

REPORT IN SUPPORT OF
RECOMMENDATION 75-2

AFFIRMATIVE ACTION IN FACULTY EMPLOYMENT
UNDER EXECUTIVE ORDER 11246

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INTRODUCTION

Many institutions of higher education hold federal contracts. As government contractors, they fall subject to Executive Order 11246, as amended.¹ The Order requires contractors to assure equal employment opportunity without regard to race, color, religion, sex or national origin in all the contractor's facilities, not just those involved in performance of a contract. In higher education, as elsewhere, administration of the Executive Order, or contract compliance, program has provoked a good deal of controversy. From within higher education there may be heard angry claims that the program seeks to override traditional standards of academic judgment and impose quotas of minority and women faculty.² This charge the Government denies. At the same time, persons interested in improving the position among higher education faculty of minority groups and women criticize the program as ineffective. There may be some truth in both these positions. Indeed, they are not necessarily inconsistent. For a number of reasons the program — at least in higher education, perhaps more generally — lacks clear direction. It may be turned to a number of purposes but exists in danger of losing any particular sense of purpose.

It may seem surprising to find the contract device employed as a reform measure. This use of the government contract, however, is by no means unprecedented. The United States Government is a formidable presence in the American economy. Each year it consumes a substantial fraction of the goods and services the country produces. As sovereign,

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¹ Exec. Order No. 11, 246, 3 C.F.R. 339 (1964-65 Comp.), amended by Exec. Order 11, 375, 3 C.F.R. 320 (1966-70 Comp.), 42 U.S.C. § 2000e (1970).

² See, e.g., Seabury, *HEW and the Universities*, COMMENTARY, Feb., 1972, at 38; Shils, *Academic Appointment, University Autonomy and the Federal Government*, 9 MINERVA 161 (1971). For a critical view of the literature critical of the HEW program in higher education see Ezorsky, *The Fight Over University Women*, NEW YORK REVIEW OF BOOKS, May 16, 1974, at 32.

the Government also makes and enforces laws advancing its conceptions of wise policy. These activities are sometimes connected — the Government uses its power as consumer to achieve its aims as regulator.³ The antidiscrimination program carried out under Executive Order 11246 represents perhaps the most important contemporary example.

The Order obliges employers contracting with the Government to promise *nondiscrimination* on grounds of race, color, religion, sex or national origin and *affirmative action* to assure equal employment opportunity. If the Government finds that a contractor has breached these obligations, it may terminate existing contracts and declare him ineligible for future contracts, to mention only the more draconian remedies. In the degree to which an employer depends upon government contracts, it may seem, he will try to perform his commitments to nondiscrimination and affirmative action. Given the Government's wide reach in the marketplace, the argument follows, execution of this strategy should contribute in a major way toward curing discrimination in employment.

Except for a short period around the close of the Second World War, executive orders attacking employment discrimination have been in effect since 1940.⁴ Up to the current order at least, they were not conspicuously successful. It is true that one investigator, discovering the existence of the then effective order in 1957, announced the end of discrimination.⁵ A successor, observing a flurry of activity carried out under a later order in the early 1960's, expressed optimism that the program might prove effective.⁶ In retrospect, both statements seem unguarded. Progress clearly depended upon a much more substantial investment than had been committed. In 1965 the present order was promulgated, and the program entered a period of reorganization and expansion. The Labor Department has been given responsibility for administration of the program. The Secretary, pursuant to a delegation contained in Executive Order 11246, has issued a series of detailed regulations. Within the Department, the Office of Federal Contract Compliance implements the Order and regulations. This includes oversight of the work of other agencies designated by the Secretary of Labor as compliance agencies. For higher education, the compliance agency is the Department of Health, Education and Welfare and, within the Department, the Office of

³ See Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 Va. L. Rev. 27 (1955).

⁴ The principal orders applying antidiscrimination regulation to government contractors are the following: Exec. Order No. 8802, 3 C.F.R. 957 (1938-43 Comp.); Exec. Order No. 9001, 3 C.F.R. 1054 (1938-43 Comp.); Exec. Order No. 9346, 3 C.F.R. 1280 (1938-43 Comp.); Exec. Order No. 10, 210, 3 C.F.R. 390 (1949-53 Comp.); Exec. Order No. 10, 227, 3 C.F.R. 739 (1949-53 Comp.); Exec. Order No. 10, 231, 3 C.F.R. 741 (1949-53 Comp.); Exec. Order No. 10, 243, 3 C.F.R. 752 (1949-53 Comp.); Exec. Order No. 10, 281, 3 C.F.R. 781 (1949-53 Comp.); Exec. Order No. 10, 298, 3 C.F.R. 828 (1949-53 Comp.); Exec. Order No. 10, 308, 3 C.F.R. 837 (1949-53 Comp.); Exec. Order No. 10, 479, 3 C.F.R. 961 (1949-53 Comp.); Exec. Order No. 10, 557, 3 C.F.R. 218 (1954-58 Comp.); Exec. Order No. 10, 925, 3 C.F.R. 443 (1959-63 Comp.); 5 U.S.C. § 3301 (1970); Exec. Order No. 11, 246, 3 C.F.R. 339 (1964-65 Comp.); 42 U.S.C. § 2000e (1970); Exec. Order No. 11, 375, 3 C.F.R. 320 (1966-70 Comp.); 42 U.S.C. § 2000e (1970).

⁵ Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 Va. L. Rev. 837 (1957) ("It can fairly be said that discrimination by government contractors is now the exception rather than the rule.")

⁶ SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT, ch. 5 (1966).

Civil Rights (OCR). HEW's Office of Civil Rights in Washington supervises branches in ten regional offices of HEW around the country. It is the activity of OCR and the regional offices which has proved so controversial, stirring a great, but stationary, cloud of dust.

A number of the factors which account for this situation are readily identified. OCR has only a small number of people to deal with a large number of institutions. No one seems to know how many institutions of higher education hold federal contracts, but of a total of approximately 2300 such institutions, one estimate places the number of contractors at 1100. It seems that many institutions have had little or no contact with the program. A great deal of time has been spent in more or less inconclusive battle between OCR and a handful of universities.

The Government employees who work in the program are poorly trained and seem to have little knowledge or understanding of higher education. Consequently, much time and effort are expended on the job in discovering the intricacies of university organization and academic personnel practices. Compliance review teams gather a great deal of data, but it is not always clear that what is obtained is understood.

The Labor Department's regulations are overgeneralized. The construction industry is treated separately, but otherwise all contractors are lumped together under the same regulations. These regulations clearly have in view a model of industrial employment. They fit the conditions of faculty employment very poorly indeed. Such matters as faculty participation in the management of universities, advanced work in intellectual disciplines and the unique combination of functions manifested in the professorial role find no reflection in the regulations.

The sanctions the Government has at its disposal are clumsy and overpotent. Although OCR has requested government agencies not to contract with certain institutions for brief periods of time, it has never moved seriously to debar a university. In order to cut off a contractor, the Government must deny itself the contractor's services, and this the Government may be unwilling to do. Then too, OCR fears the impact such a step would have on the institutions. The university, of course, shares the same sentiment and moves some way to meet OCR's demands. In consequence, the parties negotiate toward a settlement, and such outcomes as are achieved reflect less the standards of the regulations than they do the chances of a bargaining process.

More fundamental than any of these difficulties, in part their cause, is the ambiguous and contradictory character of the regulations themselves, at least in relation to higher education. It is clear neither to OCR nor to institutions of higher education what it is that the regulations require. This helps account for such features of the program as poor administration, inefficiency, improvised solutions and prolonged negotiation.

Although the problems of administering the Executive Order in higher education are serious enough, the program has begun to encounter an additional set of problems created by a variety of antidiscrimination statutes which overlap the Executive Order. There have now come to exist many opportunities for duplicated effort, conflicting results, inconsistent standards and administrative confusion. This makes urgent a more sustained and fruitful effort at coordinating the many arms of federal antidiscrimination regulation than has taken place thus far.

THE EXECUTIVE ORDER PROGRAM — ADMINISTRATION IN HIGHER EDUCATION

Executive Order 11246 is the source of the contract compliance program. It requires that nonexempt¹ government contracts include a so-called equal employment opportunity clause, providing as follows:

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

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

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

¹ Section 204 of Exec. Order No. 11246 provides:

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 (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. 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: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: And *provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's non-compliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of 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. 11246 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 the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however*, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.²

The Order places the Secretary of Labor in charge of the contract compliance program and gives him authority to adopt rules and regulations and issue orders, to require compliance reports from contractors and subcontractors and to provide for hearings for compliance, enforcement or educational purposes.³ A series of "sanctions and penalties" are specified, including: (1) publication of the names of noncomplying contractors, (2) recommendation to the Justice Department for suit to enforce the provisions of the Order, (3) recommendation to the Justice Department or the Equal Employment Opportunity Commission for institution of proceedings under Title VII of the Civil Rights Act of 1964, (4) recommendation to the Justice Department for criminal proceedings for furnishing false information to the Secretary of Labor or a contracting agency, (5) cancellation, termination or suspension of contracts or portions of contracts for non-compliance, (6) debarment of contractors as eligible bidders on government contracts.⁴ (Of this list of possible sanctions, the ones of practical significance in the administration of the program have been those providing for termination and cancellation of contracts and debarment.) Government contractors are divided into two classes — construction and nonconstruction. Institutions of higher education fall in the latter category, and it is the program for nonconstruction

² Exec. Order No. 11, 246 § 202. See also 41 C.F.R. § 60-1.4 (1973).

³ Exec. Order No. 11, 246 §§ 201, 203, 208.

⁴ *Id.* § 209.

contractors that is of concern here.⁵ The Order allows the Secretary of Labor to delegate his functions or duties "except authority to promulgate rules and regulations of a general nature."⁶ The Secretary has designated the Department of Health, Education and Welfare as the compliance agency for a number of industries including medical, legal and education services. HEW, therefore, administers the contract compliance program in higher education pursuant to regulations promulgated by the Secretary of Labor.

The Labor Department has issued a set of regulations (which seem always to be in the process of revision) controlling administration of the program. These are found in 41 CFR Chapter 60 and include: "Obligations of contractors and subcontractors" (41 CFR 60-1), "Affirmative action programs" (41 CFR 60-2), "Employee testing and other selection procedures" (41 CFR 60-3), "Sex discrimination guidelines" (41 CFR 60-20), "Hearing rules for sanction proceedings" (41 CFR 60-30), "Examination and copying of OFCC documents" (41 CFR 60-40), "Guidelines on discrimination because of religion or national origin" (41 CFR 60-50) and "Contractor evaluation procedures for contractors for supplies and services" (41 CFR 60-60). The more important of these in the administration of the program are "Obligations of contractors and subcontractors," "Affirmative action programs," "Employee testing and other selection procedures," "Sex discrimination guidelines" and "Contractor evaluation procedures for nonconstruction contractors."⁷

Much of the regulation on "Obligations of contractors and subcontractors" repeats the provisions of the Executive Order and outlines its requirements at a greater level of detail. Exemptions from the Order are specified.⁸ Compliance agencies are instructed to develop programs for administration of the Order.⁹ Contractors are required to furnish compliance reports annually and to supply with bids information relevant to a determination of compliance status.¹⁰ Segregated facilities are prohib-

⁵ Part II of Exec. Order No. 11, 246 deals with nonconstruction contractors, Part III with federally assisted construction contracts.

⁶ *Id.* § 401.

⁷ The "Guidelines on discrimination because of religion or national origin" stand in some contrast to the regulations dealing with race and sex discrimination. Contractors are instructed to review their employment practices "to determine whether members of the various religious and/or ethnic groups are receiving fair consideration for job opportunities." If the review shows deficiencies, a contractor is to undertake "outreach and positive recruitment activities." Religious and ethnic discrimination is made subject to the OFCC compliance review and complaint procedure. However, it is made clear that "the scope of the employer's efforts shall depend upon all the circumstances, including the nature and extent of the employer's deficiencies and the employer's size and resources." Contractors need not establish affirmative action plans, with their sub-structure of utilization analyses and goals and timetables, to deal with religious and ethnic discrimination. The elaborate criteria applied to employer selection procedures need not be satisfied. The Guidelines provide that contractors must take reasonable steps to accommodate employees' religious practices if they can do so without "undue hardship." The question of hardship entails consideration of "(a) business necessity, (b) financial costs and expenses, and (c) resulting personnel problems." This seems a good deal more indulgent than various provisions of the Sex Discrimination Guidelines.

⁸ Section 60-1.5, 41 C.F.R. ch. 60 specified certain exemptions, including, *inter alia*, contracts not exceeding \$10,000 and contracts to be performed outside the United States by employees not recruited domestically.

⁹ *Id.* at § 60-1.6.

¹⁰ *Id.* at § 60-1.7.

ited.¹¹ Compliance reviews, consisting of “comprehensive analysis and evaluation” of employment practices as they bear on contractors’ obligations for nondiscrimination and affirmative action, are established as a basic tool of the program. The regulation further provides that no contract of \$1,000,000 or more is to be awarded unless satisfactory compliance has been determined through a pre-award review or a compliance review conducted within the preceding twelve months.¹² Procedures for processing complaints are set up,¹³ and a system of hearings for cancellation, termination and debarment is established.¹⁴ Contractors are instructed to permit access to their records for purposes of investigation.¹⁵ Most significantly, contractors (and subcontractors) with fifty or more employees and a contract of \$50,000 or more are required to develop written affirmative action programs.¹⁶

The regulation on “Affirmative action programs” — Revised Order No. 4 — is in many ways the heart of the contract compliance program. According to Order 4, “an affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort.”¹⁷ Such a program rests on two devices: utilization analyses and goals and timetables. The first of these entails an obligation of the contractor to determine if minority group members or women are encountered less frequently at various levels and in various areas of his operations than would be expected in view of their availability (“underutilization”). In the event that analysis discloses underutilization, or a “deficiency,” the contractor must establish “goals and timetables” — predictions of increased utilization, to be achieved by good faith effort, according to a prescribed time scale to the point at which the deficiency is eliminated.¹⁸ Persons who are discovered to be suffering from the effects of past discrimination make up an “affected class,” and “corrective action” measures must be instituted to establish compliance.¹⁹ An affirmative action program must in addition include a number of elements the regulations summarize as follows:

- (a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions;
- (b) Formal internal and external dissemination of the contractor's policy;
- (c) Establishment of responsibilities for implementation of the contractor's affirmative action program;
- (d) Identification of problem areas (deficiencies) by organizational units and job classification;

¹¹ *Id.* at § 60-1.8.

¹² *Id.* at § 60-1.20.

¹³ *Id.* at §§ 60-1.21-1.24.

¹⁴ *Id.* at § 60-1.26.

