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Executive Orders and the Struggle for Workplace Equality

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*EXECUTIVE ORDERS AND THE STRUGGLE FOR WORKPLACE
EQUALITY*

DAVID C. ROTH[†]

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INTRODUCTION

President Obama declared 2014 a “year of action” and, in response to Congress’s perceived intransigence and hesitation to pass legislation, asserted that he is “going to do everything he can on his own to fight for middle-class families every single day.”¹ “Using his pen,”² the President signed thirty-one executive orders in 2014, many in furtherance of that goal.³ Seven executive orders—over twenty percent of the total issued—addressed topics relating to labor or employment law.⁴ Some of the President’s stated goals with these labor and employment executive orders include increasing morale, boosting worker productivity,⁵ and ensuring “safe, healthy, fair, and effective workplaces.”⁶

Broadly speaking, President Obama issued these orders in an attempt to strengthen workplace protections for American workers⁷ and ensure that employees are secure and successful regardless of their personal attributes or the circumstances surrounding their employment.⁸ President Obama’s executive orders, largely in response to social pressure and congressional inaction, sought to institute top-down changes. In essence, President Obama stepped into the political fray to do what he could, on his own, to ensure that more American workers received not only fair pay and protections from retaliation, but also equal and non-discriminatory treatment within the workplace.

A great unknown remains whether these executive orders, including Executive Order 13,672—which adds protections for workers discriminated against because of their sexual orientation or gender identity⁹—will have the effect President Obama and many in this country desire. After all, this and many of the other employment-related

1. *Year of Action*, THE WHITE HOUSE, <http://www.whitehouse.gov/year-of-action> (last visited Dec. 15, 2014).

2. *Id.*

3. *Executive Orders*, THE WHITE HOUSE, <http://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders> (last visited Dec. 10, 2014).

4. See Exec. Order No. 13,658, 79 Fed. Reg. 9851 (Feb. 12, 2014); Exec. Order No. 13,665, 79 Fed. Reg. 20749 (Apr. 8, 2014); Exec. Order No. 13,670, 79 Fed. Reg. 35029 (June 14, 2014); Exec. Order No. 13,672, 79 Fed. Reg. 42971 (July 21, 2014); Exec. Order No. 13,673, 79 Fed. Reg. 45309 (July 31, 2014); Exec. Order No. 13,679, 79 Fed. Reg. 62323 (Oct. 10, 2014); Exec. Order No. 13,683, 79 Fed. Reg. 75039 (Dec. 11, 2014).

5. Exec. Order No. 13,658.

6. Exec. Order No. 13,673.

7. *Remarks by the President at the Signing of Fair Pay and Safe Workplace Executive Order*, THE WHITE HOUSE (July 31, 2014, 1:40 PM), <http://www.whitehouse.gov/the-press-office/2014/07/31/remarks-president-signing-fair-pay-and-safe-workplace-executive-order>.

8. *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination*, THE WHITE HOUSE (July 21, 2014, 10:39 AM), <http://www.whitehouse.gov/the-press-office/2014/07/21/remarks-president-signing-executive-order-lgbt-workplace-discrimination>.

9. Exec. Order No. 13,672. For a more detailed analysis of Executive Order 13,672’s provisions, see *infra* Part II.

executive orders only apply to federal workers and federal contractors.¹⁰ Although undoubtedly significant, especially at the federal level, will Executive Order 13,672 induce similar protections within local governments and private employers? Will the President's unilateral actions force Congress to respond with its own legislation? Will these executive orders galvanize public support for broader employee protections? Will the President's bold, meaningful, and significant actions please some of his constituents but do little more?

This Article examines President Obama's Executive Order 13,672 and, in the course of attempting to answer these questions, determines that the President's order constitutes a significant action that should serve as an important catalyst for legal and societal restructuring. Historically, non-discrimination executive orders have played a critical role in instituting change.¹¹ They have always preceded, spurred, and influenced, rather than followed and responded to, congressional lawmaking.¹² These "first generation"¹³ orders—those concerning race and characteristics other than sexual orientation and gender identity—have been enduring and effective, and have proven instrumental in promoting workplace opportunities and protections.¹⁴ Because Executive Order 13,672 will impact millions of Americans and many of this nation's largest and most powerful corporations, there is little reason to believe that it ultimately will fail to transform our legal and social framework.¹⁵ In fact, by virtue of addressing both sexual orientation and gender identity, President Obama is significantly enlarging the one prior executive order pertaining to sexual orientation¹⁶ and building upon the critical "second generation" of employment-related non-discrimination executive orders.

Part I of this Article provides historical context by addressing prior presidents' non-discrimination executive orders. It focuses on first-generation race-based executive orders from the mid-twentieth century and then later discusses the context of, and attempts to institute, second-generation protections for sexual orientation. Part II briefly summarizes

10. See, e.g., *id.*; Exec. Order No. 13,673.

11. Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 266 (1996).

12. *Id.*

13. The author is responsible for identifying and categorizing employment non-discrimination executive orders as belonging to either a first or a second generation. First generation orders often addressed race, occurred roughly from the 1940s to the 1960s, and have been important catalysts for legal and social change. See *infra* Parts I.A-C, III.A. Second generation orders address sexual orientation and gender identity, first appear in the late 1990s, and remain active to this day. See *infra* Parts I.D, II.

14. Kenneth R. Mayer, *Executive Orders and Presidential Power*, THE JOURNAL OF POLITICS, Vol. 61, No. 2, at 445 (1999).

15. See *infra* Part III.D.

16. Exec. Order No. 13,087 63 Fed. Reg. 30097 (May 28, 1998). See also *infra* notes 121-26.

and examines President Obama's 2014 Executive Order 13,672, which prohibits discrimination based on sexual orientation and gender identity. Part III recognizes the success of first-generation non-discrimination executive orders, and proves both their significance and their ability to catalyze legal and social progress. Next, it explains the current need for additional workplace protections for gay, lesbian, bisexual, and transgender employees. Lastly, Part III examines how President Obama's order fits within the context of prior presidents' actions, notes the importance of the order's enlarged protections, and makes predictions about the order's influence and consequence. This Article concludes that President Obama's Executive Order 13,672 constitutes a significant effort to encourage workplace reforms, and determines that in response to a stymied Congress, President Obama is doing what he can to spark change. By placing the President's action within the historical context, the Article demonstrates that for those who support President Obama's workplace-rights initiatives, there is reason to be optimistic.

I. THE HISTORICAL DEVELOPMENT AND SIGNIFICANCE OF WORKPLACE NON-DISCRIMINATION EXECUTIVE ORDERS

The United States Constitution makes no explicit mention of executive orders, and no federal statute defines them.¹⁷ Additionally, there are no legal requirements governing the types of directives a president may issue, and executive orders could just as plausibly be termed executive proclamations, memorandums, directives, or determinations.¹⁸ Nevertheless, modern executive orders generally fall into two categories: (1) documents containing written instructions to Executive Branch officials, and (2) documents communicating presidential declarations to broad groups of people that might include government officials, private citizens, or even foreign individuals and governments.¹⁹ Regardless of their form, to have the force and effect of law, presidential executive orders must have either constitutional or statutory authorization.²⁰ Constitutional authorization stems from Article II,²¹ whereas statutory authorization stems from specific congressional legislation.²² Given their potential for an extraordinarily broad scope and

17. Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 546 (2005). The Federal Register Act of 1935, 44 U.S.C. 1505 (2012), sets forth publication requirements for executive orders but fails to provide a definition for what an executive order entails. *See id.* at n.17.

18. Stack, *supra* note 17, at 547.

19. Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 288 (2001).

20. Stack, *supra* note 17, at 548.

21. *Id.* at 551.

22. Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 660 (1987). For example, President Obama's Executive Order 13,672, discussed *infra* Part II, gains its statutory authority from 40 U.S.C. 121. *See* Exec. Order No. 13,672.

applicability,²³ executive orders can serve as “significant source[s] of law and policy.”²⁴ Perhaps most importantly, a president’s authority to issue executive orders is “beyond dispute.”²⁵

Because executive orders can pertain to most aspects of society, it should come as no surprise that the Executive Branch has routinely utilized executive orders to alter and influence its employment policies.²⁶ Employment-related executive orders have addressed non-discrimination provisions, wage and hour regulations, safety and compliance issues, anti-retaliation protections, and many other workplace concerns.²⁷ The genesis of non-discrimination orders, however, originates from the 1940s.²⁸ In fact, without the groundbreaking first-generation non-discrimination executive orders of the mid-twentieth century, today’s current employment law framework and workplace environment would be inconceivable.

