



6-1-1970

Philadelphia Plan

James A. Hardgrove

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

James A. Hardgrove, *Philadelphia Plan*, 45 Notre Dame L. Rev. 678 (1970).

Available at: <http://scholarship.law.nd.edu/ndlr/vol45/iss4/5>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTES

THE PHILADELPHIA PLAN

I. Introduction

The relative position of the Negro in the employment market has not improved since World War II. The unemployment rate for Negroes since the war has been roughly double that of white workers,¹ and government statisticians currently project that "the 1975 unemployment rate for nonwhites will still be twice that for the labor force as a whole."² Perhaps more important than raw unemployment rates is the related problem of the undesirable nature of many jobs open to Negroes. The National Advisory Commission on Civil Disorders (commonly called the Kerner Commission) has reported that

Negro workers are concentrated in the lowest-skilled and lowest-paying occupations. These jobs often involve substandard wages, great instability and uncertainty of tenure, extremely low status in the eyes of both employer and employee, little or no chance for meaningful advancement, and unpleasant or exhausting duties.³

This unemployability or underemployability cannot be attributed solely to a lack of training. The U.S. Census Bureau reports that a white worker with an eighth-grade education can expect to make more money in his lifetime than a Negro college graduate.⁴

The net effect of this sampling of statistics is to be seen in the comparative income figures for white and Negro families. The median income of Negro families is about one-half that of white families, and the gap is widening every year.⁵ Even more important is the concentration of true poverty: almost half of all Negro families earn less than sixty dollars a week; only seventeen percent of white families earn so little.⁶

Many factors have contributed to the disadvantaged economic and social status of Negroes in America, but employment discrimination must be recognized as one of the most important.⁷ This discrimination has taken on many different

1 In 1950, 4.5 percent of all white workers were unemployed, while 7.8 percent of non-white workers were unemployed. In 1960, the percentages were 4.7 percent and 8.7 percent, respectively. P. NORGREN & S. HILL, *TOWARD FAIR EMPLOYMENT* 76 (1964).

2 115 CONG. REC. H13087 (daily ed. Dec. 23, 1969).

3 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 253 (Bantam ed. 1968) [hereinafter cited as KERNER REPORT].

4 S. REP. NO. 867, 88th Cong., 2d Sess. 2 (1963).

5 Negro incomes still remain far below those of whites. Negro median family income was only 58 percent of the white median in 1966.

Although it is growing, Negro family income is not keeping pace with white family income growth. In constant 1965 dollars, median nonwhite income in 1947 was \$2174 lower than median white income. By 1966, the gap had grown to \$3036. KERNER REPORT 251.

The income of nonwhite workers as a percentage of income of white workers declined from 56.8 percent in 1952 to 53.4 percent in 1962. Powers, *Federal Procurement and Equal Employment Opportunity*, 29 LAW & CONTEMP. PROB. 468, 471 (1964).

6 M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 4 (1966).

7 See generally KERNER REPORT 251-65; M. HARRINGTON, *THE OTHER AMERICA* 61-82 (1962); P. NORGREN & S. HILL, *supra* note 1, at 1-14; M. SOVERN, *supra* note 6, at 1-8.

forms.⁸ Employers have failed or refused to hire Negroes, for example, or they have relegated them to the lowest type of labor and failed to promote them when promotion was due. Similarly, unions have effectively precluded Negroes from membership either by direct discrimination or through a policy of preferring relatives of members or persons approved by a majority vote of the members. In the construction industry, where union discrimination has been the most noticeable, unions have refused to refer Negroes to the construction contractors; this discrimination has been perpetuated by exclusive hiring hall agreements by which the contractor may only hire persons referred to the job by a particular union. Even where craft unions have some Negro membership, they have been able to restrict that membership by limiting Negro entry into apprenticeship programs either by directly⁹ or indirectly¹⁰ discriminating against Negro applicants or by requiring unnecessarily lengthy training periods.

It was in order to put an end to racial discrimination in employment that Congress passed title VII of the Civil Rights Act of 1964.¹¹ Although title VII contains strongly worded prohibitions against discrimination by employers, labor organizations, and recipients of federal funds, it has not brought about racial changes in the employment situation for minority-group workers.¹² This is especially true in the craft unions, which have been notoriously slow to integrate membership. The truth of the statement is reflected in the membership statistics for the eighteen major construction trade unions. Nationwide, out of a total membership of 1,300,000, only about 106,000, or 8.4 percent of the construction union members, are Negro.¹³ But even these overall figures are misleading because 81,000 of these Negroes belong to the lowest-paid laborers' unions, where they form 30 percent of the membership. In the more skilled crafts, the sta-

8 For a good discussion of the various patterns taken by employment discrimination see Rosen, *The Law and Racial Discrimination in Employment*, 53 CALIF. L. REV. 729, 730-34 (1965); P. NORGREN & S. HILL, *supra* note 1, at 17-90.

9 The Department of Labor's investigations in the Philadelphia area revealed that some unions had a policy of outright exclusion of minority-group members. Others excluded Negro members by the use of oral interviews. For example, one investigation disclosed that of twenty-eight Negro applicants tested and interviewed for apprenticeship programs, twenty-three scored on the nonoral part of the evaluation as well or better than the white candidates who were accepted; but all but one of the Negroes were rejected because they were given low scores on the oral portion of the evaluation. *Hearings on the Philadelphia Plan and S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 98-99 (1969) [hereinafter cited as 1969 *Hearings*].

10 Examples of indirect methods of excluding minorities are the acceptance of only friends and relatives of members of all-white unions and the use of nonvalidated tests that do not reflect the likelihood that a candidate will succeed in the apprenticeship program. *Id.* at 98.

11 Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e (1964).

12 The main weakness of title VII is that the numerous compromises, made both in the House and in the Senate, reduced the title's enforcement mechanism to what one commentator has called "mediation, conciliation and admonishments." Schmidt, *Title VII: Coverage and Comments*, 7 B.C. IND. & COM. L. REV. 459, 460 (1966). Many persons whose rights under title VII have been infringed remain unaware that redress is available. The enforcement procedure is begun by the filing of a complaint by the aggrieved party with the Equal Employment Opportunity Commission [EEOC] which will attempt to mediate the controversy. The EEOC has no cease-and-desist power. If compliance or settlement is not reached by conciliation, the aggrieved party must file a civil suit if he wishes to pursue the matter (but the Attorney General may bring suit if there is a "pattern and practice" of discrimination). The lack of cease-and-desist powers in the EEOC and the requirement of civil litigation makes the fight against discrimination a slow and costly process. Moreover, since the passage of title VII, the Attorney General has brought only forty-seven "pattern and practice" suits, only seventeen of which were against unions in the construction industry. 1969 *Hearings* 96.

