

Comments

Executive Orders, Title VII & LGBT Employees: Making The Case for Further Unilateral Action

By RYAN J. BLACKNEY*

EXECUTIVE ORDERS are a historically rich phenomenon and extend as far back as George Washington.¹ While executive orders are not expressly enumerated under the Constitution, the chief executive has traditionally relied on them for a variety of purposes.² Since 1789, American presidents have used executive orders in some form to implement foreign policy and to aid federal administrative agencies in discharging their inherent duties.³ Perhaps the most well known executive order was President Abraham Lincoln's Emancipation Proclamation, which effectively outlawed slavery on September 22, 1862.⁴

Over time, presidents have contributed to the transformative and flexible nature of executive orders. In the burgeoning years of the United States, executive orders were merely interpretive in purpose. However, such narrow use did not last for long. American Presidents from Abraham Lincoln to Franklin Roosevelt vastly transformed the nature of executive orders.⁵ Their presidencies were critically unique because they occurred during times of great social inequality. During these periods, executive orders began to take on many legislative characteristics because of the wider prevalence of social inequities.⁶ In

* Juris Doctor candidate, Class of 2017, University of San Francisco, School of Law; B.A., 2009, University of Michigan - Ann Arbor. Special thanks to Professor Maria L. Ontiveros for her invaluable guidance in developing this piece. Also, many thanks to Crystal M. Pizano and the University of San Francisco Law Review for their assistance.

1. John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 338 (2011).

2. *Id.* at 334–36.

3. *Id.* at 338.

4. *Id.* at 340.

5. *Id.* at 339–40.

6. *Id.*

fact, in the nation's most challenging times, executive orders have been an indispensable tool to effectuate social change during times of economic and racial strife.⁷ For example, President Franklin Roosevelt guided our country through the Great Depression and World War II. During his presidency he issued an astonishing 3,723 executive orders.⁸ Moreover, some of President Franklin's executive orders even created critically important governmental agencies such as the National Labor Board and War Powers Board.⁹ In the first half of the Twentieth Century, presidents started to view executive orders as potential change agents to bring about sweeping social reforms.¹⁰

Indeed, the political mechanism known as the "executive order" has been used throughout American history to implement policy changes and clarify law in many contexts. Executive actions have historically been used in the context of civil rights and, specifically, in the area of employment rights. In carrying on this tradition, in July 2014, President Barack Obama extended public sector employment protections to prohibit discrimination based on sexual orientation and gender identity.¹¹ However, while advocacy groups perceived this executive action as a victory for LGBT employees,¹² President Obama's Executive Order 13672 merely maintains discrimination against LGBT employees in much of the private sector and thereby allows much of the LGBT-based employment discrimination to continue unabated. In any event, a historical and constitutional analysis suggests that political leadership and executive enforcement powers can lawfully converge, in order to use the president's inherent unilateral powers to issue an executive order that extends Title VII liability to include sexual orientation and gender identity protections in the private sector. Such an order would serve Title VII's larger goals of smoking out employment discrimination and ensuring equal employment opportunities regardless of an employee's immutable characteristics.

In offering a protective and effective solution for all LGBT employees, this Comment proceeds in four parts. Part I will provide a comprehensive introduction to the reasons why the LGBT community

7. *Id.* at 344.

8. *Id.* at 339–40.

9. *Id.*

10. *Id.* at 343.

11. *With Executive Order, Obama Takes His Place in History*, HUMAN RIGHTS CAMPAIGN (July 21, 2014), <http://www.hrc.org/blog/with-executive-order-obama-takes-his-place-in-history> [<https://perma.cc/8W6V-AZPX>].

12. *Id.*

continues to suffer private sector employment discrimination. Part II of this essay will provide a detailed constitutional background to executive orders. As such, Part II will explore what an executive order is, how the president derives such unilateral power to exercise this executive authority, and how executive orders have shaped civil rights in the employment context starting in the 1940s. Part III proposes a commonsense solution for the president to use an executive order to provide equal employment protections to LGBT employees in the private sector. This Comment will conclude in Part IV by highlighting the reasons why an executive order is the best way to solve the inequity problem and why this common sense solution is the most effective, rational, and quickest way to render Title VII equality to all LGBT employees.

I. The Problem

To understand the critical importance of extending LGBT-based protections to all employees under Title VII, one must first understand the three approaches that have failed to provide these protections and how together these failures have created employment discrimination problems for LGBT employees in the private sector. Specifically, these three distinctly identifiable causes operate at the federal level and have undoubtedly contributed to the problem in their own unique fashion. These three causes need to be unpacked and examined in order to illustrate the legal and political underpinnings of the problem.¹³

13. Additionally, the current patchwork of state non-discrimination laws undoubtedly exacerbates the problem discussed in Part I. However, Part I of this essay focuses solely on the federal causes that created the current levels of LGBT-based discrimination in the private sector. There should also be awareness that the political and legal ambivalence towards LGBT-based employment protections has emboldened conservative states to pass anti-gay legislative measures. *Compare Non-Discrimination Laws: State-by-State Information—Map*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/non-discrimination-laws-state-state-information-map> (last visited Feb., 2017) [<https://perma.cc/LJZ9-KGFX>], *with Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Feb., 2017) [<https://perma.cc/2B3N-U3W7>], and Jeff Guo, *That anti-gay bill in Arkansas actually became law today. Why couldn't activists stop it?*, WASH. POST (Feb. 23, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/02/23/that-anti-gay-bill-in-arkansas-actually-became-law-today-why-couldnt-activists-stop-it/> (illustrating Arkansas anti-gay law passed in February 2015) [<https://perma.cc/C8JD-8PKQ>].

A. Title VII Fails to Expressly Provide LGBT Protections

The first cause that can be attributed to the absence of full employment discrimination protections for the LGBT community is evidenced by the fact that federal courts have been reluctant to extend full protection to suits involving claims of sexual orientation or gender identity discrimination. This judicial phenomenon can be directly traced to the plain language of Title VII.¹⁴ The statute expressly provides that any discrimination “because of such individual’s race, color, religion, sex, or national origin” is prohibited.¹⁵ Thus, because the statute does not explicitly provide for sexual orientation or gender identity protections on its face, judges are hesitant to find broader interpretations. Because the plain language of Title VII merely bars “sex discrimination,” a majority of courts hold that it does not prohibit employment discrimination on account of sexual orientation or gender identity. As such, this phenomenon is the main reason why most federal courts are reluctant to engage in progressive statute reading to assist LGBT plaintiffs.

While Title VII’s prohibitions do not explicitly encompass gender identity or sexual orientation, the Supreme Court disregarded that notion in its landmark decision in *Price Waterhouse v. Hopkins*.¹⁶ In *Price Waterhouse*, the respondent Ann Hopkins was a senior manager at the petitioner’s accounting firm.¹⁷ In 1982 she was proposed for partner.¹⁸ Initially, while Hopkins was not denied nor granted partner, her partnership decision was put on hold for reconsideration the following year. Ultimately, the firm denied her the position.¹⁹ Hopkins brought suit under Title VII alleging sex discrimination because during her tenure she was subject to numerous forms of gender stereotyping.²⁰ She also alleged that comments made on account of her gender motivated the firm’s decision to deny her partnership promotion.²¹

In affirming the lower courts’ findings in favor of Ann Hopkins, the plurality held that “for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with

14. See The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2015).

15. *Id.*

16. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989).

17. *Id.* at 231.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 235.

their group.”²² Whether one considers Ann Hopkins’s sex as the “but-for” cause of her denial is irrelevant. The Court held that whenever employers consider sex as a factor in employment decisions, those decisions violate the plain language of Title VII.²³ Reasonable logic would conclude that gender stereotyping is just another way to describe discrimination based on someone’s sexual orientation, gender identity, or maybe both.

