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Preferential Treatment in the Skilled Building Trades an Analysis of the Philadelphia Plan

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PREFERENTIAL TREATMENT IN THE SKILLED BUILDING TRADES: AN ANALYSIS OF THE PHILADELPHIA PLAN

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The conflict over jobs for minorities in the skilled building trades[1] was perhaps the most turbulent racial clash of the last half of 1969. Several urban centers were the scenes of ugly racial confrontations. Coalitions of civil rights groups picketed construction sites and closed down work completely in a number of cities,[2] while white union members in Chicago and Pittsburgh resorted to mass counter-demonstrations that led to mob violence.[3] Although the search for solutions has now shifted from the streets to city hall negotiation rooms, there is reason to believe that the battles of 1969 will be refought unless a meaningful program for integration of the building trades is achieved.[4]

In the construction industry, civil rights pressure and industry resistance have created an "irresistible force—immovable object" syndrome that inevitably leads to explosions. Blacks are desirous of obtaining construction jobs for a number of reasons.[5] A large percentage of major construction work is done in the center of cities. Since building trade work is more visible to blacks than work in other industries,

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1 The terms "skilled building trades," "construction industry," and "construction" are used interchangeably throughout this article. The term "industry" refers to employment areas other than the construction industry.

2 Civil rights groups forced work stoppages on construction in the following cities in 1969: Buffalo, N.Y. (N.Y. Times, Aug. 3, 1969, at 43, col. 1); Cambridge, Mass. (*id.*, Dec. 12, 1969, at 1, col. 5); Chicago, Ill. (*id.*, Sept. 23, 1969, at 56, col. 3); Pittsburgh, Pa. (*id.*, Aug. 27, 1969, at 1, col. 1); Seattle, Wash. (Central Contractors Ass'n v. Local 46, IBEW, 312 F. Supp. 1388 (W.D. Wash. 1969)).

3 N.Y. Times, Sept. 27, 1969, at 18, col. 3; *id.*, Aug. 28, 1969, at 27, col. 6.

4 Thus far, the pattern for construction industry conflicts appears to be cyclical. Widespread demonstrations and major confrontations over the same issues occurred in 1963. The 1963 confrontations in New York, Philadelphia, and Cleveland are described in F. MARSHALL & V. BRIGGS, THE NEGRO AND APPRENTICESHIP 51-66, 88-92, 103-04 (1967). There were also demonstrations and shutdowns in Elizabeth, Patterson, Newark, Detroit, Chicago, and Washington, D.C. Strauss & Ingerman, *Public Policy and Discrimination in Apprenticeship*, in NEGROES AND JOBS 298, 314-16 (1968). It was the failure of solutions in the intervening period which caused the problem to re-emerge last year with much greater hostility and more damaging consequences than had occurred before.

5 For a full discussion of the reasons for strong black feeling about jobs in construction, see Strauss & Ingerman, *supra* note 4, at 313.

they feel more strongly here than elsewhere that they are entitled to a "piece of the action." The high percentage of public funds supporting construction offers the possibility for political pressure. Thousands of blacks have operated for years on the edge of the high-paid, skilled building trades as non-union electricians, plumbers, or the like, and on construction sites as common laborers. In terms of present job skills, it would be a small step for many blacks to move into the building trade union skill areas, but it would mean a significant advance in pay. Finally, the educational deficiencies that plague blacks and minority group members elsewhere offer no real barriers to their obtaining jobs in construction.

At the same time, special obstacles to achievement of jobs for minorities are present in the construction industry which do not operate elsewhere. The major problem lies in union control of industry hiring policies.[6] When contractors seek employees for particular jobs, they are required by their collective bargaining agreements to contact the union business agents who refer new workers to them. The unions are primarily interested in protecting the job security of their own membership rather than in meeting the manpower needs of the industry. Thus, at the very time that blacks are seeking new job openings, unions are following a deliberate program of "planned scarcity" in the supply of workers.[7] Rather than sending new men to fill vacancies, the unions prefer to create overtime opportunities for existing members;[8] when there are openings they are often passed only to sons and relatives of those already working.[9] This policy has resulted in a "critical shortage" of skilled construction manpower in all sections of the country, with predicted estimates of shortages as high as two million by 1975.[10]

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6 For thorough discussions of the special difficulties which the hiring-hall system poses to the achievement of equal employment in the construction industry, see F. COUSENS, PUBLIC CIVIL RIGHTS AGENCIES AND FAIR EMPLOYMENT 64-69 (1969); Marshall, *Racial Practices of Unions*, in NEGROES AND JOBS 277 (1968); Sanders, *James Haughton Wants 500,000 More Jobs*, N.Y. Times, Sept. 14, 1969, § 6 (Magazine), at 30-31, 122-33.

7 F. COUSENS, *supra* note 6, at 67.

8 M. LEFKOE, THE CRISIS IN CONSTRUCTION 12 (1970).

9 Strauss & Ingerman, *supra* note 4, at 318-19.

10 M. LEFKOE, *supra* note 8, at 5. In Lefkoe's comprehensive study of the labor problems in construction, he indicates that this figure is a conservative one. In a recent study commissioned by the industry, the union-produced scarcity of workers was found to be the major cause of the industry's problems, including extremely high wage settlements, continual work stoppages, and excessive overtime wage payments. *Id.* at 3-17.

Richard C. Van Dusen, Undersecretary of the Department of Housing and Urban Development, has asserted that instead of the 40,000 persons currently completing apprenticeships each year, at least 140,000 a year will be needed between now and 1975. Wall St. J., Sept. 26, 1969, at 22, col. I.

The apprenticeship program to prepare new workers for the industry is theoretically operated by unions and management jointly, but it is, in reality, dominated by the unions.[11] Selection committees for apprenticeship favor relatives and often operate with considerable racial prejudice.[12] The rules set by unions for apprenticeship entrance are stringent, excluding those beyond their early twenties, although many slightly older blacks have significant experience in these areas and are fully capable of learning and performing construction jobs effectively.[13] Despite the ostensible control of personnel policies by unions, employers bear much of the responsibility for the segregated status of the skilled building trades. It is their acceptance of the union scheme and full cooperation with it that has been a *sine qua non* of the existing situation.

Because of these special barriers, black pressures have thus far produced almost negligible results. Statistics recently released by the Equal Employment Opportunity Commission show that blacks hold only 1.4 percent of the positions in the skilled mechanical trades,[14] while they make up 11.1 percent of the national population[15] and

11 F. MARSHALL & V. BRIGGS, *supra* note 4, at 14.

12 Although minimum requirements are published and ostensibly reviewed according to a standard procedure, these decisions are made on a highly subjective basis, particularly with respect to age and education requirements. Biased attitudes toward Negroes, candidly expressed by contractors and union officials, can and do affect chances of admission to training and is [*sic*] undoubtedly the crucial factor in the continuation of white dominance in this industry.

F. COUSENS, *supra* note 6, at 67.

13 Hain, *Black Workers Versus White Unions: Alternate Strategies in the Construction Industry*, 16 WAYNE L. REV. 37, 41 (1970).

14 EEOC Release No. 70-15, at 2 (May 19, 1970) (table). The statistics in this report show minority membership in various unions. Since almost all contractors in this industry have union shop agreements, the numbers of blacks who are union members is tantamount to the number who work in the trade. *See* Statement of William H. Brown III, Chairman, EEOC, in EEOC Release No. 69-44, at 1 (1969).

The breakdown on black percentages in the skilled mechanical trades is as follows:

Trade	Percentage of Blacks
Boilermakers	3.9%
Electrical Workers	1.9
Elevator Constructors	0.7
Iron Workers	1.9
Plumbers	0.6
Sheet Metal Workers	0.3

EEOC Release No. 70-15, *supra*. Blacks also are only 1.8% of the carpenters and 2.5% of the operating engineers. *Id.*

15 U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1969, at 23 (1970). Sanders mentions a recent Bureau of Labor Statistics study which states that if blacks held construction jobs in proportion to their percentage of the population, there would be 37,000 more black carpenters, 97,000 more mechanics, 82,000 more metal craftsmen, and 112,000 more construction foremen. Sanders, *supra* note 6, at 130.

constitute twenty percent of those in the central cities[16] where most construction occurs. Although a large number of blacks work as construction laborers,[17] these jobs are less well-paid and less desirable,[18] and black entrance into this area may be attributable to increasing white disinterest in the available jobs. In an effort to make a breakthrough for minorities in the skilled building trades, the Labor Department produced its highly controversial revised Philadelphia Plan, which requires efforts to hire certain percentages of blacks and other minority group members on federal or federally-assisted construction projects. The Plan has been through several bitter battles and one near-disastrous attack in Congress,[19] but it survives, has been extended, and has become the major tool of the current administration in attacking building trade discrimination.[20]

I

BACKGROUND OF THE PHILADELPHIA PLAN

The Philadelphia Plan operates under Executive Order No. 11246.[21] Section 202 of the Order requires the inclusion in government

16 U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, SOCIAL AND ECONOMIC CONDITIONS OF NEGROES IN THE UNITED STATES 10 (1967).