13 N.Y. Times, Dec. 23, 1969, at 30, col. 5.

tistics are even worse: 1.6 percent of all carpenters are black; among electricians, the figure is .6 percent; among plumbers, .2 percent.¹⁴

Seeing the ineffectiveness of the Civil Rights Act as a method of ending racial discrimination in the construction industry, and aware of the importance of ridding the nation of this embarrassing and potentially explosive inequity, the Department of Labor, on June 7, 1969, promulgated the Revised Philadelphia Plan.¹⁵ The Plan, which was implemented by the department under the authority of Executive Order 11246, has been the subject of debate both in and out of Congress.¹⁶ The Comptroller General¹⁷ has ruled that the Plan violates title VII of the Civil Rights Act of 1964 and is therefore invalid, while the Attorney General has twice reached the opposite conclusion.¹⁸ Other arguments have been made that the Executive Order itself is invalid and that the Plan violates federal procurement statutes in that it constitutes an unconstitutional usurpation of Congressional prerogative.¹⁹

Since the Department of Labor has indicated that the Plan is the prototype for similar plans to be applied to other areas and eventually to cover all federal contracts,²⁰ and since the department intends to continue with the Plan in spite of its questionable legality,²¹ this essay will examine in depth the origins of the Philadelphia Plan, the objective for which it was designed, and its legality in light of the federal government's power to contract and in light of the Civil Rights Act of 1964. The first part of this Note will discuss the Philadelphia Plan itself, what it is, how it is to work, and what it is designed to accomplish. Next, the legality of Executive Order 11246 will be considered. Third, the Plan will be examined in the light of the Civil Rights Act's proscriptions against "reverse" discrimination. Finally, consideration will be given to whether the Plan violates the principle of competitive bidding.

14 *Id.* col. 6.

15 Memorandum from Arthur A. Fletcher Assistant Secretary for Wage and Labor Standards, to Heads of All Agencies, June 27, 1969, reprinted in 115 *CONG. REC.* S17133 (daily ed. Dec. 18, 1969) [hereinafter cited as June 27, 1969, Order]. The June 27, 1969, Order was the second affirmative action program for the Philadelphia area. The initial plan, entitled the Philadelphia Pre-Award Plan, was issued on November 30, 1967. The Pre-Award Plan required that after the bids were submitted by the contractors, each apparent low bidder would have to submit a written affirmative action program to assure that there would be minority-group representation in specified trades. Arrangements would then be made for a preaward conference to negotiate an acceptable program. The Department of Labor suspended this plan because of an opinion by the Comptroller General that it violated the principle of competitive bidding in that the invitation for bids did not include or incorporate a statement of definite minimum standards or criteria by which the acceptability of such a program would be judged. See 48 *COMP. GEN.* 326-28 (1968). The new Philadelphia Plan has attempted, apparently to the satisfaction of the Comptroller General, to overcome this particular hurdle by setting up definite goals to be met, the standards by which good faith is to be judged in the invitations for bids, and by removing postbid negotiations altogether.

16 See 115 *CONG. REC.* S9024 (daily ed. Aug. 4, 1969); *id.* at S9161 (daily ed. Aug. 5, 1969); *id.* at S13215 (daily ed. Oct. 27, 1969); *id.* at S13583 (daily ed. Nov. 3, 1969); *id.* at S16729 (daily ed. Dec. 15, 1969); *id.* at S17131, S17195 (daily ed. Dec. 18, 1969); *id.* at S17623 (daily ed. Dec. 22, 1969); *id.* at E96 (daily ed. Jan. 20, 1970). Articles, newspaper editorials, and statements of contractors and union officials are collected in 1969 *Hearings*.

17 49 *COMP. GEN.* — (Aug. 5, 1969) (B-163026).

18 Letter from John Mitchell, Attorney General, to the Secretary of Labor, Sept. 22, 1969; 1969 *Hearings* 255. This conflict of opinions has stirred considerable debate over the separation of powers doctrine, a matter beyond the scope of this note. See Gibinic & Lasken, *The Comptroller General and Government Contracts*, 38 *Geo. Wash. L. Rev.* 349 (1970).

19 See, e.g., 1969 *Hearings* 228-30.

20 United States Dep't of Labor News Release, June 27, 1969.

21 United States Dep't of Labor News Release, Aug. 6, 1969.

II. The Philadelphia Plan

The Philadelphia Plan was promulgated on June 27, 1969, in implementation of the authority of the Secretary of Labor under Executive Order 11246,²² which required that federal contracts and federally assisted construction contracts contain specified language obligating the contractor and his subcontractors not to discriminate against an employee or applicant for employment because of race, color, religion, sex, or national origin.²³ The Executive Order further required the contractors and subcontractors to take "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."²⁴

Under section 201 of the Executive Order, the Secretary of Labor was authorized to adopt such rules and regulations and to issue such orders as he considered necessary and appropriate to achieve the purposes of the Executive Order. In most industries a contractor's affirmative action obligation could be satisfied by engaging in an active recruiting program designed to attract minority-group employees.²⁵ But the secretary found that this type of affirmative action program was insufficient to realize equal employment opportunity in the construction industry for two reasons. First, contractors must hire a new complement of workers for each construction job; after the job is over the contractor's complement of employees dissolves, so that even if he had hired a number of minority-group employees, those employees would not carry over to the next job. Such lack of tenure does not obtain in other industries. Second, because of the nature of the construction industry contractors rely on the construction craft unions as their prime or sole source of labor; and collective bargaining agreements frequently provide for exclusive hiring halls.²⁶

Because of these features, the Department of Labor found that the previous discrimination patterns of a number of labor unions²⁷ tended to be stable. It found that labor organizations in certain specified trades had traditionally discriminated in admission, apprenticeship, and referral practices. This resulted in disproportionately small percentages of Negroes in these trades, and contractors had perpetuated this situation by binding themselves to exclusive hiring hall agreements with the unions.²⁸ The department also found present minority participation in the designated trades to be far below that which would have reasonably resulted had there been participation in the past.

22 3 C.F.R. 406 (1969)

23 *Id.* at 407.

24 *Id.*

25 *See* 1969 Hearings 266 (memorandum prepared by L. H. Silberman, Solicitor of Labor).

26 *Id.* at 239 (Memorandum in Support of Legality of Philadelphia Plan).

27 The trades specified in the Plan were the ironworkers, which had a minority-group representation of 1.4 percent; steamfitters, of whom .65 percent are minority-group members; sheetmetal workers, 1 percent; electricians, 1.76 percent; elevator construction workers, .54 percent; and plumbers and pipefitters, .51 percent. Order from Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards, to Heads of All Agencies, Sept. 23, 1969, at § 3(d), reprinted in 115 CONG. REC. S17135 (daily ed. Dec. 18, 1969 [hereinafter cited as September 23, 1969, Order]).