A. President Roosevelt Issues the First Executive Order to Ban Discrimination in the Workplace

President Franklin D. Roosevelt issued the first executive orders to address and counter discrimination in the workplace, and set critical precedent for future presidential action against employment inequality.²⁹ On June 25, 1941, the President issued Executive Order 8,802³⁰ and prohibited certain biases in the hiring of federal employees and in the retention of defense contractors.³¹ Although most subsequent presidents have followed suit with their own non-discrimination employment orders, President Roosevelt’s initial use of the executive order introduced a critical—and effective—new tool for fighting workplace discrimination.³²

Executive Order 8,802 stated emphatically “that there shall be no discrimination . . . because of race, creed, color, or national origin,” and instructed all government departments and all private defense contractors

23. American presidents have employed executive orders, in one form or another, since the ratification of the Constitution. See Stack, *supra* note 17, at 548. Executive orders have covered everything from agency and administrative regulations to the establishment of the government’s security classification system, to the emancipation of the slaves during the Civil War. *Id.* at 549.

24. Stack, *supra* note 17, at 549.

25. *Id.* at 551.

26. See David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1124 (1989), noting that presidents since Franklin D. Roosevelt have utilized executive orders to influence federal employment practices.

27. See, e.g., Exec. Order No. 13,665; Exec. Order No. 13,673.

28. James E. Jones, Jr., *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 393 (1988).

29. Jones, *supra* note 28, at 393.

30. Exec. Order No. 8,802, 6 Fed. Reg. 3109 (June 25, 1941).

31. Exec. Order No. 8802; LeRoy, *supra* note 11, at 252.

32. Rose, *supra* note 26, at 1124. President Roosevelt’s order was effective because it “resulted in the increased participation of blacks in the work force and [furthered] acceptance of the proposition that blacks should be paid as much as whites for the doing the same work.” *Id.*

to avoid racial discrimination.³³ The order instructed the Office of Production Management to establish a Committee on Fair Employment Practice to “receive and investigate complaints of discrimination . . . [and] take appropriate steps to redress [valid] grievances.”³⁴ President Roosevelt justified his order by asserting that “available and needed workers have been barred from employment . . . solely because of considerations of race, creed, color, or national origin.”³⁵ Perhaps stoking anxiety and fear about America’s likely involvement in World War II, the President warned that such discrimination was detrimental to “morale and . . . national unity,” and asserted that “the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders.”³⁶

Although several New Deal and pre-war era laws³⁷ contained “prohibitions against racial discrimination,”³⁸ in accordance with *Plessy v. Ferguson*,³⁹ they provided for merely “separate but equal” treatment.⁴⁰ President Roosevelt’s order, however, mandated that employers and labor organizations “provide for the *full and equitable* participation of all workers.”⁴¹ As a result, the President moved to level the playing field and minority workers received (under law) truly equal treatment.⁴² However, Executive Order 8,802 did not provide a procedure for robust enforcement, and failed to specify a penalty for noncompliance.⁴³

President Roosevelt expanded upon Executive Order 8,802’s vague enforcement mechanisms with Executive Order 9,346.⁴⁴ That order conferred new powers on the Committee on Fair Employment

33. Exec. Order No. 8,802.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See, e.g.*, Unemployment Relief Act of 1933, ch. 17, § 1, 48 Stat. 22, 23 (1933) (“no discrimination shall be made on account of race, color, or creed”); Civilian Conservation Corps Act, ch. 383, § 8, 50 Stat. 319, 320 (1937) (“no person shall be excluded [from the Corps] on account of race, color, or creed”); Civilian Pilot Training Act, ch. 244, § 2, 53 Stat. 855, 856 (1939) (“none of the benefits [of this program] shall be denied on account of race, color, or creed”).

38. Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 300 (1996).

39. 163 U.S. 537 (1896).

40. Jones, *supra* note 28, at 392. Of course, *Plessy v. Ferguson* provided for anything but equal treatment. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

41. Exec. Order No. 8,802 (emphasis added).

42. *See* Jones, *supra* note 28, at 393-94. Professor Jones further asserts that Executive Order 8,802 might have been the early basis for the affirmative action movement. *Id.*

43. Exec. Order No. 8,802; LeRoy, *supra* note 11, at 253. Order 8,802 established the Committee on Fair Employment Practice, but the language used to describe its duties was vague. For instance, the Committee was to “investigate complaints” and “take appropriate steps to redress grievances which it finds to be valid.” Exec. Order No. 8,802. The executive order does not define “investigate,” “appropriate steps,” or “valid,” and seemingly leaves the interpretation and enforcement of those terms to the Committee’s five appointed members. *Id.*

44. Exec. Order No. 9,346, 8 Fed. Reg. 7183 (May 27, 1943). The executive order’s title clearly states its purpose: “Further Amending Executive Order No. 8,802 By Establishing A New Committee On Fair Employment Practice and Defining Its Powers and Duties.”

Practices, and permitted it to “conduct hearings, make findings of fact, and take appropriate steps to obtain elimination of [] discrimination.”⁴⁵ Furthermore, the Committee could “promulgate such rules and regulations as may be appropriate or necessary to carry out” its mission, “accept the services of State and local authorities and officials,” and make recommendations to high-ranking government officials.⁴⁶ Importantly, Executive Order 9,346 also prohibited unions from discriminating against their members and expanded racial protections to cover employees of all federal contractors, not just defense contractors.⁴⁷ Thus, by increasing enforcement mechanisms and broadening the scope of racial-based employment protections, President Roosevelt reiterated his administration’s commitment to combating discrimination in the workplace and ensured that Executive Order 8,802’s groundbreaking new protections endured.

B. Presidents Truman, Eisenhower, and Kennedy Continue and Expand Executive Action

With the alleviation of economic and social pressures following victory in World War II, questions arose as to whether President Roosevelt’s non-discrimination policies remained necessary and would remain in force.⁴⁸ President Truman, by issuing Executive Order 9,664, quickly made clear that they were both necessary and permanent.⁴⁹

Executive Order 9,664, although short, simple, and narrow, maintained the policies and protections that President Roosevelt set forth in Executive Orders 8,802 and 9,346.⁵⁰ President Truman’s order secured the continued functioning of the Committee on Fair Employment Practices, but more importantly, it ensured that workplace protections and the principle of racial non-discrimination in federal contracting “transition[ed] to a peacetime economy.”⁵¹ Thus, recognizing the need for permanent workplace protections, President Truman acted to advance equal rights for federal employees and contractors.

President Eisenhower, although a Republican not known for activist governing, nonetheless “reinvigorated the executive order to change employment practices.”⁵² Among other things, he created a new

45. *Id.*

46. *Id.*

47. *Id.*

48. LeRoy, *supra* note 11, at 254.

49. Exec. Order No. 9,664, 10 Fed. Reg. 15301 (Dec. 18, 1945).

50. *Id.*

51. *Id.*; LeRoy, *supra* note 11, at 254.

52. LeRoy, *supra* note 11, at 256. President Eisenhower issued several non-discrimination executive orders including Exec. Order No. 10,479, 18 Fed. Reg. 4899 (Aug. 13, 1953), amended by Exec. Order No. 10,482, 18 Fed. Reg. 4944 (Aug. 15, 1953), Exec. Order No. 10,557, 19 Fed. Reg. 5655 (Sept. 3, 1954), and Exec. Order No. 10,590, 20 Fed. Reg. 409 (Jan. 18, 1955).

and strengthened entity, the Government Contracts Committee.⁵³ To ensure the new Committee's efficacy, President Eisenhower appointed then-Vice President Nixon as the Committee's Chairman.⁵⁴ President Eisenhower also coined the phrase "equal employment opportunity," and emphasized that it must be the government's policy to ensure that all "persons are entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds."⁵⁵ Moreover, the President ordered the Committee to "encourage the furtherance of an educational program by employer, labor, civic, educational, religious, and other voluntary non-governmental groups in order to eliminate or reduce the basic causes and costs of discrimination in employment."⁵⁶

Perhaps President Eisenhower's most significant and lasting contribution to the advancement of workplace protections came out of the final report of the Government Contracts Committee.⁵⁷ That report, issued in 1960, recommended the institution of "a positive policy of nondiscrimination" and the enactment of legislation to advance equal employment opportunity for all government contractors and subcontractors.⁵⁸ Although President Eisenhower could not implement those recommendations given the short amount of time he had left in office, his successor, President Kennedy, followed through with the Committee's suggestions and laid some of the most significant and lasting groundwork for our present-day discrimination protections.⁵⁹

On March 6, 1961, President John F. Kennedy issued Executive Order 10,925, which modernized federal non-discrimination policy and laid much of the groundwork for Title VII of the Civil Rights Act.⁶⁰ President Kennedy's order is especially significant because in addition to repeating the clause prohibiting discrimination based on race, creed, color, or national origin, Executive Order 10,925 required that government contractors take "affirmative action" to ensure workplace equality.⁶¹ Additionally, the President's order established the Committee on Equal Employment Opportunity, a new oversight entity that would

53. Exec. Order No. 10,479.

54. James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 906 (1985) [hereinafter Jones, *Genesis*].

55. Exec. Order No. 10,479.

56. *Id.*

57. *See* Rose, *supra* note 26, at 1125.