17 EEOC Release No. 70-15, *supra* note 14, at 3 (table). Blacks are 29.2% of all general laborers. A fair percentage work in the "trowel trades." For instance, blacks constitute 13.3% of plasterers and 10.0% of bricklayers. *Id.* at 2-3 (table). However, the percentage in these trades is still disproportionate to the black percentage of the population in the central cities.

18 For instance, the average hourly rate with fringe benefits for laborers in the United States on April 1, 1970, was $4.92. The average rate for electricians was $7.16 and for plumbers was $7.51. U.S. Bureau of Labor Statistics, Dep't of Labor, Release on Union Wage Payments of Building Trade Workers 2 (May 7, 1970).

19 *See* 115 CONG. REC. S 17624-36 (daily ed. Dec. 22, 1969). A rider proposed in Congress to a supplemental Labor Department appropriations bill would have required a cut-off of federal funds on any contract operated under the Plan. The rider passed in the Senate but was defeated in the House. As a result of strong White House appeals, the Senate reversed its position and passed the bill without the rider. 72 BNA LAB. REL. REP.—NEWS & BACKGROUND INFORMATION 489 (Dec. 29, 1969).

20 For a discussion of the problems of preferential treatment in education, housing, employment, and areas other than the construction industry, see Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65 (1970); 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).

The National Advisory Commission on Civil Disorders (Kerner Commission) has called for preferential treatment in the employment and training of blacks to meet the critical needs of ghetto residents. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 413-24 (Bantam ed. 1968).

21 3 C.F.R. 339 (1964-65 Comp.), *as amended*, Exec. Order No. 11375, 3 C.F.R. 320 (1967 Comp.), 42 U.S.C. § 2000e (Supp. IV, 1969).

contracts and federally-assisted construction contracts of a clause committing the contractor and major subcontractors to nondiscrimination in employment and "affirmative action" to ensure that applicants are employed and employees treated without regard to race, creed, sex, color, or national origin.[22] The Labor Department's Office of Federal Contract Compliance (OFCC) is responsible for coordinating and supervising the efforts of federal agencies to secure compliance with the clause.[23]

The affirmative action requirement was added to a predecessor executive order in 1961[24] because of the frustration of attempts to achieve equal employment through a pure nondiscrimination requirement. Committees studying the previous program noted that it was ineffective because it simply led to passive neutrality by employers.[25] Evidence indicates that the affirmative action clause was initially interpreted to require a broadening of the government contractor's recruiting efforts through more intensive advertising and publicity in minority areas.[26] The program has come to require preferential treat-

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22 The Order applies to government construction contracts and to government supply contracts.

23 41 C.F.R. §§ 60-1.1 to -1.47 (1970). Each federal agency administering contracts or administering federal aid for construction has full-time equal employment officers who enforce the clause. Pre-award reviews of equal employment deficiencies are conducted for low bidders on these contracts. Where the contractor or subcontractor has more than 50 employees and the contract involves more than $50,000, the contractor is required to present an affirmative action plan to remedy his equal employment deficiencies. The plan must be approved before the contract will be finally awarded. The agencies make periodic checks to determine whether there is compliance with the plan. Failure to comply can lead to suspension or cancellation of the contract or debarment of the contractor from future federal contracts. Compliance responsibilities for each major industrial and supply contractor are assigned to the agency with which the company does most of its government business. In construction, the responsible agency on each contract is the one for which a facility is being built or which is administering the federal aid. The entire operation is coordinated and supervised by the OFCC.

24 Exec. Order No. 10925, 3 C.F.R. 448 (1959-63 Comp.).

The first executive order requiring equal employment practices by government contractors was promulgated by President Roosevelt in 1941. Exec. Order No. 8802, 3 C.F.R. 957 (1938-43 Comp.). A succession of orders followed, but none required anything more than nondiscrimination until 1961.

25 COMMITTEE ON GOVERNMENT CONTRACTS, PATTERN FOR PROGRESS: FINAL REPORT TO PRESIDENT EISENHOWER 14 (1960). The Committee reported that it was not so much "overt discrimination" as *"the indifference of employers to establishing a positive policy* of nondiscrimination [that] hinders qualified applicants and employees from being hired and promoted on the basis of equality." *Id.* (emphasis in original). *See also* 3 U.S. COMM'N ON CIVIL RIGHTS, REPORT 76 (1961).

26 *See* Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. REV. 590, 593-96 (1969). This note carefully describes the early attempts to administer Executive Order No. 10925 in industry and points out that the emphasis was on advertising and a broadened recruitment base.

ment in hiring as a result of an evolution in efforts to achieve effective implementation of the Order in the construction industry.[27]

The President's Committee on Equal Employment Opportunity, the predecessor of the OFCC, had severe difficulties in enforcing the Order in construction, largely because of the special problems created by union control over personnel.[28] To meet these problems, the Committee sent a large task force into the field between June and October of 1964 in an effort to explain the Order's operation in construction and to secure compliance. This effort failed to promote any positive results and achieved little more than the gathering of a great deal of information.[29] In 1965, the OFCC set up an area coordinator program in several major construction centers to help coordinate agency efforts. This program met with only limited success except in areas where a predecessor of the Philadelphia Plan was adopted.[30]

The seeds for the present Philadelphia Plan were planted in the Cleveland operating area in 1967. In a city that had been afflicted by numerous construction shut-downs, OFCC Area Coordinator Charles Doneghy, OFCC Director Edward Sylvester, and others in the Labor Department developed a solution that became formalized as the Cleveland Plan.[31] This approach went far beyond the "affirmative action" requirement of broadening one's recruitment base through more publicity and recruiting in minority areas. It required government and federally-assisted construction contractors to "assure minority group

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27 To the present time, the program has generally been more successful in creating jobs for minority groups on industries other than the construction industry. Interview with Charles Doneghy, Cleveland Area Coordinator, OFCC, in Cleveland, Ohio, July 1, 1970. For general discussions of some of the successes of the program in industry and its lack of accomplishment in construction, see R. NATHAN, JOBS AND CIVIL RIGHTS 86-149 (1969); M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 103-42 (1966). In the evolution of affirmative action under the program, some of the more extreme solutions applied to solve difficult problems in construction have later been applied in a modified, toned-down form to other industries. Thus, the present requirement that all major contractors submit manning tables specifying their equal employment goals, set forth in the OFCC regulations, 41 C.F.R. § 60-1.40 (1970), was initially a part of the Cleveland Plan for attacking construction industry discrimination in that city. *See* R. NATHAN, *supra* at 109.

The Philadelphia Plan's requirement of attempts to hire "ranges" of minorities has been toned down and applied to new industry regulations (sometimes referred to as Order No. 4), 35 Fed. Reg. 2586 (1970), that require "result-oriented procedures," with "goals and time-tables . . . to increase the utilization of minorities at all levels and in all segments of the contractor's work force where deficiencies exist." *Id.* at 2587.

28 M. SOVERN, *supra* note 27, at 137-38; THE PRESIDENT'S COMM. ON EQUAL EMPLOYMENT OPPORTUNITY, REPORT TO THE PRESIDENT 120 (1963).

29 M. SOVERN, *supra* note 27, at 138.

30 R. NATHAN, *supra* note 27, at 108-12.

31 *Id.* at 109.

representation in all trades and in all phases of the work" on such contracts.[32] It also required low bidders on government contracts to submit manning tables indicating the numbers of minority group members that would be hired in various phases of the job.[33] Contractors were informally notified at pre-award conferences that they were to have roughly twenty percent minority group participation on each project in the skilled trades, although precise numbers were determined on a case-by-case basis.[34] If the contractor did not presently have enough minority group members working for him and could not obtain them from the union, he was to go out and find sufficient numbers to satisfy his goal—a policy of preferential treatment to correct past deficiencies. This program was highly successful in Cleveland[35] and was later extended to Philadelphia.[36]

In 1968, the Comptroller General was asked to rule on the program as implemented in Philadelphia. He held that it was inconsistent with proper bidding requirements on federal contracts because it failed to explicitly inform contractors of the nature of the requirements before bidding.[37] In the summer of 1969, the Labor Department announced a new Philadelphia Plan[38] which was partially designed to meet the Comptroller General's objections but which was primarily intended to make a major breakthrough in securing jobs for minority groups in skilled construction trades.

