

## The Legality of the "Revised Philadelphia Plan"

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# Notes and Comments

## THE LEGALITY OF THE "REVISED PHILADELPHIA PLAN"

Now the term 'quota system' has been added to the racial jargon and it has become one of the most contentious terms in the civil rights dialectic. It has divided the ranks on the civil rights front and those who use it have even been charged with favoring discrimination.<sup>1</sup>

The Revised Philadelphia Plan,<sup>2</sup> first promulgated in a Labor Department memorandum dated June 27, 1969, and supplemented by an order dated September 23, 1969, has as its avowed purpose:

[t]o implement the provisions of Executive Order 11246, and the rules and regulations issued pursuant thereto, requiring a program of equal employment opportunity by Federal contractors and subcontractors and Federally-assisted construction contractors and subcontractors.<sup>3</sup>

Very generally, it requires that certain government contractors make at least a good-faith effort to meet definite minimum numerical standards of minority group utilization in specified trades in the Philadelphia area. While it may be technically incorrect to refer to the Revised Plan as a "quota system," it resembles one closely enough to have caused a division of opinion. The battle lines have been drawn with the unions<sup>4</sup> and Elmer Staats, Comptroller General of the United States,<sup>5</sup> opposing the Revised Plan's legality, and the Department of Labor<sup>6</sup> and the Department of Justice<sup>7</sup> supporting it. Certainly the eventual judicial resolution of the argument will influence

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1. Abrams, *Foreword* to R. CARTER, D. KENYON, P. MARCUSE, & L. MILLER, *EQUALITY* at viii (1965).

2. The current proposal is "revised" because the Comptroller rejected the original promulgation on the grounds that the plan did not include a description of the specifics of the "affirmative action" program in the solicitations for bids, so as to be incompatible with competitive bidding requirements. 23 U.S.C. 112 (1964). *See* 42 COMP. GEN. 1 (1962). *See also* 115 CONG. REC. 13,077 (daily ed. Dec. 23, 1969).

3. Order from Arthur A. Fletcher § 1, June 27, 1969, United States Dep't of Labor, 115 CONG. REC. 17,133 (daily ed. Dec. 18, 1969). [hereinafter cited as June 27 order].

4. *Washington Post*, Dec. 21, 1969, at 1, col. 3.

5. COMP. GEN. B163026 (1969). [hereinafter cited *COMPTROLLER'S OPINION*].

6. Memorandum, *Authority Under Executive Order 11246*, United States Dep't of Labor, Office of the Solicitor [hereinafter cited *Solicitor's Memorandum*].

7. \_\_\_\_ OP. ATT'Y GEN. \_\_\_\_ (1969).

the course that the civil rights movement will follow in the next few years.<sup>8</sup>

This comment will examine the legality of the Revised Philadelphia Plan in light of its alleged conflict with section 703(j), Title VII of the Civil Rights Act of 1964,<sup>9</sup> and with its alleged provision for an illegal quota system.

### I. HISTORY OF THE PLAN

On June 25, 1941, President Roosevelt, prompted by a threatened march on Washington to protest the federal government's discriminatory hiring practices,<sup>10</sup> made the first executive pronouncement regarding racial discrimination in employment. Executive Order 8,802<sup>11</sup> proclaimed:

I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin, and I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin.<sup>12</sup>

He established the Fair Employment Practices Committee (FEPC) which was empowered to investigate complaints and take appropriate steps to redress any grievances.<sup>13</sup> However, the Committee's success was limited because it did not possess any direct enforcement powers, but rather had to rely on the President to impose its recommended sanctions. As a result, the Committee concentrated on making statements of policy, and any positive results the FEPC effected were achieved through the use of public hearings and the unfavorable public opinion they necessarily evoked.<sup>14</sup>

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8. See Philadelphia Inquirer, Feb. 9, 1970, at 1, col. 6; N.Y. Times, Feb. 10, 1970, at 30, col. 4. As announced by Secretary of Labor George Shultz, the Philadelphia Plan will be extended to at least eighteen other cities unless the localities devise adequate plans to remedy discriminatory practices. In response to this announcement, Arthur Fletcher, Assistant Secretary for Wage and Labor Standards, predicted that this announcement would spur contractors and unions to develop acceptable plans: "None of them wants a Philadelphia Plan or public hearings. The option of developing their own plans gives them an escape hatch." *Id.* at col. 5.

9. Civil Rights Act of 1964 § 703(j), 42 U.S.C. § 2000e-2(j) (1964) [hereinafter cited as Civil Rights Act of 1964].

10. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION 9 (1966).

11. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

12. *Id.*

13. *Id.*

14. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION 10-12 (1966). Since the FEPC lacked significant weapons of sanction, it usually resorted to the issuance of "directives" toward the employer. The directives, to a limited extent,

Executive Order 9,346<sup>15</sup> abolished the first Committee, created a second Fair Employment Practices Committee and expanded its predecessor's concept by making the order applicable to all federal government contracts and to union membership. It also defined the scope of "discrimination" that was prohibited:

[t]o eliminate discrimination in regard to hire, tenure, terms or conditions of employment, or union membership because of race, creed, color, or national origin.<sup>16</sup>

However, like its predecessor, the new committee's efficiency was restricted by the absence of any significant weapons of sanction. Its directives were without force of law, and it was forced to rely on the President for enforcement. The committee did conduct public hearings, however, and the unfavorable publicity issuing from such against an alleged violator was often sufficient to compel compliance with the committee's directives.<sup>17</sup>

The second FEPC functioned until 1945 when it was deprived of operating funds by the Russell Amendment,<sup>18</sup> and, until December 3, 1951, no office of the government served the function of urging individual agency and employer compliance. On that date, President Truman created the Committee on Government Contract Compliance<sup>19</sup> to investigate what steps the government agencies were taking to effectuate the avowed policy of non-discrimination — at the same time, intending to leave enforcement in the hands of the individual agency heads. However, President Truman left office one year later, and his

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prophesy today's standards save for the expanded affirmative action concept of more recent orders. Typically they required employers to:

1. "Cease and desist" from [discrimination] practices;
2. Adjust its employment policies and practices so that all needed workers will be hired or upgraded without regard to race, creed, color, or national origin;
3. Extend in-plant training to all qualified employees without regard to race, creed, color, or national origin;
4. Issue formal instructions to all personnel officers and employees having authority to hire and upgrade workers, and prospective workers, solely on the basis of the qualifications of workers or applicants for employment without regard to their race, creed, color, or national origin;
5. Give formal notice to all employment agencies, public or private, through which it recruits workers or trainees, that it will accept workers for all classifications of work or training, solely on the basis of their qualifications without regard to their race, creed, color, or national origin;
6. Submit monthly statistical reports revealing the classification of newly hired employees;
7. Abrogate wherever necessary provisions of existing contracts which are repugnant to the national policy expressed in the Executive Order;
8. Submit periodic compliance reports; and
9. Eliminate all questions as to race and religion from employment application forms.

