New Civil Liberties Alliance

September 17, 2025

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Catherine L. Eschbach
Director
Office of Federal Contract Compliance Programs,
200 Constitution Avenue NW,
Washington, DC 20210

Re: Rescission of Executive Order 11246 Implementing Regulations
(Docket No. OFCCP–2025–0001; RIN 1250-AA17)

Dear Director Eschbach,

The New Civil Liberties Alliance ("NCLA") is pleased to submit these comments in support of the proposed rescission issued by the Department of Labor's Office of Federal Contract Compliance Programs (respectively "DOL" and "OFCCP"), *Rescission of Executive Order 11246 Implementing Regulations*, 90 Fed. Reg. 28,472 (July 1, 2025). The proposed rule rescinds some 70 pages of regulations creating a compliance and enforcement regime all of which suffered from the same fatal flaw—Congress never authorized it. For nearly 60 years, OFCCP by and through Executive Order 11,246[1] and its implementing regulations, placed onerous and costly reporting burdens on businesses, while also exposing them to enforcement risks without any statutory authorization to do so.[2]

DOL justifies rescinding these rules based on Executive Order 14,173,[3] which revoked E.O. 11,246.[4] But, as explained below, the DOL should go further and determine that the rescission is likewise justified for lack of statutory authority underlying the revoked E.O. Such a determination would add clarity regarding contractors' future regulatory obligations and enhance stability in the law.

[1] Exec. Order No. 11,246, *Equal Employment Opportunity*, 30 Fed. Reg. 12,319 (Sept. 24, 1965).
[2] DOL estimates that the compliance and reporting mandated by E.O. 11,246's implementing regulations account for "an annual time burden of 9,875,221 hours and $996,373,735 in annual monetary costs." 90 Fed. Reg. at 28,477.
[3] Exec. Order No. 14,173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8,633 (Jan. 21, 2025).
[4] *Id.* at 28,472.

Statement of Interest

The New Civil Liberties Alliance is a nonpartisan, nonprofit civil rights group devoted to defending civil liberties. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as freedom of speech, due process of law, the right to be tried by an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because legislatures, federal agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

Here, NCLA takes issue with the unconstitutional regulatory enforcement and adjudication apparatus that OFCCP has erected without any statutory authority. As a civil rights group, NCLA takes accusations of discrimination very seriously and does not condone discriminatory attitudes or conduct by the government or by federal contractors. At the same time, as an organization that takes the Constitution seriously, NCLA recognizes the irreplaceable role that Congress must play in creating any such protections—including OFCCP's elaborate enforcement and adjudication apparatus—through constitutionally prescribed channels.

Background

OFCCP administers an enforcement and adjudication apparatus that oversees federal government contractors and subcontractors. Until recently, that included ensuring compliance with the affirmative action and anti-discrimination requirements set forth in the now-revoked E.O. 11,246 and its implementing regulations, which are the subject of this proposed rulemaking.[5]

OFCCP's ostensible authority derived from E.O. 11,246, as amended.[6] Initially, E.O. 11,246 required federal contracts to include a proviso prohibiting discrimination and requiring affirmative action based on "race, creed, color, or national origin" in employment by government contractors and subcontractors (the "Equal Opportunity Clause").[7] President Johnson subsequently amended the Order in 1967 to bar sex discrimination.[8] President George W. Bush amended the order to include protections for religion.[9] And President Barack Obama amended the Order to include protections for sexual orientation, and gender identity.[10]

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[5] DOL has halted enforcement actions under the E.O. 11,246 regulations. *Id.* at 28,476 (DOL noted that this was done "pursuant to E.O. 14173").

[6] *See* 30 Fed. Reg. 12,319.

[7] *Id.* at 12,320 (§ 202).

[8] *See* Exec. Order No. 11,375*, Amending Executive Order No. 11246, Relating to Equal Employment Opportunity*, 32 Fed. Reg. 14,303 (Oct. 13, 1967).

[9] *See* Exec. Order No. 13,279, *Equal Protection of the Laws for Faith-Based and Community Organizations*, 67 Fed. Reg. 77,141 (Dec. 16, 2002).

[10] *See* Exec. Order No. 13,672; *Further Amendments to Executive Order 11,478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity,* 76 Fed.