Furthermore, lower court readings of Title VII post-*Price Waterhouse* suggest hesitancy and confusion in application of the proper legal standard involving claims of gender stereotypes. To be clear, federal courts post-*Price Waterhouse* still rely on very narrow statutory interpretations to act as the gatekeeper to exclude the majority of LGBT-type claims.²⁴ Professor Brian Soucek has written extensively on this LGBT-based phenomenon under Title VII.²⁵ Soucek notes that, “[o]n the one hand, beliefs about sexuality often, if not always, involve gender stereotypes regarding who men and women should be attracted to.”²⁶ Yet, federal courts are often wary of being regarded as judicial legislators and therefore discharge their duties quite cautiously. For those claims that lie outside traditional notions of sex stereotyping, federal courts usually deny Title VII protections to litigants seeking to prevail on claims of sexual orientation or gender discrimination.²⁷

Many cases illustrate the hesitancy and tension on the part of federal courts to apply broader interpretations of Title VII’s “sex” prong. One case that illustrates such judicial refusal is *Dawson v. Bumble & Bumble*.²⁸ In *Dawson*, the plaintiff tried to adhere to a theory of Title VII protection due to her failure to “comply with socially accepted gender roles” and as such she argued that she was a member of a protected class under the statutory scheme.²⁹ The Second Circuit expressly rejected such a broad reading of *Price Waterhouse*³⁰ and held

22. *Id.* at 251.

23. *Id.* at 240.

24. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough For Title VII*, 63 AM. U. L. REV. 715, 717 (2014).

25. *Id.*

26. *Id.* at 731.

27. *Id.*

28. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005).

29. *Id.*

30. *See generally id.* (reinforcing the notion of the unwillingness of courts to extend Title VII past its statutory text); *but see, e.g., Price Waterhouse*, 490 U.S. at 251 (Justice Brennan writing for the Court noted that “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”).

that homosexual plaintiffs cannot “bootstrap” coverage for sexual orientation into Title VII.³¹ Thus, such narrow readings of Title VII often leave LGBT-based employment discrimination claims without legal redress.

Nonetheless, a few brave federal judges have been courageous enough to extend full Title VII protections to the LGBT community. In a case where the EEOC brought a Title VII action on behalf of a gay ironworker, the traditionally conservative Fifth Circuit expressly followed the Supreme Court’s precedent in *Price Waterhouse*.³² In *EEOC v. Boh Bros. Construction Co.*, the employer hired the plaintiff Woods to work on bridge reconstruction after Hurricane Katrina in late 2005.³³ The EEOC decided to bring a hostile workplace claim on behalf of Woods. The Commission alleged that the plaintiff was subjected to severe and pejorative treatment at the hands of fellow construction workers that included vulgar language and same-sex harassment.³⁴ Co-workers mocked Woods for his alleged use of WetOnes instead of toilet paper, perceiving this behavior as undeniably feminine.³⁵ One of his harassers even approached the plaintiff from behind and simulated intercourse with him.³⁶

Affirming the district court’s findings in favor of Woods, the Fifth Circuit held that “a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping.”³⁷ Thus, the Fifth Circuit held that the EEOC may rely on evidence that Woods’ supervisor viewed him “as insufficiently masculine to prove its Title VII claim.”³⁸ However, the outcome reached in *Boh Bros.* is unfortunately an outlier and uncommon in Title VII jurisprudence. As previously noted, most federal courts adhere to a rather restrictive and straightforward interpretation of Title VII. However, society’s current perceptions of homosexuals and workplace discrimination tend to suggest that the application of Title VII in *Boh Bros.* was the correct outcome.

In determining the legal underpinnings for broader social justice, it is imperative that the federal trial courts and appellate courts take doctrinal hints from the Supreme Court. Yet, that philosophy has not been legally or politically prescient. Even the liberal Ninth Circuit

31. *Id.*

32. *EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 456 (5th Cir. 2013).

33. *Id.* at 449.

34. *Id.*

35. *Id.* at 450.

36. *Id.* at 449.

37. *Id.* at 456.

38. *Id.*

has refused such broad readings of Title VII. In *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, three gay men filed a suit alleging workplace discrimination based on their homosexuality; the court applied a narrow reading of Title VII and held that “Congress had only the traditional notions of ‘sex’ in mind” when it codified the law.³⁹ Therefore, because gay and lesbian plaintiffs suffering anti-gay discrimination in the workplace based on their effeminacy, homosexuality, or trans-sexuality do not comport with traditional notions of sex stereotyping, their claims do not “fall within the purview of Title VII.”⁴⁰

Thus, many deserving LGBT plaintiffs who are victims of sex discrimination are barred from Title VII protections in federal court. This narrow judicial approach is inherently unfair because courts that deny such coverage refuse to step outside the box and consider alternative theories to ensure equal Title VII protections for both genders regardless of sexual orientation. In essence, such a narrow reading of Title VII by federal courts does nothing more than indirectly promote deeply entrenched homophobia and bare animus against members of the LGBT community in private workplaces.

B. Congressional Inaction With Their Failure to Pass Comprehensive Non-Discrimination Legislation

The second contributing factor to unequal LGBT-based employment protections is Congress’ failure to progressively amend Title VII. By 2007, Congress considered two versions of the Employment Non-Discrimination Act (“ENDA”).⁴¹ The original ENDA bill would have prohibited employment discrimination based on sexual orientation and gender identity under Title VII.⁴² After House leaders felt that there would not be enough bipartisan support to pass the original version that covered transgender persons, a second version of ENDA was introduced that extended coverage to sexual orientation.⁴³ Since 2007, several variations of ENDA managed to pass only through one house of Congress. In November 2013, the Senate passed a version of ENDA (S. 815) but the House failed to pass the measure.⁴⁴ The federal legislature, which is often idealized throughout primary school

39. *DeSantis v. Pacific Telephone & Telegraph Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979).

40. *Id.* at 332.

41. Stephanie Rotondo, *Employment Discrimination Against LGBT Persons*, 16 *Geo. J. Gender & L.* 103, 137 (2015).

42. *Id.*

43. *Id.*

44. *Id.* at 138.

curricula as voices for the people, continuously fails to heed the voices of their constituents that ask for equal LGBT-based employment protections on the federal level.

Various advocacy groups continue to call for strategic bipartisan legislation to afford equal employment protections for all LGBT employees under federal law.⁴⁵ However, the current state of congressional ambivalence surrounding LGBT rights highlights the struggle and tension the LGBT community must face until an effective solution is reached. It is imperative during this time of congressional uncertainty that the Executive Branch exercise its inherent leadership powers in order to focus the national conversation on the plight of LGBT employees in America's workspaces.

C. President Obama's Executive Order Excludes Most LGBT Employees From Discrimination Protections

A third cause of insufficient LGBT employee protections is Executive Order 13672. On July 21, 2014, President Obama issued this order, which extended public sector and government contract employment discrimination protections to include both sexual orientation and gender identity.⁴⁶ Although this order was perceived as a victory for the LGBT community, it provides private sector LGBT protections insofar as LGBT employees may become subject to federal government contracts. Thus, even though Executive Order 13672 helped to shed light on the need for employment discrimination protections across the board under Title VII, many members of the LGBT community continue to face discrimination in private sector workplaces.⁴⁷

This shortcoming certainly leaves much to be desired, especially considering that almost five percent of the national workforce consists of people who identify as gay, lesbian, transgender, or bisexual.⁴⁸ Because it only narrowly amended Executive Order 11246 as to federal

45. *Id.*

46. Exec. Order No. 13672, 79 Fed.Reg. 141, 42971 (July 23, 2014).

47. Ian Johnson, *America's 10 Worst LGBT Work Insults*, HUFFINGTONPOST.COM (Oct. 28, 2014), http://www.huffingtonpost.com/ianjohnson/americas-ten-worst-lgbt-w_b_6054808.html [<https://perma.cc/CL6X-77DG>].