¹⁵ *Id.* at § 60-1.43.

¹⁶ *Id.* at § 60-1.40.

¹⁷ 41 C.F.R. § 60-2.10.

¹⁸ *Id.* at §§ 60-2.11, 60-2.12.

¹⁹ *Id.* at § 60.2.1.

- (e) Establishment of goals and objectives by organizational units and job classification, including timetables for completion;
- (f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives;
- (g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program;
- (h) Compliance of personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60-20);
- (i) Active support of local and national community action programs, designed to improve the employment opportunities of minorities and women;
- (j) Consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures.²⁰

Many actions a contractor must take in conducting a utilization analysis, in establishing goals and timetables and in satisfying the other requirement of an affirmative action program are stipulated in the regulation. In sum, affirmative action demands attempts to seek out eligible minority and female candidates, efforts — as by way of training and provision of child care — to redress disadvantages from which minorities and women are thought to suffer and continuous, systematic and detailed oversight of personnel policies and practices to eliminate discrimination and guard against inadvertent or unconscious bias.

The regulation on “Employee testing and other selection procedures,” though principally directed at formal testing programs, covers all methods of “hire, transfer, promotion, training or retention.” “Test” is defined as “any paper-and-pencil or performance measure used as a basis for any employment decision” as well as “all other formal, scored, quantified or standardized techniques of assessing job suitability including, for example, personal history and background requirements which are specifically used as a basis for qualifying or disqualifying applicants or employees, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers’ rating scales and scored application forms.”²¹ Contractors using tests are required to develop evidence of the test’s validity — that is, demonstration of a relationship between test performance and job behavior. Minimum standards for validation are prescribed,²² and separate demonstrations of validity for minority groups and women are demanded where “technically feasible.”²³ If tests of substantially equal validity are available, contractors are expected to use the test “which will have the least adverse effect on the employment opportunities of minorities or women.”²⁴ Contractors are not required to use “tests,” but where there is evidence suggesting that techniques other than tests have had the effect of discriminating

²⁰ *Id.* at § 60-2.13, as amended July 8, 1974, 39 Fed. Reg. 25654. (1974).

²¹ 41 C.F.R. § 60-3.2.

²² *Id.* at § 60-3.5.

²³ *Id.* at § 60-3.5(b)(5).

²⁴ *Id.* at § 60-3.14.

— *e.g.*, underutilization is found, evidence of validity may be required. If the contractor is “unable or unwilling to perform such validation studies,” then “he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.”²⁵

The “Sex discrimination guidelines” are currently shifting in content, the text of a proposed revision having appeared in the Federal Register at the end of December, 1973. The principal changes under consideration relate to “corrective action,” insurance and pension and retirement plans and maternity benefits. Otherwise, both versions cover much the same ground. Thus, contractors must recruit among both sexes for all jobs, may not advertise in “Male” and “Female” columns, must provide equivalent facilities and services for both sexes and may not address requests for information — *e.g.*, marital status — to applicants of one sex only.²⁶ Employees of both sexes must enjoy equal opportunity to qualify for any job.²⁷ No sex-based distinction may be drawn in “employment opportunities, wages, hours, or other conditions of employment,”^{27a} sex-linked seniority lines, different retirement ages for men and women, discrimination in compensation and anti-nepotism rules which bear unequally on one sex are explicitly prohibited.²⁸ A contractor may not justify sex discrimination by reliance on state protective legislation — *e.g.*, a law limiting the weight women may be required to lift.²⁹ The proposed changes on insurance, pension and retirement plans and maternity benefits are discussed below. The subject of corrective action, introduced in the proposed guidelines for the first time, has to do with the problem of relieving the effects of past discrimination.³⁰ For example, the effects of historic sex segregation of jobs may persist after company policy is changed to permit transfer between jobs. This will likely occur when seniority for purposes of layoff dates from entry into a job, line of progression or department because women formerly locked into their positions by segregation may be reluctant to give up their accrued seniority upon transfer. The proposed regulation requires protection against consequences of this kind. In the example given, this might mean a shift to company-wide seniority for the affected women or an award of seniority credit to transferring women back to the date on which it may be calculated they would have made the transfer in the absence of segregation.

“Contractor evaluation procedures for contractors for supplies and services” — also known as Revised Order No. 14 — lays down procedures

²⁵ *Id.* at § 60-3.13.

²⁶ 41 C.F.R. §§ 60-20.2(a)-(c), 60-20.3(f).

²⁷ *Id.* at § 60-20.3(b). An exception is made for jobs for which sex is a bona fide occupational qualification.

^{27a} *Id.* at § 60-20.3(c).

²⁸ *Id.* at §§ 60-20.4, 60-20.3(i), 60-20.5(a), 60-20.3(j).

²⁹ *Id.* at § 60-20.3(g). See also *id.* at § 60-20.6, providing that inconsistent state law is preempted.

³⁰ *Id.* at § 60-20.2(e).

for compliance reviews. As amended in February, 1974, this regulation describes a three-step review procedure consisting of (1) a desk audit, (2) an on-site review and (3) an off-site analysis of "information supplied by the contractor during or pursuant to the on-site review."³¹ A desk audit is a review of a contractor's written affirmative action program and "workforce analysis,"³² to be furnished upon request of the compliance agency. Normally,³³ an on-site review will be scheduled following the desk audit except in two classes of cases: (1) where the desk audit discloses the contractor's failure to make a reasonable effort to meet his obligations, in which case enforcement proceedings should be commenced, and (2) where an on-site review has been conducted within the previous twenty-four months, the desk audit confirms that the contractor has a satisfactory program and the circumstances of the previous audit have not substantially changed.³⁴ An on-site review, which is to include employee interviews,³⁵ encompasses "(1) information necessary to conduct an in depth analysis of apparent deficiencies in the contractor's utilization of women or minorities, (2) information required for a complete and thorough understanding of data contained in or offered in support for the affirmative action program and (3) information concerning matters relevant to a determination of compliance with the requirements of Executive Order 11246 (as amended) but not adequately addressed in the affirmative action program."³⁶ Finally, an off-site analysis of material obtained during the on-site review is to be conducted "where issues have arisen concerning deficiencies or an apparent violation which, in the judgment of the compliance officer, should be more thoroughly analyzed off-site before a determination of compliance is made."³⁷ The regulation attempts to provide a good deal of protection against public disclosure of data furnished by contractors.³⁸ Information a compliance agency obtains

³¹ 41 C.F.R. § 60-60.3.

³² "Workforce analysis" is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job groups) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed." *Id.* at § 60-2.11(a), 39 Fed. Reg. 25654-55 (1974); 41 C.F.R. § 60-2.11(a), 39 Fed. Reg. 25654 (1974).

³³ See "Exceptions to the desk audit requirements," *Id.* at § 60-60.3(a).

³⁴ *Id.* at § 60-60.3(b).

³⁵ *Id.* at § 60-60.5.

³⁶ *Id.* at § 60-60.3(b)(1).

³⁷ *Id.* at § 60-60.3(c).

³⁸ See *id.* at Subpart C — "Disclosure and Review of Contractor Data" — and § 60-60.3(b)(1), limiting requests for information during on-site reviews to ". . . the specific items of information which the compliance officer determines are: (i) Necessary for conducting the review and completing the standard compliance review report, and (ii) Nor contained in or able to be derived from the material submitted by the contractor." See also § 60-60.3(a) — "Exceptions to the desk audit requirements" and § 60-60.3(b)(2).

from a contractor is ordinarily available for public inspection and copying under the Freedom of Information Act.³⁹ This extends to affirmative action plans, conciliation agreements and validation studies of tests.⁴⁰ However, a contractor may claim that certain data is not subject to disclosure and obtain a determination of the question from the compliance agency, with a right of appeal to the Director of OFCC.⁴¹ Material taken off-site for analysis and much information held by a compliance agency during a compliance review or an enforcement proceeding is considered part of an investigatory file compiled for law enforcement purposes and therefore exempt from disclosure under the Act for the duration of the review.⁴² Certain data, such as trade secrets, confidential commercial or financial data, the names of complainants and personnel and medical files are regarded as not subject to disclosure.⁴³ A compliance review is to be concluded with an exit conference in which the compliance officer summarizes for the contractor the findings of the review. At that time or after further analysis the agency is to seek a written conciliation agreement committing the contractor to correct deficiencies revealed by the review.⁴⁴ The entire process is to be completed expeditiously. Enforcement procedures "shall be applicable" if a contractor fails to supply an affirmative action program and supporting documents, including a workforce analysis, within thirty days.⁴⁵ Within sixty days of receipt of the necessary documents the compliance agency is to have notified the contractor that he is in compliance or have issued a thirty-days show cause notice (subject to extensions of time for good cause).⁴⁶

³⁹ *Id.* at § 60-60.4(d); 41 C.F.R. 60-40.

⁴⁰ 41 C.F.R. § 60-40.2.

⁴¹ 41 C.F.R. § 60-60.4(d).

⁴² 41 C.F.R. § 60-40.3(5); 41 C.F.R. §§ 60-60.4(c), (d).

⁴³ 41 C.F.R. § 60-40.3. It seems apparent that the Labor Department undertook this latest revision of Order No. 14 in order to secure by administrative revision rather than attempt by appeal reversal of the decision in *Alameda County Legal Aid Society v. Schultz*, 349 F. Supp. 771 (N.D. Cal. 1972), holding that the Freedom of Information Act (5 U.S.C. § 552) required disclosure of a great deal of material furnished the Government by contractors. Under the new version of Order No. 14 it may be argued that much information revealed to government agents in the course of compliance reviews escapes the Freedom of Information Act because it never comes into the Government's possession (material made available only during an on-site review) or makes up part of an investigatory file compiled for law enforcement purposes. Comments furnished the Labor Department following publication of the revision show that both contractors and antidiscrimination groups saw the issue of public disclosure as by far the most significant aspect of the revision. Given the expansion in the legal concept of discrimination and the consequent narrowing of the gap between "underutilization" under the Executive Order and "discrimination" under Title VII of the Civil Rights Act of 1964, contractors have reason to fear that publicly disclosed data compiled for compliance review purposes will be used as evidence against them in Title VII cases and that plaintiff representatives may use such data to select defendants. These considerations operate with particular force where "affected class" situations are involved. Moreover, publicity itself can be used as a sanction. Plaintiff representatives might be expected to favor maximum disclosure for the same reasons contractors would resist it. Such material may also be helpful in litigation aimed at compelling compliance agencies to enforce the regulations because it may show that agencies are not in fact enforcing the regulations as written. Since academic personnel systems are often thought to depend upon confidential written evaluations of professors by colleagues and scholars in the same field, the question of disclosure has been a particularly sensitive one in HEW's higher education program. Revised Order No. 14 probably effects a satisfactory compromise from the point of view of most institutions of higher education; it is unlikely to please groups interested in employing the Order to advance minority and women faculty.

⁴⁴ 41 C.F.R. § 60.60.6.

⁴⁵ *Id.* at § 60.60.2.

⁴⁶ *Id.* at § 60.60.7, as amended July 8, 1974, 39 Fed. Reg. 25655 (1974).

THE OFFICE FOR CIVIL RIGHTS

Within HEW, the compliance agency for education, the agency responsible for performing the department's contract compliance functions is the Office for Civil Rights. Within OCR, the Higher Education Division has charge of the program for institutions of higher education. The Division's activities are conducted by a headquarters staff in Washington, D.C., and branch office personnel in ten regional offices. The location of the regional offices, the number of employees assigned to the executive order program in higher education as of June 30, 1973, and the number projected for June 30, 1974, are shown below:

Headquarters	Washington, D.C.	6/30/73	6/30/74
Region:		19	19
I	Boston	7	10
II	New York City	13	14
III	Philadelphia	6	10
IV	Atlanta	14	13
V	Chicago	10	13
VI	Dallas	10	12
VII	Kansas City	—	8
VIII	Denver	4	9
IX	San Francisco	13	13
X	Seattle	4	6
		<u>100</u>	<u>127</u>

There are an additional 48 employees projected for June 30, 1974, who will have responsibility for Titles VI and IX of the Civil Rights Act of 1964 (Title IX having been added by the Equal Educational Opportunity Act of 1972).

OCR's activities under the Executive Order might be divided into three categories: (1) performance of compliance reviews, (2) investigation of complaints and (3) furnishing technical assistance to higher education institutions. OCR's statistical record of its activities in higher education is not all one might wish, but the following data, supplied by OCR, gives some idea of the scale of its operations. In the period November 16, 1971, to December 31, 1972, OCR processed higher education affirmative action plans as indicated:

Regions	I	II	III	IV	V	VI	VII	VIII	IX	X	Total
AAPs approved interim or final	1	1	1	0	0	11	0	8	7	1	30
AAPs rejected	0	13	0	6	0	5	11	5	8	3	51
AAPs pending	15	17	3	6	24	9	0	21	17	4	116

During the period January 1 to July 23, 1973, sixty-two affirmative action plans were received, of which three were given final approval. The rest remained pending; none were rejected. Five plans were requested but not received. Since July 23, 1973, only a very few plans have been approved. Statistics on the number of plans approved fail to reflect the actual condition of the program. During the period in which there had been sustained compliance activity in higher education standards for approval of affirmative action programs have grown more stringent. Consequently, many plans previously approved, including plans adopted by some leading universities, do not meet OCR's current conception of the requirements of Order No. 4. The Director of the Higher Education Division has estimated that the number of approved plans which do meet this standard is probably nine (excluding junior colleges) and in any case not more than nineteen (as of April, 1974).

Statistics on the handling of complaints are, if anything, even more fragmentary. According to figures supplied by OCR, the agency received 544 complaints between November 16, 1971, and December 31, 1972. (These include both academic and non-academic staff.) Of these, 355 claimed sex discrimination and 189 charged discrimination on grounds of race and national origin. Two hundred twenty-five complaints were "settled or closed," seventy-six were under investigation, 107 had not been reached for investigation and 137 had been transferred to the Equal Employment Opportunity Commission. (EEOC acquired jurisdiction over higher education in March, 1972, and complaints filed with OCR after that date were transferred to EEOC. So-called "class complaints" — complaints filed on behalf of an individual and other persons similarly situated — of which eighty-eight were pending on December 31, 1972, were divided into class and individual aspects after EEOC's entry into the field, with the former component of the complaint being retained by OCR and the latter referred to EEOC. OCR currently has this arrangement under review.) The disposition of complaints carried as "settled or closed" is not clear. Many appear to have been dismissed as lacking in merit; in at least a few cases the agency obtained backpay settlements or reinstatement. Currently, OCR has 303 Executive Order complaints pending, of which 180 are class complaints and 123 individual complaints. These cases date back in some instances to 1969. (OCR is also processing at the present time some 62 complaints under Title VI and Title IX.) By the end of March, 1974, OCR had completed seventy-three letters of findings on individual and class complaints during the current fiscal year.

