Administrative and Judicial Nullification of Federal Affirmative Action Law

Russell W. Galloway Jr.
ADMINISTRATIVE AND JUDICIAL NULLIFICATION OF FEDERAL AFFIRMATIVE ACTION LAW

Russell W. Galloway, Jr.*

INTRODUCTION

In the past few years, the concept of affirmative action has generated substantial public interest and debate. Civil rights advocates have urged that affirmative action is a necessary method for neutralizing the preferences enjoyed by white males in our society and for eradicating the continuing effects of past racial and sexual discrimination. Opponents have replied that affirmative action is itself an illegal form of "reverse discrimination" which should be eradicated as soon as possible.¹

In the midst of this debate, an important aspect of the issue tends to be overlooked, namely, the degree to which existing affirmative action requirements are being undercut by reluctant administrators and judges. There is much evidence with regard to the affirmative action compliance system which suggests that "administrative nullification" is occurring, i.e., that the official compliance agencies are failing to enforce applicable regulations.² This article will describe the pattern of administrative nullification, illustrate the judicial response to that pattern, and propose needed changes in the judicial review of the federal compliance system.

FEDERAL CONTRACTORS AND AFFIRMATIVE ACTION

Executive Order 11246

The federal affirmative action compliance system is based upon Executive Order 11246,³ the most recent in a series of executive orders dealing with the employment practices of federal contractors.⁴ The first of these orders was issued by Presi-

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1. Cf. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 668 (1976) (California Supreme Court struck down affirmative action admissions program of University of California at Davis Medical School as constituting reverse discrimination).

2. See text accompanying notes 24-59 infra.


4. For more thorough discussions of the history of the federal affirmative action
dent Franklin D. Roosevelt in 1941. After modifications by Presidents Roosevelt, Truman and Eisenhower, the concept of "affirmative action" was introduced by President Kennedy in 1961. Executive Order 11246, was issued by President Johnson in 1965 and was amended by him in 1967 to prohibit sexual as well as racial discrimination.

Executive Order 11246 mandates that a specific "equal opportunity provision" be inserted in the body of all federal contracts. The explicit requirement that the contractor undertake affirmative action to ensure that all persons are given equal opportunity for initial employment, training, promotions and all other terms and conditions of employment is the most important portion of the provision.

Enforcement responsibility is delegated by the terms of the Executive Order to the Secretary of the Department of Labor. In carrying out this responsibility, the Secretary of Labor has issued administrative regulations which have the force and effect of statutes enacted by Congress.

The most important of the regulations issued pursuant to Executive Order 11246 is Revised Order No. 4. This order describes in detail the written affirmative action program system, see, e.g., Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964); Legal Aid Soc'y v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974), appeal docketed sub nom. Castillo v. Usery, No. 74-3234 (9th Cir. 1974); Nash, Affirmative Action under Executive Order 11246, 46 N.Y.U.L. Rev. 225 (1971).

8. Section 202(i) of Executive Order 11,246, 30 Fed. Reg. 12,319 (1965), states: The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.
9. Section 201 of Executive Order 11,246, 30 Fed. Reg. 12,319 (1965), states: The Secretary of Labor shall be responsible for the administration of Parts II [covering service and supply contractors] and III [covering construction contractors] of this Order.
11. 41 C.F.R. § 60-2 (1976). In late 1976, the Department of Labor published a notice of proposed rule-making which contained proposed regulations which would, if adopted, substantially modify Revised Order No. 4. The proposed regulations have encountered substantial opposition from civil rights groups and have not been finally adopted.
(AAP) required of federal contractors having contracts exceeding $50,000 and fifty or more employees. Revised Order No. 4 converts the general requirement of affirmative action contained in Executive Order 11246 into specific operational requirements designed to eradicate discrimination by federal contractors.

The fundamental requirement of the order is that the contractor must make every good faith effort to correct promptly any underutilization of minorities and women in its work force. "Underutilization" exists whenever the percentage of minorities or women employed by the contractor is lower than the percentage of minorities and women with requisite skills available for that type of work in the applicable labor market area. The AAP which each contractor is required to prepare and annually revise must contain a utilization analysis of its work force. This analysis must set forth, for each job group, a definition of the company's labor market area and a statement of minority and female availability. The utilization analysis must also set forth the present racial and sexual composition of each specific job group. Wherever the analysis indicates that the percentage of minorities or women employed by the contractor is lower than their availability in the labor area, the contractor has the duty to make "every good faith effort" to correct the underutilization in the minimum feasible period of time.

To illustrate how this system works, assume: (1) that X Corporation has one hundred clerical workers; (2) that thirty percent of the employed and unemployed clerical workers in the labor area of X Corporation are nonwhite; and (3) that only ten percent or ten of the one hundred clerical workers at X Corporation are nonwhite. In such a case, X Corporation has an underutilization of nonwhite clerical workers. Therefore, X Corporation has the duty to make every good faith effort to correct the underutilization, i.e., to reach at least the thirty percent availability figure, as soon as possible.

Revised Order No. 4 contains a list of specific actions which should be undertaken as part of the companies' good

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12. Factors to be considered in determining the contractor's "labor area" are set forth at 41 C.F.R. § 60-2.11 (1976).
13. Id.
14. The determination of "availability" is based on a detailed analysis of eight specific factors including population statistics, work force statistics, unemployment statistics and available training and recruitment resources. Id.
15. 41 C.F.R. § 60-2.12(c) (1976).
faith effort to correct their deficiencies. The contractor must commit itself to specific and result-oriented procedures designed to increase materially the utilization of minorities and women where deficiencies exist. It must develop and implement "action oriented programs" designed to correct its deficiencies. It must cooperate with community training, job-development and referral programs, provide training where feasible, cease using discriminatory job requirements, affirmatively recruit minorities and women, and provide career counselling programs for minority and female employees.

The Structure of the Federal Compliance System

The Secretary of Labor created the Office of Federal Contract Compliance Programs (OFCCP) to bear the general responsibility for ensuring that federal contractors comply with the affirmative action requirements of Executive Order 11246. The OFCCP, in turn, has delegated primary responsibility for enforcement of the Executive Order to a number of other federal agencies.

The compliance program has two major segments: construction and nonconstruction. Each federal agency is responsible for ensuring compliance by construction contractors who work on projects receiving federal aid which that agency administers. With regard to nonconstruction, or service and supply, contracts, compliance responsibility has been delegated to several federal agencies referred to as the "compliance agencies." Each compliance agency is responsible for service and supply contractors within a specified part of the private sector. The compliance agency assignments, in a simplified outline, are indicated in Table 1.

16. Id. § 60-2.10.
17. Id. § 60-2.13(f).
18. See, e.g., 41 C.F.R. §§ 60-2.13, .24, .26 (1976). For the sake of clarity it should be noted that Revised Order No. 4 does not apply to construction contractors. Affirmative action requirements concerning construction workers are contained in a series of separate area plans issued by the Department of Labor. These plans normally impose percentage minority work force goals by trade for the entire construction work force of the federal contractor throughout the county in which the federally assisted construction project is located. Construction contractors are not required to have a written AAP for their construction work force. Instead they are required to undertake a series of enumerated efforts to reach the percentage goals set forth in the relevant Department of Labor area plan.
19. The designation of the compliance agencies and definition of the compliance jurisdiction of each are spelled out in an OFCCP directive known as Revised Order No.
TABLE 1

<table>
<thead>
<tr>
<th>Compliance Agency</th>
<th>Assignment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Agriculture</td>
<td>Food processing</td>
</tr>
<tr>
<td>Department of Commerce</td>
<td>Shipyards; water transportation</td>
</tr>
<tr>
<td>Department of Defense</td>
<td>Manufacturing (durable goods)</td>
</tr>
<tr>
<td>Energy Research and Development Administration</td>
<td>Chemicals; glass</td>
</tr>
<tr>
<td>General Services Administration</td>
<td>Utilities; retail stores; paper; wood; real estate; surface transportation (trucking, railroad, bus)</td>
</tr>
<tr>
<td>Department of Health Education and Welfare</td>
<td>Educational institutions; hospitals</td>
</tr>
<tr>
<td>Department of Interior</td>
<td>Oil; mining; rubber; hotels</td>
</tr>
<tr>
<td>Federal Aviation Administration</td>
<td>Airlines</td>
</tr>
<tr>
<td>Department of Treasury</td>
<td>Banks; insurance</td>
</tr>
<tr>
<td>Veterans Administration</td>
<td>Drugs</td>
</tr>
</tbody>
</table>