58. *Id.*

59. *See id.*

60. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961); Michael K. Braswell et. al., *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 367 (1993).

61. Exec. Order No. 10,925; Jones, *Genesis*, *supra* note 54, at 907.

form the basis for our modern institutions and provide even more robust enforcement mechanisms.⁶²

Executive Order 10,925's introduction of affirmative action is arguably "the most significant contribution conceived" of by any of the presidential non-discrimination executive orders.⁶³ No prior orders had used that term,⁶⁴ or so explicitly stated that employers must *actively* promote equality in employment opportunity.⁶⁵ To ensure compliance with affirmative action requirements, Executive Order 10,925 mandated that, among other things, employers state in their job postings that "all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin."⁶⁶ It also required that employers file affirmative action compliance reports with the President's Committee on Equal Employment Opportunity.⁶⁷ As part of its powerful enforcement mechanisms, the order required that these compliance reports include "employment statistics of the contractor and each subcontractor."⁶⁸ This permitted the Committee to oversee employers' actions and enforce the order's provisions.⁶⁹ Additionally, all prospective contractors or subcontractors needed to state whether they had participated in previous contracts that had been subject to the order's provisions and, if they had, the order required that they submit their previous compliance reports as a precondition for bidding on a new contract.⁷⁰ The repercussions were severe if the Committee discovered that employers were not complying with the order's mandates.⁷¹ New for non-discrimination executive orders, and indicative of this order's seriousness and significance, Executive Order 10,925 permitted the Committee to report contractors to the Department of Justice for potential criminal prosecution, and granted the Committee the power to terminate an employer's contract.⁷²

Aside from its uniqueness from prior presidents' employment-related executive orders, Executive Order 10,925 is significant because it provided much of the groundwork for future congressional action.⁷³

62. Rose, *supra* note 26, at 1125.

63. Jones, *Genesis*, *supra* note 54, at 907.

64. *Id.* Although "affirmative action" was a new phrase, some scholars argue that the notion and ideals of affirmative action are traceable to President Franklin Roosevelt's Executive Order 8,802. *Id.*; *see also supra* note 42.

65. LeRoy, *supra* note 11, at 258 (emphasis added).

66. Exec. Order No. 10,925.

67. *Id.*

68. *Id.*

69. LeRoy, *supra* note 11, at 259.

70. Exec. Order No. 10,925.

71. *Id.*

72. *Id.*; LeRoy, *supra* note 11, at 259; Rose, *supra* note 26, at 1125.

73. *See* LeRoy, *supra* note 11, at 259. Although especially significant, President Kennedy's Executive Order 10,925 is certainly not the only executive order to influence congressional legislation. Phrasing from President Eisenhower's Executive Order 10,577—which targeted discrimination with regard to "employment, upgrading, demotion, or transfer; recruitment or

Specifically, Title VII of the Civil Rights Act of 1964 relied heavily upon several of the principles and provisions of Order 10,925.⁷⁴ For instance, Title VII included President Kennedy's requirement that "all solicitations or advertisements . . . state that all qualified applicants [] receive consideration for employment without regard to race."⁷⁵ Additionally, "[t]he order's reporting requirement . . . was an innovation that helped to contribute to the complex Title VII issue of proving disparate impact discrimination by statistical evidence."⁷⁶ Further, with the passage of Title VII, the Committee on Equal Employment Opportunity became part of the larger Equal Employment Opportunity Commission.⁷⁷

Without a doubt, President Kennedy's Executive Order 10,925 "marked a critical turning point in presidential regulation of private employment."⁷⁸ It introduced the tenet of affirmative action, gave serious bite to enforcement mechanisms, restructured how employers handled and reported hiring, and established an incredibly powerful precedent for forceful presidential action in the realm of employment protections.⁷⁹ It was this order that, in only a few years, would help lead to the passage of Title VII and President Lyndon Johnson's most significant employment-related executive order.⁸⁰

C. President Johnson, Executive Order 11,246, and Refinement of Order 10,925

About a year after Congress passed the Civil Rights Act of 1964, President Lyndon B. Johnson issued Executive Order 11,246.⁸¹ Although many legal scholars often credit President Johnson with establishing affirmative action and launching the modern era of federal non-discrimination provisions, Executive Order 11,246 was primarily just a refinement of President Kennedy's Executive Order 10,925.⁸² Like prior executive orders, Order 11,246 "prohibit[ed] discrimination in

recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship"—also found its way into Title VII. Exec. Order No. 10,557; LeRoy, *supra* note 11, at 257. Furthermore, language from President Ford's Executive Order 11,914 that prohibited discrimination against the physically handicapped served as the forerunner for the Americans with Disabilities Act of 1990. LeRoy, *supra* note 11, at 261.

74. LeRoy, *supra* note 11, at 259.

75. *Id.*

76. *Id.*

77. *Office of Federal Contract Compliance Programs (OFCCP)*, UNITED STATES DEPARTMENT OF LABOR, http://www.dol.gov/ofccp/about/History_EO11246.htm (last visited Dec. 15, 2014).

78. LeRoy, *supra* note 11, at 260.

79. *Id.*

80. *See id.*

81. Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 24, 1965). President Johnson signed the Civil Rights Act of 1964 into law on July 2, 1964. Elinor P. Schroeder, *Title VII at 40: A Look Back*, J. KAN. B. ASS'N, November/December 2004, at 18.

82. LeRoy, *supra* note 11, at 260.

employment because of race, creed, color, or national origin.”⁸³ However, the order further “extended affirmative action requirements to each contractor’s or subcontractor’s vendors.”⁸⁴ Executive Order 11,246 also assigned oversight and enforcement responsibilities to the Secretary of Labor.⁸⁵ The Secretary of Labor, in turn, created the Office of Federal Contract Compliance and tasked it with enforcing non-discrimination policies for federal contractors.⁸⁶ Although today that office is known as the Office of Federal Contract Compliance Programs (OFCCP),⁸⁷ the overall structure—and certainly the principles—of President Johnson’s executive order have largely remained unchanged.⁸⁸ Executive Order 11,246 serves to this day as the major safeguard for the rights of federal workers and for the employees of federal contractors.⁸⁹ When subsequent presidents issued additional non-discrimination executive orders, those orders often either amended or were directly modeled after Order 11,246.⁹⁰

D. Executive Action to Protect Against Discrimination on the Basis of Sexual Orientation

In stark opposition to the abundance and robustness of executive orders prohibiting racial discrimination, protections in the mid- to late-twentieth century relating to sexual orientation were often slow to materialize, offset by anti-homosexual legislation, and even actively obstructed.⁹¹ In fact, it was not until 1998 when President Clinton signed Executive Order 13,087—instituting the second generation of non-discrimination executive orders—that federal employees (but not contractors) gained widespread and uniform protection against discrimination based on sexual orientation (but not gender identity).⁹²

83. Exec. Order No. 11,246.

84. LeRoy, *supra* note 11, at 260.

85. Exec. Order No. 11,246.

86. *Office of Federal Contract Compliance Programs (OFCCP)*, *supra* note 77.

87. *Id.*

88. The framework of Executive Order 11,246 remains intact notwithstanding that several presidents have made changes to the Order. See Debra A. Millenson, *W(h)ither Affirmative Action: The Future of Executive Order 11,246*, 29 U. MEM. L. REV. 679, 687 (1999). In fact, only two years after issuing it, President Johnson amended Order 11,246 to provide protection from religious discrimination and discrimination based on an employee’s sex. Exec. Order No. 11,375, 32 Fed. Reg. 14303 (Oct. 13, 1967). President Nixon further amended Order 11,246 “to strengthen and assure fully equal employment opportunity in the Federal Government.” Exec. Order No. 11,478, 34 Fed. Reg. 12985 (Aug. 8, 1969). Most recently, President Obama amended Executive Order 11,246 to include protection for “sexual orientation” and “gender identity.” Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014); see *infra* Part II.

89. *Office of Federal Contract Compliance Programs (OFCCP)*, *supra* note 77.

90. See, e.g., Exec. Order No. 11,478, 34 Fed. Reg. 12985 (Aug. 8, 1969); Exec. Order No. 13,087 63 Fed. Reg. 30097 (May 28, 1998); Exec. Order No. 13,672.

91. See Mathew S. Nosanchuk, *The Endurance Test: Executive Power and the Civil Rights of LGBT Americans*, 5 ALB. GOV’T L. REV. 440, 441-42 (2012).