28 Both unions and contractors deny that they are discriminating against Negroes. Unions claim that the lack of Negro membership results from the absence of skilled Negro craftsmen and the nonracial requirement that applicants for membership have a sponsor or be related to a member. Contractors deny responsibility for the racial imbalance on their projects because

The Philadelphia Plan was designed to remedy this situation. Under the Plan, each federal agency is required to include in the invitation for bids on a construction contract where the cost exceeds \$500,000, a notice stating that to be eligible for award, each contractor will be required to submit an acceptable affirmative action program consisting of goals as to minority-group participation for the designated trades²⁹ to be used in the performance of the contract.³⁰ The invitation for bids is to include specific standards setting forth, for each of several designated trades, a "range of minority group utilization" to be determined by the Department of Labor after conducting hearings in the area where the Plan is to be implemented. In order to be eligible for the award of the contract, the bidder must, in the affirmative action program submitted with the bid, set specific goals for minority manpower utilization — goals that meet the definite standards included in the invitation for bids.³¹

The Plan sets out a number of factors to be used by the Department of Labor in determining the "ranges" for the various trades. These factors include:

- (1) the current extent of minority participation in the trade;
- (2) the availability of minority-group persons for employment in the trade;
- (3) the need for training programs in the area and/or the need to assure job demand for persons in existing training programs; and
- (4) the impact of the program upon the existing labor force.³²

After three days of public hearings in the Philadelphia area, the Department of Labor, on September 23, 1969, issued the order establishing specific standards for each of the designated trades in the Philadelphia area as follows:

Trade	Range of Minority Group Employment for the Year ³³			
	1970	1971	1972	1973
Ironworkers	5-9%	11-15%	16-20%	22-26%
Plumbers and Pipefitters	5-8	10-14	15-19	20-24
Steamfitters	5-8	11-15	15-19	20-24
Sheetmetal Workers	4-8	9-13	14-18	19-23
Electrical Workers	4-8	9-13	14-18	19-23
Elevator Construction Workers	4-8	9-13	14-18	19-23

In determining these figures, the Department of Labor took into account the number of qualified minority-group tradesmen working in the designated trades or unemployed, plus the number who would or could be trained for these

they hire exclusively from unions and cannot compel the unions to stop discriminating in membership. Contractors further claim that they are too deluged with their own problems to spend much time dealing with complex civil rights questions. *See 1969 Hearings* 64 (statement of Thomas Sensing). The Philadelphia Plan was expressly designed to stop the buck-passing.

²⁹ See note 27 *supra*.

³⁰ June 27, 1969, Order § 6(a).

³¹ *Id.*

³² *Id.* § 6(c).

³³ *See* September 23, 1969, Order § 4.

trades by the beginning of each year. After determining that a substantial number of qualified minority persons would be available for productive employment, the department estimated, on the basis of Bureau of Labor Statistics data, the number of job openings that would be available each year without impairing the job opportunities of then-employed nonminority workers. Calculating an average attrition rate of 7.5 percent due to retirement, death, injury, or other reasons, then adding a projected average growth rate of 2-3.69 percent for each of the designated trades, the department arrived at the above figures.³⁴ The department found that a contractor could commit himself to hiring minority-group persons up to the annual rate of job vacancies for each trade without any adverse impact upon the existing labor force in the designated trades.³⁵

The Plan contains two important limitations³⁶ on the contractor's commitment to specific goals. Section 6(b)(2) of the Plan provides that the purpose of the contractor's commitment is to meet his affirmative action obligation under Executive Order 11246 and "is not intended and shall not be used to discriminate against any qualified applicant or employee." Additionally, section 8 of the Plan provides that if the contractor fails to meet the goals set by the Department of Labor he must be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. The September 23, 1969, Order sets forth standards by which the good faith effort of the contractor is to be judged. For example, a contractor may be found to have met his good faith obligation if:

- (1) he exhibits evidence showing that he has notified various community organizations, which have agreed to assist any contractor by referring minority-group workers for employment in the specified trades, of opportunities for employment with him on the project in question and if he shows evidence of their response;
- (2) he has maintained a file recording the name and address of each minority-group worker referred to him. The file must show what action was taken with respect to such worker and the reasons therefor;
- (3) he has notified the OFCC Area Coordinator when a union with whom the contractor has a collective bargaining agreement has refused to refer minority-group workers or when the contractor has other information that the union's referral process has impeded him in his efforts to meet his goal; and

34 *See id.* § 3. Some question has been raised about the accuracy of the figures and the thoroughness of the surveys upon which they are based. For example, counsel for the AFL-CIO has contended that one of the "surveys" turned out to be a memorandum to the files by one government employee giving the self-proclaimed "conservative estimates" of another employee as to manpower in the trade. *1969 Hearings* 170; *see also id.* at 236.

35 The September 23, 1969, Order suggested that the lower range figures could be met by filling vacancies and new jobs approximately on the basis of one minority craftsman for each nonminority craftsman, a ratio permitted by a federal district court in granting relief for a title VII violation. *See Vogler v. McCarty, Inc.*, 294 F. Supp. 368 (E.D. La, 1968). Presumably this ratio is for filling vacancies on present jobs, not for filling new contract jobs.

36 Two other minor limitations are made in the Plan. June 27, 1969, Order § 5 exempts participants in a multiemployer program approved by the Office of Federal Contract Compliance [OFCC]. Also, the procedures set forth in the Plan do not apply to any contract where the head of the contracting agency determines that the contract is essential to the national security and that noncompliance with the Plan is necessary to the national security. *Id.* § 9(b).

(4) he has participated in and availed himself of local training programs designed to provide trained craftsmen in the specified trades.³⁷

It should be noted, however, that a contractor is not excused merely because the union with which the contractor has a collective bargaining agreement fails to refer minority employees.

If a contractor has failed to meet his goals and fails to show that he has made good faith efforts to meet them, presumably (although the Plan does not expressly so provide) the full panoply of sanctions under Executive Order 11246 would be available: cancellation, termination, or suspension of the contract and possible ineligibility to bid on further contracts.³⁸ If the contractor fails to specify goals in his bid, or if the goals he specifies are inadequate, the bid will be rejected as nonresponsive.³⁹

The Plan also provides that the prime contractor is not accountable for a subcontractor's failure to meet the prime contractor's goals, but the prime contractor must include his goals in all subcontracts.⁴⁰ These goals then become the goals of the subcontractor, who is fully bound by them. If the subcontractor fails to meet the goals, he will be treated in the same manner as would a prime contractor.

III. Legality of Executive Order 11246

A. History of the Order

Executive Order 11246 is the successor to a number of executive orders forbidding firms that contract with the United States to discriminate in employment. The earliest of these orders, Executive Order 8802,⁴¹ was issued in 1941 by President Roosevelt in response to a threat by A. Philip Randolph, President of the Brotherhood of Sleeping Car Porters, to organize a march on Washington to protest employment discrimination. Executive Order 8802 required that there be inserted in all defense contracts a clause barring employment discrimination by the contractor on the basis of race, creed, color, or national origin. Subsequent executive orders have expanded both the substance of the nondiscrimination obligation and the number of contractors subject to it. Executive Order 10925,⁴² issued by President Kennedy in 1961, required both a nondiscrimination clause and a further provision obligating contractors to undertake "affirmative action" to assure equal job opportunity. Executive Order 10925 expanded nondiscrimination coverage from defense contracts to federal contracts generally, subcontracts of federal contracts, and federally assisted construction contracts.

Under the present order, Executive Order 11246, every government contractor and subcontractor must give assurance that he "will not discriminate

37 September 23, 1969, Order § 5.

38 June 27, 1969, Order § 8(a); Executive Order 11246 § 209, 3 C.F.R. 410-11 (1969).

39 June 27, 1969, Order § 7.

40 September 23, 1969 Order § 6.

41 6 Fed. Reg. 3109 (1941).

