Nullifying Affirmative Action Through Deregulation

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This article discusses the nullification of federal affirmative action requirements proposed by the Reagan Administration. After describing the federal contract compliance program, the authors explain how the proposed regulations would, if adopted, effectively dismantle that program by weakening performance standards, diluting reporting and monitoring requirements, and creating obstacles to the effective use of remedies. Possible litigation theories for challenging this threatened nullification of affirmative action are discussed.

INTRODUCTION

Executive Order 11246[1] requires federal contractors to insure equal employment opportunities for racial and national minorities, women, and other protected groups. However, the Reagan Administration is currently dismantling the federal affirmative action compliance system by applying its master theme of deregulation. If the Administration's proposals are put into effect, many of the most important regulations will be eliminated and others will be weakened. Administrative officials are declining to enforce existing rules. Although the avowed purpose of the deregulation is to protect federal contractors,[2] the result is harmful to the minorities and women who are the intended beneficiaries of the

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[1] 30 Fed. Reg. 12,319 (1965). The Executive Order and the implementing regulations are explained in Section I *infra*.

[2] 46 Fed. Reg. 42,968 (1981) ("Our review of the regulations has indicated a need to reduce the compliance burden placed upon covered Federal Contractors").

Executive Order. This is a classic case of a regulatory agency administering a program in the regulatees' interest rather than in the interest of the intended beneficiaries.

This article describes the deregulation and suggests possible legal theories to challenge its illegal elements in the courts. Following a brief discussion of the history and structure of the federal affirmative action compliance system, the article will demonstrate that the deregulation undercuts each of the components necessary for the proper functioning of a regulatory program. The essential ingredients of any regulatory program are (1) specific and mandatory performance standards for regulatees, (2) reporting and monitoring systems for detecting noncompliance, and (3) enforcement procedures for remedying and deterring noncompliance. The authors submit that the Administration's across-the-board attack on affirmative action will necessarily result in the administrative nullification of the federal affirmative action compliance system.

Next, the article presents three approaches for obtaining judicial review and correction of this administrative nullification. The first approach is to seek an order in the nature of mandamus to enforce those specific and mandatory regulations that remain in effect. The second approach is to seek judicial review pursuant to the Administrative Procedure Act (APA),[3] claiming that federal officials have abused their discretion. This article asserts that, in cases of clear administrative nullification such as this, the courts should set aside their traditional deference to regulatory agencies and exercise intensified judicial review under the APA. The third approach is to seek an order compelling federal officials to comply with applicable rulemaking requirements.

I. BACKGROUND ON THE FEDERAL AFFIRMATIVE ACTION COMPLIANCE SYSTEM

The basic affirmative action requirement for federal contractors is set forth in Executive Order 11246. This order is the most recent in a long series of executive orders going back over a period of more than forty years.[4] The first of the orders was issued by President Roosevelt in 1941.[5] The "affirmative action" obligation was added in 1961 by Presi-

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[3] 5 U.S.C. §§ 701-706 (1976 & Supp. IV 1981) (federal statute governing judicial review of federal administrative agencies).

[4] For a more detailed history of the federal affirmative action compliance system, see Nash, *Affirmative Action Under Executive Order 11246*, 46 N.Y.U. L. REV. 225 (1971).

[5] Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941), which provided: "All contracting

dent Kennedy[6] in response to "an urgent need for increased efforts to promote full equality of employment opportunity."[7] In 1965, President Johnson issued Executive Order 11246, which remains the foundation of federal affirmative action law.

Executive Order 11246 requires companies having federal contracts to "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."[8] Implementing regulations spell out the duties of those federal officials responsible for the enforcement of the Executive Order.[9] These regulations require the federal officials (1) to compel federal contractors to adopt written affirmative action programs[10] (hereafter AAP's), (2) to perform compliance reviews of federal contractors,[11] and (3) to impose sanctions against contractors who fail to develop and implement AAP's that meet the criteria set forth in the regulations.[12]

Responsibility for administering Executive Order 11246 is delegated to the Secretary of the United States Department of Labor.[13] The Secretary is required to adopt rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes of the Executive Order.[14] The Secretary has delegated this responsibility to the Director of the Office of Federal Contract Compliance Programs (hereinafter OFCCP), an office of the Department of Labor.[15]

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agencies of the Government of the United States shall include in all defense contracts hereinafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color or national origin . . . ." The Order further established the Committee on Fair Employment Practices to investigate alleged violations of the Order and to redress valid grievances. *Id.*

[6] Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961). For the first time, this Order required contractors to take affirmative action to insure nondiscrimination, and established sanctions and penalties for noncompliance. Legal Aid Soc'y v. Brennan, 381 F. Supp. 125, 127 n.1 (N.D. Cal. 1974), *aff'd*, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

[7] Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961).

[8] Exec. Order No. 11246 § 202(1), 30 Fed. Reg. 12,319 (1965). Executive Order 11246 was amended in 1967 to include sex-based discrimination within its nondiscrimination provisions. Exec. Order No. 11375, 32 Fed. Reg. 14,303 (1967).

[9] The primary regulations effectuating the Executive Order are 41 C.F.R. pts. 60-1, 60-2 (1980).

[10] *Id.* § 60-1.7 (1980).

[11] *Id.* §§ 60-1.20 to 60-1.25 (1980).

[12] *Id.* §§ 60-1.26 to 60-1.34 (1980).

[13] Exec. Order No. 11246 § 201, 30 Fed. Reg. 12,319 (1965).

[14] *Id.*

[15] 41 C.F.R. § 60-1.2 (1980).

The term "affirmative action" has been defined in regulations issued by OFCCP. These regulations require certain federal contractors to adopt a written AAP for each of their establishments.[16] One important regulation, Revised Order No. 4,[17] sets forth requirements governing the contents of the written AAP's of federal contractors and the steps that compliance agencies must take whenever a contractor's AAP does not satisfy these requirements. Any contractor who does not have a written AAP that satisfies Revised Order No. 4 is in noncompliance with Executive Order 11246.[18]

Revised Order No. 4 is one of the most important equal employment opportunity laws because it translates the basic affirmative action requirement of the Executive Order into specific, concrete rules. Revised Order No. 4 requires each federal contractor to put forth good faith efforts to correct underutilizations of minorities and women in its work force. If enforced, Revised Order No. 4 could make a major contribution toward eliminating the effects of racial and sexual discrimination by companies receiving federal contracts. The vast potential of the Executive Order is evident from the fact that "all told, in 1980, some 350,000 employers across the country were doing business with the federal government in some way, with a total price tag of more than $100 billion and a work force approaching 40 million."[19]

The federal affirmative action compliance system has been plagued with a history of nonenforcement. For example, as early as 1969, the Acting Chairman of the United States Commission on Civil Rights found that the consistent failure to enforce the Executive Order had resulted in the subsidization of racial discrimination by the federal government.[20] In 1976, the Commission on Civil Rights found that federal

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[16] *Id.* § 60-1.40 (1980); *see* note 27 and accompanying text *infra.*

[17] *Id.* pt. 60-2 (1980).

[18] *Id.* § 60-2.2(a) (1980). A contractor is unable to comply with the equal opportunity clause of Executive Order 11246 until an AAP is developed by the contractor and accepted by the government. *Id.*

[19] U.S. DEPT. OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS 3 (Jan. 1981) (copy on file at U.C. Davis Law Review office).

[20] Enforcement of the Executive Order has been seriously deficient, at high cost to the federal civil rights effort. It is the judgment of the Commission that by continuing to contract with employers who practice discrimination, the Federal government not only fails to use a powerful readily available mechanism to help end discrimination in private employment, but in addition spends funds actually to subsidize such discrimination.