92. Exec. Order No. 13,087; EEOC Compliance Manual, No. 146, July 31, 1998, 1998 WL 35860165.

Although President Eisenhower actively promoted racial equality within the workplace,⁹³ his signing of Executive Order 10,450 proved to be a step in the opposite direction when it came to workplace rights for gays and lesbians.⁹⁴ Executive Order 10,450 mandated that all federal employees “be made subject to investigation” to ensure that “national security” was not compromised.⁹⁵ The purported intent of the order was to build a federal workforce that was “reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States.”⁹⁶ When investigating employees to be sure that they met such criteria, the order instructed agency officials to look for, *inter alia*, “any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct . . . [or] sexual perversion.”⁹⁷ Sexual perversion—while perhaps properly included if referring to a history of violent sexual offenses—was, at the time, a term commonly used to describe the conduct of gay and lesbian individuals.⁹⁸ President Eisenhower, in enacting Executive Order 10,450, thus blatantly and openly discriminated against federal workers based on their sexual orientation, and effectively barred them from holding federal jobs.⁹⁹ In 1954, the year after President Eisenhower signed the order, the government fired 618 employees because of their “sexual perversion.”¹⁰⁰ In 1955, that number grew, and 837 federal workers lost their jobs because of their sexual orientation.¹⁰¹ This discrimination against homosexual federal employees continued for the next twenty years.¹⁰² Unsurprisingly, many private employers followed the government’s lead and enacted similar personnel policies.¹⁰³

In December of 1973, after twenty years of permissible discrimination under the aegis of “sexual perversion,” and in response to several federal lawsuits,¹⁰⁴ the Civil Service Commission reformed its policies to prevent the discharge of federal employees solely because of their sexual orientation.¹⁰⁵ However, individuals could still face adverse employment action if their sexual orientation “affected . . . [their] fitness to serve.”¹⁰⁶ As such, this 1973 reform largely rang hollow because federal agencies continued to interpret broadly what affected an

93. Exec. Order No. 10,557; *see also* LeRoy, *supra* note 11, at 257.

94. Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953); Nosanchuk, *supra* note 91, at 441-42.

95. Exec. Order No. 10,450.

96. *Id.*

97. *Id.*

98. Nosanchuk, *supra* note 91, at 442.

99. *Id.*

100. *Id.* at 447.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See, e.g., Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Soc’y for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973) *aff’d in part*, 528 F.2d 905 (9th Cir. 1975).

105. Nosanchuk, *supra* note 91, at 449.

106. *Id.*

individual's ability to serve.¹⁰⁷ For example, in 1976, the Ninth Circuit Court of Appeals upheld a district court's ruling that it was not improper to fire a federal employee for "openly flaunt[ing]" his homosexuality by kissing a man in front of the building where he worked.¹⁰⁸ Such action, apparently, undercut his "efficiency of service" to this country.¹⁰⁹ Although in 1978, the Civil Service Commission reformed its regulations to prohibit consideration of "non-merit factors" in federal employment, the new rules still did not explicitly prohibit discrimination based on sexual orientation.¹¹⁰

President Carter recognized and acknowledged the inherently unjust way that the federal government was treating its gay and lesbian employees, but nonetheless refused to implement an executive order to change the government's policies.¹¹¹ According to his political calculus, such action was just too risky.¹¹² The President did, however, declare it a matter of administration policy that "applicants and employees are to be protected against inquiries into, or actions based upon, non-job-related conduct, such as . . . sexual orientation."¹¹³ Importantly, by the end of the Carter administration, the government had made "major progress" toward ending "the entrenched policy of discovering, stigmatizing, and discharging gay men and lesbians in the federal workforce."¹¹⁴

Nonetheless, it would take nearly another twenty years until gay and lesbian federal employees received absolute protection in the workplace.¹¹⁵ Finally, and through the exercise of executive order, President Clinton removed the last remaining bar to equality in the federal workplace for gay and lesbian employees (but, importantly, the bar was not lifted for transgender employees or those who would otherwise be classified based on their gender identity rather than simply their sexual orientation).¹¹⁶

By signing Executive Order 12,968 on August 2, 1995, President Clinton revised and revamped the policies and procedures that pertained to accessing and obtaining classified information.¹¹⁷ Relevant to workplace equality for gays and lesbians, the President's new order

107. *Id.*

108. *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247, 249, 256 (9th Cir. 1976) *vacated by Singer v. U.S. Civil Serv. Comm'n*, 429 U.S. 1034 (1977).

109. Nosanchuk, *supra* note 91, at 449.

110. *Id.* at 449-50.

111. *Id.* at 450.

112. *Id.*

113. *Id.* quoting Memorandum from Alan K. Campbell, Director, U.S. Office of Personnel Management, to Heads of Departments and Independent Establishments (May 12, 1980).

114. *Id.*

115. *Id.* at 452.

116. See Exec. Order No. 12,968, 60 Fed. Reg. 40245 (Aug. 2, 1995); Exec. Order No. 13,087 63 Fed. Reg. 30097 (May 28, 1998).

117. Exec. Order No. 12,968.

eliminated a longstanding provision that prohibited gay or lesbian employees from accessing classified materials.¹¹⁸ To achieve that result, President Clinton added “sexual orientation” to a long list of other characteristics, such as race, that the government could not consider when deciding whether to allow an employee access to classified materials.¹¹⁹ Additionally, the order prohibited agencies and supervisors from using sexual orientation to make inferences about an individual’s eligibility for obtaining a security clearance.¹²⁰

Three years later, President Clinton issued Executive Order 13,087 and cemented workplace protections for gay and lesbian federal employees.¹²¹ Executive Order 13,087 revised an earlier executive order ensuring equal employment opportunity for all federal workers.¹²² President Clinton’s order, although only about 100 words long, added “sexual orientation” to the list of protected categories.¹²³ Therefore, in addition to being prohibited from discriminating on the basis of race, color, religion, sex, national origin, handicap, or age, the federal government now, in all civilian¹²⁴ employment and workplace matters, could also not prohibit on the basis of sexual orientation.¹²⁵ In a statement accompanying the signing of the order, President Clinton acknowledged that his actions provided, for the first time, “a uniform policy for the Federal Government to prohibit discrimination based on sexual orientation in the federal civilian workforce.”¹²⁶ Stressing that “[i]ndividuals should not be denied a job on the basis of something that has no relationship to their ability to perform their work,” the President urged Congress to pass pending legislation known as the Employment Non-Discrimination Act (ENDA).¹²⁷

118. *Id.* The federal government had prohibited gay and lesbian employees from accessing classified materials because there was a fear that such employees would be susceptible to blackmail and be willing to turn over confidential materials to protect themselves and their jobs. *See* Nosanchuk, *supra* note 91, at 452-53.

119. Exec. Order No. 12,968.

120. *Id.*

121. Exec. Order No. 13,087.

122. *Id.*

123. *Id.*

124. President Clinton’s Executive Order 13,087, like most prior executive orders, only applied to civilian federal employees—the military and certain other specialized classes of federal employees were exempted from the order’s nondiscrimination requirements. *Legal Analysis of E.O. 13087 to Prohibit Discrimination Based on Sexual Orientation in Federal Employment*, CONGRESSIONAL RESEARCH SERVICE (Aug. 14, 1998), <http://congressionalresearch.com/98-691/document.php?study=LEGAL+ANALYSIS+OF+E.O.+13087+TO+PROHIBIT+DISCRIMINATION+BASED+ON+SEXUAL+ORIENTATION+IN+FEDERAL+EMPLOYMENT>.

125. Exec. Order No. 13,087.

126. *Statement by the President*, THE WHITE HOUSE (May 28, 1998), <http://clinton6.nara.gov/1998/05/1998-05-28-statement-on-amendment-to-eeo-executive-order.html>.

127. *Id.* Although the Employment Non-Discrimination Act finally passed the United States Senate on November 7, 2013, the House of Representatives has yet to take up the bill. Leigh Ann Caldwell, *Senate Passes LGBT Anti-Discrimination Bill*, CNN (Nov. 8, 2013, 7:46 AM), <http://www.cnn.com/2013/11/07/politics/senate-lgbt-workplace-discrimination/>.

Congress did act in the wake of Executive Order 13,087, but not in the way President Clinton would have preferred.¹²⁸ Instead of trying to guarantee workplace protections for all Americans by passing ENDA, Congressman Joel Hefley, a Republican from Colorado, introduced an amendment to an appropriations bill to overturn Executive Order 13,087.¹²⁹ Ostensibly concerned about the free speech rights of those federal employees who may possess religious or moral objections to homosexuality, the Congressman sought to prohibit the expansion of civil rights categories and cut off the funding necessary for enforcement of Executive Order 13,087.¹³⁰ Representative Hefley's measures failed to pass the House, but two now infamous pieces of legislation did pass through Congress and become law during (and even with the help of) President Clinton's administration.¹³¹

The years of the Clinton presidency embodied successes and failures in the struggle to obtain equal protections for gays and lesbians, both within the workplace and within society as a whole. Although President Clinton "campaign[ed] on promises to extend civil rights for [lesbian, gay, bisexual, and transgender] Americans" and absolutely delivered on that promise with his first-of-a-kind executive order protecting federal employees from discrimination based on sexual orientation, his other efforts largely failed.¹³² Because of anti-homosexual legislation such as the codification of "Don't Ask, Don't Tell"¹³³ and the enactment of the Defense of Marriage Act,¹³⁴ the advancement and promotion of widespread freedoms and protections for gay and lesbian Americans largely stalled in the last decade of the twentieth century.¹³⁵ Although Executive Order 13,087 was a significant achievement for the protection of gay and lesbian federal employees, without the passage of comprehensive legislation prohibiting all forms of discrimination,¹³⁶ ensuring workplace equality for all Americans remains, even in early 2015, uphill and difficult.¹³⁷

II. PRESIDENT OBAMA'S NON-DISCRIMINATION EXECUTIVE ORDER

On July 21, 2014, President Barack Obama signed Executive Order 13,672 to "bend th[e] arc of justice just a little bit in a better

128. Nosanchuk, *supra* note 91, at 454-55.

129. *Id.*

130. *Id.*

131. *Id.* at 443-44.