48. Christy Mallory & Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Kansas*, UCLA WILLIAMS INSTITUTE (Sept. 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Kansas-ND-September-2015.pdf> [<https://perma.cc/PJH6-LPQ5>].

contractors,⁴⁹ Executive Order 13672 is another critical reason why the LGBT community continues to suffer from widespread employment discrimination in the private sector. Such limited executive orders also tend to complicate matters for lawmakers because they fail to send the right political signals to precipitate further legislative protections, and they further entrench political divisiveness.⁵⁰

II. Background to Executive Orders: Historical, Constitutional, & Case Law Perspectives

To understand the ability of the President to issue executive orders that ensure equal LGBT employment protections under existing statutory framework, one must first examine the constitutional underpinnings that allow the President to issue such executive orders. Many scholars disagree as to the precise constitutional provision that provides the executive with the express authority to announce policy changes that wield the full force and effect of legislative actions. Executive orders are quasi-legislative in nature and cover a vast array of topics such as public lands, mineral reserves, civil rights, emergency economic situations, and removal of federal employees.⁵¹ Presidents and litigators often look to the Constitution to locate the exact provision that provides the power for executive orders.⁵²

A. What Is An Executive Order and Where Does This Power Come From?

The president in part derives the power to issue executive orders from several places in the Constitution.⁵³ Because many executive orders deal with military matters, scholars also look to the constitutional power assigned to the president as Commander-in-Chief as the authority for executive orders issued during war.⁵⁴ Other clauses in the Constitution that arguably support “executive legislation” during

49. David Hudson, *President Obama Signs a New Executive Order to Protect LGBT Workers*, WHITEHOUSE.GOV (July 21, 2014), <https://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers> [https://perma.cc/7W8Y-5KX8].

50. Chris Johnson, *Rubio pledges to reverse Obama's LGBT executive order*, WASHINGTON-BLADE, (Dec. 6, 2015), <http://www.washingtonblade.com/2015/12/06/rubio-pledges-to-reverse-obamas-lgbt-executive-order/> [https://perma.cc/WS3T-9T7D].

51. Duncan, *supra* note 1, at 343, 345–49.

52. *Id.* at 366–67.

53. John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 841 (1981).

54. *Id.* at 839–40.

peacetime are quite vague in regard to providing the president with explicit unilateral legislative power. This ambiguity results in disputes about the permissible scope and nature of unilateral executive actions.⁵⁵

Generally speaking, Article II of the Constitution sets forth the contours and fundamental responsibilities of the president within the Executive Branch.⁵⁶ A logical starting point in understanding the constitutional source for executive orders begins with Article II, section three of the Constitution.⁵⁷ Here, the Constitution expressly provides that the executive “shall take Care that the Laws be faithfully executed.”⁵⁸ While the Constitution delegates to Congress the inherent responsibility to make laws, the separation of powers doctrine assures laws are properly interpreted by the Judiciary and enforced by the Executive Branch.⁵⁹ Within this framework, the president acting as the chief administrator is charged by the Constitution to effectuate equal governance and execution of the laws passed by Congress.⁶⁰ Another key inquiry surrounding executive orders is the Supreme Court’s interpretation of the executive’s inherent constitutional and statutory powers to make unilateral policy decisions. The Supreme Court’s answer to the aforementioned query has produced two co-existent rules that are used to interpret the legality of executive orders.

B. Supreme Court Precedent Defines Constitutionality of Executive Orders

To help interpret the constitutional boundaries of executive orders, the Supreme Court articulated two guideposts — the doctrine of congressional acquiescence and the theory of statutory outer limits — that help define the scope and limitations on unilateral presidential actions. As the use of executive orders expanded over time, it was inevitable that the Supreme Court needed to interpret the constitutional limits of the Executive Branch.

55. *See id.*; *see also* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 2 (2002) (arguing that the increased use of executive orders and other presidential directives is a fundamental problem in modern-day America).

56. Noyes, *supra* note 53, at 842.

57. *Id.*

58. U.S. CONST. art. II, § 3.

59. Noyes, *supra* note 53, at 841–46.

60. *Id.* at 841–42.

1. The Doctrine of Congressional Acquiescence

Over many decades the doctrine of congressional acquiescence has become an important foundational pillar for executive authority.⁶¹ In *United States v. Midwest Oil Co.*, the Supreme Court expressly found in favor of the government under the congressional acquiescence doctrine.⁶² In *Midwest Oil Co.*, the challenged provision was an executive order that reserved oil-rich lands for public use and preservation, which previously were set aside for private purchase by an act of Congress.⁶³ These lands were highly attractive for private exploitation because they contained oil and other precious minerals.⁶⁴ Before the challenged executive order was issued, congressionally earmarked lands were purchased and exploited so quickly in locations such as California that the Director of the Geological Survey informed the Secretary of the Interior that the public would soon cease to own any petroleum-laden lands.⁶⁵ Upon recommendation from the Secretary of the Interior, President Taft issued an “executive proclamation.”⁶⁶ On September 27, 1909 President Taft issued an order that aimed to prevent further private exploitation of public lands.⁶⁷ President Taft’s proclamation was entitled “Temporary Petroleum Withdrawal No. 5,” and it expressly directed a list of publicly owned lands to be withdrawn from the 1897 legislation.⁶⁸

Six months after the proclamation, the predecessors in interest to the respondents moved onto public land in Wyoming with the purpose of oil exploration.⁶⁹ In response to the land grab, the United States Attorney in Wyoming filed a complaint in district court that asked for the return of the land deed to the United States and requested damages worth 50,000 barrels of oil that were unlawfully exploited after President Taft’s order.⁷⁰ The district court granted the oil company’s motion to dismiss and the Government appealed the

61. Duncan, *supra* note 1, at 374.

62. *United States v. Midwest Oil Co.*, 236 U.S. 459, 465 (1915).

63. *Id.*

64. *Id.* at 467.

65. Here, this executive order is referred to as a “proclamation” because it predates the point at which the government numbered and published executive orders in the Federal Register.

66. *Midwest Oil*, 236 U.S. at 468.

67. *Id.*

68. *Id.*

69. *Id.* at 467.

70. *Id.* at 467–68.

case to the Eighth Circuit, which certified the questions to the Supreme Court.⁷¹

The oil company challenged the validity of President Taft's withdrawal order before the Supreme Court.⁷² The Government argued that the President was well within his constitutional power to "withdraw, in the public interest, any public land from entry or location by private parties."⁷³ In opposition, the oil company argued that "there is no dispensing power in the Executive, and that he could not suspend a statute or withdraw from entry or location any land which Congress had affirmatively declared should be free and open to acquisition by citizens of the United States."⁷⁴

The Supreme Court did not make a legal determination as to whether "the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase" but only felt compelled to consider the legal consequences that flowed "from a long-continued practice to make orders like the one here involved."⁷⁵ The Court focused on the fact that before 1910 there were over 200 executive orders issued by American presidents that reserved government owned lands for public use.⁷⁶ The Court also focused on the fact that these orders were issued without any express or implied approval by Congress.⁷⁷

Most importantly, the Court acknowledged that Congress had quietly "acquiesced" to 252 executive orders regarding land use prior to 1910.⁷⁸ The most salient portion of the Court's opinion stipulated that "[b]oth officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice."⁷⁹ The Court recognized that because the oft-repeated use of executive orders to effectuate change that touched third parties was persistent for so long, these executive orders were to be treated as *de facto* legislation able to withstand legal challenges at the highest level.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 469.

76. *Id.*

77. *Id.* at 470-71.