OCR employees spend some part of their time responding to inquiries and requests for assistance from institutions. Thus, in this fiscal year OCR anticipates furnishing guidance to about 178 institutions. In October, 1972, OCR issued its "Higher Education Guidelines," giving an interpretation of the OFCC regulations in the higher education context.

Over a long period of time OCR has been attempting to prepare a technical assistance package supplying information bearing on the availability for academic positions of minority group members and women and discussing methods of calculating availability for purposes of determining underutilization and setting goals and timetables.

It seems generally agreed, within and without OCR, that administration of the higher education program in its first years suffered from a number of defects. As the figures given above suggest, the agency has had difficulty in achieving satisfactory and prompt resolution of complaints. It also appears that in some cases complaints were lost or files mislaid (hence, agency statistics on complaints are not entirely reliable). Nevertheless, a great deal of time has gone into this activity; according to estimates supplied by the branch officers to the Washington office of the Higher Education Division in January, 1973, individual complaints required an average of 27.2 man days per complaint. Also revealing is the variation reported among the branches; the estimates of man days required per complaint ranged from ten to fifty man days, suggesting that the regions held contrasting views on what constitutes a proper investigation.⁴⁷ The compliance review process seems also to have been more burdensome to institutions than it was effective in securing compliance. Thus, many reviews have been conducted but only a relatively few plans have won approval and, of these, only a small handful are currently regarded as actually satisfactory. Meanwhile, institutions have supplied a great deal of data, and in some areas have been put to much trouble and expense, without any clear resolution of their compliance status having been achieved. Branch office representatives have not always appeared capable of analyzing properly the information they have received, and seem also to have lacked a common understanding of the compliance review process and of the standards to be applied to affirmative action programs. Complaints of universities on this last point seem to receive some confirmation from the information given in the table below, showing action on affirmative action programs by region for the period November 16, 1971, through November 31, 1972, and the regions' estimates, given in January, 1973, of man days required for a compliance review.

⁴⁷ According to information supplied by OCR the regional offices made the following estimates of mandays required per complaint:

I	30	VI	15
II	50	VII	50
III	—	VIII	15
IV	10	IX	30
V	30	X	15

	AAPs approved interim or final	AAPs rejected	AAPs pending	AAP desk audits man days	AAP field review man days
I	1	0	15	30	110
II	1	13	17	8	50
III	1	0	3	—	—
IV	0	6	6	5	40
V	0	0	24	15	30
VI	11	5	9	10	15
VII	0	11	0	10	27
VIII	8	5	21	10	40
IX	7	8	17	20	20
X	1	3	4	15	60

Thus, Regions II and VII collectively rejected twenty-four plans and approved only one while Regions VI, VIII and IX approved twenty-six plans and rejected eighteen. The region approving the highest number of plans (VI) required the least time to perform a compliance review — twenty-five man days, while the regions with the most adverse ratio of rejected to approved plans (II, VII) required fifty-eight and thirty-seven days, respectively, to complete a review.

At least some of the problems encountered in the administration of the program appear to be in the process of solution owing to the leadership provided by the current director of the Higher Education Division. Thus, the Division appears to be compiling more detailed and informative records, gaining more sensitivity to the unique characteristics of higher education and providing the branch offices more guidance and supervision and the compliance program as a whole may show a firmer sense of management. Certain difficulties remain, however.

The Division staff lacks experience with higher education. OCR has claimed fourteen employees have been connected with institutions of higher education in faculty, consultative and administrative positions, but there is good reason to believe that this number, though small, is inflated. There is one Ph.D. on the Division staff (the Director) and a small number of employees with Master's or law degrees. As of March 1, 1974, thirty-five positions were vacant owing to difficulty in recruiting persons with experience in higher education. Training within OCR has been limited. A three and one-half day seminar was given in Fall, 1972 and a three day seminar (for OCR personnel generally) in Winter, 1972 and Spring, 1973. A program concerned with affirmative action standards was given for senior branch office employees from August 20 to 24, 1973. New employees since February, 1973, are supposed to undergo a three month training and orientation program under the regional office branch chiefs. This includes "introductions, briefings, and seminars with local college administrators and equal opportunity officials, women's campus groups, officials in related Federal programs (e.g., OE, EEOC, and

OFCC), etc.," together with "an overall orientation of compliance programs administrated by the Office for Civil Rights." ⁴⁸

The Division's jurisdiction is vast and ill-defined. There are about 2,400 institutions of higher education in the United States, employing slightly over 250,000 full-time faculty members (and, of course, many more part-time faculty, nonteaching academic employees and nonacademic staff). How many of these institutions are federal contractors is unknown, but one estimate, from the Higher Education Division, places it at about 1,100. How much federal money reaches these institutions through government contracts also appears to be unknown although, for some institutions government contracts undoubtedly provide an important source of funding. The total amount and its distribution, whatever they may be, would considerably understate OCR's purchase on higher education. At least with respect to sex discrimination in employment, Title IX, forbidding sex discrimination in federally assisted educational programs and activities, provides an additional instrument of regulation. HEW also holds the view, a debatable one, that Title VI of the 1964 Civil Rights Act, which prohibits discrimination on grounds of race, color or national origin in programs receiving federal financial assistance, may apply to employment practices.⁴⁹ However, the Executive Order and Title VI and Title IX provide different criteria of administration (discussed below), so that these programs cannot easily be treated as a single integrated program. Passage of Title IX, together with HEW's interpretation of Title VI, both enlarge and complicate OCR's mandate in higher education. From the perspective of individual institutions, OCR must seem to resemble Gulliver in Lilliput, but OCR must feel that the more appropriate analogy is to Gulliver in Brobdignag. The agency lacks the staff and resources to fulfill its charter; it has failed to keep its complaint docket current, and it cannot perform compliance reviews in anything approaching the number or frequency OFCC regulations require. Many contracts of \$1,000,000 or more have been awarded without a pre-award review, and it seems safe to say that a large number of higher education contractors have never been through a compliance review.

OFCC regulations rather impede than facilitate the administration of a compliance program in higher education. The very problematic application of these regulations receives extensive discussion below. Here, it may be sufficient to give one example of their lack of fit to higher education. Order No. 14 directs completion of compliance reviews in ninety days, from the compliance agency's request to the contractor for his af-

⁴⁸ Letter from Gwendolyn H. Gregory, Director, Office of Policy Communication, Office for Civil Rights, HEW, to Sheldon E. Steinbach, American Council on Education, dated September 17, 1973.

⁴⁹ Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, seems not to apply to employment practices "except where a primary objective of the Federal financial assistance is to provide employment." *Id.* at § 604, 42 U.S.C. §2000d-4. However, HEW takes the position that where employment discrimination produces effects prohibited by Title VI employment practices come within the statute. See 45 C.F.R. § 80.3(c)(3).

firmative action program to the agency determination of compliance status. OCR regards this schedule as hopelessly unrealistic, and it is clearly true that its reviews have regularly consumed a great deal more time than ninety days. The affirmative action program of Harvard University, approved in November, 1973, was reportedly the product of two years of negotiations, for example. At the same time that OCR administers an inappropriate set of regulations it also must coordinate the contract compliance program with other programs and other agencies. For some time, the Executive Order was the only federal regulation directed at employment discrimination in higher education (with the possible exception of Title VI of the 1964 Civil Rights Act, which seems to have had little or no practical significance for employment practices in higher education). The Order has now been joined by Titles VII and IX of the Civil Rights Act of 1964 and the Equal Pay Act, and OCR finds itself in uneasy alliance with the Wage and Hour Administration and EEOC. Whether or not there are too many cooks is not yet clear, but there are plainly enough to get in one another's way.

FEDERAL ANTIDISCRIMINATION REGULATION OF HIGHER EDUCATION

For a number of years the Executive Order was the only federal regulation of any significance covering discrimination among higher education faculty (and the Order, of course, applied only to institutions with government contracts). Title VII of the Civil Rights Act of 1964 did not extend to institutions of higher education or to agencies of state and local government.¹ HEW has interpreted the Title VI (of the 1964 Civil Rights Act) prohibition on racial or national origin discrimination in federally assisted programs as applicable in some circumstances to employment (although the Act states that it covers employment only when the purpose of the assistance is to provide employment),² but this administrative construction of the statute seems not to have had any importance in enforcement. The Equal Pay Act, forbidding sex discrimination in pay, excluded administrative, executive and professional employees.³ The discovery that the Reconstruction Civil Rights Acts (42 U.S.C. §§ 1981, 1983) might reach employment discrimination did not come until the late 1960's.⁴

¹ Section 702 of Title VII (78 Stat. at 255 (1964)) provided that "this title shall not apply with respect to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

² See, however, 45 C.F.R. § 80.3(c)(3); "The Executive Order Program — Administration in Higher Education" n. 49.

³ Section 6(d)(1) of the Fair Labor Standards Act forbids sex discrimination in pay. Until the passage of P.L. 92-318, 86 Stat. 373 (1972) effective June 23, 1972, section 13(a)(1) excluded persons employed in a professional, administrative or executive capacity from section 6.

⁴ See Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56 (1972); *Braden v. University of Pittsburgh*, 477 F.2d 1 (3d Cir. 1972).

The situation is now very much changed. The Equal Employment Opportunity Act of 1972 extended Title VII to take in higher education and state and local governments.⁵ The same statute added Title IX to the Civil Rights Act with the effect of prohibiting sex discrimination in federally assisted programs (unlike Title VI, the new provision includes discrimination in employment).⁶ We are now learning that discrimination in employment on grounds of race violates 42 U.S.C. § 1981 and that race or sex discrimination by a state agency may violate 42 U.S.C. § 1983.^{6a} In 1972 the exemption from the Equal Pay Act for administrative, executive and professional employees was eliminated. Higher education faculty now fall within an area covered by a number of overlapping but only partially consistent antidiscrimination measures.

Along with this development has come a multiplication of enforcement processes and of forums in which questions of discrimination may be pursued. When the Executive Order was the sole measure applicable to higher education institutions (those which were federal contractors) their employment practices were subject to the HEW compliance review process, and individuals could file complaints with HEW, thereby triggering the cancellation, termination and debarment process. It would appear also that the Justice Department could sue to enforce the contract, seeking an order compelling conformance with the equal employment opportunity clause.⁷ Now that Title VII covers higher education an individual can file a complaint with the Equal Employment Opportunity Commission and then bring an action in federal court. A case of this kind may of course be brought as a class action. At the same time that the higher education exclusion was dropped, Congress gave EEOC the power to sue, so that the agency becomes a potential plaintiff in addition to the individual complainant. Increasingly, sections 1981 and 1983 of Title 42 are becoming established as alternative vehicles for individual and class actions raising issues of discrimination, 1981 with respect to discrimination against blacks, 1983 with respect to race and sex discrimination by state agencies. As a result of the recent extension of the Equal Pay Act to administrative, executive and professional employees, questions of sex discrimination in compensation among higher education faculty are open to investigation by the Wage and Hour Administrator of the Labor Department, on his own initiative or in response to a complaint. Either the Secretary of Labor or individual employees may sue to redress

⁵ Public Law No. 92-261 § 2, 86 Stat. 103 (1972) amended 42 U.S.C. § 2000e-1 to remove the exemption for educational institutions.

⁶ 20 U.S.C. § 1681 *et seq.*, 86 Stat. 373 (1972).

^{6a} With respect to § 1981, see Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56 (1972); on § 1983 see, e.g., *Smith v. City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973); *Cohen v. Miami*, 54 FRD 274 (S.D. Fla. 1972).

⁷ Section 209(a)(2) of Exec. Order No. 11246 authorizes the Secretary of Labor to recommend to the Justice Department that proceedings be brought to enforce the equal employment opportunity clause.

claimed violations of the Act.⁸ The prevailing view has been that the Executive Order gives no basis to private parties for suit against contractors for alleged violation of the Order or its implementing regulations.⁹ However, the law may now be shifting toward recognition of private actions based on the Order.¹⁰ Title IX gives federal departments and agencies providing financial assistance a basis independent of the Executive Order for promulgating regulations dealing with sex discrimination in higher education; HEW, which provides much of the government's assistance to higher education, may become simultaneously the agent of the Labor Department in carrying out the contract compliance program on behalf of minority groups and women and the principal in its own program, in aid of women, setting conditions to any form of federal financial assistance. Title IX, however, merely forbids discrimination; unlike the Executive Order, it does not demand affirmative action. HEW's proposed Title IX regulations provide for affirmative action only as a remedy when discrimination has been established.¹¹ In this respect the proposed regulations resemble court decisions under Title VII in which quotas or hiring ratios have been imposed to remedy proven discrimination. Title IX also differs from the Executive Order in that the latter applies to all facilities of a contractor, including facilities not involved in performance of any federal contract, while under the former assistance may be denied or terminated only as to a "particular political entity or part thereof or other recipient" found out of compliance, "limited in its effect to the particular program, or part thereof" in which non-compliance is established.¹² While over-all supervision of the Executive Order program is centralized in the Labor Department, Title IX divides authority among all agencies providing financial assistance to higher education. HEW thus is not the only agency with responsibility under Title IX, and institutions receiving assistance from more than one federal source will find themselves coming under the jurisdiction of a number of agencies. It may be the case that the various agencies responsible for administration of the Executive Order and Title IX are subject to private actions seeking to require the agencies to conform to their own regula-

⁸ FLSA § 16(b), 17 29 U.S.C. §§ 216(b), 217. Under section 16(b) employees may bring class action for damages, but "no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

⁹ See *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).

¹⁰ See *Lewis v. Western Airlines, Inc.*, 8 FEP Cases 373 (N.D. Cal. 1974). In *Lau v. Nichols*, 94 S.Ct. 786 (1974), the Supreme Court entertained on the merits an action brought by private plaintiffs claiming violation of HEW regulations issued pursuant to Title VI and incorporated in funding contracts between HEW and the defendant school district, a recipient of federal financial assistance. As Justice Stewart's concurring opinion points out, the defendants did not contest the standing of the plaintiffs to sue as beneficiaries of the contract (94 S.Ct. at 790 n. 2). Nevertheless, the decision may suggest that the Court is sympathetic to private enforcement of equal employment provisions in government contracts.

¹¹ See HEW, "Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, Non-discrimination on the Basis of Sex," § 86.3(a), 39 Fed. Reg. 22227, 22233 (1974)

¹² 20 U.S.C. § 1682, § 6 Stat. 374 (1972).

tions, the Order or one or another statute.¹³ To the extent this occurs, the agencies are forced to share authority for the formulation and administration of policy with the federal courts, and regulated employers cannot rely with entire confidence on agency interpretations.

