

1996

# Sovereignty as a Bar to Enforcement of Executive Order 11246 in Federal Contracts with Native American Tribes

Vicki Limas

Follow this and additional works at: [http://digitalcommons.law.utulsa.edu/fac\\_pub](http://digitalcommons.law.utulsa.edu/fac_pub)



Part of the [Indian and Aboriginal Law Commons](#)

---

## Recommended Citation

26 N.M. L. Rev. 257 (1996).

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Articles, Chapters in Books and Other Contributions to Scholarly Works by an authorized administrator of TU Law Digital Commons. For more information, please contact [daniel-bell@utulsa.edu](mailto:daniel-bell@utulsa.edu).

# SOVEREIGNTY AS A BAR TO ENFORCEMENT OF EXECUTIVE ORDER NO. 11,246 IN FEDERAL CONTRACTS WITH NATIVE AMERICAN TRIBES

VICKI J. LIMAS\*

## I. INTRODUCTION

Native American tribes, as employers, are exempt from coverage by federal statutes prohibiting discrimination in employment.<sup>1</sup> However, tribes' contracts with the federal government and their subcontracts with prime federal contractors contain antidiscrimination-in-employment clauses authorized by Executive Order No. 11,246<sup>2</sup> and others.<sup>3</sup> These executive orders apply to contractors and their first-tier subcontractors<sup>4</sup> holding aggregate contracts of \$10,000 or more and prohibit discrimination on the same bases covered by the antidiscrimination statutes from which tribes are exempt. In addition, Executive Order No. 11,246 requires federal contractors to take affirmative action to hire and promote racial and ethnic minorities and women.<sup>5</sup> The Order mandates that contractors who have fifty or more employees and hold aggregate federal contracts valued at \$50,000 or more maintain written affirmative action plans for each

---

\* Associate Professor of Law, University of Tulsa College of Law. B.A., M.A., University of Illinois at Chicago; J.D., Northwestern University. I thank Pamela Hammers for her research assistance. I also thank individuals from the Department of Labor and the Office of Federal Contract Compliance Programs for sharing knowledge of the executive order programs and candid opinions on the subject; although we may disagree in result, their knowledge and insights helped shape my thinking about this topic. Conclusions are, of course, my own.

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1991), prohibits discrimination in employment based on race, color, national origin, sex, and religion. It expressly exempts tribal employers from coverage. Likewise, the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1990), which prohibits discrimination against disabled individuals otherwise qualified for the job in question, expressly exempts tribes from coverage. The Age Discrimination in Employment Act of 1969, 29 U.S.C. §§ 621-634 (1990), does not mention tribes but has been interpreted to exclude tribes from its coverage. *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993). Furthermore, tribes may not be subject to the United States Constitution and any equal protection obligations thereunder. *Talton v. Mayes*, 163 U.S. 376, 385 (1896) (holding the Cherokee Nation's powers are not limited by an Amendment of the Constitution).

On the general subject of coverage of tribes by federal labor and employment laws, see Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L. J. 681 (1994).

2. 3 C.F.R. 406 (Supp. 1969). Executive Order No. 11,246 prohibits federal contractors and subcontractors from discriminating on the bases of race, color, religion, sex, and national origin.

3. See, e.g., Executive Order No. 11,141, 29 Fed. Reg. 2477 (1964) (prohibiting federal contractors and subcontractors from discriminating on the basis of age); Executive Order No. 11,758, 39 Fed. Reg. 2075 (1974) (prohibiting discrimination against disabled and Vietnam-era veterans).

4. This means tribes would be subject to Executive Order No. 11,246 not only on their own direct contracts, but on a federal contract in which they are merely a subcontractor. See *infra* text accompanying notes 38-41.

5. See *infra* text accompanying notes 48-50.

of their facilities documenting their workforce composition, the available labor market, their efforts at hiring and promoting individuals within these categories, and their goals for correcting those areas within facilities that "underutilize" individuals within the categories.<sup>6</sup> Failure to comply with the terms of Executive Order No. 11,246 may result in debarment and administrative proceedings or suit by the federal government against the contractor to enforce the antidiscrimination clause on behalf of the aggrieved individual(s) or the agency.<sup>7</sup>

The issue of whether Executive Order No. 11,246 applies to tribes poses real and severe dilemmas for tribal governments. Under the purported authority of the Order, the Department of Labor (DOL) is currently considering whether to formally investigate a number of discrimination claims against Native American tribes under their contracts with the federal government or subcontracts with prime government contractors. In addition, the Office of Federal Contract Compliance Programs (OFCCP), a subagency of the DOL, recently audited Cherokee Nation Industries, a business wholly owned by the Cherokee Nation, for affirmative action compliance under a contract the Nation holds with a prime defense contractor. Potential administrative and defense costs, both in terms of money and staffing, can easily overwhelm the majority of tribal governments. On the other hand, tribes see no choice but to accede to these federal requirements as a condition of receiving federal funding or business income vital to the tribes' existence.

It has been simply assumed that tribes can be liable for employment discrimination under the executive order programs even if they cannot be liable for employment discrimination under federal statutes.<sup>8</sup> For the reasons explained below, this assumption is incorrect; government action against tribal employers under the antidiscrimination executive order programs constitutes an unlawful intrusion into tribal sovereignty.

Part II presents the history and requirements of Executive Order No. 11,246. Part III discusses the unique status of tribes as sovereigns contracting with the federal government, the law governing the federal/tribal relationship, and the incidents of tribal sovereignty. Part IV then explains why that law does not permit enforcement of Executive Order No. 11,246 against sovereign tribes. Part V proposes an alternative means of assuring nondiscrimination in employment under federal contracts, consistent with

---

6. See *infra* text accompanying notes 51-61.

7. See *infra* text accompanying notes 71-75.

8. See, e.g., FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 672 (1982 ed.): [T]he federal government enforces the Equal Employment Opportunity Act [Title VII] as part of government contracts [citing Executive Order No. 11,246]. Although tribes are not covered directly by that Act [citing Title VII], they must observe it in employment under government contracts [no citation]. The Act expressly excepts hiring preferences for Indians on or near reservations [citing Title VII and 41 C.F.R. ch. 60 (regulations implementing Executive Order No. 11,246)]. The tribes otherwise are bound by the Act in contract hiring [no citation].

federal law, that accommodates the federal government's interest in both nondiscrimination and tribal sovereignty.<sup>9</sup>

## II. EXECUTIVE ORDER NO. 11,246

### A. *History of Executive Orders Prohibiting Discrimination in Federal Contracts*

Executive order programs targeting elimination of discrimination by federal contractors resulted from vast disparities in employment opportunities for African Americans as opposed to whites.<sup>10</sup> The first executive orders requiring nondiscrimination in employment under federal contracts were aimed at defense contractors' refusal to hire African Americans during World War II. Executive Order No. 8802<sup>11</sup> was signed by Franklin Roosevelt in 1941 to forestall a planned march on Washington sponsored by the Brotherhood of Sleeping Car Porters and the NAACP to protest racial discrimination by defense contractors.<sup>12</sup> The order required all

---

9. This Article does not concern the current debate over the validity of affirmative action in general. That debate rekindled after *Adarand Constr. Co. v. Pena*, 115 S. Ct. 2097, 2101-02 (1995), which held that federally sponsored programs using race-conscious criteria are subject to a strict scrutiny standard of constitutionality. At issue were voluntary programs under the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, and the Small Business Act, 15 U.S.C. § 637 (1994), as amended by Pub. L. No. 104-106 (1996), under which prime contractors would receive an enhanced contract amount if they subcontract at least ten percent of their award with "small business concerns owned and controlled by socially and economically disadvantaged individuals." *Adarand*, 115 S. Ct. at 2103. Regulations under these programs created a rebuttable presumption that minority-owned businesses were socially and economically disadvantaged. *Id.* *Adarand* overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which had held that a racial classification designed to increase minority ownership of broadcast stations was subject to a lesser standard. See *Adarand*, 115 S. Ct. at 2101.

One commentator concludes that *Adarand* will have no effect on enforcement of Executive Order No. 11,246:

Tailoring the use of goals and timetables to situations in which there is substantial underrepresentation of women or minorities after taking legitimate qualifications into account means that the requirement of goals and timetables is limited to situations in which there is possible discrimination to remedy. The prevention of ongoing discrimination is surely as compelling an interest as providing a remedy for past discrimination, and an appropriately designed program should have little difficulty meeting the requirements of *Adarand* . . . .

Richard T. Seymour, *Affirmative Action: Update on the Legal Issues in Employment, Education, and Contracting*, ABA SEC. OF LABOR & EMPL. L., 1995 ANN. MEETING (Aug. 9, 1995).

For different reasons, *Adarand* will have no effect on programs benefitting Native Americans. The United States Department of Justice Office of Legal Counsel provides the following analysis:

*Adarand* does not require strict scrutiny review for programs benefitting Native Americans as members of federally recognized Indian tribes. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court applied rational basis review to a hiring preference in the Bureau of Indian Affairs for members of federally recognized Indian tribes. The Court reasoned that a tribal classification is "political rather than racial in nature," because it is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id.* at 554.

U.S. Dep't of Just., Office of Legal Counsel Memorandum at 8 (June 28, 1995).

10. For a comprehensive history of the federal government's antidiscrimination initiatives and the times that spawned them, see James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901 (1985).

11. 3 C.F.R. 957 (1938-1943).

12. See Jones *supra* note 10, at 905-06; OFCCP AND FEDERAL CONTRACT COMPLIANCE, 4 n.26 (David A. Copus & Linda E. Rosenzweig, eds., 1981).

federal defense contracts to contain a provision that the contractor would not "discriminate in employment based on race, creed, color, or national origin."<sup>13</sup> The Preamble to Executive Order No. 8802 "asserted that full manpower . . . utilization was the national goal and the exclusion of blacks was a major barrier to the achievement of this goal."<sup>14</sup> Two subsequent executive orders signed by Roosevelt allowed this provision to be incorporated by reference<sup>15</sup> (which is still the case under current Executive Order No. 11,246<sup>16</sup>) and extended the nondiscrimination language to all government contracts, labor unions representing workers on such contracts, and the federal civil service.<sup>17</sup> Despite the extension of coverage, Executive Order No. 9346 was "by its terms directed toward enhancing the pool of workers available for defense production."<sup>18</sup>

The executive orders issued during the Eisenhower administration continued the prohibitions on discrimination in all federal contracts, and created a committee to hear complaints and make recommendations.<sup>19</sup> These changes, however, did little to integrate federal contractors' workforces.<sup>20</sup>

Against a backdrop of nationwide racial turmoil, the next major change in content occurred in Executive Order No. 10,925,<sup>21</sup> signed in 1963 by President John F. Kennedy. President Kennedy's Order added to the prohibitions on discrimination the requirement that the contractor "take affirmative action to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, creed, color, or national origin."<sup>22</sup> In the same year, Kennedy extended the mandates of nondiscrimination and affirmative action to both federally assisted construction contracts and to contracts directly with the federal government.<sup>23</sup>

Executive Order No. 11,246<sup>24</sup> was signed by Lyndon Johnson in 1965. It expanded the scope of Kennedy's orders by requiring that all of the contractor's operations maintain compliance with the Order during the entire performance of the contract, not just those operations performing the federal contract or receiving federal assistance.<sup>25</sup> Order No. 11,246

13. 3 C.F.R. 957 (1938-1943).