Letter from Howard Glickstein, Acting Director of U.S. Comm'n on Civil Rights, to OFCCP, accompanying Commission Report on federal contract compliance system

programs to provide equal employment opportunity in the affected industries have been largely ineffective.[21] Other reports issued by the General Accounting Office and the Commission on Civil Rights reveal continued systematic nonenforcement.[22]

The Carter Administration undertook an extensive study of the federal affirmative action compliance system for the purpose of correcting its deficiencies,[23] and proposed comprehensive revisions of the regulations to improve all three of the essential components of the compliance system.[24] These proposals strengthened the specific performance standards of Revised Order No. 4 and extended its coverage to businesses having aggregate contracts of $50,000 or more. The revisions improved the reporting and monitoring systems by requiring contractors to submit annual reports on their AAP's. Moreover, efforts were made to develop computerized data processing for more efficient utilization of compliance resources and detection of noncompliance. Finally, the Carter Administration proposed to improve the enforcement process by authorizing expedited sanction procedures, by requiring back pay awards in appropriate cases, and by eliminating other obstacles to enforcement.[25]

From the outset, the Reagan Administration has undertaken a systematic campaign to destroy the effectiveness of the affirmative action compliance system. In January 1981, on the day before the most comprehensive proposals of the Carter Administration were to take effect, the Reagan Administration issued an order to freeze them.[26] This

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(Apr. 1969) (copy on file at U.C. Davis Law Review office).

[21] U.S. COMM'N ON CIVIL RIGHTS, THE CHALLENGE AHEAD: EQUAL OPPORTUNITY IN REFERRAL UNIONS, at i (1976).

[22] *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, THE EQUAL EMPLOYMENT OPPORTUNITY PROGRAM FOR FEDERAL NONCONSTRUCTION CONTRACTORS CAN BE IMPROVED (Joint Comm. Print. 1975) (report prepared for Subcomm. on Fiscal Policy of the Joint Economic Comm., 94th Cong., 1st Sess); U.S. GEN. ACCOUNTING OFFICE, MORE ACTION NEEDED TO INSURE THAT FINANCIAL INSTITUTIONS PROVIDE EQUAL EMPLOYMENT OPPORTUNITY (1976); U.S. COMM'N ON CIVIL RIGHTS ANN. REPS., FEDERAL CIVIL RIGHTS ENFORCEMENT (1970-75) (copies on file at U.C. Davis Law Review office).

[23] U.S. DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS TASK FORCE, PRELIMINARY REPORT ON THE REVITALIZATION OF THE FEDERAL CONTRACT COMPLIANCE PROGRAM (Sept., 1977).

[24] *See* 45 Fed. Reg. 86,216-58 (1980) (proposed final rules regarding government contractors and affirmative action requirements).

[25] Examples of improvements include elimination of the show cause notice requirement after breach of conciliation agreements, 45 Fed. Reg. 86,234 (1980), and improvement of reporting forms, 45 Fed. Reg. 86,232 (1980).

[26] 46 Fed. Reg. 9084 (1981). The effective date of the regulations was deferred until

freeze remains in effect to date, and the proposed regulations appear to be dead. Moreover, the Reagan Administration has proposed a number of new regulations[27] which would not only eliminate the major Carter Administration regulations but would also severely weaken many of the critical regulations previously in effect. The next section of this article will describe the Reagan Administration's major efforts to undercut the federal affirmative action compliance system.

II. THE DEREGULATION

To be effective, the federal affirmative action compliance system must contain three components: (1) performance standards, (2) monitoring procedures, and (3) enforcement mechanisms. The elimination or weakening of any one of these components can render the entire compliance program ineffective. First, without performance standards, federal contractors have no guidance in their affirmative action efforts, and federal agencies have no criteria for evaluating compliance. Second, without reporting and monitoring systems, there are no means for detecting noncompliance with performance standards. Finally, without enforcement mechanisms, there is no incentive to carry out the affirmative action requirements. As discussed below, the Reagan Administration's proposal to deregulate affirmative action will, if put into effect, undercut all three of these essential components, necessarily resulting in the nullification of federal contract compliance requirements.

A. Performance Standards

The effectiveness of federal affirmative action law depends upon the existence of specific standards to guide the performance of federal contractors in carrying out the affirmative action mandate. Therefore, the historical trend of the executive order regulations has been toward increased specificity.[28] Experience shows that affirmative action does not

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April 29, 1981 to allow the Department of Labor to review the rules fully before they took effect. *Id.* On August 25, 1981, the Department of Labor further postponed the effective date of the Carter Administration proposals until final action on the Reagan Administration's August 1981 proposals. 46 Fed. Reg. 42,968 (1981). Final action has not been taken.

[27] 46 Fed. Reg. 36,213-36,216 (1981); *id.* at 42,968-43,017 (1981). In July 1982, the Reagan Administration postponed the issuance of the final regulations until after the November elections. Masters, *Release of the Affirmative Action Rules Blocked by Administration Officials*, Legal Times, July 26, 1982, at 1, col. 3 (copy on file at U.C. Davis Law Review office).

[28] The best example of this increased specificity is Revised Order No. 4, 41 C.F.R.

work when left to the voluntary efforts of federal contractors operating without specific and mandatory standards. Moreover, the absence of standards precludes effective enforcement by compliance officials.

The most important affirmative action standards have been codified in Revised Order No. 4,[29] which has now been used through four administrations. The Reagan Administration's proposals, if adopted, will seriously weaken Revised Order No. 4 by drastically restricting its coverage and diluting its content.

1. Coverage

Perhaps the most effective way to nullify the affirmative action requirements of Revised Order No. 4, short of repealing them, is to remove federal contractors from their coverage. The new regulations would do this in at least three ways.

a. Threshold requirements

Traditionally, Revised Order No. 4 has applied to contractors who have fifty or more employees and a federal contract of $50,000 or more.[30] The Reagan proposals change this threshold requirement to 250 employees and a federal contract of $1,000,000 or more.[31] This would radically reduce the coverage of Revised Order No. 4. OFCCP estimates that the number of companies covered by written AAP's would be reduced from approximately 16,767 to approximately 4,143.[32] This amounts to an exemption of slightly more than 75 percent of the previously covered contractors. The effect is probably far worse than the government's estimate; representatives of the business community have stated that the government's figure is an astonishingly small estimate, since other reports indicate that the government contracts with over 300,000 companies.[33] Undoubtedly most of the contractors left out

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pt. 60-2 (1980), which contains numerous detailed provisions defining affirmative action and detailing implementation and enforcement procedures.

[29] *Id.* pt. 60-2 (1980); *see* notes 17-18 and accompanying text *supra.*

[30] *Id.* § 60-1.40(a) (1980). This regulation reads, in part:

> Each contractor who has 50 or more employees and (1) has a contract of $50,000 or more; or (2) has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) serves as a depository of Government funds in any amount; or (4) is a financial institution which is issuing and paying agent for U.S. savings bonds and savings notes in any amount, shall develop a written affirmative action compliance program for each of it's [sic] establishments.

[31] 46 Fed. Reg. 42,987 (1981).

[32] *Id.* at 42,978 (1981).

[33] Opinion letter from Seyfarth, Shaw, Fairweather & Geraldson, Attorneys at Law,

of the government's estimate are small and therefore would be exempted from coverage under the new regulations.

