be feasible. Of concern earlier was the lack of sufficient administrative experience and expertise, and to some extent, credibility. The President did, however, give the EEOC what has turned out to be significant influence, if not power, in giving it the coordinating role for all federal equal employment opportunity efforts.[247]

Two small goals remain: 1) transfer to the EEOC the Office of Federal Contract Compliance functions which in the 1978 order were consolidated in the Labor Department; and 2) delegate, or direct the Justice Department to delegate, to the EEOC the authority under Title 28 of the United States Code[248] to go into court to enforce the contractual obligations under the Executive Order.

Such a consolidation would take care of a number of difficulties. To the extent that deferral of individual complaints filed under the Executive Order to EEOC for processing under Title VII while retaining jurisdiction creates an awkwardness, all complaints, individual or systemic, would then go to the same agency. Once the Commission received the complaint it would then decide which avenue to take: a) pursue the matter as an individual complaint under its pre-enforcement Title VII procedures, or b) pursue it as a systemic or compliance matter under its new Executive Order processes with the ultimate sanction being debarment, cancellation or termination, or a combination of both.

If the Justice Department delegated enforcement of the contractual obligations, the General Counsel of the EEOC could litigate specific enforcement and cancellation matters, as well as Title VII matters. Where individual actions did not warrant the "H bomb" relief of cancellation or debarment, the General Counsel, after a finding of cause by the Commission, could pursue the matter as a Title VII case which the General Counsel rather than the complainant would then litigate.[249]

There would be a side benefit to such a move. It would provide all

247. President's Reorganization Plan 1 of 1978, 3 C.F.R. 321 (1978).

248. 28 U.S.C. § 510 (1976).

249. The Senate Committee on Labor and Human Resources recently released a report, after oversite hearings on Executive Order No. 11,246, which calls for a new executive order, or if its recommendations are not heeded, enactment of a statutorily based federal contract compliance program. The report concludes there is a need for an executive order program so long as it is not duplicative of other federal activities or [does not] discourage participation. 110 LAB. REL. REP. 28 (BNA) (1982). The suggestions in this article are not inconsistent with the reported recommendations of that Committee regarding administrative structure, *except* I suggest absorption of OFCCP by EEOC.

five EEOC Commissioners with greater substantive duties to perform. Under the rules, the OFCCP process requires hearings by Administrative Law Judges and then referral to the Secretary of Labor for his concurrence or modification as the last step in the process. Consolidation in EEOC could convert the Commission into a *bona fide* adjudicatory body. In Executive Order cases, it could perform an adjudicatory function much like that performed by the National Labor Relations Board under the National Labor Relations Act. It seems to me this would give added strength to the Executive Order process.

In addition, consolidation, with the exception of leaving the actions against states with the Attorney General, would provide plaintiffs and respondents alike with "one-stop-shopping." It would facilitate the development of uniform interpretations of substantive law and permit a more efficient administration of all equal employment opportunity laws which should be used to reinforce each other. The government would speak virtually with one voice.

On the main theme of this paper, a coordinated and centralized administrative process would enhance and hasten more rapid progress toward administrative maturity.