132. *Id.*

133. Policy Concerning Homosexuality in the Armed Forces, Pub. L. No. 103-160, 107 Stat. 1670, 1670-73 (1993) (codified at 10 U.S.C. § 654(2006)), repealed by Pub. L. No. 111-321, 124 Stat. 3515.

134. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7; 28 U.S.C. § 1738C (2006)), *invalidated by United States v. Windsor*, 133 S. Ct. 2675 (2013).

135. Nosanchuk, *supra* note 91, at 443-44.

136. *See supra* note 127.

137. Nosanchuk, *supra* note 91, at 443-44.

direction.”¹³⁸ Recognizing that too many American workers live in fear of being fired simply because of their sexual orientation or gender identity, President Obama issued his order to—at least for some Americans—alleviate that injustice.¹³⁹ Placing his own actions within the context of a “long bipartisan tradition” of enacting non-discrimination executive orders,¹⁴⁰ the President expanded the number of personal classifications afforded protection from discrimination.¹⁴¹

Specifically, President Obama’s executive order did two things: (1) it prohibited the federal government from discriminating against its employees based on their gender identity, and (2) it prohibited all federal contractors from discriminating against an employee on the basis of either that employee’s sexual orientation or gender identity.¹⁴² To accomplish these dual objectives, President Obama amended two prior executive orders.¹⁴³ First, President Obama amended President Nixon’s Executive Order 11,478¹⁴⁴ (which was itself a revision and expansion of President Johnson’s Executive Order 11,246).¹⁴⁵ Second, President Obama directly amended Executive Order 11,246.¹⁴⁶

To ensure that employees of the federal government were secure from discrimination based on gender identity, President Obama added to the language of Executive Order 11,478.¹⁴⁷ Section 1 of the President’s order revised “the first sentence of section 1 of Executive Order 11,478 . . . by substituting “sexual orientation, gender identity” for “sexual orientation.”¹⁴⁸ Although merely a very simple addition of the phrase “gender identity,”¹⁴⁹ the impact is significant. Whereas before the

138. *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination*, *supra* note 8.

139. *Id.*

140. *Id.* President Obama specifically mentioned President Roosevelt’s prohibition of racial discrimination in the defense industry. *Id.* He also acknowledged President Eisenhower’s and President Johnson’s efforts at strengthening and expanding upon that initial antidiscrimination executive order. *Id.*

141. Exec. Order No. 13,672; *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination*, *supra* note 8.

142. *Id.*

143. *Id.* The fact that President Obama amended two prior orders is obvious from Executive Order 13,672’s title: “Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity.” *Id.*

144. *Id.*

145. Exec. Order No. 11,478, 34 Fed. Reg. 12985 (Aug. 8, 1969); *see also supra* note 88.

146. Exec. Order No. 13,672.

147. *Id.*

148. *Id.*

149. According to the Human Rights Campaign, gender identity has the following definition: The term “gender identity,” distinct from the term “sexual orientation,” refers to a person’s innate, deeply felt psychological identification as a man, woman or some other gender, which may or may not correspond to the sex assigned to them at birth (e.g., the sex listed on the birth certificate). *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN (Jan. 16, 2015), <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions>. Thus, as opposed to “sexual orientation”—straight, gay, lesbian, or bisexual—“gender

federal government was prohibited from discriminating on the basis of sexual orientation¹⁵⁰—that is the government could not discriminate against an employee who identified as lesbian, gay, or bisexual—now the government is also prohibited from discriminating against a transgender employee.¹⁵¹

To fulfill the second objective of Executive Order 13,672 and prevent federal contractors from discriminating on either the basis of sexual orientation or gender identity, President Obama amended and expanded the scope of Executive Order 11,246.¹⁵² He substituted “sex, sexual orientation, gender identity, or national origin” for what used to be only “sex, or national origin” in the first and second sentences of paragraph 1 of section 202.¹⁵³ President Obama likewise revised the second paragraph of section 202 and paragraph d of section 203 to include the terms “sexual orientation” and “gender identity.”¹⁵⁴ Again, although President Obama simply added a few words to an existing executive order, the scope of that order’s protection drastically increased. Whereas before federal contractors could discriminate against employees who were gay, lesbian, bisexual, or transgender, the simple additions of “sexual orientation” and “gender identity” now provide for broad protection and prohibit federal contractors from engaging in sexual orientation and gender identity-based discrimination.¹⁵⁵

Thus, with the simple addition of “gender identity” to one executive order and “sexual orientation” and “gender identity” to another, President Obama effectively modernized and enlarged protections for federal workers and employees of federal contractors.¹⁵⁶ Although President Obama is justified in his belief that the signing of Executive Order 13,672 is “big business” (i.e., a significant step toward promoting broader protections),¹⁵⁷ there is still much more work to be done to advance workplace equality. Nonetheless, to better understand the path that lies ahead and why the President’s action is so significant, it is instructive to look back at the impact of the racial executive orders from the mid-twentieth century. Given their success, and the fact that President Obama is following their example with the same model for

identity” encompasses transgender individuals and those who identify or express a gender different from the one with which they were born.

150. President Clinton first established protection on the basis of sexual orientation with Executive Order 13,087 which, was itself, an amendment to President Johnson’s Executive Order 11,246. Exec. Order No. 13,087 63 Fed. Reg. 30097 (May 28, 1998).

151. Peter Baker, *Obama Calls for a Ban on Job Bias Against Gays*, N.Y. TIMES, July 22, 2014, at A14.

152. Exec. Order No. 13,672.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination*, *supra* note 8.

instituting change, the President's optimism about his recent actions is not misguided.

III. WORKPLACE NON-DISCRIMINATION EXECUTIVE ORDERS, LIKE ORDER 13,672, PROVIDE CRITICAL RIGHTS AND HELP INSTITUTE REFORMS

President Obama believes that his executive action will bring about consequential change.¹⁵⁸ Although his order unquestionably and meaningfully affects federal workers and the approximately 28 million workers employed by around 24,000 federal contractors, such employees still constitute only about one-fifth of this country's total workforce.¹⁵⁹ Nonetheless, the first-generation mid-century executive orders extending protections to racial minorities also only applied to federal workers and contractors.¹⁶⁰ However, those orders helped institute social, legislative, and even judicial change.¹⁶¹ Because President Obama's second-generation initiatives parallel earlier presidential actions that successfully brought about change, it is highly likely that future generations will view President Obama's actions as critical steps toward advancing workplace protections for lesbian, gay, bisexual, and transgender Americans.

A. Success of the First-Generation Executive Orders Portends Success for Order 13,672

There can be little doubt that the executive orders prohibiting racial discrimination had a profound impact on the American landscape. From President Roosevelt's Executive Order 8,802 prohibiting racial discrimination among defense contractors¹⁶² to President Johnson's Executive Order 11,246 laying the foundation for modern-day workplace protections,¹⁶³ these actions have fixed policies and "provided for the systematic administration of . . . non-discrimination and affirmative action" measures that have helped fundamentally change the American workplace.¹⁶⁴

To better understand the potential for success with President Obama's executive order, it is important to grasp the significance of earlier executive actions. Employment-related executive orders in general, and especially those that concern federal contractors, have

158. *Id.*

159. Jennifer Bendery, *Obama Signs Executive Order on LGBT Job Discrimination*, THE HUFFINGTON POST (July 21, 2014, 3:59 PM), http://www.huffingtonpost.com/2014/07/21/obama-gay-rights_n_5605482.html.

160. *See, e.g.*, Exec. Order No. 10,925.

161. *See, e.g., id.* and its impact on Title VII of the Civil Rights Act.

162. Exec. Order No. 8,802.

163. *Office of Federal Contract Compliance Programs (OFCCP)*, *supra* note 77.

164. James F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties, and Unfinished Tasks*, 36 J.C. & U.L. 875, 894 (2010).