These new regulations not only eliminate from coverage a high percentage of federal contractors but also exempt almost completely certain major classes of employers such as universities, trucking companies, and real estate businesses. Universities rarely have government contracts of $1,000,000 or more. Trucking companies and real estate businesses rarely have either 250 employees or $1,000,000 federal contracts.

b. Aggregation

For years, proponents of affirmative action have claimed that a major weakness of the government's program is its failure to require aggregation of separate federal contracts in determining the coverage of Revised Order No. 4. Without aggregation, a contractor receiving numerous smaller contracts totaling well over $50,000 will not be subject to the requirements of Revised Order No. 4 if no single contract exceeds $50,000. The Carter Administration's proposed regulations remedied this problem by requiring aggregation. Contractors would have been covered by Revised Order No. 4 if they received cumulative federal contracts amounting to $50,000 or more in one year.[34] The Reagan Administration's proposed regulations omit this requirement. Contractors would only be covered if they have a single contract of at least $1,000,000. The result is to exempt numerous contractors, including, for example, most universities and growers of agricultural products.

c. Public Utilities

Another weakness of the federal affirmative action system has been the exemption of the nation's public utilities from the requirements of Revised Order No. 4. The Carter Administration proposed to remove this exemption.[35] However, the Reagan Administration would delete this proposal, leaving the nation's public utilities free from the duty to develop and implement written AAP's under Revised Order No. 4.

2. Required content of AAP's

Revised Order No. 4 has traditionally required that written AAP's

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entitled "Preliminary Analysis of Proposed Changes in OFCCP Regulations," at 7 (June 22, 1981) (submitted to U.S. Department of Labor in response to OFCCP's solicitation of general comments on the Administration's proposals) (copy on file at U.C. Davis Law Review office).

[34] 45 Fed. Reg. 86,237 (1980).

[35] *Id.* at 86,231 (1980).

have three major elements: a utilization analysis to determine job groups in which women and minorities are underutilized, goals and timetables to correct the underutilizations, and action oriented programs to reach the goals. The Reagan Administration proposes to weaken each of these three requirements. Moreover, the new regulations further dilute the required content of AAP's by allowing certain contractors to adopt abbreviated and consolidated AAP's.

a. Utilization analysis

Utilization analysis is the underpinning of affirmative action programs since affirmative action, including goals, timetables, and action oriented programs, is not required unless underutilization of minorities or women exists. Revised Order No. 4 defines underutilization as having fewer minorities or women in a particular job group than would be reasonably expected by their availability.[36] The Reagan Administration proposes to redefine underutilization to excuse contractors from undertaking affirmative action substantially before bringing the percentage of minorities and women up to actual availability. The proposals would accomplish this by providing that no underutilization exists if minority and female representation in a job group is at least 80 percent of their availability.[37] The Commission on Civil Rights objected to this revision on the ground that contractors would no longer be encouraged to strive for full parity between availability and actual employment of minorities and women.[38]

The Administration has indicated a willingness to erode the utilization analysis requirement even further by proposing to redefine its job grouping and availability components. OFCCP recently issued a notice

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[36] 41 C.F.R. § 60-2.11(b) (1980). This section lists a number of factors that contractors must consider in determining whether minorities or women are being underutilized in any job group, e.g., the general availability of minorities and women having requisite skills in the immediate labor area, the availability of promotable and transferable minorities and women within the contractor's organization, and the degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities and women. In making the utilization analysis, minorities and women must be analyzed separately. *Id.*

[37] 45 Fed. Reg. 86,231 (1980). This is a misapplication of the so-called "4/5's rule" which was established as a criterion for determining how federal civil rights agencies should exercise prosecutorial discretion. The test was not intended as a measure of compliance with equal employment opportunity laws. *See* 29 C.F.R. § 1607.4(D) (1978).

[38] U.S. COMM'N ON CIVIL RIGHTS, COMMENTS ON PROPOSED AFFIRMATIVE ACTION REQUIREMENTS FOR GOVERNMENT CONTRACTORS 45 (1981) (copy on file at U.C. Davis Law Review office).

of proposed rulemaking, explaining that OFCCP is considering redefining job groups more broadly.[39] This change could be highly detrimental to affirmative action because it would enable contractors to conceal their underutilizations by artificially combining job groups with different ethnic and sexual composition. For example, the proposed regulations allow contractors to group jobs vertically. Thus, a contractor might lump together predominantly white supervisors with predominantly minority entry level employees, thereby concealing the underutilization of minority supervisors.

Similarly, OFCCP has proposed reducing the requirements defining availability,[40] thereby giving contractors broad discretion in determining the availability of minorities and women. For example, the present regulations require contractors to determine availability by considering not only the ethnic and sexual composition of the work force in the relevant labor area, but also the composition of the group of persons currently unemployed and the potential for increasing the availability of minorities and women through training programs undertaken by the contractor and other institutions. The proposed regulations eliminate these factors from the availability determination. If finally approved, the result will be a reduction in the apparent availability of minorities and women and a corresponding reduction in the level at which goals must be set in order to assure employment at the availability level.

b. Goals and timetables

The purpose of Revised Order No. 4 is to eliminate all underutilization in a contractor's work force. As stated above, the Reagan Administration would undercut this purpose by adopting the "4/5ths Rule" and redefining job groups and availability. The Administration's failure to impose a specific requirement of hiring rates would further erode the goal and timetable requirements of Revised Order No. 4. In an administrative directive interpreting Revised Order No. 4, OFCCP previously provided:

> For each job category in which underutilization exists, the contractor must establish annual rates of hiring and/or promoting minorities and women until the ultimate goal is reached. These rates shall be the maximum rates that can be achieved through putting forth every good faith effort, including the use of available recruiting and training facilities . . . .[41]

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[39] 46 Fed. Reg. 36,214-15 (1981).

[40] *Id.*

[41] U.S. DEPARTMENT OF LABOR, TECHNICAL GUIDANCE MEMORANDUM NO. 1 ON REVISED ORDER NO. 4, at 3-4 (by Philip J. Davis) (copy on file at U.C. Davis Law Review office).

The hiring rate requirement was adopted in response to federal contractors' systematic failure to achieve their ultimate goals as required by Revised Order No. 4.[42]

The Reagan Administration has apparently dropped this directive: the new regulations say nothing about hiring rates. Without a hiring rate requirement, contractors will not achieve their goals within the minimum feasible time period required by OFCCP regulations.[43] In fact, the Administration is opposed not only to hiring rates but also to goals, and has indicated that it will not require them even in Title VII cases.[44]

c. Action oriented programs

Utilization analyses and goals are not sufficient, by themselves, to achieve affirmative action. The contractor must adopt specific and realistic programs to achieve affirmative action goals. For this reason, earlier versions of Revised Order No. 4 required contractors to establish action oriented programs, and the regulations set forth detailed guidelines for establishing and implementing those programs.[45]

The Reagan Administration proposes to eliminate these requirements completely, with the declared purpose of permitting contractors to design their own methods of implementing the required ingredients of their AAP's.[46] This discretion, resulting from the lack of specific standards, will only impede affirmative action efforts.

d. Abbreviated and consolidated AAP's

The Reagan proposals would further weaken affirmative action requirements by permitting the use of abbreviated and consolidated AAP's. Contractors having fewer than 500 employees would be permitted to adopt abbreviated AAP's. The major weakness of an abbreviated AAP is that utilization analyses, goals, and timetables are based on

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[42] *See* Legal Aid Soc'y v. Brennan, 381 F. Supp. 125, 131 (N.D. Cal. 1974), *aff'd*, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

[43] 41 C.F.R. § 60-1.20(b) (1980).

[44] *See* Address by U.S. Att'y Gen. William French Smith to American Law Institute, in Philadelphia, Pa. (May 22, 1981); Testimony of William Bradford Reynolds, Ass't Att'y Gen., Civil Rights Division, before House Subcommittee on Employment Opportunities, Committee on Education and Labor (Sept. 23, 1981).