14. Jones, *supra* note 10, at 907.

15. See Executive Order No. 9001, 6 Fed. Reg. 6,787 (1941).

16. See *infra* text accompanying notes 36-38.

17. See Executive Order No. 9346, 8 Fed. Reg. 7,183 (1943). See also OFCCP AND FEDERAL CONTRACT COMPLIANCE, *supra* note 12, at 5.

18. Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 169 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

19. See Executive Order No. 10479, 3 C.F.R. 961 (1949-1953); Executive Order No. 10557, 3 C.F.R. 302 (1954-1958).

20. See OFCCP AND FEDERAL CONTRACT COMPLIANCE, *supra* note 12, at 5-6; James L. Moeller, Comment, *Executive Order No. 11,246: Presidential Power to Regulate Employment Discrimination*, 43 Mo. L. REV. 451, 455 (1978).

21. 3 C.F.R. 488 (1959-1963).

22. *Id.*

23. See Executive Order No. 11,114, 3 C.F.R. 774 (1959-1963).

24. 3 C.F.R. 406 (1969).

25. *Id.* See also OFCCP AND FEDERAL CONTRACT COMPLIANCE, *supra* note 12, at 7.

also delegated its enforcement to the Secretary of Labor.<sup>26</sup> In 1967, "sex" was added as a protected category to nondiscrimination and affirmative action requirements,<sup>27</sup> and the word "religion" replaced the word "creed."<sup>28</sup>

Other executive orders added the following categories to be protected from discrimination in federal contracting: age in 1964,<sup>29</sup> veteran status in 1974,<sup>30</sup> and handicap in 1975.<sup>31</sup> The Secretary of Labor has delegated the administration and enforcement of executive order programs to the Office of Federal Contract Compliance Programs (OFCCP), which has promulgated extensive regulations under Executive Order No. 11,246<sup>32</sup> and the other executive orders.<sup>33</sup>

### *B. Requirements of Executive Order No. 11,246*

The current version of Executive Order No. 11,246 consists of two parts. Part I covered nondiscrimination in federal employment. It has been superseded, however, by Executive Orders Nos. 11,375<sup>34</sup> and 11,478.<sup>35</sup> Part II covers private contractors with the federal government and their subcontractors; it incorporates an equal opportunity clause,<sup>36</sup> both by

---

26. 3 C.F.R. 406.

27. See Executive Order No. 11,375, 3 C.F.R. 406 (1969).

28. *Id.*

29. Executive Order No. 11,141, 29 Fed. Reg. 2477 (1964). This order prohibiting age discrimination in federal contracting preceded the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1990), which was amended in 1972 to prohibit age discrimination in federal employment.

30. Executive Order No. 11,758, 39 Fed. Reg. 2075 (1974).

31. Executive Order No. 11,830, 40 Fed. Reg. 2411 (1975). See also The Rehabilitation Act of 1974, 29 U.S.C. § 16 (1994).

32. 41 C.F.R. §§ 60.1 through 60.60 (1994).

33. 41 C.F.R. §§ 60-250.1 through 60-250.54 (1991) (veterans) and §§ 60-741.1 through 742.8 (1995) (handicap). Compliance with the regulations governing Executive Order No. 11,246 involves greater efforts on the part of the contractor, particularly in terms of creating an affirmative action plan, than does compliance with the regulations governing veterans' status and handicap. Therefore, this discussion will focus on compliance with Executive Order No. 11,246, but the conclusion that Executive Order No. 11,246 should not be applied to tribes is just as applicable to any executive order concerning employment matters.

34. 32 Fed. Reg. 14,303 (1967).

35. 34 Fed. Reg. 12,985 (1969).

36. The equal opportunity clause is set out at section 202 of Executive Order No. 11,246, which states:

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed

reference<sup>37</sup> and by mere operation of the Order itself,<sup>38</sup> into all federal contracts and subcontracts. Part III of the Order mandates application of the equal opportunity clause in any construction contract that involves federal assistance.<sup>39</sup> Executive Order No. 11,246 is limited in application to federal grants pertaining to construction contracts.<sup>40</sup> Tribal contracts or subcontracts may fall under either part of the Order.<sup>41</sup>

by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11,246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 11,246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order No. 11,246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, 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. 11,246 of September 24, 1965, and such other sanctions may be imposed and the remedies invoked as provided in Executive Order No. 11,246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11,246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however*, that in the event the contractor becomes involved in, or is threatened with, litigation as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

Executive Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e (1964).

37. 41 C.F.R. § 60-1.4(d) (1995).

38. *Id.* § 60-1.4(e) which states:

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

39. Executive Order No. 11,246.

40. *Id.* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1991), prohibits discrimination in federal grants on the bases of race, color, and national origin.

41. The general Federal Acquisition Regulations (FAR), 48 C.F.R. chs. 1-51 (1994), prescribe that federal agencies incorporate the OFCCP's nondiscrimination regulations, including the equal opportunity clause, into all contracts unless the contract has been exempted from those regulations by the agency director. 48 C.F.R. ch. 1, §§ 22.8, 52.222.21-37. The OFCCP's Equal Opportunity Clause appears in the FAR at 48 C.F.R. § 52.222.26. The FAR defines "contract" broadly at 48

Compliance with the equal opportunity clause imposes a number of obligations on the contractor and subcontractor. The Order itself states:

Each contractor having a contract containing the provisions prescribed in Section 202 [the equal opportunity clause] shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.<sup>42</sup>

The OFCCP's regulations implementing this provision of the Executive Order prescribe the following "Compliance Reports" of all contractors with fifty or more employees that hold aggregate contracts amounting to \$50,000 or more, and of their first-tier<sup>43</sup> subcontractors:<sup>44</sup>

1. *EEO-1 Report*. First, federal contractors must annually file Standard Form 100, also called Form EEO-1, which provides a breakdown of the workforce by race and sex.<sup>45</sup> The EEO-1 form must be filed with the OFCCP within 30 days of the award of the contract unless the contractor has filed the form within the 12 months preceding the award.<sup>46</sup> The EEO-1 form is also required by the Equal Employment Opportunity Commission (EEOC), a subagency of the DOL that administers Title VII.<sup>47</sup>

2. *Affirmative Action Plan*. In addition, federal contractors and subcontractors must prepare and maintain "a written affirmative action compliance program" for each of their establishments,<sup>48</sup> commonly referred to as an "affirmative action plan," or "AAP." The regulations describe the purpose of the AAP as follows:

---

C.F.R. § 2.101:

*Contract* means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.*

42. Executive Order No. 11,246.

43. Lower-level subcontractors may have to file this report as well if they meet certain requirements. See 41 C.F.R. § 60-1.7(a) (1995).

44. In addition to the prescribed reports, OFCCP regulations require contractors and subcontractors to certify to the contracting agency that they maintain nonsegregated work facilities, 41 C.F.R. § 60-1.8(b) (1995), and to post notices to employees and applicants of the employer's coverage by the antidiscrimination provisions of Executive Order No. 11,246 and their rights to contact the OFCCP if they believe they have been the subject of discrimination. *Id.* § 60-1.42.

45. 41 C.F.R. § 60-1.7(a)(1) (1995).

46. *Id.* § 60-1.7(a)(2).

47. Duplicate reporting to the EEOC is not required if the contractor has already submitted an EEO-1 report to the OFCCP or another agency. 42 U.S.C. § 2000e-8(d).

48. 41 C.F.R. § 60-1.40(a) (1995).



A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity.<sup>49</sup>

Thus, the contractor must analyze the workforce at each of its establishments to determine whether "minority groups" (including women) are being adequately "utilized" (i.e., are employed in representative numbers) throughout the contractor's job classifications. In order to make this determination, the contractor must first prepare a "table of job classifications," including "job titles, principal duties (and auxiliary duties, if any), rates of pay, and where more than one rate of pay applied (because of length of time in the job or other factors), the applicable rates."<sup>50</sup>

Next, the contractor must prepare a "utilization evaluation,"<sup>51</sup> which consists, first, of "[a]n analysis of minority group representation in all job categories."<sup>52</sup> This analysis involves not only an internal analysis of the *establishment's* workforce, but also an external analysis of the workforce *available* in an appropriate recruiting area. The area from which the contractor may expect to recruit depends upon the position being analyzed. For example, an upper-management position might involve nation-wide recruiting, whereas a clerical position might involve recruiting from within a reasonable commuting distance.<sup>53</sup>

The second step in the utilization evaluation is for the contractor to analyze and document its "hiring practices for the past year, including recruitment sources and [employment] testing."<sup>54</sup> The contractor must then analyze its "[job] upgrading, transfer and promotion" practices over the past year.<sup>55</sup> Finally, it must prepare written "goals and timetables" to document its intended efforts to redress any "underutilization" of minorities or women.<sup>56</sup>

The AAP must be on file with the contractor within 120 days of the start of the contract<sup>57</sup> and must be made available for inspection upon request by the contractor's employees as well as by the DOL.<sup>58</sup> The AAP must be updated yearly.<sup>59</sup> "[T]he contractor's affirmative action program

---

49. *Id.*

50. *Id.*

51. *Id.* § 60-1.40(b).

52. *Id.*

53. *Cf. Timken Co. v. Vaughn*, 413 F. Supp. 1183 (N.D. Ohio 1976).

54. 41 C.F.R. § 60-1.40(b)(2).

55. *Id.*

56. *Id.* § 60-2.12.

57. *Id.* § 60-1.40(c).

58. *Id.*

59. *Id.*

and the result it produces shall be evaluated as part of compliance review activities."<sup>60</sup>

Commentators have pointed out (and the author can attest) that the preparation and maintenance of an AAP imposes a "substantial administrative burden on employers."<sup>61</sup> "Employers must undertake costly, time-consuming efforts to comply with the substantive and procedural requirements of the Order."<sup>62</sup> In 1980, compliance with these provisions of the OFCCP regulations cost Fortune 500 firms over \$1 billion.<sup>63</sup> The Under Secretary of Labor has acknowledged the monetary burden that preparation of an AAP imposes on the contractor as well as the cost to taxpayers for OFCCP review of the AAP.<sup>64</sup>

Executive Order No. 11,246 allows the Secretary of Labor to exempt certain contractors from some or all of the requirements of the Order.<sup>65</sup> The OFCCP has created by regulation an exception to the equal employment opportunity requirements of the Order with respect to employment of Native Americans by allowing contractors performing work on or near a reservation to publicly announce and practice hiring preferences for Native Americans.<sup>66</sup> Thus, such contractors, including tribes, may, in essence, discriminate on the bases of race, color, and national origin in their hiring practices.<sup>67</sup> According to the OFCCP regulation,

60. *Id.*

61. Moeller, *supra* note 20, at 465.

62. Richard C. Long, Comment, *Remedying Discrimination in Seniority Systems: The Conflict Between Title VII and Executive Order 11,246*, 59 TEX. L. REV. 1077, 1101 (1981).

63. Edward C. Walterscheid, *Back Pay as a Remedy Under Executive Order 11,246: A Study in Administrative Activism*, 18 PUB. CONT. L. J. 559, 584 (1989).

64. Malcolm R. Lovell, Jr., *New Directions for OFCCP*, 32 LABOR L. J. 763, 765 (1981). The purpose of this article was to explain proposed changes to OFCCP regulations under the Reagan administration. With regard to AAPs, the OFCCP "proposed to reduce this costly paperwork by eliminating the annual report requirement for contractors with less than 250 employees and a contract of under one million dollars." *Id.* This proposed change never occurred.