*Id.* at 11-12.

15. 8 Fed. Reg. 7183 (1943).

16. *Id.*

17. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION 14 (1966).

18. 31 U.S.C. § 696 (1964). The Russell Amendment denies federal funds to any agencies established by executive orders in existence for more than one year if Congress had not specifically appropriated funds for that particular agency.

19. Exec. Order No. 10,308, 16 Fed. Reg. 12303 (1951).

committee was superseded by the creation of Executive Order 10,479.<sup>20</sup> President Eisenhower's effort in reality did nothing more than reactivate the Truman Committee, and the new committee accepted some of the investigation's recommendations.<sup>21</sup> The new Government Contract Committee was authorized to receive complaints directly but, upon receiving them, it was empowered only to direct them to the appropriate agency. Still hampered by the lack of independent sanction powers that had plagued its predecessors, its performance was disappointing.<sup>22</sup>

On March 6, 1961, President Kennedy gave the first real impetus to the fight against discrimination in employment. Until the Kennedy Administration, the duty imposed on employers had been one only of passive non-discrimination. However, Executive Order 10,925<sup>23</sup> provided: "The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."<sup>24</sup> No longer was the employer's duty phrased negatively. He was now obligated to take positive steps to prevent discrimination. The Order established the Committee on Equal Employment Opportunity and, for the first time, the enforcement agency was provided with sufficient sanctions to compel compliance. The committee was authorized to hold public hearings and publish violators' names, to seek the Department of Justice's aid to obtain injunctions, to terminate or suspend existing contracts and, most importantly, to deny a bidder's entry into a new contract until he had complied with the provisions of the order.<sup>25</sup> Since the ultimate authority for enforcement was finally taken from the individual agency heads and placed in its logical place, the committee responded with a significantly improved program in remedying discriminatory practices.<sup>26</sup> But, fearing condemnation by the courts as an usurpation of legislative authority, it was wary in the exercise of its sanction powers.<sup>27</sup> The enactment of the Civil Rights Act of 1964 quieted these fears.

Congress had enunciated a policy of equal employment opportunity in various pieces of New Deal legislation,<sup>28</sup> but, in effect, these served only as statements of policy. Between 1946 and 1963 there were numerous attempts to introduce legislation to make such a policy binding in the form of a Fair Employment Practices Act, but very

20. Exec. Order No. 10,479, 18 Fed. Reg. 4899 (1953).

21. REPORT OF THE PRESIDENT'S COMM. ON GOVERNMENT CONTRACT COMPLIANCE, EQUAL ECONOMIC OPPORTUNITY (1953).

22. REPORT OF THE PRESIDENT'S COMM. ON GOVERNMENT CONTRACTS, FIVE YEARS OF PROGRESS (1958); SIXTH REPORT OF THE PRESIDENT'S COMM. ON GOVERNMENT CONTRACTS (1959); SEVENTH REPORT OF THE PRESIDENT'S COMM. ON GOVERNMENT CONTRACTS (1960).

23. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961).

24. *Id.* (emphasis added).

25. *Id.* at 1978.

26. REPORT ON THE PRESIDENT'S COMM'N ON EQUAL EMPLOYMENT OPPORTUNITY 4 (1963).

27. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION 113 (1966).

28. Unemployment Relief Act of 1933, ch. 17, 48 Stat. 22 (1933); National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195 (1933).

few bills were even reported out of committee. Then, on June 20, 1963, Congressman Emmanuel Celler (D., N.Y.) introduced H.R. 7152<sup>29</sup> which eventually was to be enacted into law as the Civil Rights Act of 1964.<sup>30</sup> On June 17, 1964, the Senate adopted what was generally a compromise measure; on July 2, 1964, the House adopted the Senate version, and, on the same day, President Johnson signed the bill into law.

Title VII,<sup>31</sup> one of eleven titles in the Act, specifically prohibits all discrimination on the grounds of race, color, religion, sex or national origin by an employer, employment agency or labor organization. However, these three categories are not all-inclusive because only "a person engaged in an industry affecting commerce" or the "agent of such a person" is an employer,<sup>32</sup> and only a labor organization "engaged in an industry affecting commerce, and any agent of such an organization" is a labor organization.<sup>33</sup> Generally, the Act defines the scope of unlawful employment practices,<sup>34</sup> creates the Equal Employment Opportunity Commission,<sup>35</sup> and presents remedial action available for a violation of the Act.<sup>36</sup>

29. H.R. 7152, 88th Cong., 1st Sess. (1963).

30. Civil Rights Act of 1964, 42 U.S.C. § 1971 (1964).

It is interesting to note the tremendous amount of debate and amendment that preceded passage of the Act. There were ten days of debate and eighteen amendments in the House and eighty-three days of debate and eighty-seven amendments in the Senate, consuming 534 hours, one minute and thirty-seven seconds. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 10-11.

31. Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e (1964).

32. *Id.* at § 701 (b).

33. *Id.* at § 701 (d).

These limitations have been subject to criticism because it was prophesied that when Title VII became fully effective, it would affect only eight percent of employers and only forty percent of employees. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION 65 (1966).

34. Civil Rights Act of 1964 § 703(a),(c) :

It shall 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 of 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.

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, 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 the section.

35. Civil Rights Act of 1964 § 705.

36. *Id.* at §§ 706-07. These sections generally provide that the EEOC will enforce its decisions through the use of civil suits and that the Attorney General may institute civil suits on his own behalf for noncompliance with Title VII's demands.

Executive Order 11,246,<sup>37</sup> signed by President Johnson on September 24, 1965, is a continuation of the executive branch's involvement in the area of discrimination in employment, and within its limited sphere of government employment generally and of government construction contracts specifically, would seem to be a much more powerful weapon than Title VII. Similarly to Executive Order 10,925, the Order provides: "The Contractor will take affirmative action to ensure that applicants are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include but not be limited to the following: employment . . . recruitment. . . ."<sup>38</sup>

The Order provides for various sanctions — most of which, except for those arising under Title VII, were copied directly from Executive Order 10,925.<sup>39</sup> Like its predecessor, Executive Order 11,246 did not define "affirmative action," but it did provide for the authority to make that determination: "The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations as he deems necessary and appropriate to achieve the purposes thereof."<sup>40</sup>

Pursuant to this authorization, the Secretary of Labor established the Office of Federal Contract Compliance as the agency directly responsible for the implementation of the provisions of Executive Order 11,246.<sup>41</sup> The Office of Federal Contract Compliance (OFCC) regulations<sup>42</sup> demand that each government agency, when soliciting bids, require its prospective contractors to submit written affirmative action programs.