“incredible power . . . [and] make [a] real difference in people’s lives.”¹⁶⁵ In 2010 alone, the government spent almost \$600 billion on federal contractors, thus giving the federal government and its workplace rules and regulations a great deal of influence over employers and a large swath of the economy.¹⁶⁶

One executive order in particular—President Johnson’s Executive Order 11,246 (which itself was based off President Kennedy’s Executive Order 10,925)—has been especially significant and the subject of considerable scholarly attention.¹⁶⁷ As one scholar explained, “Since its issuance . . . Executive Order No. 11,246 has proved to be one of the most effective . . . of the many federal efforts to promote equal employment opportunity.”¹⁶⁸ One of the most lasting impacts of Executive Order 11,246 has been its ability to “change the way we conceive of the workforce.”¹⁶⁹ The order, and the preceding and subsequent related orders, have increased workforce participation, increased diversity and created a greater appreciation of it, and, from the employers’ perspective, even helped with bottom-line profits.¹⁷⁰

In terms of minority (and even non-minority female) hiring, empirical studies show that executive action is instrumental in bringing about change.¹⁷¹ Such studies have found that by the last quarter of the twentieth century, employment-related executive orders had positively affected traditionally marginalized minorities.¹⁷² One result was a “statistically significant positive employment effect[] for black males in federal contractor establishments, especially in the higher level managerial and professional occupations.”¹⁷³ Another result indicated that “compliance reviews, the major enforcement tool [of the executive orders], have been effective in promoting the employment of male and female blacks.”¹⁷⁴ Listing concrete figures, one study found that

165. *Paving the High Road: Labor Standards and Procurement Policy in the Obama Era*, 31 BERKELEY J. EMP. & LAB. L. 349, 357 (2010).

166. *Id.*

167. *See generally*, Millenson, *supra* note 88. President Kennedy provided the foundation and much of the wording for President Johnson’s Executive Order 11,246. *See supra* note 82.

168. Seth A. Goldberg, *A Proposal for Reconciling Affirmative Action with Nondiscrimination Under the Contractor Antidiscrimination Program*, 30 STAN. L. REV. 803 (1978).

169. *Paving the High Road: Labor Standards and Procurement Policy in the Obama Era*, *supra* note 165 at 366.

170. *Id.*

171. *See* Jones, *Genesis*, *supra* note 54, at 935-39; Braswell, *supra* note 60, at 431-35. These empirical studies are econometric in nature, and often utilize data gleaned from EEOC and OFCCP reports. Braswell, *supra* note 60 at 431-32. Generally, “two variables in particular are emphasized: (1) some measure of change in the employment of protected group members relative to some measure of total employment at the firm, and changes in the occupational distribution of the major race and sex groups; and (2) some measure of occupational distribution for protected group members.” Jones, *Genesis*, *supra* note 54, at 935-36.

172. Braswell, *supra* note 60, at 432.

173. *Id.*

174. Jones, *Genesis*, *supra* note 54, at 937.

“minority and female employment increased in compliant contractors much faster than in non-contractor establishments, 12 percent faster for black females, 3 percent faster for white females, 4 percent faster for black males, [and] 8 percent faster for other minority males.”¹⁷⁵

Of course, in addition to measurable changes within the workplace, non-discrimination executive orders have the ability to contribute to broader social and legal changes.¹⁷⁶ Importantly, non-discrimination executive orders have helped to “profoundly change[] public opinion” about minorities and other protected classes within the workplace.¹⁷⁷ Over time, forceful “directives to eradicate race discrimination” have changed public perceptions about the propriety and necessity of providing for equal employment opportunities.¹⁷⁸ Such change is possible because presidential action and opinion is persuasive, and is all the more so when there is a continuous chain of similar action regardless of the president’s party affiliation.¹⁷⁹ In the context of employment non-discrimination executive orders, this country witnessed an unbroken progression of rights and enforcement stretching from Franklin Roosevelt’s presidency all the way through to the Johnson administration.¹⁸⁰ The constancy of promotion of equal rights undoubtedly contributed to a “gradual but unrelenting change in public manners and customs” as they related to diversity in the workplace.¹⁸¹

In addition to instituting societal change, non-discrimination executive orders have led to legislative changes and congressional action.¹⁸² Perhaps most significantly, President Kennedy’s Executive Order 10,925 laid much of the groundwork for what would later become Title VII of the Civil Rights Act of 1964.¹⁸³ President Kennedy’s focus on racial discrimination within the workplace, and especially on mechanisms that the government could implement to combat discrimination, helped provide a “blueprint[] for workable and politically feasible legislation.”¹⁸⁴ Executive Order 10,925—along with some of the preceding orders that it was built upon—served as an important model for legislation and provided representatives and senators with models of successful and workable governmental actions and programs.¹⁸⁵ One

175. *Paving the High Road: Labor Standards and Procurement Policy in the Obama Era*, *supra* note 165 at 405.

176. LeRoy, *supra* note 11, at 265.

177. *Id.* at 266.

178. *Id.*

179. *Id.*

180. *See supra* section I.A-C.

181. LeRoy, *supra* note 11, at 267.

182. *See supra* notes 73-77 and accompanying text discussing President Kennedy’s Executive Order 10,925 and its connection to Title VII of the Civil Rights Act.

183. *Id.*

184. LeRoy, *supra* note 11, at 266.

185. *Id.*

other noteworthy example of executive action leading to legislation, although not related to race discrimination, is President Gerald Ford's Executive Order 11,914.¹⁸⁶ Executive Order 11,914 prohibited discrimination against the physically handicapped, and served as the forerunner for the Americans with Disabilities Act of 1990.¹⁸⁷

Lastly, many employment non-discrimination executive orders have been so effective because they have provided nimble and targeted responses to situations that are within the control of the Executive Branch.¹⁸⁸ Unlike legislation that can take years to pass—for example, ENDA has been stuck in Congress for twenty years¹⁸⁹—executive orders are quick and easily executed.¹⁹⁰ Further, executive orders can be made effective immediately, and presidents can carefully construct their language to provide for exactly what they desire.¹⁹¹ This avoids the need to compromise or negotiate, and executive orders can therefore articulate precise policies that maximize the order's impact on workplace protections.¹⁹²

B. The Current Situation Calls for Executive Action Because LGBT Discrimination Remains Rampant

Recognizing that discrimination based on sexual orientation and gender identity remains a real problem for millions of American workers, President Obama decided that it was time to address that injustice.¹⁹³ Although advocates for marriage equality and gay rights have made rapid and impressive progress in the last several years,¹⁹⁴ “in too many states and in too many workplaces, simply being gay, lesbian, bisexual or

186. *See supra* note 73.

187. LeRoy, *supra* note 11, at 261.

188. *Id.* at 267.

189. *See supra* note 127.

190. *See id.* Executive orders are quick and easy because they do not need congressional approval. Ostrow, *supra* note 22, at 659. Additionally, presidents do not need to assemble majorities, play political games, satisfy excessive procedural requirements, or engage in negotiation or compromise. Stack, *supra* note 17, at 552-53. Essentially, and so long as the orders meet minimal constitutional and statutory thresholds, presidents can issue executive orders as quickly as they can write and sign them. *See id.*

191. LeRoy, *supra* note 11, at 267.

192. *Id.*

193. *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination*, *supra* note 8.

194. Perhaps most notably, 2014 saw the number of states granting marriage equality rise from 18 to 35. Kevin M. Cathcart, *We're Not Done Yet: Lambda Legal's Victories in 2014 and Goals for 2015*, LAMBDA LEGAL (Dec. 10, 2014), http://www.lambdalegal.org/blog/20141210_not-done-yet-intro. Additionally, 2013 saw the United States Supreme Court invalidate Section 3 of the Defense of Marriage Act and hold that restricting the definition of “spouse” and “marriage” to apply only to heterosexual couples violated the Due Process Clause of the Fifth Amendment. *United States v. Windsor*, 133 S. Ct. 2675 (2013). The repeal of “Don’t Ask, Don’t Tell” in 2011 served as another positive step toward ending discrimination against individuals who identify as gay or lesbian. *See Repeal of Don’t Ask, Don’t Tell*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/the-repeal-of-dont-ask-dont-tell> (last visited Dec. 15, 2014).

transgender can still be a fireable offense.”¹⁹⁵ Given that the current state of affairs is still more discriminatory than accepting, President Obama’s actions become all the more significant. Put simply, President Obama is acting to end discriminatory practices because such action is desperately needed.