42 26 Fed. Reg. 1977 (1961).

against any employee or applicant for employment because of race, color, religion, sex or national origin" and that he "will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."⁴³ According to the Executive Order, affirmative action "shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship."⁴⁴ If an employer fails to comply with these obligations, his government contracts may be cancelled in whole or in part, and he can be barred from further government contracts.⁴⁵

B. Legality of Nondiscrimination Provisions in Government Contracts

The validity of such executive orders seems to be firmly established. In *Farkas v. Texas Instrument, Inc.*,⁴⁶ the Fifth Circuit held that Executive Order 10925, a forerunner of Executive Order 11246, was a valid implementation of the authority delegated to the president by the procurement statute to "prescribe such policies and directives"⁴⁷ as he deems necessary to "an economical and efficient system for . . . the procurement and supply of personal property and nonpersonal services."⁴⁸ The court concluded that the Executive Order had the "force and effect given to a statute enacted by Congress."⁴⁹ A similar result was reached by the Third Circuit in *Farmer v. Philadelphia Electric Co.*⁵⁰ A federal district court⁵¹ and the Supreme Court of Ohio⁵² have reached the same result with respect to Executive Order 11246 itself. Both the Comptroller General⁵³ and the Attorney General⁵⁴ have ruled on the validity of the older executive orders.

It has also been recognized that specific social objectives, such as requiring equality of employment opportunity, may be made requisites of doing business with the government. The authority for such provisions derives from the federal Constitution, Article II of which vests the executive power in the president. One of the incidents of this power is the power to contract, which, according to an early landmark decision, is "coextensive with the duties and powers of government."⁵⁵ Absent a statute or special regulation, government contracts are

43 Executive Order 11246 § 202(1), 3 C.F.R. 407 (1969).

44 *Id.*

45 *Id.* §§ 209(5), (6), 211, 3 C.F.R. 411 (1969).

46 375 F.2d 629, 632 n.1 (5th Cir. 1967).

47 Federal Property and Administrative Services Act of 1949 § 205(a), 40 U.S.C. § 486(a) (1964).

48 *Id.* § 2, 40 U.S.C. § 471 (1964).

49 375 F.2d at 632.

50 329 F.2d 3 (3d Cir. 1964).

51 United States v. Papermakers Local 189, 282 F. Supp. 39, 43 (E.D. La. 1968).

52 *Weiner v. Cuyahoga Community College Dist.*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *aff'g* 44 Ohio Op. 2d 468, 238 N.E.2d 839 (C.P. Cuyahoga County 1968), *cert. denied*, 396 U.S. 1004 (1970).

53 40 COMP. GEN. 592 (1961).

54 42 OP. ATT'Y GEN. 692 (1963).

55 *United States v. Maurice*, 26 F. Cas. 1211, 1216 (No. 15747) (C.C.D. Va. 1833).

usually governed by general principles of contract law, including "the power to choose with whom and upon what terms the contracts will be made."⁵⁶ As the Supreme Court stated in the important case of *Perkins v. Lukens Steel Co.*⁵⁷ "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."⁵⁸ In the *Lukens Steel* case the Supreme Court upheld the inclusion in a government contract of a provision requiring the contractor to pay his employees a minimum wage in accordance with the determination of the Secretary of Labor. This clause was required to be placed in government contracts by the Public Controls Act of 1936, but it was the determination of amount made by the Secretary of Labor, not the statute itself, that the plaintiff attacked in his suit. The Supreme Court made it clear that the executive branch had complete discretion to lay down the the terms and conditions on which it would make purchases, even absent an express statutory grant of authority.⁵⁹

The *Lukens Steel* case establishes the proposition that there need be no direct relationship between a clause in a government contract and the efficient performance of the contract's basic obligations. The general welfare of the nation (or the prevention of unfair competition whereby discriminating bidders gain advantage over nondiscriminating bidders) is sufficient grounds for the inclusion in government contracts of clauses designed to achieve goals unrelated to the simple procurement task. Numerous courts have specifically upheld such clauses where required under the authority of statute⁶⁰ or executive order.⁶¹ The only limitations on the executive power to contract would appear to be those expressly imposed by Congress in appropriating money for an expenditure or those necessarily implied where a federal statute runs contrary to the purpose of the inserted clause.⁶²

56 *Arizona v. California*, 373 U.S. 546, 580 (1962).

57 310 U.S. 113 (1940).

58 *Id.* at 127.

59 *See also* *Jessup v. United States*, 106 U.S. 147, 152 (1882).

60 *E.g.*, *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Jessup v. United States*, 106 U.S. 147 (1882); *George v. Mitchell*, 282 F.2d 486 (D.C. Cir. 1960); *Otis Steel Prods. Corp. v. United States*, 316 F.2d 937 (Ct. Cl. 1963).

61 *E.g.*, *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3 (3d Cir. 1964); *United States v. Papermakers Local 189*, 282 F. Supp. 39 (E.D. La. 1968); *Weiner v. Cuyahoga Community College Dist.*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970); *cf.* *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 116 (1954).

62 If a government contract violates a congressional act it is invalid. *United States v. Symonds*, 120 U.S. 46 (1886); *Kendall v. United States*, 37 U.S. (12 Pet.) 527 (1838); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

It is argued that the federal government has not only the power to require that its contractors not discriminate against any applicants for jobs but that, under the fifth amendment, it has a duty to so require. It has been held, for example, that government assistance which subsidizes private discrimination is unconstitutional, and "[f]ailure on the part of any . . . Government [official] to take legal action in the event that racial discrimination does exist . . . would constitute dereliction of official duty." *United States v. Frazer*, 297 F. Supp. 319, 323 (M.D. Ala. 1968). A federal district court has enjoined a state from entering into construction contracts with employers who had exclusive hiring hall agreements with unions that discriminated in membership or in job referral. In reaching this result the court held that the state would, by entering into such a contract, be a joint participant in a pattern of racially discriminating conduct, thus violating the fourteenth amendment. *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967). The effect of the *Ethridge* decision was to impose on state officials the affirmative duty to assure that contractors hire from nondiscriminatory sources.

C. Effect of the Civil Rights Act of 1964: The Implied Repeal Argument

Some controversy remains over whether title VII of the Civil Rights Act of 1964 impliedly proscribed Executive Order 11246.⁶³ It is arguable that Congress, in deleting section 711 of the original version of title VII⁶⁴ (which would have authorized the president to take appropriate action to prevent discrimination by government contractors), intended that title VII be the sole federal remedy for discrimination in employment. The debate on the motion to delete section 711, however, seems to indicate that the president's authority to promulgate executive orders obligating government contractors to provide equal employment opportunity was in no way affected or modified by title VII.⁶⁵ Furthermore, the Senate defeated an amendment by Senator Tower of Texas that *would* have made title VII the exclusive federal remedy for employment

Although both of these cases involved actions by state governments, the same theory is applicable to the federal government since the Supreme Court has held that discrimination violating the equal protection clause of the fourteenth amendment also violates the due process clause of the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). This theory was accepted and applied to the federal government by a federal district court. *See Todd v. Joint Apprenticeship Comm.*, 223 F. Supp. 12, 22 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir.), *cert. denied*, 380 U.S. 914 (1964). In summary, the executive branch, according to this theory, is not only authorized but also has an obligation to require that employers with whom it contracts not practice or participate in the practice of employment discrimination.

63 For a discussion of the doctrine of implied repeal with respect to title VII see Note, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 621-24 (1969).