Shortly after E.O. 11,246 was issued, OFCCP was created by order of the Secretary.[11] The Secretary also delegated responsibilities under E.O. 11,246 to OFCCP.[12] In 1977, OFCCP created the comprehensive enforcement and adjudication apparatus to enforce the Equal Opportunity Clause. The 1977 regulations marked a significant departure from E.O. 11,246's limited enforcement mechanisms, without any new statutory authority.[13] The 1977 Final Rule established, for the first time, an administrative adjudication process for violations of E.O. 11,246 and the Equal Opportunity Clause.[14] It established the basis for finding violations, requirements for the "form, filing, service of pleadings and papers," and procedures for hearings (including pre- and post-hearing processes).[15]

The 1977 Final Rule also established new retrospective remedies not contemplated in E.O. 11,246[16] or the Secretary's Order, describing them as "affirmative step[s] which [are] required to eliminate discrimination or the effects of past discrimination."[17] In contrast to E.O. 11,246, which permitted a recommendation to DOJ to seek appropriate proceedings for injunctive relief, the 1977 Final Rule purported to permit DOL itself to commence enforcement proceedings and to issue Administrative Orders enjoining violations.[18] While DOL has amended the 1977 Final Rule several times, the core processes, procedures, and remedies established in 1977 remain in place but are now the subject of this proposed rescission.

Congress Never Authorized Executive Order 11,246 and that Lack of Statutory Authorization Provides Additional Justification for Rescission

Executive Order 11,246 by its own terms only stated generally that it is issued "[u]nder and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States."[19] It did not identify any statutory grant from Congress to the President to issue E.O. 11,246 or its requirements. Nor could it, because no statute authorizes E.O. 11,246 or the regulations implementing OFCCP's enforcement and adjudication apparatus—which are currently being considered for rescission.

Executive Order 11,246 and the regulations promulgated pursuant to it might well be fine, if they did not seek to bind the conduct of anyone outside the Executive Branch. But they clearly are written to bind the conduct of third parties, *i.e.*, government contractors and subcontractors, and thus,

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Reg. 42,971 (July 21, 2014).

[11] Dep't of Labor Secretary's Order No. 26-65, Office of Federal Contract Compliance (EEO), Establishment (Oct. 5, 1965), 31 Fed. Reg. 6921 (May 11, 1966).

[12] *Id.*

[13] *See generally* OFCCP, *Equal Employment Opportunity*, 42 Fed. Reg. 3,454 (Jan. 18, 1977) ("1977 Final Rule").

[14] *See* 41 C.F.R. § 60-1.26 (1977).

[15] 41 C.F.R. §§ 60-1.26(a)(1), 60-30.1–30.30 (1977).

[16] Absent a statutory grant, the creation of new remedies by administrative agencies is improper. *See Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). Similarly, even if one assumes that rights and remedies can be granted by Executive Orders, rights and remedies beyond those specified in the Executive Order cannot be created by administrative agencies "no matter how desirable that might be as a policy matter, or how compatible with [the Executive Order]." *Id.*

[17] 42 Fed. Reg. at 3456; 41 C.F.R. § 60-1.26(a)(2) (1977) ("appropriate relief" "may include affected class and back pay relief").

[18] *See* 42 Fed. Reg. at 3456; 41 C.F.R. §§ 60-1.26(a)(2), 60-1.26(d), 60-30.30(a) (1977).

[19] 30 Fed. Reg. 12,319.

the regulations must be authorized by a statute and not just a now-revoked Executive Order. Because the E.O. 11,246 implementing regulations arrogate legislative power from Congress and judicial power from the courts, they contravene the vesting clauses of Article I and Article III of the Constitution.[20]

Agency rules, like those DOL and OFCCP now propose to rescind, that place or define binding obligations or prohibitions on regulated parties are "legislative rules."[21] Stated differently, a rule that "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy" is a legislative rule.[22] "Legislative, or substantive, regulations" have the "force and effect of law."[23]

Neither the President himself nor an executive agency has any inherent power to make new laws.[24] "[A]gencies are creatures of statute."[25] As such, "[t]hey accordingly possess only the authority that Congress has provided."[26] An agency's power to act—including promulgating binding rules—begins and ends with determining what Congress has "plainly" authorized the agency to do.[27] This limitation is a constitutional barrier to an exercise of legislative power by the executive branch.

Congress Knows How to Design and Authorize Enforcement Regimes that Protect Workers or Address Forms of Discrimination but It Did Not Do So Here

The E.O. 11,246 implementing regulations, which DOL and OFCCP now propose to rescind, are legislative rules because they made substantive changes in existing law when enacted, and they bind third parties, giving them the force and effect of law. OFCCP issued E.O. 11,246's implementing regulations without any statutory power to do so. Congress could have authorized E.O. 11,246's nondiscrimination and affirmative action policy or the 1977 Final Rule's enforcement regime (as amended), but it did not. Congress's failure to legislate is dispositive regarding OFCCP's ability to promulgate or enforce E.O. 11,246 implementing regulations lawfully.