The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity.<sup>43</sup>

## II. THE REVISED PHILADELPHIA PLAN

Once the Department of Labor, through the OFCC, had provided for the use of "specific goals and timetables," a short and logical ex-

37. Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 42 U.S.C. 2000e (Supp. IV, 1964). [hereinafter cited as Exec. Order No. 11,246]. For a detailed analysis of this order see Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. Rev. 591 (1969).

38. Exec. Order No. 11,246, § 202(1).

39. *Id.* at § 209. The Secretary of Labor or the appropriate agency may: (a) publish the names of noncomplying unions and contractors; (b) recommend to the Department of Justice the use of injunctions to compel compliance; (c) recommend to the Department of Justice or the EEOC that appropriate proceedings be instituted under Title VII; (d) recommend to the Department of Justice the bringing of criminal actions against those supplying false information; (e) cancel, suspend, or terminate existing contracts; and (f) prohibit government agencies from entering into contracts with contractors deemed not in compliance with the terms of this order.

40. Exec. Order No. 11,246, § 201.

41. Secretary's Order No. 26-65, United States Dep't of Labor, 31 Fed. Reg. 6921 (1966).

42. 41 C.F.R. § 60-1.40 (1969).

43. *Id.* at § 60-1.40(a).

tension of this rationale resulted in the promulgation of the Revised Philadelphia Plan. The first announcement of the Plan by the Department of Labor, a memorandum dated June 27, 1969,<sup>44</sup> explained the purpose, standards and functioning of the Revised Plan, and the second, an order dated September 23, 1969,<sup>45</sup> set forth the specifics of the plan's demands applicable to the Philadelphia area. The conclusions which precipitated the Revised Plan's formulation were the result of a study conducted by the OFCC in Philadelphia and its surrounding counties,<sup>46</sup> regarding the practices in seven construction trades.<sup>47</sup> The analysis revealed that, in the construction industry, employers must hire a new complement of employees for each project. Traditionally, this has been effected through the medium of union referrals. It was discovered that the unions in these particular trades claim a minutely small percentage of minority group personnel as members; the result naturally followed that a very small number of minority group members — in relation to the available work force — were ever referred for employment.<sup>48</sup>

The order provides that the only means of remedying such inequity is by "requiring bidders to commit themselves to specific goals of minority manpower utilization."<sup>49</sup> The order describes the contractor's requirement:

A bidder's affirmative action program will be acceptable if the specific goals set by the bidder meet the definite standards determined in accordance with Section 6 below.<sup>50</sup>

Such definite standards shall specify the range of minority manpower utilization expected for each of the designated trades to be used during the performance of the construction contract. To be eligible for the award of the contract, the bidder must, in the affirmative action program submitted with his bid, set specific goals of minority manpower utilization which meet the definite standard included in the invitation or other solicitation for bids. . . .<sup>51</sup>

The definite standards that are to be included in the bid are to be computed from a consideration of four factors:

44. June 27 Order.

45. Order from Arthur A. Fletcher and John L. Wilks, September 23, 1969, United States Dept. of Labor, 115 Cong. Rec. 17,135 (daily ed. Dec. 18, 1969) [hereinafter cited as September 23, Order].

46. The counties involved in the study were Bucks, Chester, Delaware, Montgomery, and Philadelphia. June 27 Order § 2.

47. The seven construction trades investigated were: iron workers, plumbers and pipefitters, steamfitters, sheet metal workers, electrical workers, roofers and waterproofers, and elevator construction workers. *Id.* at § 3.

48. June 27 Order § 4, states:

The unions in these trades still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few Negroes being referred for employment.

49. *Id.* at § 4.

50. *Id.* at § 5.

51. *Id.* at § 6(a).



- (1) The current extent of minority group participation in the trade.
- (2) The availability of minority group persons for employment in such trade.
- (3) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.
- (4) The impact of the program upon the existing labor force.<sup>52</sup>

If the contractor provides a goal within the acceptable standard and is awarded the contract, he must make a "good-faith" effort to fulfill his forecast:

In the event of failure to meet the goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. In any proceeding in which such good faith is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions.<sup>53</sup>

The Plan recognizes that many of these contractors might have collective bargaining agreements with unions which are carrying on discriminatory practices. However, it also points out that such practices are in violation of the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, and, if a contractor relies on such unions, he cannot be exonerated for failing to meet his contractual requirements.<sup>54</sup>

The demands upon the contractor are carefully restricted to avoid the obvious criticism of "reverse discrimination": "The purpose of the contractor's commitment to specific goals is to meet the contractor's affirmative action obligations and is not intended and shall not be used to discriminate against any qualified applicant or employee."<sup>55</sup>

The Department of Labor conducted hearings in Philadelphia on August 26, 27 and 29, 1969, in order to translate the four standards into numerical terms.<sup>56</sup> Concerning the factor of current minority

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52. *Id.* at § 6(c).

53. *Id.* at § 8 (a). For an explanation of how the plan is to be administered within the framework of "good-faith effort," see 115 CONG. REC. 17,135 (daily ed. Dec. 18, 1969).

54. June 27 Order § 8(b).

55. *Id.* at § 6(b)(2).

56. On February 3, 1970, the Department of Labor issued Order No. 4, extending the scope and applicability of the affirmative action concept to the area of non-construction contracts. Basically, this affirmative action program requires: (1) an analysis of the job categories with explanation if minority groups are currently "underutilized" ("underutilization" is defined as having fewer minorities in a particular job category than would reasonably be expected by their availability); and (2) specific goals and timetables if deficiencies exist; if such are not provided, the

group participation in the trade, the investigation, the findings of which are included in the order of September 23, 1969, revealed that the construction industry in the Philadelphia area has a minority group representation of thirty percent. However, the representation in the skilled labor trades dwindles to twelve percent, and, in the six trades in particular,<sup>57</sup> the representation evaporates to approximately one percent. Regarding the criteria of the availability of minorities for employment in these areas and the need for vocational training, it was also disclosed that the non-white unemployment rate was twice that of the white rate, that between 1,200 and 1,400 trained and/or experienced minority craftsmen are available for employment in these trades and that between 5,000 and 8,000 prospective minority craftsmen would begin training if there were assurance of the availability of employment.<sup>58</sup> Consideration of the last factor — the impact of the program upon the existing labor force — determined that in each trade there would be an annual vacancy rate of approximately ten percent.<sup>59</sup>

An interpretation of these factors resulted in the prescribing of a range of acceptable standards for the employment of minority group members by contractors of federally involved construction projects. Since the average federal project lasts between two and four years, standards were provided for the next four years.<sup>60</sup> Generally, the lower levels on the first year of the Plan are approximately four percent while the upper levels at the fourth year are approximately 24 percent. The increase is gradual and, in view of the ten percent attrition rate

contractor must in written detail explain his lack of a goal in light of certain factors provided in the order. 38 U.S.L.W. 2447 (Feb. 3, 1970).