Even in early 2015, there is no federal law that adequately protects lesbian, gay, bisexual, and transgender employees from discrimination in the workplace,¹⁹⁶ and fewer than half of the states have laws prohibiting discrimination against lesbian, gay, bisexual, or transgender employees.¹⁹⁷ In fact, only 18 states and the District of Columbia explicitly protect all workers regardless of their sexual orientation or gender identity.¹⁹⁸ Although over 200 cities and counties—from the very large to the very small—have instituted non-discrimination laws protecting sexual orientation and, in some cases, gender identity, to put that into perspective, there are roughly 20,000 cities and towns in the United States¹⁹⁹ and over 3,100 counties.²⁰⁰

Although many of America’s largest employers recognize that inclusive and non-discriminatory policies positively impact their bottom lines and business operations, over 10% of the top 50 Fortune 500 companies fail to extend benefits to same-sex partners, and 30% of those top 50 companies fail to extend any protections to transgender employees.²⁰¹ When looking at all Fortune 500 companies, 39% fail to extend protections to transgender employees.²⁰² Many businesses continue to have discriminatory policies in effect notwithstanding studies that link equal and welcoming workplaces with “improv[ed] employee morale and productivity.”²⁰³ Additionally, studies show that by fostering equality in the workplace, companies obtain a greater ability “to meet[] the needs of their diverse customers[],” and are better able to “spark[]

195. *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination*, *supra* note 8.

196. *Fact Sheet: Taking Action to Support LGBT Workplace Equality is Good for Business*, THE WHITE HOUSE (July 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0>.

197. Cathcart, *supra* note 194.

198. *Fact Sheet: Taking Action to Support LGBT Workplace Equality is Good for Business*, *supra* note 196.

199. Matt Lerner, *Fun with Census Data! How Many Cities are in the U.S.?*, WALK SCORE, (Apr. 20, 2009), <http://blog.walkscore.com/2009/04/fun-with-census-data-how-many-cities-are-in-the-us/#.VItflieQe1k>.

200. *How Many Counties are there in the United States?*, UNITED STATES GEOLOGICAL SURVEY, <http://gallery.usgs.gov/audios/124#.VItggCeQe1k> (last visited Dec. 15, 2014).

201. *New Study Finds Employers Adopt LGBT-Inclusive Workplace Policies because they are Good for Business*, THE WILLIAMS INSTITUTE, (Oct. 18, 2011), <http://williamsinstitute.law.ucla.edu/press/press-releases/new-study-finds-employers-adopt-lgbt-inclusive-workplace-policies-because-they-are-good-for-business/>.

202. *Fact Sheet: Taking Action to Support LGBT Workplace Equality is Good for Business*, *supra* note 196.

203. *New Study Finds Employers Adopt LGBT-Inclusive Workplace Policies because they are Good for Business*, *supra* note 201.

ideas and innovation” because employees, including lesbian, gay, bisexual, and transgender employees, often “bring different perspectives and experiences.”²⁰⁴

However, and notwithstanding the potential benefit to the employer, empirical analyses show that more than 40% of workers who identify as gay, lesbian, or bisexual, have experienced some form of employment discrimination at some point in their lives.²⁰⁵ Additionally, more than 90% of employees who identify as transgender have suffered harassment, mistreatment, or discrimination while on the job.²⁰⁶ Furthermore, studies show that it remains risky for employees to “come out” and openly admit sexual orientation or gender identity.²⁰⁷ Those who are “out” in the workplace are nearly four times as likely to suffer discrimination than those who attempt to hide their identity.²⁰⁸ Because it is “still risky to come out about being LGBT in the workplace,” up to one-third of gay, lesbian, bisexual, and transgender employees continue to mask their sexual orientation or gender identity.²⁰⁹

C. First-Generation Racial Executive Orders Segue to Second-Generation Orders Providing Protections Based on Sexual Orientation and Gender Identity

In his speech on July 21, 2014, accompanying the signing of Executive Order 13,672, President Obama acknowledged that his action was “part of [the] long bipartisan tradition” of expanding workplace protections for minorities that had started with President Roosevelt and had stretched through to Presidents Eisenhower and Johnson.²¹⁰ Noting his own addition to that long tradition, the President proudly stated that, “Today, I’m going to expand it again.”²¹¹

President Obama is certainly correct about his expansion of protections. However, what the President perhaps failed to recognize was that his action, although consistent philosophically with that of earlier presidents, is also significant because of its differences. Presidents Roosevelt, Truman, Eisenhower, Kennedy, and Johnson all issued executive orders that concerned racial inequalities in the workplace.²¹²

204. *Id.*

205. *Fact Sheet: Taking Action to Support LGBT Workplace Equality is Good for Business*, *supra* note 196.

206. *Id.*

207. *Report Shows Continuing High Levels of Workplace Discrimination, Impacts Productivity and Health*, THE WILLIAMS INSTITUTE, (July 26, 2011), <http://williamsinstitute.law.ucla.edu/press/press-releases/report-shows-continuing-high-levels-of-workplace-discrimination-impacts-productivity-and-health/>.

208. *Id.*

209. *Id.*

210. *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination*, *supra* note 8.

211. *Id.*

212. *See supra* Part I.A-C.

Presidents Roosevelt and Truman were largely responding to the domestic difficulties caused by World War II,²¹³ whereas Presidents Eisenhower, Kennedy, and Johnson were dealing with racial violence and the Civil Rights Movement.²¹⁴ Given the decreased prevalence of racial discrimination, the question arises: What spurred, influenced, and distinguished President Obama's action?

The answer to that question lies in the different social and cultural context of the early twenty-first century. Unlike the presidents of the 1940s-1960s, President Obama faces a different civil rights issue—the struggle for LGBT equality. Interestingly, although President Obama acknowledged Presidents Roosevelt, Eisenhower, and Johnson, he failed to mention President Clinton.²¹⁵ This is significant because President Clinton did something none of the earlier presidents did—he addressed the rights of gays and lesbians by writing the first executive order to prohibit discrimination on the basis of sexual orientation, thus ushering in the second generation of employment non-discrimination executive orders.²¹⁶ Although limited to federal employees, President Clinton's action was so significant, and so groundbreaking, that it became one of only a handful of executive orders that Congress has ever tried to overturn.²¹⁷

Perhaps then that is why President Obama failed to reference President Clinton. Equality for gay, lesbian, bisexual, and transgender individuals remains a contentious partisan struggle,²¹⁸ and President Clinton, unlike many of the earlier presidents, remains a polarizing figure. Nonetheless, there can be no doubt that President Obama's non-discrimination executive order picks up where President Clinton's left off. Although without question the earlier presidents laid the foundation—morally, legally, and even linguistically (via the wording of the orders)—for President Obama's order,²¹⁹ President Obama's actions, by virtue of addressing sexual orientation and gender identity, are more closely aligned with President Clinton's actions. Because President Obama is building upon and expanding LGBT protections he is positioning himself as part of a second generation of leaders making

213. President Roosevelt explicitly acknowledged the war—or the threat of war—for implementing policies prohibiting racial discrimination. *See supra* note 36. President Truman oversaw the end of the Second World War and the beginning of the Korean War, which President Eisenhower concluded.

214. *See Jones, Genesis, supra* note 54, at 909-14.

215. *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination, supra* note 8.

216. Exec. Order No. 13,087.

217. *See supra* note 129 and accompanying text.

218. As just one illustration of this struggle, look to Congress's continued failure to pass the Employment Non-Discrimination Act.

219. Exec. Order No. 13,672. Executive Order 13,672 was, after all, a modification of a series of earlier executive orders implemented by Presidents Kennedy and Johnson (with a minor addition by President Nixon in Executive Order 11,478). *Id.*

strides in combating insidious discrimination based not upon race, religion, age, or disability, but upon sexual orientation and gender identity.

Whereas the first generation of non-discrimination orders was in response to world crises (i.e., World War II)²²⁰ and racial-equality movements at home (the Civil Rights Movement),²²¹ the second generation of non-discrimination orders responds to the current issues surrounding the rights and protections of lesbian, gay, bisexual, and transgender Americans. Although it is beyond the scope of this Article to examine the forces advocating for sexual orientation and gender equality, there can nonetheless be little doubt that there is increased awareness, interest, and action on that front.²²² Whether because of social pressure, pressure from interested constituents, economic considerations,²²³ or merely the “irrefutable rightness of [the] cause,”²²⁴ President Obama, by addressing critical issues not of race inequality but of sexual inequality, has positioned his executive order within the second generation of non-discrimination protections. Although each generation addresses different inequalities, the effectiveness of the first-generation executive orders portends success for the second generation. Because both generations are ultimately grounded in the same moral and legal tradition, the second generation should influence society and spur change just like the first generation did.

D. President Obama’s Order has an Immediate and Significant Effect on Millions of Americans and Should Spark Further Protections

President Obama was correct in stating that his action was “big business,”²²⁵ and indeed many Americans have already felt its effect.²²⁶ By signing an order that prohibits discrimination in the workplaces of federal employees and federal contractors, the President granted new

220. See Exec. Order No. 8,802.

221. See Jones, *Genesis*, *supra* note 54, at 909-14.

222. Marriage equality is perhaps the most visible—and successful—of these movements. In 2014 alone, the number of states recognizing gay marriage rose from 18 to 35. Cathcart, *supra* note 194.