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32 *Id.*

33 *Id.*

34 Interview with Charles Doneghy, *supra* note 27.

35 R. NATHAN, *supra* note 27, at 109 & n.32, *citing* V. Macaluso, Survey of Minority Group Participation Under the Cleveland Operational Plan for Construction Compliance with Executive Order 11246 (memorandum dated Nov. 15, 1967). This memorandum shows that Cleveland contractors had committed themselves to hiring 110 minority group craftsmen in the mechanical trades and as operating engineers out of 475 federal construction jobs available in 1967. There were virtually no blacks in these trades prior to 1967 in Cleveland.

36 Probably because of this program's controversial preferential treatment aspect, Secretary of Labor Wirtz initially drew back from any thought of extending it beyond these two cities:

> In at least two cases—in Cleveland and in Philadelphia—the Government contract situation had gotten so bad, with antagonism and recrimination piled on top of each other . . . that there was probably no effective alternative to that kind of ruling. But it isn't right as a general policy and it won't work. Even if it drags someone who worships his prejudices into line, it demeans somebody else who has done the right thing for the right reason.

Address by W. Willard Wirtz, Secretary of Labor, Before the Convention of Building and Construction Trades Department, AFL-CIO, Nov. 29, 1967, at 4, *quoted in* R. NATHAN, *supra* note 27, at 110-11.

37 47 COMP. GEN. 666 (1968).

38 U.S. Dep't of Labor, Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction (June 27, 1969).

Under this approach, contractors and building trade unions in major construction cities are strongly encouraged to develop "home-town solutions" by instituting their own programs to bring sizeable numbers from minorities into the trades.[39] If these programs fail to show potential for significant progress, the government makes the award of contracts contingent on the promise of contractors and major subcontractors to make a "good faith effort" to hire certain government-established percentages of minority workers on federal or federally-assisted projects. The percentages required will increase each year over the next several years. The ranges for each trade in an area are established by a study of several factors: the extent of minority group participation in the trade, the availability of skilled minority manpower, the need for training programs, and the impact on the existing labor force.[40]

In the absence of satisfactory "home-town solutions," the Plan was initially implemented in Philadelphia[41] and is now being extended to Washington, D.C.[42] The Comptroller General, in a new opinion, noted that the revised Plan met his prior objection by giving contractors full information on what they would be required to do in advance of their bidding. He nevertheless held that Plan illegal because it violated the nondiscrimination provisions of Title VII of the 1964 Civil Rights Act[43] by requiring contractors to hire on the basis of race.[44] The Attorney General has ruled that the Plan is legal,[45] and it has withstood its first court test.[46] The Cleveland Plan, which also requires hiring on the basis of race, has been held lawful by the Ohio Supreme Court, and the United States Supreme Court has denied certiorari.[47] The Plan's legality and propriety, however, remain a matter of hot controversy.[48]

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39 Speech by George Schultz, Secretary of Labor, Before the National Association of Homebuilders, in Houston, Texas, Jan. 19, 1970, *condensed in* 73 BNA LAB. REL. REP.—NEWS & BACKGROUND INFORMATION 87 (Jan. 26, 1970).

40 U.S. Dep't of Labor, *supra* note 38, at 7-9.

41 U.S. Dep't of Labor, Establishment of Ranges for the Implementation of the Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction (Sept. 23, 1969).

42 74 BNA LAB. REL. REP.—NEWS & BACKGROUND INFORMATION 101 (June 8, 1970).

43 42 U.S.C. §§ 2000e to e-15 (1964).

44 48 COMP. GEN. 59, 63-71 (1969).

45 42 OP. ATT'Y GEN. No. 37 (1969).

46 Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970).

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

48 Senator Sam Ervin has attacked the Philadelphia Plan for its imposition of illegal quotas and for its excessive burdens on contractors. BNA FAIR EMPLOYMENT PRAC.—SUMMARY OF LATEST DEVELOPMENTS No. 140, at 4 (July 2, 1970).

II

POLICY CONSIDERATIONS

The major policy argument in favor of the Plan is that it offers some hope of success where nearly everything else has failed. The earlier version of the Plan achieved some substantial gains in Cleveland.[49] Its threatened application to other cities has already induced "home-town agreements" that are far more comprehensive than anything previously achieved.[50]

It is clear that a vague affirmative action obligation has been

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49 Note 35 *supra.*

50 The Labor Department has warned 19 cities to adopt home-town solutions or face the imposition of a Philadelphia Plan. 73 BNA LAB. REL. REP.—NEWS & BACKGROUND INFORMATION 141 (Feb. 16, 1970).

Boston: The Boston plan commits contractors to attempt to hire 2,000 minority group tradesmen and to provide them with continuing job opportunities for a five-year period. 74 *id.* at 165-66 (June 29, 1970).

Chicago: In a city where the Labor Department estimates that the population is one-third black and where fewer than three percent of skilled building trade jobs are held by blacks, the city's building trade unions and black civil rights groups signed a pact for a home-town solution that promises to involve 4,000 Negroes in the trades immediately. The pact was signed under pressure of possible government implementation of the Philadelphia Plan in the Chicago area. It includes an agreement to hire 1,000 qualified blacks in journeymen positions immediately and to place 3,000 more blacks in apprenticeship programs. The plan has been approved by the Labor Department and calls for establishment of neighborhood centers partially funded by the federal government to recruit blacks and other minorities. *Id.* at 39 (May 18, 1970).

Denver: This plan calls for the hiring of 400 minority group craftsmen within the first 18 months and an additional 1,050 thereafter, many of whom are to be Spanish-surnamed Americans. *Id.* at 166 (June 29, 1970).

Indianapolis: A plan has been adopted in this city to give immediate employment, union membership, and apprenticeship opportunities to large numbers of qualified blacks referred by the Minority Coalition of Indianapolis. A panel whose members are to include the Secretary of Labor has been appointed to review this plan. BNA FAIR EMPLOYMENT PRAC.—SUMMARY OF LATEST DEVELOPMENTS No. 136, at 1 (May 7, 1970).

New York: A New York plan has been adopted by the AFL-CIO Building and Construction Trades Council and the New York Building and Construction Industry Board of Urban Affairs. It provides on-the-job training for minorities with periods of instruction, counselling, and remedial education at a central training facility. However, probably because of its lack of definite standards and commitments, the Labor Department has so far refused to fund it and has not approved it as an acceptable alternative to the Philadelphia Plan. Some state funds have been committed to the plan. 73 BNA LAB. REL. REP.—NEWS & BACKGROUND INFORMATION 279 (April 6, 1970).

Pittsburgh: The Black Construction Coalition and the city's construction industry agreed upon a plan to put approximately 1,200 blacks in skilled jobs in the building trades in the next few years; the agreement probably ends the threat of a federally-imposed solution such as the Philadelphia Plan in Pittsburgh. An office is to be opened to recruit qualified blacks, and a number of them are expected to become journeymen immediately. N.Y. Times, May 27, 1970, at 50, col. 3.

largely unworkable in an industry where the obstacles to equal employment are as entrenched as they are in construction. A recent study of the federal contractor program prepared by the Brookings Institution for the United States Commission on Civil Rights indicates that contractors tend to "get by" a vaguely-defined affirmative action requirement without doing much of anything to change their hiring practices.[51] It is difficult for compliance officials to dispute their claims of satisfaction of their obligations without some specific standards like those of the Philadelphia Plan to measure results.[52] Because of the referral hiring arrangement of the building trades, it appears essential that contractors be required to hire specific numbers of blacks if any results are to be achieved at all. Otherwise, a contractor can argue that he meets his equal employment obligations by simply not discriminating among those people referred to him by the union, and that the union is likely to refer only whites. It is only the belief of the contractor that he must hire a certain number of minority group members which forces him to pressure the union into referring blacks or into going outside the union to meet his goal.