The basic duty of each agency is to ensure that the nonexempt federal contractors within its jurisdiction fulfill their affirmative action requirements. If the contractor is subject to Revised Order No. 4, the compliance agency must ensure that the contractor has an acceptable AAP and that the AAP is fully implemented. In order to make this determination, the agencies undertake compliance reviews of their assigned contractors. The reviews include two components; a “desk review” of the contractor’s AAP and supporting documents and an “onsite review” to determine whether the program is being implemented. If a company has no program, has an inadequate program, or fails to implement its program, the agency is required to issue an order requesting the company to explain its apparent failure. Where the company does not justify past noncompliance and take the necessary steps to comply with requirements, the agency is required to carry out sanction proceed-

1. The method of assignment is based upon the Standard Industrial Code (SIC), a system which classifies private industry in functional divisions (such as banks, food processing companies, heavy equipment manufacturers, etc.). Thus each compliance agency has responsibility for monitoring the affirmative action programs of all service and supply contractors having certain SIC numbers.
21. 41 C.F.R. § 60-2.2(c) (1976).
ings. Contract termination and declaration of ineligibility for future contracts are available as penalties.

**Administrative Nullification of Federal Affirmative Action Requirements**

Viewed as a whole, the federal regulations are comprehensive and far-reaching requirements which, if enforced, could result in very significant progress toward equal employment opportunity. Thus, it is important that these regulations be rigorously enforced and that federal contractors obey the affirmative action requirements contained in their contracts. If such enforcement were provided, full utilization of minorities and women would soon be achieved.

During recent years, major studies have been made to examine the effectiveness of the compliance system. These studies have uniformly found that the system has not performed effectively. As early as 1970, the United States Commission on Civil Rights (Civil Rights Commission) pointed out that, despite the potential effectiveness of federal affirmative action requirements, very little had actually been achieved. Similarly, in 1975 the General Accounting Office (GAO), the official investigating arm of Congress, concluded that “[t]he Department’s administration of the [Executive Order 11246] program has not been adequate.” In addition, the Civil Rights Commission’s Letter of Transmittal of May, 1976, which accompanies the 1976 report *The Challenge Ahead*, states: “We have found further that Federal programs to provide equal employment opportunity in the affected industries largely have been ineffective.”

These reports, highly critical of federal compliance agencies, support the conclusion that the federal compliance program has failed to secure enforcement of affirmative action

22. Id. § 60-2.2(c)(2).
23. Id.
27. Challenge Ahead, supra note 24, at i.
requirements. At least five separate factors have contributed to this failure.

**Understaffing**

There are far too few compliance officers to cover the vast number of federal contractors. As a result, many contractors are not reviewed at all, and those which are reviewed are not reviewed with sufficient frequency to create a sense of accountability. The 1975 GAO report concluded that "[m]ost compliance agencies were not reviewing an adequate proportion of the contractors for which they were responsible." According to the report, only 14.9% of the compliance universe was reviewed during fiscal 1973. At this rate, without allowing for follow-up reviews, contractors can be reviewed on the average only once every seven years. Table 2 reveals that some of the agencies had even worse records.

<table>
<thead>
<tr>
<th>Agency</th>
<th>Assigned Facilities</th>
<th>% Reviewed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Agriculture</td>
<td>21,200</td>
<td>4%</td>
</tr>
<tr>
<td>Department of Health, Education and Welfare</td>
<td>4,110</td>
<td>9%</td>
</tr>
<tr>
<td>Department of Treasury</td>
<td>6,000</td>
<td>8%</td>
</tr>
<tr>
<td>Veterans Administration</td>
<td>12,480</td>
<td>1%</td>
</tr>
</tbody>
</table>

As a result of staff limitations, the Department of Defense (DOD) rarely reviews establishments with fewer than 200 employees, a group comprising two-thirds of its assigned contractors within the western region, Region 9. Staff limitations were so severe within the postal service during 1974 and 1975 that the agency essentially discontinued its enforcement func-

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29. Id. at 33.
30. Id.; see Legal Aid Soc'y v. Brennan, 381 F. Supp. 125, 137 (N.D. Cal. 1974), appeal docketed sub nom. Castillo v. Usery, No. 74-3234 (9th Cir. 1974) (the United States Department of Agriculture can only review its contractors once every 22 1/2 years on the average).
31. Deposition of Harry Winton (former director of DOD's compliance program for Region 9), at 93, Legal Aid Soc'y v. Brennan, No. 73-282 AJZ (N.D. Cal. 1973) [on file at SANTA CLARA L. REV.] (During the course of litigation at the trial level, the name Legal Aid Soc'y v. Brennan was changed to Castillo v. Usery. To avoid confusion, subsequent references to this case will be cited as Legal Aid Soc'y v. Brennan).
tion altogether. James Southard, director of the General Services Administration (GSA) compliance program for Region 9, estimated that it would require "thousands" of compliance officers to attain "adequate" review coverage; in contrast, the actual number of compliance officers is sixteen. Edward Mitchell, national director of the GSA compliance program, projected that there will be 120 reviews during fiscal 1977 in the entire surface transportation industry, which has an estimated 67,000 nonexempt establishments.

Lack of Compliance Data

There is no general reporting required of federal contractors during the long periods before their first review and between reviews. EEO-1 reports are submitted on an annual basis to the OFCCP, but are not distributed to the compliance agencies. The agencies often receive no work force data on individual contractors except at the time of a complete compliance review. Indeed, they cannot request an assigned contractor to submit its AAP without performing a full review.

Efforts to improve the reporting system have met opposition within the executive branch and from the contractors. Several years ago, for example, the OFCCP developed a self-review and reporting format known as "Forms A and B" to be completed and submitted on an annual basis by contractors. The proposed forms were blocked by the Office of Management and Budget (OMB). Since that time, the OFCCP has stalled

32. Deposition of Clarence Featherson (former national director of the Postal Service compliance program), at 30-32, id. [on file at SANTA CLARA L. REV.]; Deposition of George Sirls (Postal Service compliance officer for Northern California), at 25-29, id. [on file at SANTA CLARA L. REV.]. The Postal Service has since been relieved of its compliance duties. Its contractors have been added to those of the GSA.
33. Deposition of James P. Southard, at 18-19, id. [on file at SANTA CLARA L. REV.].
34. Deposition of Edward Mitchell, at 29, id. [on file at SANTA CLARA L. REV.]. At this rate it would take roughly 560 years to complete reviews of all establishments.
35. EEO-1 reports or Employer Information Reports are work force reports submitted to the Joint Reporting Committee of the Equal Employment Opportunity Commission and the OFCCP, in compliance with OFCCP Directive No. 1. EEO-1 reports contain information concerning the general make-up of a company's employees by race, sex and job category.
36. Deposition of Edward E. Mitchell (national director of GSA's compliance program), at 64, Legal Aid Soc'y v. Brennan, No. 73-282 AJZ (N.D. Cal. 1973) [on file at SANTA CLARA L. REV.]; deposition of James P. Southard (director of GSA's compliance program for Region 9), at 44-45, id. [on file at SANTA CLARA L. REV.].
37. 41 C.F.R. § 60-60.7 (1976).
ADMINISTRATIVE NULLIFICATION

After inquiring into this issue, the General Accounting Office concluded: “Nine years have passed since Executive Order 11246 was issued, but the Department does not yet have a fully operational system to measure the Federal nonconstruction contractors’ progress in improving the employment of minorities and women.” In a system characterized by gross understaffing, the failure to require regular noncompliance data is fatal to efficient enforcement. Without such data, compliance cannot be detected, rational priorities cannot be established, nor can progress be measured.