78. *Id.* at 471.

79. *Id.* at 472-73.

While the Ninth Circuit questioned the central holding of *Midwest Oil Co.*,⁸⁰ no federal court decision has overturned the notion that unchecked executive orders are presumed to have the full force and effect of the law absent a determination to the contrary. The decision in *Midwest Oil Co.* indicates that executive orders are to be presumed lawful, even though such power may be subject to investigation.⁸¹ Executive orders supported by statute or the Constitution that are unscathed by the legislature and the courts should be treated as law.⁸² Therefore, by executive order, the President has inherent unilateral power to use the executive's role to set national policies as long as these policies adhere to the separation of powers doctrine.

2. Statutory Limits On Executive Power

Although the Constitution affords the President and the Executive Branch tremendous latitude in the enforcement decisions of legislative actions, the Supreme Court has overturned executive orders that run afoul of established statutory parameters.⁸³ In fact, the Supreme Court has overturned executive orders only twice.⁸⁴ In *Youngstown Sheet & Tube Co. v. Sawyer*,⁸⁵ the Supreme Court considered the constitutionality of Executive Order No. 10340 which directed the Secretary of Commerce to seize the nation's steel mills in order to ensure that a national labor strike would not impede the flow of armaments for the Korean War effort.⁸⁶ The government argued that President Truman used his combined constitutional powers as Chief Executive and Commander-in-Chief to avoid a national disaster due to an inevitable stop in steel production.⁸⁷ In opposition, the steel mills argued that President Truman's directive was actually executive law-making, and this type of conduct undoubtedly exceeded his constitutional bounds.⁸⁸

In *Youngstown*, the Court acknowledged that President's Truman's power to issue such a sweeping directive must "stem either from

80. *United States v. Woodley*, 726 F.2d 1328, 1338 (9th Cir. 1983) (calling into question the central holding of *Midwest Oil*, that historical acceptance and governmental efficiency will not save a practice if it is contrary to the Constitution).

81. *Midwest Oil*, 236 U.S. at 473 (if the Constitution leaves a question of power in doubt, "contemporaneous and continuous subsequent practical construction" is decisive).

82. Noyes, *supra* note 53, at 841-42.

83. Duncan, *supra* note 1, at 337.

84. *Id.*

85. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

86. *Id.* at 582-84.

87. *Id.* at 582.

88. *Id.*

an act of Congress or from the Constitution itself.”⁸⁹ President Truman had two statutory provisions to order government takings under certain conditions, but the government conceded that these conditions were not satisfied before President Truman directed the seizures.⁹⁰ Furthermore, with the passage of the Taft-Hartley Act⁹¹ (Labor-Management Relations Act) in 1947, Congress explicitly preempted governmental seizures as a lawful method to resolve labor-based disputes.⁹² Thus, President Truman not only lacked explicit authorization from Congress to direct seizure of the nation’s steel mills, but his decision undoubtedly acted in direct contradiction to federal labor law.⁹³

Because President Truman’s action was constitutionally and statutorily perverse, the Supreme Court had no other choice but to strike down the order. The steel mills clearly had the superior arguments and the superior position in the litigation surrounding President Truman’s executive order. Not only did his decision run afoul of laws enacted by Congress, his decision also directly undermined his inherent duty expressly charged by the Constitution to ensure that the laws be “faithfully executed.”⁹⁴ Thus, any executive order that attempts to usurp the executive’s power to overstep the traditional statutory boundaries established by Congress is unconstitutional.⁹⁵ The *Youngstown* decision certainly helped to define the executive’s role within the separation of powers framework and signaled that zealously issued presidential directives that exceed established statutory and constitutionally assigned duties may be ripe for *vacatur* when challenged.⁹⁶

The second case in Supreme Court jurisprudence to overturn an executive order involved a dispute between employer associations and the government in regard to a replacement worker and strike provision contained within the National Labor Relations Act (“NLRA”).⁹⁷ In *Chamber of Commerce v. Reich*, several employer associations challenged President Clinton’s Executive Order No. 12954, which precluded the government from contracting with third-parties who hired

89. *Id.* at 585.

90. *Id.* at 585–86.

91. *See generally*, 29 U.S.C. § 141 (2015).

92. *Youngstown*, 343 U.S. at 586.

93. *Id.* at 585–86.

94. U.S. CONST. art. II, § 3.

95. *See Duncan*, *supra* note 1, at 376.

96. *Youngstown*, 343 U.S. at 586–89.

97. *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) [hereinafter “Reich”].

full-time replacement workers during lawful labor strikes.⁹⁸ The associations argued that President Clinton's executive order not only exceeded his constitutional powers, but it also expressly contradicted provisions of the NLRA.⁹⁹ The government argued that despite the strong NLRA arguments on the merits, federal courts did not have jurisdiction to review President Clinton's executive order.¹⁰⁰

In reaching its decision, the Supreme Court focused on the undeniable tension between the President's executive order and the NLRA.¹⁰¹ The Court expressly held that the President may make broad policy determinations that fall within his inherent powers under the Procurement Act¹⁰² that "deal with government contractors' employment practices—policy views that are directed beyond the immediate quality and price of goods and services purchased."¹⁰³ Yet, the Court held that the President does not have authority to issue executive orders that are expressly pre-empted by the NLRA and would effectively supplant Congress' express power to legislate laws that impact organized labor and related employment considerations.¹⁰⁴

The *Youngstown* and *Reich* cases were exceptional decisions because federal courts traditionally interpret executive orders under a strong presumption of validity.¹⁰⁵ Federal courts, including the Supreme Court, have traditionally given deference to a president's authority to issue executive orders.¹⁰⁶ As such, the Supreme Court has only been willing to overturn remarkably few executive orders that run contrary to legislative schemes or that upset traditional limits on executive's power as outlined in the Constitution.¹⁰⁷ Thus, federal courts operate under a separation of powers assumption that the president's actions are inherently aligned with congressional intent unless contradicted by express statutory language brought under a legal challenge.¹⁰⁸

When combined with the doctrinal rules from the above-discussed cases, the separation of powers rubric held by the Supreme Court suggests that the president wields a maximum amount of execu-

98. *Id.* at 1324.

99. *Id.* at 1325; *see also* 29 U.S.C. § 151 et seq. (2015).

100. *Id.* at 1325–26.

101. *Id.* at 1333.

102. *See* 40 U.S.C. § 486(a) (2015).

103. *Reich*, 74 F.3d at 1337.

104. *Id.* at 1337–39.

105. *See* *Duncan*, *supra* note 1, at 365.

106. *Id.* at 376.

107. *Id.* at 337.

108. *Id.* at 364–65, 376.

tive order authority when Congress delegates the Executive Branch a quasi-explicit framework within which to issue “presidential legislation.” The Supreme Court affords the broadest deference to executive orders that complement existing legislative provisions.¹⁰⁹ At other times, the President’s executive order power is most restricted when it only stands on constitutional authority without statutory support or congressionally delegated approval.¹¹⁰ In any event, the President’s political leadership and executive enforcement powers may lawfully converge in order to use the executive’s inherent unilateral powers to issue executive orders that clarify legal protections and announce enforcement decisions that fall within the “zone of interests” of already existent federal statutory schemes.¹¹¹ As the relevant case law suggests, as long as the questioned executive order does not run afoul of established statutory provisions, Congress always has an opportunity to rebut the presumption of legality by legislative action.¹¹² Otherwise, congressional acquiescence suggests that the executive’s decision is implicitly ratified through temporal legislative inaction.¹¹³

Challenges to presidential orders may only be upheld if it is unreasonable and illogical to construct a reasonable interpretation of the relevant statute that complements the executive order in question.¹¹⁴ The notion of reasonableness often aggregates with the doctrine of non-justiciability¹¹⁵ to guide judicial interpretations of executive orders. Such deferential interpretive practices by federal courts produce a distinct legal phenomenon, which may be correctly characterized as a judicial “hands-off” approach towards executive order scrutiny.¹¹⁶ Additionally, congressional acquiescence further affords broad deference to questionable executive orders.¹¹⁷ In contrast to the executive orders challenged in *Youngstown* and *Reich*, executive orders that seemingly contradict legislative decisions have been upheld under the doctrine of congressional acquiescence.¹¹⁸ Similar to

109. See generally *id.* at 348.

110. *Id.* at 348–49, 363.