A somewhat troubling argument can be made that it is inappropriate for the federal government to enforce hiring on the basis of race. Preferential treatment is opposed to a basic precept of our society which requires that each man be dealt with on his merit as an individual rather than on the basis of the color of his skin. To give a preference to one man because he is black is as wrong as preferring another because he is white; the appropriate approach is to require a policy of racial neutrality and to go no further.[53]

Unfortunately, a nondiscrimination approach in construction, even if it could be effectively implemented, would be only a small step toward curing the damage of long years of exclusion. At the very best, a policy requiring nondiscrimination would lead to blacks receiving a percentage of new openings on federal contracts proportionate to their percentage of the population—roughly eleven to twenty percent in urban areas. Beyond this, it would do nothing to affect the total composition of the work force, and blacks would continue to constitute a small minority in the skilled trades for perhaps a generation. Many of those who have been wrongfully excluded in the past would continue to be denied jobs in the future. Under the Philadelphia Plan, a higher

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51 R. NATHAN, *supra* note 27, at 136-38.

52 *Id.*

53 *See generally* Kaplan, *supra* note 20.

percentage (about fifty percent)[54] of new openings on federal jobs must go to minority group members if contractors are to meet their ranges. Thus, within the next few years, the Plan will place a minority percentage on the total work force which is closely proportionate to the minority percentage of the population, and therefore remedy the past wrongs much more rapidly.

In fact, a policy of pure nondiscrimination is probably unworkable in construction. The contractor, as previously indicated, can satisfy his own nondiscrimination requirement by hiring only whites if that is all the union refers to him. A federal contractor program requiring nondiscrimination only by the contractor would be likely to achieve nothing at all. It is also improbable that racial attitudes in the industry can be changed to ones of neutrality. By background, custom, and habit, contractors and unions in construction think and act in terms of race despite the words of the law. Instead of attempting to change behavior by using a nebulous goal of racial neutrality, it is more realistic to seek a change in results through measurable objective standards. As contractors and unions deal with more blacks under the Plan, it is reasonable to hope that they will come to accept their participation in the industry and that a change in behavior and attitudes will eventually occur as a long-term result.[55]

It can be argued that a preferential system destroys individual treatment of workers on the basis of merit and that whites who would otherwise be hired because of superior skills will lose opportunities because of the program's emphasis on racial hiring. It does not appear, however, that hiring occurs on the basis of merit under the present system. Because of union control over personnel, workers receive jobs primarily through family relation, contacts, and seniority.[56] Since whites already have these advantages, the Plan should do far more to equalize black opportunity for jobs than to deprive whites of a fair chance. Furthermore, in light of the severe manpower shortages in the construction industry, the program should not result in the exclusion

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54 As applied to Philadelphia, the Plan anticipates that approximately one out of every two new openings will have to go to minority workers if contractors are to meet their ranges. U.S. Dep't of Labor, *supra* note 41, at 14.

55 [T]he phenomenon I am discussing is known as cognitive dissonance, a strain between behavior and attitude, a tendency to ameliorate this tension by bringing the two into conformity, which may be done by rationalizing an enforced behavior of nondiscrimination. In this resolution, law is an important element for there is a strong tendency to obey and emulate authoritative models and to accept a fait accompli. A number of investigations have tended to bear out this judgment. P. FREUND, ON LAW AND JUSTICE 40 (1969).

56 *See* Strauss & Ingerman, *supra* note 4, at 313.

of many capable whites.[57] If the unions respond properly, by expanding job opportunity to meet the true needs of the industry, there should be enough room for qualified whites even though the contractor meets his range for minorities.

A further objection to the Plan has been that it is directed against the wrong party; *i.e.*, contractors rather than unions. Under the hiring-hall arrangement, it is the latter who are primarily responsible for the discriminatory personnel policies that exist in the industry, and the contractor is a victim of the union's wrongs if he fails to get a contract because of his inability to comply with the program. This argument has merit, not for purposes of making contractors immune from responsibility but for calling attention to the need for more direct regulation of unions through the contractor program. Under the present approach, the provisions covering unions are very modest; they essentially require the contractor to inform the union of his equal employment responsibilities.[58] Major subcontractors for supplies and services, however, have specific affirmative action goals and percentages to meet.[59] There is no reason why the unions should not be treated as what they actually are in construction: subcontractors for purposes of supplying personnel. In this way, the unions could be regulated as subcontractors and the difficulties at the very heart of the problem could be attacked more directly.

The contractor, however, is culpable for cooperating with the existing union programs and should not be free from regulation. Despite the large economic power of unions in this industry, it is clear that contractors could have achieved a great deal by opposing racially-discriminatory union policies and insisting that blacks be referred to them. It is common practice under the National Labor Relations and Railway Labor Acts to hold an employer derivatively responsible for cooperating with the union's unfair treatment of those it is supposed

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57 Note 10 *supra*. Since the system is based on percentages, the absolute number of blacks required will go up as more whites are hired. Nevertheless, given the shortages in the industry, it ought to be possible for contractors to meet their percentages and still hire all qualified whites. Moreover, the percentages apply only to manpower hours on federal construction work—not to the contractor's total work force.

If the present business slide turns into a major recession, construction will be cut back and the projections of the manpower needs of the industry will not be accurate. Nevertheless, there are sufficient policy arguments to justify the Plan even in the unlikely event that there are no manpower shortages in the industry and the Plan does lead to the exclusion of large numbers of whites.

58 41 C.F.R. § 1-12.805-3 (1970).

59 *Id.* § 1-12.805-4.

to represent.[60] There is every reason to apply the same policies here. Furthermore, even within its present limits the program attacks union discrimination. If the unions fail to refer enough blacks to contractors in an area, that area will simply lose the federal construction contract. The unions will be faced with the alternatives of referring some blacks or seeing all of their men lose the opportunity to work on a federal construction job. Simple economics dictates that they are more likely to select the former alternative, modify their own practices, and refer minority workers.

It can be argued that other means exist to attack discrimination in the building trades and that action through other channels is more palatable than preferential treatment. One alternative is Title VII of the 1964 Civil Rights Act[61] which allows direct actions against discrimination by labor unions as well as contractors.[62] Title VII should certainly be used in conjunction with the federal contractor program. However, Title VII has a number of drawbacks as a device for curing the problem by itself. It is enforced in two ways—by individual complaints with the Equal Employment Opportunity Commission and by discretionary suits brought by the Attorney General.[63] Individual complaints are not a completely effective weapon. If the EEOC fails to negotiate a solution, the individual must bring suit himself, and there is no guarantee that his legal expenses will be reimbursed; this limitation acts as a major deterrent to individual suits.[64] The Attorney General functions through the Justice Department's Civil Rights Division which is kept busy with suits in a number of other areas, such as schools and housing. Moreover, Title VII operates on a case-by-case, union-by-union basis; it involves all the delays incidental to a judicial procedure —complaint-filing, trials, appeals, and the like. It is entirely punitive and it only takes effect after a violation has occurred. With one or two major federal construction contracts, the Philadelphia Plan can do more in a month to bring blacks into the skilled building trades than Title VII can do in several years. The Plan deals with all of the construction trades in a city at once, it offers the "carrot" of federal money, and promises of compliance must be immediate or the contract simply will not be awarded.

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60 Richardson v. Texas & N.O.R.R., 242 F.2d 230 (5th Cir. 1957); Central of Ga. Ry. v. Jones, 229 F.2d 648 (5th Cir.), *cert. denied*, 352 U.S. 848 (1956); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied on other grounds*, 326 F.2d 172 (2d Cir. 1963).

61 42 U.S.C. §§ 2000e to e-15 (1964).

62 *Id.* § 2000e-2.

63 *Id.* § 2000e-6.

64 *See* M. SOVERN, *supra* note 27, at 73-80.