65. Executive Order No. 11,246:

The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor [may], by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders . . . . The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract . . . .

66. See 41 C.F.R. § 60-1.5(a)(6) (1994):

*Work on or near Indian reservations.* It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation . . . . Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter.

67. Native American hiring preferences were held not to violate the Due Process Clause of the Constitution in *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' Tribes. This operates to exclude many individuals who are racially classified as 'Indians.' In this sense, the preference is political rather than racial in nature."). See *infra* text accompanying notes 181-86.

however, those contractors may not discriminate on the bases of religion, sex, or tribal affiliation.<sup>68</sup> As will be discussed below, Congress has recently expanded tribal preference rights even further with regard to self-determination contracts by requiring contracting agencies to abide by preference laws enacted by tribes; most tribal preference laws allow discrimination on the basis of tribal affiliation.<sup>69</sup>

### C. *Enforcement of Executive Order No. 11,246*

Executive Order No. 11,246 directs the Secretary of Labor or the federal contracting agency to implement the following sanctions against contractors found not to be in compliance with the provisions of the Order: publication of the names of noncomplying contractors; recommendation to the Department of Justice to institute enforcement proceedings; recommendation to the Equal Employment Opportunity Commission to institute proceedings under Title VII; recommendation to the Department of Justice to institute criminal proceedings for furnishing false information; termination or suspension of the contract; and proscription against entering into additional contracts.<sup>70</sup>

Courts have uniformly held that Executive Order No. 11,246 does not authorize private rights of action.<sup>71</sup> In its regulations implementing the Order, however, the OFCCP expressly permits the government to seek backpay as a remedy for individuals who have been found to be subjects of discrimination.<sup>72</sup> Commentators dispute the propriety of backpay awards as a remedy for violation of the Order,<sup>73</sup> but courts have generally accepted backpay as an available remedy.<sup>74</sup>

### D. *Relationship of Executive Order No. 11,246 to Antidiscrimination Statutes*

The coverage of Executive Order No. 11,246 is coextensive with that of Title VII of the Civil Rights Act of 1964<sup>75</sup> (Title VII). Title VII prohibits employment discrimination based on race, color, national origin,

---

68. 41 C.F.R. § 60-1.5(a)(6).

69. See *infra* text accompanying notes 199-218.

70. Executive Order No. 11,246.

71. See Walterscheid, *supra* note 63, at 577-78 n.96. See also OFCCP AND FEDERAL CONTRACT COMPLIANCE, *supra* note 12, at 35-37.

72. 41 C.F.R. § 60-1.26(a)(2) (1995). However, the Order itself does not expressly authorize backpay.

73. See OFCCP AND FEDERAL CONTRACT COMPLIANCE, *supra* note 12, at 22-31; Walterscheid, *supra* note 63; Moeller, *supra* note 20, at 488-95. Compare Carmen G. Slominski & Hazel M. Willacy, *Back Pay and Extra-Judicial Proceedings: Is the Office of Federal Contract Compliance Programs Exceeding Its Authority?*, 41 OHIO ST. L. J. 401 (1980) (arguing that Executive Order No. 11,246 authorizes backpay recovery, but OFCCP's regulations concerning backpay are invalid) with Karen Smith Bryan, Note, *Recovery of Back Pay Under Executive Order 11,246*, 52 S. CAL. L. REV. 767 (1979).

74. See, e.g., *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979); *United States v. Duquesne Light Co.*, 423 F. Supp. 507 (W.D. Pa. 1976). For a criticism of the reasoning of these cases, see Walterscheid, *supra* note 63, at 586-87.

75. 42 U.S.C. § 2000e (1991).

sex, and religion.<sup>76</sup> The content and terminology of Executive Order No. 11,246 were amended to conform to that of Title VII. In 1967, "sex" was added to the Order as a protected status, and the word "creed" was replaced by "religion."<sup>77</sup> This was "apparently [done] to dispel any question that results under the executive order should track the results achieved under Title VII of the Civil Rights Act of 1964."<sup>78</sup> In addition, Executive Order No. 11,246 provides that Title VII actions may be invoked against contractors violating the equal opportunity provisions of the Order.<sup>79</sup>

While the overall validity of Executive Order No. 11,246 has been debated by commentators,<sup>80</sup> there remains little doubt that the Order itself represents a valid exercise of presidential power.<sup>81</sup> For an executive order to be valid, "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."<sup>82</sup> However, the Executive has no constitutional power to "make" law; the Constitution authorizes him to "execute" the law.<sup>83</sup> Therefore, when issuing executive orders constitute "making" law, the Executive must act under congressional authority. The Supreme Court, in its most recent ruling on the validity of an executive order, stated that "it is doubtless the case that executive action in any particular instance falls . . . at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."<sup>84</sup>

76. *Id.* § 2000e-2(a)(1).

77. See OFCCP AND FEDERAL CONTRACT COMPLIANCE, *supra* note 12, at 7.

78. *Id.*

79. Executive Order No. 11,246.

80. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979).

81. See *cf. id.*

82. *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).

83. See Walterschied, *supra* note 63, at 569. Mr. Walterscheid highlights two passages from *Youngstown Sheet & Tube Co.* that underscore this point:

The language of the Constitution is not ambiguous or qualified. It places not *some* legislative power in the Congress; Article I, Section 1 says "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."

*Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 630 (Douglas, J., concurring)); [T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be lawmaker. The Constitution itself limits his function in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute.

*Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 587).

84. *Dames & Moore*, 453 U.S. at 669 (commenting on the three categories of executive action set out in Justice Jackson's concurrence in *Youngstown Sheet & Tube*). Courts and commentators have assessed the validity of Executive Order No. 11,246 under those three categories:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent

Some courts have concluded that the congressional authority for Executive Order No. 11,246 emanates from the Federal Property and Administrative Services Act of 1949.<sup>85</sup> Commentators note, however, that the burdensome requirements of Executive Order No. 11,246 are inconsistent with the stated purpose of that Act, which is "to provide the Government an *economical and efficient* system for . . . procurement and supply of personal property and nonpersonal services . . ."<sup>86</sup> These commentators conclude that the authority given the Executive under the procurement statute is not adequate to support the Order's requirements.<sup>87</sup>

A number of courts have concluded alternatively that Title VII provides the congressional authority for Executive Order No. 11,246.<sup>88</sup> Congress recognized the existence of the executive order program in its initial enactment of Title VII in 1964 by expressly exempting from Title VII's recordkeeping requirements those employers maintaining similar records under the executive order program.<sup>89</sup> At the same time, Congress refused to designate Title VII as the exclusive source of federal remedies for employment discrimination.<sup>90</sup> In its consideration of the 1972 amendments to Title VII, Congress more emphatically supported the executive order program when it defeated an attempt to curtail Executive Order No. 11,246. A commentator describes these events:

[D]uring debates on the Equal Opportunity Act of 1972, Congress defeated moves to transfer administration of the [Executive Order] Program to the EEOC. The transfer would have removed all fair employment power from the executive branch and brought the entire

---

presidential responsibility . . . .

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.

*Youngstown Sheet & Tube Co.*, 343 U.S. at 637-38 (Jackson, J., concurring) (citations omitted). See also Long, *supra* note 62, at 1091 n.86. Long applies the three-part test to treatment of seniority systems under Executive Order No. 11,246. *Id.* at 1093-1101.

85. 40 U.S.C. §§ 471-514 (1988). See, e.g., *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3 (3d Cir. 1964).

86. 40 U.S.C. § 471 (emphasis added).

87. See Long, *supra* note 62, at 1101. See also Walterscheid, *supra* note 63, at 573 ("[T]here must be 'a reasonably close nexus between the efficiency and economy criteria of the Procurement Act and any exactions imposed upon federal contractors by Executive Orders promulgated under its authority' for such exactions to lie within the statutory grant.") (quoting *Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981)).

88. See Walterscheid, *supra* note 63, at 574 n.71 (citing *Legal Aid Soc'y of Alameda County v. Brennan*, 608 F.2d 1319, 1329 n.14 (9th Cir. 1979)), *cert. denied sub nom.*, 447 U.S. 921 (1980); *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 465-68 (5th Cir. 1977); *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 171-73 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

89. Civil Rights Act of 1964, Pub. L. No. 88-352, § 709(d), 78 Stat. 263 (1964). This provision is no longer in Title VII, but the Act now requires the EEOC to coordinate recordkeeping requirements with other state and federal agencies. See 42 U.S.C. § 2000e-8(d) (1988). See also Long, *supra* note 62, at 1093.

90. Long, *supra* note 62, at 1093-94 (citing 110 CONG. REC. 13,650-52 (1964)).

field under congressional control. By rejecting that transfer, Congress allowed a continuance of an independent executive order program. . . . [Another] attempt to make Title VII and the Equal Pay Act the exclusive federal remedies for employment discrimination, thus eviscerating the Program, was also defeated. Finally, a 1971 House Report on proposed amendments to Title VII noted the fundamental compatibility of Title VII and Executive Order No. 11,246 by stating: "The two programs are addressed to the same basic mission—the elimination of discrimination in employment. The obligations imposed on the government contractor by the Executive Order . . . reinforce the obligations imposed by Title VII."<sup>91</sup>

Even if Congress has authorized Executive Order No. 11,246 *as a whole* through recognition in Title VII, provisions of the Order must be construed consistently with Title VII's requirements.<sup>92</sup> An example of a construction of Executive Order No. 11,246 conflicting with a provision of Title VII occurs in the treatment of seniority systems. Courts have struck down the OFCCP's interpretation of Executive Order No. 11,246 as providing a remedy for discrimination caused by the operation of "bona fide" seniority systems; such a construction, those courts held, directly contradicts the will of Congress expressed in Title VII's exemption from unlawful employment discrimination practices resulting from the operation of bona fide seniority systems. The seniority system example is instructive because it is directly analogous to the OFCCP's interpretation of Executive Order No. 11,246 as applying to tribal contractors in the face of tribes' express exemption from coverage by Title VII.

Section 703(h) of Title VII states that an employer does not violate the statute when disparate treatment of employees results from the operation of a "bona fide seniority system."<sup>93</sup> In *International Brotherhood*

---

91. *Id.* at 1094 (citing 118 CONG. REC. 1387-98 (1972)).

92. See *Contractors Ass'n of Eastern Pennsylvania*, 442 F.2d at 171-72 ("[t]he Executive is bound by the express prohibitions of Title VII"); *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 237 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd*, *United Steelworker's of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) ("I do not disagree with the majority's conclusion that if a conflict between the Executive Order and Title VII exists, it should be resolved in favor of Title VII. But . . . [h]ere, the two are not in conflict."). In *Weber*, the Supreme Court reversed, on the basis of Title VII only, the Fifth Circuit's holding that the affirmative action plan in question was invalid; the Supreme Court's only mention of Executive Order No. 11,246 was in a footnote stating that it need not determine the validity of the plan under the Order. See *Weber*, 443 U.S. at 209 n.9.

However, in another case in which it decided the validity of OFCCP regulations regarding disclosure of information provided under Executive Order No. 11,246, the Supreme Court stated that "in order for such regulations to have the 'force and effect of law,' it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979).