111. *Id.* at 334.

112. *Id.* at 369.

113. *Id.* at 367, 375.

114. *Id.* at 376.

115. Simply, a doctrine of judicial restraint that the limited jurisdictional powers of federal courts should not be wasted on adjudicating “political” questions that should be left to the political branches of government to decide.

116. See Duncan, *supra* note 1, at 376; *cf.* Justice Frankfurter’s concurrence in *Youngstown*, 343 U.S. at 589.

117. See Duncan, *supra* note 1, at 363.

118. *Id.* at 374.

the affirmative defense of laches,¹¹⁹ congressional acquiescence acts as a type of tacit approval that gives legal effect to executive orders that otherwise may be challenged in a court of law. In the employment context, a long history of executive orders that extended equal employment rights to private employees harkens back to President Franklin Roosevelt.¹²⁰

C. Executive Orders Covering Civil Rights in “Employment” & Notable Legal Challenges

In the 1930s and 1940s, a socio-political and activist leadership coalition headed by President Roosevelt put in place an effective prototype to Title VII.¹²¹ During this time, African-American groups protested the segregated defense industries.¹²² In response to these demonstrations, federal personnel agencies sent letters to defense contractors that asked them to eliminate discriminatory employment practices.¹²³ Additionally, civil rights activists planned a march on Washington, D.C., to bring public attention to the employment plight of African-Americans involved in the war effort.¹²⁴ President Roosevelt gave in to their demands and issued Executive Order 8802.¹²⁵ Supporters remarked that it was the most significant document since the Emancipation Proclamation.¹²⁶ Executive Order 8802 created the Fair Employment Practices Committee (“FEPC”).¹²⁷

As a civil rights effort initiated by President Roosevelt and Executive Order 8802, the FEPC attempted to smoke out employment discrimination in the private sector by holding hearings on the status of discrimination in each major geographical region throughout the nation.¹²⁸ However, the FEPC came under political opposition, lacked financial resources, and suffered numerous key leadership resigna-

119. Deirdre R. Wheatley-Liss, *Doctrine of Laches means you are “Out of Time”*, LEXISNEXIS, (Jan. 26, 2012), <http://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/archive/2012/01/26/doctrine-of-laches-means-you-are-quot-out-of-time-quot.aspx> [<https://perma.cc/CK8E-WNKA>].

120. Maria L. Ontiveros, *The Fundamental Nature of Title VII*, 75 OHIO ST. L.J. 1165, 1178 (2014).

121. *Id.*

122. *Id.*

123. *Id.* at 1178–79.

124. *Id.* at 1179.

125. *Id.*

126. *Id.*

127. *Id.* at 1179; *see also* Exec. Order No. 8802, 6 Fed. Reg. 3109 (2015).

128. Ontiveros, *supra* note 120, at 1180.

tions.¹²⁹ Fearing that the FEPC was ineffective due to the political climate, President Roosevelt issued Executive Order No. 9346 that reinvigorated the FEPC by reestablishing it as an independent agency that reported directly to him.¹³⁰

The reinvigorated FEPC performed exceedingly well in the mid-1940s by protecting African-American employees from the harms of employment discrimination in the Alabama shipyards.¹³¹ Although less than ideal for the progressives of the time, the FEPC directly conferred employment benefits in private employment by ordering the promotion of African-Americans into welder positions.¹³² The FEPC also effectively provided equal opportunities to African-American employees who were eligible for promotions and subsequently integrated them into their respective trades after decades of discriminatory treatment.¹³³

1. James v. Marinship Corporation

Prominent NAACP lawyer Charles Houston litigated civil rights-based employment discrimination cases before the FEPC and federal courts.¹³⁴ Despite the successes of the FEPC in the south, employers and labor unions such as the American Federation of Labor (“AFL”)¹³⁵ openly chose to ignore its orders.¹³⁶ Labor unions and employers openly resisted the consequences that flowed directly from the decisions of the FEPC.¹³⁷ There are two cases of critical importance in regard to legal challenges to executive orders that conferred civil rights in the employment context.

First, the Supreme Court of California recognized the legal authority of President Roosevelt’s Order 9346 in *James v. Marinship Corporation*.¹³⁸ In *Marinship*, plaintiff James and other similarly situated African-American workers brought an action to enjoin the defendants from discharging them because they were not members of a labor union that had a closed shop agreement.¹³⁹ The defendants appealed

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1180–81.

134. *Id.* at 1181.

135. American Federation of Labor, now part of the labor organization known as the AFL-CIO.

136. Ontiveros, *supra* note 20, at 1182.

137. *Id.* at 1181–82.

138. *See generally* James v. Marinship Corp., 25 Cal.2d 721 (Cal. 1944).

139. *Id.* at 724.

the trial court order awarding the employees a preliminary injunction.¹⁴⁰ The shipyards were owned by the United States and operated by the defendant shipbuilder under a contract that prohibited employment discrimination on account of race, color, creed, or national origin.¹⁴¹ The unions at issue had closed shop agreements with the shipbuilder to exclusively fill its labor needs.¹⁴² Moreover, these unions did not allow African-Americans to become fully carded members but required them to join other local auxiliary unions to become eligible for employment with the shipbuilder.¹⁴³ The plaintiffs refused to join these other unions for work clearances and the unions threatened them with termination for failure to comply with their demands.¹⁴⁴

The workers argued that the unions' demands would result in a breach of the shipbuilder's non-discrimination contract with the Maritime Commission.¹⁴⁵ They further argued that it would be contrary to law and public policy for the court to condone such prejudicial treatment.¹⁴⁶ The defendants contended that a union may arbitrarily close its membership to otherwise qualified persons and at the same time may, by enforcing a closed shop contract, demand union membership as a condition of employment.¹⁴⁷ The defendants also argued that the plaintiffs were not subject to the non-discrimination clause in the contract because they were not members of the union that had the closed shop agreement with the shipbuilder.¹⁴⁸ The court found in favor of plaintiffs by looking to the Railway Labor Act, the National Labor Relations Act, and the implications that flowed from such statutes.¹⁴⁹ Specifically, the court held that each labor union that is selected to bargain on behalf of its employees has a duty to exercise fairly, impartially, and without discrimination because of race.¹⁵⁰ Further, in addition to running afoul of state and federal labor provisions, the court tried to square such discriminatory practices with President Roosevelt's Executive Order 9346 and its implications for the full par-

140. *Id.*

141. *Id.* at 725.

142. *Id.*

143. *Id.*

144. *Id.* at 726.

145. *Id.*

146. *Id.*

147. *Id.* at 730.

148. *Id.*

149. *Id.* at 735, 739.