A single university may find itself in the following position. As a federal contractor it is obliged to refrain from discrimination on grounds of race, color, religion, sex and national origin and to take affirmative action to insure equal employment opportunity without regard to race, color, religion, sex or national origin. Its employment practices are subject to investigation by HEW as the compliance agency designated by the Department of Labor. Failure to conform to the requirements of the Executive Order program expose it to cancellation or termination of contracts and debarment as a federal contractor, and it may be sued by the Department of Justice in an action to enforce the equal employment opportunity clause. Conceivably, individuals who claim to have been injured by violations of the nondiscrimination or the affirmative action standards of the program may also sue as a kind of third party beneficiary of the equal employment opportunity clause. As an employer subject to Title VII the university may be sued by persons who have filed charges with the EEOC claiming discrimination in employment on grounds of race, color, religion, sex or national origin. Such cases may be prosecuted by a single person attacking a particular event — *e.g.*, termination — or as a class action on behalf of a large number of “similarly situated” persons in which very extensive and detailed judicial regulation of employment practices is sought. The same range of issues may arise in suits brought by the EEOC in response to a complaint. It seems clear that blacks who wish to avoid certain procedural requirements of Title VII can by-pass the EEOC and sue directly under section 1981 of Title 42. If the university is a state agency, members of other groups may be able to make parallel use of section 1983. Since the university receives various forms of federal financial assistance, it is obliged under Title IX of the Civil Rights Act to conform to whatever regulations HEW and other agencies may eventually issue to implement the statute’s prohibition of sex discrimination in federally assisted programs. The same may be true of alleged employment discrimination on grounds of race, color or national origin under Title VI of the Civil Rights Act of 1964. If violations of the regulations are shown in an administrative hearing, the agency conducting the proceeding may require affirmative action or terminate or deny assistance. HEW’s proposed regulations provide for individual complaints, and, here too, it is possible that individuals may be able to sue directly on the regulations. Finally, the university may find itself involved in disputes

¹³ In *Adams v. Richardson*, 480 F.2d the Court of Appeals for the District of Columbia Circuit held, *en banc*, that private plaintiffs could sue for an injunction requiring HEW to carry out the provisions of Title VI of the Civil Rights Act of 1964 by commencing proceedings to terminate federal financial assistance to segregated systems of education. See also, *Legal Aid Society of Alameda County v. Brennan*, F.Supp. (N.D. Cal. 1974).

with the Wage and Hour Administrator or with individual employees over issues of compensation arising under the Equal Pay Act. Of course, many questions are common to more than one source of regulation. Thus, a claim of sex discrimination in pay could be raised under the Equal Pay Act, Title VII, Title IX or the Executive Order. At the same time, the same question can be posed differently depending upon the regulatory context in which it arises. Thus, one agency might conclude that a particular action was not "discriminatory" under Title IX while HEW might decide that the same action fell short of a commitment to "affirmative action."

There may be something to be said for this proliferation of antidiscrimination measures and enforcement mechanisms. It sets many guardians on employers and guarantees complainants a forum in which to press their claims. The inevitable collision of philosophies and the competition among divergent procedures may help clarify the goals of antidiscrimination policy and contribute to developing suitable methods of achieving them. But there are also costs which make the present, confused situation appear very doubtfully desirable.

These costs are of several kinds: (1) one proceeding conducted by one agency may duplicate another proceeding undertaken by another agency; (2) one agency may establish standards which conflict with standards developed by another agency; (3) different agencies may follow inconsistent interpretations of the same standards; (4) there is only limited assurance that a resolution achieved with one agency will be accepted by other agencies.

(1) EEOC investigations of Title VII complaints, agency investigations of Title IX complaints, HEW compliance reviews — whether under Title IX or the Executive Order — and investigations of the Wage and Hour Administrator all may cover some of the same ground. Unless the agencies standardize their investigatory procedures as much as possible, particularly their demands for information, multiple inquiries into the same events, employment patterns or personnel practices will prove needlessly burdensome to institutions and to the agencies themselves. For example, individuals sometimes file with OCR so-called class complaints on behalf of the complainant and all others similarly situated. After institutions of higher education came under Title VII and until recently, OCR's practice has been to refer the individual aspect of the case to EEOC and retain the "class" element of the charge for investigation by the appropriate field office. EEOC's demands for information can be very wide-ranging. Indeed, an exploration of a question of discrimination in an individual instance may require comparison among many similar cases, so that EEOC in effect may conduct much the same investigations as will OCR (or *vice versa*). If each agency fails to coordinate its approach with the other, they may repeat interviews with the

same people, demand information bearing on similar concerns but in different form and otherwise waste their own and others' resources. The practical difficulties of distinguishing class complaints from individual complaints has led OCR to reexamine its practice in this regard, but no clear solution has emerged.

(2) Different agencies may fall into conflict on the same issue. This possibility has been realized perhaps most dramatically in the case of insurance and pension and retirement plans, but questions of maternity benefit policy and testing standards supply additional examples.

All the agencies are concerned to prevent discrimination. It follows that men and women should receive equal treatment under insurance and pension and retirement plans. What has remained obscure is what treatment is equal. Because the costs of medical insurance (excluding pregnancy and pregnancy-connected disabilities) and retirement benefits apparently tend to run higher for women than for men, it is open to argument whether equal contributions by the employer or equal benefits to employees yields equality of treatment. Originally, the OFCC Sex Discrimination Guidelines accepted either equal contributions or equal benefits.¹⁴ So did EEOC, in giving its interpretation of Title VII, and the Wage and Hour Administrator, in furnishing his interpretation of the Equal Pay Act.¹⁵ EEOC has changed its view, and now takes the position that only equal benefits will satisfy Title VII.¹⁶ OFCC has issued a proposed revision of the Sex Discrimination Guidelines which avoids commitment to either position, merely setting out both as alternatives without presently choosing between them.¹⁷ The Wage and Hour Administration (like OFCC, an agency of the Labor Department) stands on its original position. HEW's proposed regulations under Title IX follow the Wage and Hour Administration.¹⁸ Fortunately, perhaps, the meaning of "discrimination" in this context is open to litigation under Title VII, and the courts may ultimately resolve the question.¹⁹

The agencies appear to be arriving at a common view on maternity benefit policy, but only after a period of disagreement resembling the impasse over retirement benefits. OFCC's current version of the Sex Discrimination Guidelines obliges a contractor to extend maternity leave on the same terms (except one) that leave is given for other purposes under his existing leave policy. The exception has to do with length; maternity leave must be granted for a "reasonable" time. If the contractor has no leave policy, the regulation compels him to grant reasonable

¹⁴ 35 Fed. Reg. 8888 (1970).

¹⁵ This history is reviewed at 38 Fed. Reg. 35337 (1973). For the Labor Department's view, see 29 C.F.R. § 800.116(d) (1973) (Interpretive Bulletin on Equal Pay Act).

¹⁶ 29 C.F.R. § 1604.9 (1973).

¹⁷ 38 Fed. Reg. 35336 at 35338 (Dec. 27, 1973).

¹⁸ See 39 Fed. Reg. at 22237, § 86.46(b)(2) (1974).

¹⁹ Cf. *Rosen v. Public Sec. Elec. & Gas. Co.*, 477 F.2d 90 (3d Cir. 1973).

maternity leave and reinstatement to the same or equivalent employment.²⁰ These requirements are less rigorous than the demands of Title VII as interpreted in EEOC's Sex Discrimination Guidelines.²¹ However, if OFCC adopts the proposed revision of its Sex Discrimination Guidelines the two agencies will come into congruent positions. In the OFCC's language, "medically verifiable disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are [,] for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance policies or sick leave plans available in connection with employment." Matters such as "the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance policies or sick leave plans" are to be dealt with on the same terms as "other temporary disabilities." However, if employees suffer termination because no leave or "insufficient" leave is available, the employer may be guilty of discrimination. This consequence follows if his policy follows with "disparate effect" on one sex, and he lacks justification in "business necessity."²² The Wage and Hour Administrator takes no position on maternity benefits, holding to the view that they are not compensation for purposes of the Equal Pay Act.²³ The proposed regulations drafted by HEW under Title IX track the EEOC interpretation of Title VII and OFCC's proposed construction of the Executive Order.²⁴ Again, litigation under Title VII may give the courts the last word.

EEOC and OFCC have issued guidelines on testing and other employee selection procedures.²⁵ These are generally consistent with each other but probably inconsistent with Civil Service Commission practices in federal government employment. When the Federal Service Entrance Examination, developed and administered by the Civil Service Commission, was attacked in litigation as discriminatory against blacks, EEOC, as *amicus curiae*, asserted a position adverse to the Civil Service Commission.²⁶ (The plaintiffs' motion for preliminary injunction was denied and the case remanded to the Civil Service Commission for exhaustion of administrative remedies instituted after the action was filed.) An effect of this incident was to furnish a demonstration that one agency of government held a view of antidiscrimination policy sharply at variance with the conceptions of personnel selection followed by another agency with responsibility for administering the federal civil service. More recently, the Equal Employment Opportunity Coordinating Coun-

²⁰ 41 C.F.R. § 60-20.3(g)(1973).

²¹ 29 C.F.R. § 1604.10 (1973).

²² 38 Fed. Reg. 35337 (1973) (§ 60-20.3(h)).

²³ 29 C.F.R. § 800.110 (1973).

²⁴ 39 Fed. Reg. at 22237 § 86.47(b)(1974).

²⁵ 29 C.F.R. 1607 (1973)(EEOC); 41 C.F.R. 60-3 (1973)(OFCC).

²⁶ The case is *Douglas v. Hampton*, 4 FEP 382 (D.D.C. 1972).

cil, a group of agency representatives including EEOC and CSC, has collaborated on a set of uniform guidelines for testing and employee selection. Successive drafts of these guidelines have been circulating for many months but have not yet taken definitive form. HEW's draft regulations under Title IX seem to resemble OFCC and EEOC guidelines but are far less detailed. Questions of testing and employee selection are frequently raised in Title VII litigation; a number of courts have endorsed various aspects of the EEOC Guidelines, but some difficult problems remain unresolved.²⁷

(3) Different agencies do not seem to share the same understanding of common techniques or strategies which they all employ. The proper use of "goals and timetables" illustrates this problem. "Goals" refers to projected proportions of minority and female employment in certain occupations or jobs utilized by an employer. "Timetables" are the periods of time in which the goals are expected to be reached. For example, a goal and timetable might predict that black employment in a certain job would expand from its current level of 2% in increments of 2% per year for five years, arriving at a total of 12% of employment in the job in five years' time.²⁸ Goals and timetables are a standard feature of affirmative action programs required by OFCC and its compliance agencies under the Executive Order. EEOC and the Justice Department have secured goals and timetables in negotiating settlements with employers in Title VII cases, and the courts have imposed them in some litigated cases as a remedy for past discrimination. The Civil Service Commission may also become involved with goals and timetables in seeking to prevent discrimination in federal personnel programs. A survey of federal officials from these agencies and the Commission on Civil Rights in September, 1973, appeared to disclose differences of emphasis and perhaps of underlying conceptions, as well as a certain vagueness, in appraising the device of goals and timetables.²⁹ For the Civil Service Commission, goals and timetables seemed to serve as a tool for measuring an employer's progress in administering a system of employment based on "merit." In varying degrees other agencies appeared to regard goals and timetables as something approaching a commitment to produce increased minority and

²⁷ In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court endorsed generally the EEOC interpretation of Title VII as requiring that tests used for employee selection purposes be job related. How to interpret and apply this requirement remains problematic, as a number of cases illustrate. See, e.g., *Allen v. City of Mobile*, 466 F.2d 122 (5th Cir. 1972), *Spurlock v. United Airlines*, 475 F.2d 216 (10th Cir. 1972).

²⁸ Examples of goals and timetables, and of a process of calculating them, may be found in the OFCC "imposed" plans in the construction industry. See, e.g., 41 C.F.R. 60-5 (1973) (the Washington Plan).

²⁹ See *Malbin, Non-Discriminatory Hiring*, 5 NAT'L J. REPS. 1400 (1973).

female employment.³⁰ Differences of degree and emphasis on the length of timetables and the size of goals, also revealed in the comments of agency officials, seem to reflect tension between a view of antidiscrimination action as a process designed to afford equal employment opportunity presently and in the future and a conception of antidiscrimination programs as a means of rapidly achieving the same pattern of outcomes as would have been obtained had there been no discrimination in the past. If past discrimination in society generally has had the effect of reducing the present qualifications, at least for some occupations, of minority groups and women, the latter view seems more likely to result in discrimination against whites and males than the former. It is not surprising, therefore, that agencies with a more result-oriented conception of affirmative action tended more to favor explicit consideration of race and sex in choosing among "equal" applicants and employees.³¹ It is also noteworthy that four agencies — the Justice Department, the Labor Department, EEOC and the Civil Service Commission — had arrived at a common, written position on the use of goals and timetables in March, 1973. That document included the following passage:

Under a system of goals, therefore, an employer is never required to hire a person who does not have qualifications needed to perform the job successfully; and an employer is never required to hire such unqualified person in preference to another applicant who is qualified; nor is an employer required to hire a less qualified person in preference to a better qualified person, provided that the qualifications used to make such relative judgments realistically measure the job in question, or other jobs to

³⁰ A representative of the Civil Service Commission said, ". . . goals are not the be-all and end-all of affirmative action. In fact, they are not affirmative action at all, but are merely the means of encouraging affirmative action" and that, "a selecting official should have some flexibility in hiring, but he may not use race or sex as a criterion in making his final selection." *Id.* at 1404. A Justice Department spokesman said, "You have a mix of people who were actually discriminated against and you have a mix of people who were not but who, by conditions of their race and sex have historically been discriminated against. . . . Since you can't historically turn the clock back to know which are which, the judge takes some of the first group and adds a presumption that there are additional persons in the second group, and sets a goal." *Id.* at 1408. The Director of OFCC stated that as between two roughly equal candidates, "I would encourage the contractor to give the minority applicant every consideration," rather than let the decision be made by lot." *Ibid.* Another official of OFCC said that "before Order No. 4 it was a matter of looking at techniques. Now we look at results" and stated also, "it's a simple fact that there has been discrimination in the past. Our purpose is to achieve a degree of utilization which would have existed had discrimination not occurred. The mere fact that a contractor is hiring in rough proportion to availability does not mean that the contractor is in compliance. It depends on the seriousness of the deficiency. You would expect the goals in many cases to be higher than the current availability in order to remedy past deficiencies." *Ibid.* The Civil Rights Commission has issued a statement which takes the view that, "An affirmative action plan must require some action that has not heretofore taken place, otherwise it is useless. . . . One of the requirements therefore is that in the subjective evaluations that always occur in the selection process one factor previously excluded should now be included — a concern that a reasonable number of qualified minorities and women be hired until equity is attained." *Id.* at 1409.