93. Section 703(h) provides, in pertinent part:

Notwithstanding any other provision of this [Title], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin

42 U.S.C. § 2000e-2(h).

of *Teamsters v. United States*,<sup>94</sup> the Supreme Court confronted the question of whether the operation of a seniority system is unlawful if it is non-discriminatory on its face, but tacitly perpetuates the effect of pre-Title VII discrimination. Earlier, in *Griggs v. Duke Power Co.*,<sup>95</sup> the Court stated that, under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"<sup>96</sup> (i.e., discrimination that occurred prior to the passage of Title VII). In *Teamsters*, the Court acknowledged that a seniority system that continues the effect of pre-Title VII discrimination would fall within the *Griggs* rationale "[w]ere it not for § 703(h)."<sup>97</sup> It then examined the legislative history of section 703(h) to determine the congressional intent behind the protection afforded by the statute.

The Court focused on the Title VII supporters' response to the significant criticism that the legislation "would destroy existing seniority rights."<sup>98</sup> Both the bill's proponents and the United States Department of Justice consistently maintained that Title VII would in no way affect seniority rights.<sup>99</sup> The Court then noted that section 703(h) was added "as part of . . . [a] compromise substitute bill that cleared the way for the passage of Title VII."<sup>100</sup> A purpose of the compromise bill was "to resolve the ambiguities in the House-passed" bill, one of which "concerned Title VII's impact on existing collectively bargained seniority rights."<sup>101</sup> From the debates on the compromise bill, the Court concluded:

[Section] 703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an explicit provision embodying the understanding and assurances of the Act's proponents, namely, that Title VII would not outlaw such differences in treatment among

---

94. 431 U.S. 324 (1977).

95. 401 U.S. 424 (1971).

96. *Id.* at 430.

97. *Teamsters*, 431 U.S. at 349.

98. *Id.* at 350.

99. *Id.* at 350-51. The Court quoted from memoranda by Senators Clark and Case:

Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, *if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis.* He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. . . .

Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. *This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.*

*Id.* (emphasis in original).

100. *Id.* at 352.

101. *Id.*

employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act.<sup>102</sup>

Therefore, the Court held that if an employer's seniority system is "bona fide"—that is, it was not originally created for the purpose of discriminating on any of the bases covered by Title VII<sup>103</sup>—the employer cannot be liable under Title VII for its continued operation. This holds true even if the seniority system perpetuates the effects of discrimination that occurred prior to the passage of Title VII.<sup>104</sup>

OFCCP interpretation of Executive Order No. 11,246, however, considers any bona fide seniority system perpetuating discrimination to violate the antidiscrimination provision of the Order.<sup>105</sup> The agency's regulations do not address seniority systems *per se*; however, the OFCCP's *Federal Contract Compliance Manual*<sup>106</sup> (*Manual*) states that its policy is "the elimination of 'systemic discrimination,'" which it defines as practices that "though often neutral on their face, serve to differentiate or to perpetuate a differentiation in terms of conditions of employment of applicants or employees because of their race, color, religion, sex, national origin, or veteran's status."<sup>107</sup> The *Manual* cites as an example of a practice that perpetuates past discrimination "[c]ollective bargaining agreements with seniority provisions that penalize movement between seniority units,"<sup>108</sup> and provides a remedy to those employees who are discriminated against in such a system.<sup>109</sup> OFCCP field agents are instructed to "approximate where those class members would have been but for the systemic discrimination . . . and fashion a remedy to achieve as quickly as is reasonably possible the rightful place of these class members" in the seniority ranks.<sup>110</sup>

The OFCCP's position on bona fide seniority systems directly contradicts the holding of *Teamsters*. However, the circuits that have addressed

---

102. *Id.*

103. *Teamster*, 431 U.S. at 355-56.

104. *Id.* at 353-54. Retroactive seniority can be part of a remedy for individuals who have proven unlawful discrimination under Title VII. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

105. This analysis of the OFCCP's position on seniority systems appears in Long, *supra* note 62, at 1088-90.

106. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEP'T OF LABOR, FEDERAL CONTRACT COMPLIANCE MANUAL (1980).

107. *Id.* at § 1-60.96.

108. *Id.* at § 7-30.5a.

109. *Id.* at § 7-30.5a1.

110. *Id.* at § 7-50.3. A commentator notes the effect of this remedy on individuals in the seniority system:

Although the OFCCP discourages "bumping" employees out of their positions, it requires opportunities for accelerated seniority advancement for discriminatees when vacancies occur in seniority structures. This kind of remedy will necessarily have an adverse impact on the expectations of beneficiaries of the existing seniority system. The latter will not suffer an absolute reduction in seniority status, but their advancement will be slowed as discriminatees are promoted past them to fill openings occurring at higher levels in the system.

Long, *supra* note 62, at 1089.



this conflict have interpreted section 703(h) of Title VII broadly as an expression of national policy not confined to Title VII and therefore applicable to Executive Order No. 11,246 or any other statute or order implicating seniority rights. In *United States v. East Texas Motor Freight System, Inc.*,<sup>111</sup> the Fifth Circuit rejected the government's claim based on Executive Order No. 11,246 for retroactive seniority rights under a system virtually identical to that at issue in *Teamsters* (such as, one that was not administered in a discriminatory manner but perpetuated the effects of pre-Title VII discrimination). The court first reiterated the rule that "an order of the Executive has the force of law only 'if it is not in conflict with an express statutory provision.'"<sup>112</sup> Then, citing language and reasoning in *Teamsters*, "not based on any specific words in Title VII but on the fixed intent of Congress and the policy behind that intent,"<sup>113</sup> the Fifth Circuit held that "Congress has declared for a policy that a bona fide seniority system shall be lawful."<sup>114</sup> Therefore, the court concluded, "[t]he Executive may not, in defiance of such policy, make unlawful—or penalize—a bona fide seniority system."<sup>115</sup> As further rationale, the *East Texas Motor* court cited the Supreme Court's statement in *Teamsters* that Title VII had given courts "broad equitable powers . . . to give the 'most complete relief possible' . . . to identified individual victims [of discrimination]."<sup>116</sup> "If such relief is the 'most complete . . . possible,'" the court added, "the Executive Order could scarcely be interpreted to demand more."<sup>117</sup> Finally, the Fifth Circuit noted, in support of its holding that the language of section 703(h) is not limited only to Title VII, that the Supreme Court itself remanded a claim for seniority relief under a different civil rights statute<sup>118</sup> "for further consideration in light of" the *Teamsters* decision.<sup>119</sup>

The United State Court of Appeals for the D.C. Circuit embraced the Fifth Circuit's interpretation of congressional intent as not limiting section 703(h)'s protection of bona fide seniority systems to Title VII only. *United States v. Trucking Management, Inc.*,<sup>120</sup> involved consideration of whether the operation of the *same* seniority system at issue in *Teamsters* would justify relief under Executive Order No. 11,246 for perpetuating past discrimination. The court noted the novelty of the government's narrow reading of section 703(h): "Before *Teamsters*, the Government never had to construe Title VII's legislative history as expressing congressional approval of a more far-reaching *executive* power

---

111. 564 F.2d 179 (5th Cir. 1977).

112. *Id.* at 185 (quoting *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 465 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (quoting *Teamsters*, 431 U.S. at 364).

117. *Id.*

118. 42 U.S.C. § 1981.

119. *East Texas Motor*, 564 F.2d at 185 (quoting *Teamsters*, 431 U.S. at 364).

120. 662 F.2d 36 (D.C. Cir. 1981).

to remedy past discrimination perpetuated by bona fide seniority systems'' because, before *Teamsters*, courts had held that *Title VII itself* invalidated the operation of otherwise bona fide seniority systems that perpetuated the effects of past discrimination.<sup>121</sup> The court continued:

We find appellants' present efforts to reassess the legislative history strained and unconvincing. As originally enacted, Title VII made only one reference to the entire Executive Order program, and that was inserted into the legislative history without debate or commentary. The legislative history of section 703(h), the section of Title VII explicitly concerned with seniority systems, made no mention of the Executive Order. At the same time, however, the legislative history of that section exhibited considerable congressional concern and struggle to preserve the vested seniority rights of workers without major curtailment of Title VII's overriding objective of eliminating employment discrimination . . . .

A fair reading of the same legislative history suggests that *Congress simply did not consider, either in 1964 when it passed Title VII, or in 1972 when it amended it, whether the Executive could or should reach beyond Title VII to redress any discrimination which a facially neutral bona fide seniority system might perpetuate.* The Government's construction of section 703(h) would require us to conclude that Congress somehow intended to permit the Executive independently to modify or dismantle concededly bona fide seniority systems. *We find it highly unlikely that Congress would have impliedly approved Executive interference with the same bona fide seniority systems it had deliberately immunized under section 703(h).*<sup>122</sup>

Thus, despite the overall validity of Executive Order No. 11,246, the OFCCP cannot interpret it in a way that contradicts the will of Congress. As will be argued below, the same reasoning that applies to the OFCCP's treatment of bona fide seniority systems applies to the OFCCP's enforcement of Executive Order No. 11,246 against Native American tribes. Just as Title VII exempts bona fide seniority systems from its coverage, Title VII also exempts tribal employers from its coverage. Borrowing the

---

121. *Id.* at 43. For this reason, the D.C. Circuit rejected the government's reliance on the Third Circuit's statement in *Contractors Ass'n*, 442 F.2d at 172, that "§ 703(h) is a limitation only upon Title VII, not upon any other remedies":

Not only was [*Contractors Ass'n*] decided before *Teamsters* when no court or legislator had focused on any distinction between Title VII and the Executive Order, but it was based on the affirmative action obligations of the Executive Order which have only prospective application. Those obligations could not be applied here to provide retroactive seniority relief. Furthermore, because the court in *Contractors Ass'n* evaluated the seniority system discussed there under pre-*Teamsters* standards, there was no finding as here that the seniority systems at issue were protected by § 703(h).

*Trucking Management*, 662 F.2d at 43, n.56 (emphasis added).

The same criticism applies to the Third Circuit's holding in *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978), in which the court found that sections 703(a), (h), and (j) do not bar affirmative action provisions of a consent decree and seniority relief thereunder.

122. *Trucking Management*, 662 F.2d at 44 (citations omitted) (emphasis added).

D.C. Circuit Court's language in *Trucking Management*, it is "highly unlikely that Congress would have impliedly approved Executive interference with the same tribal employers it had deliberately immunized under Title VII."<sup>123</sup>

### III. NATIVE AMERICAN TRIBES ARE UNLIKE OTHER FEDERAL CONTRACTORS

#### A. Tribes' Sovereign Status

Federal policy toward Native American tribes acknowledges and respects their status as sovereign nations. All three branches consider the federal/tribal relationship as one of "government-to-government."<sup>124</sup> Federal law recognizes that tribes, as sovereign nations preexisting the United States,<sup>125</sup> retain all aspects of sovereignty they have not ceded through treaties or lost through congressional enactment.<sup>126</sup> Although Congress has legislative power over tribes, its policy within the last twenty-five years has been to exercise such power sparingly<sup>127</sup> and to curtail judicial incursions into sovereignty.<sup>128</sup> The Congressional findings of the recent Tribal Self-Governance Act of 1994<sup>129</sup> reflect this policy:

123. *Id.*

124. *See, e.g.*, Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (West Supp. 1996); Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250; Presidential Documents, Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994).

125. *See* Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV. U. L. REV. 359, 364-65 (1993) (citations omitted):

Tribal sovereignty derives from tribes' status as self-governing nations whose existence predates that of the United States. From the time of contact, first the European nations, then the colonies and then the United States government, recognized Indian tribes as nations and interacted with them through intergovernmental treaties. The United States Constitution acknowledges the sovereignty of Indian tribes as well, and recognizes them on a par with foreign nations and the states as entities with which Congress may regulate commercial dealings. Also, the Constitution excludes Indians from population counts for representation and taxation purposes.