An approach advocated by the building trade unions is the AFL-CIO's "Apprenticeship Outreach,"[65] which is partially funded by the Labor Department and is designed to bring more minority group members into building trade apprenticeships. The program is useful. However, it does not have an element of government coercion, and it emphasizes progress through the slow apprenticeship route under which it can take three to five years to give a black full status and pay as a journeyman. Even under the most optimistic predictions, the program is not expected to have a significant impact for several years.[66] Moreover, progress in "Apprenticeship Outreach" has been considerably stimulated by the development of the Philadelphia Plan, as unions in various areas seek to present a home-town solution to avoid the application of the Plan in their areas.[67]

The Labor Department's Bureau of Apprenticeship and Training has equal employment regulations that apply to all registered apprenticeship programs.[68] However, the penalty for noncompliance is deregistration. Since registration confers no tangible benefits, this penalty is equivalent to nothing more than a slap on the wrist.[69] The program's effectiveness is limited further because the Bureau is run primarily by former building trade union officials who are more sympathetic to unions than to equal employment.[70]

The Plan has another important advantage. Despite its rather radical approach to the problem, it has broad support among moderate, conservative, and liberal elements of the political spectrum. The Plan is consistent with the conservative credo that every man in society should be given a chance to work. Moreover, it has been proposed and implemented by a Republican Administration. At the same time, liberals generally applaud the Plan for its potential impact in creating jobs for the underemployed and underprivileged.[71] The only groups vehemently opposed to the Plan are the contractors and the building trade unions, but preferential employment of blacks could lead to their being accepted in the construction industry and thus to beneficial changes in

65 73 BNA LAB. REL. REP.—NEWS & BACKGROUND INFORMATION 36 (Jan. 19, 1970).

66 Statement of William H. Brown III, *supra* note 14, at 3.

67 *See* note 50 *supra.*

68 29 C.F.R. §§ 30.1-.16 (1970).

69 The loss of registration status to unions and employers operating joint apprenticeship programs would constitute little more than a loss in prestige. *Cf.* M. SOVERN, *supra* note 27, at 177-97.

70 Sanders, *supra* note 6, at 130. State and local equal employment agencies have been similarly unsuccessful in attacking construction industry discrimination. *See* F. COUSENS, *supra* note 6, at 69.

71 *See* 71 BNA LAB. REL. REP.—NEWS & BACKGROUND INFORMATION 537 (Aug. 25, 1969).

attitudes.[72] Therefore, unless one takes an absolute position against preferential treatment, the Philadelphia Plan of federal contractor compliance seems uniquely qualified from a policy point of view to meet the problem of achieving equal employment opportunity in the construction industry.

III

LEGALITY OF THE PLAN

A. *Constitutional Considerations*

An argument can be made that the Plan violates the equal protection rights of white citizens by establishing a preferred hiring classification for blacks and other minorities. The responses to such an argument depend upon the extent to which the due process clause of the fifth amendment incorporates the equal protection requirements of the fourteenth amendment and makes them applicable to the federal government.

In *Bolling v. Sharpe*,[73] the Supreme Court indicated that equal protection and due process are not necessarily coextensive, but recognized that "discrimination may be so unjustifiable as to be violative of due process."[74] It observed further that when a racial classification is not reasonably related to any proper governmental objective, the result is a deprivation of due process.[75] It is arguable that where, as in the Philadelphia Plan, the government utilizes a justifiable racial classification to promote the proper objective of equal employment opportunity for racial minorities, no violation of the fifth amendment's due process clause results.

If the equal protection requirements of the fifth and fourteenth amendments are coextensive,[76] the response to the contention that the Plan denies whites equal protection is more complex. Normally, when the Supreme Court reviews an economic regulation that establishes classifications of citizens, it pays considerable deference to the law.[77] It requires only that the classification be for a reasonable and permissible purpose (*e.g.*, for the public welfare), that the classification

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72 *See* note 55 *supra*.

73 347 U.S. 497 (1954).

74 *Id.* at 499 (footnote omitted).

75 *Id.* at 500.

76 *Cf.* Griswold v. Connecticut, 381 U.S. 479, 517 n.10 (1965) (Black, J., dissenting).

77 Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969).

be relevant to the purpose of the law, and that it include "all persons who are similarly situated with respect to the purpose of the law."[78]

As an economic regulation affecting the federal government's contracting program, the Philadelphia Plan meets all of these tests. Its purpose is to create equal job opportunities for minorities who have been the victims of discrimination—a goal clearly in the public interest. Moreover, the classification is clearly relevant, and it includes all those similarly situated with respect to its purpose since it is carefully designed to include all minorities who have suffered past discrimination in construction.[79]

However, the Plan establishes a racial classification, one that is highly suspect under the fourteenth amendment and thus reviewed by the Court with more "rigid scrutiny" than that indicated above.[80] The Court has indicated that a racial classification is permissible when there is an overriding social justification for it.[81] To establish such justification, it is necessary to show that the law's objective could not be obtained through non-racial classifications and that the rule meets a rigid balancing test in which the public interest considerably outweighs any detriments to affected private parties.[82]

A constitutional test of the Plan would be clearly distinguishable from cases in which the Court treats racial classifications as highly suspect. Instead of tending to impede the purpose of the fourteenth

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78 Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949). *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

79 The Plan includes blacks, American Indians, Spanish-surnamed Americans, and Orientals. U.S. Dep't of Labor, *supra* note 38, App., at 3.

80 Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Korematsu v. United States, 323 U.S. 214, 216 (1944).

81 The Court adopted such a position in Korematsu v. United States, 323 U.S. 214 (1944), when it held that special wartime legislation requiring removal of Japanese and Japanese-Americans from the West Coast was justified on the basis of an overriding need for national security. The Court observed that "[p]ressing public necessity may sometimes justify the existence of such restrictions; racial *antagonism* never can." *Id.* at 216 (emphasis added).

This view has apparently been confirmed in two more recent decisions, Loving v. Virginia, 388 U.S. 1 (1967), and McLaughlin v. Florida, 379 U.S. 184 (1964), where the Court invalidated antimiscegenation and anti-interracial cohabitation statutes, noting that the requisite showing of overriding justification was absent. In *McLaughlin* the Court stated:

> Our inquiry . . . is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise. Without such justification the racial classification contained in [the statute] is reduced to an invidious discrimination forbidden by the Equal Protection Clause.

Id. at 192.

82 Comment, *supra* note 77, at 1103.

amendment, it can be argued that the Philadelphia Plan is designed to further that purpose by remedying the effects of a long history of discrimination against minority groups and by creating conditions of equality for them. The Court's fear of racial classifications has been that they act "invidiously" to discriminate against minorities; the reason for such concern does not exist when the classifications act in a "benign" manner to restore equal treatment. Thus, the Court might choose to review the Philadelphia Plan with its benign quota system under the normal review criteria for non-racial classifications;[83] the Plan would clearly pass such a test.

If the Court, however, were to subject the Plan to "rigid scrutiny" as a racial classification, it appears that it would satisfy even the more stringent requirements. First, a racial classification is necessary here because it is the only practical way to define a group that has been victimized by discrimination in the past. Second, the benefits likely to be conferred on minorities will considerably outweigh any damage that might occur if a small number of whites are denied job opportunities because of the Plan's operation. The great benefits to minorities are obvious. The detriments to whites are speculative, and if they do occur at all, they are likely to affect only small numbers of job applicants.

While the racial classification system of the Philadelphia Plan does not make the Plan unconstitutional, it is possible to argue the opposite —that the Plan is required, or at least strongly supported, by the Constitution. The government would be constitutionally forbidden to give a federal or federally-assisted construction contract to a contractor who discriminates in his employment practices. In *Burton v. Wilmington Parking Authority*,[84] the Supreme Court prohibited state involvement with or support of a discriminatory operation. *Burton* calls for "sifting facts and weighing circumstances"[85] to determine whether there is sufficient government activity to invoke its doctrine. In that case, sufficient involvement was found in the variety of mutual benefits conferred when a private restaurant leased space inside a state building from the state parking authority. At least as much and probably more government activity exists in employment on federal construction work done with federal money. If the government contracted with a racially-exclusive employer, it would be doing the very thing condemned by

83 *See id.* at 1107.

84 365 U.S. 715 (1961).

85 *Id.* at 722.

Burton—placing its "power, property and prestige behind the discrimination."[86]

A federal district court has resolved the precise issue by applying *Burton* to enjoin a state from making a construction contract with a discriminating employer;[87] the court's reasoning could be applied to the federal government as well.[88] Thus, the Plan serves to protect the government from violating its constitutional duty to refrain from financing contractors who would use federal money to engage in employment discrimination.

The Philadelphia Plan, however, does more than require present nondiscrimination. It also attempts to remedy the effects of prior discrimination by requiring that minorities receive special consideration in future hiring. In the context of federal construction, it is clear that the wrong the government is attempting to remedy is not the contractor's alone. To some extent, the government is seeking to remedy its own past failures in awarding contracts to discriminatory employers without requiring that equal employment opportunity existed.