[45] 41 C.F.R. §§ 60-2.10 to 60-2.26 (1980) (action oriented programs include recruitment programs, training programs, and upward mobility programs).

[46] 46 Fed. Reg. 42,976 (1981). "Contractors should be able to design implementation procedures best suited to the achievement of effective affirmative action considering their individual circumstances." *Id.*

EEO-1 job categories,[47] such as semi-skilled operators, clerical workers, and professional and administrative employees. The breadth of these categories enables contractors to conceal underutilizations by combining job groups having different ethnic and sexual compositions.

The proposed regulations also permit contractors to prepare consolidated AAP's which cover different establishments subject to the same supervision.[48] The consolidated AAP's would allow contractors to avoid correcting underutilizations within a particular establishment by basing their goals on composite data involving several establishments.

B. Monitoring

Regardless of their strength and specificity, the legal standards can have little effect absent a monitoring system capable of detecting noncompliance. There are several key elements of an effective monitoring system. Staffing must be adequate to allow reasonably frequent reviews of federal contractors. There must be a reporting system designed to detect noncompliance. And, there must be procedures for effective and ongoing reviews of contractors in apparent noncompliance. Although the federal contract compliance system has been historically weak in each of these areas, the Reagan proposals would make the monitoring system weaker still.

1. Understaffing

Unless the compliance system is adequately staffed, noncompliance is difficult to detect and, even if detected, enforcement procedures cannot be carried out. Understaffing has been a perennial problem in the federal contract compliance system.[49] A 1975 General Accounting Office report concluded that most compliance agencies were not reviewing an adequate proportion of the contractors for which they were responsible.[50] Similarly, a federal judge found staffing was so low in the mid-1970's that agricultural contractors could expect to be reviewed only once every twenty-two and one-half years.[51]

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[47] EEO-1 reports, or Employer Information Reports, are annual work force reports submitted to the Joint Reporting Commission of the Equal Opportunity Commission and the OFCCP, in compliance with OFCCP Directive No. 1.

[48] 46 Fed. Reg. 42,992 (1981).

[49] *See* Galloway, *Administrative and Judicial Nullification of Federal Affirmative Action Law*, 17 SANTA CLARA L. REV. 559, 565-66 (1977).

[50] GEN. ACCOUNTING OFFICE, THE EQUAL EMPLOYMENT OPPORTUNITY PROGRAM FOR FEDERAL NONCONSTRUCTION CONTRACTORS CAN BE IMPROVED 9-11 (1975).

[51] Legal Aid Soc'y v. Brennan, 381 F. Supp. 125, 137 (N.D. Cal. 1974), *aff'd*, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

Despite the severe problem of understaffing that has plagued the federal contract compliance system, the Reagan Administration has proposed a reduction in the OFCCP compliance staff of approximately fifteen percent.[52] This reduction will severely impede both the investigation of discrimination complaints and the conduct of routine compliance reviews.[53]

2. Compliance data

Especially in a severely understaffed system, the effectiveness of the monitoring system depends upon the availability of compliance data. Reporting requirements serve several important functions. The information obtained through the reports enables the agency to locate the worst deficiencies and prioritize its on-site compliance reviews to focus on those deficiencies. Any subsequent enforcement efforts depend upon this information. Moreover, imposing reporting requirements upon contractors serves to deter noncompliance since contractors know that compliance officials are aware of their deficiencies.

The inadequacy of OFCCP's reporting system has been notorious.[54] There is no general requirement that federal contractors submit periodic data regarding their affirmative action programs. As a result, compliance agencies have had no way, aside from undertaking time consuming on-site reviews, to determine whether contractors have goals,

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> By utilizing this practice [of requiring only annual goals] . . . the USDA in fact concedes that it requires no meaningful commitment of the contractors, since it has conducted under 800 compliance reviews each year for the past three years of the more than 18,000 contractors assigned to it for supervision. At this rate, each contractor would be reviewed once every 22½ years, making the requirement of annual goals ludicrous.

Id.

[52] U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS: A NATIONAL, NOT A SPECIAL INTEREST 38 (1981) (copy on file at U.C. Davis Law Review office). In 1981, 1,482 staff positions were authorized for the OFCCP. The Administration's revised fiscal year 1982 budget calls for 1,264 staff positions, a 14.7% decrease. The effect of these budget cuts may result in more than a 14.7% decrease once inflation is taken into account. *Id.* at 37-38.

[53] Authorized staff positions have been cut by 14.7 percent for FY 1982, hampering the investigation of discrimination complaints at a time when the number of such complaints is increasing. As a result, the OFCCP complaint backlog probably will rise to approximately 5,000 cases in FY 1982. In addition, OFCCP is already behind its own schedule for FY 1981 compliance review activity. This trend is likely to continue into FY 1982 because of the budget reductions proposed by the administration.

Id. at 44.

[54] *See* Galloway, note 49 *supra*, at 566-67.

timetables, or underutilizations — or whether they have even adopted AAP's. To rectify this deficiency, the Carter Administration proposed that federal contractors be required to submit an annual program summary report which would have contained this information.[55] The Reagan Administration deleted this requirement.[56] At a time of severe understaffing, the elimination of this requirement demonstrates the Administration's willingness to undercut the compliance system in order to eliminate minor burdens upon contractors.

The Administration's opposition to effective reporting is further demonstrated by several other provisions in its proposed regulations. The only regular reporting requirement presently imposed upon the contractors is the submission of EEO-1 reports showing ethnic and sexual composition by very general job groups. The Administration would weaken even this requirement by raising the threshold for filing EEO-1's. Presently, contractors with fifty or more employees are covered;[57] under the proposed regulations, only contractors with 100 or more employees will be required to file.[58] In addition, the proposed regulations, unlike those proposed by the Carter Administration,[59] fail to provide specifically for access to relevant computer tapes and printouts.[60] Since contractors have resisted disclosure of this data, the failure to require the disclosure creates another obstacle to effective reviews.

In dealing with large numbers of contractors, an effective monitoring system requires the use of a computerized data processing system. Under the Carter Administration, OFCCP began developing a computerized data processing system which would have linked field and headquarter offices, thereby substantially increasing OFCCP's effectiveness. As noted by the Commission on Civil Rights, however, "the reduced budget will delay full development and establishment of a needed comprehensive data and processing system that would merge data files and procedural functions."[61]

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[55] 45 Fed. Reg. 86,241 (1980).

[56] 46 Fed Reg. 42,976 (1981). The Department of Labor considers this section, which requires contractors to develop and submit an AAP summary, to place an undue reporting burden upon contractors. *Id.*

[57] 41 C.F.R. § 60-1.7(a) (1980).

[58] 46 Fed. Reg. 42,984 (1981).

[59] 45 Fed. Reg. 86,238 (1980) (permitting access to such computer tapes and printouts as may be relevant to the investigation).

[60] 46 Fed. Reg. 42,987 (1981) (requiring access to other records but omitting specific reference to computer tapes and printouts).

[61] U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS: A NATIONAL, NOT A SPECIAL INTEREST 44 (1981).

3. Compliance reviews

The Reagan Administration threatens to create several major obstacles to effective compliance reviews. First, the proposed regulations eliminate pre-award reviews.[62] Such reviews are widely considered to be the most effective type of compliance reviews because the threatened loss of a pending contract creates a substantial incentive for the contractor to improve its AAP. OFCCP traditionally made pre-award reviews mandatory.[63] Since this requirement placed too much strain upon OFCCP's resources, the Carter Administration proposed to make these reviews discretionary.[64] This approach is sound. There is no justification, however, for totally eliminating this very important type of compliance review.