This differs from the Philadelphia Plan in that the goals or timetables are not set by the contracting agency, and, in fact, it would seem that submission to numerical standards is not an absolute prerequisite to the awarding of a contract.

57. The Department of Labor has since concluded that there is adequate minority group representation in the trade denoted "roofers and waterproofers." September 23 Order § 2.

58. Although these statistics demonstrate the present effect of past discriminatory practices in the construction trades, because the Department of Labor has failed to include a statistical analysis of the availability of white craftsmen or prospective craftsmen for comparison, there is no indication of what effect the plan would have upon the future racial balance in these trades.

59. September 23 Order § 3. This ten percent figure was reached by adding the proposed growth rate (2.5%) to the calculated attrition rate (7.5%). This figure takes on significance when the minimum standards are set in each trade. Generally, for the first year, the lower levels of the plan demand either four or five percent minority group participation in each trade. Since the attrition rate is ten percent, "the lower range figure may be met by filling vacancies and new jobs approximately on the basis of one minority craftsman for each non-minority craftsman." *Id.* at § 3 (f).

60. *Id.* at § 4. The following ranges were established as standards for minority manpower utilization for each trade for four years:

Range of Minority Group Employment  
(Percent)

Trade	Until Dec. 31, 1970	Until Dec. 31, 1971	Until Dec. 31, 1972	Until Dec. 31, 1973
Ironworkers	5-9	11-15	16-20	22-26
Plumbers & 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

*Id.*

in each trade, seems to be based on a system which will alternate hiring blacks and whites for the entire extent of the Plan.<sup>61</sup>

### III. THE LEGALITY OF THE PLAN

#### A. *Conflict with Section 703(j)*

The first criticism that has been leveled at the Revised Plan's legality is its alleged conflict with section 703(j) of Title VII of the Civil Rights Act of 1964.<sup>62</sup> This section provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this sub-chapter 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 any employer, referred or classified for employment by any 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.*<sup>63</sup>

This provision, an addition of the Dirksen-Mansfield compromise based on Senator Allott's (R., Colo.) amendment,<sup>64</sup> was formulated to silence objections that Title VII would compel employers to maintain some form of racial balance in their work force.

In comparing the language of section 703(j) with the provisions of the Revised Plan it must be remembered that the Plan's numerical standards are determined by a consideration of four factors: the current extent of minority group participation in the trade; the availability of minority group persons for employment in such trades; the need for vocational training programs; and the effect of such a plan

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61. See note 56 *supra*.

62. COMPTROLLER'S OPINION 7-8.

63. 42 U.S.C. 2000e-2 (j) (1964) (emphasis added).

64. Amendment No. 568, 110 CONG. REC. 9881-82 (1964). The amendment provided:

The court shall not find, in any civil action brought under this title, that the respondent has engaged in or is engaging in an unlawful employment practice charged in the complaint solely on the basis of evidence that an imbalance exists with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency, 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, without supporting evidence of another nature that the respondent has engaged in or is engaging in such practice.

on the existing labor force. Although the Plan affords no indication of the relative importance of these four criteria it may be reasonably inferred that, by virtue of the first two, significant weight must be given to a comparison of current minority group participation and the size of the relevant available minority group work force. Section 703(j) in essence requires that no employer be obligated to grant preferential treatment to a group, because of that group's race, *on account of an imbalance which may already exist in his employ in comparison with the number of such group in the area or in the available work force.* It would appear then that a literal construction of section 703(j) would definitely preclude consideration of the first two criteria.

The Solicitor of Labor in a memorandum supporting the legality of the Plan assumes, without admitting, that the Plan does require the proscribed "preferential treatment." His refusal to make such an admission is compelled by the fact that the plan, on its face, purports to prohibit discriminatory practices against any qualified applicant.<sup>65</sup> However as discussed below, a degree of preferential treatment may be implicit in the effective operation of the plan.<sup>66</sup> He argues that section 703(j) prohibits only preferential treatment which is "on account" of racial imbalance and that because the Plan's minority group participation requirements are "on account" of *discrimination*, not *racial imbalance* they do not fall within the act's proscription.<sup>67</sup>

This argument, of course, rests upon the premise that the terms racial imbalance and discrimination denote distinct and mutually exclusive concepts. If this premise is not accepted, the solicitor's contentions must fail. It may be tenably argued that the term racial imbalance as used in section 703(j) is a general term denoting simply an unacceptably low ratio of minority group employment to minority group availability. Such ratio may result from a variety of causal factors one of which may have been a sustained pattern of racial discrimination. Thus it would seem that the drafters of section 703(j) intended merely that no employer be required to hire minority group employees solely because of an existing racial imbalance, regardless of the cause of that imbalance.

Some support for this interpretation may be found in the legislative history of Title VII. Illustrative is an interpretive memorandum submitted by Senators Clark (D., Pa.) and Case (R., N.J.), the floor managers of the bill:

There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority in

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65. See note 55 *supra* and accompanying text.

66. See Section IV *infra*.

67. Solicitor's Memorandum 36.

the work force may be a relevant factor in determining whether in a given case the decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.<sup>68</sup>

In order to avoid this conflict with section 703(j) the Solicitor has offered two additional arguments: first, that because Executive Order 11,246, pursuant to which the Revised Plan was issued, does not contain a section parallel to section 703(j), such restriction on affirmative action is not applicable to the plan;<sup>69</sup> and second, that Congress has sanctioned the concept of affirmative action in both Executive Order 11,246 and in the formation of the OFCC.<sup>70</sup> As to the first argument it must be noted that even if the inapplicability of section 703(j) to Executive Order 11,246 and its progeny is accepted, the Solicitor would still have to overcome certain language in the order itself: "The contractor will take affirmative action to ensure that applicants are employed. . . *without regard to their race, creed, color, or national origin.*"<sup>71</sup> While this provision may not accurately be called a precise parallel to section 703(j) it does seem to convey an idea so similar to the historical interpretation of that section that it would appear to raise the same restriction on affirmative action.<sup>72</sup>

The Solicitor's second argument, that Congress has sanctioned the affirmative action concept in both Executive Order 11,246 and in the formation of the OFCC is more meritorious. The concept of affirmative action had been promulgated when Title VII was first introduced.<sup>73</sup> Thus the bill's explicit recognition of Executive Order 10,925 (which first enunciated the affirmative action concept) as a concurrent means of regulation in the area of discrimination in employment in its text<sup>74</sup> and in its legislative history<sup>75</sup> operated, in effect, as a sanction of the affirmative action concept. The Solicitor carries this reasoning one step further to conclude that this sanction should now extend to

68. 110 CONG. REC. 7213 (1964). Senator Humphrey's (D., Minn.) views are in accord:

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 703(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. *Id.* at 12,722.