Failure to Impose Sanctions

Since most contractors are subject to compliance reviews very rarely, if at all, and there is no reporting system to enable agencies to monitor performance during the periods when no reviews occur, most noncompliance is simply undetected. In this situation, the only available method for motivating federal contractors to comply with their affirmative action requirements is to ensure that when noncompliance is detected, it will be punished. The importance of deterrence in the enforcement of equal employment opportunity laws has been explicitly recognized by the Supreme Court in Albemarle Paper Co. v. Moody.

Several steps are involved in the sanction procedures available in cases where federal contractors are in noncompli-

73-282 AJZ (N.D. Cal. 1973) [on file at SANTA CLARA L. REV.].
39. In September, 1976, the OFCCP published a proposed new regulation (to have been codified in 41 C.F.R. § 60-2.13) which could have resolved this problem by requiring the annual submission of AAP summaries and progress reports. 41 Fed. Reg. 40,339 (1976). This regulation, however, was not adopted.
41. In Albemarle, the Court stated that the primary objective of Title VII was prophylactic. In considering an award of backpay, it found that backpay had an obvious connection with this purpose. It stated:

If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that “provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history . . . .”

422 U.S. 405, 417-18 (1975) (citation omitted).
ance with their affirmative action requirements. First, when noncompliance is detected, the compliance officer must notify officials of the appropriate compliance agency and the OFCCP of such fact.\(^4\) The compliance agency is required to issue a “show cause notice” whenever administrative enforcement is contemplated.\(^4\) Thereafter, if the contractor fails to show good cause for noncompliance or fails to submit an acceptable AAP, the agency is to send to the Director a written request for enforcement proceedings.\(^4\) Finally, sanctions may be imposed unless the contractor convinces an administrative judge or the Director of OFCCP that they should not be.\(^4\) The federal compliance agencies have failed to apply these sanction procedures vigorously. This failure is evident at each of the three procedural levels.

The compliance agencies have issued surprisingly few show cause notices. The 1974 figures for some of the compliance agencies are set forth in Table 3.\(^4\)

**TABLE 3**

**REVIEWS AND SHOW CAUSE NOTICES**

**FISCAL YEAR 1974**

<table>
<thead>
<tr>
<th>Compliance Agency</th>
<th>Reviews</th>
<th>Show Cause Notices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atomic Energy Commission</td>
<td>592</td>
<td>16</td>
</tr>
<tr>
<td>Department of Agriculture</td>
<td>565</td>
<td>12</td>
</tr>
<tr>
<td>Department of Commerce</td>
<td>146</td>
<td>0</td>
</tr>
<tr>
<td>General Services Administration</td>
<td>2,523</td>
<td>146</td>
</tr>
<tr>
<td>Department of Interior</td>
<td>577</td>
<td>5</td>
</tr>
<tr>
<td>Department of Treasury</td>
<td>385</td>
<td>1</td>
</tr>
<tr>
<td>Veterans Administration</td>
<td>148</td>
<td>6</td>
</tr>
</tbody>
</table>

On the basis of such data, the GAO concluded that compliance agencies issued show cause notices in only 1.2% of the total reviews conducted during the period from July 1, 1971 through March 31, 1974.\(^4\) Similarly, the Civil Rights Commission has

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42. 41 C.F.R. § 60-2.2(c)(1) (1976).
43. Id.
44. Id. § 60-2.2(c)(2).
45. Id. § 60-1.26.
46. 1974 ENFORCEMENT, supra note 24, at 392.
47. EQUAL EMPLOYMENT, supra note 24, at 27.
found that the following percentages of contractors reviewed received show cause notices: 1971, 2%; 1972, 2%; 1973, 3.2%; 1974, 3.6%. 48

In the few cases where show cause notices are issued, the agencies almost invariably withdraw the show cause notices and rarely issue notices of proposed sanctions. For example, the Civil Rights Commission found that only two notices of proposed debarment were issued during fiscal 1974 and the first half of 1975. 49 This failure is due, in large part, to a misinterpretation of an OFCCP regulation governing the issuance of notices of proposed sanctions. The regulation requires the issuance of notices of proposed sanctions whenever contractors found guilty of noncompliance are unable to show good cause therefore—regardless of promises of future compliance. The agencies have instead interpreted the regulation as prohibiting the issuance of notices of proposed sanctions in all cases where the contractor submits an acceptable prospective AAP. This interpretation, which was specifically rejected in Castillo v. Usery, 50 allowed contractors to escape sanctions for noncompliance, no matter how severe, merely by submitting a formally correct AAP.

Additional proof concerning the failure of the compliance agencies to use authorized enforcement proceedings is their extremely limited use of sanctions against contractors. On this issue, the Civil Rights Commission found that:

As of February, 1975, only nine companies had been debarred in the 10 years since the Executive Order was issued. . . . Six of the nine debarred companies were small

49. Id. at 298-99.

If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency, upon the approval of the Director, shall immediately issue a notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts pursuant to § 60-1.26(b) of this subchapter, giving the contractor 14 days to request a hearing. If a request for hearing has not been received within 14 days from such notice, such contractor will be declared ineligible for future contracts and current contracts will be terminated for default.

51. No. 73-282 AJZ (N.D. Cal. 1973) (order granting partial summary judgment, Sept., 1976). Castillo v. Usery is the name used both on appeal and in later trial court proceedings in the case formerly known as Legal Aid Soc'y v. Brennan.
specialty construction contractors. . . The withholding of progress payment was authorized in April, 1973, but as of February, 1975, this sanction had never been used.52

The GAO stated that "[t]he almost nonexistence of enforcement actions taken could imply to contractors that the compliance agencies do not intend to enforce the program."53

Conflicts of Interest Within the Agencies Responsible for Enforcement

For several reasons, the institutions responsible for administering the compliance system are not unequivocally committed to effective enforcement of affirmative action. First, a conflict of interest pervades the compliance agencies. Primary responsibility for enforcing Executive Order 11246 has been delegated to the agencies which are also responsible for the procurement function of the federal government; the task of purchasing goods and services for use by the government. Obviously, the compliance and procurement functions involve conflicting interests. Aggressive enforcement of affirmative action requirements could disrupt relations with the contractors supplying goods and services to the government. This is particularly true when it involves imposing sanctions such as contract cancellation, suspension and debarment. For example, it is not surprising that the GSA, which must purchase paper supplies for the entire federal bureaucracy, appears reluctant to terminate contractual relationships with the paper companies over which it has compliance jurisdiction. Similarly, it is difficult to believe that the Department of Defense will dissolve its relationships with defense contractors because of their civil rights posture.

Second, the opposition to effective affirmative action enforcement is not limited to the compliance agencies; it lies at the heart of the enforcement system, within the Department of Labor itself. A striking illustration of this point was the tenure of Secretary of Labor Peter Brennan, executive director of the New York Building Trades Council prior and subsequent to his term as Secretary. During this period, the Department of Labor issued a directive known as the "Brennan Memorandum," which declared that local affirmative action requirements would not apply to construction projects involving federal as-

52. 1974 Enforcement, supra note 24, at 298-99.
In effect, this was an attempt to use federal affirmative action authority to hinder rather than further affirmative action. The Department of Labor’s loyalty to a primary constituency, the labor movement, which is often opposed to affirmative action, creates a conflict of interest that tends to undercut effective enforcement of affirmative action requirements.