³¹ Compare a statement by a CSC representative — "I personally don't believe minorities can expect to catch up in the employment situation until they also catch up in other areas which affect their employability, such as education and past employment service. A lot of elements in society have to come along. This has to be looked at in a total context. It has been happening. Blacks, for example, have been increasing their college enrollment. More and more women are going into occupational areas formerly considered male. Things are changing, but it is a gradual process. I don't see any overnight changes in the employment picture. A lot of people are looking for shortcuts, but shortcuts won't work. If you short-cut the idea of goals too much, leaving out the backup, they become quotas." *Mablin*, n. 30, *supra* at 1405 — with the Civil Rights Commission statement — "The best test for determining whether these aims are being achieved is by a results test. Whether expressed in terms of application, hires or promotions, the results test is the best test of whether women and minorities in fact are achieving the equal employment opportunities required pursuant to the twin aims of affirmative action." *Id.* at 1409.

which he is likely to progress. The terms "less qualified" and "better qualified" as used in this memorandum are not intended to distinguish among persons who are substantially equally qualified in terms of being able to perform the job successfully. Unlike quotas, therefore, which may call for a preference for the unqualified over the qualified, or of the less qualified over the better qualified to meet the numerical requirement, a goal recognizes that persons are to be judged on individual ability, and therefore is consistent with the principles of merit hiring.³²

These statements may appear categorical; in practice they turn out to be ambiguous. Without a fairly precise understanding of such critical terms as "qualifications," "realistic measures" and "equal" qualifications different persons can agree on this formulation while holding quite divergent views on the size of pools of qualified labor, what proportion of those qualified are equal and how quickly minority and female employment can be increased without reverse discrimination. It is by no means apparent that a common understanding of such questions has emerged.³³

(4) Given the present situation of overlapping jurisdiction, inconsistent standards and diverging interpretations of policy, an institution of higher education cannot be confident that conformity to one agency's views of its obligations will satisfy other agencies. This is most clearly evident in the case of retirement benefits. In this instance a university can comply with all relevant agency interpretations of the law only by adopting an equal benefits formula. The courts may, of course, ultimately hold that this position is correct. On the other hand, they may not. Meanwhile, there is at the least a certain anomaly in a state of affairs under which a university must abandon a position one agency considers in compliance with law to take a different position another agency of the same government regards as legally required. The very vague character of dominant concepts — "discrimination," "goals and timetables," "qualified," etc. — referred to above and discussed more fully below, leads to less obvious conflicts in the approaches different agencies bring to administration of equal employment opportunity in higher education. Conflicts of this kind may surface on occasion, as in a celebrated case involving the Bogalusa, Louisiana, plant of Crown Zellerbach Corporation.³⁴ There, EEOC approved an alteration in the seniority system to redress the effects of past discrimination. This was overturned by OFCC, which imposed a new arrangement. The OFCC solution in its turn was attacked (successfully) by the Justice Department in litigation under Title VII. More commonly, discrepancies of view may remain concealed in the low visibility workings of administrative processes in which multiple agencies

³² "Memorandum for U.S. Attorneys, Field Representatives of the Civil Service Commission, Field Representatives of the Equal Employment Opportunities Commission, Field Representatives of the Office of Federal Contract Compliance — Subject: Federal Policy on Remedies Concerning Equal Employment Opportunities in State and Local Government Personnel Systems" (Mar. 23, 1973) 3-4.

³³ See n. 30, 31, *supra*.

³⁴ *Local 189, United Papermakers & Paperworkers, AFL-CIO v. United States*, 416 F.2d 980 (5th Cir. 1959), *cert. denied*, 397 U.S. 919 (1970).

settle the conditions of eligibility for grants and contracts and attempt resolution of complaints of discrimination.

There presently exists machinery for coordinating the work of agencies active in the antidiscrimination field. This equipment, however, does not yet appear to be in good working order. The Equal Employment Opportunity Act of 1972 added section 715 to Title VII of the Civil Rights Act to create an Equal Employment Opportunity Council, composed of representatives of the Labor Department, the Justice Department, EEOC, the Civil Service Commission and the Civil Rights Commission.³⁵ The Council has "responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders and policies." The principal achievement of the Council to date seems to be a set of draft guidelines on employee selection procedures. The Council deserves a great deal of credit for addressing what is probably the most crucial and difficult problem for antidiscrimination policy. On the other side, the Council has to be faulted for its failure to deal with the problem effectively. The Council's members have not agreed on a document they are prepared to publish, and the draft they have produced perpetuates some of the more notable inadequacies of the existing guidelines adopted by OFCC and EEOC. The four agency agreement on goals and timetables represents another praiseworthy, though only ambiguously successful, effort to achieve consistent interpretation of policy. There is also a section of the OFCC Sex Discrimination Guidelines providing:

To avoid overlapping and conflicting administration the Director will consult with the Administrator of the Wage and Hour Administration before issuing an opinion on any matter covered by both the Equal Pay Act and Executive Order 11246, as amended by Executive Order 11375.³⁶

The undertaking to consult, however, clearly does not insure agreement, as evidenced by OFCC's willingness to consider a position in conflict with that of the Wage and Hour Administrator on retirement plans. The efforts at coordination made so far lead in the right direction. They remain piecemeal approaches to one or another problematic feature of antidiscrimination policy and fail to reflect a comprehensive view of what that policy ought to be. The Executive branch seems to lack capacity to formulate a clear conception of policy and to secure obedience to it on the part of the responsible agencies.

³⁵ 42 U.S.C. § 2000e-14, 86 Stat. 111 (1972).

³⁶ 41 C.F.R. § 60-2.5(c)(1973).

In many ways, despair seems the most appropriate response to the present state of affairs. In varying degrees, a number of agencies of the executive branch, the legislature and the courts have contributed to the tangle of overlapping jurisdictions, remedies and substantive standards which now exists. In all probability, it will never be entirely pulled apart and rationalized. It does not seem too much to ask, however, that at least the agencies of the executive branch concerned with equal employment opportunity should get out of each other's way, whether by deferring to some one agency on questions unique to a particular field, such as higher education, or by coming to a shared understanding on issues of common importance to all of them. Congress has already said there should be coordination; what remains to be done is actually to coordinate.

THE FAILURE OF ENFORCEMENT: HEARINGS AND SANCTIONS

On the surface, it would appear that the contract compliance program should furnish frequent occasion for administrative hearings directed toward the imposition of sanctions. Among the principal sanctions for noncompliance which the Executive Order provides are cancellation, termination or suspension of contracts and debarment of contractors.¹ The regulations contemplate regular compliance reviews, and no contract over \$1,000,000 is to be awarded unless compliance on the part of the successful bidder has been established through a preaward review within the preceding twelve months.² Whenever a compliance review discloses that a contractor lacks an acceptable affirmative action program, or has "substantially deviated" from an approved affirmative action program, he must be declared nonresponsible;³ the regulations provide that upon a second finding of nonresponsibility debarment proceedings must be commenced.⁴ Furthermore, "when the Director [of OFCC] has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted."⁵ Under Revised Order 14, as published in the Federal Register in February,

¹ Exec. Order No. 11, 246 §§ 209(a)(5), (6).

² 41 C.F.R. § 60-1.20(d) (1973).

³ 41 C.F.R. § 60-2.2(b) (1973): If, in determining such contractor's responsibility for an award of a contract it comes to the contracting office's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments or has substantially deviated from such an approved affirmative action program, the contracting office shall notify the Director and declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless upon review, it is determined by the Director that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgment, required prior to a determination that the contractor is nonresponsible. . . ."

⁴ *Ibid.*

⁵ 41 C.F.R. § 60-1.27 (1973).

1974, a compliance agency seemed to be required, within sixty days of receiving a contractor's affirmative action program, either to notify the contractor that he was in compliance or to issue a thirty day show cause notice.⁶ Earlier versions were more vague as to the periods within which compliance agencies were to act but also looked toward a finding of compliance or issuance of a show cause notice.⁷ Revised Order No. 4 requires the compliance agency to give a thirty day show cause notice "immediately upon finding that a contractor has no affirmative action program or has deviated substantially from an approved affirmative action program or that his program is not acceptable . . ." ⁸ While it is not certain that these provisions are wholly consistent,⁹ it is clear that cancellation, termination and debarment serve as prompt alternatives, at least on paper, to satisfactory compliance. None of these sanctions may be imposed without offering an opportunity for hearing.¹⁰ The Director may suspend existing contracts under the regulations, but only during the period proceedings for cancellation, termination or debarment are pending; when the Government has accepted the contractor's plan within the preceding twelve months even suspension must be preceded by a hearing, unless the contractor has "deviated substantially" from the plan.¹¹ The Comptroller General has ruled that progress payments due under a contract may not be withheld for violation of the equal employment opportunity clause without an opportunity for hearing.¹² Finally, the Equal Employment Opportunity Act of 1972 added to Title VII of the Civil Rights Act section 718, which provides:

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: *Provided*, that if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply. . . .¹³

⁶ 39 Fed. Reg. 5630 (1974). On July 8, 1974, the regulations were amended to make clear that extensions of time could be granted, 41 C.F.R. § 60-6.7, 39 Fed. Reg. 25665 (1974).

⁷ Under 41 C.F.R. 60-60, 38 Fed. Reg. 13377 (1973) on-site investigations were to be conducted no later than forty-five days from the request to a contractor for his affirmative action program. 41 C.F.R. §§ 60-60.3(c)(2), (d) (1973). Within forty-five days of the initiation of the on-site investigation the contractor was to be notified that he was in compliance or a 30-day show cause notice was to issue. *Id.* at § 60-6.8. However, the compliance agency could grant an extension of time "for good cause, including an opportunity for the contractor to avail himself of conciliation. . . ." *Ibid.*

⁸ 41 C.F.R. § 60-2.2(c) (1973).

⁹ It is not entirely clear whether a thirty-day show cause notice is to issue upon a finding of noncompliance or after failure of conciliation following noncompliance or one or the other, at the discretion of the compliance agency or Director of OFCC or depending upon whether the deficiency is discovered in a preaward review, in a regular compliance review or in some other way.

¹⁰ 41 C.F.R. § 60-1.26(b)(2) (1973).

¹¹ *Id.* at 60-1.26(b)(2)(iv) (1973).

¹² 52 COMP. GEN. 476 (1973).

¹³ 42 U.S.C. § 2000e-17, 80 Stat. 384 (1972).

Government agencies award a large volume of contracts to institutions of higher education yet only a few of them have approved affirmative action plans. There has been ample opportunity for commencement of proceedings leading to cancellation or termination of contracts and debarment. The typical outcome of a compliance review is a finding of deficiencies in the institution's affirmative action program. Only a small number of plans have received final approval, a larger number have been rejected and many plans have remained pending for long periods of time. The Director has had authority to initiate enforcement proceedings whenever he believed a contractor had violated the equal employment opportunity clause. Findings of noncompliance after compliance reviews are supposed to trigger show cause notices. Given the length of time some programs have been held under review, it must be the case that two or more contracts over \$1,000,000 in amount have been awarded to a single institution with no finding of compliance having been made. But Revised Order 4 prohibits the award of a contract in excess of \$1,000,000 unless a preaward review has established compliance and requires a debarment proceeding upon a second finding of nonresponsibility. Many contracts are awarded to institutions which have never undergone a compliance review because OCR, in common with other compliance agencies, lacks the manpower to perform the tasks set down in the regulations. It is also true, however, that the conditions to sanction proceedings are routinely satisfied at institutions which are reviewed. Yet the Government has never moved seriously to invoke against an institution of higher education the sanctions provided in the Executive Order.¹⁴ Why not?

Several reasons may be offered for the absence of formal sanctioning proceedings in higher education. It is possible that HEW lacks the political will to pursue the drastic remedies of cancellation, termination and debarment on any very wide scale or against influential contractors. The sanctions are so overwhelming as to deter their use. The government projects an attitude of ambivalence toward the program, reflecting the tension between the function of the government contract as a means of procuring required goods and services at the highest quality for the lowest cost and use of the contract as a regulatory technique. HEW has an alternative means of bringing pressure to bear on contractors (the contract freeze, discussed below) which avoids the commitment of time and resources entailed by formal enforcement proceedings and postpones the need to resolve the underlying tensions and dilemmas of the regulations, as well as the problems posed by their lack of fit to the conditions of higher education. These features of the regulations furnish an additional, formidable impediment to straightforward enforcement.

¹⁴ It is reported that the Office for Civil Rights requested HEW's General Counsel in November, 1971, to initiate steps leading to termination of Columbia University's federal contracts and debarment of Columbia as a government contractor. No hearing was ever held, however. See Wheeler, *The Role of University Counsel in Dealing with Equal Opportunity Compliance Problems*, 7 THE COLLEGE COUNCIL 249 (1972).

At least some OCR employees have entertained doubts about the willingness of politically appointed officials to support strong enforcement measures against contractors. Whether or not such doubts are well-founded, their existence probably serves to inhibit vigorous action by the people involved in the day to day work of the compliance program. How persistent, widespread and deepseated is the skepticism about the current administration's commitment to the program is hard to say. Some officials profess considerable confidence in the wholehearted support of highranking political appointees in the executive branch, others are noncommittal and still others acknowledge considerable uncertainty. If there is any general rule about the matter, it would seem to be that skepticism varies directly with the distance in the organization's hierarchy between the speaker and the highest levels of administration, but what this tendency may measure could be less the real attitude of the speaker than the degree of his willingness to speak candidly. A number of people in and out of government claim awareness of one or another incident suggesting that political considerations may have deflected the program's administration on some occasion. Naturally, it is quite difficult either to verify or to disprove allegations of this kind. It does seem fair to say that OCR does not reflect full confidence that the Department stands prepared to support stern enforcement measures.