Second, the proposed regulations require OFCCP to exempt federal contractors from routine compliance reviews for a five year period upon the contractor's request if the contractor is found to be in compliance and commits to an undefined hiring program.[65] This five year exemption is ill-advised, especially in the case of large contractors, since employment and compliance patterns may change dramatically during this period.

C. Enforcement

No matter how specific the standards and how detailed the reporting system, the federal contract compliance system will not function effectively unless strong sanctions and remedies are applied in the event of

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[62] 46 Fed. Reg. 42,973 (1981) (explaining reasons for deletion).

[63] 41 C.F.R. § 60-1.20(d) (1980). The purpose of a compliance review is to determine if a contractor is maintaining nondiscriminatory hiring and employment practices and is taking affirmative steps to insure equal opportunity for all employees. *Id.* § 60-1.20(a) (1980). Previously, contractors were subject to a compliance review before the award of a contract. A contract was not awarded unless a pre-award compliance review of the prospective contractor had been conducted within 12 months prior to the award. To qualify for award of a contract, a contractor had to have been found in compliance with Part 60-2 of these regulations. *Id.* § 60-1.20(d) (1980).

[64] 45 Fed. Reg. 86,233 (1980). In determining whether to conduct a pre-award review, OFCCP can consider, e.g., the contractor's past EEO performance, the volume and nature of complaints filed against the contractor, employment opportunities likely to result from the contract in issue, and whether resources are available to conduct the review. *Id.*

[65] 46 Fed. Reg. 42,992 (1981). The Director shall grant the contractor's request if, after an onsite compliance review, the following criteria are met: (1) the review results in a finding of compliance, (2) the contractor's AAP contains annual goals and timetables, and (3) the program contains an approved training program. *Id.*

noncompliance. A number of sanctions are possible, including back pay and debarment. Vigorous use of these sanctions is necessary if contractors are to have the incentive to undertake self-evaluation of their employment practices and to correct any discriminatory practices. A federal district court has found that the ability of compliance agencies to use the sanctions provided in the Executive Order is necessary to motivate contractors to carry out their affirmative action duties voluntarily.[66] Recent developments suggest a serious weakening of this enforcement principle.

1. Back Pay

During the Carter Administration, OFCCP increasingly used back pay awards as the primary sanction to insure that contractors complied with Executive Order requirements. Since 1976, through OFCCP's efforts, federal contractors have returned more than $20 million in back wages to 14,000 employees as compensation for the effects of job discrimination.[67] Almost half of that amount was returned in 1980 alone.[68]

The United States Supreme Court emphasized the importance of back pay in *Albemarle Paper Co.* v. *Moody*.[69]

> It is the reasonably certain prospect of a back pay 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."[70]

The Reagan Administration has indicated that it intends to restrict or eliminate the use of back pay awards. In a recent notice of proposed rulemaking, the Administration requested public comments on a proposal to take away OFCCP's power to impose back pay awards.[71] In response to extensive opposing comments, OFCCP decided not to eliminate back pay entirely, but instead proposed to restrict the use of back pay awards. For example, OFCCP's new proposed regulations would restrict back pay awards to those situations in which individual victims

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[66] Castillo v. Usery, 13 Empl. Prac. Dec. (CCH) ¶11,559, at 7,023 (N.D. Cal. 1976).

[67] U.S. DEPT. OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS 8 (Jan. 1981) (copy on file at U.C. Davis Law Review office).

[68] *Id.*

[69] 422 U.S. 405 (1975).

[70] *Id.* at 417-18 (quoting United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973).

[71] 46 Fed. Reg. 36,215 (1981).

of past discrimination can be identified.[72]

Meanwhile, the Department of Labor is delaying back pay awards. For example, the Department recently refused to pursue a $15 million back pay claim against the National City Bank of Cleveland indicating "that the department would seek back pay only in extreme cases."[73] Moreover, there has apparently been a drastic reduction in the number of back pay awards since Reagan's inauguration.[74]

2. Debarment and pass-over

Debarment of federal contractors in the event of serious noncompliance is the most powerful sanction available to OFCCP to ensure compliance. Debarred contractors cannot receive federal contracts until their eligibility is reinstated. Historically, OFCCP has failed to use this power effectively. Until 1974, there had never been a debarment of a federal nonconstruction contractor,[75] and there have been extremely few since that time.[76]

The unmistakable trend of the Reagan Administration is to further restrict, if not completely eliminate, the use of debarment. No debarment of a federal contractor has taken place since the Reagan Administration took office. The new regulations prohibit the use of debarment against banks and savings and loan associations.[77] Moreover, the use of debarment is contrary to the Administration's policy of voluntarism, which assumes that compliance can best be achieved by contractors' voluntary efforts rather than vigorous government enforcement efforts.

As an alternative to the use of debarment, OFCCP has the power to pass-over noncomplying bidders for federal contracts.[78] However, elimination of pre-award reviews effectively bars the use of pass-over in most cases, since the bidder's noncompliance cannot be determined before the contract is awarded.

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[72] 47 Fed. Reg. 17,779 (1982) (limiting back pay to "identifiable victims who have suffered economic loss due to the contractor's discriminatory actions").

[73] Masters, *Officials Speak of Back Pay Tradeoff*, LEGAL TIMES, Feb. 15, 1982, at 1, col. 2 (copy on file at U.C. Davis Law Review office).

[74] *See* Women Employed News, Spring 1982, at 1, col. 1 (alleging that OFCCP Director has suspended all back pay awards).

[75] U.S. Comm'n on Civil Rights, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT — 1974, at 298-99 (July 1975).

[76] Castillo v. Usery, 13 Empl. Prac. Dec. (CCH) ¶11,559, at 7,014 (N.D. Cal. 1976).

[77] 46 Fed. Reg. 42,991 (1981).

[78] 41 C.F.R. § 60-2.2(b) (1980) (contractor failing to comply with AAP requirements shall be declared nonresponsible and, as such, is subject to pass-over).

3. Specific enforcement

Given the failure to use back pay, debarment, and other sanctions, specific performance suits to mandate compliance are the only available means for insuring compliance. Admittedly, this is not a very effective method for securing compliance. As the Supreme Court noted in *Albemarle*, "if employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."[79] Employers would only be required to do that which they should have done in the first place.

Given the position of the Reagan Administration, the already weak remedy of specific enforcement will be of no use in effectuating affirmative action programs. To be effective, specific enforcement orders must impose hiring rates for minorities and women until the goal of parity under Revised Order No. 4 is achieved. The problem, however, is that OFCCP must be represented by the Justice Department in any specific performance litigation, and the Justice Department has declared that it will not seek court orders requiring numerical goals or hiring rates.[80] Without goals and hiring rates, specific performance orders will fail to serve their purpose of insuring compliance with the requirements of Revised Order No. 4.

D. Nullification of Affirmative Action: Summary

The Reagan Administration's proposals, if adopted, will undercut the effectiveness of Executive Order 11246 by attacking all three of the fundamental components of any effective compliance system. They will dilute the contractors' performance standards by reducing the coverage of Revised Order No. 4 and by decreasing the specificity of its requirements. They will destroy the possibility of effective monitoring by reducing the compliance staff, eliminating critical reporting requirements, and impeding the compliance review process. Finally, the Administration has threatened to cripple enforcement efforts by restricting back pay awards, discontinuing debarment and pass-over, and opposing goals and hiring rates, thus making specific performance actions meaningless.[81]

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[79] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (referring to denial of equal employment opportunities to minority persons).

[80] *See* authorities cited in note 44 *supra*.