64 H.R. 7152, 88th Cong., 1st Sess. § 711 (1964) provided:

(a) the President is authorized and directed to take such action as may be necessary to provide protections within the Federal establishment to insure equal employment opportunities for Federal employees in accordance with the policies of this title.

(b) The President is authorized to take such action as may be appropriate to prevent the committing or continuing of an unlawful employment practice by a person in connection with the performance of a contract with an agency or instrumentality of the United States.

65 Mr. POFF, Mr. Chairman, it is altogether true, as the gentleman from Louisiana has just said, that he has fostered this amendment from the very beginning.

May I add, and I am sure he will agree, I arrived at exactly the same conclusion separately and independently. I intended to offer precisely this same amendment. I consider it an important and substantive amendment.

Parenthetically, however, let me also add that my chief concern, and I believe the chief concern of the gentleman from Louisiana, was with section 711(b) rather than section 711(a).

Unquestionably, present law now guarantees those things to which section 711(a) addresses itself.

I add further the adoption of this amendment and the striking out of this language from the bill would in nowise affect substantive law as it is written on the books today.

Mr. CELLER. And will the gentleman not also say that the deletion of the language by the amendment does not have any effect upon existing Presidential power?

Mr. POFF. Of course, the striking of language from a bill could not in any way impair existing law.

Mr. CELLER. And it does not limit it and it does not broaden it. It remains intact as it is now.

Mr. POFF. That is true.

Mr. Chairman, I join in support of this amendment. 110 CONG. REC. 2574-75 (1964).

In the Senate, the Clark-Case memorandum in support of title VII stated:

Title VII, in its present form, has no effect on the responsibilities of the committee or on the authority possessed by the President or Federal agencies under existing law to deal with racial discrimination in the areas of Federal Government employment and Federal contracts. 110 CONG. REC. 7215 (1964).

discrimination.⁶⁶ The debate, which contained numerous references to Executive Order 10925, reveals that the primary object of the defeated amendment was to oust presidential authority and action in this field.⁶⁷

Title VII also contains numerous references to the presidential fair employment practices program and to Executive Order 10925 in particular. Section 709(d) provides, in part, that where an employer

is required by Executive Order 10925 . . . or by any other Executive order prescribing fair employment practices for Government contractors and sub-contractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee . . . the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.⁶⁸

Section 716(c) specifically named the President's Committee on Equal Employment Opportunity as one of the agencies invited to participate in conferences to be held for the purpose of familiarizing groups affected by the new Act with its rights and obligations.⁶⁹ These references in the Civil Rights Act preclude an interpretation that Congress intended to make title VII the exclusive federal remedy for employment discrimination,⁷⁰ a view implicitly supported by the numerous cases that have upheld the executive orders.⁷¹

66 Senator Tower's amendment provided:

Beginning on the effective date of sections 703, 704, 706, and 707 of this title, as provided in section 716, the provisions of this title shall constitute the exclusive means whereby any department, agency, or instrumentality in the executive branch of the Government, or any independent agency of the United States, may grant or seek relief from, or pursue any remedy with respect to, any employment practice of any employer, employment agency, labor organization, or joint labor-management committee covered by this title, if such employment practice may be the subject of a charge or complaint filed under this title. 110 CONG. REC. 13650 (1964).

67 See *id.* at 13650-52.

68 Civil Rights Act of 1964 § 709(d), 42 U.S.C. § 2000e-8(d) (1964). This subsection was added by the Dirksen-Mansfield substitute bill. See 110 CONG. REC. 12820 (1964) where Senator Dirksen explains this change and recognizes the continuing vitality of Executive Order 10925.

69 Civil Rights Act of 1964 § 716(c), 42 U.S.C. § 2000e-15 (1964).

70 Cf. *Rubber Workers Local 12 v. NLRB*, 368 F.2d 12, 24 n.24 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

71 Opponents of the Plan also point to the case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) as authority for the proposition that the president cannot, through the issuance of an executive order, take over the functions of Congress. See, e.g., Remmert, *Executive Order 11,246: Executive Encroachment*, 55 A.B.A.J. 1037 (1969); 1969 *Hearings* 230. In the *Youngstown* case, President Truman had issued an executive order seizing the steel mills during the Korean conflict to effect a wage increase and to keep the steel furnaces in production. The Supreme Court held that the order was an unconstitutional usurpation of legislative power since Congress had, in 1947, explicitly rejected legislation giving the president the power to make such seizures in times of national emergency. But that case would not seem to control the president's power to issue Executive Order 11246 since Congress, in enacting title VII, expressly approved the then-existing executive order program (under Executive Order 10925). Moreover, the issue in the *Youngstown* case was the existence of an inherent power under the Constitution for the executive to seize private property in a labor dispute, whereas the power of the government to contract on its own terms has already been established by the Supreme Court as emanating from Article II of the Constitution. Finally, in *Youngstown*, the statute before Congress involved a proposed grant of power to the president, the rejection of which precluded his subsequent exercise of that power, while in title VII the fact that the Act did not require that employers take affirmative action to correct past abuses was for the purpose of defining the scope of title VII, without limiting independent action apart from the statute. See Note, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. REV. 590, 600 (1969).

If *Youngstown* is read broadly to stand for the proposition that the president's power to

IV. The Philadelphia Plan and "Reverse" Discrimination

A. Quota Hiring

The main thrust of the arguments of the opponents of the Philadelphia Plan is that the Plan violates the antidiscrimination clauses of title VII of the Civil Rights Act of 1964. Section 703(a) of title VII states the public policy concerning employment practices by declaring it to be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or [sic] employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁷²

The public policy regarding labor organization practices is delineated in section 703(c), which provides that it shall be an unlawful employment practice for a labor organization:

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.⁷³

Opponents of the Plan contend that it violates the above sections of title VII in that it requires contractors to make race a factor for consideration in hiring.⁷⁴ Opponents also maintain that the Plan, in requiring an employer to abandon his customary practice of hiring through a union because of a racial imbalance in the local's membership, and by forcing the contractor to make "every good faith effort" to employ the designated range of minority group members from outside sources, violates section 703(j) of the Act, commonly known as the antiquota provision.⁷⁵ Section 703(j) provides as follows:

issue an executive order must stem from either an act of Congress or from the Constitution itself, Executive Order 11246 would still be valid because of the *Lasker Steel* interpretation of Article II, the possible duty to insure equal employment opportunity under the fifth amendment, and the procurement statute's grant of power to the president to implement rules under which the government will contract.

⁷² Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1964).

⁷³ *Id.* § 703(c), 42 U.S.C. § 2000e-2(c).

⁷⁴ *E.g.*, 49 COMP. GEN. — (Aug. 5, 1969) (B-163026).

⁷⁵ *Id.*

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.⁷⁶

It should be first observed that the language of section 703(j) is not prohibitory in nature; rather, the section speaks in terms of what is *not* required by title VII. This phraseology has been the subject of much debate, and the legislative history does not make the intention of Congress perfectly clear. Apparently, the section was designed to remove any doubt that title VII was to be given retroactive treatment or that quota hiring of minority-group members or preferential treatment for a minority group was required in order for an employer to be in compliance with title VII.⁷⁷ The section, it has been held, does not add or detract from the probative force that evidence of racial imbalance may have in a given case, nor does it preclude a court or the EEOC from looking at past discrimination to see whether an employer is perpetuating a pattern of discrimination through other means.⁷⁸ A fortiori, it would not seem to preclude the use of other federal measures, such as executive orders, to eliminate racial discrimination in employment.