*Id.*

126. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (citations omitted): [O]ur cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . .' The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

*Id.*

127. Limas, *supra* note 1, at 690 ("[U]nder current federal policy favoring tribal sovereignty, self-determination, and economic self-sufficiency, Congress is reluctant to derogate its policy by exercising its prerogative to limit or abolish tribal rights"). *Cf.* Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 107-08 (1991); Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power*, 27 U.S.F. L. REV. 419, 424 (1993).

128. In *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court held that tribes could not exercise criminal jurisdiction over crimes committed on their land by Native Americans who were not members of their tribe. Congress promptly restored tribal jurisdiction over non-member Indians. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified at 25 U.S.C. § 1301 (1994)). For an account of Congress's correction of *Duro*, see Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992).

129. The Tribal Self-Governance Act of 1994, is part of the Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, tit. 2, §§ 201-204, tit. 4, §§ 401-408, 108 Stat. 4250.

Congress finds that—

(1) *the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations;*

(2) *the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes . . . .*<sup>130</sup>

In recognizing Native American tribes as sovereign nations, federal policy actively promotes tribal self-determination and economic self-sufficiency:

It is the policy of this title to permanently establish and implement tribal self-governance—

(1) *to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes;*

(2) *to permit each Indian tribe to choose the extent of the participation of such tribe in self-governance;*

. . . .  
(5) *to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority to plan, conduct, redesign, and administer programs, services, functions, and activities that meet the needs of the individual tribal communities . . . .*<sup>131</sup>

Modern federal legislation concerning tribes is directed toward these goals of tribal self-determination and economic self-sufficiency,<sup>132</sup> and such legislation is broadly interpreted by the courts in favor of tribes to accomplish these goals.<sup>133</sup>

A crucial aspect of sovereignty is the sovereign's immunity from suit without its permission.<sup>134</sup> Federal law has long recognized that tribes retain this aspect of their sovereignty unless it has been waived by Congress

130. *Id.* § 202 (emphasis added).

131. *Id.* § 203 (emphasis added).

132. *See, e.g.,* Indian Financing Act of 1974, 25 U.S.C. §§ 1451-544 (1984); Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. §§ 450-459e (1994); Indian Health Care Improvement Act, 25 U.S.C. §§ 1601-03, 1611-15, 1621, 1631-33, 1651-58, 1661, 1671-75, 42 U.S.C. §§ 1395f,n,qq, 1396j (1992); Indian Employment, Training and Related Services Demonstration Act of 1992, 25 U.S.C. §§ 3401-17 (Supp. 1995); Indian Tribal Justice Act, 25 U.S.C. § 3601 (Supp. 1996).

133. *See* Wagman, *supra* note 127, at 424-25 ("Statutes supporting self-determination are usually given broad deference and pro-Indian construction.")

As a matter of fact, courts are required to interpret all legislation affecting tribal interests liberally and to resolve ambiguities in favor of those tribal interests. *See* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). Furthermore, statutes must be interpreted in accordance with current federal policy toward Native Americans regardless of the policy in effect at the time they were enacted. *See* Santa Rose Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), *cited with approval* in Bryan v. Itasca County, 426 U.S. 373, 388 (1976); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1141 (1990).

134. A discussion of the bases of federal, state, and tribal sovereign immunity appears in Wagman, *supra* note 127, at 438-49.

or the tribe itself.<sup>135</sup> Furthermore, any waiver of sovereign immunity must be "unequivocally expressed;" a waiver of sovereign immunity cannot be implied.<sup>136</sup>

*Santa Clara Pueblo v. Martinez* illustrates and summarizes principles of federal Indian law concerning tribal sovereignty and sovereign immunity. There, the Supreme Court addressed tribal immunity and federal jurisdiction under the Indian Civil Rights Act (ICRA).<sup>137</sup> The ICRA grants civil rights to individual tribal members concerning their tribes' governments similar to those rights granted American citizens in the Bill of Rights to the United States Constitution.<sup>138</sup> Of particular relevance to a discussion of employment rights is the ICRA's requirement that tribes afford due process and equal protection rights to their members; these provisions encompass claims of discrimination or other types of unfair treatment.<sup>139</sup> Although *Martinez* was not an employment case, it concerned a violation of equal protection rights under the ICRA.<sup>140</sup> The plaintiffs sued the Pueblo and its governor in federal district court claiming that the Pueblo's membership ordinance violated ICRA's equal protection clause.<sup>141</sup> The tribal ordinance extended membership rights to children of male members who marry nonmembers but not to children of female members who marry nonmembers.<sup>142</sup>

The *Martinez* Court held that the ICRA did not waive the Pueblo's immunity from suit and did not confer federal jurisdiction over the claim

135. See, e.g., *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940) ("Indian Nations are exempt from suit without Congressional authorization"); *Puyallup Tribe, Inc. v. Dep't of Game of Washington*, 433 U.S. 165, 172 (1977) ("Absent an effective waiver or consent, . . . a state court may not exercise jurisdiction over a recognized Indian tribe."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers . . . [W]ithout congressional authorization, the 'Indian Nations are exempt from suit.'"); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.").

136. *Martinez*, 436 U.S. at 58.

137. 25 U.S.C. § 1301-1341 (1994).

138. *Id.* § 1302. Because tribal governments pre-date the Constitution, the Supreme Court has stated that the United States Constitution does not apply to them. See *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896); accord *Martinez*, 436 U.S. at 56. Rights accorded by the ICRA, however, are "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Martinez*, 436 U.S. at 57. The ICRA requires tribes to afford rights to their citizens of free exercise of religion, speech, press, assembly, due process, and equal protection; rights against unreasonable searches and seizures and governmental taking without just compensation; and, in criminal cases, rights against double jeopardy and self-incrimination, and rights to speedy trials, confrontation and securing of witnesses, counsel at defendant's expense, and trial by a jury of six. 25 U.S.C. § 1302. The ICRA also prohibits excessive bail and fines, cruel and unusual punishment, imprisonment over one year per offense, fines in excess of \$5,000, bills of attainder, and ex post facto laws. 25 U.S.C. § 1302. An account of the legislative history of the ICRA appears in VINE DELORIA, JR. & CLIFFORD LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 200-14 (1984).

139. See *Limas*, *supra* note 125, at 382-85.

140. See *Martinez*, 436 U.S. at 54-55.

141. *Id.* at 53.

142. *Id.* at 51-52.

against the governor.<sup>143</sup> The only specific relief Congress provided under the ICRA was for *habeas corpus*, and the Court noted that the respondent in a suit for such relief would be an individual, not the tribe.<sup>144</sup> The Court discussed its long-standing recognition of tribal sovereign immunity and the rule that a waiver of immunity must be express and unequivocal.<sup>145</sup> The ICRA's provision for relief against an individual could not be deemed a general waiver of immunity for a *tribe*, the Court reasoned.<sup>146</sup>

In holding that the ICRA did not confer federal jurisdiction for claims other than *habeas* actions, *Martinez* relied on principles of tribal sovereignty. It reiterated early Supreme Court holdings that "tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government"<sup>147</sup> and "the power of regulating their internal and social relations."<sup>148</sup> The Court found that, in enacting the ICRA, Congress intended to promote the dual interests of "strengthening the position of individual tribal members" and "promot[ing] the well-established federal 'policy of furthering Indian self-government.'"<sup>149</sup> Balancing those goals, the Court concluded that "[c]reation of a federal cause of action for the enforcement of rights created in [the ICRA] . . . plainly would be at odds with the congressional goal of protecting tribal self-government."<sup>150</sup>

Tribes' retention and use of sovereign immunity is directly related to their ability to achieve the federally stated goal of self-determination. One commentator states that "the dire economic status of most American Indian groups" must inform federal policy and decisions regarding tribal sovereign immunity:

Tribal sovereign immunity is one of the last strongholds of the promise of self-determination that has not been removed or effectively gutted . . . . [F]ortification of the doctrine is directly in line with the policy of tribal self-determination and economic self-sufficiency, and any decrease in its protection would be "inconsistent with overriding interests of the National Government" which are now directed at tribal sustenance and restoration.<sup>151</sup>

The Supreme Court recently reiterated and strengthened the doctrine of tribal sovereign immunity in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*.<sup>152</sup> There the State of Okla-

---

143. *Id.* at 72.

144. *Id.* at 59.

145. *Martinez*, 436 U.S. at 58.

146. *Id.* at 59.

147. *Id.* at 55 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

148. *Id.* (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)).

149. *Id.* at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

150. *Id.* at 64.

151. Wagman, *supra* note 127, at 471 (citations omitted). See also Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1069-74 (1982).

152. 498 U.S. 505 (1991). For a critical discussion of *Citizen Band Potawatomi*, but one that ultimately reaches the conclusion that the case represents a "steadfast, acceptance and reaffirmation of the near-absolute nature of tribal immunity[.]" see Wagman, *supra* note 127, at 465-70.

homa attempted to sue the Potawatomi Indian Tribe in state court for taxes on the Tribe's cigarette sales.<sup>153</sup> The State pressed the Court to abolish the doctrine of tribal immunity altogether, or alternatively, to limit it to the Tribes' governmental, rather than business, activities.<sup>154</sup> The Court refused to limit the doctrine in any way,<sup>155</sup> and thus reaffirmed its longstanding recognition of the doctrine. Citing Congress' stated goals of tribal self-government, self-sufficiency, and economic development in legislation such as the Indian Financing Act of 1974<sup>156</sup> and the Indian Self-Determination and Education Assistance Act,<sup>157</sup> the Court reasoned that elimination of sovereign immunity for tribal businesses would essentially destroy the ability of the tribes to attain these goals.<sup>158</sup>

### B. Tribal Dependency on Federal Funding

Although tribes are sovereign nations, they are economically weak compared to state and local governments and private sector federal contractors. Most Native American tribes are virtually dependent upon federal contracts and grants for their very existence.<sup>159</sup> Unlike states and municipal governments, tribes have little economic base to support their governments. The average income of Native American workers living on or near reservations is \$7,000 per year.<sup>160</sup> In 1989, 47.3 percent of families living on reservations or trust land lived below the poverty level, compared to 11.5 percent of families nationwide.<sup>161</sup> The median family income on reservations and trust lands was \$13,489, compared to \$34,213 nationwide.<sup>162</sup> The United States government's estimate of the unemployment rate for Native Americans is 45 percent, but the actual rate is probably much higher.<sup>163</sup>

153. *Citizen Band Potawatomi*, 498 U.S. at 507.

154. *Id.* at 510.

155. *Id.*

156. 25 U.S.C. §§ 1451-1544 (1994).

157. 25 U.S.C. §§ 450-458hh (1994).

158. *Citizen Band Potawatomi*, 498 U.S. at 510.

159. Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J. L. REF. 277, 284 (1993).

160. ARLENE HIRSCHFELDER & MARTHA KREIPE DE MONTANO, *THE NATIVE AMERICAN ALMANAC: A PORTRAIT OF NATIVE AMERICA TODAY* 211 (1993).

161. Dirk Johnson, *Economies Come to Life on Indian Reservations*, N.Y. TIMES, July 3, 1994, at A1, A10, A11 (referencing statistics from the Census Bureau and National Indian Policy Center).