150. *Id.* at 736.

ticipation of all persons in the war effort, regardless of race, color, creed, or national origin.¹⁵¹

In sum, the court held that the defendants' discriminatory policies not only ran afoul of state and federal labor laws, but the policies were directly contrary to President Franklin Roosevelt's national non-discriminatory employment policies set out by Executive Order 9346.¹⁵² Ultimately, the court affirmed the trial court's order enjoining defendants from discriminatory employment and labor practices.¹⁵³ *Marinship* is a seminal case because the legality of executive orders in the civil rights employment context was upheld as California's Supreme Court gave broad deference to President Roosevelt's directive. Most critically, *Marinship* signaled to both public and private employers that executive orders effectively set national policy initiatives that have real legal consequences against discriminatory behavior.¹⁵⁴

In the subsequent decades following the decision in *Marinship*, the early to mid-1960s was a time of widespread social revolution. Children born in the years immediately following World War II were coming of age and challenging societal norms imposed by their elders. During this time many racial minorities remained subject to discrimination in employment. Like the FEPC era, the federal government continued help abolish patterns of social inequity because society demanded it.¹⁵⁵ The FEPC provided an important legal and practical framework to confer social equality by weeding out employment inequities in the private sector.¹⁵⁶ Similar to the successes of the FEPC, the Philadelphia Plan helped desegregate the skilled trade unions, allowing equal employment access to the drastically underrepresented African-American trade members.¹⁵⁷

On September 24, 1965 President Lyndon B. Johnson signed Executive Order 11246, which charged federal agencies with establishing equal employment programs.¹⁵⁸ This order also established requirements for non-discriminatory hiring and employment practices by fed-

151. *Id.* at 741.

152. *Id.* at 742.

153. *Id.* at 744.

154. *Id.* at 742; see also Ontiveros, *supra* note 120, at 1182.

155. David F. Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071 (2011).

156. *Id.* at 1120-21.

157. David L. Rose, *Twenty-Five Years Later: Where Do We Stand On Equal Employment Opportunity Enforcement?*, 42 VAND. L. REV. 1121, 1141-43 (1989).

158. Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965).

eral government contractors.¹⁵⁹ Executive Order 11246 in conjunction with anti-discrimination efforts by the Department of Labor came to be known as the Philadelphia Plan.¹⁶⁰ The goal of Order 11246 was to desegregate the trade unions of five counties in the eastern Pennsylvania region.¹⁶¹ Order 11246 expressly proscribed contractors from discriminating on the basis of race, creed, color, or national origin.¹⁶² It also required contractors to take affirmative steps to implement in-house procedures to ensure equal employment opportunity free from racially motivated practices.¹⁶³

2. Contractors Association of Eastern Pennsylvania v. Secretary of Labor

Similar to the unpopular effects of President Roosevelt's FEPC on private sector shipbuilders in Northern California highlighted in *James v. Marinship Corp.*, several labor associations brought a federal court challenge against Executive Order 11246. In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor* ("Contractors"),¹⁶⁴ several contractors and labor organizations challenged the regulations promulgated by the Secretary of Labor under the directives announced in Executive Order 11246.¹⁶⁵ The plaintiffs challenged the codified labor regulations that required "[f]ederal contracts and federally assisted construction contracts contain specified language obligating the contractor and his subcontractors not to discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin."¹⁶⁶ Executive Order 11246 also imputed consequences against third party employers because it imposed "various sanctions on the contractors which include the cancellation, suspension or termination of contracts and the debarment of a contractor from further Government contracts."¹⁶⁷

159. *Id.*; see also Rose, *supra* note 157, at 1143 (discussing how Executive Order 11246 evolved in 1970, when the Secretary of Labor incorporated timetables and numerical goals in what became known as 'Order No. 4', which was subsequently codified into an official regulation issued by the Department of Labor. See 41 C.F.R. pt. 60-2 (1988)).

160. See Rose, *supra* note 157, at 1141-43.

161. *Id.* at 1141.

162. Exec. Order No. 11246, *supra* note 158, at section 202.

163. *Id.*

164. *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 311 F.Supp. 1002, 1004. (E.D. Penn. 1970) [herein "Contractors"].

165. *Id.* at 1004-05.

166. *Id.* at 1005.

167. *Id.*

The labor organizations and contractors challenged Executive Order 11246 on the assumption that it violated both the Constitution and laws passed by Congress.¹⁶⁸ The main legal questions that surrounded the action was “whether or not the provisions of the Philadelphia Plan for commitment to specific goals for minority group participation is in conflict with Title VII of the Civil Rights Act of 1964.”¹⁶⁹ Specifically, the plaintiffs contended that the Philadelphia Plan contradicted the express provisions of Title VII because Order 11246 required them to “hire and employ on the basis of and with regard to race, color and national origin.”¹⁷⁰ The government argued that the contractors openly discriminated against minorities that were regarded as protected classes under Title VII.¹⁷¹ In effect, Order 11246 simply required private contractors subject to government contracts to comply with Title VII.¹⁷² In reaching its decision the court articulated the existence of “[t]hirty years of executive mandates [that] have been enunciated and their validity is established.”¹⁷³ The court also looked “to the initial executive order relative to discriminatory practices first enunciated by President Franklin D. Roosevelt in 1941 and by his successors in office.”¹⁷⁴ While relying on the underpinnings of the Equal Protection Clause and Title VII’s prohibitions, the court implicitly reaffirmed the doctrine of congressional acquiescence because there was “no doubt that the authority to issue the applicable executive orders will withstand any assault.”¹⁷⁵ Thus, the legality of using executive orders to confer private sector equal employment opportunities and protections was unequivocally reaffirmed in *Contractors*.¹⁷⁶

Prior to the decision in *Contractors* that upheld Executive Order 11246, President Johnson took further executive action. He issued Executive Order 11375, which amended Order 11246, and provided that “[i]t is desirable that the equal employment opportunity programs provided for in Executive Order No. 11246 expressly embrace discrimination on account of *sex*.”¹⁷⁷ Thus, via several executive orders it be-

168. *Id.* at 1010.

169. *Id.* at 1008.

170. *Id.*

171. *Id.*

172. *Id.* at 1009.

173. *Id.* at 1011.

174. *Id.* at 1011–12.

175. *Id.* at 1012–13.

176. See Rose, *supra* note 157, at 1143.

177. Exec. Order No. 11375, 32 Fed. Reg. 14,303 (Oct. 13, 1967).

came evident that the Executive Branch had an important responsibility to ensure equal employment opportunities, which eventually led to the creation of the President's Committee on Equal Employment Opportunity.¹⁷⁸ It carried out this duty by using the power of executive orders along with Title VII to topple the gender and race barriers that blocked access to private sector jobs and government contract work for many minorities.¹⁷⁹ Order No. 11246 was a major progressive victory for racial minorities because it spearheaded equal access to a category of private sector jobs free from society's pervasive racial stereotypes that underpinned employment opportunities for decades.

3. Title VII-Related Executive Orders Post-Contractors

The vast success of desegregating the trade unions is directly attributable to the unilateral executive actions taken to effectuate equal employment within private sector contract work, as well as the outcome in *Contractors*. After the Third Circuit upheld the legality of executive orders in the context of Title VII,¹⁸⁰ President Nixon continued to build on the legacies of Executive Order 11246 and *Contractors* by prohibiting federal civilian workforce discrimination with Executive Order 11478.¹⁸¹ President Nixon signed Executive Order 11478 on August 8, 1969.¹⁸² Order 11478 further extended federal non-discriminatory hiring and employment protections by mandating federal agencies to establish programs of equal employment opportunity.¹⁸³

Specifically, Section Two of Executive Order 11478 mandated federal agencies to "assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability."¹⁸⁴ In addition, Order 11478 furthered the use of executive orders as a powerful tool to provide broader employment equality in federal jobs because it called for affirmative action programs for minority applicants to federal jobs.¹⁸⁵ As such, Order 11478 furthered the goals of Title

178. See Rose, *supra* note 157, at 1125.

179. *Id.* at 1125–26, 1141–43.

180. *Id.* at 1143.

181. Executive Order 11478, WIKIPEDIA.COM (last visited Jan. 6, 2016), https://en.wikipedia.org/wiki/Executive_Order_11478.