Recent cases in the school desegregation area offer some support for an argument that special treatment on the basis of race is constitutionally required to remedy past equal protection violations by government. In those cases, federal courts sought to remedy school board violations of racial integration orders promulgated under the authority of *Brown v. Board of Education*[89] by requiring that certain minimum numbers of black teachers be assigned to schools in the South where such teachers had been excluded in the past.[90] Although these cases can be distinguished factually from the situation in the construction industry,[91] they do provide at least some constitutional support for the argument that state and federal governments ought to engage in

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86 *Id.* at 725.

87 Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967). *See also* Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945); Griffin v. State Bd. of Educ., 296 F. Supp. 1178 (E.D. Va. 1969). *Griffin* held that any state financing will subject the organization financed to the limitations of the fourteenth amendment.

88 *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

89 347 U.S. 483 (1954).

90 United States v. Montgomery Bd. of Educ., 395 U.S. 225 (1969); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 940 (1967).

91 For one thing, state responsibility for school segregation in the South has been much more substantial and direct than federal responsibility for past construction industry discrimination. Moreover, there is as yet no Supreme Court decision in the area of discrimination by government contractors to lay a constitutional foundation for preferential treatment remedial orders in this area.

special, "color-conscious" treatment toward blacks when they have been responsible for neglecting their equal protection rights over a long period of time. As the Second Circuit has pointed out:

> [C]lassification by race . . . is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.[92]

The thirteenth amendment, which eliminated slavery, and the Civil Rights Statutes,[93] which were designed to eliminate slavery's relics, provide a further basis for requiring this kind of preferential treatment. A federal court has recently held that the section of the Civil Rights Statutes which assures blacks the right to make contracts[94] proscribes racial discrimination that interferes with their making contracts of employment.[95] Article II of the Constitution requires the President to "preserve, protect, and defend the Constitution"[96] and to "take Care that the Laws be faithfully executed";[97] his executive orders are promulgated under these constitutional powers.[98] In using Article II authority to disburse federal money in government contract work, the President is arguably obligated to implement the spirit of the thirteenth amendment and the Civil Rights Statutes by rectifying past job deprivation to blacks. In the Philadelphia Plan, of course, this is precisely what the President is attempting to accomplish.

B. *Implied Congressional Disapproval*

It has been suggested that congressional regulation in the equal employment area under Title VII of the 1964 Civil Rights Act[99] impliedly prevents the executive branch from requiring anything more

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92 Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 931-32 (2d Cir. 1968) (footnotes omitted).

93 *E.g.*, REV. STAT. §§ 1977-79 (1875), 42 U.S.C. §§ 1981-83 (1964). These statutes were designed to give former slaves the rights to as "full and equal benefit of all laws and proceedings for the security of person and property as . . . enjoyed by white citizens . . . ." *Id.* § 1977, 42 U.S.C. § 1981.

94 *Id.*

95 Central Contractors Ass'n v. Local 46, IBEW, 312 F. Supp. 1388 (W.D. Wash. 1969).

96 U.S. CONST. art. II, § 1, cl. 8.

97 *Id.* § 3.

98 *See* Speck, *Enforcement of Nondiscrimination Requirements for Government Contract Work*, 63 COLUM. L. REV. 243, 244 (1963).

99 42 U.S.C. §§ 2000e to e-15 (1964).

of contractors than Congress required in that statute.[100] This suggestion is based on the principle that where Congress in comprehensive legislation has declined to grant the President some particular authority, he exceeds the constitutional limits of his power when he attempts to exercise that authority by executive order.[101] Therefore, since Congress has dealt comprehensively with equal employment and requires only racial neutrality of employers, the executive branch cannot on its own initiative require affirmative action obligations.

In the case of Executive Order No. 11246, however, presidential authority existed twenty-three years in advance of the congressional legislation, and its affirmative action language had been given the force of law before 1964.[102] There is no evidence that Congress intended to modify or limit the Order in Title VII; the entire legislative debate indicates Congress's intention to leave the President's power unaffected and unimpaired by the passage of Title VII.[103] Further, Title VII's

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100 Note, *supra* note 26, at 596.

101 *Id.* at 597 & n.50; *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 597, 593-614 (1952) (Frankfurter, J., concurring).

102 42 OP. ATT'Y GEN. No. 21 (1961); 42 COMP. GEN. 692 (1963); 40 COMP. GEN. 592 (1961). For judicial decisions that have treated the Order, with its affirmative action obligation, as valid law before and after Title VII was passed, see Farkas v. Texas Instr., Inc., 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964); Contractor's Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970).

103 Title VII, as originally proposed in the House, contained a specific provision authorizing the President to "take such action as may be appropriate to prevent unlawful employment practices by government contractors." H.R. 7152, 88th Cong., 2d Sess. § 711(b) (1964). When this proposal was abandoned, the following discussion ensued in the House:

MR. POFF:

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. CELLAR:

And will the gentleman not also say that the deletion of the language by 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. CELLAR:

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

MR. POFF:

That is true.

110 CONG. REC. 2575 (1964).

The Clark-Case memorandum, in which two Senators presented their explanation of Title VII, stated:

Title VII, in its present form, has no effect on the responsibilities of the com-

references to the Order indicate that it was to remain operative: contractors obligated to make reports under the Order are excused from making similar reports under Title VII.[104] Moreover, there is nothing necessarily inconsistent in allowing both provisions to stand —a congressional statute requiring nondiscrimination on private projects and an executive order requiring "affirmative action" when the government is involved through the use of public funds.[105]

C. *The Legality of the Executive Order Under Title VII*

An executive order causing contractors to violate a congressional statute would be unlawful.[106] There is some question as to whether Executive Order No. 11246, as implemented in the Philadelphia Plan, does this. There are two sections of Title VII which are arguably violated by the Philadelphia Plan—703(j) and 703(a).

Section 703(j) reads in relevant part:

> *Nothing contained in this title shall be interpreted to require any employer . . . 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 . . . .[107]

The Comptroller General has argued that this section makes the Philadelphia Plan illegal since it does the very thing the section makes unlawful—requires preferential treatment to correct a racial imbalance caused by past discrimination.[108] But the introductory language of the section limits its application to the statute of which it is a part and makes it inapplicable to other federal laws. Moreover, the entire legis-

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mittee 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.

Id. at 1715.

104 42 U.S.C. § 2000e-8(d) (1964). Representatives of the President's Committee administering Executive Order No. 10925 were invited to an information conference concerning the operation of Title VII. *Id.* § 2000e-15.

105 Both Title VII and the Order as implemented in the Philadelphia Plan have the force of law. Normal rules of statutory interpretation call for reading two laws together—*in pari materia*—so as to make them consistent where possible. *See* 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5201 (3d. ed. 1943).

The rule is normally used to reconcile two statutes. However, there is good reason to apply the rule here since Title VII makes specific reference to Executive Order No. 11246.

106 42 OP. ATT'Y GEN. No. 37, at 6 (1969).

107 42 U.S.C. § 2000e-2(j) (1964) (emphasis added).

108 49 COMP. GEN. 59, 66-67 (1969).

lative history of this section shows that it was proposed by advocates of Title VII in answer to arguments by Southern Senators that the Title would require preferential treatment and lead to discrimination against whites; section 703(j) was designed to make it clear that no such result was required by Title VII itself.[109]

Section 703(a) provides:

> 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

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109 The following are illustrative of the statements made by Southern Senators which led the group supporting the bill to add § 703(j) for purposes of clarification:

> Title VII of this bill does not in fact provide for "equality of opportunity," but it seeks to establish a preference in employment and a special "right to employment" based upon "race, religion, color, national origin or sex." This title seeks to force all employers to give favored consideration and treatment to any person of a religious or racial minority in order to avoid prosecution and punishment on a charge of "discriminating" against such a person.

110 CONG. REC. 7774 (1964) (remarks of Senator Tower).

> The proposal is based on the strange thesis that the best way to grant special privileges to a particular group of people is to deny the majority of other Americans those previous rights they already possess. In the name of equal employment opportunity, title VII seeks to establish a preference and special right to employment based on "race, color, religion or national origin." When in full operation, it would seek to force all employers and labor organizations . . . to give preferential treatment to any person of a racial or religious minority in order to avoid any charge of so-called discrimination against an applicant or an employee or member.

Id. at 8441 (remarks of Senator Hill).