See also 110 CONG. REC. 8921 (1964) (remarks of Senator Williams).

69. Solicitor's Memorandum 36.

70. *Id.* at 8-23.

71. Exec. Order No. 11,246 § 202(1) (emphasis added).

72. As he interprets § 703(j), the Solicitor notes:

"This section forbids finding an employer or union in violation of Title VII solely because the racial composition of its work force or membership does not mirror the ratio that a given minority group bears to the general population in a given geographical area."

Solicitor's Memorandum 37. This, however, would seem to be an interpretation of the original amendment on which § 703(j) was based. See note 62 *supra*.

73. See note 22 *supra* and accompanying text.

74. Civil Rights Act of 1964 § 709(d).

75. 110 CONG. REC. 2706-08, 7212-15, 13650-52 (1964).

Executive Order 11,246 and to the OFCC, which was formed pursuant to the Executive Order and to which Congress has appropriated funds.<sup>76</sup> This conclusion appears sound; however, on one occasion congressional debate did appear to evidence dissatisfaction with the Labor Department's interpretation of congressional intent.

Since the passage of the Civil Rights Act of 1964, Congress had not had occasion to express its intent beyond the verbiage of Title VII nor on the developments *per* Executive Order 11,246 and the OFCC regulations. However, an amendment to the Supplemental Appropriations Bill of 1970<sup>77</sup> provided an opportunity to at least register congressional approval of the Revised Plan. Amendment No. 33, incorporated as section 904 of the bill, provided:

In view of and in confirmation of the authority invested in the Comptroller General of the United States by the Budget and Accounting Act of 1921, as amended, no part of the funds appropriated or made available by this or any other Act shall be available to finance, either directly or through any Federal aid or grant, any contract or agreement which the Comptroller General of the United States holds to be in contravention of any Federal statute.<sup>78</sup>

While the Revised Plan was not specifically mentioned, since the Comptroller had ruled that the Plan was in contravention of section 703(j),<sup>79</sup> the effect of this amendment would have been to deny funds to any contractor who had participated in the program. However, while the amendment would have effectively blocked the Plan, it was worded much more broadly than necessary for that purpose, and much debate was directed at the overbreadth of the language.<sup>80</sup> In spite of the all inclusive language, on December 18, 1969, the Senate denied approval of the Plan by adopting the amendment by a seventy-three to thirteen vote.<sup>81</sup> On the following day, the House disagreed to numerous Senate amendments, including Amendment No. 33, and agreed to the conference asked by the Senate.<sup>82</sup> On December 20, 1969, the committee of conference reported disagreement over the conflict regarding Amendment No. 33,<sup>83</sup> and three days later the House voted

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76. Funds were provided for the Office of Wage and Labor Standards of which the OFCC was a branch when President Nixon signed into law the Labor-HEW Appropriations Bill. H.R. 15,931, 91st Cong., 2d Sess. (1970).

77. H.R. 15,209, 91st Cong., 1st Sess. (1969).

78. 115 CONG. REC. 17,153 (daily ed. Dec. 18, 1969).

79. See note 60 *supra* and accompanying text.

80. *E.g.*, 115 CONG. REC. 17,139 (daily ed. Dec. 18, 1969). Senator Javits (R., N.Y.) remarked:

So he [the Comptroller] holds it to be in contravention of any Federal Statute, and he, in fact, controls the purse strings of the United States. Then he, the top man in this country — and perhaps the 7 days in May have arrived — of all people is the real ruler of the country, the Comptroller General of the United States.

81. 115 CONG. REC. 17,157 (daily ed. Dec. 18, 1969).

82. 115 CONG. REC. 12,822 (daily ed. Dec. 19, 1969).

83. 115 CONG. REC. 12,855 (daily ed. Dec. 20, 1969).

208 to 156 to uphold its previous action disapproving the Senate amendment.<sup>84</sup>

On the same day as the House action, the Senate was faced once again with Amendment No. 33. However, the legislators were under pressure from lobbyists,<sup>85</sup> the President (who had threatened a veto if the amendment was not deleted),<sup>86</sup> and from the prospect of an abbreviated Christmas holiday.<sup>87</sup> The Senate voted thirty-nine to twenty-nine to delete the amendment.<sup>88</sup>

Primarily, the amendment was much broader than necessary to withdraw support from the Philadelphia Plan, and certainly such an amendment could have presented grave constitutional issues regarding the authority of the Comptroller General. But it would seem that in light of the margins of the votes taken and the attendant circumstances the Senate has registered at least discontent with the OFCC's interpretation of its intent.

### B. *The Philadelphia Plan as an Illegal Quota System*

The second criticism that has been raised against the Revised Plan's legality concerns its alleged provision of an illegal quota system.<sup>89</sup> While the quota system has never been specifically denied legitimacy as a valid means of destroying a discriminatory hiring practice, it has generally been conceded that a "rigid" and "inflexible" quota would be either illegal as a denial of equal protection or unacceptable as a self-defeating mechanism.<sup>90</sup> The Solicitor evidently accepts the first concession as fact since he carefully distinguishes the type of "numerical standard" employed in the Revised Plan from the "fixed" quota.<sup>91</sup>

84. 115 CONG. REC. 13,089 (daily ed. Dec. 22, 1969).

85. Washington Post, Dec. 21, 1969, at 1, col. 3.

86. 115 CONG. REC. 17,625 (daily ed. Dec. 22, 1969).

87. An interesting discussion took place during the Senate debate which might illustrate one reason for some senators' vote:

Mr. DOLE: Second, if the motion to table fails, where are we? We are here tomorrow, in others words?

Mr. SCOTT: And Christmas and New Year's.

The PRESIDING OFFICER: If the motion to table fails, the amendment in disagreement would be before this body.

Mr. JAVITS: And would be debatable.

The PRESIDING OFFICER: And would be debatable.

Mr. SCOTT: And if the motion to table fails, as far as the Chair is able to advise us, we may be here for Christmas or New Year's?

The PRESIDING OFFICER: The motion is debatable for quite sometime.

A motion to recede was finally made on which debate was limited to one and one-half hours. 115 CONG. REC. 17,624-25 (daily ed. Dec. 22, 1969).

88. 115 CONG. REC. 17,626 (daily ed. Dec. 22, 1969).

89. A "quota" is a "proportional part or share of a fixed total, amount or quantity . . . the number of persons of a specified kind permitted to enter, join or immigrate." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1182 (unabr. ed. 1967).

90. See Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment*, 61 NW.U.L. REV. 363 (1966); Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553 (1969); Developments, *Equal Protection*, 82 HARV. L. REV. 1065 (1969).