This lack of authority stands in stark contrast to other enforcement and adjudication regimes that protect employees and were specifically authorized by Congress. For example, in 1935, Congress passed the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq*.[28] The NLRA created the National Labor Relations Board ("NLRB" or "the Board") and articulated a comprehensive administrative enforcement scheme to protect the rights of employees to organize, collectively bargain and be free from unfair labor practices that curtail those rights. Under the NLRA, the Board is authorized to "make, amend, and rescind … such rules and regulations as may be necessary to carry

[20] "All legislative Powers" are "vested" in Congress. U.S. CONST. art. I, § 1. "The judicial Power" is "vested" in the courts. U.S. CONST. art. III, § 1.
[21] *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).
[22] *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).
[23] *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979).
[24] *See Loving v. United States*, 517 U.S. 749, 758 (1996) ("the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity.").
[25] *NFIB v. OSHA*, 595 U.S. 109, 117 (2022); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (agencies have "no power to act … unless and until Congress confers power upon [them]").
[26] *Id.*
[27] *Id.*
[28] In addition to protecting employees' rights, the NLRA also provides protections for employers and labor unions.

out" the Act.[29] The NLRA specifically empowers the Board to "to prevent any person from engaging in any unfair labor practice … affecting commerce" by authorizing the NLRB to initiate administrative proceedings against a person or entity accused of unfair labor practices.[30] If after the hearing the Board determines that violations occurred, it may provide remedies to those harmed, specifically "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of" the NLRA.[31]

Not only does Congress know how to design and authorize enforcement and adjudication regimes through statutes generally, Congress has previously authorized DOL itself to administer other enforcement and adjudication regimes that Congress designed.[32] In 1972, Congress passed the Vietnam Era Veterans' Readjustment Assistance Act of 1972 ("VEVRAA") requiring that certain government contracts include a proviso requiring the contractor to "give special emphasis to the employment of qualified disabled veterans and veterans of the Vietnam era."[33, 34] To ensure compliance with VEVRAA's affirmative action provision, the DOL is authorized to receive and investigate complaints from qualified veterans who believe a contractor has not complied with such provision.[35] The DOL is also authorized to "take such action" on the complaint "as the facts and circumstances warrant consistent with the" contract's terms and applicable laws and regulations.[36]

Congress also passed the Rehabilitation Act of 1973 which, among other purposes, aimed to "promote and expand employment opportunities in the public and private sectors for handicapped individuals."[37] Section 503 of the Rehabilitation Act requires certain government contracts to include a proviso requiring the contractor to "take affirmative action to employ and advance in employment qualified individuals with disabilities."[38] To ensure compliance with Section 503's affirmative action provision, the DOL is authorized to receive and investigate complaints from individuals with disabilities who believe a contractor has not complied with such provision.[39] The DOL is also authorized to "take such action" on the complaint "as the facts and circumstances warrant" consistent with the contract's terms and applicable laws and regulations.[40] As amended, Section 503 of the Rehabilitation Act also provides standards for determining if a violation has occurred.[41]

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[29] 29 U.S.C. § 156.
[30] 29 U.S.C. § 160(a), (b).
[31] 29 U.S.C. § 160(c).
[32] *See* 29 U.S.C. § 793 (Section 503 of the Rehabilitation Act); *see also* 38 U.S.C. §§ 4211, 4212.
[33] *See* Pub. L. No. 92-540, title V, § 503(a), 86 Stat. 1074, 1097 (1972); *see also* 38 U.S.C. § 4212(a).
[34] The linguistic similarities between the VEVRAA, Rehabilitation Act, and 1977 Final Rule provisions are striking. Given that the 1977 Final Rule was adopted years after these acts raises the possibility that DOL took these statutorily authorized mechanisms and simply applied them more broadly, but it had no legal authority to do that. If that in fact occurred, then DOL should have gone to Congress and asked for permission. It appears that it instead just implemented the 1977 Final Rule.
[35] *See* 38 U.S.C. § 4212(b); *see also* Pub. L. No. 92-540, title V, § 503, 86 Stat. at 1097.
[36] § 503,86 Stat. at 1098.
[37] *Stutts v. Freeman*, 694 F.2d 666, 668 (11th Cir. 1983) (citation omitted).
[38] 29 U.S.C. § 793(a); *see also* Pub. L. No. 93-112, title V, § 503(a), 87 Stat. 355, 393 (1973).
[39] 29 U.S.C. § 793(b); Pub. L. No. 93-112, title V, § 503(b), 87 Stat. 355, 393.
[40] 29 U.S.C. § 793(b).
[41] 29 U.S.C. § 793(d).