Loopholes

The federal compliance system is further weakened by a number of exemptions which cover important components of the compliance universe. The most striking is the de facto exemption of most of the surface transportation industry (trucking, railroad and bus companies) from the requirements of Revised Order No. 4.\(^5\) This order, with its crucial definition of the affirmative action requirement, is applicable only where a contractor has a contract in excess of $50,000. The surface transportation industry, however, uses contracts, known as government bills of lading or GBL's, which are always in small denominations and rarely exceed $50,000.\(^6\) (The average GBL is just over $200.) Therefore, Revised Order No. 4 is inapplicable to nearly 100% of the surface transportation industry. Even if a major contractor does millions of dollars of cumulative government business, it is not covered by Revised Order No. 4. Despite the obvious irrationality of this exemption, the Department of Labor resisted making the modification necessary to bring the industry under Revised Order No. 4 until the eve of trial in Castillo v. Usery.\(^7\)

Another major loophole is created by the de facto exemption of small contractors from review coverage. Under operating procedures adopted by the DOD, facilities having fewer than 200 employees are reviewed only in rare circumstances.\(^8\) Similarly, GSA’s insistence that its compliance officers average 500 employees per review, effectively excludes reviews of most

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55. The legality of this exemption has been the subject of extensive litigation in Legal Aid Soc’y v. Brennan, No. 73-282 AJZ (N.D. Cal. 1973).
56. The national director of the Postal Service compliance program has testified, “I have never seen a $50,000 bill of lading.” Deposition of Clarence Featherson, at 23, id. [on file at SANTA CLARA L. REV.].
57. Under the new regulations, bills of lading are accumulated; if the aggregate amount exceeds or can be expected to exceed $50,000 within a 12-month period the company is within the coverage of the Order. 42 Fed. Reg. 3461 (1977) (to be codified in 41 C.F.R. 60-2.2(a)).
58. See note 31 & accompanying text supra.
small companies. Since the compliance system has no method for obtaining work force data from and doing summary “desk reviews” of these smaller contractors, they escape notice altogether and are in effect totally exempt.

**Judicial Ratification of the Administrative Nullification of Executive Order 11246**

In light of the above-discussed enforcement problems, the courts could help to ensure that federal contractors comply with their affirmative action duties. Since the agencies are either unable or unwilling to require full compliance, the courts could allow minorities and women, the intended beneficiaries of Executive Order 11246, to bring suit against the individual federal contractors and obtain court orders designed to attain compliance. A private cause of action could be implied under Executive Order 11246, allowing private parties to seek damages, specific performance or contract debarment for violations of the standards established by the Order and the implementing regulations. Alternatively, the same result could be accomplished by allowing minorities and women to sue as third party beneficiaries of the affirmative action provisions contained in the companies’ federal contracts.

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60. The Supreme Court has found the eradication of racial and sexual discrimination in employment to be of highest priority. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (emphasis added), where the Court stated: “In the Civil Rights Act of 1964... Congress indicated that it considered the policy against discrimination to be of the highest priority.” In Franks v. Bowman Transp. Co., 432 U.S. 418 (1976), the Court again stated that “in enacting Title VII of the Civil Rights Act of 1964, Congress...ordained that its policy of outlawing...discrimination should have the 'highest priority...'”

61. Although employment discrimination suits against federal contractors are available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 17 (1974), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1974), an action under Executive Order 11,246 has certain advantages. The most important is that relief, i.e., the implementation of programs designed to achieve equal employment opportunity, could be obtained without proof of past discrimination. The duty of federal contractors to take affirmative action does not rest upon a finding of past discrimination. It arises directly from the federal contract and the Executive Order. Far reaching orders based upon federal regulations such as Revised Order No. 4 could be issued solely on the basis of a showing that the contractor has failed to take the affirmative steps specified. In addition, these orders could, in many cases, exceed the scope of relief which could be granted under the above-mentioned statutes on the basis of evidence of discrimination.
The "Private Cause of Action"

The official enforcement mechanism provided for Executive Order 11246 has broken down. It is understaffed, bereft of information, compromised by conflicting interests and encumbered by red tape. In this situation, enforcement of the law depends largely on allowing the persons who are the intended beneficiaries of affirmative action requirements to bring suit directly. There is no shortage of legal authority supporting the right of the intended beneficiaries of affirmative action requirements to bring private enforcement actions. For example, the Supreme Court's concept of the private attorney general allows private parties to bring suit to vindicate the strong public policy against employment discrimination. Alternatively, private persons are entitled to seek judicial enforcement of rules when those persons are members of the class that the rules are designed to protect, and the violations cause the kind of injury that the law is designed to prevent. Moreover, since the affirmative action requirements are contractual in nature and specifically intended to benefit the protected classes, third party beneficiary contract law is also potentially applicable.

Executive Order 11246 is receptive to the use of alternative legal approaches. Section 202(6), the contract provision dealing with sanctions for noncompliance, explicitly authorizes contract cancellation, suspension and debarment. It incorporates by reference an array of specific sanctions listed in section 209, plus sanctions authorized by Department of Labor regulations, and such additional sanctions and remedies as are "otherwise provided by law." Section 202(6) states:

> in the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of Sept. 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.  

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In short, there exists a national policy of highest priority, an urgent need for private enforcement, several available legal theories supporting private enforcement and an underlying law that explicitly invites the use of all means of enforcement. Despite these compelling considerations, the courts have rejected private enforcement of federal affirmative action duties.

The Farmer-Farkas rule. The leading cases on the issue of whether a private cause of action exists to enforce Executive Order 11246 are Farmer v. Philadelphia Electric Co. and Farkas v. Texas Instruments Inc. Since these two cases are almost invariably relied upon in subsequent cases raising this issue, they merit careful scrutiny.

Farmer v. Philadelphia Electric Co. involved a black line-man who was discharged by the Philadelphia Electric Company for allegedly discriminatory reasons. The discharge occurred prior to both the enactment of Title VII of the Civil Rights Act of 1964 and the resuscitation of the Civil Rights Act of 1866; there was therefore no general prohibition of racial discrimination. Plaintiff argued that the defendant's conduct violated the Executive Order's nondiscrimination requirement, applicable to the company by virtue of its federal contracts. After noting that the issues had not been raised before, the court analyzed the Executive Order and concluded that it did not authorize private persons to bring suit against contractors for discrimination.

The court discussed the history of the federal affirmative action system at great length and concluded that Executive Order 11246 had the force and effect of law. It then turned its attention to the issue of private enforcement and articulated three reasons for dismissing the case. First, there was no express statement of intent in the Executive Order or elsewhere to allow private suits against contractors. Second, allowing private persons to sue contractors directly would bypass the administrative process, thus undermining the policy favoring resolution of disputes through "conciliation" between the con-

65. 329 F.2d 3 (3d Cir. 1964).
66. 375 F.2d 629 (5th Cir. 1967).
69. 329 F.2d at 5-7.
70. Id. at 8.
71. Id.
tractor and compliance agency. Third, the court found that plaintiffs had failed to exhaust available administrative remedies by filing a complaint with the responsible federal agency. For a number of reasons, the court's analysis of the private cause of action in the Farmer case should no longer be considered authoritative. First, the case was actually decided on the ground of failure to exhaust administrative remedies, and the discussion of the private cause of action was dictum. Second, the case rests on the now abandoned theory that private beneficiaries of a law cannot sue to remedy violations unless the law expressly or implicitly indicates a positive intent on the part of the enacting body to allow such suits. Recent cases have held that unless there is some indication of contrary intent, or unless private involvement would interfere with enforcement, the class of persons intended to be protected by a law may sue to correct an injury that the law was designed to prevent. Thus, the absence of any indication of presidential intent now leads to the conclusion that the private cause of action does exist. Third, the Farmer court failed to note the broad approach to sanctions expressed in sections 202(6) and 209(a) of the Executive Order, particularly in the language authorizing the use of all sanctions "otherwise provided by law." There is an implication in these sections that all available uses of the Executive Order are to be made.

Finally, the context in which Farmer arose is important. At the time, in 1964, there was no generally applicable prohibition of employment discrimination. Thus, creation of a private cause of action under the Executive Order would have involved a broad change of social policy.

The second leading case disallowing private civil actions

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72. Id. at 8-10. The policy favoring conciliation is established by sections 205 and 209(b) of Executive Order 11,246, 30 Fed. Reg. 12,319 (1965). Similar provisions were present in the predecessor executive order that was under consideration in Farmer.

73. 329 F.2d at 10.

74. The Farmer opinion itself states: "[W]hether a district court could then [after administrative remedies have been exhausted] entertain jurisdiction is not here decided." 329 F.2d at 10. Thus, as the court pointed out in Lewis v. Western Airlines, Inc., 379 F. Supp. 684, 687 (N.D. Cal. 1974), "The question of a private right of action... was therefore expressly reserved by the court in Farmer."