[81] In addition to the nullification of the federal contract compliance system through publicly announced changes in the regulations, it is likely that the Administration will further nullify the program through its informal decision making, and day to day management of the program. Examples may include delays in enforcement; refusals or fail-

III. JUDICIAL REMEDIES FOR NULLIFICATION OF AFFIRMATIVE ACTION

Since the Reagan Administration has demonstrated its intention to nullify rather than enforce the affirmative action requirements of the Executive Order, alternative means of enforcement must be sought if minorities' and women's rights under the Executive Order are to be protected. Several strategies are available. First, civil rights advocates should continue commenting on proposed regulations and lobbying Administration and congressional representatives to prevent further weakening of the affirmative action requirements. Second, local groups may undertake community based enforcement,[82] such as direct efforts to ne-

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ures to issue show cause notices, institute enforcement proceedings, or impose appropriate sanctions; failures to uncover deficiencies in compliance reviews; and approval of improper AAP's. This kind of nullification is all but inevitable given (1) the Administration's tendency to subordinate civil rights interests to the interests of business, (2) the Administration's intent to reduce the role of government and leave affirmative action to voluntary efforts of contractors, and (3) the Administration's opposition to goals and timetables.

[82] The underlying theory of the community based enforcement model is that the strongest source of enforcement pressure is those persons who stand to gain the most from enforcement of affirmative action requirements, i.e., the minorities and women who are the intended beneficiaries of the Executive Order.

Past experience has shown that, in order to be effective, community based enforcement strategies should include several steps. The first step is the development of a coalition of individuals and groups interested in affirmative action enforcement. The existence of such a group is necessary to share the ongoing burdens and to provide credibility. Potentially interested groups may include civil rights organizations representing minorities and women, job resource organizations, labor organizations, local government agencies and officials with civil rights enforcement responsibilities, public interest law groups, and churches.

Once an affirmative action coalition has been established, the next step is to obtain systematic data regarding the compliance status of federal contractors in the community. This information is essential for detecting those companies with the most discriminatory employment records, prioritizing local enforcement activities, and providing a means for demonstrating noncompliance. In order to obtain systematic information, the community-based organizations should submit Freedom of Information Act requests to OFCCP and possibly to state and local agencies responsible for enforcing equal opportunity laws. The most important documents are work force reports such as the EEO-1's that are periodically submitted by the federal contractors to OFCCP. These documents should reveal the ethnic and sexual composition of the contractors' work forces by job categories. Affirmative action programs and compliance review reports may also be obtained for more detailed information and enforcement efforts against particular contractors.

Once the information has been obtained and reviewed and priorities have been established, several tactics are available to induce contractors to hire more minorities and

gotiate improved affirmative action efforts by employers having federal contracts. Third, the beneficiaries of the Executive Order may resort to the electoral process. However, this is not an immediate solution, and traditionally has not been a viable option for minorities. Fourth, litigation may be undertaken to enforce affirmative action duties. The remainder of this article will discuss this last option.

Civil rights advocates should consider litigation to counter the nullification of federal affirmative action law based on three different approaches. First, mandamus is available when compliance officials violate specific, mandatory duties. Second, orders may be available under the Administrative Procedure Act when administrative officials use their discretion to nullify, rather than effectuate, affirmative action requirements. Third, the new affirmative action regulations may be challenged for failure to comply with applicable rulemaking requirements.

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women. Obviously, the most direct method is to contact the contractor and attempt to negotiate an effective affirmative action program. Local organizations concerned with job development for minorities and women should have a particular interest in these efforts since federal contractors, as part of their affirmative action obligations, should notify the local job developers regarding any opportunities for employment of minorities and women. Direct negotiations with contractors are consistent with the federal government's theme of voluntarism which calls upon contractors, on their own, to carry out affirmative action. Historically, local groups have had substantial success in negotiating improved affirmative action programs with contractors without committing the extensive resources necessary for litigation. All efforts to negotiate voluntary improvements in affirmative action should be documented so that the record is clear in the event that future enforcement efforts are necessary.

If the contractor refuses to carry out his affirmative action obligations voluntarily, there are several steps available to apply pressure. One is to file administrative complaints with OFCCP, EEOC, and local and state agencies responsible for enforcing equal employment opportunity laws. This step has several potential advantages. First, it may trigger an OFCCP compliance review which, if properly performed, will result in correction of the deficiencies. Second, a complaint filed with EEOC lays the foundation for future Title VII litigation and provides the basis for back pay liability which is determined according to the date of filing a complaint. Third, when coupled with media coverage, the filing of an administrative complaint may bring substantial pressure upon the federal contractor to take action to correct discriminatory practices and improve public relations.

Ultimately, if the contractor refuses to comply with affirmative action duties, litigation is available under Title VII of the 1964 Civil Rights Act to correct discriminatory practices. If such litigation is successful, back pay awards and attorneys fees may be awarded. *See, e.g.*, Galloway and Ronfeldt, *Enforcing Affirmative Action Requirements of Executive Order 11246*, CLEARINGHOUSE REVIEW (Nov. 1974) (copy on file at U.C. Davis Law Review office).

A. Mandamus to Enforce Specific, Mandatory Duties

Federal courts are authorized by statute to mandate federal officials to perform their legal duties.[83] *Legal Aid Society v. Brennan*[84] establishes the applicability of conventional mandamus law to Executive Order 11246.[85] In that case, minorities and representative civil rights organizations brought suit to enforce the requirements of Revised Order No. 4. Finding that federal compliance officials had systematically approved AAP's not in compliance with the requirements of Revised Order No. 4, the federal court mandated the officials to disapprove the illegal AAP's. The Ninth Circuit Court of Appeals upheld the ruling,[86] and certiorari was denied by the United States Supreme Court.[87]

Mandamus will issue only when government officials violate specific and mandatory duties imposed by statutes, executive orders, or regulations. To the extent that the Reagan Administration is successful in repealing the specific and mandatory affirmative action requirements, the mandamus approach is undercut. However, even the revised regulations contain many important and specifically defined requirements. Given the hostility of the Reagan Administration to affirmative action, it is safe to assume that the compliance officials will ignore these requirements. This has been characteristic of past administrations[88] and will probably become much worse. If this is true, mandamus provides a well established basis for judicial intervention.

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[83] 28 U.S.C. § 1361 (1976) (federal mandamus statute).

[84] 381 F. Supp. 125 (N.D. Cal. 1974), *aff'd*, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

[85] Executive Order 11246, like other executive orders, has the force and effect of law. *See, e.g.* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 166-71 (3d Cir. 1971) (upholding affirmative action duties imposed by Philadelphia Plan on federal construction contractors). Mandamus actions against government officials should not be confused with private actions against federal contractors, which may not be allowed. *See, e.g.*, Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967) (rejecting private cause of action to enforce affirmative action requirements against individual federal contractor).

[86] 608 F.2d 1319 (9th Cir. 1979). The Ninth Circuit stated that, in addition to mandamus, it is also appropriate to invoke the remedies available under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976 & Supp. V 1981) [hereafter APA], 608 F.2d at 1331. When federal officials violate specific and mandatory duties, the action may be challenged as action "not in accordance with law" under 5 U.S.C. § 706(2)(A) (1976), or as action unlawfully withheld under 5 U.S.C. § 706(1) (1976). As used in this article, mandamus refers to orders obtained pursuant to these sections of the APA as well as to those obtained pursuant to 28 U.S.C. § 1361 (1976).

[87] 447 U.S. 921 (1980).

[88] *See generally* authorities cited in note 22 *supra*.

Finding standing of the plaintiffs to bring suit is a substantial obstacle to mandamus litigation. The Burger Court has tightened standing rules in cases of this nature. The conceptual problem is demonstrating that the particular plaintiff has suffered specific, identifiable harm as a result of defendant's actions and that the judicial relief sought is likely to remedy that harm.[89] Nevertheless, the Ninth Circuit found standing for individual plaintiffs in *Brennan*.[90] Assuming that standing can be established, mandamus is clearly available for challenging failures by federal compliance officials to carry out specific and mandatory duties.