The very severity of the sanctions creates another obstacle to their use. Debarment of a number of universities, including many of those at which OCR has concentrated its efforts, would inflict considerable damage. Probable consequences would include layoff of personnel, sharp curtailment or elimination of many research programs and constriction of educational and training opportunities, particularly for advanced students. Further, since universities are complex organizations very poorly described by the industrial model reflected in OFCC regulations, it is often difficult to frame clear issues and build a compelling case demonstrating that a university stands in default on a clearly stated and important requirement of the program. For example, much frustration has been encountered in developing satisfactory analyses of university workforces for the purposes of compliance review. Even to be initiated, an epithet OCR representatives infrequently deserve, a large university seems a confusing, if not chaotic, welter of job titles, disciplines, subfields and organizational units. OCR representatives and university officials have in some cases spent considerable time constructing suitable methods of collecting and reporting data on employees.¹⁵ The problem of calculating deficiencies and setting goals among academic employees supplies another illustration. There has been lacking fully satisfactory means of establishing the availability of eligible minority and female candidates, especially in the case of minorities, but these determinations must be

¹⁵ See the account furnished by a lawyer for Columbia University in Wheeler, n. 14 *supra*.

made to estimate underutilization and set goals. In consequence of difficulties of this kind, it is easy to find a university out of compliance but hard to say exactly what it should have done in order to comply. Review of a university becomes a process of mutual discovery of a series of intractable problems; the university may lag behind OCR demands and requests, but it can usually avoid falling into obvious recalcitrance. In this setting, extreme sanctions which fall heavily on "innocent" employees and students seem out of proportion to the university's fault. Consequently, they are not employed.

In addition to the paradox that, at a certain point, sanctions lose efficacy as they gain in power, contract compliance faces the dilemma that its sanctions injure the Government at the same time they hurt the university. One of the purposes of contract awards to colleges and universities is to strengthen the higher education system.¹⁶ To withhold contracts in aid of antidiscrimination efforts thus serves to advance one federal policy at the expense of another. (The converse is true only if there is no feasible alternative to withholding of contracts.) But Government policies conflict still more sharply. The Government desires the goods and services it purchases through contracts with universities. Termination, cancellation and debarment further the Government's interest in improving the condition of women and minority groups but sacrifice the performance for which the Government has contracted and the contractor's capacity to assist the Government in achieving many of its goals. For example, it was reported that indefinite continuation of the recent freeze of contract awards at the University of California at Berkeley would have required cancellation of the Apollo-Soyuz space flight planned for July, 1975.¹⁷ There will be disagreement, of course, over the appropriate ordering of priorities as between elimination of discrimination and achievement of various other objectives. The responsibility of monitoring compliance with the equal employment opportunity clause was separated from the function of awarding contracts precisely in order to increase the weight of antidiscrimination policy in the overall mix of governmental objectives represented by the Government contract device. The point remains that enforcement of equal employment opportunity involves a balance of gains and losses, and the responsible officials may sometimes conclude that the balance weighs against enforcement. At least some OCR officials see this tension in contract compliance quite clearly, and this perception contributes to their sense of isolation and to their suspicion that sanction proceedings will not be carried through to the end against important contractors.

¹⁶ See Wilson, *A Dilemma of American Science and Higher Education Policy: The Support of Individuals and Fields versus the Support of Universities*, 9 MINVERVA 171 (1971).

¹⁷ See BNA, 42 Daily Lab. Rep. A12-A13 (Mar. 1, 1974).

OCR has available to it one method of bringing pressure to bear on contractors apart from the formal procedures of termination, cancellation and debarment. This method — the freeze on new contract awards — has been used on a number of occasions.¹⁸ Revised Order No. 4 provides:

If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments or has substantially deviated from such an approved affirmative action program, the contracting officer shall notify the Director [of OFCC] and declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless upon review, it is determined by the Director that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgement, required prior to a determination that the contractor is nonresponsible.

. . .¹⁹

Under the Federal Procurement Regulations contracting officers are required to evaluate the "responsibility" of prospective contractors. For the most part, the criteria of responsibility — *e.g.*, financial resources, record of performance — have to do with the contractor's capacity to supply goods or services according to contract specifications.²⁰ However, in order to be considered responsible a prospective contractor must "be otherwise qualified and eligible to receive an award under applicable laws and regulations . . .," including Executive Order 11246 and its regulations.²¹ If OCR is dissatisfied with a contractor's performance of his affirmative action obligations, it may announce that fact to contracting agencies, with the likely consequence that contracting officers will withhold findings of responsibility. So long as contracting officers are willing to defer to OCR determinations of non-compliance with Revised Order No. 4,²² the agency is able to shut off the flow of federal contract money to the offending university for some (unknown) period of time. This technique permits OCR to induce concessions from contractors without incurring the substantial costs of time and resources demanded by formal proceedings. This tactic also allows OCR to demonstrate "progress" in expanding employment opportunities for minority groups and women while relieving the executive branch of the responsibility of taking a clear position on the meaning of affirmative action.

¹⁸ According to information supplied by HEW, delay of contracts has been utilized on some twenty-two occasions involving twenty institutions of higher education and nearly \$28.5 million in contract awards (in some cases, no contracts were pending at the time the contract freeze was imposed). Letter from Cheryl Olkes, Public Information Office, OCR, to Sheldon Steinbach, ACE, dated Jan. 15, 1974.

¹⁹ 41 C.F.R. § 60-2.2(b) (1973).

²⁰ Sec. 41 C.F.R. § 1-1.1203 (1973).

²¹ *Id.* at § 1-1.1203(e); 41 C.F.R. § 1-12.8 (1973).

²² Under 41 C.F.R. § 60-2.2(b) (1973) a declaration of nonresponsibility is made by the contracting officer. It is not clear that he is obliged to heed OCR's conclusions on the question of nonresponsibility.

These are only in part the functions for which the contract freeze was designed. It appears that OFCC saw in this technique the means of solving two problems. As described by a Solicitor of Labor, these were:

First, the compliance agencies frequently ignored the Executive order's mandate that conciliation efforts continue for only a reasonable time, thus permitting dilatory contractors to protract "conciliation" for a period of several years; and, second, the adversary proceedings contemplated by Section 208(b) of the Executive order, even when promptly instituted, are time consuming and necessarily divert limited compliance resources from other program tasks.²³

Under the most plausible interpretation of Order No. 4, the discovery that a contractor is deficient in meeting his affirmative action obligations should trigger a thirty day show cause notice as well as a finding of nonresponsibility. If the matter is not resolved during the thirty day period, there should follow a "notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts. . . ." ²⁴ OCR seems unconstrained by this timetable, apparently feeling free to continue "conciliation, mediation and persuasion" beyond the time periods set by the regulations.²⁵ The compliance review tends to evolve into a negotiation process with a partly indeterminate outcome. This whole process is quite likely to consume many months and may never reach a definitive conclusion. In this process, show cause notices and the occasional contract freeze serve rather to restore movement to a stalled negotiation than to lend structure to an enforcement procedure leading either to the imposition of the prescribed sanctions or a determination of compliance with a set of ascertainable standards. It would seem that OFCC hoped to provide an informal and expeditious means of resolving compliance problems which could bypass formal hearing mechanisms and proceed to a terminal point within a finite time period. This objective assumes, however, that the compliance agency's task is primarily an administrative process of monitoring conformance to a set of determinate obligations described by the regulations. In reality, insofar as the regulations defy coherent application in the setting of higher education, the contract freeze comes to function as a pressure tactic in a bargaining process; delay of contracts helps to force agreement with a particular university while case-by-case negotiation of agreements allows OCR to escape the responsibility, which a litigation process might impose, of committing itself to a meaningful conception of affirmative action.

²³ Nash, *Affirmative Action Under Executive Order 11, 246*, 46 N.Y.U.L. REV. 225, 253 (1971).

²⁴ C.F.R. § 60-2.2(c)(1) (1973).

²⁵ According to 41 C.F.R. § 60-2.2(c)(2), "During the 'show cause' period of 30 days every effort shall be made by the compliance agency through conciliation, mediation and persuasion to resolve the deficiencies which led to the determination of nonresponsibility." However, "if satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency, with the prior approval of the Director, shall promptly commence formal proceedings leading to the cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts under § 60-1.26(b) of this chapter."

It seems clear that OCR should not be dependent so exclusively on the extreme sanctions of termination, cancellation and debarment. Their very severity seriously inhibits their use. Consequently, it could easily occur that OCR might leave unremedied an institution's defaults on a wide range of individual matters because the only sanctions available to the agency seem excessively harsh.²⁶ It is unlikely, for example, that OCR will seek to debar a university because, in the agency's view, a department has discriminated on grounds of sex in denying tenure to a woman faculty member. On the other hand, to the extent that OCR is prepared to pursue debarment in such cases the university is likely to capitulate out of unwillingness to risk eligibility for contracts on the outcome of litigation over a matter of secondary importance to the institution as a whole. As a practical matter, a university for which government contracts are important will not deliberately risk its eligibility on the accidents of administrative litigation on any but the most gravely significant issue.²⁷ The present system creates the risks either that OCR obtains less than full compliance or that the agency imposes on institutions a version of their obligations which would not survive the test of litigation.

These unsatisfactory alternatives are partly due to the ambiguous and indeterminate character of the regulations. On one hand, institutions are uncertain as to the nature and extent of their obligation and, on the other, OCR's findings of compliance or noncompliance have a large element of pure discretion. In addition to revision of the regulations themselves, it would seem desirable to seek better definition of the program's requirements through the process of "elucidating litigation." This process will not go forward, however, within the framework of the present system of sanctions. Either OCR will not invoke them or the institution will make the minimum concessions necessary to avert the risk of debarment.

Two reforms seem desirable to correct this situation: (1) OCR should have at its disposal a system of graduated sanctions; (2) OCR should not be able to impose any sanction without an opportunity for prior hearing. The first of these is no simple matter to arrange. Essentially it is a matter of providing by contract for the range and flexibility of judicial remedies.

²⁶ See Fisher, *The Carrot and the Stick: Conditions For Federal Assistance*, 6 HARV. J. LEGIS. 401 (1969), for a description of this dilemma.

²⁷ 41 C.F.R. § 60-1.24(c)(4) provides: "Where a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of an agency or the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within ten days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action by the agency or the Director." It does not appear that this procedure has ever been utilized. For this there may be several reasons. Contractors dislike challenging the Government for fear of prejudicing the award of future contracts. Action once taken can be difficult to undo later — e.g., a grant of tenure to a complainant. OCR tends to avoid "orders" or "recommendations" in favor of pointing to "deficiencies" (e.g., inadequate workforce analysis, availability not sufficiently established), and the requirements of the program are so vague and open-ended that a contractor can ordinarily assume he is out of compliance. Indeed, it may be doubted that OCR has been entirely satisfied even with those few plans it has approved, to say nothing of OFCC. To contest an order, therefore, invites a retaliatory debarment proceeding, and this poses serious risks.

The penalties for violation of the regulations or departures from an affirmative action program should be heavy enough to discourage frivolous contests for purposes of delay or obstruction but not so overwhelming that institutions feel compelled to abandon genuinely held positions on serious questions. Sanctions should be adequate to deter but not so devastating that they either are not employed or impose losses out of proportion to the institution's default or coerce compliance to debatable interpretations of the regulations. Depending upon circumstances, sanctions for demonstrated violations have one or more of three functions to perform: (1) to deter future violations of the regulations generally, by the respondent and others, (2) to compel a respondent to conform a continuing cause of conduct to the requirements of the program, (3) to make whole injured persons. A dispute might arise over an institution's recruiting practices, an example of (2) above. If those are shown to fall short of compliance with the institution's obligations under the Executive Order, the indicated remedy is the equivalent of an injunction. On the other hand, if an institution fails in a few individual instances to perform its commitment to advertise openings, an illustration of (1), a monetary penalty, the equivalent of a fine, might be appropriate. Finally, it may be desirable in some cases to provide remedies for individuals — *i.e.*, a promotion or grant of tenure.

The Executive Order, as it stands, does not lend itself to a remedial scheme of this kind. It would be possible for OCR to seek termination or cancellation of a particular contract or a "portion thereof" ²⁸ without attempting debarment as well. This would be a crude solution since it would tie the possible range of remedies to an institution's pattern of contracts and would allow only limited flexibility in the choice of remedy. It would also have undesirable side effects on the institution's activities and employees involved in the contract and on the contracting agency. More satisfactory would be amendment of the Executive Order to permit promulgation by regulation of a scale of monetary penalties to which institutions would consent in entering into government contracts. These would be imposed for violations either admitted by institutions or proved through the existing hearing procedures (subject to judicial review). Penalties in appropriate amounts would either be imposed, as in cases in which fines are appropriate, or forgiven upon compliance with the obligation established through litigation, as when a change in practice or provision of remedies to individuals is demanded from the institution. The debarment sanction could be retained for cases of continued recalcitrance.

A solution of this kind would work awkwardly or imperfectly in some cases. Since it would almost certainly prove infeasible to specify in

²⁸ Executive Order 11, 246, in section 209(a)(5), provides for cancellation, termination or suspension of a contract or "any portion or portions thereof."

advance what penalties would be appropriate for which violations, the question of penalty would often have to be litigated along with the underlying issue of the violation itself. Consequently, OCR might be tempted to claim large penalties to gain bargaining leverage, thereby circumventing the hearing process. Also, such a system would function most effectively with institutions which rely heavily on government contracts, much less well with institutions which contract with the Government only sporadically or for small amounts. Defects like these, however, simply reflect the distortions and anomalies which accompany the use of the government contracts as a regulatory device. As always, proposals have to be judged against existing arrangements and practical alternatives.

The availability of an adjudicative process does not insure that it will be used. As long as OCR can exert significant pressure on institutions outside the framework of formal sanctions, the program's content may continue to depend more on what the agency has the strength to negotiate than on what the regulations can be shown to require. At present, termination or cancellation of contracts and debarment can take place only upon opportunity for prior hearing. However, the agency claims the power simply to declare an institution a nonresponsible bidder for inability to comply with the equal employment opportunity clause, and this technique, by damming the flow of contract funds to the institution, may enable OCR to win concessions which may exceed what can properly be imposed.²⁹ It is open to doubt whether the compliance agencies actually have authority to make findings of nonresponsibility without affording an opportunity for hearing.³⁰ However that may be, it would seem desirable as a matter of policy to force OCR to formulate an intelligible conception of the program and demonstrate its legitimacy by channelling enforcement away from the administrative mechanism of the contract freeze and into an adjudicative process.

The same considerations apply to administration of Title IX, forbidding sex discrimination in federally assisted education programs and activities. Section 902 provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become

²⁹ The use of the contract freeze to settle dispute over the meaning of the regulations is comparable to resort to strike in preference to arbitration to resolve a question arising under collective bargaining agreements. In both situations a test of strength determines issues of interpretation.