75. E.g., Cort v. Ash, 422 U.S. 78 (1975); Stewart v. Travelers Corp., 503 F.2d 108 (9th Cir. 1974); see Barlow v. Collins, 397 U.S. 159 (1970); cf. Data Processing Serv. v. Camp, 397 U.S. 150 (1970) (a person within the "zone of interests" sought to be protected by a statute has standing to sue for its violation, whether or not an intended beneficiary).

76. See text accompanying note 64 supra.
under Executive Order 11246 is *Farkas v. Texas Instruments Inc.* As in *Farmer*, the plaintiff's allegedly discriminatory discharge and blacklisting occurred prior to the effective date of Title VII. An effort was therefore made to ground the claim against the company on the Executive Order. The court's discussion of the private cause of action was, unfortunately, extremely brief. After quoting at some length from the *Farmer* opinion, the court merely stated its agreement with the conclusion in *Farmer* that "the threat of a private civil action was not contemplated by the orders." The court then noted that plaintiff had filed an administrative complaint, in which proceeding he had been denied relief. The court concluded that the administrative decision was final and not subject to review by a court of law. It dismissed the case for failure to state a cause of action.

The holding of the *Farkas* case can be questioned on the same general grounds as the reasoning in *Farmer*. The court made several observations which, under present law, would no longer lead to the same conclusion. First, it quoted with approval the following language from the *Farmer* opinion: "[T]he threat of a private civil action was not contemplated by the orders." The lack of specific intent to create a private cause of action is no longer viewed as dispositive. The lack of specific intent on the issue is now viewed, absent other considerations, as a basis for granting, rather than denying, the private beneficiaries standing to sue.

The *Farkas* court then postulated that in the absence of other effective remedies, the inference would be strong that a private cause of action should be allowed in order "to give vitality to the contractual assurances of nondiscrimination." It concluded, however, that other effective remedies were available and disallowed the private cause of action on that
Had the court understood the reality of administrative nullification within the compliance program, and had it examined the actual procedures involved in the administrative complaint scheme, it might have realized that the administrative remedies are ineffective and that private enforcement is indispensible "to give vitality" to affirmative action requirements. The court actually articulated one of the most compelling reasons for allowing private enforcement, but then drew the wrong conclusion, since it failed to recognize the extent and effect of administrative nullification in the compliance program.

Given the inadequacy of the federal compliance program, private enforcement is the only hope for insuring that federal subsidies to discriminatory private companies do not continue. Since the Farmer-Farkas rule is outdated, it should no longer be invoked to prohibit private enforcement actions. On the contrary, the intended beneficiaries of Executive Order 11246 should be encouraged to seek enforcement of the affirmative action duties of federal contractors and to litigate if necessary to achieve this end.

Lewis v. Western Airlines. Recently, one case, Lewis v. Western Airlines, Inc., has recognized the defects in the Farmer-Farkas reasoning and articulated the case for the private cause of action.

Plaintiffs in the Lewis case brought an action against Western Airlines alleging racial and sexual discrimination in the airline's employment practices. In conjunction with a Title VII claim, plaintiffs sought relief under Executive Order 11246, naming officials of the responsible compliance agency, the Federal Aviation Administration, as additional defendants. Relief in the nature of mandamus was sought against the federal officials to compel them to enforce the applicable regulations. Defendant Western Airlines moved to dismiss the claim for relief under the Executive Order on the Farmer-Farkas theory that

84. Id.
85. The applicable regulations do not provide a right to a hearing, discovery rights or a right of participation by the complainant. 41 C.F.R. §§ 60-1.21-.27 (1976).
86. Unfortunately, a number of cases decided since Farmer and Farkas have cited the rule against private enforcement of Executive Order 11,246 with approval. See, e.g., Freeman v. Schultz, 468 F.2d 120 (D.C. Cir. 1972); Blaze v. Moon, 440 F.2d 1348 (D.C. Cir. 1971); Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970); Traylor v. Safeway Stores, Inc., 402 F. Supp. 871 (N.D. Cal. 1975).
it created no private cause of action against federal contractors.

In denying the motion to dismiss, the court pointed out that Supreme Court cases subsequent to Farmer and Farkas had changed the law by holding that silence on the issue of private enforcement allowed such enforcement.\footnote{The court stated: Data Processing Service v. Camp . . . and Barlow v. Collins . . . hold that an individual may bring a civil action to enforce or challenge a federal regulatory statute or regulation, even if the statute or regulation do [sic] not specifically confer such a right of action, provided the individual can show he has a personal interest in the outcome of the litigation which is within the zone of interests sought to be protected by the statute or regulation in question. Id. at 688.} The Court then stressed a point overlooked in Farmer and Farkas, namely that the Executive Order and supporting OFCCP regulations anticipated the use of “numerous remedies” to achieve the policy of nondiscrimination.\footnote{Id. at 689.}

The existence of a private cause of action was implicitly acknowledged. The court stated:

Implying a private right of action from a statute or Executive Order should not become a device to undercut effective administrative remedies established by Congress or pursuant to an Executive Order. To maintain a cause of action against Defendant Western Airlines, Plaintiffs will have to show, as they have pleaded, that they have exhausted whatever administrative remedies were reasonably available.\footnote{Id. at 689.}

The court implied that if plaintiffs succeeded in proving that they had exhausted the administrative remedies, they would be able to maintain a cause of action against the airline company.

At this point, when the court had almost held in favor of the private cause of action against federal contractors under the Executive Order, it went on to note:

The only relief plaintiffs seek directly under the Executive Order is an injunction compelling the Secretary of Labor,
the Director of the Office of Contracts [sic] Compliance, and the Federal Aviation Administration to comply with their mandate under the Executive Order and the Regulations. A writ of mandate is available to provide this relief. Legal Aid Society of Alameda County v. Brennan, supra. Because Western Airlines' interests are integrally involved in this proceeding and would be substantially affected by the relief Plaintiffs seek under the Executive Order, it is a proper party to this action. F.R.Civ.P. Rule 19(a)(2). This language implies that the private cause of action is, in actuality, solely against the federal agency and that the company is named only as a "proper party" who might be adversely affected by the claim against the agency. The court found that other relief sought was available under Title VII and other statutes. The Lewis case is nevertheless encouraging since it points out the weakness of the Farmer-Farkas reasoning and implies that a cause of action against federal contractors is appropriate. To date, Lewis v. Western Airlines, Inc. remains the strongest authority for the proposition that private enforcement of Executive Order 11246 against contractors is authorized.

A subsequent case in the Northern District of California, Traylor v. Safeway Stores, Inc. has retreated to the Farmer-Farkas rule. The Traylor court based its analysis on two Supreme Court cases which held that the existence of a private right of action by members of the class of persons intended to be protected by a law depended on the legislative intent and whether private enforcement would be consistent with the underlying purpose of the statutory scheme. According to the Traylor opinion, Executive Order 11246 does not manifest an express or implied intent on the issue of private enforcement, therefore resolution of the issue depends on whether private enforcement would be "disruptive of the administrative scheme" of enforcement. The court rejected the private cause of action on the ground that it would, in fact, be disruptive of the administrative scheme.

91. Id.
92. Id. at 689 n.4.
95. 402 F. Supp. at 875.
96. Id.
This conclusion appears to be incorrect. Administrative nullification is so prevalent within the federal compliance program that there is essentially no meaningful administrative process to disrupt. For example, the United States Department of Agriculture (USDA), the compliance agency responsible for Safeway (the defendant in the Traylor case) and the rest of the food processing industry, has no compliance officers in the entire state of California\textsuperscript{97} and the USDA compliance staff rarely comes to California except in response to private complaints. In addition, it has consistently approved AAP's which did not comply with the requirements of Revised Order No. 4.\textsuperscript{98} Private enforcement, far from being disruptive, appears to be the only hope for enforcement of Executive Order 11246 in the huge California agribusiness industry. By overlooking facts such as these, the courts in \textit{Traylor v. Safeway Stores, Inc.}\textsuperscript{99} and other similar cases\textsuperscript{100} have failed to recognize administrative nullification of Executive Order 11246 and have allowed federal subsidies for private discrimination to continue.