182. Exec. Order No. 11478, 34 F.R. 12985 (Aug. 8, 1969).

183. *Id.* at § 2.

184. *Id.*

185. *Id.*

VII by tasking the Civil Service Commission with the further weeding out of discrimination in federal employment.¹⁸⁶

Continuing the legacy of executive orders in the Title VII employment context, on Monday, June 1, 1998 the White House announced President Clinton's Executive Order 13087,¹⁸⁷ which further amended Executive Order 11478.¹⁸⁸ Order 13087 added "sexual orientation" to the list of immutable characteristics protected within federal employment and government contract work.¹⁸⁹ President Clinton's directive made it unlawful for any federal agency to discriminate because of an employee's or job applicant's sexual orientation.¹⁹⁰ This executive action was a big step for the LGBT community in the federal workforce.

Most recently, President Obama's Executive Order 13672 amended Orders 11478 and 11246.¹⁹¹ Specifically, President Obama's Order 13672 extended sexual orientation and gender identity protections for the federal civilian workforce as well as to those employees subject to government contract work.¹⁹² While Order 13672 has been celebrated as a victory for the LGBT community, the current levels of private sector employment discrimination suffered by gays, lesbians, and transgender persons is directly analogous to the struggles of African-American skilled trade workers in the 1940s. The ever-evolving social-political climate that once demanded equal employment opportunities and desegregated war defense industries for African-Americans during World War II now demands similar outcomes for the LGBT community in private workspaces.

III. The Solution: How Issuance of an Executive Order Can Effectuate Equal Title VII Protections for All LGBT Employees

The current political atmosphere coupled with hesitancy by the federal courts suggests that a properly drafted executive order can

186. Captain Marilyn H. David, *A Title VII Cause of Action for the Sexually Harassed Federal Employee?*, 23 A.F. L. REV. 254, 268 (1982) (discussing the availability of Title VII to federal employees in part due to President Nixon's signing of Executive Order 11478, which furthered the reliance on presidential actions in order to broaden the overall effectiveness of Title VII).

187. Exec. Order No. 13087, 63 Fed. Reg. 30097 (May 28, 1998).

188. *Id.*

189. *Id.*

190. L. Camille Hébert, *Prevalence of employment discrimination based on sexual orientation and gender identity*, 2 Empl. Privacy Law § 9:4 (2016).

191. Exec. Order No. 13672, *supra* note 46.

192. *Id.*; see, also *Sexual orientation or gender identity as basis for protection under federal discrimination laws*, 5 Emp. Coord. Employment Practices § 6:2 (updated Oct., 2016).

fully integrate LGBT employees under Title VII. There are several reasons why such an order would be both judicially and historically effective, and would send a critical political message to both public and private actors about LGBT rights. As with any other president, the executive has the inherent duty to lead the nation in times of social inequality in an attempt to satisfy full economic integration for all persons, which includes every minority group that yearns for equal protection under Title VII.

A. The Chief Executive Should Continue the Executive Order Tradition Sparked by President Roosevelt to Provide Full Civil Rights Employment Protections For All LGBT Workers

Simply by following the pattern of Executive Branch civil rights legislation first initiated by President Roosevelt in 1941, the chief executive has the inherent responsibility to “take care” that the nation’s law be “faithfully executed.”¹⁹³ Moreover, the chief executive also has the prerogative as the chief administrator to use the Executive Branch to lead the United States into a more perfect union. Thereby, the chief executive can lawfully exercise his aggregated powers to issue an executive order to prohibit further LGBT discrimination in private workplaces. Just as President Johnson followed President Roosevelt’s lead and spearheaded the EEOC as the successor in interest to the FEPC under Order 11246,¹⁹⁴ the chief executive is surely supported by decades of executive orders in the civil rights employment context to effectuate the changes that LGBT employees in the private sector demand.

Currently, the LGBT community suffers from the same pervasive discriminatory impacts as the African-American trade workers suffered in the 1940s when President Roosevelt founded the FEPC.¹⁹⁵ From the decisions in *Midwest Oil Co.*¹⁹⁶ and *Contractors*¹⁹⁷ it is clear that the chief executive has inherent legislative power, separate from Congress’ ability to pass laws, that enables the Executive Branch to set national policy goals through executive interpretation of laws codified by the legislature. Any such executive order would continue to fulfill the president’s role as the chief political leader of our nation.

193. See Noyes, *supra* note 53.

194. See Duncan, *supra* note 1.

195. See Ontiveros, *supra* note 120, at 1178–79.

196. See *Midwest Oil*, 236 U.S. at 465.

197. See *Contractors*, 311 F.Supp. at 1009–11.

Within the chief executive's inherent ability to exercise such unique unilateral powers, the Executive Branch indeed plays a critical role in signaling society's demands for broader interpretations of progressive statutes like Title VII. Society now demands equal protection for the LGBT community under Title VII. In response, the chief executive is well within constitutional and statutory bounds to issue such an executive order to weed out private sector LGBT-based workplace discrimination as outlined in Part I. This proposed solution would reaffirm the chief executive's role in defining the law as understood by normative judicial and legislative traditions.

Undoubtedly, the president's inherent constitutional and political powers may lawfully converge under the relevant holdings outlined above to effectuate full private sector LGBT-based employment protections that include both sexual orientation and gender identity prohibitions under Title VII. Similar to the outcome in *Contractors*, federal courts would likely exercise judicial restraint and give broad deference to the Executive Branch because "the denial of equal employment opportunity must be eliminated from our society."¹⁹⁸ An executive order that clarifies Title VII's express prohibition on "sex" discrimination would likely withstand a legal challenge and be distinguishable from the decisions in *Youngstown* and *Reich*. Such a "hands-off" approach would not upset Congress's intent to smoke out all forms of invidious discrimination in both private and public workspaces.

B. The Doctrine of Congressional Acquiescence Provides the Chief Executive with a Presumption of Legality in Regard to Any Executive Order Affecting Private Employers

Furthermore, the doctrine of congressional acquiescence, otherwise simply known as congressional inaction, provides a presumption of legality that extends to any unchecked judicial or executive actions, especially actions within the civil rights context.¹⁹⁹ Congress's continued failure to pass sweeping legislation, such as ENDA, seems to confer an unofficial legislative intent in regard to gay rights issues under Title VII. Even so, the legal inquiry does not simply end there. Congressional acquiescence played a critical role in the Rehnquist Court

198. See *Contractors*, 311 F.Supp. at 1012.

199. See above-outlined discussion of the doctrine of congressional acquiescence in the civil rights area, *supra* Part II; see also William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 670-72 (1991).

decisions because it influenced the Court's reading of plain statutory provisions.²⁰⁰ Considering some recent Supreme Court decisions being hailed as progressive victories,²⁰¹ the modern Court seems that it would be even more inclined to grant broad deference to the Executive Branch when addressing any claims that executive orders that extend LGBT-based Title VII protections to private workspaces are unconstitutional.

More than fifty years have passed since President Johnson put Executive Order 11246 into action. That order was challenged in *Contractors* and held to be lawful.²⁰² In the forty-five years since, Congress has criticized but never overturned any chief executive's executive order affecting equal employment rights related to Title VII.²⁰³ Legally speaking, this long-sustained period of unchecked executive orders in the Title VII arena makes such presidential actions almost indispensable. In any legal challenge to such executive action, as long as the executive order that addresses LGBT discrimination protections in private employment runs congruently with the larger legislative goals of Title VII, federal courts are likely to side with the Executive Branch. The most informative example of legislative acquiescence for this Comment is Congress' inaction to overturn through legislation the central holding in *Price Waterhouse*.²⁰⁴ Thus, pro-LGBT cases like *Price Waterhouse* provide tacit approval for broader readings of Title VII. The EEOC's recent enforcement actions of LGBT-rights in the private employment sector²⁰⁵ further buttress this assumption.