Although section 703(j) would thus appear to be a mere clarifying provision effecting no change with respect to preferential treatment of minority-group members, the legislative history of title VII does indicate that "any deliberate attempt to maintain a racial balance, whatever such a balance may be,"⁷⁹ or to grant preferential treatment to unqualified or subqualified minority-group members,⁸⁰ or to discharge present white employees or to employ unneeded additional employees in order to achieve a racial balance⁸¹ would violate section 703(a). Section 703(a), however, does not outlaw the affirmative action

76 Civil Rights Act of 1964 § 703(j), 42 U.S.C. § 2000e-2(j) (1964).

77 A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning. 110 CONG. REC. 12723 (1964) (remarks of Senator Humphrey). *See also* *id.* at 9881-82 (remarks of Senator Allott); *id.* at 8921 (remarks of Senator Williams); *id.* at 7206 (letter of Walter Reuther).

78 *Heat & Frost Insulators Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States v. Papermakers Local 189*, 282 F. Supp. 39 (E.D. La. 1968); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

79 110 CONG. REC. 7213 (1964) (Clark-Case memorandum).

80 *Id.*

81 *Id.* at 14331 (remarks of Senator Williams).

program under Executive Order 11246. The validity of that program is established, as noted above, by the references in the Civil Rights Act to the earlier executive order and by several decisions in the federal courts.

It is difficult to distinguish between those acts prohibited by section 703(a) and those validly required by the affirmative action program of the Executive Order.⁸² It seems to be generally agreed that quota hiring violates section 703(a)⁸³ while publicity campaigns aimed at interesting and informing potential Negro applicants of available job opportunities do not.⁸⁴ It is difficult to determine, however, whether the Philadelphia Plan falls within either of these two categories.

The Comptroller General contends that the Plan constitutes illegal quota hiring in that contractors are required to obtain a certain percentage of minority-group craftsmen for each work complement and that such hiring constitutes "reverse" discrimination in that employment opportunity for nonminority-group members would be prejudiced by such a policy.⁸⁵ The government, on the other hand, while apparently not disputing that quota hiring is illegal, denies that the Philadelphia Plan requires quota hiring. The "ranges" within which the contractor must set his goals in his bid are, according to the government, concrete standards designed to give specificity to the Executive Order's requirement of affirmative action.⁸⁶ Such standards differ from quotas in that the failure to meet the required numbers or percentages does not, in itself, constitute noncompliance with the Executive Order or the contract stipulation. The contractor need only show that he has made a good faith effort to meet his goals; if he has made such a good faith effort, as defined in section 8 of the September Order, he is in compliance with the contract stipulation. In other words, the Plan merely establishes "ranges" to show what is expected of a typical contractor in the Philadelphia area — given the number of qualified minority-group tradesmen in the area — who is making a good faith effort to put an end to employment discrimination on his projects. When the contractor falls short of expectations, this merely shifts onto him the burden of going forward to show his own good faith, i.e., he must explain why he did not employ as many minority workers as he agreed to employ when such a number was available in the labor market. The burden of proving noncompliance, of course, would remain with the government.⁸⁷ In light of the September Order's definition of good faith, the Plan could be viewed in its most favorable light as a mere requirement that contractors attempt to broaden their recruitment bases and keep records of minority-group members who apply for jobs with reasons for not hiring those who are rejected.

82 One commentator has suggested that "[n]o language in the statute prevents someone from being hired because of his race; the statute merely makes it illegal to refuse to hire because of his race." Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. IND. & COMM. L. REV. 473, 491 (1966). According to this view, correcting racial imbalance is permissible so long as qualified whites are not refused employment.

83 See, e.g., 110 CONG. REC. 7218 (1964).

84 E.g., Note, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. REV. 590, 598 (1969).

85 49 COMP. GEN. — (Aug. 5, 1969) (B-163026).

86 See note 15 *supra*.

87 See 1969 *Hearings* 109 (remarks of Jerris Leonard); 115 CONG. REC. S17147 (daily ed. Dec. 18, 1969) (remarks of Senator Javits).

The government also contends that there is no inconsistency between the Plan's requiring a contractor to make a good faith effort to meet his goals and title VII's proscription against "reverse" discrimination. This is because the September Order's "ranges," and hence the contractor's goals, are based on *new job openings* in the industry and can be reached without denying jobs to presently enrolled white union members or firing men already on the job.⁸⁸ Clearly, the Plan does not require that unqualified Negro applicants be hired in preference to qualified white applicants in order that the contractor's goals be met. Rather, the converse is true; such conduct on the part of a contractor would violate section 6(b)(2) of the Plan, which provides that "the contractor's commitment to specific goals . . . shall not be used to discriminate against any qualified applicant or employee."⁸⁹

A more vexing problem remains: What if the Negro and white applicants are equally qualified, but there are not enough jobs for all qualified applicants? Administration spokesmen say that where this is the case the contractor is not to prefer the Negro workers over the white workers; he has met his good faith obligation if he merely keeps a record of why he hired the workers he did, e.g., first-come, first-served.⁹⁰ But this statement is open to the criticism that the overall psychological effect of the Plan, when coupled with section 8(a)'s presumption of compliance with the affirmative action program when the goals are being met by the contractor, will be to force contractors to give preferential treatment to minority-group applicants. The government's answer to this is that the September Order's definition of good faith should be sufficient to guarantee that contractors do not violate title VII or section 6(b)(2) of the Plan.⁹¹ The obligation of the contractor is only to broaden his recruitment base and not to discriminate against any worker. But whether a contractor will be willing to rely on his ability to establish the good faith defense (rather than simply preferring minority-group tradesmen over equally qualified white workers) remains problematic.

B. "Color-blind" Hiring Policies

The basic presupposition underlying the department's promulgation of the Philadelphia Plan is that an employer may, without contravening section 703(a) of the Civil Rights Act, use race as a determinative factor in his decision to hire workers,⁹² i.e., title VII does not require an employer to maintain a "color-blind" hiring policy. Those cases that have upheld the validity of the executive orders' affirmative action programs, e.g., recruiting and training minority-group members, would seem to indicate that the race of an applicant need not be ignored. One such program specifically upheld is the Cleveland Plan, which, like the Philadelphia Plan, was issued under the authority of Executive Order 11246. Under this plan each contractor was required to submit in his bid a "manning

88 September 23, 1969, Order § 3.

89 June 27, 1969, Order § 6(b)(2). See 1969 Hearings 268.

90 1969 Hearings 49-50.

91 *Id.* at 95.

92 The Department of Labor readily admits this fact. See *id.* at 129, 134, 136.

table" — a list of the proposed total number of tradesmen for the job and the number of Negroes intended to be employed for that job.