B. APA Abuse of Discretion Litigation

The Administrative Procedure Act provides a second basis for litigation challenging administrative nullification of federal affirmative action law. The APA provides the basic mechanism for judicial review of federal administrative actions. It establishes a claim for relief if an administrative agency abuses its discretion or acts in a manner not in accordance with law.[91] Many cases emphasize that governmental agencies do not have unfettered discretion in enforcing the law.[92] Discretion con-

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[89] *See, e.g.*, Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) (denial of standing to enforce free health care requirements); Warth v. Seldin, 422 U.S. 490 (1975) (denial of standing to challenge exclusionary zoning).

[90] Legal Aid Soc'y v. Brennan, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Specifically, the Ninth Circuit found that the denial of employment opportunities to a qualified minority applicant satisfied the requirement of actual injury. The injury was "fairly traceable" to the federal officials' failure to enforce the Executive Order, because there was a substantial probability that enforcement of the AAP requirements against noncomplying contractors would result in new job opportunities, not only for minorities in general, but also for the named plaintiff. The court stated:

> Appellee need not prove she is bound to be selected for the new opportunities over all others. Like the individual plaintiffs in *Arlington Heights*, she need show only that her "quest" for a desired employment opportunity for which she could have competed was "thwarted" by the actions complained of, and that the opportunity will likely materialize — thus allowing her to compete for it — if the defendants act as required by the decree.

608 F.2d at 1335. The Ninth Circuit found a sufficient causal link between enforcement of the Executive Order and creation of job opportunities for the plaintiffs. The court further found a substantial probability that the relief sought would remedy the alleged injury.

[91] 5 U.S.C. § 702 (1976 & Supp. V 1981) (right of review); *id.* § 706(2)(A) (scope of review).

[92] *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (upholding judicial review of administrative decisions concerning freeway location); East Oakland-Fruitvale Planning Council v. Rumsfeld, 471 F.2d 524 (9th Cir. 1972) (upholding judicial review of administrative decision concerning defunding of commu-

ferred upon a governmental agency must be exercised in a manner that effectuates, rather than nullifies, the purposes of the law.[93] Discussing the analogous question of the federal courts' discretionary authority to award back pay in Title VII cases, the United States Supreme Court has stated:

> The power to award back pay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions. A court must exercise this power "in light of the large objectives of the Act". . . That the court's discretion is equitable in nature . . . hardly means that it is unfettered by meaningful standards . . . . [W]hen Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not "equity [which] varies like the Chancellor's foot."[94]

Adams v. Richardson[95] is a leading case in which the APA abuse of discretion standard was applied to prevent federal administrative lawlessness. The *Adams* case involved HEW's alleged failure to initiate enforcement proceedings against school districts known to be in noncompliance with the requirements of Title VI of the Civil Rights Act of 1964. HEW claimed that enforcement of Title VI was not subject to judicial review since it was a matter committed to agency discretion. The court acknowledged that HEW has some discretion in carrying out its enforcement responsibilities but made it clear that the discretion could not be exercised in a manner that failed to effectuate Title VI.

The main problem with this abuse of discretion approach is the courts' traditional deference in reviewing actions of administrative agencies. Bowing to administrative expertise, courts normally have undertaken only a limited inquiry into whether the agency had some basis for action.[96] This minimal review effectively immunizes agencies from judicial enforcement except in the most egregious cases since it normally is not difficult to provide some rational basis for agency actions.

Courts should set aside their customary deference and review agency

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nity organization).

[93] *See, e.g.*, Russell v. Landrieu, 621 F.2d 1037 (9th Cir. 1980) (enforcement of National Housing Act); Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974) (suspension of low rent housing program); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) (regulation of trading on Navajo reservations); Rocky Ford Housing Authority v. USDA, 427 F. Supp. 118 (D.D.C. 1977) (administration of rural rent supplement program).

[94] Albemarle Paper Co. v. Moody, 422 U.S. 405, 416-417 (1975).

[95] 351 F. Supp. 636 (D.D.C. 1972), *aff'd en banc*, 480 F.2d 1159 (D.C. Cir. 1973).

[96] The leading case in this area is Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (challenge to administrative decision concerning freeway location).

actions with intensified scrutiny when, as in the case of the affirmative action compliance system, it can be shown that the agency has been systematically dismantling the regulatory requirements.[97] Judicial deference is not justified if the agency expertise is being used to thwart rather than effectuate the law.

In determining whether to set aside customary judicial deference and invoke intensified judicial review, the court should make a threshold inquiry into whether a pattern of administrative nullification is present. This inquiry should include a consideration of whether the agency has undermined any of the essential components of an effective regulatory program, that is: (1) specific and mandatory performance standards; (2) adequate reporting and monitoring mechanisms; and (3) strong sanctions and remedies for dealing with noncompliance. If the agency has voluntarily undercut one or more of these essential components, administrative nullification is presumptively present, and the court should set aside its customary deference. In fact, where administrative nullification has been shown, the court should also shift the burden of proof to the agency to establish by persuasive evidence that the intent and effect of the challenged action is to further, rather than defeat, the purpose of the underlying law.

Intensified judicial review and shifting the burden of proof should be appropriate in cases challenging the present management of the federal contract compliance system. As shown in Part II, the Reagan Administration has made an across-the-board effort to dismantle the entire federal affirmative action compliance system. It has sought to weaken or destroy not one, but all, of the essential components of the compliance system, thereby making judicial deference wholly inappropriate.

Assume, for example, that a civil rights organization files suit challenging OFCCP's systematic failure to undertake enforcement actions against noncomplying contractors. If the court were to apply the traditional, deferential standard of judicial review, OFCCP could simply contend that voluntary efforts would better effectuate affirmative action than would the imposition of sanctions. In the context of administrative nullification, however, this claim becomes much less credible. Obvi-

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[97] *Cf.* Pennsylvania v. Lynn, 501 F.2d 848, 862 (D.C. Cir. 1974) (application of intensified scrutiny under the APA to determine whether HUD's supervision of low rent housing programs complied with National Housing Act goals: "Since the discretion vested in the Secretary is a narrow one, and the potential for mischief in the event of its abuse great, it is natural for a court to extend its inquiry somewhat beyond the 'rational basis' that elsewhere suffices to support an administrative decision under 5 U.S.C. § 706").

ously, voluntarism may allow contractors to evade affirmative action. The court should allow plaintiffs to make a preliminary showing of an overall pattern of administrative nullification. If this showing is made, the court should more closely scrutinize the challenged action and require OFCCP to demonstrate that nonenforcement will, in fact, lead to more, rather than less, affirmative action.

Intensified judicial review is particularly appropriate in the context of administrative nullification when the challenged agency action involves the repeal of regulations originally adopted for the purpose of improving the regulatory system. There are several additional reasons why heightened review is appropriate in this situation. First, the repeal of regulations designed to achieve affirmative action provides additional evidence of administrative nullification. Second, rather than substituting its own judgment, the court can rely upon the expertise of the agency that adopted the original regulations. In such a case, the court would rely upon the expertise of the agency that chose to enforce the law rather than upon the agency that is choosing to nullify it. Third, the remedy is simple: rather than promulgating a new regulation or leaving the area unregulated, the court can reinstate a regulation that has previously been approved by administrative experts and, in many cases, has already proven to be workable.