223. President Obama specifically noted in his remarks that “[e]quality in the workplace is not only the right thing to do, [but that] it turns out to be good business [as well.]” *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination*, *supra* note 8. When businesses have protections in place or foster an open and equal environment, gay, lesbian, bisexual, and transgender employees have a lower turnover rate and therefore provide more stability—economic and otherwise—to their employers. *The Cost of the Closet and the Rewards of Inclusion*, HUMAN RIGHTS CAMPAIGN, http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Cost_of_the_Closet_May2014.pdf (last viewed Dec. 15, 2014).

224. *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination*, *supra* note 8.

225. *Id.*

226. See *infra* notes 231-33.

protections to millions of American workers.²²⁷ Further, the President laid the groundwork for future congressional action and signaled to the American people that protection based on sexual orientation and gender identity is a serious issue worthy of presidential action.

Executive Order 13,672 immediately went into effect on July 21, 2014, the very day the President issued the order.²²⁸ As written, the order applies to federal contracts entered into on or after July 21, 2014.²²⁹ However, because of the President's actions, the OFCCP updated its regulations and directives to ensure that all contracts, even those that predate Executive Order 13,672, incorporate protections for sexual orientation and gender identity.²³⁰

The effect of President Obama's order means that employees of federal contractors working in one of the 29 states that do not provide protections based on sexual orientation or in one of the 32 states that do not provide protections based on gender identity are now protected by the agencies and oversight of the Executive Branch.²³¹ Put another way, employees of the 19% of the top 50 federal contractors who do not include sexual orientation in their non-discrimination policies are protected from discrimination, as are employees of the 56% of the top 50 federal contractors who do not offer protection based on gender identity.²³² Nationwide, President Obama's executive order has the potential to reach some of the 14 million American workers who reside in a state and work for an employer that does not offer gender identity protections, and some of the 11 million workers who work for an employer and live in a state that does not prohibit discrimination based on sexual orientation.²³³ Thus, with a few simple additions to existing executive orders, and with a stroke of the pen, President Obama ensured that millions of Americans receive new and enhanced workplace protections. Federal workers and federal contractors can now rest securely knowing that they can no longer be harassed, fired, or

227. Brenda Gazzar, *Executive Order Could Bolster California LGBT Worker Protections*, LOS ANGELES DAILEY NEWS (June 21, 2014, 5:01 PM), <http://www.dailynews.com/social-affairs/20140621/executive-order-could-bolster-california-lgbt-worker-protections>.

228. *OFCCP Announces Sex Discrimination Includes Discrimination on the Basis of Gender Identity and Transgender Status*, HUNTON EMPLOYMENT & LABOR PERSPECTIVES (Sept. 8, 2014), <http://www.huntonlaborblog.com/2014/09/articles/ofccp-1/ofccp-announces-sex-discrimination-includes-discrimination-on-the-basis-of-gender-identity-and-transgender-status/>.

229. *Id.*

230. *Id.*

231. Ryan Gibson, *President Obama Signs Executive Order Banning LGBT Job Discrimination by Federal Contractors and Government*, WORLD OF EMPLOYMENT (July 21, 2014), <http://www.stoelrivesworldofemployment.com/2014/07/articles/labor/president-obama-signs-executive-order-banning-lgbt-job-discrimination-by-federal-contractors-and-government/>.

232. *New Study Finds Employers Adopt LGBT-Inclusive Workplace Policies because they are Good for Business*, *supra* note 201.

233. Gazzar, *supra* note 227.

discriminated against solely because of their sexual orientation or gender identity.

In addition to the immediate and tangible effects on employees, Executive Order 13,672 also has the potential to institute social and legislative change. Recognizing that ENDA has spent decades languishing in Congress, President Obama called on the public to “keep putting pressure on Congress to pass federal legislation” that, once and for all, addresses sexual orientation and gender identity discrimination in the workplace.²³⁴ For the President’s supporters who would like to see congressional action, there may be reason for optimism. Executive orders are powerful tools that presidents often use to “establish policy . . . alter administrative and regulatory processes, [and] affect how legislation is interpreted and implemented.”²³⁵ Significant executive orders enter the public discourse and have the potential—even likelihood—to influence congressional action.²³⁶ Executive orders concerning equality are especially visible and powerful, and have a long history of directly influencing Congress and the states.²³⁷ In fact, it is incredibly important to recognize that “every employment discrimination law regarding race, gender, age, and disability followed rather than preceded a related executive order.”²³⁸ Especially given the shifting cultural attitudes about sexual orientation and gender identity, there is little reason to doubt that President Obama’s Executive Order 13,672 will depart from this powerful trend. Still another reason supporters of equality should be hopeful is that subsequent presidential administrations do not overturn non-discrimination executive orders.²³⁹ Historically, subsequent administrations with opposite policies have shelved or failed to advance earlier non-discrimination executive orders, but they have never overturned them.²⁴⁰ Because the orders have remained intact, future administrations have been able to once again take up and advance the cause of equality.²⁴¹ Therefore, even if Congress and the next administration fail to act on additional protections for LGBT Americans, there should be little reason to fear a reversal of progress. Supporters of

234. *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination*, *supra* note 8.

235. Mayer, *supra* note 14, at 445.

236. *Id.*

237. See LeRoy, *supra* note 11, at 266.

238. *Id.*

239. Nosanchuk, *supra* note 91, at 469.

240. *Id.*

241. *Id.* A notable example of this phenomenon would include the period between President Johnson’s administration and President Clinton’s. Although non-discrimination executive orders were expanded to include categories such as age and disability, there was little if any movement on the racial front, and obviously no movement on the sexual orientation front until President Clinton’s order in 1998. However, at the same time, although many of the Republican presidents between President Johnson and President Clinton did not make racial equality or minority protection an important policy objective, none of the presidents overturned any of the earlier executive orders establishing racial non-discrimination policies. *See id.*

Executive Order 13,672 should take great comfort in knowing that President Obama has laid important groundwork for the implementation and expansion of second-generation executive orders protecting the rights of lesbian, gay, bisexual, and transgender workers.

CONCLUSION

President Obama's Executive Order 13,672 prohibits discrimination on the basis of sexual orientation and gender identity, and undoubtedly takes a bold and significant step in the march towards workplace equality. Although executive orders have traditionally played an important role in advancing workplace protections,²⁴² because President Obama's order addresses sexual orientation and gender identity as opposed to race, the President's action breaks from much of the precedent and helps charter a new course for workplace protections. President Clinton may have been the first to protect federal employees from discrimination based on sexual orientation, but President Obama, by enlarging existing protections to include gender identity and apply to employees of federal contractors, is drastically redefining the scope of workplace protections for millions of Americans and building upon a second generation of non-discrimination executive orders.

The unfortunate fact remains that despite the incredible advancements the lesbian, gay, bisexual, and transgender community has made in the past few years, workplace discrimination remains rampant.²⁴³ Although many large companies do provide protection for lesbian, gay, bisexual, and transgender employees,²⁴⁴ millions of workers can still be fired simply because of who they love or how they view themselves, and are subsequently forced to hide their sexual orientation or gender identity.²⁴⁵

Although President Obama's executive order cannot ensure equality for everyone—only Congress, by passing ENDA, can do that—the President's actions do have, and should continue to have, real and lasting impacts. By picking up where President Clinton left off and greatly expanding existing protections, President Obama is sending a loud message to the public and to the other branches of government. Historically, executive orders, and especially executive orders relating to non-discrimination, have been effective and enduring tools for change.²⁴⁶ In fact, executive orders are often the necessary catalyst to spur both

242. See, e.g., Exec. Order No. 8,802.

243. *Fact Sheet: Taking Action to Support LGBT Workplace Equality is Good for Business*, *supra* note 196.

244. *New Study Finds Employers Adopt LGBT-Inclusive Workplace Policies because they are Good for Business*, *supra* note 201.

245. *Report Shows Continuing High Levels of Workplace Discrimination, Impacts Productivity and Health*, *supra* note 207.

246. See Mayer, *supra* note 14, at 445.

congressional action and broader social acceptance of equal rights for minorities.²⁴⁷ Given Executive Order 13,672's relationship and connection to first-generation non-discrimination orders, there is no reason to believe that it will not have this same impact or effect. Thus, it should not be an understatement to proclaim that President Obama's order "is one of the most important actions ever taken by a president to eradicate LGBT discrimination from America's workplaces."²⁴⁸

247. See LeRoy, *supra* note 11, at 266.

248. Valerie Jarrett, *What They're Saying: President Obama Signs Executive Order on LGBT Workplace Equality*, THE WHITE HOUSE (July 21, 2014, 6:12 PM), <http://www.whitehouse.gov/blog/2014/07/21/what-they-re-saying-president-obama-signs-executive-order-lgbt-workplace-equality>.