In *Weiner v. Cuyahoga Community College District*,⁹³ the United States Supreme Court left standing a decision of the Supreme Court of Ohio upholding the Cleveland Plan. In that case, a local college district invited bids for a construction contract financed, in part, by the federal government. The apparent low bidder on the contract had submitted a manning table in his bid, but the table stipulated that it was "subject to availability and referral to Reliance Mechanical Contractors, Inc., of qualified journeymen and apprentices from Pipefitter's Local No. 120." This bid was rejected as nonresponsive, and the contract was awarded to a construction firm that guaranteed sufficient Negroes on the project. The Supreme Court of Ohio upheld the award to the second contractor, stating that the government could require a contractor to unequivocally assure equal employment opportunity.⁹⁴

Race has also been viewed by the courts as a valid consideration in fashioning a remedy to correct present discriminatory consequences of past discrimination.⁹⁵ In *Heat & Frost Insulators Local 53 v. Vogler*,⁹⁶ the Fifth Circuit held that a union rule requiring applicants to obtain written recommendations from three union members and requiring approval by a majority vote of the members was a discriminatory practice in violation of title VII. In attempting to remedy the present effects of this discriminatory rule, the district court ordered the union to alternately refer Negroes and whites for work, and this order was affirmed by the Fifth Circuit. In *Quarles v. Philip Morris, Inc.*,⁹⁷ the Negro employees of a factory, which had maintained segregated departments prior to the passage of title VII, sued their employer on the grounds that the former discriminatory practice had been perpetuated by the factory's seniority system, which was based on time worked in a department. The district court held the departmental seniority system to be discriminatory and ordered the employer to permit Negroes to transfer to formerly segregated departments with their employment seniority intact.⁹⁸

Similar results have been reached in the fields of education, housing,⁹⁹ and voting.¹⁰⁰ In the area of school desegregation, for example, the Supreme

93 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970).

94 *Id.* at 40, 249 N.E.2d at 911.

95 Under title VII there is an important distinction between taking corrective measures to redress past discriminatory practices (which action is not required by the title) and the use of past practices as evidence that present practices, seemingly innocent, are in fact discriminatory.

96 407 F.2d 1047 (5th Cir. 1969).

97 279 F. Supp. 505 (E.D. Va. 1968).

98 A similar result was reached by another district court sitting in Louisiana. *United States v. Papermakers Local 189*, 282 F. Supp. 39 (E.D. La. 1968).

Courts have permitted bona fide business policies which have the effect of continuing the inequities of past discriminatory practices. In *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (M.D.N.C. 1968), a federal district court upheld a company policy, put into effect in 1958, requiring that workers in all departments but one have high-school diplomas. Negro plaintiffs complained that white employees hired before 1958 in these formerly all-white departments did not have diplomas. The court admitted that it could look to the time prior to the effective date of the Act to determine whether present practices were discriminatory, but held that, on this fact pattern, there was no discrimination. *See also* *Dobbins v. Electrical Workers Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968).

99 *See, e.g.*, *Gautreaux v. Chicago Housing Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969).

100 *See, e.g.*, *Louisiana v. United States*, 380 U.S. 145 (1965).

Court has approved the use of racial percentages. In *United States v. Montgomery County Board of Education*,¹⁰¹ a unanimous Court upheld a district court's order that a school board "move toward a goal under which 'in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system.'"¹⁰² The court of appeals had modified this part of the order because it required a fixed mathematical ratio.¹⁰³ The Supreme Court acknowledged that the argument against the order might be troublesome if the order were rigid and inflexible, but the Court declined to read it so. And in *United States v. School District No. 151*,¹⁰⁴ the Seventh Circuit upheld an order allowing the bussing of both white and Negro pupils saying "[t]his is not done to achieve racial balance, although that may be a result, but to counteract the legacy left by the [school] Board's history of discrimination."¹⁰⁵

The Fifth Circuit expressed the rationale for using racial considerations in remedying past discrimination thus:

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.¹⁰⁶

In the latter sense, the court went on, a court "cannot measure good faith or progress without taking race into account."¹⁰⁷

It is argued that this rationale cannot sustain the Philadelphia Plan since the remedies in the school cases were fashioned only after a judicial determination that the defendants were engaged in a pattern of discrimination. This argument, however, ignores the presidential order as a separate source of law. The Department of Labor points out that the Plan was promulgated after an administrative finding that the construction industry in the Philadelphia area was engaged in practices perpetuating past discrimination in the industry.¹⁰⁸ The department

101 395 U.S. 225 (1969).

102 *Id.* at 232.

103 *Montgomery County Bd. of Educ. v. Carr*, 400 F.2d 1 (5th Cir. 1968), *rev'd sub nom.* *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969).

104 404 F.2d 1125 (7th Cir. 1968).

105 *Id.* at 1130.

106 *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966). *See also* *Norwalk CORE v. Norwalk Redevel. Agency*, 395 F.2d 920 (2d Cir. 1968).

107 372 F.2d at 877. It may be asserted that this approach is inapplicable to the Philadelphia Plan because section 703(j) of the Civil Rights Act prohibits using race as a basis for hiring in order to remedy past discrimination. But, as noted earlier, section 703(j)'s language is not prohibitory. Moreover, the Fifth Circuit in *Jefferson County*, construing a similar provision in title IV, held that it may not be interpreted to mean that conduct to overcome a racial imbalance is illegal, only that such conduct is not required by title IV. The section interpreted by the *Jefferson County* court provides:

"Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance. Civil Rights Act of 1964 § 401(b), 42 U.S.C. §

2000c(b) (1964).

108 The Comptroller General contends that the Plan, unlike the court cases cited above, in attempting to cure the evils resulting from union actions, makes no specific reference to any past or existing actions or practices by the contractors. 49 COMP. GEN. — (Aug. 5, 1969) (B-163026). The Comptroller's characterization of the Plan is not entirely accurate. The

has, under the authority of the Executive Order, in effect adjudged the entire construction industry to be engaged in a pattern of discriminatory practices and has therefore required every contractor who wishes to enter into a contract with the government to take affirmative action to put an end to racial discrimination in selected trades.

It has also been contended that even though race may be used as a factor in desegregating a school district or in rearranging an employer's seniority system, it should not be used as a basis for increasing the percentage of Negroes on a job. The reason for this distinction, the argument goes, is that the enforcement of the rights of minority individuals in the former case does not deprive any member of a majority group of his right to an education or to plant-wide seniority, whereas the hiring of a minority-group member, as one of a job complement limited by the employer's needs, necessarily precludes employment for a member of the majority group. The short answer to this is that the Philadelphia Plan does not require — indeed does not permit — the hiring of a minority-group member in preference to an equally qualified majority-group member on the basis of race. The Plan seeks only to force employers to recruit qualified minority group applicants both within and without the craft unions and to do away with any criteria that tend to perpetuate the past discrimination against minority group members, e.g., hiring workers with the most experience when minority group members were previously unable to get work. In the long run, no worker, white or black, would be prejudiced since the goals are set to reflect the percentage of qualified minority-group members in the trades and are not binding on a contractor as to a particular job. Moreover, at least one court has set goals requiring the employment of a certain percentage of Negroes when the lack of Negroes on the job is due to past discriminatory practices.¹⁰⁹

V. The Philadelphia Plan and Competitive Bidding

Another related question is whether the Plan violates the principles of the competitive bidding process for federal and federally assisted construction contracts. Overriding all federal appropriations is the congressional mandate that “[e]xcept as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.”¹¹⁰ The Federal Property and Administrative Service Act requires that, where appropriate, expenditures be made and contracts awarded on the basis of competitive bidding.¹¹¹ In interpreting these provisions, the rule has generally been applied that

contract stipulations tending to restrict competition and to increase the cost

government clearly contends that both unions, in not admitting or referring minority-group members, and contractors, in not broadening their effective recruiting bases, are engaged in discriminatory practices, and the Plan is designed to prevent any buck-passing between the two groups.