\textbf{The Judicial Creation of Administrative Barriers to the Enforcement of a Basic Constitutional Right}

As the foregoing discussion indicates, the courts have unnecessarily rejected a weapon which could be used against the administrative nullification of Executive Order 11246, namely the private cause of action against federal contractors. To this extent, the courts have ratified the administrative nullification and have become partners in the perpetuation of discrimination by federal contractors.

Executive Order 11246 is concerned with companies holding federal contracts, \textit{i.e.}, companies making major profits from federal tax dollars. In effect, Executive Order 11246 addresses the problem of the perpetuation of discrimination through the equivalent of public subsidies. This adds a constitutional dimension to the issue. It is arguably unconstitutional

\textsuperscript{97} Interviews with William Gladden, then director of the USDA Compliance Program and other USDA compliance officials (1973).
\textsuperscript{98} See, \textit{e.g.}, Legal Aid Soc'y v. Brennan, 381 F. Supp. 125, 139 (N.D. Cal. 1974), appeal docketed sub nom. Castillo v. Usery, No. 74-3234 (9th Cir. 1974), holding that all 29 written affirmative action programs approved by the USDA in early 1973 were illegal since they did not comply with the most fundamental requirements of Revised Order No. 4.
\textsuperscript{100} See note 86 supra.
for public agencies to underwrite private discrimination. The equal protection clause of the fourteenth amendment has in fact been held to prohibit state agencies from contracting with discriminatory private companies for the construction of public buildings. Similar restrictions against becoming “partners” in private discrimination theoretically apply to the federal government by virtue of the fifth amendment due process clause.

Normally, when unconstitutional action by government agencies is alleged, the courts take firm action to provide remedies. However, in this situation the courts have in fact erected barriers to the vindication of fundamental rights. For example, in Hadnott v. Laird, plaintiffs sought to enjoin the Department of Defense from contracting with certain companies which had allegedly persisted in discriminatory employment practices. Instead of allowing plaintiffs to present their evidence, the Hadnott court held that plaintiffs had to file complaints against the contractors and proceed through the administrative machinery under Executive Order 11246. This requirement of exhaustion of administrative remedies is essentially useless because the agencies rarely find against respondent companies. In addition, the hearing procedures lack the compulsory discovery procedures needed to prove the companies’ discrimination. Indeed, the procedures traditionally have not even provided for participation by the complaining parties. Finally, the agencies do not have sufficient staffs to investigate and consider such complaints properly.

In short, Hadnott v. Laird channels the vindication of important constitutional rights through an inept compliance system before allowing full adversary judicial proceedings.


104. See, e.g., Letter from James W. Chin to Russell Specter (May 8, 1976) on file at SANTA CLARA L. REV. Mr. Chin, compliance officer for the Department of Defense, states in his letter: “Minority and Female complainants against government contractors do not have a fair investigation by our office (DCASR, Region 9). If I were to examine the records, I would estimate 95% of the investigative findings have held for the government contractor.”

105. A similar effort to force discrimination claims under the Civil Rights Act of
Thus, Executive Order 11246 has been transformed from a potentially far-reaching affirmative weapon in the struggle against discrimination into an actual barrier against efforts to cut off federal funds to private discriminators. These judicial developments constitute judicial ratification of the administrative nullification of Executive Order 11246.

The Third Party Beneficiary Theory

Another blow to private enforcement of affirmative action requirements, at least in California, was struck in Martinez v. Socoma Companies,106 where the California Supreme Court held that the beneficiaries of the Economic Opportunity Act of 1964,107 could not bring suit as third party beneficiaries to enforce the employment and training provision in federal contracts with private companies. Prior to Martinez, arguments supporting application of third party beneficiary law in the affirmative action context seemed quite promising. California has a statute that specifically provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."108 Since the affirmative action provisions required by Executive Order 11246 are included in federal contracts expressly for the benefit of protected groups, the statute seems to apply.

A lower court case was apparently on point.109 That case involved private enforcement of contract provisions contained in Veterans Administration construction contracts. The contracts required contractors to meet certain specifications in building subsidized housing for veterans. After the houses had been completed and purchased by veterans, the new owners discovered that some of the specifications had been violated. The veterans, who were not parties to the original construction contracts, brought suit as third party beneficiaries to recover damages. The court held that the suit was proper. Since the veterans were the intended beneficiaries of the contract specifications, they could sue under Civil Code Section 1559 to en-

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106. 11 Cal. 3d 394, 521 P.2d 841, 113 Cal. Rptr. 584 (1974).
force the specifications.\textsuperscript{110}

\textit{Martinez v. Socoma Companies} raised a major obstacle to third party beneficiary suits to enforce the affirmative action provisions of federal contracts. Under the Economic Opportunity Act of 1964, the Department of Labor was authorized to fund programs designed to employ and train "hard-core unemployed residents" of certain designated "Special Impact areas." The Department designated East Los Angeles as a special impact area and entered into contracts with several companies under which, in return for substantial federal grants, the companies agreed to employ and train area residents certified as eligible by the Department. Although the companies received nearly $1.5 million in federal funds, they failed to provide the jobs and training specified in the contracts. Plaintiffs, members of the class of persons certified as eligible, brought suit to recover damages.

The California Supreme Court held that plaintiffs had no standing, and dismissed the case. The court framed the issue as whether or not plaintiffs had standing to enforce the contracts as third party beneficiaries. The answer depended on the meaning of section 1559 of the Civil Code which provided simply that "[a] contract, made expressly for the benefit of a third person, may be enforced by him."\textsuperscript{111} The dissent argued that the contract provisions calling for the training and employment were expressly intended for the benefit of plaintiffs and their fellow class members, therefore section 1559 was applicable and the suit was appropriate.\textsuperscript{112}

The majority came to the opposite conclusion. It held that the certified unemployed residents of East Los Angeles could not sue the companies for failure to deliver the promised jobs and training.\textsuperscript{113} To begin, the court noted that section 1559 applies only to persons "expressly" intended to be the beneficiaries of the contract. Rather than simply giving effect to the apparent meaning of the language, however, the court grafted

\textsuperscript{110} Id. at 291, 272 P.2d at 90.

\textsuperscript{111} See note 108 supra.

\textsuperscript{112} Martinez v. Socoma Co., 11 Cal. 3d 394, 409-10, 521 P.2d 841, 851, 113 Cal. Rptr. 584, 595 (1974). As the dissent noted, the contracts in question explicitly described their purposes as follows: "to help find jobs and provide training for thousands of the Nation's hardcore unemployed" and "to provide training and work opportunities for such seriously disadvantaged persons." Id. (quoting from the preambles of the contracts).

\textsuperscript{113} Id. at 407, 521 P.2d at 849-50, 113 Cal. Rptr. at 593-94.
the entire body of common law third party beneficiary theory onto the statute. Under traditional common law rules, only "creditor" or donee beneficiaries can sue as third party beneficiaries; all other beneficiaries are considered "incidental beneficiaries" and may not sue. Without encouragement from the language of the statute, the court imported these common law definitions into section 1559 and found "expressly" to mean not incidentally. Thus, all persons other than creditor and donee beneficiaries are incidental beneficiaries at best, and therefore, are not entitled to sue under section 1559.

Rephrased in these terms, the issue was whether plaintiffs were either creditor or donee beneficiaries. The unemployed residents of East Los Angeles were not creditor beneficiaries, since the government owed them no duty to provide jobs and training. Nor were they donee beneficiaries, since the benefits under the contracts were not gifts. Had they been gifts, the residents could have enforced the promises. Here, however, the benefits were not gifts; the court found that they were a means for carrying out the public policy of alleviating underemployment. It stated that "[t]he benefits of such programs are provided not simply as gifts to the recipients but as a means of accomplishing a larger public purpose." Therefore, the contracts were not enforceable by these beneficiaries.