In response to these charges, Senator Allott of Colorado offered § 703(j) as an amendment in its initial form on May 4, 1964. Senator Allott introduced his amendment with the following statement:

> Mr. President, I have heard over and over again in the last few weeks the charge that title VII, the equal employment opportunity section, would impose a quota system on employers and labor unions. . . . [The argument] is that an employer will hire members of minority groups, regardless of their qualifications, to avoid having any problems with the Equal Employment Opportunity Commission. . . .
>
> I do not believe title VII would result in . . . a quota system . . . .
>
> But the argument has been made and I know that employers are . . . concerned with the argument. I have, therefore, prepared an amendment which I believe makes it clear that no quota system will be imposed if title VII becomes law. Very briefly, it provides that no finding of unlawful employment practice may be made solely on the basis of racial imbalance.

Id. at 9881. When the amendment was passed in its final form, the language was changed slightly to state, as it does at present, that '[n]othing contained in this title shall be interpreted to require . . . .' preferential treatment to correct a prior imbalance. *Id.* at 12819. Since the legislative history of § 703(j) indicates that the section was intended only to make it clear that preferential treatment was not required by Title VII itself, there is no reason to assume that the section limits the Order in any way.

> would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex or national origin.[110]

The argument of opponents of the Philadelphia Plan has been that this section makes it illegal to hire on the basis of race and therefore makes illegal the preferential treatment requirements of the Plan.

During the legislative debate, the Clark-Case memorandum, prepared by the two Senators to explain and defend Title VII, contained a statement that has been cited in support of this position:

> 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 balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual.[111]

Senator Humphrey made a similar statement:

> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.
>
> That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.[112]

The statement by Humphrey and the Clark-Case memorandum should be viewed in their proper context. The Senators were not discussing the permissible scope of Executive Order No. 11246 and did not have this matter in mind at the time they made their comments. Many statements in the *Congressional Record* indicate that Title VII was to leave the executive's authority unimpaired under the Order.[113] Moreover, the Humphrey and Clark-Case comments were offered by proponents of the Title and designed to defeat attacks by those opposed to the Act. The Senators were merely pointing out that Title VII did not require preferential treatment. In their zeal to defend the statute,

110 42 U.S.C. § 2000e-2(a) (1964).

111 110 CONG. REC. 7213 (1964).

112 *Id.* at 6549.

113 *See* note 103 *supra.*

they went on to argue that it would outlaw preferential treatment and racial hiring altogether. The existing judicial opinions interpreting Title VII in the context of the Order have not supported this view.[114]

In fact, the language of the section does not explicitly make "hiring on the basis of race" unlawful. Instead, the language prohibits discrimination causing a loss of job opportunity to an individual because of his race.[115] As the Attorney General[116] and the court in *Contractor's Association v. Secretary of Labor*[117] have noted, there is a difference between preferential hiring and discrimination. The former refers to giving special consideration to *inclusion* of the members of one group whereas the latter concerns deliberate *exclusion*. There is no theoretical inconsistency between the two provisions. The Philadelphia Plan requires only a "good faith effort" by contractors to include larger numbers of minorities in construction work. Like Title VII, it also prohibits discrimination or exclusion on the basis of race. If the contractor could not reach his percentage of minorities without rejecting white applicants on a racial basis, he would be obligated under the Plan as well as under Title VII to hire the whites even if this meant a failure to meet his range. He satisfies his contractual obligation as long as he makes genuine efforts—short of discrimination against whites—to meet his goal for inclusion of blacks.

The Comptroller General has argued that any preference to one race will necessarily and inevitably lead to some exclusion of members of the other. He insists that the only permissible standard is one of

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114 Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970).

115 It has been argued that the Plan contains "illegal racial quotas." The use of this emotion-packed phrase is something of a "red herring." The Labor Department states in a memoraudum supporting the Plan that "such characterizations [as quotas], without definition, do not contribute to a rational discussion of the legal issues." U.S. Dep't of Labor, Authority Under Executive Order 11246, *condensed in* 71 BNA LAB. REL. REP. —NEWS & BACKGROUND INFORMATION 366 (July 1, 1969). The Department notes that, according to the dictionary definition, a quota is a "*fixed* number or percentage of minority group members." *Id.* (emphasis in original). The memorandum argues that the Plan establishes a "goal" rather than a quota since it does not force the contractor to hire a fixed number of group members but only requires him to make a "good faith effort" to come within general "ranges." *Id.* Even more importantly, § 703(a) does not contain any language forbidding "racial quotas"—it refers only to racial discrimination. The real issue is not whether the Plan is a quota; it is whether the Plan causes the kind of racial discrimination against whites that Title VII forbids. Even the Comptroller General indicates in his opinion that the "quota" discussion diverts attention from the real problem. 49 COMP. GEN. 59, 64-65 (1969).

116 42 OP. ATT'Y GEN. No. 37, at 6 (1969).

117 311 F. Supp. 1002 (E.D. Pa. 1970).

pure racial neutrality.[118] A problem does arise in regard to what the Plan will achieve in practice. In order to avoid the difficulties and problems of proving to compliance officers that they have acted in "good faith," some contractors may meet their ranges even if required to discriminate against whites. The Comptroller General argues that this risk is enough reason to find the Philadelphia Plan unlawful.[119]

Several other factors, however, ought to be taken into account. First, in light of the severe shortages in the construction industry and because the goals set by the Plan for minority participation do not go beyond ten percent in each trade for the first year and twenty-five percent in the final year,[120] the problem of a contractor's having to discriminate against whites to meet his goal should rarely arise. Given the shortages in construction, there should be ample room for all well-qualified whites and minority applicants to be hired under the Plan. The minorities in most cases should be serving in additional jobs rather than replacing white applicants who would otherwise have been hired. If this does not happen, the fault will be with union unwillingness to open up employment rather than with the Plan itself. Second, it is unrealistic to view Title VII as requiring pure racial neutrality in conduct or fact. The pure nondiscrimination called for by the Comptroller General's opinion is something of a fiction. Those who have historically discriminated do not suddenly develop attitudes of racial neutrality to comply with the equal employment laws. Instead, they probably do what the Southern Senators suggested in the debate over Title VII—they begin hiring a few blacks to avoid trouble with the administrators. Such deliberate hiring of blacks should not be viewed as violative of Title VII.

In reality, human conduct toward the black and white races ranges across a spectrum with maximum favoritism toward whites and hostility toward blacks at one end, and maximum favoritism toward blacks and hostility toward whites at the other.[121] In the center is an ideal of racial neutrality. Realistically, Title VII forbids conduct that leans heavily toward one side or the other, that is hostile to blacks or whites

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118 49 COMP. GEN. 59, 69 (1969).

119 *Id.* at 71.

120 U.S. Dep't of Labor, *supra* note 41, at 15-16. The percentage requirements apply only to contractors' federal or federally-assisted construction work. Since the federal government is involved in less than half of all construction, the percentages for many contractors' total work forces will be less than half of what is required by the Plan. Hopefully, contractors will hire blacks for non-federal work in addition to meeting their ranges on the federal work, but the Plan does not require this.

121 *See* F. MARSHALL & V. BRIGGS, *supra* note 4, at 201-03.

and intended to exclude members of either race from opportunity. The Philadelphia Plan, however, is designed to bring conduct by construction employers and unions, which in the past has leaned heavily on the white favoritism, black hostility side, much closer to the ideal center. It contains no element of hostility toward whites but seeks only to create greater opportunities for inclusion of blacks in the skilled building trades. Even under Title VII judges have found it necessary to issue preferential treatment remedies for past violations of nondiscrimination requirements.[122] These remedies are also within the proper scope of the Title because they are not designed to exclude whites but rather to bring opportunities in the industry much closer to a level of equality where there will be less discrimination against blacks.

D. *Contractors' Collective Bargaining Agreements*

When contractors are unable to meet their ranges through the union referral halls, the Labor Department has made it clear that they are expected to disregard the exclusive hiring-hall agreement and go outside the unions to secure minority workers.[123] It has been argued that the Philadelphia Plan is unlawful because it will require contractors to violate their collective bargaining agreements.[124] This problem is not as serious as it may appear. Under the law regarding enforcement of labor agreements, a union's charge of violation should not be successful.