³⁰ In *Crown Zellerbach Corp. v. Wirtz*, 281 F.Supp. 337 (D.D.C. 1968), the court enjoined the Secretary of Labor from, *inter alia*, temporarily suspending the plaintiff corporation from further business with the government prior to a hearing on the plaintiff's compliance status under Executive Order No. 11, 246.

effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been refund, or (2) by any other means authorized by law: *Provided, however*, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.³¹

HEW's draft regulations under Title IX provide for suspension of assistance while formal proceedings to terminate or deny assistance are pending.³² To the extent that assistance is critical to the recipient institution, it will be true under Title IX, as under the Executive Order, that interruption of funds will lead to a negotiated outcome, circumventing the procedures of hearing and judicial review afforded by the statute as well as its machinery for legislative oversight. It would seem as desirable in the administration of Title IX as in that of the Executive Order that any cut-off of funds follow, rather than precede, the adjudicative procedure the statute provides.

Precisely the same argument holds for Title VI of the Civil Rights Act of 1964, which Title IX simply repeats in the respects relevant here.³³

THE DILEMMA OF ENFORCEMENT: UNADMINISTRABLE STANDARDS OF MERIT

The Executive Order forbids discrimination and requires affirmative action. Neither of these terms lends itself to straightforward application. Labor markets are inherently discriminatory; one of their functions is to allocate a good in short supply relative to demand. The formula "discrimination on grounds of race, color, religion, sex or national origin" seems to mean that these attributes are not to figure in the discriminations among persons which employment decisions inevitably effect. On one view, claims of discrimination turn on the question whether or not the employer took these characteristics into account, using them as standards to guide his decisions. Discrimination poses fundamentally a

³¹ 20 U.S.C. § 1682, 86 Stat. 374 (1972).

³² 39 Fed. Reg. 22238-39 (1974) (§ 86.63(b)).

³³ 42 U.S.C. § 2000d-1, 78 Stat. 252 (1964).

psychological issue, and the employer's intentions are crucial. If it appears that his decisions do not vary depending, for example, on the race of applicants or employees, he cannot be guilty of racial discrimination. What considerations apart from race may determine his decisions are immaterial. The employer can discriminate on any basis he chooses, other than race. If, for example, an employer refuses to hire applicants who have arrest records, his practice is nondiscriminatory even though a larger proportion of blacks than of whites have arrest records. At one time this notion of discrimination as conduct resulting from an intention to discriminate on prohibited grounds seems to have marked the limit of the legal conception of discrimination.¹

On another view of the matter, racial discrimination need not rest on an intention to discriminate on grounds of race but may exist even where there is an intention not to discriminate in this way. Now, claims of discrimination depend on the effects of the employer's practices. If their effect is disproportionately to disadvantage blacks as against whites, the employer has discriminated on grounds of race.

Of course, the question arises, disproportionate with respect to what? One answer might be, with respect to the fraction of blacks in the labor force. Another answer would be, with respect to the relative "merit" — *i.e.*, job performance — of blacks and whites in the labor force. These two answers might come to the same thing if it were the case that capacity for job performance were equally distributed among blacks and whites for all jobs.² This is, however, not the case. For example, a lower percentage of blacks than whites possess what society insists upon as a necessary minimum of training for the practice of medicine. The cumulative impact of the black experience in the United States has the consequence that relative capacity across the entire range of jobs in the economy (in the sense of "present" as opposed to "innate" capacity) is not proportionately distributed between the two racial groups. It makes a difference whether discrimination against blacks is defined as, employing a lower proportion of blacks in particular jobs than their proportion of the labor force, or as, employing less able whites than available blacks. The former definition may serve as a measure of discrimination in society, but it is unlikely to furnish a test of unlawful discrimination unless modified to include a standard of minimum qualification. At least three considerations combine in favor of the latter definition. It serves an interest in efficiency. It gives effect to the view that the person who will perform a job best deserves the job. It rejects race as a criterion of selection. When discrimination is understood in this way, the case of the employer who rejects applicants

¹ See Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 66-75 for an account of the evolution of the legal concept of discrimination.

² They would not necessarily amount to the same thing. If, for example, blacks and whites differed in their relative access to employment opportunities — owing to residential patterns and plant location — disproportionately high numbers of blacks or whites might be employed even though the capacity of the two groups was equal.

with arrest records needs to be reexamined. Unless arrest records signal some disqualifying trait for the job in question, this employer discriminates on grounds of race.³ It is this second conception of discrimination as decisions which, whether or not intentionally, fail to match racial patterns of employment with capacity for job performance that approaches the contemporary legal meaning of discrimination.⁴

This expansion of the meaning of discrimination reduces the scope of affirmative action, as used in the Executive Order. If discrimination meant only knowing or intentional departures from the principle of selection according to capacity for job performance, then a duty to take affirmative action could be used to alter unintentional or inadvertent practices with the same effect. It may be, for example, that an employer's failure to recruit aggressively among minority groups and women is not discrimination. If so, however, a duty to recruit may be imposed as part of a federal contractor's affirmative action obligation.⁵ But affirmative action on behalf of minority groups and women reaches its limit at the point of discrimination against whites and men. Although the Constitution may permit the Government to require preferences to members of disadvantaged groups, it appears that federal law at present forbids discrimination for as well as against such groups. Thus Title VII prohibits discrimination on grounds of race or sex, not discrimination against blacks or women, and the Supreme Court has read the statute as saying that "discriminatory preferences for any group, minority or majority, is precisely and only what Congress has proscribed."⁶ Since Title VII covers federal contractors, it is very doubtful that the contractual stipulation for affirmative action could require reverse discrimination.⁷ In any case, it seems that the Executive Order itself bans discrimination against whites or males.⁸ Although the obligation to take affirmative

³ In *Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972), the court held that the use of arrest records as a screening device violated Title VII on the grounds that the device disproportionately disadvantaged black applicants and had not been shown to further a reasonable business purpose.

⁴ This proposition emerges from decisions establishing the principles that racial imbalance may create a *prima facie* case of discrimination, that findings of discrimination do not require proof of intention to discriminate and that racially neutral selection criteria which adversely affect minority groups are unlawfully discriminatory unless shown to be related to job performance. For a discussion of these principles see Larson, *The Development of Section 1981 as a Remedy For Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV.-LIB. L. REV. 56, 90-96 (1972).

⁵ In *In re Allen Bradley*, CCH EMPL. PRAC. GUIDE ¶¶ 8065, 8070 (OFCC 1968, 1969), recruitment from walk-in applicants was considered to violate the contractor's affirmative action obligation rather than his duty not to discriminate.

⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁷ See 42 OP. ATTY GEN. No. 37 at 11 (1969), *cf.*, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁸ Thus, the Executive Order does not prohibit discrimination against minority groups and women but discrimination on grounds of race or sex. Order No. 4 provides that "The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligations. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin." 41 C.F.R. § 60-2.30. HEW's "Higher Education Guidelines: Executive Order 11246" state: "A university contractor must carefully and systematically examine all of its employment policies to be sure that they do not, if implemented as stated, operate to the detriment of any persons on grounds of race, color, religion, sex or national origin." **** "The nondiscrimination requirements of the Executive Order apply to all persons, whether or not the individual is a member of a conventionally defined 'minority group.' In other words, no person may be denied employment or related benefits on grounds of his or her race, color, religion, sex or national origin." HEW, "Higher Education Guidelines: Executive Order 11246." 2-3, 3 (1972) (emphasis in original).

action is said to require something more than nondiscrimination, the duty not to discriminate for or against persons on grounds of race, color, religion, sex or national origin limits the reach of affirmative action. As the meaning of discrimination comes to take in more ground 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" comes to be squeezed more and more tightly against the ban on discrimination hostile to persons of any race, color, religion, sex or national origin.

The cumulative effect of the duties to refrain from discrimination and to take affirmative action is to compel employee selection according to job performance, actual or predicted. A contractor's failure to employ members of minority groups and women in each job in the proportions indicated by their relative capacity for performance suggests that he has been derelict in taking affirmative action if, indeed, he has not discriminated. On the other hand, to the extent that he has favored minority persons or women over whites or males of superior job performance capacity he has been guilty of reverse discrimination. To be workable at all, the contract compliance program must have an administrable conception of job performance. It is at this point that the program suffers breakdown in its application to faculty employment.

Administration of the contract compliance program is facilitated by certain conditions. The regulations assume that the contractor is an organization characterized by an hierarchical authority structure, with a centralized management capable of establishing a system of personnel rules and monitoring conformance to the rules by subordinates. Entry level jobs require little training, experience or education beyond that widely distributed in the population at large and any additional necessary skills are acquired during employment. The content of jobs is clearly understood, as when the technology of production defines the job, and criteria of performance are subject to objective measurement. There is an effective ceiling on performance imposed by the character of the job itself or, at least, there is an average level of performance defined as successful which is commonly attained. Faculty employment in higher education stands in marked contrast. In matters of employment and promotion the institution's authority tends to be widely diffused to departments and schools, and there is considerable participation by faculty in faculty personnel matters, amounting at times almost to control. Entry into faculty employment typically follows a lengthy and intellectually demanding period of training, and entry may only serve to commence a probationary period of several years duration, often with no assured outcome. The professor's role is very complex and the variation in performance quite wide. The work is highly specialized, and much of it, especially research, can only be judged by experts. Criteria of per-

formance are vague and subject to dispute. Nevertheless, they tend to produce rankings of people within a field rather than broad groupings. In this setting, it is possible to estimate how well various groups have succeeded, but difficult to determine how much of observed differentials result from illegal discrimination by institutions and how much from varying tastes or preferences and the cumulative effect of such influences as socialization or discrimination in society at large.

A considerable amount of work has been done on the position of women among higher education faculty.⁹ This work strongly suggests some degree of sex discrimination. At the same time, it helps to illustrate why the contract compliance program furnishes a very problematic remedy. According to a recent study by the Office of Education, women comprise some 22.5 percent (57,297) of full-time college and university faculty on nine- and ten-month contracts (total: 254,930). The average salary of women for the 1972-73 academic year was \$11,862, that of men \$14,352. The following table shows the rank and salary distribution of male and female faculty (1972-73):

Rank and sex.....	Total		Universities		Other 4-year		2-year	
	No. of faculty	Average salary	No. of faculty	Average salary	No. of faculty	Average salary	No. of faculty	Average salary
Total	254,430	\$13,793	95,524	\$15,231	121,014	\$13,052	38,392	\$12,556
Men	197,633	14,352	79,222	15,829	92,676	13,496	25,735	12,889
Women	57,297	11,865	16,302	12,325	28,338	11,601	12,657	11,862
Professors	55,890	18,911	27,980	20,741	25,480	17,156	2,430	16,231
Men	50,325	19,128	26,135	20,931	22,296	17,273	1,894	16,544
Women	5,565	16,950	1,845	18,050	3,184	16,620	536	15,122
Associate								
Professors	54,479	14,353	24,954	14,591	30,233	13,849	4,302	14,426
Men	49,674	14,481	21,684	15,063	24,764	13,974	3,226	14,459
Women	9,805	13,704	3,270	14,207	5,459	13,280	1,076	14,327
Assistant								
Professors	87,049	12,043	32,038	12,442	46,845	11,745	8,166	12,181
Men	66,190	12,233	25,535	12,594	35,098	11,967	5,557	12,259
Women	20,859	11,437	6,503	11,845	11,747	11,083	2,609	12,015
Instructors	55,512	10,613	10,552	9,749	18,446	9,401	23,494	11,954
Men	31,444	10,964	5,868	10,009	10,518	9,550	15,058	12,325
Women	21,068	10,089	4,684	9,423	7,948	9,204	8,436	11,292

More sophisticated studies indicate a rather complex set of explanations underlying data like these. For example, one of the more probing in-

⁹ ACADEMIC WOMEN ON THE MOVE (Rossi ed. 1973) is a convenient collection of material representative of the literature which undertakes to demonstrate the disadvantaged position of women in higher education.

vestigations appears to demonstrate that part of such differentials in rank and pay as those shown above is due to factors like differences in highest degree held, interest in teaching as against research, publication, academic discipline and type of parent institution.¹⁰ Thus, it is reported that "women college faculty are only about half as likely as men faculty to hold a doctorate."¹¹ Women are more highly concentrated in lower paying fields, more often indicate primary interest in teaching than in research, publish less and are employed disproportionately in two-year institutions. Women appear less mobile than men, apparently with a negative effect on their salaries. Even after allowance is made for differences between male and female faculty of this kind, however, significant discrepancies remain. The authors conclude that:

If the same criteria, with the same weights, were applied in awarding rank to women as are applied to men . . . , the average compensatory *increase in rank* would be from slightly below to somewhat above the assistant professor level, an average of one-fifth step. To award women the same salary as men of similar rank, background, achievements, and work settings . . . would require a compensatory *average raise* of more than \$1,000 (1968-69 standards). This is the amount of salary discrimination which is *not* attributable to discrimination in rank. The amount of *actual* salary discrimination, attributable to discrimination in advancement, would substantially increase this figure.¹²

Further, some of the choices women make which help account for their lower pay and rank may not be choices at all but additional handicaps imposed by discrimination. Hiring discrimination may restrict their access to better paying institutions, and they may be given fewer opportunities in administration and research than they deserve.¹³

On the other hand, many women may make certain career choices which tend to limit their professional success but which accurately reflect their interests and their perception of their abilities. In any event, some part of the differential between men and women faculty seems not to be the result of failure to apply existing academic standards evenhandedly but rather a consequence of their application. Thus, high scholarly productivity is rewarded, and this tends to favor male faculty. However, the standards themselves may be attacked as unfairly discriminatory. The study just quoted from illustrates a common approach:

Sex discrimination in academe does not begin when a woman accepts an appointment at a college or university. Rather, its roots reach far back to the cumulative effects of earlier sex differentiation processes and discrimination: early childhood socialization for "appropriate" sex roles, different treatment and expectations accorded to boys and girls by their parents, teachers, and peers throughout adolescence and early adulthood, differential opportunities for access and admission to undergraduate and graduate school, and so forth. As a result, when they enter teaching careers in

¹⁰ Astin & Bayer, *Sex Discrimination in Academe*, EDUCATIONAL RECORD, Spring, 1972, 101, 103.

¹¹ *Ibid.*

¹² *Id.* at 115.