It would seem that the presence of a "larger public purpose" would make it more important that effective enforcement be allowed. If a government program offering mere gifts would be enforceable by the private beneficiaries, it would seem to follow that a program offering benefits to carry out an urgent public purpose should also be enforceable by the private beneficiaries. The decision of the court, unfortunately, was to the contrary.

The similarities of Martinez to the Executive Order situation are obvious: a government contract; implementation of an important public policy; a call for employment of underemployed groups; and administration by the Department of Labor. Since Martinez did not involve Executive Order 11246, it is not directly controlling with regard to enforcement of affirmative action contract requirements. It may still be possible, by distinguishing the case, to establish third party beneficiary

114. Id. at 400-01, 521 P.2d at 845, 113 Cal. Rptr. at 589.
115. Id. at 401, 521 P.2d at 845, 113 Cal. Rptr. at 589.
enforcement rights for affirmative action requirements. But the chances of success are not great, at least in California.

To summarize, the courts have in many instances ratified the administrative nullification of Executive Order 11246 by rejecting private enforcement efforts. They have rejected the private cause of action against contractors. They have disallowed direct lawsuits based on constitutional grounds to bar the government from contracting with persistent discriminators. And, at least in California, they may have blocked the use of third party beneficiary contract suits. As a result, Executive Order 11246 has been converted from a weapon against discrimination into a shield, diverting complaints of discrimination into an ineffective administration system.

THE RAY OF HOPE — LEGAL THEORIES WHICH STILL PROVIDE A BASIS FOR ENFORCING EXECUTIVE ORDER 11246.

The courts have not entirely disregarded the intended beneficiaries of Executive Order 11246. There are still several viable legal weapons available to upgrade the quality of the federal compliance program.

As a preliminary matter, it is important to note that disclosure of basic compliance data necessary for enforcement can in theory be obtained pursuant to the Freedom of Information Act. This act established the general rule that any identifiable document in the possession of the federal government must be disclosed, upon payment of certain costs, unless it is within the scope of one of the several exceptions set forth in the Act. Although the issue has not been settled, the majority of lower federal courts have held that the documents containing the most important compliance data concerning federal contractors are subject to disclosure.

Several documents are needed to determine whether federal contractors and compliance agencies are complying with

116. For example, the court stressed the fact that the contract in Martinez had a provision for liquidated damages payable to the government. This, the court felt, indicated an intent to limit liability to the liquidated amount. 11 Cal. 3d at 402, 521 P.2d at 846, 113 Cal. Rptr. at 590. No such provision appears in federal affirmative action contract provisions.


applicable regulations. First, work force statistics are necessary. The most important work force statistics are EEO-1's (Standard Forms 100).\textsuperscript{119} EEO-1's of federal contractors must be disclosed upon request.\textsuperscript{120} The contractor's AAP's are also needed. These must also be disclosed if the agency has copies.\textsuperscript{121} Compliance review reports prepared by the compliance agency assigned to the case are necessary, and must be disclosed.\textsuperscript{122} In short, it is possible to obtain the basic data needed to detect at least the most serious noncompliance by federal contractors and compliance agencies.

Assuming one has obtained the relevant compliance data and can prove that noncompliance exists, enforcement must somehow be achieved. As the discussion in the preceding section shows, it is probably not possible to sue the company directly and obtain orders requiring it to comply. An alternative route, is available, however, by bringing an action against officers of the responsible federal agency.

There are several jurisdictional bases available for actions to compel compliance personnel to obey applicable regulations. First, if a public official violates a specific regulation, an order in the nature of mandamus can be obtained compelling the officer to comply with the regulation.\textsuperscript{123} Second, judicial review of the administrative action can be obtained under the Administrative Procedure Act\textsuperscript{124} (APA). Under this statute, the courts have power to enjoin agency action that is not in accordance with law, or is an abuse of discretion.\textsuperscript{125} Third, the general jurisdiction of the federal district courts over federal questions involving more than $10,000 can also be invoked.\textsuperscript{126} Although these are technically different jurisdictional grounds, the arguments presented are the same, regardless of the jurisdictional basis of the action. They will therefore be treated as one, a mandamus-APA action.

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\textsuperscript{119} & See note 35 \textsuperscript{supra}.
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\textsuperscript{120} & Sears, Roebuck & Co. v. General Serv. Administration, 509 F.2d 527 (D.C. Cir. 1974); Legal Aid Soc'y v. Shultz, 349 F. Supp. 771 (N.D. Cal. 1972); 41 C.F.R. § 60-40.2(b) (1976).
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\textsuperscript{125} & Id. § 706(2)(A) (1966).
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\textsuperscript{126} & 28 U.S.C. § 1331 (1976). The federal question is whether the duly enacted federal Executive Order and regulations are being violated by federal officials.
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These bases can be reconciled with the Farmer-Farkas rule precluding a private cause of action to enforce the Executive Order. The cases hold only that there is no private cause of action against the contractors. They do not reject a claim for relief against federal officials who violate the law.\textsuperscript{127}

It may be helpful to spell out explicitly why the Farmer-Farkas rule prohibiting private suits against federal contractors under Executive Order 11246 does not prevent suits against federal compliance officials. A variety of considerations justify distinguishing between private suits directly against contractors and mandamus-APA actions against compliance officials.\textsuperscript{128}

First, the Farmer-Farkas courts were concerned that allowing direct suits against federal contractors would encourage private parties to by-pass administrative enforcement, thereby thwarting the Executive Order's preference for resolution of disputes through conciliation and mediation.\textsuperscript{129} Analysis of the Farmer opinion leaves no doubt that this was a major factor in the formulation of the rule. Whether or not this concern is justified in the context of suits against contractors, there is no danger that mandamus-APA actions will by-pass the administrative process or thwart conciliation efforts. Since the conciliation requirements are included in the rules which plaintiffs in a mandamus-APA action seek to enforce, a court order requiring compliance with these rules will not avoid the conciliation process. To the contrary, mandamus orders requiring the agencies to carry out their enforcement duties should result in an

\textsuperscript{127} Legal Aid Soc'y v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974), appeal docketed sub nom. Castillo v. Usery, No. 74-3234 (9th Cir. 1974). The distinction between a private cause of action against particular contractors and a mandamus action against the responsible compliance officials was also recognized in Traylor v. Safeway Stores, Inc., 402 F. Supp. 871, 876 (N.D. Cal. 1975), where the court stated:

Plaintiffs' reliance on Legal Aid Society of Alameda County v. Brennan ... is simply misplaced. That case involved suit for mandamus to require the relevant officials to enforce the provisions of the executive order, not the claim of an individual seeking recovery for injuries allegedly suffered as a result of a contractor's noncompliance. The court specifically stated that the cases refusing to imply a private right of action were simply inapplicable ... an unchallengable conclusion in view of the different policy considerations.

\textsuperscript{128} The issue whether lawsuits will be allowed against federal compliance officials to enforce duties imposed upon them by Executive Order 11,246 and its supporting regulations, has recently been presented to the Ninth Circuit and is now awaiting decision. Legal Aid Soc'y v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974), appeal docketed sub nom. Castillo v. Usery, No. 74-3234 (9th Cir. 1974).

\textsuperscript{129} See note 49 supra.
increase in conciliation. For example, court intervention in *Legal Aid Society v. Brennan*\(^{130}\) resulted in conciliation between USDA and twenty-nine contractors which would probably not have been achieved but for the suit. The concern for conciliation therefore favors mandamus actions.

Second, there is an important difference between enforcement suits against individual contractors and suits against federal compliance agencies in terms of the burden on the courts. Recognition of a private cause of action against federal contractors might increase the burden on the courts by inviting a substantial number of suits against companies accused of violating Executive Order 11246. Mandamus actions against compliance officers to compel enforcement of the Executive Order would tend to reduce rather than increase the burden on federal courts. One of the heaviest burdens on federal courts since the mid-1960’s has been employment discrimination litigation. Some of this burden could be removed if compliance agencies forced federal contractors to fulfill their affirmative obligation to eradicate discrimination. Effective compliance enforcement could mean fewer suits under Title VII. Moreover, the mandamus action involves a multiplier effect that would be beneficial in reducing court burdens; a single mandamus order requiring a compliance agency to perform its enforcement duties could affect the thousands of contractors subject to that agency’s jurisdiction.