We are not suggesting that a general presumption be adopted against the repeal of existing regulations, but only that repeals be viewed skeptically in the context of administrative nullification. The court might offer the agency an opportunity to demonstrate why the prior regulation should not be reinstated and to suggest a more effective alternative. If the agency fails to make such a showing, then reinstatement of the prior regulations is appropriate.

On this basis, a strong case can be made to enjoin the Reagan Administration's efforts to repeal several important affirmative action regulations. For example, the reduced coverage of Revised Order No. 4 and the elimination of pre-award reviews and annual program summary reports cannot be justified. They mock, rather than effectuate, Executive Order 11246. Courts should not allow excessive notions of judicial deference to immunize such flagrant abuses of discretion.

C. APA Rulemaking Litigation

A third basis for litigation challenging the nullification of the affirmative action compliance system is the Reagan Administration's failure to comply with applicable rulemaking requirements. In promulgating new regulations, agencies are required to establish a record demonstrating that they considered all relevant factors and made a reasoned choice

among the various alternatives presented.[98] Arguably, the burden of persuasion rests upon the agency to establish the adequacy of the record and to justify its decision.[99]

These requirements are reinforced by Executive Order 12291, which was heavily relied upon in deregulating the affirmative action compliance system. Executive Order 12291 prohibits the issuance of major regulations without a detailed cost/benefit analysis.[100] Pursuant to this order, the proposed Carter regulations were frozen by the Reagan Administration the day before they were to become effective. Executive Order 12291 was also used as a major rationalization for the Reagan proposals since they were purportedly designed to avoid excessive costs to contractors and the government. Thus, in addition to normal APA rulemaking requirements, the government is obligated to develop a detailed cost/benefit analysis as part of the record in support of the proposed regulations. The central focus of such an analysis should be the impact of the proposed regulations upon the minorities and women who are the intended beneficiaries of Executive Order 11246.

The Department of Labor failed to satisfy applicable rulemaking requirements in preparing its new affirmative action regulations. Throughout its analysis of the proposed regulations, it considered the cost savings to contractors and government, but did not specifically analyze the potential impact upon minorities and women.[101] For example, in raising the threshold requirement of Revised Order No. 4, the Department did not analyze the effect that exempting three-quarters of

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[98] "In sum, an agency, if its rulemaking is to be sustained, must demonstrate that it has considered the relevant factors brought to its attention by interested parties during the course of rulemaking, and that it has made a reasoned choice among the various alternatives presented." National Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 699-700 (3d Cir. 1979). "[A]n adequate record for Section 553 rulemaking will reflect 'all of the relevant views and evidence considered by the rulemaker, from whatever source, and — like a mini-history — it must reveal it and how the rulemaker considered each factor . . . .'" National Welfare Rights Org. v. Mathews, 533 F.2d 637, 648-49 (D.C. Cir. 1976), quoting Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 395 (1974).

[99] National Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 700 n.36 (3d Cir. 1979) (challenge to regulations concerning training of miners).

[100] 46 Fed. Reg. 13,193-94 (1981). Agencies are required to prepare Regulatory Impact Analyses of major rules, including: a description of the potential costs and the identification of those likely to bear the costs, a determination of the potential net benefits of the rule, and a description of alternative approaches that could substantially achieve the same regulatory goal at lower cost. *Id.*

[101] *See id.* at 42,978-79 (1981) (omitting analysis of potential impact on minorities and women).

the contractors will have on the job opportunities for minorities and women. In its discussion of the proposed regulations, the Department described the amount of money contractors are expected to save but failed even to estimate the regulations' impact in terms of lost job opportunities. The same approach applies to the proposed elimination of pre-award reviews and annual program summary reports.

The Department of Labor, in its preliminary regulatory impact analysis, asserted that the regulations would "if adopted result in substantial cost savings for contractors without significantly affecting employee protections under Executive Order 11246."[102] There is no elaboration or discussion of any evidence demonstrating the truth of this statement. Perhaps this conclusion is based on the Administration's assumption that voluntary efforts are more effective than mandatory enforcement. But, this assumption is contrary to past experience under the Executive Order and cannot be accepted in the absence of supporting evidence.

The Civil Rights Commission's comments on the proposed regulations emphasize the stark absence of any analysis of the regulations' potential impact upon minorities and women and call for withdrawal of the proposed regulations until the impact upon minorities and women is properly analyzed.[103] The Civil Rights Commission's criticism is

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[102] *Id.* at 42,978.

[103] Letter from Arthur S. Fleming, Chairman, Comm'n on Civil Rights, to Ellen Shong, Director, OFCCP, accompanying Comments on Proposed Affirmative Action Requirements for Government Contractors (Oct. 26, 1981) (copy on file at U.C. Davis Law Review office).

> More specifically, we are disturbed that the Department of Labor has proposed substantial changes in the program without providing a detailed assessment of their impact on the employment opportunities of members of the protected groups. Data contained in the "Preliminary Regulatory Impact Analysis" project cost saving for employers . . . . There are no data, however, measuring the impact of these proposed changes on minorities or women in the total workforce, or in industries or occupations in which they are underutilized or where new job opportunities are expected: It is also evident from the nature and number of questions raised in the preamble to the proposed regulations that publication of these specific proposals to increase coverage thresholds, eliminate contract aggregation, and adopt multiyear affirmative action plans is premature because the Department has not yet assessed thoroughly their expected impact.
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> In evaluating many of these proposals, it is necessary to know not only their expected benefits in terms of administrative convenience or reduced dollar cost, but how they will ensure that OFCCP resources are, in fact, targeted properly to address problems of poor equal employment performance and underutilization. The Department provides no evidence that it

sound. A proper cost/benefit analysis under Executive Order 12291, like a proper APA rulemaking record, must consider the adverse impact on minorities and women and the alternatives available to the agency for best effectuating the objectives of the regulatory program. The cost/benefit analysis in the proposed regulations does neither. Consequently, the regulations were promulgated in a manner contrary to the rulemaking requirements of the APA and Executive Order 12291.

CONCLUSION

Pervasive discrimination against minorities and women has been characteristic of American history and remains today. Affirmative action is essential to neutralize this discrimination. Unfortunately, the Reagan Administration has chosen to nullify rather than effectuate the affirmative action compliance program. It proposes do so by systematically undercutting all three fundamental components of the enforcement system. If adopted, the proposals will weaken the performance standards for federal contractors, make effective monitoring impossible, and undermine enforcement efforts by creating obstacles to the effective use of sanctions. The purpose and effect are to nullify affirmative action.

Because the Executive Branch can no longer be relied on to enforce

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has considered such basic questions as the following: Which industries (e.g., banking, education, insurance, services, transportation) and occupations (e.g., white collar, professionals/managers) have poor equal employment profiles generally? Which have serious underutilization in certain job groups? Which are the growth industries with the potential for employing more minorities and women? Which industries have significant numbers of Federal contractors? Which have many contractors with 250 or more employees? Which have many contractors with single contracts of $1 million or more? What proportion of contractors in the above categories would remain covered if the 50 employee threshold were raised to 250 — or to each of the intermediate levels considered? How many would remain covered under the single $1 million contract provision? Such questions clearly require a detailed analysis of underutilization of minorities and women in the contractor workforce without which effective targeting of OFCCP resources and proper elimination of unwarranted costs or paperwork would appear impossible. Meanwhile, we see no reason for change until detailed evidence is provided that leads to the conclusion there should be changes. All proposals reducing the scope of Executive Order coverage and affirmative action requirements should be withdrawn and reissued for public comment only when accompanied by an appropriate analysis.

Id.

affirmative action, civil rights advocates must seek different solutions. The solution recommended in this article is direct suits against federal officials to compel them to comply with their legal obligations. If such action is not undertaken, affirmative action may soon become a nullity.