What is different about the Plan, however, is that it makes its judgment with reference to the industry at large and not with reference to individual contractors.

¹⁰⁹ Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

¹¹⁰ 31 U.S.C. § 628 (1964).

¹¹¹ Federal Property and Administrative Services Act of 1949 §§ 2, 303, 40 U.S.C. § 471, 41 U.S.C. § 253 (1964).

of performance — and thereby the charges against the contract appropriations — are unauthorized unless reasonably requisite to the accomplishment of the legislative purposes of the contract appropriation, or unless such stipulations are expressly authorized by statute, and where the Congress has legislated on the subject it is not open to administrative discretion to stipulate contract conditions beyond or at variance with those directed by statute.¹¹²

Opponents of the Plan contend the required inclusion in government contracts of the Philadelphia Plan stipulation is invalid since the Plan's requirements are not reasonably requisite to the accomplishment of the legislative purposes of the contract appropriation and would tend to increase the cost of performance.¹¹³

There are several answers to this position. First, two federal courts of appeal have held, with respect to the procurement of government supplies, that the executive orders' antidiscrimination provisions are not "so unrelated to the establishment of 'an economical and efficient system for * * * the procurement and supply' of property and services, 40 U.S.C.A. § 471, that the order should be treated as issued without statutory authority."¹¹⁴ An analogous argument could be made with respect to public construction contracts. Second, Congress can be viewed as having sanctioned such nondiscrimination clauses under the executive authority by the references in title VII to that program. Finally, it may be contended that the required inclusion of such clauses in government contracts would not necessarily raise the cost of construction.¹¹⁵ As the Supreme Court of Ohio stated:

It may be argued that requiring public contractors to take affirmative action to forestall discriminatory employment practices in the performance of their contracts will tend to raise the cost of such contracts. Increased costs impair another governmental interest, that of economy. It must be noted, however, that neither state nor federal contracts are secured only to the lowest bidder, but to the lowest *and best* bidder (Section 3354.16, [Ohio] Revised Code) and lowest *responsible* bidder (Section 112[b], Title 23, U.S. Code). Moreover, the alternative of securing a like degree of compliance with equal employment opportunity laws by means of public prosecutions and administrative proceedings is also costly and, in addition, is both *post hoc* and punitive. Indeed, it might reasonably be supposed that the governmental objectives of equal employment opportunity and low-cost public construction would be better served by requiring public contractors to undertake affirmative duties in practicing nondiscrimination in their dealings with and through others in the performance of the contract, thereby denying the benefits of public contract expenditures to those who would discriminate.

... We conclude that the capacity to assure a performance which complies with antidiscrimination laws is reasonably a part of the standard of

112 18 COMP. GEN. 295 (1938); see 49 COMP. GEN. — (Aug. 5, 1969) (B-163026); 42 COMP. GEN. 2 (1962).

113 *E.g.*, 1969 Hearings 229. The Comptroller General also raised this issue but did not reach a decision on it. 49 COMP. GEN. — (Aug. 5, 1969) (B-163026).

114 *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 7-8 (3d Cir. 1964).

115 In the long run, the inclusion of nondiscrimination clauses in government contracts may lower the costs of construction since, under one economic theory, an employer who hires only members of one race, religion, or color is limiting his source of supply and will generally have to pay higher prices than an employer who does not discriminate — a higher price which will be borne by the government. *Cf. M. FRIEDMAN, CAPITALISM AND FREEDOM* 111-17 (1962).

a best or responsible bidder on a contract involving the expenditure of public funds.¹¹⁶

VI. Conclusion

The Philadelphia Plan plays a significant role in the emerging national policy of this past decade to provide equal employment opportunity to all workers. Its legality has already been sustained by one district court¹¹⁷ and this decision is likely to stand on appeal.

How effective will the Plan be? First of all, the Plan is not, it must be noted, a panacea for employment discrimination. Its application is limited to federal construction contracts,¹¹⁸ although it could be later extended to all federal contracts if it proves successful in the construction industry. Moreover, only blue-collar jobs are affected by the Plan, although this too could be changed if the Plan is broadened to apply to all federal contracts, including large defense plants. Third, it only helps those who are presently skilled or who will be trained in the immediate future; the most disadvantaged minority-group members will not be directly affected by the Plan.

Still the Plan is a promising beginning.¹¹⁹ No longer will an employer in the construction industry safely feel that he has fulfilled his affirmative action obligations merely by posting a sign on the job premises that he is an "equal employment opportunity employer" or by advertising to that effect in the local newspaper. If he wants to obtain, and keep, a government contract, he will be forced to *actively* recruit nonwhite workers. There will surely be psychological pressure on an employer to "play it safe" by hiring qualified nonwhites over equally qualified white workers or to hire unqualified nonwhites as extra, unneeded employees. Although this conduct on the part of an employer is apparently forbidden by the Plan, the government is not likely to scrutinize an employer's hiring policy for such a violation.

James A. Hardgrove

¹¹⁶ *Weiner v. Cuyahoga Community College Dist.*, 19 Ohio St. 2d 35, 38-39, 249 N.E.2d 907, 910 (1969), *cert. denied*, 396 U.S. 1004 (1970).

¹¹⁷ *Contractors Ass'n v. Schultz*, 3 GCH URBAN AFFAIRS REP. ¶ 18,628 (E.D. Pa. Mar. 13, 1970).

¹¹⁸ Improvement of the situation in the construction industry is an important start, however, since construction jobs are highly visible and of special significance to low-income black communities. This is especially true when the employer is (at least indirectly) the federal government, for in many cities the hiring practices of the federal contractor set the pattern for the entire community. 2 T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1889 (3d ed. 1967).

¹¹⁹ The Plan has already had an impact on areas outside of Philadelphia: witness the rash of new "agreements" between the construction industry and minority-group leaders. These accords are generally voluntary, and precatory, in nature and are designed to prevent the harsher Philadelphia Plan from being applied to the local area. For example, the "Chicago Plan" sets out, in its preamble, the pious hope that minority-group representation in the skilled trades will become proportionate to racial percentages in the community at large. Parts I and II of the Chicago Plan merely set up committees to administer it. Part III lists the following guidelines for the Chicago construction industry: immediate employment of 1,000 qualified minority-group journeymen; apprenticeship membership for those who have worked a particular craft for two years or more; recruitment programs aimed at minority-group members with no skill and no work experience; on-the-job training of others who fail the tests for apprenticeship members. AFL-CIO BUILDING & CONST. TRADES DEPT., *THE CHICAGO PLAN* (1970). These provisions are mere hopes and recommendations; no commitments are made by individual contractors or unions, and no sanctions are available if the goals are not met. Whether this plan will have any effect at all is highly questionable.