Third, there is an important distinction between the *Farmer-Farkas* private cause of action and a mandamus action in terms of effecting a remedy for the problem addressed. In the mandamus context, the problem is the failure of a compliance agency to enforce Executive Order 11246 and its regulations. Such failures normally affect all of the agency’s assigned contractors. Such a problem cannot be remedied by filing administrative complaints against the affected companies. For example, the violations in the USDA compliance program alleged in *Legal Aid Society v. Brennan*\(^{131}\) involved its supervision of all of the 18,000 contractors assigned to the agency. To handle the problem via complaints against individual contractors could have necessitated 18,000 administrative complaints and the approach would have failed, since the compliance agency did

\(^{130}\) 381 F. Supp. 125 (N.D. Cal. 1974), appeal docketed sub nom. Castillo v. Usery, No. 74-3234 (9th Cir. 1974).

\(^{131}\) Id.
not agree that its actions were illegal. Where the complaint involves discrimination by a specific contractor, the Farmer-Farkas rule requiring individual administrative complaints may have some validity. In the mandamus situation, where the complaint involves the conduct of the supervising agency itself, and by implication all of its assigned contractors, the Farmer-Farkas approach is wholly futile.

Fourth, there is a difference between Farmer-Farkas suits and mandamus-APA actions in terms of the nature of the issue presented for adjudication. In Farmer and Farkas, plaintiffs asked the courts to hear the equivalent of a Title VII action, and determine whether the contractor was guilty of racial discrimination against its employees. In the mandamus-APA situation, the issue is simpler and more manageable; namely, whether the agency is complying with mandatory, clearly defined duties imposed by applicable regulations. In the typical mandamus-APA action, this issue can be resolved by summary judgment without the drawnout complexities that plague Title VII litigation.

Fifth, and perhaps most important, the extension of the Farmer-Farkas rule to the mandamus-APA situation would result in administrative insulation unintended by those cases. The Farmer-Farkas rule, as it originated, was limited to suits against contractors. It therefore left open an avenue for preventing serious administrative lawlessness by the compliance agencies; namely, a mandamus-APA action. Thus, the Farmer-Farkas rule does not insulate administrative lawlessness from judicial review. If the rule is extended to mandamus actions, however, it will deprive the courts of authority to order compliance agencies to enforce their own rules. Such a result would differ drastically from that in Farmer and Farkas; it would release the agencies from their duty to obey OFCCP regulations, by placing the entire federal compliance program beyond judicial supervision.

It is simply incorrect to say that there is no difference between a private cause of action against individual contractors and a mandamus action to compel federal compliance officials to enforce the provisions of the Executive Order and its supporting regulations. To the contrary, the five reasons stated above provide an ample basis for viewing the two kinds of cases differently. Indeed, the reasons which support the rule against a private cause of action cut in precisely the opposite direction when mandamus actions against compliance officials are considered.
Another legal principle, independent of the foregoing, also compels the conclusion that mandamus actions should be allowed under Executive Order 11246. The rule concerning private enforcement of federal law has changed since the *Farmer* and *Farkas*\(^\text{132}\) decisions. The earlier rule did not allow private enforcement unless an express or implied intent to do so could be found in the language or legislative history of the particular law at issue. The new rule, as enunciated in *Cort v. Ash*\(^\text{133}\) and other cases,\(^\text{134}\) permits private enforcement, even absent such intent, where that enforcement aids in achieving the objectives of the law.

If rules concerning private rights of enforcement are applicable in the context of a mandamus action, the test under *Cort v. Ash*\(^\text{135}\) is whether private suits will aid or hinder attaining the objective of Executive Order 11246. Assuming for the sake of argument that *Farmer* and *Farkas* are correct, that private suits against individual contractors would disrupt the enforcement of the Executive Order, the opposite is true with regard to mandamus actions against the agencies. The Department of Labor is charged with the duty of insuring that the Executive Order is enforced. To fulfill this duty, the Department of Labor has prepared a detailed body of regulations. The compliance agencies, however, because of their commitment to other interests and constituencies, fail to obey the regulations. In this situation, since the Department of Labor alone cannot insure enforcement of its regulations, the courts must be able to require adherence to the regulations or the compliance system will collapse.

There is absolutely no doubt that mandamus actions will aid in the enforcement of the Executive Order.\(^\text{136}\) Indeed, they are indispensable, since they offer the only method of forcing compliance agencies to obey the rules promulgated by the OFCCP for the enforcement of affirmative action requirements.

Suits like *Legal Aid Society v. Schultz*\(^\text{137}\) and *Legal Aid
Society v. Brennan are clearly not a panacea for administrative nullification of Executive Order 11246. With the aid of these legal weapons, however, private citizens and groups such as NAACP, the National Organization of Women, IMAGE and Urban League could detect and correct at least some of the most serious examples of noncompliance.

In order to make such mandamus actions more effective, it is proposed that whenever the evidence demonstrates that administrative nullification exists in an executive agency, the scope of review accorded by the judiciary be expanded. The courts should discard their traditional deference and assume a more active role in ensuring that legal rules are enforced. In most instances, courts are reluctant to order administrative agencies to act in a specific way, and for good reason. Agencies are often more able to determine the best way to deal with problems in their area of responsibility. Relative to the administrative agency, courts have limited monitoring ability and very little administrative capacity to enforce complex remedies. Indiscriminate judicial forays into areas of government run by executive agencies are not appropriate.

There are fact situations, however, which warrant closer judicial scrutiny than others. For example, during the 1950’s and 1960’s, the Supreme Court recognized that claims involving discrimination against insular minority groups, including racial minorities, required special attention, since these groups, as a result of their minority status, could not obtain redress through the majoritarian political process. Thus, issues such as school desegregation became a special concern of the judiciary. It was recognized that the executive branch cannot be relied upon to resist majoritarian pressure and enforce unpopular laws, therefore the judiciary must play a more active role in securing enforcement of these laws.

The courts should create another exception to the traditional rule of judicial deference in cases where there is substantial evidence that administrative nullification is occurring. Typical patterns of administrative nullification such as those

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139. See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), which first raised the question “whether prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry.”
described above can serve as tests for determining whether nullification exists. If a plaintiff can demonstrate that these patterns are present, the court should suspend the normal assumption of administrative good faith and scrutinize the conduct of the administrative agency more closely. The burden of proof should perhaps shift to the agency, which would then have to demonstrate a convincing basis for its decision.

It should be noted that expansion of judicial supervision over the executive branch is not an unequivocal blessing. At the same time, the executive branch must not be allowed to nullify duly enacted laws. A major duty of the judiciary is to remedy the violation of legal rules, and it should fulfill that duty when the executive branch effectively nullifies laws which it is charged with enforcing.

CONCLUSION

The federal affirmative action system is potentially a strong force in the struggle to eliminate employment discrimination. This potential remains largely unrealized because the agencies charged with compliance responsibility have nullified rather than enforced the law. In this situation, the success of the compliance program depends, in large part, on the willingness of the courts to order federal contractors and compliance agencies to obey their legal duties. To an unfortunate degree, the courts have failed to perform this function. They have rejected suits against federal contractors accused of violating affirmative action duties, and have refused to allow minorities to seek orders requiring contract debarment. In so doing, the courts have become passive partners in the perpetuation of private discrimination, and have converted Executive Order 11246 into a barrier against legitimate efforts to cut off federal funds to discriminatory contractors.

It is proposed that the courts should play a more active role in securing compliance with Executive Order 11246. The anomalous rule prohibiting private enforcement suits against contractors should be overturned. Vigorous action to compel federal officials to carry out their enforcement duties is necessary to achieve compliance. Moreover, in order to offset executive lawlessness, the courts should discard judicial restraint and deference where there is evidence that administrative officials are nullifying rather than enforcing the law. It has often been said that the government is the omnipresent educator.
The failure of the government itself to obey the law teaches that lawlessness is an appropriate form of behavior. It is long past time for the federal government to end executive lawlessness within the affirmative action field.