162. *Id.*

163. See HIRSCHFELDER & DE MONTANO, *supra* note 160, at 211. The authors explain the reasons for this conclusion:

The official estimate of Native American unemployment is forty-five percent, while the average unemployment rate for the United States is eight percent. Judging from the Bureau of Labor Statistics' figures, the unemployment problem for American Indians seems severe. However, since the Bureau of Labor Statistics' estimate does not include those who are discouraged from seeking work, the real unemployment rate for Native Americans may be much higher. In 1985, the Full Employment Action Council reported that Native American unemployment may in fact be as high as eighty-seven percent on some reservations. Some of the most commonly cited reasons for high unemployment for Native Americans are poor education, discrimination, and the lack of industry on and near reservations.

*Id.*

Tribal businesses and income-generating ventures represent efforts by tribes to free themselves from government funding and thereby attain "true sovereignty."<sup>164</sup> To the extent that tribes "profit" from income derived through federal contracts, such profit accrues to the commonwealth of the tribe *as a nation* to operate its government and provide services to its citizens. As one commentator put it, "Indian economic development may be less about creating wealth than it is about creating the conditions for political power in the context of socially responsible choices for the continued existence and cohesion of the Indian nation."<sup>165</sup> Management of employment relations within tribally owned and operated businesses is truly an exercise of tribal sovereignty.<sup>166</sup>

#### IV. INCOMPATIBILITY OF TRIBAL SOVEREIGN STATUS WITH THE REQUIREMENTS OF EXECUTIVE ORDER NO. 11,246

As discussed previously, the antidiscrimination executive orders resulted from the exclusion of certain minority groups, primarily African Americans, from the workforce.<sup>167</sup> The same motivation, of course, existed behind the passage of Title VII and other civil rights laws, which were more broadly based.<sup>168</sup> Such laws protecting minority group rights were enacted for the purpose of integrating those groups into the entire political, economic, and social realms of American society.<sup>169</sup> Federal laws governing Native American rights, on the other hand, protect the "cultural separateness and political autonomy" of Native Americans, "a special protection of a separate minority population."<sup>170</sup>

This distinction—between the federal goal of broad inclusion of minority groups into mainstream American society and the federal goal of pres-

---

164. See Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 560-61 (1994) (citation omitted):

We came to the realization that rather than seeking the help of government agencies and departments, or of other countries and Indian nations, or of private persons and charitable groups, we needed to empower ourselves as a people and to develop our own resources. We could not allow these outside groups, whether political bodies or charities . . . to define for us what our lives should be. We could not claim to be truly sovereign and yet remain dependent on others. We would have to make the difference in our futures and in our lives.

*Id.*

165. John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495, 499 (1991).

166. A Native American commentator relates employment opportunities to the sovereignty of his tribe as follows:

The greatest accomplishment . . . is the renewed self-esteem of our people and the renewed hope that has accompanied new opportunity. This is the result of real, practical economic sovereignty according to our definition and under our control. Even if resources were made available to us by grant or charity, it is immeasurably more satisfying to have achieved all of this from our own effort and hard work.

Halbritter & McSloy, *supra* note 164, at 571.

167. See *supra* text accompanying notes 10-14.

168. See generally CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* (1985).

169. See ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 1 (3d ed. 1991).

170. *Id.*



ervation of one "minority" group's political and cultural separateness from mainstream American society—lies at the heart of this discussion of Executive Order No. 11,246. Congress recognized this distinction in drafting the federal antidiscrimination statutes, as do the courts in applying them; the executive branch does not when it attempts to apply Executive Order No. 11,246 to tribes.

### A. *The Antidiscrimination Statutes*

Title VII and other antidiscrimination statutes reflect Congress' intent that tribal employers occupy a "unique legal status" free from governmental interference.<sup>171</sup> Those statutes recognize the need for "special protection" of Native American groups. In particular, Native American tribes are expressly excluded from coverage by Title VII.<sup>172</sup> By this exclusion, Congress recognized tribes' status as self-governing sovereigns like the federal government, which it also originally excluded from coverage by Title VII.<sup>173</sup>

The exclusion of tribes from Title VII's coverage was proposed by Senator Mundt of South Dakota as an amendment to the Senate bill's definition of "employer":

To a large extent many tribes control and operate their own affairs, even to the extent of having their own elected officials, courts and police forces. *This amendment would provide to American Indian tribes in their capacity as a political entity [sic], the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs and economic activities without consideration of the provisions of the bill.*<sup>174</sup>

In his remarks, Mundt compared this amendment to the other amendment concerning Native Americans he had already successfully introduced, which allowed employers operating on or near reservations to preferentially hire Native Americans living on or near the reservation.<sup>175</sup> Both of these

171. A similar discussion of the history of the exclusion of tribes from coverage of antidiscrimination statutes appears in Limas, *supra* note 1, at 715-23.

172. See 42 U.S.C. § 2000e(b). This section states that:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, *but such term does not include* (1) the United States, a corporation wholly owned by the Government of the United States, *an Indian tribe*, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service . . . .

42 U.S.C. § 2000e(b) (emphasis added).

173. *Id.* Title VII was amended in 1972 to cover the United States government as an employer. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-16).

174. 110 CONG. REC. 13,702 (1964) (emphasis added).

175. This provision is codified at 42 U.S.C. § 2000e-2(i):

Nothing contained in this subchapter [setting forth unlawful employment practices] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

amendments, he asserted, would "assure our American Indians *of the continued right to protect and promote their own interests* and to benefit from Indian preference programs now in operation or later to be instituted,"<sup>176</sup> adding that Native Americans comprise "the one minority group in the United States which has suffered the longest and the most from the callous indifference and the poor judgment of Americans generally."<sup>177</sup>

The intent reflected in Senator Mundt's statements—that tribes are sovereigns in their own right and are entitled to exercise control over their own interests without congressional interference—was reiterated by the Supreme Court when it interpreted the 1972 amendments to Title VII. These amendments extended Title VII's coverage to employment by state, local, and federal governments.<sup>178</sup>

In *Morton v. Mancari*,<sup>179</sup> the Court held that these amendments to Title VII did not repeal the Indian hiring preference provision of the Indian Reorganization Act of 1934<sup>180</sup> for Bureau of Indian Affairs employment.<sup>181</sup> The Court observed that tribes were not mentioned at all in the legislative history of the 1972 amendments,<sup>182</sup> and that both provisions of Title VII concerning tribes—the exclusion of tribes from the definition of "employer" and the hiring preference for Native Americans living on or near a reservation—remained intact after the 1972 amendments.<sup>183</sup> Both provisions, the Court found, reflected the "longstanding federal policy" of congressional deference to tribal sovereignty by "*providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment.*"<sup>184</sup>

Congress continued to express its intent not to interfere with tribal sovereignty in employment matters when it expressly excluded Native American tribes from the definition of "employer" in the Americans with Disabilities Act of 1990 (ADA).<sup>185</sup> Title I of the ADA prohibits discrimination against disabled individuals who are otherwise qualified to hold the job in question and imposes a duty upon the employer to "reasonably accommodate" the individual's disability.<sup>186</sup> The legislative history of the ADA does not explain why tribes are excluded from the definition of "employer," except to say that Congress borrowed the

---

176. 110 CONG. REC. 13,702 (emphasis added).

177. *Id.*

178. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Federal employment was added to Title VII's coverage at 42 U.S.C. § 2000e-16; state and local governments were deleted from Title VII's original exclusions from its definition of "employer" at 42 U.S.C. § 2000e(b).

179. 417 U.S. 535 (1974).

180. 25 U.S.C. § 472 (1988).

181. *Mancari*, 417 at 553-54.

182. *Id.* at 547.

183. *Id.* at 548.

184. *Id.* at 547-48 (recognizing that tribes and their members enjoy a distinct political status as opposed to a racial status) (emphasis added).

185. 42 U.S.C. §§ 12111-12117 (Supp. IV 1992).

186. *Id.* § 12111(9).

procedural framework of the ADA from that of Title VII and that Title VII's definition of "employer" was part of that procedural framework.<sup>187</sup>

Although Congress did not mention tribes in its definition of "employer" in the Age Discrimination in Employment Act of 1967 (ADEA),<sup>188</sup> the two circuits that have addressed the question have interpreted the ADEA to exclude tribes from its coverage because of tribal sovereignty.

In *EEOC v. Cherokee Nation*,<sup>189</sup> the Tenth Circuit held that the ADEA did not authorize the Equal Employment Opportunity Commission (EEOC) to investigate a charge of age discrimination against the Cherokee Nation's Director of Health and Human Services because tribes are exempt from the statute's coverage.<sup>190</sup> The ADEA's definition of "employer" is virtually identical to that of Title VII except for mentioning tribes.<sup>191</sup> The court reasoned that, because the application of the ADEA would involve sovereign tribal rights, the difference between the two statutes' language created an ambiguity that, under federal law, must be resolved in favor of the tribe by excluding it from coverage by the ADEA.<sup>192</sup>

The Eighth Circuit used similar reasoning in *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*,<sup>193</sup> in which it affirmed the dismissal of an age discrimination case against a tribally owned business by a member of the tribe. It found the suit to involve a matter of tribal sovereignty:

Subjecting such an employment relationship between the tribal member and his tribe to federal control and supervision *dilutes the sovereignty of the tribe*. The consideration of a tribe member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe *in accordance with its culture and traditions*.<sup>194</sup>

Because application of the ADEA would impinge on tribal sovereignty, the court resolved the ambiguity resulting from the ADEA's silence in favor of the tribe and held that the tribe was not a covered employer under the ADEA.<sup>195</sup>

The "unique legal status" Congress affords tribal employment in the antidiscrimination statutes must be respected in the interpretation and application of Executive Order No. 11,246. A tribe's culture and the way employment is treated in that culture is part of that "unique legal

---

187. H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 54, pt. 3, at 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 306, 445, 454-55 (citation omitted).

188. 29 U.S.C. § 621 (1990). The ADEA prohibits discrimination against individuals over age 40. *Id.* § 631.

189. 871 F.2d 937 (10th Cir. 1989).

190. *Id.* at 939.

191. *See* 29 U.S.C. § 630(b).

192. *Cherokee Nation*, 871 F.2d at 939.

193. 986 F.2d 246 (8th Cir. 1993).

194. *Id.* at 249 (emphasis added).

195. *Id.* at 251. Both *Cherokee Nation* and *Fond du Lac Heavy Equipment* contained dissents that would have interpreted the ADEA to apply to tribes. For discussion and criticism of the dissents' reasoning as being contrary to federal law, *see* Limas, *supra* note 1, at 721-26.

status," as the Eighth Circuit acknowledged. A commentator explains this point:

[C]onceptions of equality specific to one culture are not useful tools to assess the justice of practices and beliefs of another culture. For example, one conception of equality declares that political rights and responsibilities ought to be distributed among citizens without regard to racial or cultural difference. This stands in stark contrast to the distributive principle adhered to in a society that distributes political rights and responsibilities by reference to, say, lineage. That society's distributive principle might conform to a particular conception of equality, namely, that all who are of a certain lineage be treated equally. A distribution based on lineage, however, is a far cry from the conception of equality that prohibits consideration of race or cultural difference.<sup>196</sup>

Congress's recognition of the "unique legal status" of tribal employment by legislatively excluding it from governmental oversight accommodates cultural differences and advances the congressional policy promoting tribal sovereignty. Judicial interpretation and application of these statutes likewise reflect the policy of tribal sovereignty. In attempting to apply the Order to Native American tribes in direct contravention of Congress's exemption of tribes from Title VII and other antidiscrimination laws, the OFCCP acts without statutory authority and against federal policy, just as it does when it ignores Congress's protection of bona fide seniority systems under section 703(h) of Title VII.