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122 Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047, 1051, 1055 (5th Cir. 1969). The remedial order issued under Title VII in this case required alternating black and white referrals for work. *See also* Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968); United States v. Papermakers Local 189, 282 F. Supp. 39 (E.D. La. 1968), *aff'd*, 416 F.2d 980 (5th Cir. 1969); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). In these cases, judicial orders went beyond proscribing future discrimination to require the abandonment of existing seniority systems that maintained the effects of past discrimination. The orders established new seniority systems that would give greater equality in the future to blacks who had been denied opportunity in the past. *Contra*, United States v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968); United States v. Sheet Metal Workers Local 36, 280 F. Supp. 719 (E.D. Mo. 1968). However, the latter cases were based on § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1964)—a section that limits interference with existing seniority systems and has no application to Executive Order No. 11246.

For a discussion of these cases, see Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

123 "It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees." U.S. Dep't of Labor, *supra* note 38, at 10.

124 *See* 115 CONG. REC. S 16729 (daily ed. Dec. 15, 1969) (remarks of Senator Ervin).

A suit for breach of a collective bargaining agreement is to be decided on the basis of federal substantive law. In *Textile Workers Union v. Lincoln Mills*,[125] the United States Supreme Court ruled that section 301 of the Taft-Hartley Act[126] gave the courts power to fashion a body of contract-enforcement law that would be appropriate for collective bargaining relationships and applicable in both state and federal courts. In making decisions under the section, courts are to give heavy weight to general federal labor law policies.[127]

Federal labor policy, as set out in recent decisions under the National Labor Relations Act,[128] Title VII of the 1964 Civil Rights Act, and the *Steele v. Louisville & Nashville Railroad*[129] doctrine, is clearly opposed to discrimination in employment, particularly when it is by labor unions. An employer unable to meet his ranges through a union referral hall would normally be dealing with a union that had discriminated against minority groups.[130] In such a case, a federal or state court properly exercising its authority under section 301 should refuse to enforce the referral-hall agreement.[131] This result is supported

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125 353 U.S. 448 (1957).

126 Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 185 (1964).

127 We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as a federal law and will not be an independent source of private rights.

353 U.S. at 456-57.

128 It has been held that racial discrimination by unions is an unfair labor practice, violating the union's duty of fair representation. Rubber Workers Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); Metal Workers Local 1, 147 N.L.R.B. 1573 (1964); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

129 323 U.S. 192 (1944); *see* Vaca v. Sipes, 386 U.S. 171 (1967). If the union fails to fairly represent the interests of blacks, the blacks can sue in federal courts to enforce their right to fair treatment.

130 It is theoretically possible for a contractor to deal with a union that is not discriminating and still fail to meet his ranges under the Plan. Such a union might refer workers to him on a nondiscriminatory basis, but not refer enough blacks for the contractor to satisfy his goals. However, in that special situation, the contractor would probably be considered in "good faith" even if he refused to go outside the union to hire more workers. Thus, he would not be forced in such a case to breach his contract. Moreover, such a situation is not likely to arise because the Plan would not be applied to trades where the unions were not discriminating. The Labor Department has indicated that the Plan is designed only for skilled trades in which the unions are guilty of very serious racial bias.

131 Several recent decisions support this conclusion. *E.g.*, Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970). In these cases, the

by *Shelley v. Kraemer*[132] which prohibited courts from serving as governmental entities to enforce discriminatory agreements. Similarly, if an arbitrator held for the union on a contract breach question of this type, it would be improper for the courts to enforce the result despite the normal deference paid to arbitrators' decisions.[133]

It has also been argued that an employer who goes outside a hiring-hall agreement is instituting a unilateral change in working conditions and thus violating his obligation under section 8(a)(5) of the National Labor Relations Act[134] to bargain in good faith with the union concerning such changes.[135] This argument does not pose any serious legal obstacle to the Plan. The Board's concern with section 8(a)(5) violations for unilateral changes is greatest when they occur before a contract has been negotiated. At that point, the Board fears that the unilateral imposition of working terms and conditions by the employer may prevent a meaningful negotiating relationship from ever being established between the parties. Although the unilateral change doctrine has been applied to the post-agreement situation, the Board often defers in such cases to the arbitrators and the courts on the theory that the changes are primarily contract violations.[136]

Even if the Board heard the case, it would not find a violation of section 8(a)(5) if, in order to meet his obligations under the Philadelphia Plan, the contractor was forced to breach a collective bargaining agreement because the union had been excluding minority groups. The employer, by hiring outside the hall, would simply be avoiding the possibility of a derivative violation of sections 8(a)(1) and 8(a)(3)[137] which would occur if he cooperated with the union's discrimination scheme.[138] The Board would surely not hold the employer guilty of

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employers sought to avoid state and federal executive orders because of their obligations to discriminating labor unions with whom they had exclusive referral arrangements. In both cases, the courts disallowed the union agreements as an excuse for failure to comply with the executive orders.

132 334 U.S. 1 (1948).

133 *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

134 29 U.S.C. § 158(a)(5) (1964).

135 NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Katz, 369 U.S. 736 (1962); C & S Indus., Inc., 158 N.L.R.B. 454 (1966).

136 Dubo Mfg. Corp., 142 N.L.R.B. 431 (1963); International Harvester Co., 138 N.L.R.B. 923 (1962).

For an explanation of the standards that the Board applies in deciding whether to assert jurisdiction over § 8(a)(5) violations in post-contract situations, see Ordman, *Arbitration and the N.L.R.B.*, in NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING 47 (1967).

137 29 U.S.C. §§ 158(a)(1), (a)(3) (1964).

138 *See* cases cited in note 60 *supra*.

an illegal act for taking unilateral action to avoid committing an unfair labor practice. If the Board became at all involved in this kind of case, its concern would be with the union's discrimination. In respect to the employer's unilateral action, the Board should simply decline to exercise jurisdiction, leaving the matter to arbitrators and courts with the likely result that no liability would be found.

CONCLUSION

The Labor Department's decision to require federal construction contractors to engage in preferential hiring of minorities is justified by the special obstacles to equal employment opportunity which exist in the building trades. Under a simple nondiscrimination requirement, minorities in construction have had no opportunity to break the control that unions maintain over the industry's manpower supply. Although a preferential hiring program under the Philadelphia Plan raises a number of legal questions, a careful and realistic analysis of these issues indicates that the Plan is not illegal.

Although this article has been devoted to a discussion of the general legal and policy issues surrounding the Plan, it would be a mistake to leave this topic without saying a few words about the issue of securing compliance with Executive Order No. 11246. Regardless of how well designed a program may appear conceptually, it will be futile without effective enforcement. Unfortunately, past enforcement of the Order has left a great deal to be desired.[139] Already, there are indications that compliance with the Plan has been inadequate in Philadelphia, the city of the program's birth.[140]

The main problem appears to be the unwillingness of the government to invoke available sanctions.[141] Although some contracts have been suspended temporarily, there have been no instances in construction in which a contract was terminated and very few in which con-

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139 R. NATHAN, *supra* note 27, at 141-42.

140 BNA FAIR EMPLOYMENT PRAC.—SUMMARY OF LATEST DEVELOPMENTS No. 136, at 1 (May 7, 1970). The Philadelphia head of the OFCC noted that "compliance was lagging" and that the number of minorities on the job thus far falls below the number promised and expected.

141 Far and away the most common complaint of civil rights leaders about the contract compliance program is the lack of instances in which sanctions and penalties have been applied against major contractors. Criticism to the effect that "they have never pulled a contract" or "turned the water off" was widespread in the field research.

R. NATHAN, *supra* note 27, at 141.

tractors were debarred from future federal contracts.[142] Hopefully, at the same time that a new program is launched, a new effort will be made to utilize whatever sanctions are necessary to achieve results. Construction work under the Plan should be carefully scrutinized to see that contractors are meeting their obligations. When "home-town solutions" do not deliver on their goals, they should be scrapped and the Plan applied. Otherwise, the program will lack "teeth"; contractors will begin to take their obligations lightly and the bright promise of the Philadelphia Plan will disappear like other promises and hopes of the past.

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142 No contract has ever been cancelled, terminated or suspended; and there have been Executive Orders covering contract compliance for many years. Contract awards have been delayed in Philadelphia and Cleveland. And the Post Office has passed over two low bidders and blacklisted several contractors. This is the extent of the sanctions applied during the course of these years. The combination of reluctance to impose sanctions and the responsiveness of Congress and administrators to pressure from union and contractor groups, destroys the effectiveness of the contract compliance program and the morale of the staff.

Transcript of Open Meeting Before the Mass. State Advisory Comm. to the U.S. Comm. on Civil Rights, Contract Compliance and Equal Employment Opportunity in the Construction Industry 450-51 (1969) (testimony of Paget L. Alves, Jr.).