¹³ *Id.* at 116.

colleges and universities, most women have interests, aspirations, expectations, educational backgrounds, and life experiences that differ from those of their male counterparts. Once on the faculty, women experience a second barrier to equality with men: the academic reward system is biased toward behaviors and activities exhibited more often by men than women. Indeed, the content of the academic reward system was established by men, so rewards go primarily to those women who accept and share men's criteria for academic rewards. Thus, administration, research and publications, which men engage in to a greater extent than women, receive higher rewards than teaching, which women devote more time to than men. This reward system is far from ideal and may even be dysfunctional to the educational objectives of American colleges and universities. Indeed, the system should be examined and restructured.¹⁴

This passage strikes two themes: the theme of the mute inglorious Milton and that of the ugly duckling. On one side, women are differentiated from men by socialization processes which stultify their innate capacity for intellectual roles; on the other, women are different from men in ways which enhance their capacity for service in higher education, once it is understood that the faculty role should properly be defined by a different set of characteristics than it is at present. Anyone who has worked on a university campus during the past several years must by now be familiar with both these themes, developed in the case of minority groups besides that of women, as well as with the claim that women who perform indistinguishably from men are less well rewarded nonetheless. Considerable evidence can be mustered in support of the last proposition. Neither of the first two is clearly wrong by any means. Together, they set a dilemma for policies aimed at producing "equal opportunity." There is reason to believe that existing standards have not been applied evenhandedly across sex lines in a significant number of cases. It may also be true that one or more groups protected by the Executive Order and legislation might still fare less well, on average and for some period of time at least, than whites and males under a regime of perfect consistency in the application of standards of faculty employment. It might also be true that a reformulation of standards would improve the position, *e.g.*, of women relative to men. Whether they should be reformulated, and how, squarely poses the issue of "merit" in faculty employment and raises, in turn, the question of how the mission, or missions, of higher education should be defined. OFCC's regulations are incapable of speaking to such questions intelligibly. Taken literally, however, the regulations preempt them. This dubious objective they achieve by imposing an impossible burden of demonstration on judgments of academic merit.

A contractor's obligation to take affirmative action follows from the discovery of underutilization in his workforce. The regulations define "underutilization" as "having fewer minorities or women in a particular job classification than would reasonably be expected by their availabil-

¹⁴ *Id.* at 101.

ity.”¹⁵ A notion of availability implies possession of attributes important for successful job performance; a person cannot be said to be available for a position in any meaningful sense if he lacks capacity to perform it. In calculating underutilization, the contractor is to “consider . . . the general availability of minorities [women] having requisite skills in the immediate labor area” and “the availabilities of minorities [women] having requisite skills in an area in which the contractor can reasonably recruit,” as well as “the availability of promotable and transferable minorities [female employees] within the contractor’s organization.”¹⁶ What attributes, or skills, a job demands, however, is no less a judgment than the decision who, among a number of candidates, possesses them in greatest measure. Misevaluation of the requirements of a job and of the job-related characteristics of the persons considered both could be systematically biased against women or minority persons. Where this occurs, it will result in “adverse effect” — technically, “a differential rate of selection (for hire, promotion, etc.) which works to the disadvantage of a covered group.”¹⁷ Misdefinition of the job may lead to underutilization also, but avoid adverse effect in this narrow sense. This will happen if members of minority groups and women who do have “requisite skills” are discouraged from applying (or are not considered) because they possess less often than whites or men the superfluous attributes the contractor requires. The regulations take account of this possibility. Contractors are instructed that “special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination.”¹⁸ Further, “where requirements screen out a disproportionate number of minorities or women such requirements should be professionally validated to job performance.”¹⁹ How one determines that a screening effect is disproportionate in impact is left unsaid. However, “Testing and Selection Order Guidance Memorandum No. 7a,” recently issued by the Department of Labor, speaks to the general problem with unusual clarity:

12. Q. May a contractor utilize unvalidated selection requirements in deciding the availability of applicants with requisite skills when using Revised Order No. 4 criteria to establish goals?

A. No.²⁰

Thus, who is available and, hence, whether there is underutilization (including adverse effect), together with the extent of underutilization, at

¹⁵ 41 C.F.R. § 60-2.11(a) (1973).

¹⁶ *Id.* at §§ 60-2.11(a)(1)(iv), (v), (vi), 60-2.11(a)(2)(iii), (iv), (vi). See also 41 C.F.R. § 60-2.11(a)(2)(v): “The availability of women seeking employment in the labor or recruitment area of the contractor.”

¹⁷ U.S. LAB. DEPT. EMPLOYMENT STANDARDS ADMINISTRATION, OFCC, *Testing & Selection Order Guidance Memorandum No. 7a*, “Question & Answer 7” (1974).

¹⁸ 41 C.F.R. § 60-2.24(b) (1973).

¹⁹ *Ibid.*

²⁰ *Testing & Selection Order Guidance Memorandum No. 7a*, n. 17 *supra*, “Questions & Answers” 12.

least partly depends upon selection requirements. To insure detection of inaccurate measures of availability resulting from faculty selection requirements, those requirements must be validated. What is validation?

According to the Guidance Memorandum, "validation is the demonstration of the job relatedness of a selection procedure."²¹ Under the Testing and Selection Order, there are three methods of showing the necessary relation between a position and a procedure used to select for it: criterion-related validity, content validity and construct validity.^{21a} The regulations provide technical standards for establishing criterion validity and content validity (but not construct validity). Satisfaction of these standards would appear to depend upon the use of "tests," which are defined as follows:

For the purpose of this order, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. This order applies, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, training, or retention. This definition includes but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" also covers all other formal, scored, quantified or standardized techniques of assessing job suitability including, for example, personal history and background requirements which are specifically used as a basis for qualifying or disqualifying applicants or employees, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales and scored application forms. . . .²²

There may be selection techniques employed which are not "tests." The regulations deal with these in the following manner:

Selection techniques other than tests, as defined in § 60-3.2, may be improperly used so as to have the effect of discriminating against minority groups or women. Such techniques include, but are not restricted to, unscored or casual interviews, unscored application forms and unscored personal history and background requirements not used uniformly as a basis for qualifying or disqualifying applicants. Where there are data suggesting employment discrimination, the contractor may be called upon to present evidence concerning the validity of his unscored procedures regardless of whether tests are also used, the evidence of validity being of the same types referred to in §§ 60-3.4 and 60-3.5. Data suggesting the possibility of discrimination exists, for example, when there are higher rates of rejection of minority candidates than of nonminority candidates for the same job or group of jobs or when there is an under-

²¹ *Id.*, "Questions & Answers" 3.

^{21a} These types of validity are defined as follows:

Criterion-related validity — A statistical demonstration of a relationship between a selection device and the job performance of a sample of workers.

Content-validity — A demonstration that the content of a selection device replicates job duties disclosed in the job analysis, or measures job knowledge, or skills shown to be critical and essential for immediate performance on the job.

Construct-validity — A demonstration that (a) a selection device is a measure of the construct (*e.g.*, honesty) and (b) the construct is related to actual job performance.

Ibid.

²² 41 C.F.R. § 60-3.2 (1973).

utilization of minority group personnel among present employees in certain types of jobs. . . .²³

Since selection techniques can only be validated under the criteria given in the regulations for tests, which entail quantification, it is hard to see how any procedure other than a test can be validated. Rather, if validation is necessary, it would seem that a test must be substituted. Confirming this impression, the Guidance Memorandum says:

Although unscored interviews or applications are not specified in the definition of a test, these procedures also come under the requirements of the Testing and Selection Order if they have the effect of discriminating against minorities or women (sec. 60-3.3). In these cases the contractor must either eliminate the adverse effect or quantify the procedures (i.e., make them into "tests") so that they can be validated. Therefore, all selection procedures are covered by the Testing and Selection Order.²⁴

Of course, validation is demanded only when there exists "data suggesting employment discrimination." The Guidance Memorandum states, "If there is no finding of adverse effect, there is no validation requirement."²⁵ However, under the Testing and Selection Order, an implication of discrimination may be suggested not only by differential rejection rates according to race or sex (adverse effect) but also by the residual phenomenon of underutilization. Underutilization depends upon availability, and availability cannot be determined by unvalidated selection requirements.

How feasible is validation? At best, it seems, validation is difficult and expensive. The cost and difficulty is markedly increased by the requirement that "differential validity" be demonstrated — i.e., that a test be separately validated for groups in the relevant population separated by race and sex. The utility of establishing differential validity seems to be in controversy among psychologists.²⁶ Otherwise, the criteria of validity may well reflect something approaching a consensus of informed professional judgment on the conditions justifying high confidence in a test; they are taken over from a manual of the American Psychological Association. What is less clear is how widely those conditions may be feasibly achieved.²⁷ That they can be satisfied at all readily seems doubtful in the case of a great deal of professional employment.

For example, take the requirement of a Ph.D. as a condition of employment in academic positions. This might well be considered a "test." Is a university to hire one hundred persons with the degree and one hundred without and then compare the performance of the two groups? Presumably, the definitive comparison would take place after several

²³ *Id.* at § 60-3.13.

²⁴ *Testing & Selection Order Guidance Memorandum No. 7a*, n. 17 *supra*, "Questions & Answers" 1.

²⁵ *Id.* at 6.

²⁶ See Malbin, *Hiring Practices*, 5 NAT'L J. REPS. 1429, 1433 (1973).

²⁷ *Id.* at 1432.

years — something like the presently established period for tenure review. How would one eliminate the possibility of “supervisory bias” in evaluations? Is it possible the Ph. D. is job related for university positions in the physical sciences but not in foreign languages? In one subfield but not elsewhere in the discipline? If so, is there a sufficiently numerous population appropriately distributed to test the possibility? To demonstrate differential validity?

One must ask what are the elements of the performance under evaluation. At the University of California, for example, faculty members are to be judged on the dimensions of teaching, scholarship, university service and public service. It is probably accurate to say these are classically regarded as analytically separable but, in practice, aspects of a single role. Thus, teaching feeds scholarship and scholarship teaching, while the professor’s cultivation of his discipline equips him to contribute to the public interest at the intersections of scholarly inquiry and public debate or policy formation, and the need for reconciling the demands of professional autonomy with the imperatives of coordinating intricately overlapping and opposing activities and interests in a complex organization imposes a citizen’s obligation of participation in governance.

No doubt, “scholarship” ranks well ahead of the other components of the faculty member’s role. Even though scholarship is crucial to appointment and promotion, however, it receives different weight in relation to the remaining elements in different schools and departments and, additionally, falls subject to varying criteria in one unit as against another. It is not always clear in what exactly scholarly work consists, and the worth of most examples of this *genre* is proverbially vulnerable to challenge.

Why should not teaching rate higher in relation to scholarship? Many people believe it should. But, whatever its relative weight, how should it be judged? Teaching takes place in many settings and at a number of levels. These include lecture courses for large undergraduate classes, seminars for small groups of undergraduate or graduate students and supervision of a doctoral candidate’s research. What is the value of one form of teaching as against another? It is not obvious how to rate a faculty member’s performance in any of his teaching functions with sufficient precision to permit accurate and ready comparison with others. Nor is it always clear what point or points in time furnish appropriate moments for judgment.

University service and public service are rather cloudy notions. A conception of public service limited to something like that suggested above — intervention in some public forum on the basis of a scholar’s expertise in his academic field — would strike many persons as much too restrictive. Some disciplines may lend themselves to public service more readily than others. A law professor, for example, may have more op-

portunities to contribute to the public interest, in some conventional understanding of the term, than a professor of Sanskrit. Their actual contributions, however, may stand in inverse relation to their opportunities. What significance attaches to considerations of this kind?

Many faculty members perform little or no service to the public or to the university. Some part of a faculty is made up of poor teachers, another fraction (including, unfortunately, a number of the same individuals), of very indifferent scholars. Many professors emphasize different aspects of the professor's role at different stages of their careers. It is understood that the role of the professor is an abstraction which will not accurately or fully describe the behavior of many professors. What is important is that the resource the university possesses in its faculty collectively supply the university's demands.

Of course, the requirement of a Ph.D. degree, where it exists, makes up only a part of the over-all selection process. For certain institutions, possession of the degree is not, in itself, qualifying. Selection of junior faculty is time-consuming and expensive. Many persons who hold the degree will not be considered at all, for to consider everyone would entail unacceptably heavy commitments of time, effort and expense. Academic employers may rely on various clues to eliminate many potential candidates, reducing the number given serious consideration to manageable proportions. Prominent among these are the institution (and department) granting the degree and endorsements of teachers respected in the field. Theoretically at least, such criteria are not purely arbitrary rationing devices. On the contrary, they function partly to focus attention at the institutions which attract the most able students, identify their academic qualities most accurately and provide the best training. Naturally, statements of this kind imply a lengthy series of debatable assumptions. They easily qualify as "unvalidated selection requirements." Choice among the persons who do become serious competitors for a position involves institutional judgments which would seem clearly to be procedures "other than tests." The objective is to predict which person will perform the role of professor so as to contribute most to the discharge of the faculty's collective obligation in the foreseeably likely mix of people, resources and responsibilities. In one case, capacity for productive scholarship may almost eclipse performance as a teacher; in another instance, teaching ability may count far more heavily. At times, competence in particular subfields may be decisive. In every case, judgments will be intuitive, discretionary, quite possibly arbitrary; they also may be informed or expert. They can hardly be validated according to the regulations, but such judgments may be indispensable to the conduct of the enterprise.

The regulations do provide an alternative to validation. The Testing and Selection Order provides that, "if the contractor is unable or unwill-

ing to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.”²⁸ Examples of such conditions, it will be recalled, are “adverse effect” — *e.g.*, “a higher rate of rejection of minority candidates than of nonminority candidates for the same job or group of jobs” and “underutilization.” It would seem that aggressive recruiting among women and minority groups might generate adverse effects at the same time that it produced equal employment opportunity — enlarging the scale of the recruiting effort gives assurance that no qualified minority or woman candidate has been overlooked but may operate to bring forward many unqualified minority and women applicants. More significantly, to refer to “underutilization” is simply to reenter the same circle travelled above in which underutilization depends upon availability and availability determinations require validated selection devices. At this point, it seems the themes developed in the regulations have reached a moment of denouement at which they all stand frozen on the stage awaiting the descent of some *deus ex machina*, which, however, the management has unfortunately neglected to provide. No one can tell whether equal employment opportunity is present or absent without satisfactory standards of merit, but the criteria of merit are cast in such a way that no one can say what it is or show who has it and who does not. It is understandable that in this setting affirmative action programs would be more negotiated than designed against a set of intelligible criteria.

The regulations fail to address the characteristics of faculty employment. Rather, it is insisted that faculty personnel standards conform to the regulations. Carried to its logical conclusion, this would imply: substitution of objective standards of appointment and promotion to foreclose the possibility of biased judgments, subdivision of the professorial role to facilitate application of objective standards and enlarge the pool of eligible candidates, strengthening of centralized administration to enforce adherence to required procedures for selecting academic staff. These tendencies conflict with academic traditions of peer review, decentralized authority and diffused responsibility and integration of functions — notably, research and teaching. It is precisely these traditions which are widely regarded as central to the academic enterprise. It seems unlikely that such a metamorphosis of butterfly into caterpillar will be seriously attempted. What seems more likely is that administration of the contract compliance program, left to itself, will veer ineffectually between *de facto* quotas and incipient breakdown, caught between the need to produce results and the inherent defects of the program’s design.

²⁸ 41 C.F.R. § 60-3.13 (1973).