### *B. Statutory Indian Preferences*

The tribal employment preference provisions of Title VII<sup>197</sup> and other statutes further indicate that Congress does not intend the antidiscrimination requirements of Executive Order No. 11,246, along with their cumbersome compliance regulations, to apply to tribal employment.<sup>198</sup> Recall that Senator Mundt, who introduced the preference provision into Title VII, characterized it and the provision to exclude tribes from Title VII's coverage as a means of assuring tribes "of the continued right to protect and promote their own interests."<sup>199</sup> Furthermore, in *Morton v. Mancari*, the Supreme Court noted the pervasiveness of Indian preferences throughout the history of the United States' dealings with tribes and matters affecting tribes:

The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834. Since that time, Congress repeatedly has enacted various preferences of the general

---

196. Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1351-52 (1993).

197. See *supra* note 172, for the text of this provision.

198. Recall that the OFCCP regulations implementing Executive Order No. 11,246 contain a Native American hiring preference provision. See *supra* text accompanying note 172. Indeed, the Order itself contains a similar hiring preference provision.

199. 110 CONG. REC. 13,702. See *supra* text accompanying note 174.

type here at issue. The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.<sup>200</sup>

The Court also characterized Title VII's exemption of tribes as employers and its preference provision as "a clear congressional recognition, within the framework of Title VII, of *the unique legal status of tribal and reservation-based activities*."<sup>201</sup> Citing Senator Humphrey's statement, the Court added that "[t]his exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians."<sup>202</sup>

As discussed previously, *Mancari* held that the 1972 amendments to Title VII, which extended that Act's prohibition of discrimination to federal, state, and local employment, did not repeal Indian preference laws.<sup>203</sup> In its reasoning, the Court explained that the *fundamental difference* between antidiscrimination laws and Indian preference laws

is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference is a *longstanding, important component of the Government's Indian program*. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, *obviously is designed to deal with an entirely different and, indeed opposite, problem . . .*<sup>204</sup>

The "problems" that Indian preference provisions address are, of course, the previously discussed dichotomy between the goals of integrating minority groups in general into the American labor force and that of preserving autonomy for a "special" minority group.<sup>205</sup> The preference provisions allow Native Americans to take "a greater control of their own destinies"<sup>206</sup>—that is, maintain their sovereignty—through employment in activities and services that affect them.<sup>207</sup> Tribal employment

200. *Morton v. Mancari*, 417 U.S. 535, 541-42 (1974) (citations omitted).

201. *Id.* at 545-46 (emphasis added).

202. *Id.* at 546 (quoting 110 CONG. REC. 12,723 (1964)).

203. *Id.* at 547.

204. *Id.* at 550 (emphasis added).

205. See *supra* text accompanying notes 169-171.

206. *Mancari*, 417 U.S. at 553.

207. A Native American commentator states this point eloquently:

It is important to distinguish the desire of Indian peoples to maintain their cultural identity from similar desires of other minority groups in American society. Indian people are not looking for "multicultural perspectives" or "diversity" or for recognition of our contributions to the "melting pot." Our rights are not civil rights, minority rights, affirmative action rights nor anything of the kind. Our rights are those of sovereign nations, as recognized in repeated treaties with our fellow sovereign, the United States . . . .

The United States has thus always seen us as separate, and therefore our struggle to maintain our identity is unlike that of any other ethnic group. The desire of other groups in American society for equal rights is different from our desire for sovereignty. We are empathetic to the sufferings of others, but there are fundamental differences between sovereignty and equal protection or due process.

Halbritter & McSloy, *supra* note 164, at 555-56 n.85.

preferences directly advance tribal sovereignty. As a commentator has pointed out, preference of tribal members in tribally-related businesses

supports a tribal goal which, stated in its most basic terms, involves the maintenance of tribal identity, integrity, custom, and, in some circumstances, its very existence. Tribal preference ordinances also correct much of the discrimination which has kept reservation Indians from getting jobs or job training. Additionally, tribes have an interest in creating and maintaining a job market on the reservation to encourage Indian labor to remain.<sup>208</sup>

Congress has recently indicated its approval of a broader reading of tribal preferences than those recognized by agency regulations. Some tribes have enacted preference ordinances stating that employment preference can be made on the basis of tribal membership.<sup>209</sup> Even though OFCCP regulations provide for an Indian preference,<sup>210</sup> however, they state that a contractor "shall not . . . discriminate among Indians on the basis of religion, sex, or tribal affiliation."<sup>211</sup> Similar language appears in Bureau of Indian Affairs and Indian Health Service regulations.<sup>212</sup> In the 1994 amendments to the Indian Self-Determination and Education Assistance Act of 1975,<sup>213</sup> governing federal assistance to tribes in the form of self-determination contracts, Congress mandates that "with respect to any self-determination contract . . . that is intended to benefit one tribe, the tribal employment or contract preference laws *adopted by such tribe* shall govern with respect to the administration of the contract . . ."<sup>214</sup> The purpose of this amendment was to "remove the source of conflict by endorsing tribal TERO [tribal employment rights ordinances] where they are in place."<sup>215</sup> Thus, if a tribe discriminates in employment

---

208. Kevin N. Anderson, Comment, *Indian Employment Preference: Legal Foundations and Limitations*, 15 TULSA L. J. 733, 758 (1980). Cherokee Nation Industries, discussed in *supra* part I, was founded by the Cherokee Nation in response to widespread Native American unemployment in Adair County, Oklahoma.

209. See *id.* at 766.

210. See *supra* note 66.

211. 41 C.F.R. § 60-1.5(a)(6) (1995).

212. For example, the Bureau of Indian Affairs prescribes the following Indian preference clause in its contracts:

(a) The Contractor agrees to give preferences to Indians who can perform the work required regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation for training and employment opportunities under this contract

48 C.F.R. § 1452.204-71 (1994).

213. 25 U.S.C. § 450.

214. Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, § 102(4) 108 Stat. 4250 (codified at 25 U.S.C. § 450 (1994)) (emphasis added).

215. S. Rep. No. 374, 103d Cong., 2d Sess. 5 (1994). The Senate Report's explanation for the amendment is as follows:

Section 2(4) amends section 7 of the statute to add a new subsection (c) to recognize tribal laws addressing employment preferences. Presently, tribal governments are unable to reconcile the terms of tribal employment rights ordinances (TERO) (which generally provide for tribal preferences in employment for tribal members) with section 7(b) of the Act (which establishes a general Indian preference). Presently, the Bureau of Indian Affairs and the Indian Health Service disagree on the ap-

in favor of tribal members under its laws, the contracting agency must follow the tribal law.

As stated in *Mancari*, tribal preference laws are a "long-standing, important component" of the federal policy toward Native American employment.<sup>216</sup> Congress' action in recognizing tribal preference laws in self-determination contracts reinforces the Congressional policy of tribal self-determination. OFCCP regulations reject tribal preference laws; thus, they run counter to federal policy and congressional intent.

There is another reason, given the policy behind preference laws, that it does not make sense to impose Executive Order No. 11,246 on tribal employers. The Order is primarily directed toward hiring of racial and ethnic minorities. But the preference provisions, by their very terms, exempt tribes from any duty to hire from other racial or ethnic groups. Under the preference laws, tribal employment will be overwhelmingly Native American, a "minority" group recognized by the OFCCP. Moreover, preferences on the basis of tribal membership could lawfully exclude from consideration anyone—male or female—who is not a tribal member. It simply makes no sense to impose the requirements of Executive Order No. 11,246 on tribes when tribal employment is by its very nature employment of "minorities" within the meaning of the OFCCP's own regulations.

### C. *The Indian Self-Determination and Education Assistance Act*

The most recent congressional pronouncement that the executive order program is not appropriate to tribal contracts appears in the 1994 amendments of the Indian Self-Determination and Education Assistance Act (ISDA).<sup>217</sup> There Congress makes clear that it did not intend for federal contracting regulations, including Executive Order No. 11,246, to apply to self-governance contracts between tribes and the United States under the Indian Self-Determination and Education Assistance Act of 1975,<sup>218</sup> which represent the sole source of federal funds for many tribal programs. Under self-determination contracts, tribes receive lump sums from the Bureau of Indian Affairs or the Indian Health Service to administer tribal programs themselves that would otherwise be administered by a government agency.<sup>219</sup>

The original purpose of the ISDA was to authorize tribes "to contract with the federal government to operate programs serving their tribal members."<sup>220</sup> Tribes, rather than the federal government, would thus administer programs benefitting their members. The Act was passed in

---

plicability of tribal TERO ordinances to employment under self-determination contract. The new amendment will remove the source of conflict by endorsing tribal TERO ordinances where they are in place.

216. *Morton v. Mancari*, 417 U.S. 535, 548 (1974).

217. Pub. L. No. 103-413, 108 Stat. 4250 (codified at 25 U.S.C. § 450 (1994)).

218. 25 U.S.C. § 450.

219. *Id.* § 450(e).

220. S. Rep. No. 374, 103d Cong., 2d Sess. 1 (1994).

response to President Nixon's 1970 policy statement to Congress on tribal self-determination:

For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the threat of termination. But another reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the federal authorities and not the Indian people who finally make that decision.

This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing to assume administrative responsibility for a service program which is presently administered by a federal agency.<sup>221</sup>

The 1988 ISDA amendments resulted from Congress's realization that "the original goal of ensuring maximum tribal participation in the planning and administration of federal services, programs and activities for the benefit of Indians had been undermined by excessive bureaucracy and contract requirements."<sup>222</sup> It noted that "federal bureaucrats had imposed administrative and reporting requirements on Indian tribes which were more stringent than the standards which would apply to direct federal operation of the programs"<sup>223</sup> and that "the contract approval process required an average of six months rather than the 60 days mandated by the Act."<sup>224</sup> So Congress mandated that the BIA and the IHS develop new joint regulations "with the participation of Indian tribes" for the implementation of contracting under the Act.<sup>225</sup> The regulations were to be "relatively simple, straightforward, and free of unnecessary requirements or procedures."<sup>226</sup>

The 1988 amendments allowed the agencies one year to promulgate the new regulations, but the regulations were not *proposed* until January 20, 1994.<sup>227</sup> Congress found the proposed regulations to "contain hundreds of new requirements . . . [many of which] 'are more restrictive than existing regulations and raise new obstacles and burdens for Indian tribes seeking the opportunities for effective tribal self-government promised by the Act.'"<sup>228</sup> Congress further noted the tribes' dissatisfaction with the new regulations, as many of the regulations did not comport with the tribes' understandings of the agreements they had reached with the BIA and IHS in their consultations with those agencies on the regulations.<sup>229</sup>

---

221. *Id.* at 2 (quoting President Richard Nixon, *Special Message to the Congress on Indian Affairs*, (1970)).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* (quoting S. Rep. No. 274, 100th Cong., 1st Sess. 1 (1987)).

227. *Id.* at 3.