C. EEOC Enforces Title VII Actions Based on Sexual Orientation and Gender Identity: Proof That Title VII Complements Such an Executive Order

In addition to the doctrine of congressional acquiescence, other enforcement actions lend further support to the legality of an execu-

200. *Id.* at 670.

201. The recent Supreme Court decisions covering gay marriage, abortion, etc. *see e.g.*, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

202. *See generally*, *Contractors*, 311 F.Supp, 1002.

203. Since the early 1940's Congress has not expressly overturned any such executive orders, even though it sharply criticized President Clinton's Executive Order 13087, *see supra* note 187.

204. *Price Waterhouse*, 490 U.S. at 245 (holding that Title VII covers gender stereotyping, which lends to a somewhat broader reading than traditional notions of sex).

205. *What You Should Know About the EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm [<https://perma.cc/UBX6-LTKX>].

tive order solution. In recent years, the EEOC expressly held that private sector discrimination against an individual because of that person's gender identity is sex discrimination and therefore runs afoul of Title VII's express proscriptions against sex discrimination.²⁰⁶ Part of the EEOC's current enforcement strategy identifies Title VII claims involving gays, lesbians, bisexuals, and transgender persons as a priority.²⁰⁷ Thus, the EEOC recognized the strife of private sector LGBT's in the workforce and responded by committing its attorneys to enforce Title VII protections for affected LGBT employees. In fiscal year 2015, statistics show that 1,412 LGBT-based complaints were lodged with the EEOC.²⁰⁸

Because the EEOC has made a clear choice to pursue LGBT-based Title VII actions, this choice would further add to the legitimacy of an executive order solution that expressly extends private sector employment protections to cover sexual orientation and gender identity. As outlined above in *Boh Bros.*, even the traditionally conservative Fifth Circuit has been willing to allow broader readings of Title VII.²⁰⁹ Such cases illustrate the judiciary's willingness to respond to normative interpretations of Title VII. This notion underpins the successes of the above-highlighted executive orders beginning in 1941 with President Roosevelt and the FEPC. The EEOC's success in prosecuting LGBT-based Title VII actions also serves to reaffirm the validity of legislative inaction. The latest EEOC strategic enforcement plan suggests that any executive order extending Title VII protections to all LGBT employees would have the full effect and force as a traditionally legislated law.

D. Why This Solution Is the Most Effective, Commonsense, and Quickest Way to Render Equality to All LGBT Employees Under Title VII

Not only does an executive order expressly covering private sector LGBT-based employment protection have legal and historical foundations, such an order would be the most effective, commonsense, and quickest path to render equality to all persons under Title VII. This proposed solution would be the most effective answer moving forward. It would create a bright-line rule for employers and federal courts to apply in regard to LGBT-based Title VII claims. The

206. *Id.*

207. *Id.*

208. *Id.*

209. *See supra* Part I.A.

current interpretations of sexual orientation and gender identity claims under Title VII highlight the tension between society's progressive demands and the often-restrictive judicial interpretations. Although cases like *Price Waterhouse*²¹⁰ and *Boh Bros.*²¹¹ undoubtedly help to further Title VII's goal to eliminate all types of private discrimination by employers,²¹² federal courts continue to struggle with broader statutory interpretations involving sex discrimination.²¹³ The proposed executive order is the most effective solution because it announces an easy to follow, bright-line rule that will afford greater justice and protections for all LGBT workers in America.

As the above-outlined analysis suggests, several legal and political precedents provide the chief executive with inherent constitutional power and political capital to extend full Title VII protections to the LGBT community. Furthermore, larger social-political underpinnings are critically important to the proper legal interpretation of the congressional intent behind Title VII. If the goal of Title VII is to weed out disparate employment decisions and their impact upon racial minorities, then courts should feel compelled to examine the current civil rights landscape when interpreting discrimination claims. Similar to the Constitution, which provides our most basic liberties and fundamental rights, Title VII was undoubtedly intended to wipe out society's widespread and pervasive discrimination from America's workspaces. As such, society and government must yield to Title VII and its inherent judicial flexibility to confer real benefits upon large sections of disparate populations. Thus, as society changes and discrimination evolves, so too will the ways in which Title VII will need to be applied by federal courts. Some legal scholars have coined Title VII as a "super" statute.²¹⁴ Fundamentally, the most critical feature of super statutes is their ability to adapt to society's needs over time. Of equal importance to super statute effectiveness is the president's use of executive orders to signal policy shifts to the legislature and judiciary. Cases such as *Contractors*²¹⁵ and *Boh Bros.*²¹⁶ reaffirm the notion

210. *Price Waterhouse*, 490 U.S. at 228.

211. *Boh Bros.*, 731 F.3d at 444.

212. David Michael McConnell, *Title VII at Twenty—The Unsettled Dilemma of 'Reverse' Discrimination*, 19 WAKE FOREST L. REV. 1073, 1075–76 (1983) (highlighting the enactment and development of Title VII by discussing its purpose and goals).

213. See general discussion *supra* Part I.A, (highlighting the struggles of lower courts in applying Title VII to gender stereotyping).

214. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231, 1237–42 (2001).

215. *Contractors*, 311 F.Supp. at 1011.

216. *Boh Bros.*, 731 F.3d 444.

that Title VII is a super statute that has been honed over time through a focused tripartite conversation among Congress, the Judiciary, and the Executive Branch. Arguably the most integral voice in this conversation has been the ability of presidents to signal societal demands and effectuate these changes by adapting Title VII through the inherent power of the executive. Just as the Constitution over time has given rise to new fundamental rights like marriage and abortion, Title VII was intended to be flexible enough to remedy evolving disparate impacts in the workplace over time.

The proposed executive order is the best commonsense solution given the current social-political situation. Amongst the national pleas for immigration reform and the call for American troops to help quash terrorism, most congressional representatives only have one goal: to propel their party to the next political victory. Under any post-Obama administration, congressional inaction on ENDA will likely continue to persist. Many of President Obama's legacies, such as LGBT rights, will likely come under heavy conservative scrutiny. Because many practical implications continue to block equal Title VII protection for many LGBT workers, the chief executive should act unilaterally and accordingly. It is unreasonable to assume that the EEOC and the federal courts will weed out all invidious discrimination against LGBT workers. Just as President Franklin Roosevelt responded to the calls from African-American trade workers in the South and shipbuilders in the West,²¹⁷ the chief executive needs to use the opportunity to reaffirm an inherently progressive legacy in the eyes of the American people and issue such an order.

Finally, if the LGBT populace is forced to wait for the judiciary to consider another seminal case like *Price Waterhouse* to receive needed workplace protections, thousands of LGBT employees will continue to suffer irreparable harms at the hands of private sector employers. With all practical considerations on the table, if the LGBT community is forced to wait another ten or twenty years for judicial action to effectuate full Title VII equality, LGBT-based discrimination in the private sector will eventually become unmanageable.

Conclusion

In sum, with the stroke of a pen, the chief executive has the quickest, most effective, and best commonsense solution to effectuate equal Title VII for LGBT employees across the nation. In our current

217. See Ontiveros, *supra* note 120, at 1178–82.

socio-political state, an executive order is the most obvious choice to weed out the continued strife of the LGBT community. Hopefully the chief executive heeds the call of equality that links back to the actions of President Franklin Roosevelt. Such continued preservation of executive orders to effectuate equal employment protections for the vulnerable LGBT workforce that continues to suffer discriminatory impacts in private sector would likely pass any legal challenge. Perhaps these orders will one day encourage Congress to pass much needed legislation like ENDA. Until then, the executive order is the best tool to smoke out LGBT-based discrimination in all of America's workspaces, both public and private.