91. Solicitor's Memorandum 31.

Very few courts have been faced with the problem of the "fixed" quota but, in *Hughes v. Superior Court*,<sup>92</sup> the California Supreme Court affirmed the awarding of an injunction to prevent blacks from picketing to compel an employer to hire blacks as clerks in a ratio corresponding to the number of black to white customers. The court said:

The fact that those seeking such discrimination do not demand that it be practiced as to all employees of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of a fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but rather, on membership in a particular race.<sup>93</sup>

The Supreme Court,<sup>94</sup> in affirming the decision, stated that California has the right to enjoin peaceful picketing when the purpose of that picketing is contrary to state policy — which did condemn the quota system. While the Court made no conclusive statement on the "quota" issue, because the petitioners' claim was based on a denial of due process, evidently the Court felt that picketing for such a purpose was not within the protection of the due process clause.<sup>95</sup> However, *Hughes* has been generally cited as outlawing "fixed" racial quotas.<sup>96</sup> Two more recent cases<sup>97</sup> also support the conclusion that a "fixed" quota would be in violation of the policy expressed in section 703(j) of the Civil Rights Act of 1964.

The Solicitor has taken rather explicit steps to differentiate the "numerical standards" provided for by the Revised Plan from the "illegal quotas." His first contention is that a quota is, by definition, fixed; the "goals" provided for by the Plan are flexible; therefore, the standards there are not, by definition, quotas. His second distinguishing feature is "the consequence of failing to meet the standard or goal." Under the Revised Plan, a failure to meet the "goals" does not automatically constitute noncompliance, but rather serves only "as a starting point in determining good faith compliance."<sup>98</sup>

92. 32 Cal. 2d 850, 198 P.2d 885 (1948), *aff'd* 339 U.S. 460 (1950).

93. 198 P.2d at 889.

94. 339 U.S. 460 (1950).

95. *Id.* at 464. But Justice Frankfurter noted:

To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities.

96. *See, e.g.*, *Progress Dev. Corp. v. Mitchell*, 182 F. Supp. 681 (N.D. Ill. 1960), *aff'd* 286 F.2d 222 (7th Cir. 1961). In this case, a developer's planned integration program was denied legitimacy, the court noting that the "fixed" quota would operate to preclude Blacks from true open housing.

97. *Centennial Laundry Co. v. West Side Organization*, 34 Ill. App. 2d 257, 215 N.E.2d 443 (1966); *Weiner v. Cuyahoga Community College Dist.*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969).

98. Solicitor's Memorandum 31-32.



As to his first argument, it would seem fatuous to reject a rigid ten percent quota but accept one which provides goals of from eight to twelve percent. The efficacy of this type of standard obviously rests in its minimum level. Theoretically, under the first example, failure to meet the exact requirement would result in a determination of noncompliance. Under the second example, a failure to meet the minimum requirement would be determinative of noncompliance. In either case, a minimum goal must be achieved, the only difference being, that in the second instance, exceeding the minimum by a specified degree would not be penalized.

As to his second argument, the consequences of failure to achieve a goal would hardly seem determinative of the nature of the standard. While it is true that failure to achieve the lower requirement does not result automatically in a violation, there nevertheless do exist the immediate consequences of a conference at which the contractor must prove a good faith effort on his part to achieve the goals. It would seem that the difference visited upon the employer under the "fixed" quota plan and the "flexible" goal standard of the Revised Plan are a matter of degree only and would not appear to be a valid basis upon which to distinguish the two standards. Although the administrative hearing, at which the issue of the contractor's good faith effort to comply is determined, may not be considered a legally recognizable injury,<sup>99</sup> it would nevertheless seem to be an incentive for invidious discrimination. And the fact that the burden of proving a good faith effort to comply is on the contractor, in addition to increasing that incentive, may be a deprivation of due process.<sup>100</sup> However these arguments were rejected in *Contractors Association v. Shultz*,<sup>101</sup> the first case to consider the legality of the Revised Plan. The court rested its holding that the Revised Plan does not involve an illegal quota on the fact that under the Plan the contractor who does not meet his employment goal would not be subject to penalty if he could show a good faith effort to meet his commitment.

The Comptroller, arguing against the plan's legality, extends his criticism beyond a consideration of the standards provided for in the Revised Plan and attacks the very premise upon which the Plan is grounded:

Whether the provisions of the Plan requiring a bidder to commit himself to hire — or make every good faith effort to hire — at least the minimum number of minority group employees specified in the ranges established for the designated trades is, in fact, a "quota" system (and therefore admittedly contrary to the Civil Rights Act) or is a "goal" system, is in our view largely a matter

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99. See *Myers v. Bethlehem Ship Building Corp.*, 303 U.S. 41 (1938).

100. See *Armstrong v. Manzo*, 380 U.S. 545 (1965), which held that a hearing subsequently granted to petitioner who had not been given proper notice of pending adoption proceedings did not cure the constitutional infirmity because petitioner was thereby forced to assume certain burdens of proof which normally would have rested with respondents.

101. No. 70-18 (E.D. Pa., March 13, 1970).

of semantics, and tends to divert attention from the end result of the Plan — *that contractors commit themselves to making race or national origin a factor for consideration in obtaining their employees.*<sup>102</sup>

He bases this contention largely on the legislative history of the Act. In addition to the senatorial impressions noted earlier,<sup>103</sup> he cites two other interpretations of the Act importing the “race should not be a factor” concept.<sup>104</sup>

The Solicitor, however, controverts the Comptroller’s basic premise, asserting that the Revised Plan justifiably requires a consideration of race. This conclusion is based on two separate lines of reasoning. First, he argues that the “affirmative action” obligation demands a consideration of race.<sup>105</sup> “Affirmative action” in Executive Order 10,925 was sanctioned by Congress in the passage of Title VII;<sup>106</sup> the Secretary of Labor, pursuant to Executive Order 11,246, defined the scope of the terms;<sup>107</sup> as defined, the regulations impose an obligation to prevent future discrimination and to remedy the effects of past discrimination; this concept of “affirmative action” has been sanctioned by the courts in other cases involving Title VII,<sup>108</sup> therefore, a program which attempts to correct the effects of past discrimination is entirely valid. However, the Solicitor proceeds to assert that a limited conception of “affirmative action,” i.e., where no specific numerical standards are provided, would be valid in non-construction trades, but that it would be totally inadequate because of the “strange nature” of the construc-

102. Comptroller’s Opinion 7 (emphasis added).

103. See note 68 *supra* and accompanying text.

104. Senator Humphrey (D., Minn.):

Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used for the basis for hiring or firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.

110 CONG. REC. 6549 (1964).

Senator Clark (D., Pa.):

Nothing in the bill will interfere with merit, hiring, or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote. *Id.* at 7218.

One further reference to the legislative history is necessary to a complete understanding of the reasoning behind the Comptroller’s objections. The Clark-Case memorandum reads:

Question. If an employer obtains his employees from a union hiring hall through operation of his labor contract is he in fact the true employer from the standpoint of discrimination because of race, color, religion, or national origin when he exercises no choice in their selection?