The Procurement Act Did Not Authorize E.O. 11,246 or Its Implementing Regulations

In recent years, DOL and OFCCP have suggested that E.O. 11,246 was authorized by the Federal Property and Administrative Services Act of 1949 (the "Procurement Act").[42] Any reliance on the Procurement Act as providing statutory authority in support of E.O. 11,246 is, at best, an unconvincing *post hoc* rationalization. Such an interpretation of the Procurement Act comes decades too late to have any convincing insight into the statute's original meaning.[43] The DOL and OFCCP should disclaim any reliance on the Procurement Act.

The Procurement Act does not mention employment discrimination, and it includes no language authorizing the enforcement scheme imposed by E.O. 11,264's implementing regulations.[44] Thus, E.O. 11,246 cannot provide a constitutionally sufficient basis for OFCCP's power or adjudicative regime, which it established through E.O. 11,246's implementing regulations. The Procurement Act states that the President may "prescribe policies and directives that the President considers necessary to carry out" the provisions of the Act.[45] Any policies prescribed by the President must be "consistent" with 40 U.S.C. § subtitle I.[46] The Procurement Act is intended "to provide the Federal Government with an economical and efficient system for" specified activities, including "[p]rocuring and supplying property and nonpersonal services, and performing related functions;" using and disposing of property, and "records management."[47] The Act also empowers the Administrator of the General Services Administration ("GSA")—not the President or other federal agencies—to promulgate regulations that are necessary to give effect to the GSA's Procurement Act responsibilities.[48] Under this statutory scheme, agency heads are only empowered to "issue orders and directives" considered necessary to carry out the GSA's regulations, unless the GSA has delegated its authority to another agency head.[49]

A review of the subsequent executive orders amending E.O. 11,246 and OFCCP's implementing regulations establishes that the Procurement Act was not cited as a basis of authority until at least 2002, when President Bush issued E.O. 13,279.[50] The stated authority for E.O. 13,279 included only part of the Procurement Act: 40 U.S.C. § 121(a).[51] However, the 2003 final rule amending the relevant sections of OFCCP's enforcement and adjudication regulations makes no mention of 40 U.S.C. § 121(a) or the Procurement Act more generally as the authority for the

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[42] 40 U.S.C. ch. 1.

[43] *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) ("interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning").

[44] *See Chrysler*, 441 U.S. at 304 n.34 ("nowhere in the Act is there a specific reference to employment discrimination").

[45] 41 U.S.C. § 121(a).

[46] *Id.*

[47] 40 U.S.C. § 101.

[48] 40 U.S.C. § 121(c)(2).

[49] 40 U.S.C. § 121(d)(1).

[50] *Compare* Exec. Order No. 11,246 (no mention of specific statutory authority); Exec. Order No. 11,375 (no mention of specific statutory authority); 1977 Final Rule (authority for rule is based exclusively on Executive Order 11,246) *with* Exec. Order No. 13,279.

[51] *See* Exec. Order No. 13,279.

regulations.[52] Thus, even OFCCP's own interpretation suggests that the Procurement Act is not a proper source of authority for E.O. 11,246's implementing regulations.[53] The Procurement Act did not grant President Johnson the power to establish E.O. 11,246's nondiscrimination and affirmative action enforcement apparatus—nor did he claim such. And the now-revoked E.O. could not legally bind anyone outside the Executive Branch—via adjudication or otherwise. NCLA welcomes the fact that DOL and OFCCP are willing to correct course now.

Conclusion

As DOL and OFCCP acknowledge, with E.O. 11,246 revoked, "there is no source of valid legal authority supporting the regulations[.]"[54] After nearly 50 years of DOL's arrogating legislative power, it is time to restore the separation of powers, which rescission of the rules does. But it is also time to acknowledge DOL (under administrations led by presidents of both parties) misappropriated legislative power in the first instance, a step which NCLA urges the agency to take now. This latter step—admitting the agency always lacked legislative authority to adopt the regulations implementing this vast and elaborate enforcement and adjudication apparatus (aside from VEVRAA and the Rehabilitation Act)—will have lasting impact, as such a frank acknowledgement of past wrongdoing could not be easily reversed by future administrations. For this reason, the almost complete lack of statutory authority underlying OFCCP provides a crucial additional justification for rescinding E.O. 11,246's implementing regulations. DOL and OFCCP should readily adopt this further justification for its constitutionally praiseworthy rescission in the final rule.

Sincerely,

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[52] *See* Dep't of Labor, *Affirmative Action and Nondiscrimination Obligations of Government Contractors, Executive Order 11246, as amended; Exemption for Religious Entities*, 68 Fed. Reg. 56,392 (Sept. 22, 2003).
[53] *See Loper Bright Enters. v. Raimondo*, 603 U.S. at 394 (noting that contemporary and consistent interpretations may provide guidance as to a statute's meaning).
[54] 90 Fed. Reg. at 28,476.