228. *Id.*

229. *Id.*



These findings led to the enactment of the Indian Self-Determination Contract Reform Act of 1994 (Contract Reform Act).<sup>230</sup>

The purpose of the Contract Reform Act was to "limit the promulgation of regulations under the Indian Self-Determination and Education Assistance Act and to prescribe the terms and conditions which must be used in any self-determination contract between an Indian tribe and the Departments of Interior and Health and Human Services."<sup>231</sup> The Contract Reform Act totally divests these agencies of the power to issue regulations governing self-determination contracts,<sup>232</sup> and it enacts terms and specifications for all self-determination contracts.<sup>233</sup>

The Contract Reform Act specifically states that, except for "construction contracts," federal contracting laws and regulations do not apply to self-determination contracts, "except to the extent that such laws expressly apply to Indian tribes."<sup>234</sup> It adds a definition of "con-

230. Pub. L. No. 103-413, 108 Stat. 4250 (1994) (codified at 25 U.S.C. § 450 (1994)).

231. S. Rep. No. 374, 103d Cong., 2d Sess. 1 (1994).

232. *Id.* at 3.

233. *Id.* at 43.

234. Pub. L. No. 103-413, § 102(10), 108 Stat. at 4253. The entire new subsection reads as follows:

(10) by striking subsection (a) of section 105 and inserting the following new subsection:

(a)(1) Notwithstanding any other provision of law, subject to paragraph (3) [concerning construction contracts], the contracts and cooperative agreements entered into with tribal organizations pursuant to section 102 shall not be subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes.

(2) Program standards applicable to a nonconstruction self-determination contract shall be set forth in the contract proposal and the final contract of the tribe or tribal organization.

(3)(A) With respect to a construction contract (or a subcontract of such a construction contract), the provisions of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) and the regulations relating to acquisitions promulgated under such Act shall apply only to the extent that the application of such provision to the construction contract (or subcontract) is—

(i) necessary to ensure that the contract may be carried out in a satisfactory manner;

(ii) directly related to the construction activity; and

(iii) not inconsistent with this Act.

(B) A list of the Federal requirements that meet the requirements of clauses (i) through (iii) of subparagraph (A) shall be included in an attachment to the contract pursuant to negotiations between the Secretary and the tribal organization.

(C)(i) Except as provided in subparagraph (B), no Federal law listed in clause (ii) or any other provision of Federal law (including an Executive Order) relating to acquisition by the Federal Government shall apply to a construction contract that a tribe or tribal organization enters into under this Act, unless expressly provided in such law.

(ii) The laws listed in this paragraph are as follows:

(I) The Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.).

(II) Section 3709 of the Revised Statutes.

(III) Section 9(c) of the Act of Aug. 2, 1946 (60 Stat. 809, chapter 744).

(IV) Title III of the Federal Property and Administrative Services Act of 1949 (63 Stat. 393 et seq., chapter 288).

(V) Section 13 of the Act of Oct. 3, 1944 (58 Stat. 770; chapter 479).

(VI) Chapters 21, 25, 27, 29, and 31 of title 44, United States Code.

struction contract" to "assure that the federal acquisition regulations are not applied to contracts which do not involve classic construction activities."<sup>235</sup> It then specifies a number of federal acquisition statutes and regulations which will *not* apply even to construction contracts, including Executive Order No. 11,246.<sup>236</sup>

The Contract Reform Act further evinces Congress' intent to preserve the "unique legal status" of tribal employment. It has mandated that employment involved in the administration of tribal programs and services under self-determination contracts be free from governmental interference through the executive order program. It makes no sense to differentiate between employment under self-determination contracts and employment involved in tribally owned businesses that hold other federal contracts; in either case, the tribe is still the employer.

#### D. No Waiver of Immunity

Finally, the executive order program cannot be interpreted to waive tribal sovereign immunity from government actions. The Executive has no power to waive tribal sovereign immunity; only Congress can legislate over tribal affairs. Nowhere in any legislation that can be deemed to authorize Executive Order No. 11,246 does there appear any waiver—express or otherwise—of tribal sovereign immunity from governmental actions to enforce the Order. Under federal law, a waiver of tribal sovereign immunity must be "unequivocally expressed."<sup>237</sup> By exempting tribes from its coverage, Title VII reinforces tribal sovereignty and sovereign immunity.<sup>238</sup> Significantly, Congress amended Title VII in 1972 to expressly cover state and local governments, thereby waiving their immunity from federal enforcement of Title VII; it did not do so for tribes.

Moreover, policy dictates that Congress' exclusion of tribes from antidiscrimination actions cannot be deemed a protection that tribes can waive by entering into a contract with the government or a prime government contractor.<sup>239</sup> As stated previously, most tribes are dependent

(VII) Section 2 of the Act of June 13, 1934 (48 Stat. 948, chapter 483).

(VIII) Sections 1 through 12 of the Act of June 30, 1936 (49 Stat. 2036 et seq. chapter 881).

(IX) The Service Control Act of 1965 (41 U.S.C. 351 et seq.).

(X) The Small Business Act (15 U.S.C. 631 et seq.).

(XI) Executive Order Nos. 12,138, 11,246, 11,701 and 11,758.

235. S. Rep. No. 374, 103d Cong., 2d Sess. 4 (1994).

236. See *supra* note 234.

237. See *supra* text accompanying notes 135-37.

238. See Anderson, *supra* note 208, at 762 ("Title VII does not limit inherent tribal sovereignty, but indicates an opposite congressional intent.") (citations omitted).

239. A commentator makes the same point with respect to seniority systems protected by § 703(h) of Title VII:

The argument that the OFCCP does not make any seniority system "unlawful" in contravention of § 703(h), but rather merely adds a clause to government contracts, which employers may voluntarily choose to accept or forego, fails for several reasons.

First, the OFCCP's own definitions make clear that it does indeed consider seniority systems perpetuating discrimination to be illegal . . . .

Beyond the definitional considerations, it is clear that the OFCCP *forces a great*

on federal funding; they have no alternative source of income.<sup>240</sup> Because of tribes' dependency on federal funding for their survival, they *must* enter into federal contracts and have little or no power to bargain over the terms of the contracts. In that regard, federal contracts are akin to adhesion contracts.<sup>241</sup> Thus, in order to avoid any possibility of having to defend a discrimination action under Executive Order No. 11,246 (from which they are otherwise immune by statute), tribes would be forced to forego participation in federal contracts. The alternative is to incur significant administrative costs to comply with the Order and to be subjected to the possibility of incurring even greater costs in defending agency actions to enforce compliance. Tribal treasuries can ill afford such costs. The OFCCP's placement of tribes in such a position flouts congressional policy promoting tribal self-determination and self-sufficiency.

Congress recognized the power of federal agencies to dictate terms of contracts and create obstacles to the tribes' ability to govern themselves when it amended the Indian Self-Determination and Education Assistance Act of 1975.<sup>242</sup> It terminated these powers by enacting contractual language for self-determination contracts and by stripping the Departments of Interior and Health and Human Services of their ability to issue regulations governing such contracts.<sup>243</sup> In subjecting tribes to the requirements of and regulations under Executive Order No. 11,246, the OFCCP likewise obstructs and thereby diminishes the tribes' ability to attain Congress' stated goals of tribal self-determination and economic self-sufficiency.

#### V. AN APPROACH TO NONDISCRIMINATION UNDER FEDERAL CONTRACTS THAT ACCOMMODATES TRIBAL SOVEREIGNTY, FEDERAL INTERESTS, AND CONGRESSIONAL INTENT

There is a way to accommodate the tribes' interest in maintaining sovereignty and the federal government's interest in withholding taxpayers'

---

*number of employers whose survival may often depend on government contracts to abandon seniority systems that Teamsters and the legislative history of § 703(h) indicate are protected . . . .*

Finally, the guarantee of protection to bona fide seniority systems and their recipients may be *a right that cannot be waived in the consensual relationship between parties to government contracts*. Courts have routinely held that the benefits Title VII extends to the victims of discrimination cannot be waived . . . . [Citations omitted.] [T]here is no obvious reason why the protections extended to seniority recipients under § 703(h) should be treated differently. If those rights indeed cannot be waived, then the OFCCP's policy of requiring that they be waived constitutes an independent violation of § 703(h).

Long, *supra* note 62, at 1090 n.79 (emphasis added).

240. See *supra* text accompanying notes 160-67.

241. An "adhesion contract" is defined as a [s]tandardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms.

BLACK'S LAW DICTIONARY 40 (6th ed. 1990).

242. 25 U.S.C. § 450 *et seq.*

243. See *supra* text accompanying notes 214-16.

dollars from employers that discriminate. It is of course in a tribal employer's interest to treat its employees fairly; by maintaining a strong and loyal workforce, a tribal nation will enhance its sovereignty. In its "government-to-government relationship" with tribes, however, the federal government must respect the tribes' ability to govern themselves and manage their own affairs, which Congress and the federal courts have acknowledged repeatedly.

The Indian Civil Rights Act of 1968 (ICRA)<sup>244</sup> provides a means to reconcile the tribal interest in autonomy and the federal interest in nondiscrimination. Under the authority of the ICRA, the federal government can place antidiscrimination conditions on tribes' participation in federal contracts that would accomplish its goal of preventing employment discrimination without infringing on tribal sovereignty and thwarting congressional goals of self-determination and economic self-sufficiency. The government can simply require, as a contract term, that tribal contractors agree to a limited waiver of sovereign immunity to provide a forum and appropriate remedies for employees' or applicants' complaints of unfair treatment under the due process and equal protection provisions of the ICRA, which would cover employees' claims of unfair treatment.<sup>245</sup> Many tribes provide such employee protections in their laws.<sup>246</sup> Under the ICRA, "due process" and "equal protection" are defined by tribal law and custom.<sup>247</sup> Thus, tribes would be obligated as employers under federal contracts to provide the same rights to their employees that they are obligated to provide under the ICRA. An explicit waiver to such effect in federal contracts would protect the government from inability to enforce the provision under a sovereign immunity defense.

Congress has already approved such an approach in the Contract Reform Act. Its prescribed language for self-determination contracts specifies that tribal contractors agree to comply with the ICRA in administering programs under the contract.<sup>248</sup> The same approach in all federal contracts will accommodate federal and tribal interests and will further the United States' government-to-government relationship with sovereign tribal nations.

---

244. 25 U.S.C. §§ 1301-1341.

245. 25 U.S.C. § 1302(8). For a discussion of tribal waivers of immunity under the Indian Civil Rights Act, see Limas, *supra* note 125, at 380-82.

246. See, e.g., Limas, *supra* note 125, 382-83.

247. See *Smith v. Confederated Tribes of the Warm Springs Reservation of Oregon*, 783 F.2d 1409 (9th Cir.), cert. denied, 479 U.S. 964 (1986); *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976). See also Limas, *supra* note 125, at 383-84.

248. Indian Self-Determination Contract Reform Act of 1994, § 108(c), 108 Stat. 4265 (codified at 25 U.S.C. § 450(l) (1994)). The provision reads as follows:

(13) ADMINISTRATIVE PROCEDURES OF CONTRACTOR—Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.), the laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract.

## VI. CONCLUSION

Coverage of tribes and tribal employment by Executive Order No. 11,246 is an invalid exercise of executive authority because such coverage is inconsistent with congressional intent expressed in various statutes, federal policy toward tribal self-determination, self-sufficiency, and economic development, and federal law pertaining to tribal sovereign nations.

As suggested above through the Indian Civil Rights Act, however, federal contracts with Native American tribes can be administered in a way that protects federal interests in nondiscrimination in federally funded contracts as well as federal and tribal interests in tribal self-determination. Such an approach is consistent with federal law and policy toward Native American tribes and achieves federal goals of nondiscrimination.