Answer: An employer who obtains his employees from a union hiring hall through operation of a labor contract is still an employer. If the hiring hall discriminates against Negroes, and sends him only white, he is not guilty of discrimination — but the union hiring hall would be.

*Id.* at 7217.

105. Solicitor’s Memorandum 27-28.

106. See notes 74-75 *supra* and accompanying text.

107. 41 C.F.R. § 60-1.40 (1969).

108. *Heat and Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Quarles v. Phillip Morris*, 279 F. Supp. 505 (E.D. Va. 1968); *United States v. Local 189, United Papermakers*, 282 F. Supp. 39 (E.D. La. 1968). *But see United States v. H.K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968); *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (M.D.N.C. 1968).

tion industry.<sup>109</sup> The "strange nature" of the industry is due to two considerations: contractors must hire a new complement of employees for each project; and contractors rely almost exclusively upon unions for their sources of manpower. Since there is a constantly changing workforce, it is necessary to achieve equal employment opportunity on each project, and the sources of referrals are supplied from unions which have a minority membership that is negligible. Therefore something more than the limited affirmative action programs would be necessary to effectively produce equal employment opportunity.

This argument, of course, relies very heavily upon the "strange nature" of the construction industry which warrants this special treatment. Although the high turnover in workforce might facilitate prompt implementation of a goal system, this alone does not seem to be a valid justification. Nor is there an adequate explanation of why a continued, limited affirmative action program, properly enforced, would not adequately achieve positive results. Reliance is also placed on the fact that contractors rely almost exclusively upon unions which are guilty of discriminatory admission procedures for their sources of manpower.

Indeed, the essence of the Philadelphia Plan seems to be that it provides a method, albeit indirect, by which the effect of the firmly established discriminatory practices of the local craft unions may be minimized. Of course, if this analysis is correct, the question arises: out of fairness to the contractors, and in order to most effectively remedy the effects of discrimination, shouldn't governmental action of this sort be directed to the violators themselves?

Second, the Solicitor notes that the affirmative action concept has been judicially determined to require steps to overcome the effects of past discrimination. However, it is at least questionable whether the affirmative action concept the Solicitor speaks of may be equated with its namesake in other areas of civil rights. As the Comptroller notes:

Even if the present composition of an employer's work force or the membership of a union is the result of past discrimination, *there is no requirement imposed by the Constitution, by a mandate of the Supreme Court, or by the Civil Rights Act for an employer or a union to affirmatively desegregate its personnel or membership.*<sup>110</sup>

The Solicitor relies on two recent cases to support the proposition that courts have sanctioned the use of numerical standards to correct the effects of past discrimination.<sup>111</sup> In *United States v. Jefferson County Board of Education*,<sup>112</sup> the court approved the use of percentages, in the form of HEW guidelines, as a "rule of thumb" for

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109. Solicitor's Memorandum 28-29.

110. Comptroller's Opinion 13 (emphasis added).

111. Solicitor's Memorandum 33-35.

112. 372 F.2d 836 (5th Cir. 1966).

measuring progress in desegregating the local system.<sup>113</sup> However, it must be noted that the decision was an implementation of the *Brown v. Board of Education*<sup>114</sup> "affirmative action" order, and, in addition, the court noted: "There is no provision requiring school authorities to place white children in Negro schools or Negro children in white schools for the purpose of striking a racial balance in a school district proportionate to the racial population of the community or school district."<sup>115</sup> Analogy to the Revised Plan's comparison of minority group employment to the available minority group labor force is apparent.

In *United States v. Montgomery County Board of Education*,<sup>116</sup> the Court affirmed a plan which was to provide for the allocation of teachers on a three to two ratio (white to black) in each school throughout the system. But the conclusion that this case represented judicial sanction of numerical standards is fallacious, for the Court, noting that the school board had remained completely intransigent in the face of the *Brown* edict, insisted that these requirements must not be "rigid" and "inflexible." Also, the district court's plan which was approved also provided that any further hiring, assignment or dismissals of teachers would be effected *without* consideration of race or color.<sup>117</sup> Finally, it is interesting to note the ratio of white to black teachers in the entire system at the time the plan was introduced was three to two. Thus, if the teachers were assigned simply by chance — or without regard to race — there is the very strong probability that the ratio in each school would mirror the ratio in the entire system.<sup>118</sup>

The Solicitor has also cited several cases under Title VII<sup>119</sup> involving remedial relief which could be characterized as "quotas." These cases were decided under section 706(g)<sup>120</sup> of the Civil Rights Act of 1964 which provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement or promotion of an individual as an employee . . . if such individual was refused admission, suspended or expelled or was refused employment or advancement or was suspended or discharged for any reason other

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113. *Id.* at 886-87.

114. 347 U.S. 483 (1954).

115. 372 F.2d at 886.

116. 395 U.S. 225 (1969).

117. 12 RACE REL. L. REP. 1200, 1205-06 (1967).

118. Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification* by Race, 67 MICH. L. REV. 1553, 1603 (1969).

119. Solicitor's Memorandum 37-39. See note 108 *infra*.

120. Civil Rights Act of 1964, § 706(g).

than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

While this section does use "affirmative action," the tenor of the entire section would seem to suggest that it is directed at the individual whose complaint had been found justified. In that case the court would have the power to enjoin the employer from continuing in the same fashion and to compel the employer to hire the particular individual harmed.

Illustrative is *Heat and Frost Insulators v. Vogler*,<sup>121</sup> where the union was found guilty of denying petitioners membership solely on the basis of race. The court ordered the union to admit these individuals, to redefine its membership criteria and, in the interim, to refer blacks and whites alternately for jobs. The union urged that such a plan was violative of section 703(j) of the Civil Rights Act of 1964 — a contention which the court rejected without comment. A close reading of section 703(j) reveals that no labor organization may be compelled to grant preferential treatment to minority groups because of an imbalance which exists in regard to the number it refers for employment and the number in the workforce or in the geographic area. The court made no reference to a racial imbalance; it was simply trying to correct the effects of past discrimination. While this contention may seem inapposite to earlier arguments, it must be pointed out that the Revised Plan *does* make racial imbalance a criterion for determining acceptable levels of achievement.

*Weiner v. Cuyahoga Community College District*, 100<sup>122</sup> is similarly distinguishable. There, the Supreme Court of Ohio held that the lowest bidder's bid on a federally aided construction project was properly rejected because the affirmative action program was conditioned on the availability of blacks for employment. The second lowest bidder's bid was properly accepted since he had assured black representation on the project through a "manning table" which predicted the number of blacks to be employed. The specifications for the "manning table" unlike the Revised Plan were not directed by the OFCC nor were they based on a computation of racial imbalance, nor was there any indication that punitive action would be taken against the contractor for failure to achieve the projected figures. The Court was careful to emphasize the fact that the table was directed not to guaranteeing equal employment but to assuring equal employment opportunity.<sup>123</sup>

#### IV. PROBLEMS

There are several problems which will arise in the operation of the Revised Plan. A hypothetical will best illustrate some of the contradictions and inequities that must develop under the terms of

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121. 407 F.2d 1047 (5th Cir. 1969).

122. 19 Ohio St. 2d 35, 249 N.E.2d 907, *aff'g* 238 N.E.2d 839 (1969), *cert. denied*, 396 U.S. 1004 (1970).

123. 249 N.E.2d at 911.

the program as it is now proposed and the "preferential treatment" that seems implicit in the effective operation of the Plan.

Under the terms of the Revised Plan, a contractor would submit his bid and affirmative action program to the contracting agency, and, after approval of his plan by the OFCC, he would be awarded the contract. In his affirmative action plan, he must assure the agency that he will attempt to have a minority group representation of from five to nine percent during the first year of the project. This figure accords with the Revised Plan's minimum specifications. The existence of a collective bargaining agreement with a local union does not affect this contractual obligation. If such an agreement requiring the contractor to accept only union referrals exists with a union which is guilty of discriminatory practices, the contractor is obligated to use other methods and sources under his good-faith effort duty.<sup>124</sup>

In order to perform his contract, the contractor needs twenty-five electrical workers. Thirty have either been referred by the union or have applied independently. He has hired twenty-four men — one of whom is black; he has rejected three blacks as unqualified; for the remaining one position, he has two applicants of equal qualifications — one of whom is white, the other black. In order to be deemed in compliance with his affirmative action program, he must select the black. But, if he hires the black solely in order to meet his requirement, it would seem that the white has been denied employment because he is white — clearly a form of "reverse discrimination." However, if the contractor selects the white, he will not be deemed in compliance with his program, and he must now prove a good faith effort on his part to achieve these goals. If he chose the white because of his own prejudices, he has discriminated on the basis of race. If he chose the white by chance selection, he still must prove a good faith effort. As a practical matter, it would seem that the contractor would hire the black in this situation in order to avoid conflict with the OFCC. If this were the case, it would seem that the white would be able to file a complaint with the OFCC — the avowed purpose of which is to provide equal employment opportunity for all without regard to race, creed, color or national origin.<sup>125</sup>

Even when the applicants' qualifications are unequal, the contractor may be placed in a precarious position. Suppose the same fact situation as in the above hypothetical, except that, of the remaining two applicants, the black is extremely well experienced and qualified and the white is a recent graduate of an apprentice program without experience. However, the contractor sees a great supervisory potential in the white. If he selects the white, the contractor's compliance posture is subject to review by the OFCC. If the test applied is to be one of objectivity, the contractor will be deemed to have not exercised a good faith effort. Obviously, the only equitable standard is

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124. Discrimination in referral for employment, even if pursuant to a collective bargaining agreement is prohibited by the National Labor Relations Act §§ 8(a)(1)-(3). 29 U.S.C. § 158 (a)(1)-(3) (1964). See *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961).

125. 41 C.F.R. § 60-1.1 (1969).

a subjective one, but the difficulties implicit in administering such a standard would provide very complex problems for determination.

The acceptable standards are in the form of a range of goals. The above discussion has centered on a failure to meet the minimum requirements. However, if the contractor exceeds the upper level of the standard, presumably, he has not complied with his program and should, according to the terms of the Revised Plan, be compelled to prove a good faith effort on his part. But, it is difficult to imagine the OFCC carrying the program to its logical extension. If the OFCC did not take the necessary steps to investigate a violation this sort, then, for all practical purposes, the Revised Plan has an effective standard represented by the minimum level of the acceptable range, and it becomes the rigid and inflexible quota condemned even by the Solicitor.

Aside from these considerations, if the Revised Plan is followed literally, it would seem to be self defeating. It is clearly stated that no contractor will be required to practice "reverse discrimination" by selecting less qualified applicants because of their race. But the Revised Plan recognizes that very few minority group members have been granted union membership. Since most of the hiring is the result of union referrals, it must necessarily follow that few minority group members have had any actual work experience. Experience must be the primary consideration in determining an applicant's qualifications in these highly skilled trades. Therefore, if the contractor is to hire only on the basis of the most qualified applicants, except in isolated instances, the minority group member will be relegated to a secondary position as long as whites with any experience have applied for the same position. If the Revised Plan truly does not require "preferential treatment," then the black has not been aided.

#### CONCLUSION

There is clear evidence that the unions in the specified trades have been guilty of employing discriminatory membership practices, and, since this nation is devoted to the principle of the equality of man, it is clear that remedial steps must be taken to eradicate these instances of prejudice. The Comptroller adopts the position that there is absolutely no mandate for any type of preferential treatment to more quickly bring the black race to the status of true equality. But, it would seem that the case law cited by the Solicitor would clearly mitigate against this interpretation. Whether or not preferential treatment is psychologically sound for this nation — for both black and white — is a question that has no easy answer.<sup>126</sup> On the other hand, the OFCC, with meritorious objectives, has sought to strain

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126. See R. CARTER, D. KENYON, P. MARCUSE & L. MILLER, *EQUALITY* (1965); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Vieira, *Racial Imbalance, Black Separatism and Permissible Classification by Race*, 67 MICH. L. REV. 1553, 1604-26 (1969).

the existing case law — in the face of a clearly evidenced contrary senatorial interpretation — and apply numerical standards.

It would seem that a position somewhere between these two extremes would be the most provident. It must be remembered that the discriminatory practices involved are those of the unions while the Revised Plan aims directly at the contractors and only indirectly at the unions. But, there are very ample provisions in both the Civil Rights Act of 1964<sup>127</sup> and Executive Order 11,246<sup>128</sup> through which the unions could be attacked directly. At the same time, the OFCC — whose operations have been sanctioned by a congressional appropriation of funds — must still conduct its programs of “affirmative action” for government contractors. It would seem that an ambitious use, against the unions, of these weapons coupled with the OFCC implementation of its approved regulations would withstand objections from both extremes and, at the same time, alleviate some of the problems that continue to plague the black labor force.

One further possibility exists — the OFCC plan in effect in the Cleveland area — the type approved in *Weiner*. Under this plan there are no requirements as to specific levels of minority group utilization which the contractor is obligated to attempt to achieve. At the same time, solicitations for bids carefully set forth requirements for an affirmative action plan which would *assure* black representation. Certainly there naturally must result a degree of preferential treatment, but only the very naive will not admit this has been judicially recognized and applauded. At the same time, without demanding percentages of compliance, the conflict with the Civil Rights Act of 1964 would be avoided, along with the unnecessary debate and delay that must result.

*Dennis J. DuBois*

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127. See note 36 *supra*.

128. See note 39 *supra*.